Mariner Life - November 2003,

Legal Desk Q&A - ***Call Back, Williams***

Caller: Nick Roman, Capt.
Local: Ocoee, Florida
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I was a deckhand and mate on many logtowers coming down Johnstone Strait, and many times we would favour the Vancouver Island shore. If we were in the right location when a south-easter came up we'd duck into Robson Bight and hang on until the wind eased up. Three or four years ago I read that Robson Bight was made into a sanctuary with restrictions. Now according to Darren Williams... there is no touching of the whales allowed. So what happens when a log tow is going to be tied up and there is a whale, or a whole pod, cavorting in the bay? They may not get out of the way, and in the meantime there could be another logtower or two waiting to tie up their tows to yours, with the wind picking up.

Call Back:

Captain Roman raises the question, should a mariner be concerned about a charge under the *Fisheries Act* for "disturbing marine mammals" where the master is compelled (by weather in this case, or navigational hazard, schedule or otherwise) to maneuver their vessel (or tow) close to marine mammals?

The short answer to the question is, unless the benefit of preserving persons or property outweighs the impact of disturbing the whales, you may not have a defence to a charge of "disturbing" marine mammals.

Firstly, why is this important? Disturbing a marine mammal is a quasi-criminal offence under the *Fisheries Act and* carries a maximum penalty of a $100,000 fine and a one year prison term. Although fines in B.C. currently hover between $100 and $1,000 with no prison term, the political tide-table forecasts charges and penalties to be on the flood, particularly in cases where the alleged victim is an orca. Masters may be imprisoned for repeated offences and vessels may be seized on a first offence, whether they are owned by the master or not. Ship owners may be vicariously liable for the actions of their employed masters.

With orca now having achieved god-like status to some in our society (a status that has existed in aboriginal culture for thousands of years), our sensitivity to their survival has reached an all-time high. The casual mariner should be aware that there are many individuals watching from the shore that relish the opportunity to report someone they perceive to be disturbing a marine mammal – particularly in places like Robson Bight and the Gulf Islands.

The bright side, if there is one, is that potentially disturbing a marine mammal does not mean you will be convicted, charged, or even caught. Of course no one, nowadays, would intentionally disturb an orca, but charges have been laid by DFO where the defendants are otherwise innocent. It is the possibility of being charged when you are innocent that is most troubling to the mariner.

What is concerning about the rising number of charges for disturbing whales is that, because there is no firm way of telling whether a whale was actually disturbed at the time, charges may be laid on the basis of observations of untrained enforcement officers, in which case it becomes the word of the enforcement officer against the word of the master. Moreover, in 1991 Provincial Court Justice Bracken found that because there is no way of confirming with a whale that it was disturbed, the law would make an assumption that the whale was disturbed if certain activities occurred around a whale (the "Bracken Assumption").

One of these activities is attempting to approach within 100 metres of a whale while under power, such as the case that Captain Roman describes. Although not currently the law, this 100 metre rule is a guideline adopted by the whale watch industry that the DFO is attempting to translate into firm law. In two current cases before the B.C. Provincial Court, masters are charged with disturbing whales for, allegedly, following within 100 metres of a whale.

Since the 1991 court decision where the Bracken Assumption was formulated, significant scientific data has been collected to show that certain pods of orcas are not disturbed by certain vessel traffic, indeed, it is the whales that approach the vessels. There is of course, scientific data that shows otherwise. Regardless of any scientific data, mariners who have spent time around whales know that it is possible for a vessel to be mere metres from whale and not disturb it, while a vessel several hundred metres away may disturb the whale – this all depends on the nature of the vessel and its characteristics such as speed, direction, noise, vibration, exhaust, sonar, and such. Therefore, in the author's opinion, the Bracken Assumption is now flawed and should not be good law.

Getting back to Captain Roman's question, if weather or other factor forces you to take you vessel and/or tow near to a whale or pod of whales, and there is a presumption that the whales were disturbed based on someone's observation of your vessel, you may be found *not guilty* by reason of *necessity* – or, *you had no other reasonable choice*.

The defence of *necessity* requires the defendant to make out the following three factors:

1. There must be an urgent situation of clear and imminent peril. Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril. Therefore, in the case that Captain Roman describes, if the weather was sudden and unforecasted, as opposed to simply overlooked by the master, the defence may be successful.

2. There must be no reasonable legal alternative to disobeying the law. For example, if the tug and tow could make its way to another shelter nearby, the defence of necessity would not be successful.

3. The third requirement is that there be proportionality between the harm inflicted and the harm avoided. For example, if the Court finds that the weather was not likely severe enough to cause the loss of the tow had shelter not been sought, and the result of seeking shelter in the bay was to disturb the mating behavior of the resident orcas, the defence would likely not succeed.

In one of the two cases currently before the B.C. Provincial Court, the master of an American whale watching boat, and 5 passengers, were observing a pod of orca outside of the 100 metres recommended by the industry. The increasing wind had begun to push the vessel onto nearby rocks when a lone whale unexpectedly surfaced next to the boat. The whale passed the vessel, and the master engaged his engines to move his vessel away from the rocks. A DFO zodiac was watching from across the pass, and from their perspective, saw the master motor-after the whale. The master was charged with "disturbing" a marine mammal for following within 100 metres of a whale. This is a case where the defence of necessity may be used successfully.

In another interesting marine case, involving the vessel *Samarkanda*, the defendants were charged with possession of drugs for the purposes of trafficking when the *Samarkanda*, laden with 34 tonnes of marijuana, sought shelter from weather along the west coast of Vancouver Island and ran aground. The vessel was traveling from Columbia to Alaska, but experienced mechanical difficulty, then ran into bad weather. The defendants argued the defence of necessity, but failed on all of the three grounds above.

The problem with the defence of *necessity* is that it is easily abused, or inappropriately relied on. For example, while it may be valid to say you had to maneuver through the whale pod in order to keep your vessel off the beach in the sudden storm, it is not acceptable to argue that the same approach was necessary because you wanted to beat the other guy to the dock. As absurd as it may sound, this example illustrates the two ends of the slippery slope of the defence of *necessity*. At what point does the defence of

necessity lose its validity and simply become an excuse? This can only be answered on a case by case basis.

In closing, it is worth noting that where it is the whale that instigates interaction with a vessel, a conviction for harassing marine mammals will likely not result. In these cases, which are becoming more and more common, the prudent mariner will cut his engines and enjoy the company of the whale knowing they are doing nothing illegal.

Please forward your marine related legal questions to _____ or to Darren Williams by email at gdw@MarineLaw.ca, by fax at 250-478-9943

This article is editorial opinion, and is not legal advice. No warranty is given of its fitness to any situation or person. Darren Williams is a marine lawyer and principal of Williams & Company, Marine Lawyers of Victoria, B.C. and can be reached for comment or question at *Tel: 250-478-9928, www.MarineLaw.ca*