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## **THE MARINE LIABILITY ACT: PARTS 2, 3 AND 4** **APPORTIONMENT OF LIABILITY, LIMITATION OF LIABILITY AND CARRIAGE OF** **PASSENGERS**

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## **1.0 INTRODUCTION**

The Marine Liability Act, c.6, S.C. 2001 (hereafter referred to as “MLA”), contains many important changes to Canadian maritime law. This paper reviews and summarizes Parts 2, 3, and 4 of the MLA. Part 2 of the MLA creates an apportionment of liability regime. Part 3 of the MLA re-enacts the limitation of liability provisions formerly contained in the Canada Shipping Act. Part 4 of the MLA implements the Athens Passenger Convention, a regime governing the carriage of passengers, but with important Canadian modifications.

## **2.0 PART 2 OF THE MLA: APPORTIONMENT OF LIABILITY**

### **Background**

Apportionment of liability is not a new concept in maritime law. In fact, the notion that liability should be apportioned where a loss is caused by the fault of two or more persons has been a principle of admiralty law since antiquity. Initially the admiralty courts apportioned liability equally. This rule was codified in the Merchant Shipping Acts of the U.K. and the Canada Shipping Act. These statutes were later amended to modify the rule to allow for apportionment of liability in accordance with degrees of fault. However, the problem with the admiralty rule was that it applied only to cases of collision between ships. It did not apply to any other maritime torts.

Unlike the Admiralty courts, the common law courts did not develop rules apportioning liability where a loss was caused by the fault of two or more persons. To the contrary, the rules developed under the common law were particularly harsh. The common law developed the contributory negligence doctrine which barred a plaintiff from recovering any damages if he was partially at fault. This rule applied even if the plaintiff was only minimally at fault. The common law also developed a rule barring recovery as between joint tortfeasors. Under this rule although the joint tortfeasors were each liable to the plaintiff for 100% of the damage (regardless of their degrees of fault), there was no right to recover contribution or indemnity from the other tortfeasor.

In both the United Kingdom and Canada statutes were enacted to abolish or modify the harsh common law rules that had been developed. In Canada, the statutes modifying these rules were enacted by the various provinces. These various provincial statutes are quite similar,

although not identical. They generally provide that contributory negligence by a plaintiff is not a bar to recovery, abolish the rule against contribution between joint tortfeasors and implement a regime of apportionment of liability based on fault.

Since the passage of the various provincial contributory negligence statutes, there have been a number of Canadian decisions that have considered whether and under what circumstances the provincial statutes can apply to maritime torts. Unfortunately, these decisions have been very inconsistent. In *Sparrows Point v Greater Vancouver*, [1951] S.C.R. 396, the Supreme Court held that the apportionment of liability provisions of the British Columbia Contributory Negligence Act had no application to a negligence action involving damage to water mains caused by a ship's anchor and dismissed claims for contribution as between the two tortfeasors. This issue was next considered in *Gartland S.S. Co. v The Queen*, [1960] S.C.R. 315. In *Gartland*, a case involving a collision between a ship and bridge, the Supreme Court came to the opposite conclusion and apportioned liability pursuant to the provincial contributory negligence statute. Because of the peculiar facts of the *Gartland* decision it was easily distinguished by the lower courts who refused to follow it. In both *Algoma v Manitoba Pool Elevators*, [1964] Ex. C.R. 505 and *Fraser River Harbour Commission v The "Hiro Maru"*, [1974] 1 F.C. 490, the Exchequer/Federal Court held that provincial contributory negligence statutes did not apply to maritime torts. However, the next decision on this issue was again by the Supreme Court of Canada in *Stein v The "Kathy K"*, [1976] 2 S.C.R. 802. In *Stein* the Supreme Court could see no reason why a maritime claim should not be governed by the substantive law of the province concerning division of fault and, accordingly, held that the provincial statute applied to a maritime tort.

A decade after *Stein v The "Kathy K"*, the Supreme Court of Canada decided *I.T.O. v Miida Electronics*, [1986] SCR 752. This was a seminal decision in the development of Canadian maritime law. In that case the Supreme Court held that Canadian maritime law was a uniform body of federal law encompassing common law principles of tort, contract and bailment. It was expressly stated that Canadian maritime law was not the law of any one province. The *I.T.O.* decision re-introduced the notion that provincial statutes of general application, including contributory negligence statutes, could have no application to maritime torts and later cases reinforced this. (See: *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.R. 779).

The specific question of whether a provincial contributory negligence statute could apply to a maritime tort was again considered by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [[1997] 3 S.C.R. 1210. In this case the Supreme Court held definitively that the provincial contributory negligence statutes had no application to maritime torts. The court did, however, go on to reform the common law rules and Canadian maritime law by recognizing the concept of shared liability for fault and eliminating the contributory negligence bar.

The decision of the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.* has finally confirmed the existence of a lacuna in Canadian maritime law namely, an absence of a regime governing apportionment of fault for cases other than collisions between ships. It is this gap which Part 2 of the MLA is intended to fill.

### **Application**

Section 16 of the MLA provides that the provisions of Part 2 apply whenever a remedy is sought under or by virtue of Canadian maritime law or by any other law of Canada in relation to navigation and Shipping. This provision is sufficiently broad to encompass all claims that could be made under Canadian maritime law. Any claims not coming within this provision would come within the applicable provincial counterpart of Part 2 of the MLA.

### **Apportionment**

Section 17 is the apportionment section. 17(1) provides that where loss is caused by the fault of two or more persons or ships liability shall be apportioned in accordance with degrees of fault or, if it is not possible to determine degrees of fault, liability shall be apportioned equally.

### **Joint and Several Liability**

Subsection 17(2) creates joint and several liability. This section provides that where a loss is caused by two or more persons or ships those persons or ships are jointly and severally liable to the plaintiff but, as between themselves, are liable to make contribution. This means that each of the defendants is 100% responsible to the plaintiff. This can result in a defendant paying more than its share of liability if the other defendant is without assets or outside the jurisdiction of the court. Therefore, an early arrest may be essential in cases involving joint and several liability.

An exception to the joint and several liability rule is contained in subsection 17(3). Subsection 17(3) provides that where a loss is caused by two or more ships and the claim is for the loss of one of those ships, its cargo, property or earnings then liability is not joint and several.

There are two noteworthy aspects to this section. First, the loss must be caused by the fault or neglect of two or more ships. Second claims for personal injuries or fatalities are not included within the 7(3) exception. Therefore, there will always be joint and several liability where the loss is caused by two or more persons (not ships) or where the claims is for personal injury or fatal accidents.

### **Contribution or Indemnity**

Section 17(2) provides that the persons at fault are liable, as between themselves, to make contribution or to indemnify each other in accordance with their degree of fault. Sections 18 through 20 govern how such claims are made. Pursuant to section 18 claims for contribution or indemnity can be brought by adding the other person as a party to any pending proceeding, by commencing separate proceedings, or, if the other person has settled with the plaintiff, by continuing any pending proceeding or commencing new proceedings. It is important to note that, pursuant to section 20(1) the limitation period for a claim in contribution or indemnity is one year from the date of judgment or settlement. Further, pursuant to section 20(2) a claim in contribution or indemnity is not defeated by any period of limitation or notice provision applicable to the original claim.

### **Last Clear Chance**

Section 21 abolishes the last clear chance rule. The last clear chance rule was a common law rule which was developed to ameliorate the effects of the contributory negligence bar. Under this rule the plaintiff could recover notwithstanding his own negligence if the defendant had the last clear chance to avoid the accident but failed to do so. The rule is unnecessary in a regime that apportions liability based on fault and is therefore abolished.

### **Contractual Rights**

Section 22 of the MLA expressly preserves the contractual rights of the parties. It provides that any claim for contribution or indemnity is subject to the terms of any contract between the person claiming contribution or indemnity and the person from whom contribution or indemnity is claimed.

## **3.0 LIMITATION OF LIABILITY**

Part 3 of the MLA implements the 1976 Convention on Limitation of Liability for Maritime Claims and the 1996 Protocol but with Canadian amendments and limits. These provisions originally became part of Canadian law on August 10, 1998 when they were enacted as amendments to Part IX of the Canada Shipping Act. Their appearance in the MLA does not signal any change in the law. These provisions were moved to the MLA for purposes of convenience, ie. so that all provisions relating to liability would be in one statute.

### **Persons Entitled to Limit**

As is well known, the 1976 Convention as amended by the 1996 Protocol regulates the limitation of liability of shipowners. Article 1 sets out the persons entitled to limit liability. They are: the owner, charterer, manager and operator of seagoing ships and salvors. Article 1(4) extends the right to limit to employees and agents of such persons. Article 1(6) extends the benefits to liability insurers of persons entitled to limit.

The MLA further extends the list of persons entitled to limit their liability beyond that allowed in the Convention. Section 25(1)(b) of the MLA extends the right to limit to owners, charterers, managers and operators of all ships and not just “seagoing” ships and further to any person with an interest in or possession of a ship. With these amendments the right to limit applies to pleasure craft on lakes and rivers as well as “seagoing” ships.

### **Claims Subject to Limitation**

Article 2 of the Convention sets out the claims that are subject to limitation of liability. The list of claims in article 2 is very broad and includes: claims for loss of life or personal injury, claims for loss of or damage to property, claims for consequential losses, claims for delay in the carriage of cargo, and passengers and various other claims.

Article 3 sets out the claims excepted from limitation. The excepted claims are limited. They are: claims for salvage, claims for oil pollution damage governed by the 1969 Convention on Civil Liability for Oil Pollution, claims for nuclear damage, and claims by employees if the applicable law does not permit limitation.

### **Conduct Barring Limitation**

Article 4 sets out the circumstances under which a person will lose their right to limit. These circumstances are very limited. In order to prevent a defendant from limiting his liability the plaintiff must prove that the loss resulted from the personal act or omission of the defendant “committed with the intent to cause such loss, or recklessly and with knowledge that such loss

would probably result”. This is a very strict test and is often referred to as establishing an “unbreakable limitation”. To the knowledge of the author, there has never been a case where Article 4 has successfully been invoked and the shipowner has lost the right to limit.

### The Limits

The general limits of liability are established by Article 6 of the Convention and by section 28 of the MLA. Section 28 of the MLA sets out special Canadian limits for vessels of less than 300 gross tons. For vessels of more than 300 gross tons the limitation amount is governed by the Convention. The table below summarizes the limits applicable to all claims with the exception of claims by passengers. The limits of liability for passenger claims is dealt with in Article 7 of the Convention and section 29 of the MLA. These limitations are dealt with in the next section.

#### Limitation Amounts

<b>Ship's Gross Tonnage</b>	<b>Claims For Loss of Life or Personal Injury (except passengers or persons carried on a ship)</b>	<b>Other Claims (except passengers or persons carried on a ship)</b>
Less than 300	C\$1 million	C\$500,000
300 - 2,000	2,000,000 SDR (approx. C\$4,000,000)	1,000,000 SDR (C\$2,000,000)
2001 - 30,000	2 million SDR (C\$4 million) plus 800 SDR (C\$1,600) for each ton over 2000	1 million SDR (C\$2 million) plus 400 SDR (C\$800) for each ton over 2000
30,001 - 70,000	24,400,000 SDR (C\$48,800,000) plus 600 SDR (C\$1,200) for each ton over 30,000	12,200,000 SDR (C\$24,400,000) plus 300 SDR (C\$600) for each ton over 30,000
over 70,000	48,400,000 SDR (C\$96,800,000) plus 400 SDR (C\$800) for each ton over 70,000	24,200,000 SDR (C\$48,400,000) plus 200 SDR (C\$400) for each ton over 70,000

(Note: All SDR amounts are converted to Canadian dollars at a rate of 1 SDR= C\$2.) The above limitations apply to the aggregate of all claims arising on any distinct occasion.

It should be noted that pursuant to Article 6(2) where the limitation amount applicable to personal injury claim is insufficient to satisfy all such claims the amount applicable to property damage claims shall be made available to satisfy the personal injury claims.

Pursuant to Article 6(4) the limits of liability applicable to a salvor not operating from a ship are to be calculated according to a tonnage of 1,500 tons.

### **Limits of Liability for Fatalities and Personal Injuries to Passengers**

The limits of liability for claims by passengers and persons carried on board a ship are set by Article 7 and by section 29 of the MLA. Article 7 establishes the maximum liability at 175,000 SDR (C\$350,000) multiplied by the number of passengers the ship is authorized to carry by her certificate. This provision, of course, requires that a ship have a certificate. It is unworkable where the ship carries passengers but is not required to have, and does not have, a certificate. In such cases, section 29(1) of the MLA provides that the limitation amount is the greater of 2,000,000 SDR (C\$4,000,000) and 175,000 SDR (C\$350,000) multiplied by the number of passengers on board the ship. Sections 29(2) applies a similar limit to claims for loss of life or personal injury to persons carried on a ship “otherwise than under a contract of passenger carriage”. By virtue of the exceptions in section 29(3) these limits do not apply to the master, crew or other persons employed on the ship and do not apply to persons carried on board ships used for pleasure purposes.

### **Owners of Docks Canals and Ports**

Section 30 of the MLA includes special limitation provisions applicable to owners of a dock, canal or port including, any person having the control or management of the dock, canal or port and any ship repairer using the dock, canal or port. Such persons are entitled to limit their liability for loss caused to a ship or to any cargo or property on board the ship. The limitation amount is calculated by multiplying \$1,000 by the tonnage of the largest ship to have used the dock in the last five years but is subject to a minimum of \$2 million. As with claims under the convention, the right to limit liability is lost if it is proved that the loss resulted from the personal act or omission of the person seeking to limit and “committed with intent to cause the loss or recklessly and with knowledge that the loss would probably result”.

**4.0 CARRIAGE OF PASSENGERS**

Part 4 of the MLA implements the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and the 1990 Protocol and introduces special Canadian amendments. The operative section is Section 37 which gives the Convention and Protocol the force of law in Canada.

**Application**

Article 2 of the Athens Convention provides that the provisions of the conventions apply to: (a) any international carriage if the carrying “ship” is flagged or registered in a State party to the convention, (b) the “contract of carriage” is made in a State party to the convention, or (c) the place of departure or destination is, according to the contract of carriage, in a State party to the convention. The terms “ship” and “contract of carriage” are defined terms under the Athens Convention. “Ship” is defined as a seagoing vessel. “Contract of carriage” is defined as a contract for the carriage by sea of a “passenger”. “Passenger” is in turn defined as any person carried in a “ship”. The net effect of these definitions and Article 2 is that the Athens Convention applies of its own force only to international contracts for the carriage of passengers in seagoing ships. This application was considered too narrow for Canada and was therefore expanded by sections 36 and 37 of the MLA .

Section 36 expands on the definition of ship to include ships of all types and whether seagoing or not. The effect of this change in definition is to make the Convention applicable to the carriage of passengers on inland lakes and rivers.

Section 37(2)(a) expressly makes the Convention applicable to contracts for the domestic carriage of passengers as well as international carriage.

Section 37 (2)(b) further extends the application of the convention by dispensing with the requirement that there be a contract of carriage in the case of persons ( excluding the Master, crew or employees) carried on ships operated for a commercial or public purpose . This is achieved through the following strangely worded provision:

37(2) Articles 1 to 22 of the Convention also apply in respect of...

(b) the carriage by water, otherwise than under a contract of carriage, of persons or of persons and their luggage, excluding

(i) the master of a ship, a member of a ship’s crew or any other person employed or engaged in any capacity on board

a ship on the business of the ship, and

(ii) a person carried on board a ship other than a ship operated for a commercial or public purpose.

The first clause of section 37(2)(b) extends the application of the Convention to the carriage of all persons regardless of whether there is a contract of carriage. The use of the term “persons” and the discarding of the requirement that there be a contract of carriage make the Convention applicable to virtually every person on board a ship for whatever reason. It is for this reason that the qualifiers in 37(2)(b)(i) and (ii) are introduced. Section 37(2)(b)(i) states that the Convention does not apply to the master or crew of the ship or other persons employed on board the ship. Section 37(2)(b)(ii) is intended to ensure that the Convention does not apply to persons carried on board pleasure craft.

In summary, the combination of Article 2 of the conventions and sections 36 and 37 of the MLA make the Convention applicable to both domestic and international carriage of passengers in ships of all sorts on inland lakes and rivers as well as the high seas. In addition, persons (not being master, crew or employees) on board ships used for commercial or public purposes are governed by the Convention regardless of the existence of a contract of carriage.

### **Liability and Burden of Proof**

Pursuant to Article 3, the carrier under the Athens Convention is liable for damages suffered due to the death or personal injury of the passenger or for the loss of or damage to the passenger’s luggage where (1) the incident which caused the damage occurred during the course of carriage and (2) the damage was due to the fault or neglect of the carrier or his servants or agents acting within the scope of their employment. The burden of proving the incident which caused the damage occurred during the course of carriage is on the claimant. In cases of shipwreck, collision, stranding, explosion, fire or defect in the ship, the fault or neglect of the carrier is presumed. Similarly, for claims in respect of loss of or damage to luggage the fault of the carrier is presumed. In all other cases, the burden of proving the fault or neglect of the carrier is on the claimant.

### **Who is Liable**

The Athens Convention recognizes that there are often two types of carriers, contracting carriers and performing carriers, and makes both liable. The term “carrier” is defined in Article 1(a) as the person by or on behalf of whom a contract of carriage has been concluded regardless of whether the carriage is performed by him or a performing carrier. The term “performing

carrier” is defined as the person who actually performs all or part of the contract of carriage.

Pursuant to Article 4, where there is both a contracting and performing carrier, the “carrier” (ie. the contracting carrier) remains liable for the entire carriage. Further, pursuant to Article 4(2) the contracting carrier is made liable for the acts and omissions of the performing carrier. The liability of the “performing carrier” is invoked by Article 4(1) which makes the “performing carrier” subject to and entitled to the provisions of the Convention for that part of the carriage performed by him.

Article 4(4) provides that where both the contracting and performing carriers are liable their liability is joint and several.

### **Limitation of Liability**

The carrier under the Athens Convention is given the right to limit his liability. Article 7 provides that the maximum liability of the carrier for the death of or personal injury to a passenger is 175,000 SDR (approximately C\$350,000). Article 8 provides that the maximum liability of the carrier for loss of or damage to cabin luggage is limited to 1,800 SDR (C\$3,600) and to 10,000 SDR (C\$20,000) for loss of or damage to a vehicle including all luggage carried in the vehicle. Other types of luggage are subject to a limitation of 2,700 SDR (C\$5,400) per passenger per carriage. (Note: All SDR amounts are converted to Canadian dollars at a rate of 1 SDR= C\$2.)

The above limits are individual limits applicable to claims by individual passengers. In the case of claims by multiple passengers, the carrier may seek the right to limit liability to a global figure pursuant to Part 3 of the MLA and the 1976 Convention on Limitation of Liability. Article 19 of the Athens Convention would appear to preserve this right in the carrier.

### **Loss of Right to Limit**

Article 13 provides that the carrier will lose his right to limit liability where it is proved that the damage resulted from an act or omission done with intent to cause damage or recklessly and with the knowledge that such damage would probably result.

### **Notice Provisions**

Article 15 prescribes a notice provision for claims for the loss of or damage to luggage. For “apparent” damage, the passenger is required to give written notice of such damage at the time of disembarkation for cabin luggage or the time of re-delivery for other luggage. In the case of loss of luggage or damage that is not “apparent”, the passenger must give written notice

within 15 days from the date of disembarkation or re-delivery. In the absence of written notice, the luggage is presumed to have been received in good condition.

### **Prescription/ Time Limitation**

Article 16 prescribes the applicable limitation periods. In the case of personal injury or loss of or damage to luggage the limitation period is two years from the date of disembarkation. In the case of death of the passenger during the carriage the limitation period is two years from the date the passenger should have disembarked. In the case of a death resulting after disembarkation due to a personal injury received during the carriage, the limitation period is two years from the date of the death but shall not exceed three years from the date of disembarkation.

### **Jurisdiction**

Article 17 prescribes the jurisdictions in which a claim under the Convention must be brought. Those jurisdictions are: the place where the defendant has his permanent residence or principal place of business; the place of departure or of destination under the contract; the place where the claimant is domiciled or has permanent residence provided the defendant also has a place of business in that State; or the place where the contract of carriage was made if the defendant has a place of business in that State.

### **Exclusion Clauses**

Pursuant to Article 18 of the Convention any contractual provision that tends to relieve the carrier of his liability or to fix a lower limit of liability than that prescribed shall be null and void. Similarly, any provision tending to shift the burden of proof which rests upon the carrier or to restrict the claimants right to commence proceedings in the specified jurisdictions is null and void.