STANDARD TOWING CONDITIONS AND AGREEMENTS TO INSURE

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Introduction

This paper examines the liability of a tugboat owner for loss or damage to the tow. It is divided into three parts as follows:

- PART I - THE LIABILITY OF THE TUG OWNER AT COMMON LAW
- PART II - STANDARD TOWING CONDITIONS
- PART III - AGREEMENTS TO INSURE

PART I - The Liability of the Tug Owner at Common Law

Notwithstanding the existence of standard towing conditions and the fact that almost all tugboat operators utilize such conditions or have their own variations of them, the common law liabilities of a tugboat owner are nevertheless important because not infrequently the standard conditions are not properly made part of the contract. The obligations of a tugboat owner are set out in Halsbury's Laws of England, 3rd ed., vol 35 at p. 589, as quoted and approved by the Supreme Court of Canada in Wire Rope v B.C. Marine, [1981] S.C.R. 363, at 392:

In an ordinary contract of towage the owner of the tug contracts that the tug shall be efficient for the purpose for which she is employed, and that her crew, tackle and equipment shall be equal to the work to be accomplished, in the weather and under the circumstances reasonably to be expected. There is a warranty implied in such a contract that at the outset the crew, tackle and equipment are equal to the work to be accomplished in circumstances reasonably to be expected, and there is an implied obligation that thereafter competence, skill and best endeavours shall be used in doing the work.

The tugboat owner is therefore obliged to provide a seaworthy tug, properly manned and equipped, and is required to carry out the towing operation with due care and skill. Notwithstanding these obligations, however, it is always open to the tug owner to show that an

accident was caused by weather or circumstances not reasonably foreseeable or contemplated. Sir Samuel Evans in The Marechal Suchet, [1911] P. 1, said:

On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to vis major or to accidents not contemplated, and which rendered the doing of the work impossible.

It is noteworthy that where circumstances arise during a tow that are outside the contemplation of the parties, the towage contract is suspended and is replaced by a contract of salvage. (The Minnehaha, [1861-73] All E.R. 346)

It is not entirely clear whether the tug owners duty to supply a seaworthy tug is an absolute obligation or whether the obligation can be discharged by the tug owner showing the unseaworthiness was not preventable or discoverable by reasonable care or skill. In The West Cock, [1911] P 208, Sir Samuel Evans, held that the obligation was an absolute one. On appeal, however, the Court of Appeal found it unnecessary to decide the point and neither affirmed nor rejected this view. The decision of the Supreme Court of Canada in the Wire Rope case would seem, however, to support the view that the obligation is an absolute one. In that case the Supreme Court held that the inclusion of an exemption clause in the towage contract which required the owner to exercise due diligence to make the tug seaworthy replaced the implied warranty. (pp.392-3) Implicit in this reasoning is that the implied warranty is something different than due diligence.

Regardless of whether the obligation to provide a seaworthy tug is absolute, where the tow is lost or damaged during the course of the tow, the onus is on the tugboat owner to relieve himself from liability by showing that there was no negligence or want of reasonable care or skill on his part.(The West Cock, pp.224-5 and p. 231) It is noteworthy that there are very few cases which have been determined on the basis of the burden of proof and, therefore, in practice the onus and order of proof may not be terribly important.

In determining the liabilities between tug and tow it may be important to distinguish between situations involving the hire of a specific, named tug and situations where the tow merely contracts for towing services. The case of Robertson v The Amazon Tug and Lighterage Co. (1881) 8 Q.B. 598, a decision by the English Court of Appeal has been cited as authority for the proposition that where there is a hire of a specific tug there is no implied undertaking on the part of the tug owner that the tug is reasonably fit and efficient for the purposes of the journey. The facts of the case were, however, somewhat unusual in that the defendant was both the owner of the tug and the tow and the plaintiff was a Master mariner who contracted with the defendant to take the tug and tow across the Atlantic. The crossing took longer than expected because of a defective engine in the tug and, as a consequence, the plaintiff lost money. Because of these unusual facts, the case is easily distinguishable and its authority for the above proposition is questioned. (Reed v Dean [1949] 1 K.B. 188, at p.192-3)

It may be that in an appropriate case, where there has been an inspection and hire of a specific tug, there should be no implied warranty respecting things the inspection ought to have revealed, (i.e.. the size and horsepower of the tug). Support for this is found in Yeoman Credit

Ltd. v Apps, [1962] 2 Q.B. 508, a decision by the English Court of Appeal involving the hire of a motor vehicle. After reviewing the authorities concerning the implied obligation of fitness Lord Justice Pearce said at p. 516:

Those cases clearly establish that such a warranty, condition or undertaking exists in the hiring of a specific chattel except in the case where the defect is apparent to the hirer, and he does not rely on the skill and judgment of the owner.

This is further recognized in Palmer on Bailment, 2d. ed., at p.1228, where the learned author says:

The fact that the hirer has inspected the chattel beforehand may be of significance in the application of common law rules for two associated reasons: it may show that he did not rely upon the lessor's skill and judgment and it may indicate that the agreement was to hire a chattel subject to all those defects and characteristics that were evident upon an inspection of the kind that has been made.

Finally, the tug owner is also obliged to inspect the tow to ensure it is in a suitable condition for the intended voyage. In Fraser River Pile & Dredge Ltd. v Empire Tug Boats Ltd., (1995), 92 F.T.R. 26, the tug owner was held liable when the crane on a barge hit and damaged a bridge. The Court held the tug owner had the duty to inspect the tow, including the height of the crane, to ensure it was suitable for the intended voyage.

PART II - Standard Towing Conditions

The common law obligations and liabilities of tug and tow are less important today than they were in the past because of the prevalence of written towage contracts which contain terms that exempt the tug owner from liability for loss or damage to the tow. In many geographical areas the terms and conditions of towage contracts have been standardized. Perhaps the most widely known standard towing conditions are the U.K. Standard Conditions For Towage and Other Services published by the British Tug Owners Association. These terms are normally used for towage services performed in British Ports but are also used in many other countries. (Chorley & Giles, Shipping Law, 8th ed. p.421)

In Canada, the most widely known standard conditions are the Eastern Canada Standard Towing Conditions ("ECTOW") published by the Shipping Federation of Canada. These towing conditions are used on the East coast and on the Great Lakes. There is no single set of standard towing conditions that is widely used on the West coast of Canada. The various tug owners on the West coast have tended to use their own towage conditions or a variation of the conditions used by the larger tug companies. (At one time the B.C. Tugowners Association published a set of standard conditions but these were not widely adopted.)

Not surprisingly, since standard towing conditions are drafted by tug owners they are particularly one-sided and provide a great deal of protection to the tug owner. There are essentially three main elements to standard towing conditions: first they provide that the master and crew of the tug are deemed to be the servants of the tow and under the control of

the tow; secondly, they provide a very broad exemption clause in favour of the tug owner exempting the tug owner from liability for loss or damage however caused, including negligence; finally, they provide that the tow owner shall indemnify the tug owner against and in respect of any claims for loss or damage made against it.

Interestingly, both the U.K. Standard Towing Conditions and the ECTOW conditions provide that the exempting and indemnity provisions will not apply where the tug owner fails to exercise due diligence to make the tug seaworthy. There is, however, an important distinction between the U.K. conditions and the ECTOW conditions in this respect. The U.K. Standard Towing Conditions expressly provide that the onus is on the tow to prove the loss resulted solely from the tug owners failure to exercise due diligence. The ECTOW conditions contain no such express provision. In the Wire Rope Industries case, at p. 395, it was held by the Supreme Court of Canada that once the tow owner establishes the loss or damage was due to unseaworthiness of the tug the onus shifts to the tug owner to establish due diligence to make the tug seaworthy.

Having considered the basic nature of standard towing conditions the next question is whether such clauses are valid and enforceable. In the United States exemption clauses of this nature in towing contracts have been held to be contrary to public policy and therefore invalid by the Supreme Court. (Bisso v Inland Waterways, 39 U.S. 85, [1955] A.M.C. 899) The situation in England and Canada, however, is that such clauses have routinely been held to be valid and enforceable unless vitiated by fraud or misrepresentation.

It is important to note that Standard Towing Conditions are not statutory or quasi- statutory in nature. A tug owner can only rely on them to the extent that they have been made part of the contract with the tow owner. This can sometimes prevent problems since not infrequently towage contracts are made informally over the telephone or are comprised in one or two letters that set out the basics of the contract. Often, the full terms and conditions are not communicated to the tow owner until after the fact when an invoice containing the terms on the reverse is delivered.

There are essentially three ways by which Standard Towing Conditions can be made part of the contract of towage: by express agreement, by implication through a course of dealing and by custom. Situations of express agreement occur where the tug owner and the tow owner sign a written towage contract that sets out the standard conditions. Where this happens there is usually little difficulty and the conditions will form part of the contract. The only exception to this may be where the tow is of a small vessel, the tow owner is a consumer and the contract is on the tug owner's standard form. In such a situation the tug owner may be required to show that he specifically brought any exemption clauses to the attention of the consumer. (Tilden Rent-A-Car v Clendenning (19780 83 D.L.R. (3d) 400)

In the absence of express agreement a tug owner may still be entitled to rely on the standard conditions if a prior course of dealing with the tow owner can be established. It is, however, always risky to rely on a prior course of dealing. In Mckenzie Tug & Barge Co. v Rivtow Marine Ltd., (1968) 70 D.L.R. (2d) 409, affd. 7 D.L.R. (3d) 96, the tug owner attempted to rely on an exemption clause contained in its standard invoice, a copy of which had been given to the plaintiff on one prior occasion. The court held the exemption provision did not form part of the

contract since the plaintiff's dispatcher was unaware of the clause in the invoice at the time the towage contract was negotiated.

Similarly, in A.I.M. Steel v Gulf of Georgia Towing, (1964) 50 W.W.R. 476, a tug owner was not entitled to rely on an exemption clause contained in letters sent to the plaintiff in respect of previous shipments. The court reasoned that the contract in question was "for reward to transport steel" whereas the previous contracts were "for the supply of a scow and towing services to transport steel" and, because the letters related to a different form of contract, the exemption clause could not be relied on. The court thought it was no significance that the plaintiff was aware the transport was to be by tug and scow. Although the court's reasoning on this ground might be questioned, the learned judge went on to find that neither of the individuals who actually negotiated the contract had the exemption provision in mind when the contract was made and therefore held it did not apply.

Although there are few Canadian cases where a prior course of dealing has been successfully invoked in a tug and tow context to incorporate an exemption clause, one such case is Plumper Bay Sawmills Ltd. v Jericho Towing Ltd., unreported, Federal Court of Canada Trial Division, No. T-5611-78, May 15, 1980. At p. 12 of the judgment Mr. Justice Walsh stated:

The question which causes me some concern is whether a verbal contract, made without reference to any limiting condition can be modified with retroactive effect to the contract itself by a condition contained on the invoice. If this was the first time that Plaintiff had seen any such conditions on towage invoices it might well be able to claim that it never accepted them and they were not binding on it. However, there is a constant course of conduct by Plaintiff in its frequent dealings with towage companies and specifically in its dealings with (its agent) to accept without protest such clauses when paying the invoices and it would be unreasonable not to infer that subsequent contracts entered into verbally with the same company could be subject to the same conditions found on the previous invoices.

Similarly, in Mitsubishi Canada Limited v Rivtow Straits Ltd., unreported, B.C. Supreme Court, Vancouver Registry No. C763146, May 12, 1977, Mr. Justice Rae held that an exemption clause was incorporated into the contract of towage by virtue of prior dealings.

I find on the evidence that the plaintiff had ample notice of the clause in question, and although it may not have liked it, knew and must be taken to have expected and appreciated that the defendant was undertaking the towage subject to that clause as part of the contract. There had been a great number of transactions between these parties prior to that here, pursuant to which the existence and content of the clause was in fact known to the plaintiff. These transactions constituted a lengthy and consistent course of dealings in which the clause was brought to the plaintiff's attention.

In addition to a prior course of dealing a tug owner can invoke an exemption provision if it establishes that such clauses are so widely used that they are a custom of the trade. Custom was an alternative basis for the decision in Plumper Bay Sawmills v Jericho Towing Ltd.. The defendant in that case led evidence in the form of invoices from various towing companies all of which contained the same or a similar exemption clause. Mr. Justice Walsh held at p. 12 that:

...there is ample evidence to establish that such conditions are a custom of the trade...

Once the tug owner establishes that the exemption clause is part of the towing contract the next hurdle to be overcome is the rule that such clauses are to be construed strictly. Although in theory exemption clauses are valid and will be given effect to by the courts, in practice it is often very difficult to rely on an exemption clause because of the rule of strict construction.

The meaning and effect of the rule of strict construction is succinctly stated in Fridman's, The Law of Contract in Canada, 2d ed., p.541, as follows:

...the language of the contract must be read literally, which means that the courts will be sharp to detect any "deviation" from the contract and its proper performance. For a party to claim the protection of an exclusion, exemption or limitation clause, he must show that he acted "within the four corners" of the contract. If what has occurred does not come within the scope of the contract, or if the party involved, or his conduct, does not fall fairly and squarely within the protection sought to be achieved by the clause, the claim of exemption or limitation will fail.

Closely allied with the rule of strict construction is the rule of contra proferentem. This rule applies to interpret the exemption clause against the maker where the clause is ambiguous and is capable of more than one reasonable construction.

The reluctance of the English and Canadian courts to give effect to exemption clauses is illustrated by many decisions where the tug owner has been held not entitled to rely on the exemption provisions contained in the towing contract. It is beyond the scope of this paper to deal with these many cases other than to provide a sampling.

In The West Cock, [1911] P. 208, it was held that the tug owner could not rely on an exemption clause which applied only to circumstance during towage. The cause of the loss in that case was defective rivets attaching the towing gear to the tug. As this defect existed prior to the commencement of the tow the tug owner was not exempt from liability.

In the Plumper Bay Sawmills case the Court found the tug was improperly manned during part of the voyage and the tug owner was therefore not entitled to rely on the exclusion clause. At pp. 14-15 the learned Judge said:

Any immunity or waiver of liability clauses in any contract constitute a departure from the normal rule that a party is responsible for damages caused by its negligence or fault, and, being exceptions, must be strictly interpreted, and the party seeking to avail itself of the benefit of such a clause has the burden of proving that all conditions permitting its application have been fulfilled, and if there is any doubt, such a clause must be interpreted against the party who has stipulated it.

In McKenzie Barge & Derrick Co. v Rivtow Marine, (1968) 70 D.L.R. (2d) 409, affd. 7 D.L.R. (3d) 96, a scow was lost due to a defective pennant. Although the Court held the exemption clause did not form part of the contract of towage, it nevertheless stated that where the loss was due

to a defective pennant, the tug owner had not used due diligence to make the tug seaworthy and, therefore, was not entitled to rely on the exempting provision.

The most recent Canadian case to consider the construction and enforceability of standard towing conditions is Meeker Log and Timber Ltd. et. al. v The "Sea Imp VIII" et. al. (May 30, 1996) Vancouver Registry CA019851 (B.C.C.A.). In this case The British Columbia Court of Appeal ruled that a widely used set of towing conditions composed of four parts and incorporating the Carriage of Goods by Water Act were so inconsistent and ambiguous that no effect could be given to them. The full text of this decision can be obtained here.

It is apparent that although standard towing conditions have provided a measure of protection to tug owners they do not provide absolute protection. In any towing contract there is always a serious risk that notwithstanding the standard towing conditions the tug owner will be found liable for loss or damage to the tow.

PART III - AGREEMENTS TO INSURE

To better protect themselves from liability tug owners might consider adopting an approach that has been utilized in the United States and, in a different context, has been approved by the Supreme Court of Canada. This approach is the agreement to insure or cross-insurance clauses.

As mentioned above, exemption clauses have been ruled invalid in the United States. The reaction to this was to include in towage contracts provisions requiring the tow to carry full insurance with a waiver of the right of subrogation and naming the tug owner as an additional assured. This approach was accepted by the Fifth Circuit Court of Appeal as an effective means of avoiding liability in Fluor Western Inc. v G & H Offshore Towing Co., 447 F. 2d 35, [1972] A.M.C. 46, and Twenty Grand Offshore Inc. v West India Carriers Inc., 492 F. 2d 679, [1974] A.M.C. 2254.

The effect of an agreement to insure is that the tug owner effectively obtains the benefit of any insurance proceeds received by the tow for the loss. Because of the waiver of subrogation and named insured provision, the insurer will be precluded from recovering its subrogated losses from the tug owner. Further, in the event the tow owner does not adequately insure as required by the towing contract, it will be liable to the tug owner for breach of contract to insure and will not be entitled to recover its uninsured losses.

Agreements to insure are not new to the common law. In Brice & Sons v Christiani and Nielsen, (1928) 44 T.L.R. 335, the Court was required to interpret a provision in a contract for the hire of a barge and crane which stipulated that the owner was to obtain all risks insurance to be paid for by the hirer. The owner in fact obtained insurance but it was not all risks insurance and did not cover the damage to the crane which in fact occurred. The Court found the hirer would have been liable but for the agreement to insure. It held the agreement to insure was intended to be for the benefit of both parties.

In a series of decisions the Supreme Court of Canada has given effect to agreements to insure. Agnew-Surpass Shoestores v Cummer-Yonge Investments,[1976] 2 S.C.R. 221, 55 D.L.R. (3d)

676, concerned a fire in a shopping centre caused by the negligence of a tenant. By the terms of the lease the landlord agreed to insure the shopping centre against all risk of loss or damage by fire. The lease also contained a provision requiring the tenant to make needed repairs except damage for which the landlord was required to obtain insurance. The landlord's insurer brought a subrogated action against the tenant for the damage caused to the building and for lost rental income. The Supreme Court held that the tenant was not liable for the damage to the building by reason of the landlord's obligation to insure and the exception provision in the repair covenant excepting from the duty to repair damages for which the landlord was obliged to insure. The tenant was however found liable for the loss of rental income.

In Ross Southward Tire Ltd. v Pyrotech Products Ltd., [1976] 2 S.C.R. 35, 57 D.L.R. (3d) 248, the issue was again whether the insurer of a landlord could recover for fire damage to a building caused by the negligence of a tenant. The lease in this case contained a provision requiring the tenant to pay insurance premiums. The Court held that the effect of this provision was to transfer to the landlord the risk of loss by fire and, accordingly, the tenant was not liable. It is noteworthy that in this case the Court considered the lack of an exculpatory provision to be unimportant. The obligation to pay fire insurance premiums was, by itself, sufficient to transfer the risk of loss by fire to the landlord. (see pp.251-2 D.L.R.)

In T. Eaton Co. Ltd. v Smith, [1978] 2 S.C.R. 749, 92 D.L.R. (3d) 425, the Supreme Court once more considered whether a landlord's insurer could bring a subrogated action against a tenant that had negligently caused the building to be destroyed by fire. The lease in this case contained a provision requiring the landlord to insure the building against fire. However, unlike the Agnew-Surpass case the tenant's covenant to repair did not contain a provision linking the repair covenant with the landlord's obligation to insure. Nevertheless, the Court held that the covenant to insure was for the benefit of both the tenant and the landlord and, accordingly, the tenant was not liable.

The T. Eaton case is extremely important in that it indicates that an agreement to insure, by itself, is sufficient to transfer the risk of loss. In that case it was recognized that by virtue of the tenant's covenant to repair the tenant would be liable for the fire damage subject only to the effect to be given to the agreement to insure. The Chief Justice stated at p. 428 D.L.R.:

If it can escape this liability in the present case, it can only be on the basis that the landlord's covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage.

The effect of an agreement to insure in a towing contract was recently considered in St. Lawrence Cement Inc. v Wake ham & Sons Ltd., (1995) 86 O.K.. 182. This action involved a stranding of a barge due to the negligence of the tug. The towage contract specifically provided that the barge owner would be responsible for insurance on the barge and cargo and further provided that the towage was to be at the sole risk of the barge owner. At Trial, the Judge found that these provisions did not relieve the tug owner of liability for the loss. On appeal, however, the Court of Appeal held that the agreement to insure could have no purpose other than to relieve the tug owner of liability.

Conclusion

Agreements to insure may provide tug owners with a level of protection from liability which has escaped them due to the hostile manner in which courts have generally treated the exemption clauses contained in standard trading conditions. Although the development of the law in this respect is in its infancy, it could prove very promising for tug owners and all tug owners ought to give serious consideration to including in their standard conditions a provision requiring the tow to provide insurance against all risk of loss or damage to the tow or her cargo.