Guild Yule LLP

WCB EXCLUSION IN MARITIME CLAIMS

Vernon J. Pahl
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"Ryan's Commander": The SCC preserves the "historical trade-off" in marine maritime negligence claims

Introduction

In August of last year, the Supreme Court of Canada in *Marine Services International Ltd. v. Ryan Estate* (2013 SCC) finally settled the question as to whether Provincial Workers' Compensation regimes can co-exist with Canadian maritime law; the latter of which is exclusively a matter of federal law and for the most part unaffected by Provincial statute.

In what can only be described as a sea-change, the SCC decided that the Newfoundland and Labrador "Workplace Health, Safety and Compensation Act" ("WHSCA") was constitutionally applicable and operative in the context of a maritime tort claim. The result being that the WHSCA legislation served to bar the tort actions in negligence.

From the perspective of the private insurance industry, this is a somewhat encouraging outcome.

Background

On September 19, 2004, with a crew of five aboard, the fishing vessel, *Ryan's Commander*, departed Bay de Verde bound for its home port of St. Brendan's. En route, off of Cape Bonavista, in heavy seas, the *Ryan's Commander* capsized, forcing her crew to abandon ship. Tragically, two brothers, Joe and David Ryan, did not survive the ordeal, despite intensive search and rescue efforts.

The design of the fishing vessel, *Ryan's Commander*, came under intense scrutiny.

In 2006, the dependents of the Ryan brothers commenced a lawsuit in the Supreme Court of Newfoundland and Labrador Trial Division, naming the designer and builders of the *Ryan's Commander*, Universal Marine Ltd., Marine Services International Ltd., and David Porter (an employee of Marine Services International Ltd.) as defendants. It was alleged that negligence in the design and construction of *Ryan's Commander* caused the deaths of the Ryan brothers. Additionally, an action was brought against the Attorney General of Canada, alleging negligence on the part of the Ministry of Transportation with respect to the vessel, specifically its stability. (*Ryan's Commander* was designed to be less than 65 ft. in length and 150 gt. in displacement, so as to avoid various restrictions and regulations that applied to vessels in excess of that length and tonnage. Most importantly, the vessel was a stretch design of her sister ship, the *Elite Voyager*, which was designed with 7.5 tonnes of ballast. *Ryan's Commander* had no ballast.)

The Defendants Marine Services International Ltd. and their employee David Porter applied to the Province's Compensation Commission, seeking a determination as to whether the Plaintiffs

claims were statute barred by virtue of s. 44 the WHSCA. The Commission determined that the actions against the applicants were statute barred by virtue of s. 44 of the WHSCA, which limits a "worker's" rights of action against an "employer" for injuries in the conduct or incidental to the employer's operations.

The Ryan Estate Plaintiffs then applied to the Supreme Court of Newfoundland (Trial Division) for judicial review of the Commission's decision. They argued pursuant to the *Marine Liability Act*, as dependents of a person injured by the fault or neglect of another, they were entitled to recover damages for their loss.

In a 2009 Decision, the Supreme Court of Newfoundland and Labrador (Trial Division), following review of the Commission's Decision, and in the application of the doctrines of interjurisdictional immunity and paramountcy held that the Federal Parliament had exclusive jurisdiction to make laws in relation to navigation and shipping and this was achieved, with respect to maritime negligence claims in the *Marine Liability Act*. The Court held that the statutory bar found in s. 44 of the WHSCA restricted the right to sue granted under s. 6(2) of the *Marine Liability Act* and therefore the Workers' Compensation legislation was unconstitutional.

An Appeal was brought before the Newfoundland and Labrador Court of Appeal. A majority decision confirmed the Decision of the lower Court.

The matter was appealed to the Supreme Court of Canada ("SCC") wherein the SCC overturned the Court of Appeal Decision and specifically expressed deference to the Compensation Commission's Decision. It is interesting to note that there were a number of interveners, namely the Attorney Generals of Ontario, Nova Scotia, British Columbia, Newfoundland and Labrador, and the Workers' Compensation Board of British Columbia.

The SCC in the course of conducting their constitutional analysis held that the impugned Provincial legislation must "impair" rather than just "affect" the Federal legislation. The SCC held that s. 6(2) of the *Marine Liability Act* provided "room" for the operation of Provincial Workers' Compensation schemes. In the end, the Court held that the WMSCA and the MLA can operate side by side without conflict.

Between the lines of the judgment of the SCC, it appears that the Court was saying that the Dependents in the Ryan Estate would recover monetary benefits whether under the *Marine Liability Act* or the WHSCA. As such, they were not in conflict.

What is not discussed is the degree of entitlement that Plaintiffs could potentially achieve under the Provincial Workers' Compensation scheme and the *Marine Liability Act*. From a private insurer's perspective, this is where the rubber hits the road. In most situations, a Plaintiff who has suffered personal injury as a result of the negligence of another party within the maritime law context would be entitled to significantly higher monetary compensation under the *Marine Liability Act* than they would under the compensation schemes provided by the Provincial workers' compensation legislation.

As such, it behooves all Examiners to consider within the context of any maritime claim whether a statutory Workers' Compensation bar is available.