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THE LEGAL OBLIGATIONS OF SHIP MASTERS AND SEAPLANE PILOTS

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LEGAL OBLIGATIONS OF SHIP MASTERS AND SEAPLANE PILOTS

I. INTRODUCTION

The purpose of this paper is to provide a general overview of the legal obligations and liabilities of ship masters and seaplane pilots. This issue is relevant to liability insurers of vessels and float planes as the pilots have control and authority over the operation of these vessels and thus have the ability to directly affect the risks to which a vessel is exposed.

II. MARITIME LAW

Before discussing the various statutory and common law obligations of masters and seaplane pilots, it is useful to begin with a brief discussion on the nature of maritime law.

Maritime law is its own body of law that was administered in special courts called Admiralty Courts where many common law doctrines did not apply. It is within the exclusive jurisdiction of the federal government due to the constitutional authority of the federal government over shipping and navigation. This jurisdiction extends to the ability to regulate over Canadian in-land waters.[1]

It is also an area of law that has seen significant uniformity across most of this century due to the inherently international aspects of shipping and navigation. There has been a significant trend in the last 30 years towards the incorporation of international treaties into domestic law to regulate the areas of shipping and navigation.

Canada recently gave royal assent to the *Canada Shipping Act, 2001*[2] and the *Marine Liability Act*[3], both of which serve to incorporate various international shipping and navigation treaties, or parts thereof, into Canadian law and consolidate the legal principles applicable to maritime law into two statutes.[4] However, maritime law still remains a creature of both statutory law and the common law.

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[1] *Triglav (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283.
[2] S.C. 2001, c. 26, assented to November 1, 2001.
[3] S.C. 2001, c. 6, assented to May 10, 2001.
[4] Roger S. Watts, "The Canadian *Marine Liability Act*", paper prepared for the British Columbia branch of the Canadian Bar Association Maritime Law Section, September, 2001, at 1.

III. MASTERS OF SHIPS

master of a ship is an employee of the owner of a ship. Accordingly, the owner of a ship is vicariously liable for the acts of a master in the course of his or her employment. For insurance purposes, this means that an owner of a ship is liable for property loss, personal injury or death resulting from the negligence of a master whether pursuant to a claim against the owner personally or pursuant to an *in rem* claim against the ship.

A master is responsible for the navigation of a vessel and the safety of both the vessel and those on board. A master owes a duty to take the precautions of a reasonable person exercising ordinary foresight and judgment in all of the circumstances, or the duty to exercise prudent seamanship.

Liability for damage caused by a vessel will lie with the vessel found to be negligent. The case law on what constitutes the negligent operation of a vessel is largely fact-driven and serves to highlight the general propositions that a master must take reasonable steps to ensure the safety of the vessel and those on board. However, general principles emerge from the case law to illustrate the obligations of a master in the navigation of a vessel.

A master owes a duty to keep a proper look-out and to take all necessary precautions to avoid a collision. A master must ensure that the vessel is traveling the appropriate speed for the prevailing conditions and that appropriate warning signals of a vessel's approach are given. Further, a master is required to obey the "rules of the road" governing navigation, including those regulating the right-of-way of a vessel in narrow waters.

A master is not relieved of liability for failure to keep a proper look-out on the basis that the entity responsible for the harbour waters should have warned the ship about potential navigational hazards. In *The Procyon v. Canada (National Harbours Board)*[5], a ship collided with a buoy that had been twice displaced from its original position due to storms. The ship claimed that the National Harbours Board owed a duty to warn a ship navigating in the harbour of the dislocated buoy's location because it knew of the dislocation and the fact that it might pose a navigational hazard. The Court rejected this argument on the basis that the ship would have seen the buoy if it had kept a proper look-out. It further found that the employees of the National Harbour Board had satisfied themselves that the buoy did not pose a navigational hazard and there was no negligence for failing to warn ships of its new location. The Court rejected the analogy offered by the ship that the National Harbours Board owed it a duty akin to that owed by the manager of an airport to warn approaching aircraft of hazards on the

[5] [1968] 2 Ex. C.R. 330

runway not visible from the air and stated that it is those with control of the ship that have the responsibility for its safe navigation.

A master owes a further duty to other vessels to ensure that his or her operations do not put other vessels in danger, including taking measures to avoid a collision even in circumstances where the master may have the right-of-way. However, in cases where a collision is imminent or inevitable, a master is entitled to place the safety of his or her vessel and crew first.

An example of this can be found in *Hamilton Marine & Engineering Ltd. v. CSL Group Inc.*[6]. In this case, the owners of a tug sought damages from the owner of ship when the tug was damaged in the process of attempting to assist the ship in leaving a berth in one of the locks on the Great Lakes. The tug alleged that the ship had not waited until the tug returned to the starboard position beside the ship and this had endangered its safety and caused it to collide with a "settee." The Court considered the law of tug and tow and found that the masters of both vessels owe a duty to exercise proper skill and diligence with respect to the navigation of their own ships as well as to the other ship not to create unnecessary risk for the other. The tug was found entirely at fault for the collision due to the failure of her master to properly communicate with the ship and in undertaking a maneouvre that imperilled the safety of the tug. The ship was not required to anticipate unexpected navigation by the tug and was justified in continuing its attempts to leave the berth.

A. THE COLLISION REGULATIONS[7]

The *Collision Regulations* govern the operation of vessels on navigable waters, and expressly apply to Canadian in-land waters. The *Collision Regulations* reflect international rules adopted to prevent collisions on the seas, with Canadian modifications that apply to Canadian ships or ships in Canadian waters, and are generally known as the "rules of the road."

The *Collision Regulations* contain provisions governing the requirement to keep a proper look-out, navigate at a safe speed, assess the risk of a collision and take the necessary action to avoid a collision; contain the navigation rules in narrow channels, rules for overtaking other vessels and actions required in head-on situations and crossing situations; contain rules directing which vessels must keep out of the way of other vessels; governing conduct in restricted visibility, the requirements for the visibility, shapes and positioning of lights on vessels in various modes of navigation; and prescribing sound and light signals for communication between vessels.

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[6] [1995] F.C.J. No. 739 (T.D.)
[7] C.R.C., c. 1416.

Proof of breach of the *Collision Regulations* is *prima facie* evidence of negligence on the part of a master. The burden then shifts to the master to prove that the circumstances required a deviation from the *Collision Regulations* and that it was reasonable and prudent in all the circumstances that the action be taken. It is notable that the *Collision Regulations* expressly provide that a master must also comply with the ordinary practices of seamen as required by the special circumstances of the case.

For example, in *Sincennes McNaughton Line Ltd. v. SS. "Brulin,"*[8] the owners of a tug sued the owners of a ship after a collision between the two vessels on a lake off of the St. Lawrence River. The Court expressly relied on the *Collision Regulations,* to find that neither the tug nor the ship had obeyed the "rules of the road" when passing each other, as neither ship kept a proper look-out or used any of the required signals when approaching each other and failed to pass each other on the side of the sea-lane that was provided for in the *Collision Regulations*. There were no special circumstances in the case to justify either vessel from failing to undertake these actions and accordingly both vessels were found partly at fault.

B. STATUTORY OBLIGATIONS

Further legal obligations and liabilities are imposed on a master by the *Canada Shipping Act, 2001*.

A master is defined in the *Canada Shipping Act, 2001* as a person in command and charge of a vessel, not including a licensed pilot engaged in pilotage duties under the *Pilotage Act*[9].

Under the *Canada Shipping Act, 2001*, a master has the obligation to ensure that all crew members possess the necessary qualification certificates imposed under the Act. The master must also comply with all other statutory obligations for the inspection of ships and obedience to those charged with authority to give orders respecting the navigation of vessels.

A master is primarily responsible for the safety of the vessel and all those aboard, including all persons engaged in the loading and unloading of the vessel. This includes ensuring that the operations upon a vessel are conducted safely, in good order and in compliance with all statutory obligations. Accordingly, a master is given statutory authority to detain persons and use reasonable force if he or she considers it necessary to do so to ensure the safety of the vessel and those aboard.

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[8] [1929] 3 D.L.R. 536 (S.C.C.)
[9] R.S.C. 1985, c. P-14.

A master has further duties respecting the navigation of a vessel. These include a duty to report hazards to navigation, a duty to assist vessels in distress and a duty to report collisions and stay with a vessel after a collision.

C. LIMITS OF LIABILITY

The *Marine Liability Act* adopted the 1976 Convention on the Limitation of Liability for Maritime Claims, as amended by the 1996 Protocol, as the law of Canada. This Act serves to modify the previous limitations of liability contained in the *Canada Shipping Act*[10] for damages arising from personal injury, death and property loss occasioned by the fault of a vessel. The main differences between the old *Canada Shipping Act* and the scheme enacted by both the *Canada Shipping Act, 2001* and the *Marine Liability Act*, are discussed more fully by Roger S. Watts, in a paper prepared for the British Columbia branch of the Canadian Bar Association Maritime Law Section in September, 2001, a copy of which is appended to this paper.

The *Marine Liability Act* limits the liability of an owner, defined to include a person in control of a ship, and extends this limitation of liability to anyone for whom the owner is responsible. Notably, an insurer is also entitled to claim any limitation of liability that its insured could claim.

The limitation applies to the aggregate of all claims arising out any distinct occasion for personal injury; death; property loss occurring on board or in direct connection with the operation of the vessel, including consequential loss; loss from delay; and loss from the infringement of rights, other than contractual rights, occurring in direct connection with the operation of the ship. However, the limitation only applies to liability for damages. The limitation does not apply to claims for oil pollution, nuclear damage or to claims under employment contracts in certain circumstances as environmental pollution is addressed in a later section of the Act.

The limitation does not apply to losses arising from a personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The quantum of the limitation of liability involves a calculation using the gross tonnage of the vessel and the Canadian equivalent of the Special Drawing Right ("SDR") as determined by the International Monetary Fund to give a monetary figure. The Canadian dollar equivalent of one SDR, as of January 31, 2003, is approximately $2.10.[11]

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[10] R.S.C. 1985, c. S-9.

[11] Taken from the website for the International Monetary Fund

Examples of the Canadian dollar amounts for the limits of liability for death, personal injury and property damage, by ship size are as follows:

Loss of Life or Personal Injury Other than to Own Passengers:

gross tonnage less than 300 tons:	$1,000,000
gross tonnage 301-2,000 tons:	$4,200,000
gross tonnage 2,001-30,000 tons:	$4,200,000 plus $1,680 per ton over 2,000 tons
gross tonnage 30,001-70,000 tons:	$51,240,000 plus $1,260 per ton over 30,000 tons
gross tonnage over 70,000 tons:	$101,640,000 plus $840 per ton over 70,000 tons

Other Claims

gross tonnage less than 300 tons:	$500,000
gross tonnage 301-2,000 tons:	$2,100,000
gross tonnage 2,001-30,000 tons:	$2,100,000 plus $840 per ton over 2,000 tons
gross tonnage 30,001-70,000 tons:	$25,620,000 plus $630 per ton over 30,000 tons
gross tonnage over 70,000 tons:	$50,820,000 plus $420 per ton over 70,000 tons

Own Passengers

ship – no safety certificate required – for loss of life or personal injury to passengers on the ship, the greater of:	$4,200,000 or $367,500 per passenger

for loss of life or personal injury to passengers on a ship that are not carried under a contract of carriage, the greater of:	$4,200,000 or $367,500 x number of passengers authorized to carry by safety certificate or the number of persons on board the ship if no safety certificate required

The Supreme Court of Canada, in *The Rhone v. The Peter A.B. Widener,*[12] found that the calculation of the limit of liability included the tonnage of all vessels owned by the same owner that actually contributed to the resulting damage. Thus, in that case, the fact that the tow was being pulled by two tugs owned by the same owner did not entitle the plaintiff to calculate the limit of liability amount on the basis of the tonnage of both tugs because only one of the tugs had actually caused the damage.

It is notable, however, that the amounts calculated for the limits of liability for "other claims" can be used to satisfy claims for personal injury or death if the fund established for these purposes is extinguished. The claims for personal injury or death then rank rateably with other claims over the "other claims" fund.

The *Marine Liability Act* provides for the establishment of a fund to extinguish a claimant's other possible remedies against an owner of a ship, or those for whom the owner is responsible, without the admission of liability by the person on whose behalf the fund is set up. An insurer who makes a payment to a claimant is entitled to set up a subrogated claim against any fund established under the Act.

The Act also contains provisions on contributory negligence, the apportionment of liability and claims for contribution and indemnity and expressly permits set-off for counterclaims. It further allows an expanded class of persons to claim as dependants of persons killed or injured on a vessel, thus displacing previous law that decided the provincial acts permitting claims by dependents were not applicable to maritime law.

There is a two year limitation period for the commencement of claims against an owner or a ship arising from death, personal injury or property loss.

A recent case from the British Columbia Court of Appeal, *Capilano Fishing Ltd. v. The Qualicum Producer*[13] considered the limitation of liability of an owner under the old *Canada Shipping Act* in an action for damage to a fishing net caused by the actions of

[12] [1993] 1 S.C.R. 497
[13] 2001 BCCA 244

another fishing vessel during the roe-herring fishery. The trial judge found the owners of the defendant ship liable on the basis that her master was negligent in permitting his vessel to get too close to the plaintiff ship, resulting in the defendant's propellers cutting the plaintiff's fishing net and releasing its catch of roe-herring. The trial judge applied the *Canada Shipping Act* to limit the plaintiff's damages on the basis that the negligent acts of the defendant's master could not be attributed to the privity or fault of the owner, which would otherwise have deprived the owner from relying upon the statutory limit of liability.

The Court of Appeal unanimously upheld the trial judge's finding of negligence on the part of the defendant's master, but reversed the finding that the owner was entitled to rely on the limitation of liability provided by the *Canada Shipping Act*. The Court of Appeal found that the nature of the roe-herring fishery was such that safe seamanship was subordinated to the primary objective of making a profit. In these circumstances, masters were not only *not* instructed by the owners of ships to take the care of a reasonable and prudent seaman, but in fact masters were encouraged to do what they could to maximize a catch. Accordingly, the owner could not avail itself of the limitation of liability because it knowingly put its vessel into a situation where safe navigation and seamanship were not practiced.

This decision shows that a liability insurer should be wary about relying on the statutory limitations of liability even when the loss arises from the negligence of a master, when the master is engaged in a marine adventure that implicitly requires the master to forego the normal duty of care required in the navigation of a vessel.

D. PILOTS OF A SHIP

It is worth mentioning the role of pilots in the navigation of ships and the implications for the duties of a master when the vessel is under the control of a pilot. The *Pilotage Act* is designed to ensure the safe navigation of ships through inland waters and near-shore waters with high volumes of shipping traffic. There are four pilotage authorities throughout Canada (the Pacific Pilotage Authority, the Great Lakes Pilotage Authority, the Laurentian Pilotage Authority, and the Atlantic Pilotage Authority) and in many areas, pilotage is mandatory. The role of the pilot is to guide a vessel to its berth in circumstances where the pilot has a superior knowledge of the local waters.

The *Pilotage Act* requires a master to obey a pilot and not interfere with the pilot's activities. It expressly provides that the Federal Crown and any Pilotage Authority are not liable for damages caused by a pilot. This provision is widely drafted to include damage caused by the fault, neglect, want of skill or wrongful act of a pilot.[14] The

[14] s. 39

Pilotage Act also limits a pilot's liability for his or her negligent acts to $1,000. Further, an owner and a master are not exempted from liability for damage caused by a ship because the ship was under the control of a pilot or because the damage was caused by the fault, neglect, want of skill or wilful or wrongful act of a pilot.[15]

The combined effect of these two provisions is to make the owner or master of a ship liable for damages exceeding $1,000 caused by a vessel when under the control of a pilot. They also serve to prevent a claim for damages incurred by a vessel because of the negligent navigation of a pilot. *Irish Shipping Limited v. The Queen*[16] is illustrative of this point. In this case, the appellants' vessel was under the control of a pilot in a mandatory pilotage area. The pilot ran the ship aground in a recently-changed portion of the sea-route. This new route was recommended, but not required, by the Federal Crown. The appellant contended that the Crown was responsible for the damage to the ship because it had created a dangerous travel route and had not installed the necessary navigation aids to allow a ship to safely navigate through the passage. This argument was rejected at trial and on appeal, both levels of court finding that the ship could not recover damages because the accident was due to the negligence of the pilot and not from any breach of duty by the Crown to ensure the safety of a sea route that was not required to be used and was not inherently dangerous.

However, it should also be noted that, despite a pilot's limit of liability for his or her own negligence, it should be open for the master and owner to claim the limitations of liability contained in the *Marine Liability Act* for damages resulting from the negligence of a pilot on the logic that a pilot is someone for whom the master and owner are statutorily responsible under the terms of the *Pilotage Act*.

E. CONTRACTUAL LIMITS OF LIABILITY

A ship owner may contractually limit its liability for damages, whether based on the negligence of the master of the ship or other crew members, except that any contractual limitation of liability that purports to vary adversely any of the provisions dealing with liability to the passengers of a ship is null and void. Accordingly, a ship owner can lower or eliminate its exposure for damage caused to the carriage of goods, but not for carriage of passengers or their luggage.

Contractual limitation of liability clauses for goods are expressly permitted in the *Marine Liability Act* and recognized by the courts according to the ordinary rules of contract. Accordingly, when a limitation clause is ambiguous, or does not expressly limit liability arising from acts of negligence on the part of the master or the crew, an

[15] s. 41
[16] [1984] 2 F.C. 777 (C.A.)

owner cannot rely on the limitation clause. This issue was addressed in *Meeker Log and Timber Ltd. v. The Sea Imp VIII.*[17] The tug operator used a standard form limitation clause that was found to be a term of the agreement between the parties due to their long course of business dealings. The plaintiff's tow sustained damage after grounding due to the admitted negligent navigation by the tug master. The Court found that the tug was not exempted from liability on the basis of the exclusion clause because the clause was ambiguous and inherently contradictory and was therefore null and void. The Court, however, applied the limits of liability in the old *Canada Shipping Act* to limit the tug's liability, which had the effect of reducing the tow's claim for damages from $430,495 to about $35,000.

This case shows that liability for damage to cargo can be limited or exempted with a properly worded clause, so long as the limitation or exemption does not purport to apply to passengers or their luggage.

F. AGREEMENTS TO WAIVE SUBROGATION

The Supreme Court of Canada in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*[18] upheld a clause in a marine insurance contract where the insurer agreed to waive its subrogation rights against unnamed third party beneficiaries. The insurer commenced a subrogated action against Can-Dive who had chartered one of Fraser River's vessels which sunk due to the negligence of Can-Dive. The Court permitted Can-Dive to rely on the waiver of subrogation clause as a defence to the subrogated action on the "principled exception to the doctrine of privity of contract." This was permitted even though Fraser River had entered into an agreement with its insurer to pursue a subrogated action against Can-Dive, thus revoking the waiver of subrogation clause. The Court found that the insurer and Fraser River could not unilaterally revoke Can-Dive's right to rely on the clause after the very damage that it was contemplated be covered by the clause had occurred, thus crystallizing Can-Dive's right to rely on the clause.

IV. PILOTS OF FLOAT PLANES

Aviation is governed generally by the *Aeronautics Act*[19]. However, the *Canada Shipping Act, 2001* provides that regulations made for the prevention of collisions in Canadian waters may be made in respect of aircraft on or over Canadian waters[20] and the *Collision Regulations* provide that a seaplane is a vessel when it is on the water.

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[17] [1994] B.C.J. No. 3006 (S.C.) affirmed [1996] B.C.J. No. 1411 (C.A.)
[18] [1999] 3 S.C.R. 108
[19] R.S.C. 1985, c. A-2
[20] s.120(3)

Accordingly, the duties of a pilot of a seaplane are analogous to those of a master when the seaplane is on the water. A pilot of a seaplane must exercise the degree of care of a competent, prudent, and qualified pilot in all circumstances. A pilot is responsible for the safety of the seaplane and those aboard. In addition, the pilot of a seaplane must obey the *Collision Regulations* when operating on water. The *Collision Regulations* further provide that a seaplane must, in general, keep well clear of all vessels and not impede their navigation except in circumstances where the risk of collision exists, in which case it must comply with the Part B Rules governing steering and sailing.[21]

A pilot of a seaplane must ensure that the water is clear of all vessels before landing on the water and must further ensure that the intended route of travel to the dock is clear of vessels after landing. In *Ontario Central Airlines Ltd. v. Gustafson*[22], a seaplane collided with a motor boat after the seaplane had landed and was taxiing to the dock. The trial judge had found both the pilot of the seaplane and the operator of the motor boat contributorily negligent, the pilot for failing to keep a proper look-out and the boat operator for failing to take reasonable action to avoid a collision. The majority of the Court of Appeal upheld this finding by applying the *Collision Regulations* to the seaplane.

The Court of Appeal affirmed that the pilot had a duty, after landing on the water, to ensure that its route to the dock was clear of other vessels. The pilot in this case was taxiing at a rate of speed which lifted the nose of the seaplane and prevented the pilot from having any forward view. The fact that the seaplane had the right-of-way did not relieve the pilot from the obligation to be aware of the presence and direction of travel of other vessels or to maintain a proper look-out to ensure that he could take proper action to avoid a vessel in disregard of the seaplane's right-of-way.

It is notable that, while seaplanes are under the same obligations as vessels when they are on the water, the pilot or the owner of a float plane is not entitled to the limitations of liability contained in the *Marine Liability Act*.

V. CONCLUSION

The legal obligations and liabilities of both a master of a ship and a pilot of a seaplane are governed by the ordinary principles of negligence law and by the statutory law enacted to regulate the safe navigation of vessels on the water. The master of a ship is responsible for the safety of the vessel and all those aboard it, and a ship owner is

[21] Rule 18(e)
[22] (1957) 8 D.L.R. (2d) 584 (Ont. C.A.)

responsible for the acts of the master in the course of his or her employment. The liability of a master for damages to property, personal injury or death arising from the master's negligent navigation of a vessel are statutorily limited.

The pilot of seaplane is required to conduct the seaplane in the same manner as a master is required to conduct a vessel when it is on the water. However, a pilot of a seaplane has the more onerous obligation of keeping out of the way of vessels and is not entitled to the benefit of a statutory limitation of liability.