Interest and increases: Developments in the law on limits of liability in Canada

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There have been two recent developments on the limitation of liability for vessels under 300 GT in Canada. The first is a decision of the Ontario Court of Appeal (ONCA) confirming that the limit of liability is exclusive of interest and costs. The second is an amendment to the *Marine Liability Act* that increases the limits of liability for small vessels.

Canada gives force of law to the Civil Liability Convention[1] and its 1996 Protocol under the *Marine Liability Act*. However, the Civil Liability Convention does not apply to vessels under 300 GT, and limits of liability for these vessels are set out in s. 29 of the *Marine Liability Act*. In the recent *Algra v Comrie Estate,* 2023 ONCA 811 decision, the ONCA confirmed the near unbreakable nature of the limit of liability under the Civil Liability Convention and the *Marine Liability Act* but clarified that the limits are exclusive of any court costs and pre-judgment interest award.

In a tragic boating accident that occurred around Leamington Harbour, three passengers died and two other passengers were badly injured. The owner of the pleasure craft and the operator of the vessel at the time of the accident both passed away. The surviving passengers issued claims in negligence against the vessel owner and the operator along with various levels of government. In an earlier summary judgment, the Court found that the vessel owner and the operator alone were equally liable for the plaintiffs' injuries.

The issue in this decision was whether the limitation of liability found in s. 29(a) of the *Marine Liability Act* was exclusive of any costs or pre-judgment interest. The text of s. 29(a) of the *Marine Liability Act* as it existed at the time of the accident read:

> **29** The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is
>
> (a) $1,000,000 in respect of claims for loss of life or personal injury; and
>
> (b) $500,000 in respect of any other claims.

The lower court concluded that the limitation of liability was exclusive of costs and pre-judgment interest. The text of the provision specifies the types of claims that the limitation will apply to, namely, claims for loss of life or personal injury. It makes no mention of interest or costs.

The purpose of a costs award, along with indemnifying successful parties, is to ensure that litigation is conducted in an efficient, fair, and just manner by allowing for sanctions or penalties to parties who act unreasonably.

The purpose of an interest award is to compensate for the loss of use of money's worth from the date the injury is sustained to the time of judgment. It recognizes the practical reality that it is impossible to render immediate judgment at the moment the injury is sustained.

On appeal, the ONCA confirmed the lower court's decision and noted that Parliament was explicit in that the limitation only applied to claims for loss of life or personal injury. ONCA further noted that restrictions on a court's ability to award costs and interest, two of their most effective tools in controlling the litigation process, would be extraordinary and defeat the fundamental policy goals of tort law. If most of a potential recovery is eaten up by interest and costs, there would be little incentive to commence an action.

The practical effect of this decision is that when the ship owning interest calculates the limit of liability following an incident, whether it is to set a reserve or to make an offer of settlement, an allocation for interest and allowable costs must be added to the limit of liability in capital. The rate of interest on the capital is set in the Income Tax Act2, so it can be calculated with a high degree of reliability.

The recent increases to the statutory caps on liability under s. 29 of the *Marine Liability Act*

In June 2023, Parliament increased the statutory limits of liability for owners and operators of vessels under 300 GT pursuant to s. 29 of the *Marine Liability Act*. The original limits had not been increased since the *Marine Liability Act* came into force in 2001, hence the need to increase those limits to account for inflation. The limit of liability for claims for loss of life or personal injury increased from C$1,000,000 to C$1,500,000. The limits for claims for damage to property and any other claims increased from C$500,000 to C $750,000. There were no other amendments to this portion of the *Marine Liability Act*.

The increase in the limits of liability will have an impact of the amount of liability insurance that shipowners and operators of vessels of less than 300 GT should carry. Considering the combination of the limit of liability for personal injury and property damage, applicable interest and costs, as well as coverage for wreck removal, Canadian owners and operators would be well advised to reexamine their coverage with their insurance brokers.

For more information on the *Marine Liability Act* and applicable limits of liability, please reach out to one of the key contacts listed below.

[1] Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol of 1996 (Civil Liability Convention).

[2] See s. 33(5) of the *Marine Liability Act*.

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