CASE NOTE:
High "Stakes" Ruling in *Oddy v. Waterway Partnership Equities Inc.*, 2019 BCCA 185

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In late summer of 2012 Kornella Oddy suffered a terrible accident while houseboating on Shuswap Lake, in south-central British Columbia. While she was at the helm of the beached houseboat a stake embedded in the beach, and attached by a mooring rope to the vessel, broke free and was catapulted back towards the houseboat. The stake and rope smashed through the windshield and the rope struck her, causing serious injuries.

Ms. Oddy brought an action in negligence against the houseboat rental company, Waterway Partnership Equities Inc. ("Waterway"). After trial, Affleck J. of the Supreme Court of British Columbia dismissed the action and Ms. Oddy appealed. In reasons dated May 21, 2019, Harris J.A. of the Court of Appeal upheld the dismissal.

The decision of Harris J.A. is significant for it offers valuable insight on the standard of care owed by rental companies in selecting equipment. The case also raised questions, without answering them, about whether the *Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, 1974, as amended by the Protocol of 1990* (*"Athens Convention"*), as adopted into Canadian law under s.37 of the *Marine Liability Act,* S.C. 2001, c. 6 (*"MLA"*) could apply to the commercial rental of pleasure craft.

The Facts

On September 9, 2012, Ms. Oddy, with her friends and family, bareboat chartered the houseboat, "Annalise" from Waterway for a five day vacation on Shuswap Lake. The Annalise is a substantial vessel of about 60 gross tons with overnight accommodation and other facilities for numerous passengers. She was equipped with two 5/8" Novabraid double-braided nylon mooring lines, which were commonly used and highly regarded for mooring vessels, and two roughly 3' steel beaching stakes.

Before leaving, a representative of Waterway instructed the designated captain, Ms. Oddy's husband, how to moor the boat at night. He was instructed to drive the Annalise bow-first onto the beach and then secure mooring lines on either side of the stern to beaching stakes driven deep into the beach. The mooring lines were to be pulled taut.

On September 12, 2012, the Annalise was beached and moored as instructed. Ms. Oddy and her husband were awoken by windy conditions the next morning. They noticed the port side mooring line was slack and the vessel was drifting. Ms. Oddy moved to the helm intending to start the engine and turn the bow back to face the beach.

Before she could start the engine, as she put it, "the world just blew up." The starboard beaching stake broke loose and catapulted with the mooring line towards the Annalise, shattering the windshield behind which Ms. Oddy was standing. The mooring line struck Ms. Oddy on her left side causing significant injuries.

The Trial

The principal issues at trial were whether Waterway breached the standard of care owed to Ms. Oddy in the selection of the particular type of rope to be used to moor the Annalise; and whether the damage was too remote to be recoverable.

Affleck J. found that Waterway had not breached the standard of care. Waterway had purchased the mooring line from a recognized and reputable dealer of marine equipment. It was reasonable to have relied on the dealer's advice in selecting the line. Waterway had no duty to consult an engineer or other marine expert prior to purchasing the line.

There was also no evidence that Waterway knew or ought to have known that the line selected was not suitable for the intended purpose. It had used this particular mooring line for two years on numerous vessels; and had for many years used double-braided nylon lines generally for its houseboat fleet, in part for their shock absorption qualities, all without issue. It was also not aware of any other similar accidents. When the mooring line was purchased Waterway had no knowledge that the line's elastic properties posed a risk of injury.

Even if there had been a breach of the standard of care, Affleck J. found that the damage caused was too remote. The sudden release of the beaching stake and

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its propulsion through the windshield of the Annalise was not "reasonably foreseeable." The judge did not refer to the *Athens Convention* or the *MLA* in his reasons.

The Appeal

The appeal focused on two primary grounds. The first alleged that the trial judge erred in not addressing an argument that the *Athens Convention/MLA* applied to create a presumption of negligence against Waterway, which it had not displaced. Article 3(3) of the *Athens Convention* does create a rebuttable presumption of fault or neglect against the carrier where injury to a passenger arises from shipwreck, collision, fire or, *inter alia,* a "defect in the ship." Ms. Oddy contended that the subject mooring line was such a "defect" in that it was too elastic for use as a houseboat mooring line.

In respect of the *Athens Convention,* s. 37(2) of the *MLA* expands its application under Canadian law and provides:

> **(2)** Articles 1 to 22 of the Convention also apply in respect of
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> (a) the carriage by water, under a contract of carriage, of passengers or of passengers and their luggage from one place in Canada to the same or another place in Canada, either directly or by way of a place outside Canada; and
>
> (b) the carriage by water, otherwise than under a contract of carriage, of persons or of persons and their luggage, excluding
>
> …
>
> (ii) a person carried on board a ship other than a ship operated for a commercial or public purpose…
>
> (emphasis added)

Ms. Oddy argued that the *Athens Convention* was brought into force in Canada in 2001 to "establish a new regime of shipowners' liability" to passengers, and that it applied to her because (a) the ship owner Waterway ought to be considered a "carrier" under *Athens Convention/MLA,* even in the circumstances of a bareboat charter, and (b) she was a "passenger" or person on board a vessel that was being operated for a commercial purpose, as it was rented at the time.

This argument rested on the notion that the purpose of the operation of the vessel should be determined not by considering that the Annalise was being used for a family holiday/pleasure cruise on a lake, but from the perspective of its owner Waterway, who chartered houseboats for a business/commercial purpose with the object of profit.

Waterway countered that the *Athens Convention,* an international convention regarding carriage of passengers on vessels such as cruise ships and ferries, could not apply because, among other issues, there was no "carriage of passengers." The bareboat charter of the houseboat was not a "contract of carriage," and Waterway was not hired to "carry" Ms. Oddy anywhere.

Waterway further contended that Ms. Oddy's "commercial purpose" argument confused its *ownership* of the Annalise with the *operation* of the vessel by the Oddy family, and it was only operation that mattered under s. 37(2) of the *MLA.*

The second main ground for appeal alleged that the judge's finding that the standard of care had been met rested on palpable and overriding error in relation to several critical findings of fact.

Harris J.A. decided that the factual issue at the heart of this trial was whether Waterway breached the standard of care in selecting the mooring line. If the judge made a supportable positive finding that the selection of the line was reasonable, then the issue of the applicability of the *MLA* would be moot. This is so because the *MLA,* if it applied, would merely create a presumption of negligence that may be rebutted by evidence.

Harris J.A. was persuaded that the trial judge had found as a fact that Waterway satisfied the standard of care. This finding was a positive conclusion. Accordingly, the possible application of the *MLA* was not material to the outcome of the appeal. The real question was whether the judge's finding rests on palpable and overriding error.

Harris J.A. found that the evidence supported the judge's finding that Waterway did not breach the standard of care. The finding does not rest on palpable and overriding error. The mooring line is widely and commonly used in the industry, and is regarded as a good rope for mooring houseboats. Waterway had chosen the line based in part on the recommendation of a reputable dealer of marine equipment and it was reasonable to do so.

Furthermore, the evidence supported Affleck J.'s conclusion that Waterway was under no duty to consult an engineer or other marine specialist before using the mooring line. The judge was also entitled to accept that there was no history of similar accidents. The evidence was clear that there was nothing inherent in the appearance or feel of the rope that would put a person on notice of a possibility that the line might be unsuitable for the intended purpose.

In light of the finding that the judge had made no palpable and overriding error in finding that Waterway had satisfied the standard of care owed to Ms. Oddy, Harris J.A. remarked that it was neither necessary nor desirable to comment on whether Ms. Oddy's arguments on the application of the *MLA* have any merit.

Comments

Harris J.A.'s reasons offer insight for anyone in the vessel/vehicle rental and leasing industries on the standard of care when selecting equipment. It seems clear that one may rely on the recommendation of recognized and reputable dealers in selecting equipment without needing to consult a specialist or expert as well.

In addition, the extent of use and general reputation of the equipment in the industry are relevant factors. The history and knowledge of accidents involving the equipment are also relevant. A further consideration is whether the inherent qualities of the equipment raise or ought to raise red flags about potential risks of use.

As the Court of Appeal declined to rule or comment on the potential application of the *Athens Convention/MLA,* the issue of whether the *Athens Convention* could apply to the Oddy family's charter of the Annalise was not determined. It remains to be seen whether the rental of a houseboat or similar vessel in the circumstances of another

case might be capable of coming within the expanded scope of the *Athens Convention* under s. 37 of the *MLA*.

It is submitted, however, that this result is unlikely. Section 37(2)(b) of the *MLA* extends Canada's application of this international convention by removing the requirement that the carriage by water be under a contract, but not, *inter alia,* where the person is carried on board a ship that is being operated other than for a commercial or public purpose. In other words, it seems clear that where the person is on board a ship operated for recreational or pleasure purposes, Parliament did not intend the *Athens Convention* to apply.

This exclusion would appear well in accord with the *Athens Convention* being limited in scope by its own language to contractual carriage by sea which, it is submitted, was purposeful. The Hansard record of Parliamentary debates from the spring of 2000, which formed part of the record before the Court of Appeal in *Oddy,* indicated that both the Canadian Maritime Law Association and Canadian Board of Marine Underwriters had pleaded to have the initially proposed wording changed to ensure there was no confusion that it did not apply to pleasure boats. Parliament listened and shortly thereafter s. 37(2)(b) was changed to its current formulation and subsequently brought into force in 2001.