

# CBMU ANNUAL CONFERENCE

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YACHT P&I COVERAGE, WARRANTIES AND  
LIMITATION OF LIABILITY

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# AGENDA

- **Typical P&I Coverage**
- **Pleasure Craft Use v. Public Commercial Use**
- **Limitation of Liability**
- **Post Incident**



# Typical P&I Coverage

## Coverage Grant:

*We will pay compensatory damages for **Bodily Injury or Property Damage** for which an **Insured** person becomes legally liable because of the ownership, maintenance or use of the **Insured Vessel**.*

Policy only responds to legal obligations and does not cover moral obligations or excluded perils (fines, penalties, punitive or exemplary damages, crew injuries, intentionally caused, arising from use of the vessel for parasailing etc. )



# Typical P&I Coverage

## Warranties v. Suspensive Conditions – The Promises an Insured Makes

These apply to all sections of the policy (including liability):

*In order to keep this Policy in effect, You must make, and must keep certain promises. These are known as warranties and suspensive conditions.*



# Typical P&I Coverage

## Warranties v. Suspensive Conditions – The Promises an Insured Makes

*A **warranty** must be strictly complied with and if it is not, insurance cover will cease as from the date of the breach of warranty. Once the insurance cover ceases, the insurance cannot be reinstated even if the violation is corrected or cured.*



# Typical P&I Coverage

Warranties v. Suspensive Conditions – The Promises an Insured Makes

*A **Suspensive Condition** must be strictly complied with and if it is not the insurance cover will cease from the date of the breach of the condition until the end of the breach.*



# Typical P&I Coverage



## WARRANTIES

*Private Pleasure Warranty: The Insured Vessel will be used solely for Private Pleasure Purposes and will not be used indirectly or directly for any public or commercial purpose.*

Private Pleasure Purpose is usually defined to mean used for recreational or leisure time activities. It may be further defined to exclude rentals, leases, carrying goods or passengers for hire, chartering, catching or trapping marine life for compensation, or any other business purpose.

# Typical P&I Coverage

## WARRANTIES

### *Prohibited Use Warranty*

*Warranted that the insured watercraft is not used to compete in speed with, have a race with or try to surpass in speed, another boat, or engage in any test of speed. This warranty does not apply to sailboats.*







# Typical P&I Coverage

## WARRANTIES

### *Safety Equipment Warranty*

*Warranted that the insured watercraft is equipped with all of the safety equipment, including fire extinguishers, required by law and that all of the equipment is kept in good and efficient working order at all times.*





# Typical P&I Coverage

## SUSPENSIVE CONDITION

### *Lay Up Suspensive Condition*

*The insured watercraft will be laid up ashore, winterized and out of commission from December 1st to April 1st inclusive, except for those insured watercraft operating within those areas of the West Coast Navigational Limits that are always ice free.*





# Typical P&I Coverage

## SUSPENSIVE CONDITION



### *Navigational Limits Suspensive Condition*

*The insured watercraft will be operated only in the Navigational Limits as outlined below:*

- *the inland waters of Canada and the U.S.A., not south of 40°N;*
- *the islands of Saint Pierre and Miquelon, Overseas Collectivity of France; at no time are you to proceed more than 100 nautical miles offshore.*
- *East Coast limited to not north of 52°N and not south of 40°N within Canadian and U.S. coastal waters only; at no time are you to proceed more than 100 nautical miles offshore.*
- *West Coast limited to not north of the northern most Canadian territorial waters and not south of 40°N within Canadian and U.S. coastal waters only; at no time are you to proceed more than 100 nautical miles offshore except;*
  - o *not more than 20 nautical miles off the west coastal/tidal waters of Vancouver Island and Haida Gwaii (formally known as the Queen Charlotte Islands); or*
- *North Coast limited to the waters of Hudson Bay and James Bay only; at no time are you to proceed more than 100 nautical miles offshore. At no time are you to navigate any waters of the Arctic Ocean, including the Hudson Strait.*

# Pleasure Craft Use v. Public /Commercial Use

- Why is this important?
- Private Pleasure Warranty: The Insured Vessel will be used solely for Private Pleasure Purposes and will not be used indirectly or directly for any public or commercial purpose.
- What happens in the following scenarios:
  - a) a real estate agent uses his personal boat to show cottage properties from the lake to prospective buyers.
  - b) an insurance broker uses his personal boat to take out customers in the hopes of becoming their broker of record
  - c) a company owner uses his personal boat to participate in the Easter Seals regatta (and puts his company name as a sponsor on a banner on the boat.





# Pleasure Craft Use v. Public /Commercial Use

- Important for 2 main reasons:
  - A) it may be a breach of the insurance policy and may result in no coverage
  - B) the limitation of liability is different.

For a vessel (under 300 tons) with 14 passengers the limitation for public or commercial use craft is 2,450,000 SDR (=1.81 x 2,450,000= \$4,434,500.00 for personal injuries/death

Whereas for a pleasure craft under 300 tons the limitation of liability is \$1,500,000 for personal injuries / death

# Pleasure Craft Use v. Public /Commercial Use

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- *Mcintosh v. Royal & Sun Alliance Ins. Co.* 2007 FC23 – a vessel insured as a pleasure craft was used by the owner to develop a chartering business in “poker” runs. He set up a website, bank account (from which he paid boat expenses), put a decal on his boat, and handed out business cards. There were payments into the bank account that were not explained.
- Held by the Court: The boat had been used mostly for pleasure but the owner had also chartered the boat out for tours, including poker runs. There was no coverage for the theft of the vessel.





# Limitation of Liability

- The *Marine Liability Act* allows a vessel owner/operator to limit liability unless it is proved that the loss resulted from the personal act or commission of the person, **committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.**
- In Canada the limitation convention has never been broken.
- Limits were increased on June 22, 2023.

<u>Type of Claim</u>	<u>Old Limit</u>	<u>New Limit</u>
Personal Injury or death	\$1 M	\$1.5M
Property Damage	\$500,000	\$750,000



# Limitation of Liability

Limits were increased on June 22, 2023.

<u>Type of Claim</u>	<u>New Limit</u>
Personal Injury or death	\$1.5M
Property Damage	\$750,000

MLA provides that interest is in addition to the limitation amount.

Assuming a case takes 2 years to proceed through the courts and assume both property damage and personal injury, the amounts needed are \$2,250,000 plus \$270,000 interest= \$2,550,000

Marinas are now requesting insurance of \$3 million



# Limitation of Liability

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## Cases

*Peracomo v Telus Communications* [2014] 1 SCR 621

Held: that the intent required to bar recovery was subjective because the purpose of the LLMC was to set an “unbreakable” limitation with limited exceptions. This meant that the owner had to have the intention of committing the act (cutting a cable), and also the intent to cause the actual loss (a telecommunications blackout). The two conditions were not met, and limitation was allowed.



# Limitation of Liability

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## Cases

*J.D. Irving, Limited v. Siemens Canada Limited* 2016 FC 69

Cargo (valued at \$40,000,000) fell into the sea, while being loaded on the deck of a barge. J.D. Irving brought a limitation action to limit liability to \$500,000.

Siemens opposed saying that Irving and their naval architect had acted recklessly, and that the loss would probably result – the barge was too narrow and small for the job.

Held: Limitation was allowed. The barge was suitable, and the loss was caused by a number of factors; a challenge to the right to limit will fail if (for instance) only recklessness but not knowledge is established. That knowledge means actual and not constructive knowledge.



# Limitation of Liability

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## Cases

*Woodbury et al v. Woodbury* 2021 ONSC Number, CV-09-383220: A 9-year-old plaintiff suffered a severe traumatic brain injury in a boating accident on Rice Lake in Ontario. He had been riding in a tube behind a pleasure craft operated by his father. The tube swung out and hit another pleasure craft.

The Court held that the father “needed to have known he would probably collide with another boat”. The Court found that, while reckless, the defendant father did not act such that he knew that a collision with another boat was probable. The Court confirmed the defendant father’s entitlement to limit his liability to \$1,000,000.



# Post Accident – Case Study (O’Leary)

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- On August 24, 2019, two vessels were involved in a collision on Lake Joseph which tragically resulted in the death of two individuals, Susanne Brito and Gary Poltash. The deceased were aboard a vessel owned by Irv Edwards, and operated by Richard Ruh. The other vessel was owned by Kevin O’Leary and operated by Linda O’Leary.
- Finding in Criminal Proceedings: The Edwards/Ruh vessel was stationary at anchor without lights (star gazing).





# Post Accident – Case Study (O’Leary)

## Sequence of Proceedings

1. OPP investigation
2. Linda O’Leary charged with careless operation of a vessel (acquitted after a trial)
3. Experts retained
4. Civil Lawsuits in Ontario (3 lawsuits totaling \$60 million)
5. Federal Court Limitation Action brought by O’Leary’s and Ruh/Edwards to limit liability for each vessel to \$1 million
6. Enjoinment of Ontario action
7. Affidavits and Claims filed in response to Federal Court Action



# Post Accident – Case Study (O’Leary)

## Sequence of Proceedings

8. Wagg Motion (application to the Crown law office and OPP to release information).
9. Cross Examinations on Affidavits
10. Assessment of losses
11. Limitation Hearing – (not held – parties agreed boat owners/operators could limit liability)
12. Hearing on apportionment of liability / damages (not held – matter was settled)
13. Court approval of infant settlements.

# Post Accident – Case Study 2<sup>nd</sup>

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On August 24<sup>th</sup> 2019, a vessel owned and operated by N. Borgatti collided with a vessel being operated by K. Koch on Stoney Lake. Mr. Borgatti and his friend were killed in the collision. Another passenger on the Borgatti's vessel was injured as well as three individuals in the Koch vessel.

## Sequence of Proceedings

1. OPP investigation
2. No one charged (rare – but likely due to death of one operator).
3. Experts retained
4. Civil Lawsuits in Ontario (3 lawsuits)
5. Federal Court Limitation Action brought by both vessels to limit liability for each vessel to \$1 million
6. Enjoinment of Ontario action
7. Affidavits and Claims filed in response to Federal Court Action



# Post Accident – Case Study 2<sup>nd</sup>

## Sequence of Proceedings

8. Mediation Scheduled

9. Borgatti insurer brings statement of claim in Federal Court for a declaration that there is no coverage for the loss as the Borgatti vessel was in breach of the safety equipment warranty:

*Warranted that the insured watercraft is equipped with all of the safety equipment, including fire extinguishers, required by law and that all of the equipment is kept in good and efficient working order at all times.*

Pleading that vessel was being operated without requisite lights – Illumination was from a fish finder and cell phones.





# Finally

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- Understand the coverage grant – each policy is different
- Understand the warranties and suspensive conditions
- Understand the facts
- Retain expert and counsel that understand limitation of liability

Thank you

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