Product Liability Claims in Canadian Maritime Law

By Robin Squires[*] and Alex Kim[†]

Table of Contents

[*] Robin Squires is a Partner and the National Leader of BLG's Transportation Focus Group and the Toronto Leader of BLG's Maritime Focus Group. He is recognized by *Best Lawyers of Canada* as the 2022 'Lawyer of the Year' in Toronto for Transportation Law.
[†] Alex Kim is an Associate in BLG's Commercial Litigation and Transportation Law practice groups.

I. Introduction

Canadian maritime law operates within a distinct legal sphere developed and shaped by common law, statute, and the Canadian Constitution. Compared to other areas of Canadian law, maritime law often presents unique challenges to those unfamiliar with its highly specialized nature.[3] Where product liability claims have a maritime aspect or are fully part of the maritime context, legal professionals must have a strong understanding of Canadian maritime law to spot the relevant issues and assess them properly. In this article, the authors provide a high-level overview of Canadian maritime law as it relates to product liability and provide practical insights for commencing or defending these proceedings in Canada. In addition, the authors highlight how changes in the technological landscape may impact product liability claims in the Canadian maritime context.

II. What is Canadian Maritime Law?

Canadian maritime law is a single body of federal law that governs maritime and admiralty disputes. It is established in the *Federal Courts Act* ("*FCA*") under s. 2, which describes its substantive content, and s. 22, which vests jurisdiction over maritime matters within the Federal Court and the provincial Superior Courts. Generally, where it is found to apply to a dispute, Canadian maritime law governs and not provincial laws and/or statutes.[4]

Historically, Canadian maritime law stemmed from the English Admiralty Courts, which exercised jurisdiction over "wet" matters or things done at sea. Typically, these have included contracts and torts committed at sea, collisions, salvage and rescue operations, acts of mariners etc. However, once Canada obtained the rights to self-govern under the *Statute of Westminster, 1931* and the subsequent modern *Federal Courts Act*, the scope of Canadian maritime law and jurisdiction expanded beyond what it had been before.

Today, Canadian maritime law governs and deals with all claims in respect to maritime and admiralty matters, subject only to the defined scope of the federal government's jurisdiction over navigation and shipping matters under s. 91(10) of the *Constitution Act, 1867*.[5] Because it is a separate body of law, its substantive content draws from statutory and non-statutory sources of law, including the common law; national statutes; international statutes and agreements; and specialized rules and principles of admiralty.[6]

III. Does Canadian Maritime Law Apply to this Claim?

The first question a product liability lawyer must answer is whether Canadian maritime law applies to the claim. Generally, where a claim can be characterized as being so "integrally connected with maritime matters", Canadian maritime law will apply. To assess this, the Supreme Court of Canada in *ITO-Int'l Terminal Operators v Miida Electronics*, developed a three part test to determine whether a claim falls under the federal court's jurisdiction over maritime matters.[7]

First, the subject matter of the claim, or its "pith and substance", must concern a matter in respect of which there is a statutory grant of jurisdiction by the federal Parliament. This is can be satisfied by showing a claim falls under s. 22 of the *FCA* or other federal legislation that grants jurisdiction to the Federal Court. The absence of a statutory grant is fatal to a finding of jurisdiction in the Federal Court.

Second, there must be an existing body of federal law that is essential to the disposition of the claim and which "nourishes" the statutory grant of jurisdiction as defined in s. 2 of the FCA. In other words, there must be a body of federal law in common law or statute that is capable of resolving the issues.[8]

Lastly, the law on which the case is based must be "a law of Canada" as expressed under s. 101 of the *Constitution Act*, *1867*. That is to say, the claim must fall under a federal head of power over Shipping and Navigation under s. 91(10) of the *Constitution Act*.[9]

---

[3] *Ordon Estate*, [1998] 3 S.C.R. 437 [*Ordon Estate*]; *QNS Paper v Chartwell Shipping*, [1989] 2 SCR 683.
[4] *Ordon Estate*, *supra* at paras 92-93.
[5] *Ordon Estate*, *supra* at para 71.
[6] *Ordon Estate*, *supra* at para 75.
[7] *ITO-Int'l Terminal Operators v Midda Electronics*, [1986] 1 S.C.R. 752 [*ITO*].
[8] *Canadian Transit Company v Windsor (Corporation of the City)*, 2015 FCA 88 at paras 38-39.
[9] *ITO-International Terminal Operators v Miida Electronics*, 1986 1 SCR 752 [*ITO*]; *Elroumi v Shenzhen Top China IMP & EXP Co. et al*, 2019 FCA 281.

However, as will be discussed later in this article, when applied, there are interesting interactions between the second and third parts of the test. As Madam Justice Wilson foreshadowed in *Roberts v Canada*:

> … the second element, as I understand it, requires a general body of federal law covering the area of the dispute… . No difficulty arises in meeting the third element of the test if the dispute is to be determined on the basis of an existing federal statute. As will be seen, problems can, however, arise if the law of Canada which is relied on is not federal legislation but so-called "federal common law" or if federal law is not exclusively applicable to the issue in dispute.[10]

An Example

An example of how maritime jurisdiction may apply to a product liability claim is *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 SCR 1210 [*Bow Valley*]. *Bow Valley* was a product liability claim in negligence related to a heat-tracing system installed on an oil rig. The heat-tracing system was unsuited for its intended use and after an electrical fault occurred, the oil rig caught on fire. The companies that had contracted for oilrigs' use sued the contractor responsible for constructing the rig and the manufacturer of the heat-tracing system in both contract and tort. Among the various issues was whether the plaintiff's claim was barred on the basis of contributory negligence. If maritime law applied, any contributory negligence on the plaintiff's part would bar recover to damages. However, if provincial law applied, the plaintiff could claim for damages despite being found contributorily negligent.

In addition, since the contract between the plaintiff and the builder of the oil rig contained a limitation of liability clause, another relevant issue was whether such clauses were enforceable under Canadian maritime law.

Applying the "integrally connected" test, the Supreme Court determined that the claims were governed by Canadian maritime law because the product liability issues were "clearly dominated by marine considerations"[11] According to the Supreme Court:

> … The rig was not only a drifting platform, but a navigable vessel. As Cameron J.A. put it at pp. 133-34, the rig "is capable of self-propulsion; even when drilling, is vulnerable to the perils of the sea; is not attached permanently to the ocean floor and, can travel world wide to drill for oil". Alternatively, even if the rig is not a navigable vessel, the tort claim arising from the fire would still be a maritime matter since the main purpose of the Bow Drill III was activity in navigable waters. The operation of the rig's heat trace system was hazardous because the GFCB system that was installed was not appropriate in the ungrounded marine context. The claims against the defendants for failure to warn included allegations that the defendants knew about the special marine material requirements such as non-combustibility or flame retardancy…

After finding Canadian maritime law applied to the dispute, the Supreme Court made two substantive points. First, under Canadian maritime law, limitation of liability clauses, like the one between the plaintiff and the builder, were enforceable. Second, although the Supreme Court recognized that under Canadian maritime law, contributory negligence normally barred recovery, the Supreme Court made an "incremental change" to the common law. Relying on the "modern view of fairness and justice", various academics, and foreign international law sources from the United States, Australia, and England, the Supreme Court ruled that contributory negligence should no longer act as a complete bar for recovery under Canadian maritime law.

Consequently, although the Court found that the plaintiff was contributorily negligent, the Court allowed the plaintiff's claim to proceed against the manufacturer and builder. However, since the builder had an enforceable limitation of liability clause that was interpreted to exclude liability for "defects", the builder was not found liable for the plaintiff's damages.

Notwithstanding *Bow Valley*, where an "integral connection" to shipping and navigation was sufficient to establish jurisdiction under Canadian maritime law, in other cases, more may be required.

In *Desgagnes Transport Inc. v Wartsila Canada Inc.* [*Wartsila*], the Supreme Court of Canada considered circumstances where a shipping company purchased a reconditioned crankshaft from a supplier to replace its original crankshaft, which was damaged in an accident. The parties entered into a contract containing a six-month warranty clause and a provision that limited the supplier's liability to 50,000 euros. The contract also provided that the laws of Quebec would govern the contract. After the six-month warranty expired, the ship's main engine suffered a major failure and the shipping company sued the supplier for defective engine parts. At issue was whether Canadian maritime law governed the claim or the Civil Code of Quebec did. If Canadian maritime law applied, the limitation of liability clause

[10] *Roberts v Canada*, p1989] 1 S.C.R. 322 at p. 330.
[11] *Bow Valley Husky (Bermuda) Ltd. v. St. John. Shipbuilding Ltd.*, [1997] 3 SCR 1210 [*Bow Valley*] at para 85.

would be enforced, however, if the Civil Code of Quebec applied, the supplier would not be able to limit its liability by the terms of the contract.

After characterizing and determining the "pith and substance" of the claim as a sale of engine parts for a commercial vessel, the Supreme Court held that the claim was sufficiently and integrally connected to navigation and shipping matters under s. 91(10) of the *Constitution Act*.[12] However, the Supreme Court also found that the Civil Code of Quebec applied to the claim. This therefore presented a double aspect where the subject matter of the claim could be regulated by both a provincial power and federal power.

Applying a constitutional analysis to resolve the issue, the Supreme Court held that contractual issues surrounding the sale of marine engine parts were not at "the core" of navigation and shipping.[13] Furthermore, since the Civil Code of Quebec was a validly legislated statute, and the relevant Canadian maritime law was non-statutory in nature, the Supreme Court held that the applicable maritime laws could not be paramount to the Civil Code of Quebec.[14] As a result, provincial laws governed the dispute.

Given the different approaches depending on the nature and subject-matter of the claim, lawyers should always be cognizant of constitutional issues and tread carefully when there are potential provincial statutes that could govern the claim. Notwithstanding the fact that the issue of maritime jurisdiction is determined on a case-by-case basis and depends on the characterization and nature of the claim, the following are examples of claims that have been held to be subject to Canadian maritime law:

i) enforcement of a concluded contract for the sale of a ship by delivery and execution of a bill of sale[15];

ii) recovery of losses arising from latent defects in machinery installed on a ship[16];

iii) debt owing on a contract of sale for goods delivered by ship[17];

iv) recovery of losses for damages caused by gas wells installed in a lake[18];

v) loss arising from the post-discharge theft of cargo from a marine terminal[19];

vi) relating to a contract for stevedoring services[20];

vii) based on a contract of maritime insurance[21];

viii) damages arising from defective oil drums unsuitable for ocean voyage[22]; and

ix) claims arising out of injuries and death resulting from boating accidents[23].

IV. Substantive Canadian Maritime Law on Product Liability Claims

Generally, once maritime jurisdiction is established, substantive Canadian maritime law, rather than provincial law, will govern the claim. However, unlike other systems of law, like the United States of America, which established a formal

[12] The Supreme Court of Canada outlined a non-exhaustive list of factors to consider when assessing whether a claim sufficiently and integrally connected to a head of power under the constitution: (i) the spatial relationship between the non-maritime and maritime elements of the matter at issue; (ii) the functional relationship between those elements, which involves consideration of, inter alia, whether the activity or good implicates seaworthiness, or, more generally, transportation by water; (iii) the temporal relationship between those elements; (iv) the context surrounding the relationship of the parties to the dispute; (v) the practical importance or necessity of legal uniformity; (vi) the fact that the matter implicates standards, principles and practices that are specific to the maritime context or informed by maritime considerations; (vii) the historical connection with English maritime law; and (viii) relevant precedents at para 56.
[13] *Wartsila*, *supra* at para 92-94.
[14] *Wartsila*, *supra* at para 103.
[15] *Antares Shipping Corporation v. The Ship "Capricorn" et al*, [1980] 1 SCR 553 [*Antares*].
[16] *Wire Rope Industries of Canada (1966) Ltd. v. BC Marine Shipbuilders Ltd. et al.*, [1981] 1 SCR 363 [*Wire Rope*].
[17] *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 SCR 779 [*Monk*].
[18] *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 SCR 206.
[19] *ITO*, *supra*.
[20] *QNS Paper v. Chartwell Shipping*, [1989] 2 SCR 683 [*QNS Paper*].
[21] *Zavarovalna Skupnost, (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 SCR 283 [*Triglav*].
[22] *Pakistan National Shipping Corp. v Canada*, 1997 CanLII 6339 [*Pakistan*].
[23] *Ryan Estate*, 2013 SCC 44.

framework of assessing product liability claims in the maritime context, the Canadian maritime law of product liability is constructed piecemeal.[24]

On the rare occasions where product liability claims are found to be integrally connected to maritime matters and do not additionally engage a province's jurisdiction over property and civil rights (like in *Wartsila*), the body of Canadian maritime law on product liability is an incremental development. Although this implies therefore that this area of Canadian maritime law is under-developed and contains "gaps", Canadian maritime law is able to draw from multiple sources of law to sufficiently "nourish" and determine the issues. As the Supreme Court in *Wartsila* described, Canadian maritime law is:

> …a seamless web of law that exists in parallel to the common law and that is capable of resolving any dispute falling within the scope of its application. In this way, there are no "gaps" in Canadian maritime law, just as there are no "gaps" in the common law. And the application of common law or civil law rules within Canadian maritime law is not an incidental application of provincial private law; they are rather part of that body of federal law…[25]
>
> …
>
> Because the scope of Canadian maritime law is limited only by the scope of the federal power over navigation and shipping, there may or may not be readily apparent rules that apply to maritime aspects of every dispute. However, as already noted, the absence of readily apparent "rules" does not mean that no Canadian maritime law exists; rather, like the common law, Canadian maritime law is ubiquitous and develops rules by analogy where a matter falls within its ambit.[26]

To fill the "gaps" that are identified from time to time, Canadian maritime law has incorporated certain common law principles and doctrines, including tort law, contract law, bailment, and the law on agency.[27] As it relates to product liability claims, there are three main decisions that provide some guidance.

a) Breach of Contract, Negligence, Latent and Patent Defects, and Due Diligence Defence

Wire Rope v BC Marine [*Wire Rope*] was the first major Canadian decision that dealt with a product liability claim in the maritime context.[28]In *Wire Rope*, a defective socket in a cable used to connect a tugboat to a barge failed which caused the loss of the barge. The owner of the barge and the towing company claimed against the tug owner and the company that re-socketed the cable for breach of contract and negligence, while the tug owner brought a third party claim for indemnity against the re-socketing company. No action was brought against the manufacturer of the defective socket.

The Supreme Court of Canada unanimously found that Canadian maritime law applied to the claim and not British Columbia common law. In particular, the Supreme Court rejected the argument that Canadian maritime law lacked the essential law to feed the jurisdiction of the federal court for breach of contract, negligence and third party indemnity claims.[29]

In assessing the evidence, the Supreme Court held that the loss of the barge was not attributable to the cable's re-socketing, but rather a defect in the socket itself during its manufacturing. Accordingly, all claims against the re-socketing company were dismissed. Instead, the remaining issues turned on whether the tug owner exercised due diligence in furnishing a seaworthy tug in accordance with its contract of towage. Drawing from the *Carriage of Goods by Water Act*, the *Hague Rules*, and the English Admiralty jurisprudence concerning the responsibilities and liabilities of carriers to ensure the seaworthiness of their ships, the Supreme Court ruled that the tug owner could escape liability if the defect was not discoverable on an ordinary examination. As the Supreme Court outlined:

> …the defect was a latent defect and no amount of diligence on the part of Yorke could have detected it. The evidence demonstrates, in my view, that the failure and the resulting loss of the *Westport Straits* were not caused by any failure on the part of Yorke to exercise due diligence in furnishing the tug in a seaworthy condition.[30]

---

[24] The Supreme Court of the United States formally incorporated product liability into its maritime law in *E. River Steamship Corp. v Transamerica Delval, Inc.*, 476 U.S. 858, 628 (1959).
[25] *Wartsila*, *supra* at para 17.
[26] *Wartsila*, *supra* at para 20.
[27] *Wartsila*, *supra* at para 19.
[28] *Wire Rope v BC Marine*, [1981] 1 S.C.R. 363 [*Wire Rope*].
[29] *Wire Rope*, *supra* at p. 380.
[30] *Wire Rope*, *supra* at p. 400.

Along with allowing claims based on breach of contract, negligence, and indemnity for defective maritime products, *Wire Rope* incorporated the defence of due diligence into Canadian maritime law.

b) Duty to Warn and Learned Intermediary Defence

The second major decision dealing with product liability issues was *Bow Valley* (above). This was the first Canadian decision that permitted a claim in negligence and breach of contract to be made against a manufacturer of a defective product in the maritime context. Recall, in that case, a defective heat-tracing system installed on an oil rig led to a fire that caused significant damages while on the water. The owner of the rig claimed against the manufacturer of the defective heat-tracing system and the rig's builder for breach of contract and negligence. After finding Canadian maritime law governed the dispute, the Supreme Court, drawing from foreign maritime jurisprudence and the Civil Code of Quebec, held that contributory negligence did not bar recovery for negligence between joint tortfeasors.

In assessing the negligence claim, the Supreme Court incorporated the duty imposed on manufacturers and suppliers to warn all parties who could reasonably be affected by potentially dangerous products. Citing *Lambert v Lastoplex Chemicals Co.* and *Hollis v Birch*, [1972] S.C.R. 569, the Supreme Court held that this duty applied in the Canadian maritime context and that the manufacturer's and supplier's duty to warn included non-contractual parties, as long as those parties were reasonably foreseeable users of their goods.[31] Accordingly, even though the manufacturer of the heat-tracing system did not have a direct contract with the plaintiff, the oil rig owner, since the manufacturer knew that the heat-tracing system would be used by the plaintiff, the Supreme Court held that the manufacturer had a duty to warn the plaintiff about the heat-tracing system's inflammability.

Fleshing out the duty to warn in more detail, the Supreme Court held that a manufacturer's and supplier's duty to warn continued, unless:

> …the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product, making the maxim *volenti non fit injuria* applicable.[32]

Although the plaintiff was aware that the cladding would burn in some circumstances, the Supreme Court held that, that degree of knowledge was insufficient to establish an acceptance of the product's risk.

However, as noted above, since the Majority ruled that the builder's limitation of liability clause was enforceable, the Supreme Court turned to whether the manufacturer could rely on any defences.

The manufacturer relied on the learned intermediary defence and argued that they discharged their duty to warn by advising the builder of the inflammability of the heat-tracing system's cladding. As the Supreme Court described the defence:

> …Since the operates to discharge the manufacturer's duty to the ultimate consumer, the intermediary must be "learned" in the sense that its knowledge of the product and its risks is essentially the same as that of the manufacturer.[33]

However, since the cladding was not a highly technical product and there were many opportunities for the manufacturer to warn the owner directly, the Supreme Court held that the manufacturer could not rely on this defence. As a result, the Supreme Court attributed 40% of the liability to the manufacturer and the remaining 60% on the plaintiff, the owner of the rig.

Counsel should turn to *Bow Valley* for guidance on how a Canadian court may incorporate and modify existing laws to deal with novel product liability issues.

c) Negligent Misrepresentation

Of some relevance is the Federal Court of Appeal's decision in *Pakistan National Shipping Corp. v Canada* [*PNSC*], which opened the possibility of a negligent misrepresentation claim on the basis of defective products. In *PNSC*, damages arose from a voyage carrying barrels of canola oil. Due to heavy weather, the canola oil leaked from the barrels, which affected the ship's stability and forced it to seek refuge in the middle of the voyage. As a result of the lost oil and the interim stops, the shipping company incurred significant expenses and claimed against the charterer,

[31] *Bow Valley*, *supra* at para 19.
[32] *Bow Valley*, *supra* at para 22.
[33] *Bow Valley*, *supra* at para 36.

who subsequently filed a third party claim against the manufacturers of the barrels. In its third party claim, the charterer alleged the manufacturer misrepresented the suitability of the barrels for sea voyage.[34]

Despite the alleged misrepresentation being made on land, the Federal Court of Appeal held the matter fell within the ambit of Canadian maritime law. And although the Federal Court of Appeal did not deal with merits of the claims or comment on how negligent misrepresentation may be analyzed in the maritime context, it clearly opened the door for misrepresentation claims to be made against product manufacturers, even if such contracts or representations were made on land.

d) Summary

The existing Canadian maritime product liability jurisprudence incorporates the following legal concepts:

i) Negligence;
ii) Contributory Negligence;
iii) Patent and Latent Defects;
iv) Due Diligence Defence;
v) Breach of Contract;
vi) Duty to Warn;
vii) Learned Intermediary Defence; and
viii) Negligent Misrepresentation.

V. When Does Provincial Law Apply?

Since Canadian maritime law is a "seamless web of law" without any "gaps", provincial law can never technically usurp or govern the dispute once maritime jurisdiction is found. However, provincial laws of general application can have, in effect, an incidental application on a dispute governed by Canadian maritime law.[35]Specifically, the Supreme Court in *Ordon Estate*, outlined a four-part test to determine when a party could apply a provincial statute of general application to a claim concerning maritime matters:

i) Characterize the matter at issue to decide whether it concerns maritime matters;

ii) If it does, determine whether Canadian maritime law contains a counterpart rule to the provincial rule sought to be relied upon;

iii) If there is no such counterpart rule, consider whether the non-statutory maritime law rules should be reformed or adapted to provide a solution to the dispute; and

iv) If the matter cannot be resolved through the first three steps, analyze whether the provincial statute is constitutionally applicable to the maritime dispute.

The first prong simply confirms whether the claim is subject to Canadian maritime law. If the claim is not, any relevant provincial laws would obviously apply.[36]

The second and third prongs relate to the substance and content of Canadian maritime law. Illustrated in *Bow Valley*, courts have preferred to incorporate doctrines and principles from provincial laws and simply reform them to be applied. This is especially the case where provincial laws may have developed and evolved faster than Canadian maritime law.[37]

The final prong requires the court to engage in a constitutional analysis where the provincial law is applied to the specific issue to the extent that it does not infringe on an unassailable core of federal maritime law. In case it does, the provincial law would be read down as to avoid such an infringement.[38]

However, it is unclear how this test is applied post-*Wartsila* where the Supreme Court of Canada held that non-statutory Canadian maritime laws could not be paramount against validly enacted provincial statutes that did not engage a core

[34] *Pakistan*, *supra*.
[35] *Ordon Estate*, *supra* at paras 72-95.
[36] *Ordon Estate*, *supra* at para 72.
[37] *Ordon Estate*, *supra* at para 73-79.
[38] *Ordon Estate*, *supra* at paras 80-90.

of a federal head of power. One way of reconciling the two somewhat competing roles of provincial laws in Canadian maritime law may be to read *Wartsila* as only applying at the jurisdiction stage where a claim can be characterized as having a double aspect in regards to validly engaging a provincial head of power and a federal head of power. In contrast, the framework outlined above in *Ordon Estate* applies where jurisdiction is found in Canadian maritime law, and the only the substantive content of Canadian maritime law as it applies to the claim is at issue.

In any case, in navigating the "seamless" web that is Canadian maritime law, counsel should be aware of the important role provincial laws and statutes have. They can be a competing system of law that may govern the dispute, like in *Wartsila*, but may also be an important source of law that can develop and inform the content of Canadian maritime law, as was the case in *Bow Valley*.

VI. Autonomous Ships

Another key development in the maritime industry about which product liability lawyers should be aware is the ever-increasing use of autonomous technology. The examples of the use of autonomous technology in shipping abound, and would quickly be out-of-date if listed here.

Since ships are primarily governed by maritime law, unique product liability issues may arise when autonomous systems replace individual actors and crewmembers. Where these types of claims typically engage issues related to relationships and duties owed between manufacturers, suppliers, and ship owners, with autonomous technology, the parties and their roles and relationships changes. Instead of traditional equipment manufactured or assembled for use, autonomous systems are produced by programmers and engineers, using code that may be sourced from a variety of suppliers and involve complex algorithms and software. The replacement of duties traditionally performed by crewmembers and/or or ship owners by these complex machines modifies the relationship between the relevant actors and their corresponding duties. As outlined in one study:

> In [uncrewed] autonomous vessels, shipowners will continue to supervise and inspect them; the software manufacturer will be under the duty to provide to the shipowners a product that fills all the standards of safety which might reasonably have been expected by the shipowners. The pre-programmer shall act in due diligence when he pre-programmes the [unscrewed] navigational course.
>
> Based on this arrangement, the liability arising from an accident involving a pre-programmed autonomous [unscrewed] ship stands to be apportioned in some proportion between the shipowner, the software manufacturer and the pre-programmer.[39]

However, implicit in these changing considerations, is the shifting of responsibility and liability from crewmembers and ship owners, to manufacturers and programmers. As one author writes:

> [M]anufacturers are in the best position to guarantee the safety of the technology deployed, whether it is the technology which aids the SBO in discharging his/her duties, or the pre-programmed algorithm installed onboard. Currently, a major chunk of marine liability lies with the shipowner. **However, with MASS technology, the future may witness a major shift in the onus of liability towards the manufacturers and an increase in product liability disputes**..[40][emphasis added]

The technical nature of this new approach may be especially relevant as it relates to potential defences a manufacturer can raise in a product liability claim. For example, as discussed above in *Bow Valley*, a manufacturer may be found to have discharged its duty to warn the ultimate consumer of any risks associated with its products by invoking the learned intermediary defence. To successfully invoke this defence, the intermediary must be "learned" in the sense that its knowledge of the product and its risks is essentially the same as the manufacturer's.[41]

However, in the case of automated systems, which involve complex software and algorithms, it is difficult to imagine how an intermediary, like a supplier, would possess the necessary technical knowledge and background to obtain the same level of knowledge as the programmer or manufacturer.

---

[39] Candidate 1583, "Maritime Product Liability: The Case of Unmanned Vessels" (2018) University of Oslo Faculty of Law at p. 28 citing CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory.
[40] Raghav Sharma, "Maritime autonomous surface ships: caught between the devil's advocate and the deep blue sea" (2019), World Maritime University Dissertations 1232 [*Sharma*] at pp. 38-39. Note: "SBO" refers to Shore Based Operators and "MASS" refers to Maritime Autonomous Surface Ships.
[41] *Bow Valley*, *supra* at para 36.

Conversely, as Sharma identifies, ship owners with autonomous ships may be more easily able to access defences to claims based on the seaworthiness of the ship.[42] As seen in *Wire Rope*, a ship owner may be liable for damages arising from defects that rendered the ship unseaworthy. However, where a ship owner can establish it exercised due diligence when examining the vessel for defects, and the defect was latent in the sense that it was not discoverable upon a reasonable inspection; the ship owner will not be found liable for the damages.

Applied to automated systems, it is difficult to see how a defective system would be discoverable upon a reasonable inspection by someone without a high-technical understanding of the system. As Sharma describes:

> …if a defect exists in the autonomous software, it would be quite hard to ascertain that the competent skills of the software producers or the authority delegated could have found out any software malfunctions rendering the ship unseaworthy; it could be an error in the software not detectable or a technical malfunction which was not present and discernible when the vessel sailed. After all, we are talking about an unparalleled automated system which will be a culmination of many other systems.[43]

Accordingly, whereas automated systems would likely make it more difficult for manufacturers to invoke a defense, the inverse is true for ship owners.

In any case, as automated systems become more popular in shipping, it will be interesting to see how Canadian courts apply and modify Canadian maritime law to address these changing considerations and dynamics.

VII. Conclusion

The authors have provided a general overview of just some of the basic and nuanced issues a lawyer should consider when examining a product liability claim under Canadian maritime law. A basic understanding of maritime product liability claims allows lawyers to navigate the complex legal issues that are unique to this area of the law. This article serves only as an introduction to product liability claims in Canadian maritime law and should not be used as a stand-alone source to advance or defend against a claim.

[42] *Sharma*, *supra* at p. 51-52.
[43] *Sharma*, *supra* at p. 19.

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749