House
Legislative
Analysis
Section

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LIABILITY FOR BOATING INJURIES

House Bill 4140 (Substitute H-1)
First Analysis (2-27-03)

Sponsor: Rep. David Palsrok
Committee: Conservation and Outdoor Recreation

THE APPARENT PROBLEM:

Michigan's natural resources are, undoubtedly, the crown jewel of the state's tourism industry, and include a vast system of lakes, streams, and rivers. In addition to the Great Lakes, the state has over 11,000 inland lakes as well as an extensive system of streams, rivers, and wetlands covering over 35,000 miles. As such, it should be expected that the state leads the nation in the number of boat registrations. In addition to the thousands of privately registered boats, there also exists a myriad of commercial boat and canoe liveries, which rent boats to consumers and also contribute greatly to the state's economy. Indeed, a 2000 study by researchers at Michigan State University estimated that 165,000 canoes were rented in 1999, directly generating $10.6 million in sales and $3.7 million in personal income. Secondary effects included an additional $17 million in sales and $6 million in personal income.

Boating liveries are currently regulated under Part 445 of the Natural Resources and Environmental Protection Act, which incorporated the provisions of the Charter and Boat Livery Safety Act. The act requires, among others things, that livery operators purchase liability insurance. However, in recent years the insurance premiums have steadily increased and have forced some smaller canoe liveries out of business. In addition, there is growing concern among livery operators over the possibility of being found liable if a renter were to injure or kill himself or herself while operating a canoe rented from a livery operator. Some believe that, in order to protect the viability of the canoeing industry in the state, certain limits should be placed on the liability of boat livery operators.

THE CONTENT OF THE BILL:

The bill would amend the Natural Resources and Environmental Protection Act to exempt the owner of a nonmotorized livery boat (generally, a nonmotorized watercraft that is rented or leased for noncommercial uses) from any liability for an injury to, or the death of, a user of such a boat that results from the inherent risks associated with the use or operation of such a boat. Risks inherent to the operation of a nonmotorized livery boat would mean a danger or condition that is an integral part of using or operating such a boat, including (though not limited to) the following:

- Wave or other water motion;
- Weather conditions;
- Contact or maneuvers necessary to avoid contact with another vessel or other man-made object;
- Contact or maneuvers necessary to avoid contact with rock, sand, vegetation, or other natural objects;
- Failure to use or wear a person flotation device or to have lifesaving equipment available, except in an instance when the owner of the boat has failed to provide the requisite flotation devices or lifesaving equipment;
- The actions of a vessel operator, except if the owner knowingly rented or leased a nonmotorized livery boat to a person who was disqualified by law or regulation from operating such a boat; or
- Having a number of persons on the boat in excess of the maximum allowable number approved for the boat, except if the owner knowingly allowed the boat to leave the premises with the excess persons.

MCL 324.44520a

BACKGROUND INFORMATION:

Liability. In tort actions, the state follows the doctrine of modified comparative negligence. Under the doctrine, the trier of fact (the jury in a jury trial) considers the culpability of all parties involved in a matter, including the plaintiff, and adjusts the awards accordingly. Under the Revised Judicature Act

(MCL 600.2957), "liability shall be allocated by the trier of fact, and in direct proportion to the person's percentage of fault." This means that if it were determined that a plaintiff was 10 percent responsible for his or her own injuries, the amount awarded to him or her would be reduced by 10 percent.

Previous legislation. Over the past several years, similar legislation has been introduced on several occasions, including the following:

- House Bill 6209 of the 2001-2002 session, introduced by Representative David Mead, was identical to this bill, and died in committee.

- House Bill 5518 of the 1995-1996 session, introduced by Representative John Llewellyn, would have amended the NREPA to specify that someone who rented or leased a "class E" vessel from a boat livery operator who had posted certain warnings would be presumed to have accepted the dangers inherent in the operation of the vessel, including capsizing, striking objects, or the failure to heed clearly posted signs or warnings. The bill died on the House floor.

- House Bill 5374 of the 1993-1994 session, introduced by Representative Beverly Bodem, would have amended the Charter and Livery Boat Safety Act (which was later incorporated into the NREPA) to require the operator of a boat livery to post a notice specifying that persons who operated a livery boat would accept the inherent dangers of operating a livery boat; to reasonably maintain each notice; to reasonably maintain each livery boat and piece of equipment; and to warn someone who intended to operate a livery boat of known water-related conditions that could endanger the person. The bill also specified that a person who intended to operate a livery boat would accept the dangers inherent in the operation of the boat that are "obvious and necessary" including, among others not specifically enumerated, capsizing, striking objects, losing control due to water conditions, and the failure to heed a clearly posted sign or warning.

Personal flotation devices. During the course of the committee hearing, there were several questions regarding the requirements regarding the availability of personal floatation devices and life jackets. [The concern was aimed that the definition of inherent risk and, more specifically, the provision of a personal floatation device (PFD) or life saving equipment.] In general, all boats must be equipped with a PFD for each person on board. The U.S Coast Guard (USCG) requires a wearable and properly fitting PFD for each person on board. State law permits a vessel that is less than 16 feet long, a canoe, or a kayak to have either a wearable or throwable PFD for each person on board. State law also requires that each child under six years of age wear a type I or II USCG-approved life jacket. [Note: Type I jackets are off-shore jackets that are generally good for rough or remote waters, for rescues that take longer, and will turn a person face up. Type II life jackets are near-shore jackets that are good for calmer waters and faster rescues and may or may note turn a person face up.]

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, there would be no fiscal impact on the state or on local governmental units. (2-26-03)

ARGUMENTS:

For:

The bill is necessary to protect the viability of the canoeing industry in the state. According to committee testimony, liability insurance for boat liveries ranges between $3,000 and $8,000 and, in some cases, is expected to increase by 15 percent. For many smaller "mom and pop" businesses this increase can be detrimental to their economic viability. The cumulative effect of this would seriously cut into state and local tourism industries, of which boating liveries are an integral part.

Further, the bill takes a common sense approach to limiting liability of boat livery operators and provides them with protections similar to those provided to certain equine professionals, ski lift operators, and other providers of recreational activities. There is no question that boating - like other recreational activities - is an inherently dangerous sport. As such, it is quite reasonable to expect boaters to be responsible for their own actions and accept those risks associated with boating. The bill, by immunizing boat livery operators from any injury or death due to the inherent risks of boating appears, on the surface, to be reasonable, given that one would certainly not expect boat livery operators to be liable for something beyond their control such as weather conditions, wave currents, and the actions of the boaters. This is not to say that the bill permits the boat livery operator to abscond from any responsibility to reasonably ensure the safety of the boaters. Rather, the bill includes several provisions that explicitly state that livery operators are not

exempt from liability if their actions do not comport with statutory and regulatory requirements.

Against:

The bill is unnecessary for several reasons. First, the state follows the doctrine of modified comparative negligence, which reduces the amount awarded to the plaintiff based on the amount he or she contributed to his or her own injury. Again, if it were determined that a plaintiff was 10 percent responsible for his or her own injuries, the amount awarded to him or her would be reduced by 10 percent. If the plaintiff is found to be more than 50 percent responsible for his or her own injuries, the plaintiff receives no award whatsoever. Knowing this, personal injury attorneys often do not take up these types of cases, often deemed to be "frivolous", as it is quite apparent that they will not prevail. Additionally, when juries determine the fault in a case involving a nonmotorized livery boat, it already takes into account those risks that are "inherent in the use or operation of a nonmotorized livery boat" (see the list enumerated in the bill). Further, this doctrine was not even in place at the time similar assumption of risk provisions were provided to other recreational activities. Had the doctrine been in place, those provisions would not have been necessary.

In addition, the bill appears to be both overly broad and too narrow at the same time. As stated earlier, courts already take into consideration those factors specifically enumerated in the bill. However, the bill appears to take a "one size fits all" approach to these situations. This will undoubtedly result in several unintended consequences (like virtually any other piece of legislation), as a blanket protection such as this often precludes a person from seeking recourse without first looking at the specific facts of the case - an injury that resulted from an accident due to weather conditions may not always be an acceptable inherent risk of boating.

In addition, the bill is too narrow in that it specifically lists the risks inherent to the operation of a nonmotorized livery boat. Under the bill, a boat owner would not be liable if a wave or other water motion or the weather conditions were the cause of an individual's injury. However, would not the owner share responsibility for a person's injury if the owner permitted a person to operate a boat in dangerous conditions? Other risks include those maneuvers that are necessary to avoid contact with other vessels and objects. What if the owner was operating the boat and injured a passenger? Certainly the bill notes that boating "risks" are not limited to those specifically enumerated. It would be reasonable, and expected, for a judge or jury to determine other inherent risks that reduce the boat owner's liability. However, this has two apparent problems. First, why should a judge or jury be permitted to expand the list of risks (and thereby further limit the liability of a boat owner), but not reduce those risks, even in the face of certain facts that would otherwise make the boat owner liable for an individual's injuries? Second, by not specifically limiting the boating risks - the bill states that the risks would include, but would not be limited to, those specifically enumerated - the bill appears to leave it up to the courts to determine what constitutes an inherent risk. It would appear, then, that the bill could accomplish the same purpose by granting a boat owner immunity from any liability for any injury or death due to the inherent risks of boating without specifically enumerating what those risks include, and reserving to the courts the responsibility for determining what constitutes an inherent risk. And, as noted, it would appear that such a practice already occurs in these types of tort actions and, therefore, it appears that the bill is not necessary.

Additionally, under several appellate court decisions, the waivers typically filed by persons engaging in recreational activities - whereby they acknowledge and accept the risks inherent in engaging in the activity - are beginning to be honored, which further limits the liability of boat livery operators. Furthermore, it is not clear that enacting this bill would do anything to reduce or slow the increase in liability insurance premiums. Rather, many believe that there are a myriad of other factors (none of which would be affected by this bill) that contribute to cost of insurance premiums.

Against:

During the course of the committee hearing, several questions were posed regarding the language of the bill. First, it is not entirely clear what is meant by, under the definition of inherent risks, a "malfunction of equipment, except for equipment owned by the owner of a nonmotorized livery boat." While, on the surface this provision seems fairly clear in that the owner of the boat livery would be liable for a malfunction of equipment that he or she owns, but not equipment owned by the boater, questions still abound. There was some concern that "malfunction" did not meet the same definition of a "defect", which appears to be the generally accepted term by the courts for faulty equipment. Second, there was concern about the liability if an individual were to rent a boat with a hole in it. It was believed that such a circumstance would not provide a livery operator with immunity, as he or she is the actual owner of the

boat. However, it is not entirely clear if the immunity would be provided if a boater were to hit an object and put a hole in the boat. Strictly looking at the language, it appears that that the livery operator would be liable if the person were to drown in this instance. However, if that provision regarding malfunctioning equipment was taken in conjunction with other risks, namely contact or maneuvers necessary to avoid contact with other objects, any concern regarding liability could be ameliorated. The committee defeated an amendment that would have stated that risk would not include a defect in the boat that was known or in the exercise of reasonable care should have been known by the owner of the boat.

POSITIONS:

Several boat livery operators offered testimony to the committee in support of the bill, including Baldwin Canoe Rental in Baldwin, Happy Mohawk Canoe Livery in Montague, and Pine River Paddlesports Center and Campground in Wellston. (2-26-03)

The Michigan Trial Lawyers Association opposes the bill. (2-26-03)

Analyst: M. Wolf

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.