House
Legislative
Analysis
Section

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LIABILITY FOR BOATING INJURIES

House Bill 4140 as passed by the House
Second Analysis (3-24-03)

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.

In recent years the premiums for liability insurance - necessary for the operation of a boat livery - 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 Part 445 of the Natural Resources and Environmental Protection Act, which incorporated the provisions of the Charter Boat and Livery Safety 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 that is limited to one or more of 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 rented or leased a nonmotorized livery boat to a person who the owner knew or should have known 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 or did not properly inform the user of the maximum weight or number of persons approved for the boat.

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 (e.g. 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." For instance, 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.

- House Bill 6209 of the 2001-2002 session, introduced by Representative David Mead, was substantially 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. (3-24-03)

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 because 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. 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"), or will not argue that an individual was injured due to any of the listed inherent risks, 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 seems to complicate matters further in that it continues to appear 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 - for instance, an injury that resulted from an accident due to weather conditions may not always be an acceptable inherent risk of boating. Rather than arbitrarily throwing out any lawsuit involving an injury due to a purported inherent risk, it should remain the province of the court to ascertain the true facts of the matter and assign liability accordingly.

In addition, the bill is too narrow in that it specifically lists the risks inherent to the operation of a nonmotorized livery boat. This does not preclude the court from considering other circumstances as being an accepted risk of boating, but rather it simply provides an automatic immunity to the livery operator from any liability if the injury was a result of an inherent risk listed in the bill. However, the problem with this is that the bill appears to create a two-pronged liability test: (a) Does the action that caused the injury constitute an inherent risk listed in the bill? If yes, the livery operator is not liable for the injury. If no, then (b) Does the action that caused the injury constitute an inherent risk that is not listed in the bill, or an action on the part of the aggrieved individual? If yes, the livery operator's liability would be reduced following the doctrine of comparative negligence. If no, the livery would be liable for the injury. The chief problem with the test then becomes one regarding the existence of any facts and evidence. Under this test, notwithstanding any evidence to the contrary, any injury arising from a listed inherent risk would preclude the aggrieved individual from seeking recourse. Yet, an injury that resulted from an unlisted inherent risk (surely, the enumerated list of inherent risks is not exhaustive) requires both the livery operator and the aggrieved individual to present evidence and facts to ascertain the liability of both parties. In this instance, should it really matter if a person was injured as a result of a listed inherent risk or an unlisted inherent risk?

However, this is not to say that returning to the bill's original language of not limiting the inherent risks to those enumerated would be a better alternative. By not specifically limiting the boating risks, it would be left up to the courts the courts to determine what constitutes an inherent risk. It would appear, then, that the same purpose could be accomplished 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 would continue to be unnecessary. Perhaps, to better effectuate the bill's purported intent, the bill could simply state, as a point of clafication and general policy, that livery operators shall not be liable for an injury or death of a user of a nonmotorized livery boat that results from a risk inherent in the operation of the boat, and reserve to the court the responsibility for ascertaining what constitutes an inherent risk, rather than enumerating an incomplete list of what an inherent risk would inlcude.

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. [Note: 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)

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.