

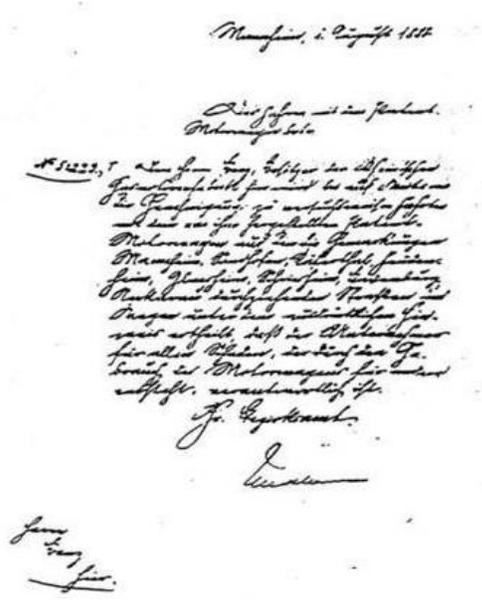


*"If you really cared about me, you'll swim back to the boat and get my bottle of wine."*

**Impact of the new Pleasure Craft Operating Card regime: a brief history lesson, some thoughts on the future**

M. Gosia Bawolska, Marine Law Group  
McCague Borlack LLP  
416-869-7823  
gosia.bawolska@mccagueborlack.com

As of September 15, 2009, the *Canada Shipping Act, 2001*, (Competency of Operators of Pleasure Craft Regulations) requires boaters to obtain a Pleasure Craft Operator Card (“PCO Card”) to operate a powered watercraft. The new PCO Card regime is, relatively speaking, lenient so far as boater compliance: the test to obtain the card is undemanding, cards are issued for life and there are no provisions to rescind the card, and the fine for operating a boat without the card is \$250.00, plus \$55 in court fees. Why should boaters, and their insurers, pay attention?



Despite some industry statements to the contrary, the PCO Card likely represents a first step towards a more stringent licensing system. The history of the motor vehicle driver’s licensing regime is likely a blueprint for what will happen with the PCO Card regime over the next few years.

The first “driving license” was issued to Karl Benz on August 1, 1888, by an official of the Grand Duchy of Baden. You can see a copy of it on the right-hand side.

In North America, the first driver’s licenses were issued in 1903 in Massachusetts and Missouri. These licenses, much like the PCO Cards we are talking about today, required no examinations of driving skills and were little more than identification cards. Also, as the driving of cars in those days was smelly, hard work, licenses were typically issued to chauffeurs.



The use of motor vehicles became increasingly popular in the 1900s: in the USA, there were 8,000 registered vehicles in 1900, 468,500 in 1910,

and more than 9 million by 1920. With the increase in the number of cars came a corresponding increase in the number of car-related accidents. The driver's licensing regime was established as a result of a public outcry over the rising amount of accidents caused by motor vehicle drivers. This outcry culminated in a 1907 New York Times article that ridiculed the fact that "little attention has yet been paid to the right of any man to drive a car".

The licensing regime developed further in 1913 when the State of New Jersey mandated that all drivers, not just chauffeurs, pass a written as well as practical examination before a license would be issued. Overall, however, the evolution of the licensing system was



slow and uneven. Even in the 1930s and 1940s all that was required by most states was a small fee, and the license was then sent to the driver by mail. The last American jurisdiction to make the passing of a driver's exam mandatory was South Dakota, in 1959! (The first Ontario driver's license was issued in 1927.)

There are almost 1,000 marinas in Canada, most of them owner-operated small businesses, and over 300 yacht clubs. According to a 2006 National Marine Manufacturers Association of Canada report, there are 2.9 million pleasure craft operating in Canada; nearly six million Canadians, almost 20% of the total population, took to the water in a boat. Closer to home, almost half of all Ontario households own a pleasure craft. In the nearby Great Lakes states, there are 4.3 million registered boats – this makes up about one-third of all US boaters. It is getting pretty crowded out there!

Until September 15, 2009, Canadians could enjoy boating as freely as car owners could enjoy driving at the turn of the 19<sup>th</sup> century. To paraphrase that 1907 New York Times article, until now little attention has been paid to the right of any man to operate a boat.



The introduction of the PCO Card is the first step towards the beginning of the end of that unfettered liberty on the water. Similarly to the early driver's licensing regime, the PCO Card system has come about as a result of increasing use of pleasure craft, and the corresponding increase in boating accidents. Every summer the news media are filled with stories of boating accidents; the majority of these accidents are

due to inexperience (the so-called “day trippers”) and inappropriate alcohol use. Public outcry prompted politicians to start moving towards a boat operator licensing regime, with the PCO Card system as the first step. As we have observed this spring, the news media are now filled with interviews of police officers who are promising to demand that boaters produce their PCO Cards or else face the consequences – mild though those consequences are at this time.



As with any new, and still untested, law, the question we must ask is: does the PCO Card regime matter to us? Should we, the marine insurance and law professionals, pay attention?

Generally speaking, the answer is “yes, we should pay attention”. It is beyond the scope of this brief summary of our views to provide detailed advice on the impact of the PCO Card regime on the policies our friends and clients underwrite – as a good coverage lawyer will tell you, each policy is unique and its wording will be interpreted differently. However, many policies do have in common coverage exclusions for liability arising out of illegal acts. An illegal act is generally viewed by the Courts as an action that is contrary to or not sanctioned by the law. Some policies are even more equivocal: coverage is excluded for deliberate violations of a statute or ordinance by the insured, or with the knowledge or consent of the insured.

Historically, insurance claims were denied for similar activity relating to motor vehicles. The 1921 Ontario case of *O’Hearn v. Yorkshire Insurance Co.*<sup>1</sup> was the original authority for the proposition that the plaintiff could not claim indemnity for loss occasioned by his own criminal and illegal act. Arguably, both sets of exclusion wording paraphrased above suggest that a loss which occurs while the insured is operating the craft without the PCO Card will be excluded from coverage not only because of the explicit exclusion but also because the loss will not fit into the definition of “accident”: the insured knowingly operates the craft without the mandatory license, contrary to the law.

If our proposition that the PCO Card regime will be treated akin to the drivers’ licenses, underwriters also need to turn their minds to how they will react with respect to technical violations of the new law. The recent case of *Manzanares v. Pembridge*<sup>2</sup>, where the insured had a Class G1 driver’s license at the time of the accident but violated the terms of the license, distinguishes between someone driving without a license and someone driving contrary to a license condition. The technical violation of the licensing conditions in that case did not result in a denial of coverage – making the rules regarding coverage in the face of an “illegal act” even more uncertain.

The level of enforcement by the authorities will also likely affect potential insurance claims. *Gipson v. Pilot Insurance Co.*<sup>3</sup> is a case where a party successfully applied for a declaration that he was entitled to benefits under the Statutory Accident Benefits

<sup>1</sup> (1921), 50 O.L.R. 377

<sup>2</sup> [2005] O.F.S.C.D. No. 32

<sup>3</sup> [2005] O.J. 239

Schedule, even though he had an elevated (and illegal) blood alcohol level. His application for coverage was successful because he was not convicted of any criminal charge in relation to the accident. Again, clear, well-worded policies will eliminate the uncertainty created by the decision in *Gipson*.

The PCO Card regime is new, and the boating season has only just begun, therefore we have yet to test before the Courts arguments for and against coverage for boaters operating without a card. However, it is likely that the historical similarities between drivers' licenses and the PCO Card regime will persuade the Courts that a boater without a PCO Card is akin to a driver with out a driver's license and, going forward, the caselaw regarding motor vehicles is likely to be applied to powered watercraft. As the Court decisions with respect to coverage for losses resulting from motor vehicle accidents are occasionally contrary to what the insurer may have intended when writing the policy, clear language and guiding principles are necessary to eliminate uncertainty.