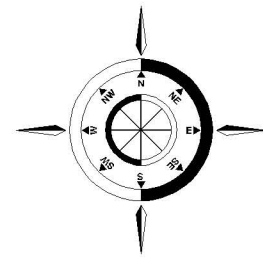


BOATING BRIEFS



Donald C. Greenman, Chairman
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This journal will summarize the latest cases and other developments which impact the recreational boating industry. We welcome any articles of interest or suggestions for upcoming issues.

- The Editorial Staff

In This Issue

Failure To Instruct Lessor Regarding Characteristics of PWC Defeats Limitation	1
Defense of Assumption of The Risk Not Applicable in Sailing Race	3
Settlement Reached in Challenge to Regulations Governing PWC Use In National Parks	4
Burdened Vessel Found Not At Fault in Sail Race Collision	5
United States Liable for Deaths of Pleasure Boaters	6

Failure To Instruct Lessor Regarding Characteristics of PWC Defeats Limitation

In July, 1995, Steven Goldberg rented a personal water craft from Bay Runner Rentals, Inc. in Ocean City, Maryland. The PWC, operated by Goldberg, collided with a bulkhead and his passenger Samantha Kempton was seriously injured. The PWC was traveling at 15 to 20 knots prior to the collision.

The rental company filed a petition to limit its liability to the value of the PWC under the Limitation Act, 46 U.S.C. § 181 et seq., in the U.S. District Court for the District of Maryland. Ms. Kempton filed a claim in the Limitation Action to recover for her injuries. Kempton alleged that Bay Runner was negligent in failing to instruct Goldberg about the operating characteristics of a PWC and specifically the fact that the craft has no steerage capability when the throttle is disengaged.

The court held that the

Limitation Act is applicable to a claim involving a PWC and ordered a separate trial to determine Bay Runner's right to limit its liability. *In re Bay Runner Rental's Inc.*, 2001 AMC 894 (D. Md. 2000).

Before addressing Bay Runner's right to limitation the court considered what acts of negligence caused the collision. The rental company presented expert and fact witness testimony in an attempt to establish that the collision resulted solely from the operator's negligence and specifically that he did not maintain a proper lookout and operated the PWC at an excessive rate of speed in close proximity to a wooden bulkhead.

The claimant maintained

continued on page 2

that the operator released the throttle when he recognized that a collision was imminent, that he was not aware that a PWC losses steering capability when the throttle is released and that he had received no instructions from the rental company employees. The court, relying on *Restatement 2d Torts* § 388, held that in order to establish negligence for failure to provide adequate instruction the claimant must prove that (1) the product possessed a danger that would not be obvious to anticipated users; (2) the rental company had reason to know that the danger would not be obvious to anticipated users, and; (3) the rental company failed to give an adequate warning to the user in question. The court found that the inability to steer a PWC when the throttle is disengaged is a characteristic that is inconsistent with other types of vehicles and is, therefore, not obvious to anticipated users. Bay Runner's own expert admitted at trial that a new user could not be expected to know of the characteristic prior to operation and that this information was "critically important" for safe operation. The court found that the rental company knew that the danger was not obvious to users and had

failed to instruct the operator Goldberg regarding the handling characteristics of the PWC. Based on these findings the court concluded

that the operator's lack of knowledge regarding the handling characteristics of the PWC prevented him from taking evasive maneuvers and that Bay Runner's failure to instruct the operator was a proximate cause of the collision.

Having concluded that the rental company's negligence was a proximate cause of the incident, the court proceeded to a determination of whether the owner was without privity or knowledge of the failure to provide instructions to the operator. The rental company's managers testified at trial that their operating employees known as "dock boys" had been trained to provide detailed instructions regarding the operation of the PWC to the operators and to specifically convey information regarding the lack of steering when the throttle was released. Nevertheless, the court concluded that the managerial employees had privity and knowledge of the failure to instruct the operator regarding the handling characteristics because they relied exclusively on a "laconic" sixteen-year-old dockboy to convey those instructions.

Defense of Assumption Of The Risk Not Applicable in Sailing Race

The owner of a sailing yacht brought suit to recover for damage to his vessel following a collision with another yacht while both were engaged in a race in Mattapoissett Harbor, Massachusetts in July, 1997. Both boats were on a starboard tack at the time of the collision with the defendant's boat to windward. The defendant's vessel was the burdened vessel under the Rules of the Road given the relative positions of the yachts prior to the collision.

The Defendant filed a motion for summary judgment. In considering the defendant's motion the trial court ruled that the standard of care applicable to participants in a yacht race was the avoidance of reckless misconduct rather than simple negligence. The trial court found that the defendant's conduct did not breach this standard and granted the defendant's motion.

The plaintiff appealed and the decision of the trial court was reversed in *Gleason v. Adelman*, 2001 AMC 962 (Mass. Ct. App. 2000).

The court of appeals held that the trial court's decision to apply a reckless misconduct standard of care was essentially equivalent to allowing a defense of assumption of the risk. The court noted that the doctrine

of assumption of the risk had been abolished under Massachusetts' law. The defendant argued that federal maritime law rather than state law was applicable and that the defense of assumption of risk was available in connection with claims arising from yacht racing under maritime law.

The court noted at the outset that there should be no preemption of state law unless there was an actual conflict between federal maritime law and Massachusetts state law with regard to the defense of assumption of the risk in the context of sailing races. The court reviewed what it termed "sparse" precedent concerning the apportionment of liability in racing collisions under maritime law.

The Fourth Circuit had considered the question of whether the defense of assumption of the risk was available as a defense in connection with claims arising from competitive racing under maritime law in *DeSole v. United States*, 1992 AMC 242 (4th Cir. 1991). The Fourth Circuit declined to decide the issue but commented that they saw no compelling reason to find that assumption of the risk is a defense under maritime law in the context of claims involving racing.

In the subsequent case of *Manning v. Gordon*, 853 F.Supp. 1187, 1994 AMC 2202 (N.D. Ca. 1994), the district court was faced with the issue of whether California state law or maritime law should apply. The defense of assumption of the risk was available under California law in connection with claims arising from racing. The district court concluded that no federal court had endorsed the application of assumption of the risk to yacht racing under maritime law. In these circumstances the court held that the defense of assumption of the risk in yacht racing claims was not available under maritime law and application of contrary state law was impermissible in light of the necessity of preserving uniformity in admiralty law.

Based on the foregoing analysis the court of appeals in *Gleason* held that assumption of the risk was not available as a defense in a collision case involving yachts engaged in racing.

Settlement Reached in Challenge to Regulations Governing PWC Use in National Parks

In April, 2000, the National Park Service implemented regulations designed to limit the use of Personal Watercraft in national parks. The Final Rule, published in the Federal Register at 65 Fed. Reg. 15077 (March 21, 2000), became effective April 20, 2000. (See discussion at 9 Boating Briefs No. 1(Spring/Summer 2000).

The regulations carved out an exception for ten designated recreation areas where the primary use is recreational boating, specifically authorizing continued PWC use subject only to local regulation. These areas included Armistad and Lake Merideth in Texas, Bighorn Canyon in Montana, Chickasaw in Oklahoma, Cureanti in Colorado, Gateway in New York, Glen Canyon and Lake Mead in Arizona, Lake Roosevelt in Washington and Whiskeytown-Shasta in California. In addition, the regulations allowed continued PWC use in eleven other areas during a two-year grace period. After the expiration of the grace period, PWC use in those areas would be prohibited unless authorized by agency rulemaking. The eleven areas subject to the grace

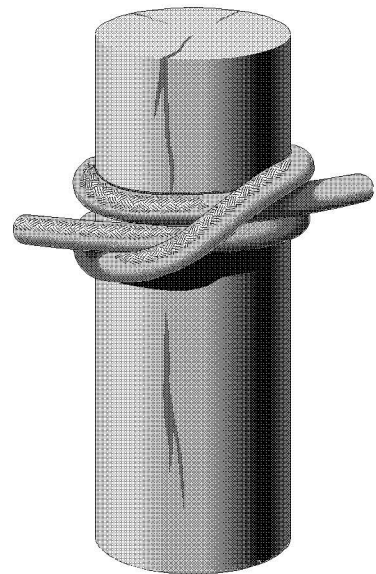
period included Assateague in Maryland/Virginia, Cape Code in Massachusetts, Cape Lookout in North Carolina, Cumberland Island in Georgia, Fire Island in New York, Gulf Islands in Florida, Padre Island and Big Thicket in Texas, Indiana Dunes in Indiana, Pictured Rocks in Michigan and Delaware Water Gap in Pennsylvania/New Jersey.

In August, 2000, an environmental group filed suit against the National Park Service to enjoin enforcement of the regulations, arguing that PWC use in the National Parks violated the Park Service's mandate to prevent impairment of park resources. *Bluewater Network v. Stanton*, No. 00-cv-2093, United States District Court, District of Columbia.

On April 12, 2001, the District Court approved a settlement between Blue Water and the Park Service. Under the terms of the settlement, PWC use in all twenty-one parks listed above is to be prohibited unless authorized following a special rulemaking process complying with the environmental reviews required by the National Environmental Policy Act.

The special rulemaking must be conducted for each specific area with public involvement. The settlement provides for a grace period until the Fall of 2002 during which time PWC use may continue in all twenty-one areas subject to local regulation.

Motions to intervene in the case had been filed by the Personal Watercraft Industry Association and the American Watercraft Association. The court denied the motions to intervene based on lack of standing.



Burdened Vessel Found Not At Fault in Sail Race Collision

In July, 1996, the sailing yachts Bolero and The Last Drop collided just before the finish line of the Rum Challenge race on Long Island Sound off Old Saybrook, Connecticut. The owner of The Last Drop sued the owner of the Bolero for personal injuries and damages to his boat. The defendant's vessel was technically the burdened vessel under the Rules of the Road but was found to have no liability to the plaintiff in *Tunney v. McKay*, 2000 WL 33116537, (D. Conn. 2000).

The court held that the 1972 International Regulations for Preventing Collisions at Sea ("COLREGS"), 33 U.S.C. § 1602 et seq. governed the responsibilities and liabilities of the yachts during the race. The two boats were in close proximity as they approached the finish line but were in different classes and were not racing against one another. The defendant's vessel Bolero was in last place in her division and her time across the finish line was meaningless. Based on the evidence at trial the district court found that both boats were on a port tack until the plaintiff's vessel tacked to starboard within three hundred to four hundred feet of the finish line and approximately ninety to

one hundred twenty feet in front of the defendant's boat. The district court accepted evidence that the defendant had less than six to eight seconds to respond the plaintiff's maneuver. The evidence showed that the defendant initiated

evasive maneuvers in an attempt to pass under the stern of the plaintiff's boat by turning hard to starboard and ordering crew to let out the boat's sails after the plaintiff's vessel tacked

to starboard. The plaintiff alleged that the defendant vessel

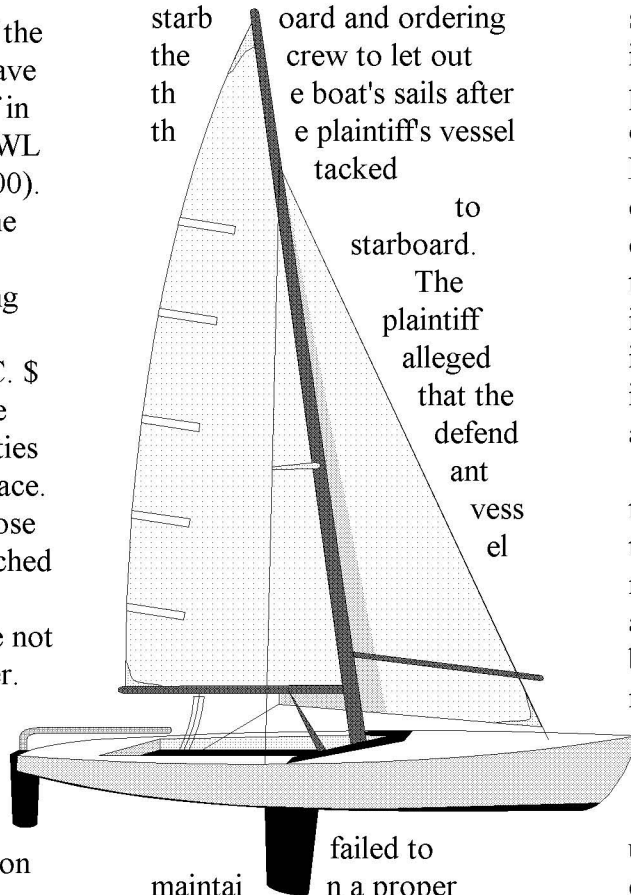
failed to maintain a proper lookout as required by Rule 5 of the COLLREGS and failed to take proper evasive maneuvers to avoid an imminent collision as required by Rules 8 and 17.

The court recognized that

a sailing boat on a starboard tack has the right of way in relation to a sail boat on the port tack under Rule 12 of the Rules of the Road and that, therefore, the plaintiff's vessel technically had the right of way in relation to the defendant's vessel just prior to the collision. Moreover, the evidence established that the plaintiff's vessel maintained her course and speed prior to the collision as is generally required of a privileged vessel by Rule 17 of the COLLREGS.

However, the court concluded that due to the close proximity of the vessels the plaintiff violated Rule 17 in the first instance by initiating the starboard tack in such close proximity to another vessel.

Based on the foregoing the district court conclude that the defendant violated no duty owed to the plaintiff and was not negligent because the plaintiff's maneuver in close proximity denied the defendant sufficient time and space to assess the need for, undertake and complete emergency evasive action which was otherwise proper under Rule 8 of the COLLREGS.



United States Liable for Deaths of Pleasure Boaters

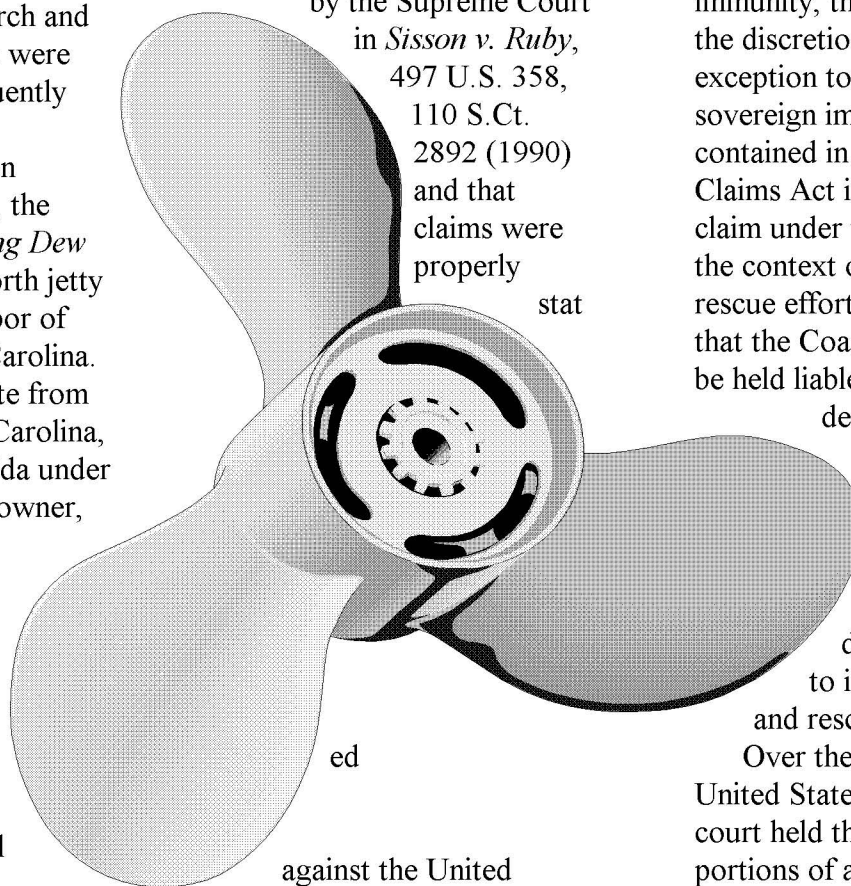
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In the recent decision *Hurd v. United States*, ___ F.Supp. ___, ___ AMC ___, 2001 WL 261867 (D.S.C. 2001), the United States was found liable for the deaths of three teenage pleasure boaters based on a finding that the Coast Guard acted recklessly and wantonly in connection with search and rescue efforts which were initiated but subsequently aborted.

At 0217 hours on December 29, 1997, the sailing yacht *Morning Dew* collided with the North jetty leading into the harbor of Charleston, South Carolina. The boat was enroute from Little River, South Carolina, to Jacksonville Florida under the command of its owner, Michael Cornett. Cornett's two teenage sons, Michael and James Cornett and their fourteen year old cousin Bobby Lee Hurd, Jr., were also aboard the boat. All of the occupants drowned following the collision and sinking of the boat.

The personal representatives of the boys' estates sued the United States under the Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671 et seq. and the Suits in Admiralty Act,

48 U.S.C. § 741 et seq. The plaintiffs also alleged admiralty jurisdiction and claims under the general maritime law. The district court held that there was admiralty subject matter jurisdiction over the claims pursuant to the test set forth by the Supreme Court in *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892 (1990) and that claims were properly stat



ed against the United States under the Suits in Admiralty Act based on the waiver of sovereign immunity in that statute. Specifically the court held that the Suits in Admiralty Act imposes liability on the government where the principles of admiralty law would impose liability on private

uals. However, although the SIAA itself does

not contain a discretionary function exception to the waiver of sovereign immunity, the court held that the discretionary function exception to a waiver of sovereign immunity contained in the Federal Tort Claims Act is applicable to a claim under the SIAA. In the context of search and rescue efforts, the court held that the Coast Guard cannot be held liable for making a decision on whether or not to act but is obligated to exercise due care once a decision is made to institute search and rescue operations.

Over the objection of the United States the district court held that all factual portions of a National Transportation Safety Board report on the incident, including the testimony of Coast Guard personnel, was admissible. The facts established that the boat struck the jetty prior to 0217 hours on December 29, 1997. The court found that the adult owner, Michael

Cornett, was thrown from the boat and drowned as a result of the collision. A mayday call was made by one of the three boys at

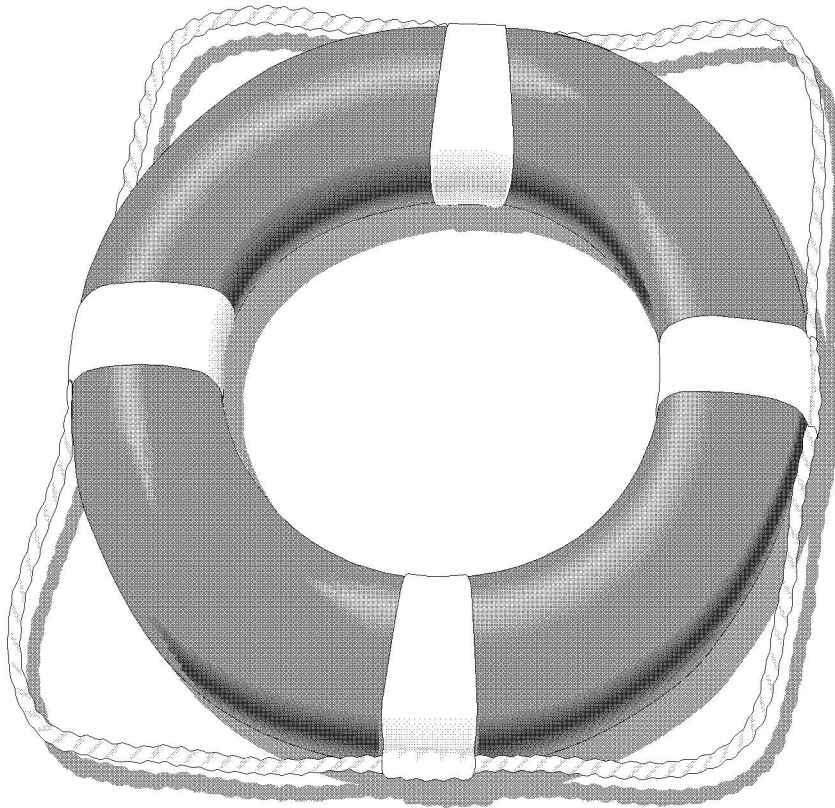
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0218. The Coast Guard watch officer testified that he could only understand the

water scream for help as his vessel entered the harbor. The pilot's association informed the Coast Guard that it would dispatch its pilot boat to the area to conduct a search. The Coast Guard acknowledged this action and requested a report. No Coast Guard assets were dispatched. The court found that the Coast Guard had

individuals had been located and that the pilot boat was suspending its efforts. After receiving this report the Coast Guard watch officer took no further action. The court concluded that the Coast Guard's failure to take any further action was an unreasonable decision to suspend the search and rescue effort prior to day



words "Coast Guard" and that his efforts to contact the caller were unsuccessful. As a result no action was taken in response to the initial mayday call.

At 0627 hours on December 29th a pilot aboard an inbound cargo vessel reported to the Coast Guard that he heard someone in the

made a decision to initiate search and rescue efforts by acknowledging that the pilot boat would conduct a search.

The pilot boat conducted a search in the location where the calls for help were heard but the operator did not see or hear any individuals in the water. At 0648 the operator called the Coast Guard watch officer to report that no

break and that it was foreseeable that the decision would result in injury or death to the plaintiffs' decedents.

The bodies of the three boys were discovered during the late morning of December 29th. The court found that all three survived the collision and died as a result of hypothermia and

drowning. The court accepted expert testimony that the boys could have survived in the water until at least 1000 on December 29th and, therefore, that the Coast Guard could have saved their lives if search and

continued on page 8
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rescue operations had not been suspended at 0648 hours.

In addressing the operative standard of care the court noted that the Coast Guard has no affirmative duty to undertake search and rescue operations but must exercise reasonable care once a decision is made to initiate a response. Further, the court held that, like a private individual, the Coast Guard acts as a “good Samaritan” when it undertakes search and rescue operations. Therefore, the Coast Guard is subject to liability only for reckless or wanton conduct or for failure to exercise reasonable care if the victim’s position is worsened as a result of the Coast Guard’s actions. The court held that the Coast Guard’s decision to suspend further operations after receiving the report from the pilot boat was reckless and wanton, worsened the position of the victims and was the proximate cause of the deaths of the three boys.

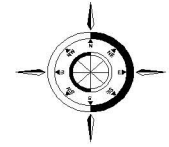
Relying on the decision in *Yamaha Motor Corp. v.*

Calhoun, 516 U.S. 199, 116 S.Ct. 619 (1996), the court held that the decedents’ estates were entitled to assert state law claims for wrongful death and survival damages since the decedents were non-seamen and that state law therefore governed the damages available for the deaths of the boys. The court conducted a federal choice of law analysis under the guidelines of *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953) and held that South Carolina law governed the damages available against the United States.

Applying the South Carolina wrongful death statute, the court awarded pecuniary damages of \$57,000 to the mother of Daniel and Paul Cornett for expenses, including the cost of medication which the court found she would be required to purchase for the balance of her life. Mrs. Cornett was also awarded a total of \$12 million in non-pecuniary damages for the suffering associated with the loss of her two children. In awarding the non-pecuniary damages the court noted that a Coast Guard officer’s decision to visit Mrs. Cornett following the incident and to play the recording of her son’s final mayday call was unnecessary and only served to increase her suffering. The court also awarded \$6 million in non-pecuniary damages to

the parents of Bobby Lee Hurd. Finally, the court awarded \$300,000 to each of the decedents’ estates for the conscious pain and suffering endured by each prior to their deaths.

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