Recreational Boating Committee of The Maritime Law Association of the United States

BOATING BRIEFS

Thomas A. Russell, Chairman **Frank P. De Giulio, Editor**

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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

Army Corps of Engineers Liable for Failure to Conspicuously Mark Dam on Ohio River

On an August afternoon in 1999, the operators of four jet skis heading downstream on the Ohio River in West Virginia mistook the Robert C. Byrd Lock and Dam for a bridge. When they finally realized they were not encountering a bridge, it was too late. The vessels and their operators plunged over the gates of the dam into the water below, a vertical distance of about 25 feet. Although there were several warning signs posted above the dam, the jet skiers did not see them. Local boaters testified that the warning signs were either obscured by vegetation or difficult to read. The dam is operated by the Army Corp of Engineers.

The operators of the jet skis brought suit against the United States for personal injuries pursuant to the Suits in Admiralty Act, 46 U.S.C. § 741 et seq. ("SAA"), in the U.S. District Court for the Southern District of West Virginia. The district court found that the government is not immune from suit under the SAA, but concluded that the Corps of Engineers had no duty to warn the jet skiers of the dam and entered summary judgment in favor of the United States. *McMellon v. United States*, 194 F. Supp. 2d 478 (S.D.W.Va. 2002). The plaintiffs appealed.

A three judge panel of the Fourth Circuit Court of Appeals reversed the district court's decision in *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003), with one judge dissenting. The majority agreed with the district court's finding that in a case filed under the SAA the United States cannot avail itself of the

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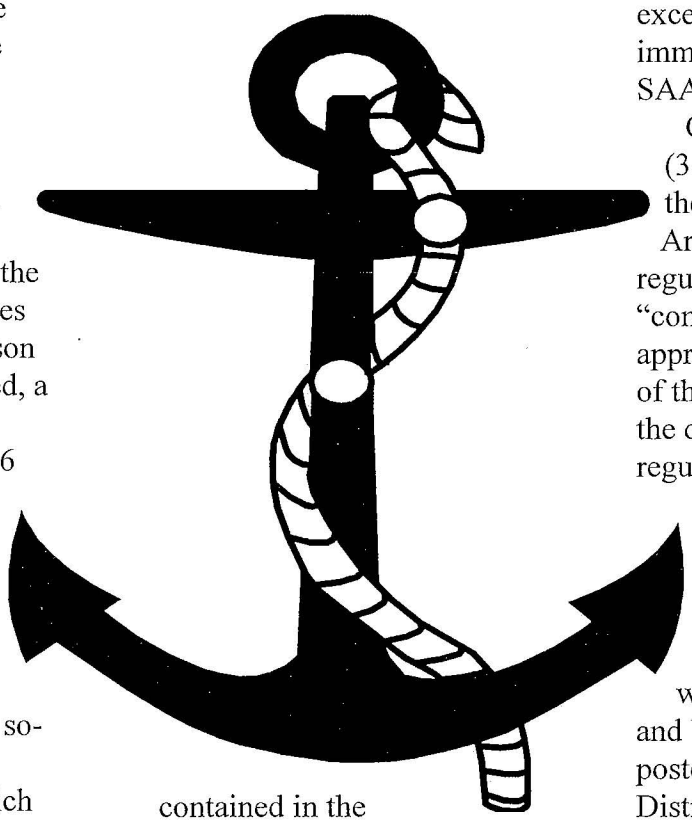
"discretionary function exception" to the federal government's waiver of sovereign immunity and affirmed that part of the district court's decision. However, the panel also held that the Corps of Engineers had both a regulatory and a legal duty to provide adequate warning to vessels approaching a dam on the Ohio River and therefore remanded the case to the district court for a determination of the government's liability.

The SAA permits an injured party to bring an admiralty action against the U.S. government "in cases where if ... a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. app. § 742. The Federal Tort Claims Act, the SAA's non-maritime counterpart, also waives the federal government's immunity from suit, but includes a so-called "discretionary function exception," which continues to immunize the government from claims that are based on the performance or non-performance of a federal agency's "discretionary function or duty."

Although the SAA does not contain an explicit discretionary function exception, nearly all federal courts have held that the exception is to be implied in cases falling under the SAA, in part to avoid judicial second-guessing of discretionary agency activity. In fact, the Federal Courts of Appeal in the First, Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have all held that the SAA incorporates the discretionary function exception to liability contained in the Federal Tort Claims Act.



Notwithstanding the decisions of virtually every other federal circuit, nearly thirty years ago the Fourth Circuit Court of Appeals considered the issue and refused to imply a discretionary function exception in the SAA in *Lane v. United States,* 529 F.2d 175 (4th Cir. 1975).

Two of the three Fourth Circuit judges in *McMellon* rejected the government's argument that the *Lane* decision should be overruled and therefore declined to read a discretionary function exception into the SAA. Thus, the Fourth Circuit continues to stand alone in its position that the federal government may not rely on the discretionary function exception to sovereign immunity in cases under the SAA.

Citing federal regulations (33 C.F.R. § 207.300(s)), the majority found that the Army Corps has a regulatory duty to "conspicuously and appropriately mark the limits of the restricted area around the dam." The applicable regulation, which governs Corps of Engineer activity on the Ohio River, states as follows: "*Restricted areas at locks and dams*. All waters immediately above and below each dam, as posted by the respective District Engineers, are hereby designated as restricted areas. No vessel or other floating craft shall enter any such restricted area at any time. The limits of the restricted areas at each dam will be determined by the responsible District Engineer and marked by signs and/or

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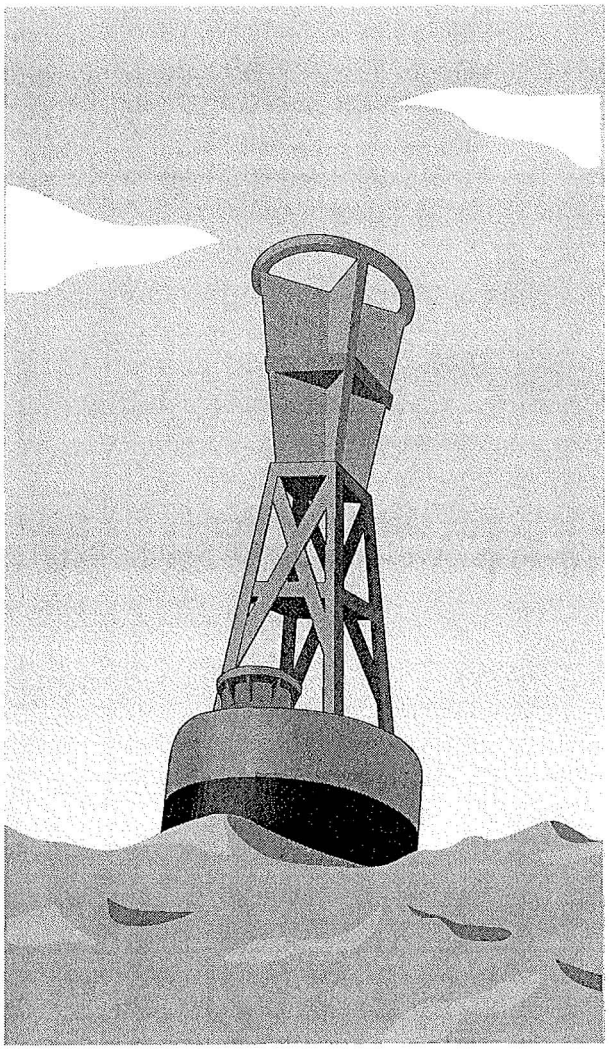
flashing red lights installed in conspicuous and appropriate places."

The majority broadly read the last sentence to impose a duty on the Corps to "conspicuously mark the boundaries of any area surrounding each dam it decides the restrict." The majority concluded that jet skiers are within the class of persons that the regulation was meant to protect, and that the injury suffered by the plaintiffs was the kind of harm that the regulation sought to avoid. Thus, having chosen to designate the approach to the Robert C. Byrd Lock and Dam as a "restricted area," the Corps was required to adequately warn oncoming jet skiers of the restriction according to the Court.

In addition to its regulatory obligations, the Court also held that the Army Corps has a duty to warn the public of a dam's presence under the general maritime law. The court analogized the Corps' duty to that owed by a private property owner, namely the duty to warn others if one's property constitutes an obstruction to navigation. The court did acknowledge, however, that the federal government is not bound to ensure the safety of every inch of the nation's waterways. Rather, the Corps' legal duty in this case was derived from its status as an "owner" of a navigational hazard.

The Corps of Engineers defended on the grounds that the plaintiffs were mere trespassers at the time of the accident and were thus owed no legal duty at all. The majority rejected this position. Citing the Supreme Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the majority noted that in the case of a tort committed against a visitor lawfully aboard a vessel, general maritime law does not distinguish between invitees, licensees, and trespassers; rather, every visitor is owed a duty of reasonable care under the circumstances.



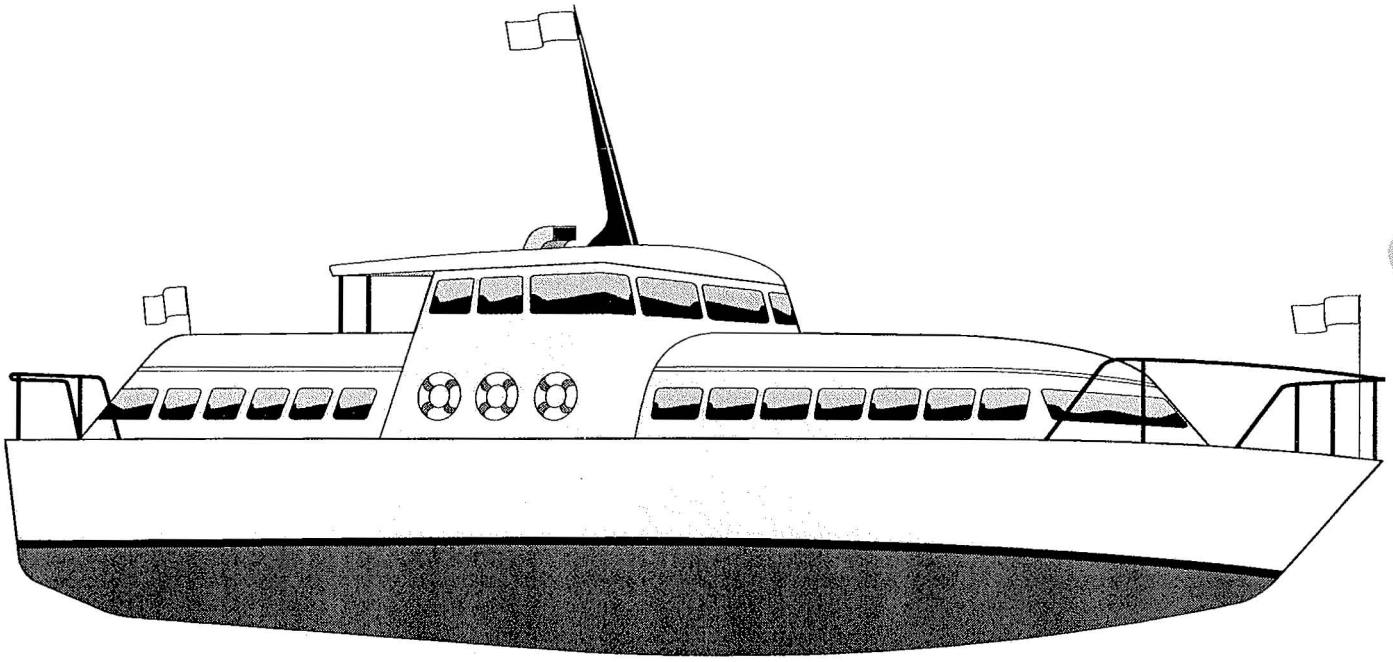
The panel imposed this same duty of care on the Army Corps, even though the alleged negligence in this case did not occur aboard a vessel.

Finally, the Court rejected the government's argument that the plaintiffs' failure to see the dam earlier was, as a matter of law, a failure to avoid an "open and obvious" danger. The court considered this to be a factual issue, properly decided by the trial court. It explained that not all dams are to be deemed open and obvious hazards, and that even if the plaintiffs were negligent in not seeing the dam in time to react, this would not necessarily preclude recovery but would simply reduce their damage award in proportion to their relative fault.

Editor's Note: As this edition went to print the judges of the Fourth Circuit Court of Appeals agreed to reconsider the panel's decision en banc.

Unrecorded Bill of Sale Does Not Protect a Federally Documented Vessel from Attachment by Seller's Creditors

Dr. David Mullane purchased the yacht LADY B GONE from David and Angela Murphy pursuant to a bill of sale dated July 2, 1998. On August 28, 1998, the local sheriff's department seized the yacht to enforce two state court writs of execution held by the Murphys' judgment creditors. Five days after the yacht was seized, Mullane recorded his bill of sale with the National Vessel Documentation Center.



Mullane filed suit in the U.S. District Court for Massachusetts against the yacht, *in rem*, pursuant to Rule D of the Supplemental Admiralty Rules, seeking possession of the yacht and a determination that the creditors' claims against the vessel were invalid. Mullane also sued the judgment creditors and the sheriff's department, alleging that the seizure was improper and that the yacht had been damaged in the course of the seizure.

The district court held that the seizure of a federally documented yacht to execute on state law judgments held by the creditors of the former owners was invalid, even though the new owner had not recorded the bill of sale at the time of the seizure. According to the district court, Mullane was a bona fide purchaser for value without notice of claims and, therefore, took the vessel free and clear of all encumbrances. The district court also awarded $100,000 in punitive damages to Mullane and against the Murphys' judgment creditors on the grounds that the creditors had intentionally disregarded Mullane's rights to the vessel. Finally, the district court awarded $43,720 in attorneys fees to sheriff's department.

The judgment creditors appealed the district court's decision to the U.S. Court of Appeals for the First Circuit. The First Circuit reversed and remanded. *Mullane v. Chambers,* 333 F.3d 322, 2003 AMC 1740 (1st Cir. 2003).

On appeal, the judgment creditors argued that their seizsure of the yacht was

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proper because Mullane's unrecorded bill of sale was invalid as to them under 46 U.S.C. § 31321 of the Federal Maritime Lien Act. 46 U.S.C. § 31321(a)(1) provides in relevant part as follows: "A bill of sale ... whenever made, that includes any part of a documented vessel ... must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, *against any person* except: (A) the grantor, mortgagor, or assignor; (B) the heir or devisee of the grantor, mortgagor, or assignor; and (C) *a person* having actual notice of the sale .... (emphasis added).

Construing the language and intention of § 31321, the Court of Appeals for the First Circuit held that judgment creditors are included among the "persons" protected by the statute and that Mullane's unrecorded bill of sale could not preclude the judgment creditors' seizure unless Mullane could prove that the creditors had actual notice of the sale at the time of the seizure. Noting that the district court did not make any findings regarding the creditors' notice, the circuit court reversed and remanded the case for further proceedings on the issue. Furthermore, observing that the district court had improperly applied federal law to determine the validity of the transfer from the Murphy's to Mullane, the Court of Appeals also instructed the district court on remand to reconsider whether Mullane was a bona fide purchaser for value under Massachusetts law and to determine whether the sale was a fraudulent conveyance.

In reaching its decision on the applicability and effect of § 31321, the Court of Appeals noted that two state supreme courts had reached an opposite conclusion regarding the scope and effect of the statute, originally enacted in 1850. In those decisions, both dating from the 1800s, the courts held that the statute was only intended to protect subsequent purchasers and mortgagees and not judgment creditors. These courts reasoned that creditors' rights are entirely contingent upon the debtor possessing legal title to the vessel at the time of execution, whether or not a sale has been recorded. The First Circuit rejected this reasoning, concluding that nothing in the legislative history indicated that Congress intended to limit the scope of the statute and that judgment creditors were within the meaning of "any person" under the plain language of the section.

The Court of Appeals also reversed the district court's award of punitive damages against the judgment creditors. The award of punitive damages was premised on the district court's conclusion that the judgment creditors improperly continued to press their claims after Mullane produced his bill of sale for the vessel in the litigation. The First Circuit held that the creditors' conduct amounted to nothing more than the presentation of legal arguments. There was no finding of any abuse of process or malicious prosecution.

Finally, the Court of Appeals vacated and reversed the district court's award of attorneys fees to the sheriff's department and against Mullane. The Court observed that attorneys fees are available only where a party has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." In this case, the district court had failed to specify and describe the conduct upon which the award was based. Moreover, after reviewing the sheriff department's motion for attorneys fees, the Court of Appeals held that the facts as alleged did not amount to conduct that was sufficiently egregious to support an award of attorneys fees.

Eighth Circuit Enforces Exculpatory Clause in Marina's Slip-Rental Agreement

A houseboat moored at the St. Louis Yacht Club caught fire as a result of an improperly installed fuel pump. The pump installation had been negligently performed a few days earlier by a yacht club employee. As the fire spread, three other vessels docked at the marina were destroyed. The owners of these boats brought negligence claims against the yacht club, which defended on the basis of a red letter clause in its slip-rental agreement. This clause purported to relieve the yacht club from "any and all liability for loss ... including fire." The district court refused to enforce the clause on the grounds that it was ambiguous and was the result of unequal bargaining power between the parties. Furthermore, the district court concluded that exculpatory clauses which completely absolve a party from any liability are unenforceable as a matter of law. The district court entered judgment in favor of the boat owners against the yacht club.

The yacht club appealed. The Court of Appeals for the Eighth Circuit reversed the district court's decision in *Sander v. Alexander Richardson Investments*, 334 F.3d 712, 2003 AMC 1817 (8th Cir. 2003).

The exculpatory clause in question stated in its entirety: "INSURANCE: TENANT AGREES that he will keep the boat fully insured with complete marine insurance, including hull coverage and indemnity and/or liability insurance. THE LANDLORD DOES NOT CARRY INSURANCE covering the property of the TENANT. THE LANDLORD WILL NOT BE RESPONSIBLE for any injuries or property damage resulting, caused by or growing out of the use of the dock or harbor facilities; that

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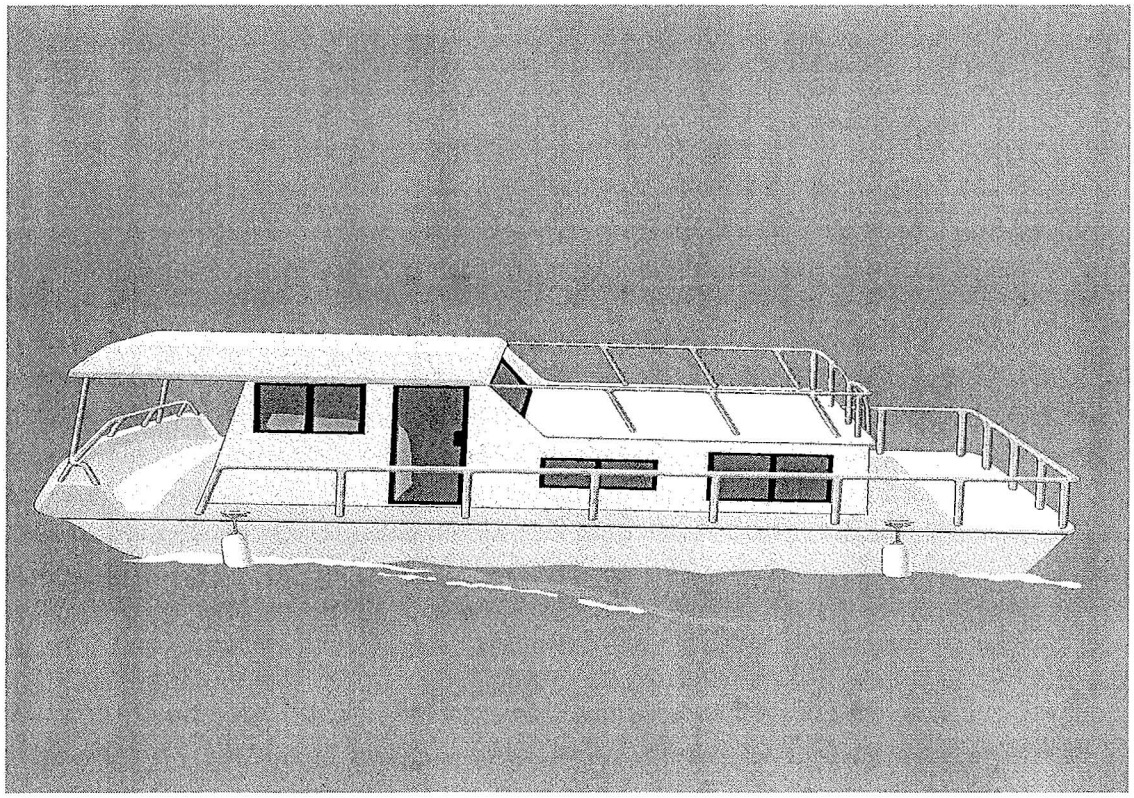

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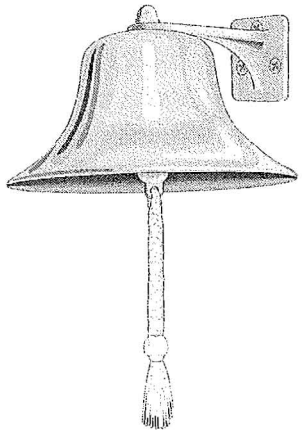
the TENANT RELEASES AND DISCHARGES THE LANDLORD from any and all liability for loss, injury (including death), or damages to person or property sustained while in or on the facilities of LANDLORD, including fire, theft, vandalism, wind storm, high or low waters, hail, rain, ice, collision or accident, or any other Act of God, whether said boat is being parked or hauled by an Agent of LANDLORD or not."

The Eighth Circuit first considered the issue of whether the clause was ambiguous. According to the Eighth Circuit, the clause reflected a clear intention to absolve the yacht club from the consequences of its own fault. Even though the clause did not explicitly refer to negligence, the Court held that "[t]he term 'any and all' used in the exculpatory clause is all-encompassing and leaves little doubt as to the liability from which the boat owners released the Yacht Club." Thus, under general maritime law, the clause would be deemed to encompass all losses, even those arising from the yacht club's negligence.

Next, the Court determined whether the clause was enforceable under Admiralty law. The Eighth Circuit reviewed what it described as a split of authority between the Federal Circuits regarding the enforceability of exculpatory clauses under Admiralty law, specifically citing and contrasting the decisions in *Diesel "Repower," Inc. v. Islander Investments Ltd.*, 271 F.3d 1318 (11th Cir. 2001) and *La Esperanza de P.R. Inc. v. Perez y Cia de P.R. Inc.*, 124 F.3d 10 (1st Cir. 1997) (exculpatory clause unenforceable if it purports to absolve the party of all liability) with the decisions in *Royal Ins. Co. v. S.W. Marine*, 194 F.3d 1009 (9th Cir. 1999) and *Theriot v. Bay Drilling Corp.* 783 F.2d 527 (5th Cir. 1986) (except in towing contracts exculpatory clauses may absolve a party of all liability for negligence).

In *Sander* the Eighth Circuit held that in its opinion the courts' historic hostility to exculpatory clauses in Admiralty cases should be limited to towage contracts and other similar arrangements, such as "bailment, employment, or public service relationships," where one side enjoyed a monopoly or grossly uneven bargaining power. In the absence of such circumstances, the court preferred to "uphold the strong public policies of recognizing parties' liberty to contract and enforcing contracts as written." Accordingly, the Eighth Circuit sought to align itself with the decisions of the First and Fifth Circuit Courts of Appeal in *La Esperanza* and *Royal Insurance*.

Finally, the Eighth Circuit considered and concluded that there was no evidence of fraud or overreaching, nor was there any extreme imbalance in bargaining power between the parties which might serve as a basis to void the exculpatory clause. Reviewing the evidence the Court observed that the boat owners remained free to take their business to one of the other marinas in the vicinity and that none had voiced any objection to the clause when they entered into their rental agreements with the yacht club. In these circumstances the Eight Circuit held that public policy "demands" that the written contract of the parties be enforced as agreed. Accordingly the Court vacated the district court's judgment against the yacht club, holding that the boat owners (or their insurers) must bear their own losses.

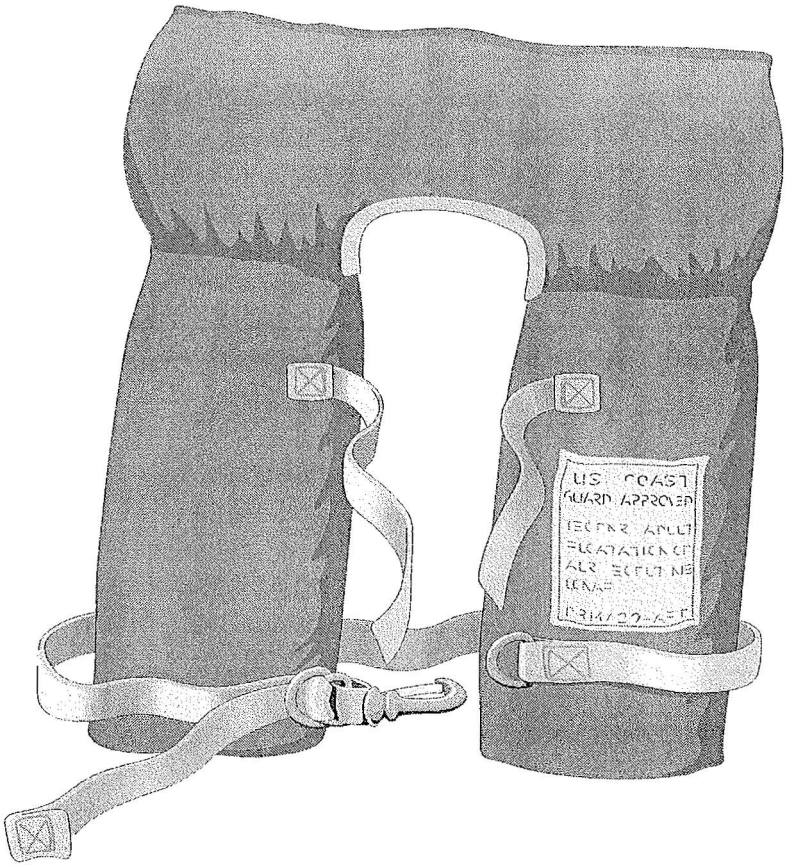


Loss of Society Damages Are Not Available under General Maritime Law to the Parent of a Child Killed in State Waters

The Court of Appeals for the Eleventh Circuit has held that a non-dependant father may not recover loss of society damages under general maritime law for the death of a child in state waters.

The plaintiff's minor son suffered fatal injuries when the 19-foot Wellcraft in which he was riding collided with a 36-foot Pearson sailboat. The collision occurred on the Intracoastal Waterway near Orange Beach, Alabama. The decedent's father brought a wrongful death action in admiralty against the operators of the sailboat. He sought, among other things, nonpecuniary damages for his grief and loss of affection. The trial court struck the father's claim for nonpecuniary damages. On interlocutory appeal from the district court's decision, the Eleventh Circuit affirmed in *Tucker v. Fearn*, 333 F.3d 1216, 2003 AMC 1705 (11th Cir. 2003).

The court negotiated an array of Supreme Court precedent, beginning with *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* recognized for the first time a cause of action for wrongful death under general maritime law for deaths occurring in territorial waters.



Subsequently, the Supreme Court held in *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), that a dependent relative of a longshoreman killed in territorial waters could recover nonpecuniary damages for loss of society.

Four years later, in *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978), the Supreme Court declined to allow recovery of nonpecuniary damages for wrongful deaths on the high seas because Congress, in passing the Death on the High Seas Act (DOHSA), had explicitly decided to allow recovery of "pecuniary loss" only, and it was therefore not the judiciary's place to "supplement" the Congressional scheme.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Supreme Court ruled that the mother and administratrix of a seaman killed in territorial waters could not recover damages for loss of society under either the Jones Act or under general maritime law.

Finally, in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), the Court decided that, in the absence of a federal statute, the survivors of a "nonseafarer" killed in territorial waters are not limited to a *Moragne*

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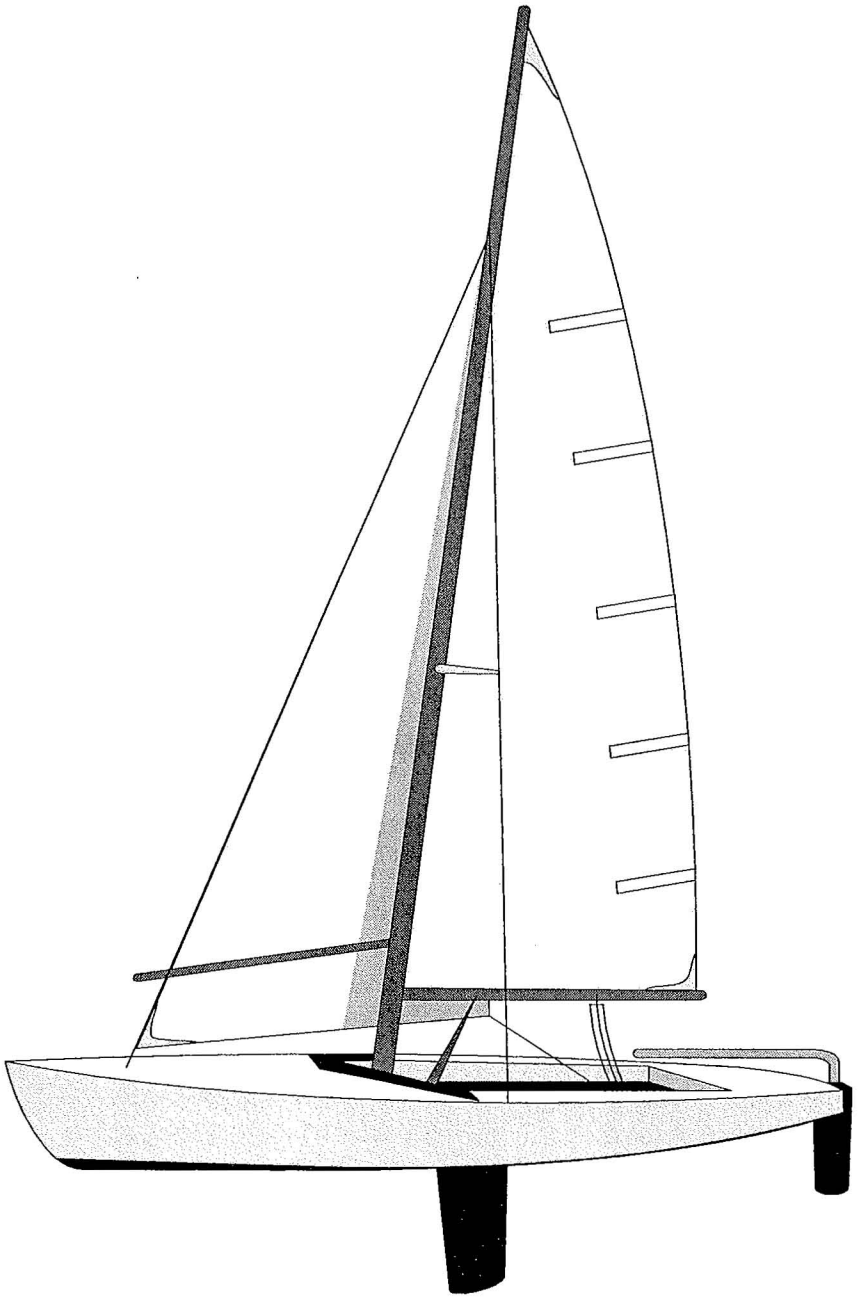
wrongful death action; rather, they may seek damages under the applicable state wrongful death statute.

With this framework in mind, the Eleventh Circuit concluded that the wrongful death of a child in state waters does not entitle a non-dependent father to recover loss of society damages under maritime law. The court was reluctant to afford the plaintiff a remedy more generous than that available under DOHSA for deaths on the highs seas. The Eleventh Circuit also observed that "[a] strange anomaly would result if we were to permit the survivors of non-seaman the right to recover loss of society damages while the survivors of seaman—the traditional wards of admiralty law—are barred from such recovery under the Jones Act and general maritime law."

The plaintiff pointed to the Supreme Court's decisions in *Gaudet* and *Yamaha* as support for his position. But the Eleventh Circuit was unconvinced, noting that in the *Miles* decision the Supreme Court had limited the applicability of *Gaudet* to cases involving a longshoreman killed on territorial waters. The Court also held that the *Yamaha* decision was not controlling because according to the Court it merely "preserve[d] the application of state statutes to deaths within territorial waters" and did not establish a survivor's right to seek nonpecuniary losses in admiralty. Moreover, the Second, Fifth, and Sixth Circuits had already held that nondependent survivors of non-seamen may not recover loss of society damages under general maritime law.

This latest decision from the Eleventh Circuit further isolates the Ninth Circuit Court of Appeals in its position on this issue. *See Sutton v. Earles*, 26 F.3d 903, 915-17 (9th Cir. 1994) (interpreting *Gaudet* to allow loss of society damages for deaths of non-seamen in state waters).



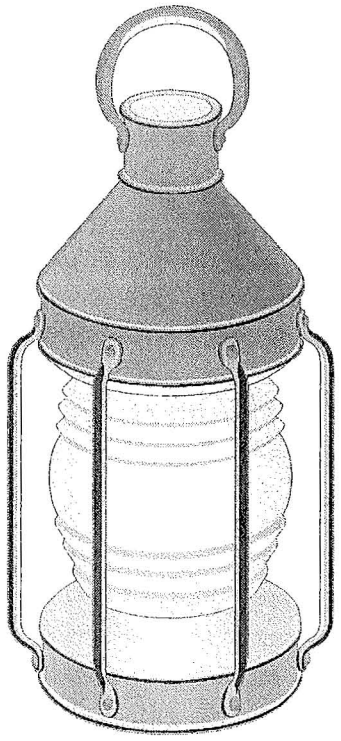
Sixth Circuit Affirms Coast Guard's Liability for Damages Caused by Negligent Rescue

On an August night in 1997, after several hours of drinking, a man dove headfirst from a pleasure boat into the shallows of Little Muscamoot Bay, near Algonac, Michigan. The man's spine was severed upon impact and water entered his lungs. His wife brought him to the surface alongside the boat and, while a friend resuscitated him, she summoned the sheriff's department over the boat's radio. Local firefighters proceeded to the scene by boat. They put the victim on a backboard and prepared to transport him by boat to an ambulance waiting on shore. A Coast Guard patrol boat then arrived and advised the firefighters to await a Coast Guard helicopter that was en route to effect the rescue. However, the helicopter did not appear on the scene for at least 40 minutes. When it did arrive, its lifting apparatus could not be connected to the back board, and rather than risk moving the victim again, the rescuers took him ashore by boat as originally planned. Within a month of the accident, the victim developed pneumonia, which doctors linked in part to the one-hour delay in transporting him to the emergency room.

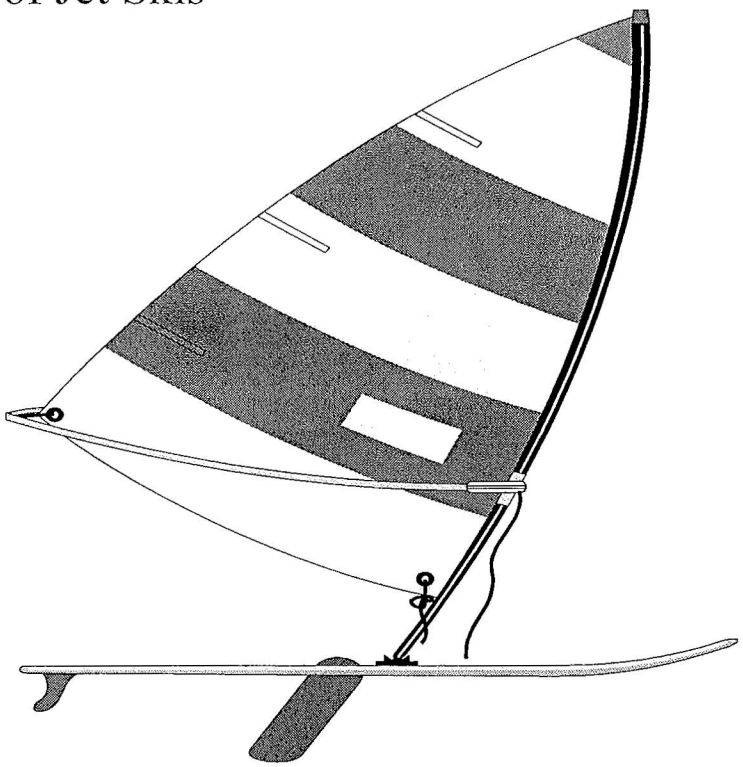
The victim and his wife brought suit against the United States under the Suits in Admiralty Act, alleging that the Coast Guard was negligent in its response to the emergency and thereby exacerbated the victim's injuries. Shortly after the suit was filed, the victim died of complications from quadriplegia and pneumonia. The district court granted the government's motion for summary judgment, finding that the plaintiffs had failed to show that the Coast Guard's negligence caused or contributed to the victim's injuries.

On appeal the Court of Appeals for the Sixth Circuit reversed. *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003). The Sixth Circuit observed that while the Coast Guard does not have a statutory duty to mount a rescue for every maritime emergency, once a rescue is undertaken the Coast Guard is bound to act with reasonable care. This duty of care arises under general maritime law rather than statute. If a rescue operation is negligently carried out, the government may be liable in tort for the resulting harm.

The Coast Guard apparently conceded that it was negligent in hampering the victim's transport to the hospital. To establish that this negligence contributed to the victim's injuries, the plaintiffs had presented expert testimony that the one-hour delay in evacuating the victim left him more susceptible to pneumonia and respiratory problems. Even the government's expert had tacitly admitted that the delay contributed to at least some of the victim's ailments. Thus, the Appellate Court held that the plaintiffs had presented sufficient evidence of causation to survive summary judgment, and remanded the case to the district court for a determination of the government's liability on the merits.



Texas Court of Appeal Rejects Proposed Class Action Against Manufacturer and Seller of Jet Skis



The purchaser of two Polaris jet skis attempted to bring a class action against Polaris and a Polaris dealer, claiming that the lack of off-throttle maneuvering capability rendered the jet skis unmerchantable and defective. A Texas court of appeal found class certification improper and dismissed the case. *Polaris Industries, Inc. v. McDonald*, No. 12-01-00372, 2003 Tex. App. Lexis 6985 (Tex. App. Aug. 13, 2003).

The plaintiff alleged that the jet skis were unreasonably dangerous because they had no steering or collision avoidance capability while the engine was idling or shut off. He brought his claims in the form of a class action on behalf of thousands of Polaris jet ski purchasers and owners in Texas. The trial court judge agreed to certify a class that consisted of "[a]ll persons and entities who purchased new Polaris personal watercraft from dealers in the State of Texas after May 4, 1995 and who still own their Polaris personal watercraft."

On interlocutory appeal, the Court of Appeal for the Twelfth District reversed, holding that the plaintiff had no standing to bring the class action. Neither the plaintiff nor anyone he knew had actually been injured as a result of the jet skis' design. The plaintiff and his children had used their jet skis for six years, apparently without incident. Numerous warning labels had informed the plaintiff at the time of purchase that the jet skis could not be steered without using the throttle. In the court's words, the plaintiff "got exactly what he paid for – a water vehicle fit for recreational use."

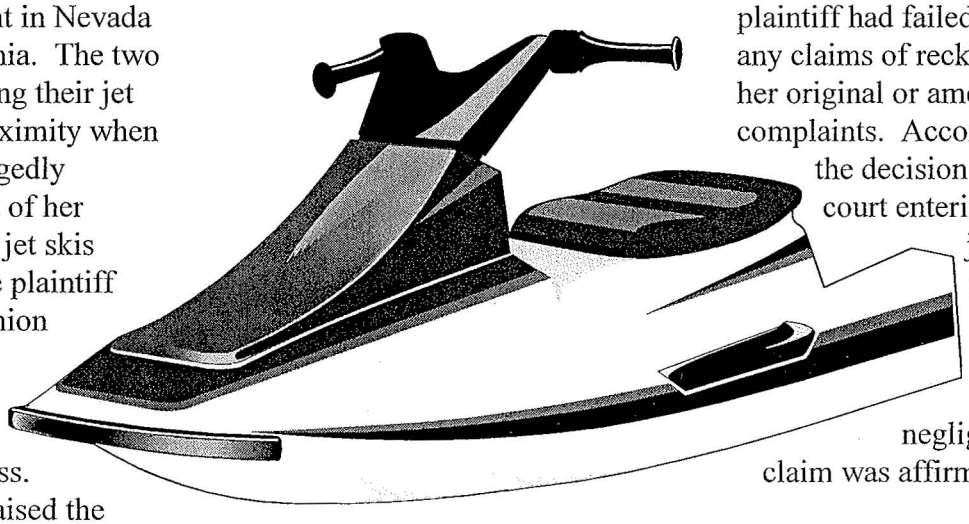
Class certification was also improper according to the court because there was insufficient commonality of factual and legal issues: each jet ski purchaser or user would have likely had a different experience. The court was also concerned that a ruling in the class action in favor of the defendants might preclude a subsequently injured class member from bringing a claim for defective design. Finally, the court noted that the U.S. Coast Guard, under the authority of the Federal Boat Safety Act, continues to assess the feasibility of requiring off-throttle steering systems in personal watercraft. For these reasons, the court concluded, class action certification was inappropriate.

California Court of Appeal Applies Primary Assumption of Risk Doctrine to Personal Watercraft

Under California common law, a sports participant ordinarily will not face tort liability if he injures another participant through simple negligence. The purpose of the doctrine is to encourage healthy competition. A California court of appeal has concluded that a jet skier may qualify for immunity under this doctrine because jet skiing is a challenging activity with significant risk of injury and, according to the court, a refusal to apply the doctrine "would chill vigorous participation in jet skiing, thereby having a 'deleterious effect' on the nature of the sport as a whole." *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883 (Cal. App. 2003).

The plaintiff and her male companion were operating two jet skis on Lake Engelbright in Nevada County, California. The two were maneuvering their jet skis in close proximity when the plaintiff allegedly swerved in front of her friend. The two jet skis collided, and the plaintiff sued her companion for negligence and negligent infliction of emotional distress. The defendant raised the primary assumption of risk doctrine as a defense, and the trial court rendered a judgment in the defendant's favor.

The Court of Appeal for the Third Appellate District affirmed. It observed that "[a]s a matter of common knowledge, jet skiing is an active sport involving physical skill and challenges that pose a significant risk of injury, particularly when it is done – as it often is – together with other jet skiers in order to add to the exhilaration of the sport by racing, jumping the wakes of the other jet skis or nearby boats." According to the Court, even if this plaintiff was a novice and was not in actual competition with the defendant, the general nature of jet skiing made the sport subject to the primary assumption of risk doctrine.



The plaintiff argued that two recently-enacted California statutes compelled a different result. One statute made it a misdemeanor to operate a watercraft "in a reckless or negligent manner so as to endanger the life, limb, or property of any person." The other statute required that personal watercraft "be operated in a reasonable and prudent manner." The court concluded, however, that these statutes did not trump the common law doctrine of assumption of the risk because the statutes did not reflect a clear legislative intent to do so.

Furthermore, the Court held that the plaintiff could not show that the defendant's conduct was so reckless as to fall outside the range of activity protected by the primary assumption of risk doctrine, noting that the plaintiff had failed to include any claims of recklessness in her original or amended complaints. Accordingly, the decision of the trial court entering judgment for the defendant on the plaintiff's negligence claim was affirmed.

Connecticut Court Holds Insured to *Uberrimae Fidei* Standard

An insured brought breach of contact, breach of covenant of good faith, and fraud claims against an insurer who declined to pay a claim after the apparent disappearance of the insured's 34-foot Wellcraft. Relying on the doctrine of *uberrimae fidei*, a judge of the Stamford-Norwalk District Court had no difficulty dismissing the insured's claims. *Rocco v. Continental Insurance Co.*, No. 99-CV-0171669-S (X05), 2003 Conn. Super. Lexis 1514 (Conn. Super. May 13, 2003).

The evidence showed that the insured had overstated the vessel's purchase price by about one-half when he applied for insurance. He again misstated the purchase price when he filed a claim for the vessel's disappearance. He had also elected coverage for only "Inland Lakes and Rivers" when he knew he would be operating his vessel in "coastal waters."

Such facts were material to the risk, the court wrote, and, if disclosed as they should have been, these facts would have affected a prudent underwriter's decision to issue a policy. Such facts also would have affected the premium charged. Thus, the insured had violated his obligation to act with the utmost good faith, and the policy was void from the start.

As if that were not enough, the Court also found that insured breached the policy's cooperation clause and fraud and concealment provisions. He delayed informing the insurer about the claimed disappearance, gave inconsistent statements to the insurer, the adjuster, and the local police, and failed to supply requested documentation to the insurer. The court held that the insured's lack of cooperation, taken with his prior misrepresentations, voided all coverage under Connecticut law.

The Editors wish to thank Frederick A. Lovejoy, of Lovejoy and Associates, Easton, Connecticut, for calling our attention to this case.

"Non-Contact" Vessel Owes a Duty of Care to Prevent Other Vessels from Colliding

After an outing together on the Chesapeake & Delaware Canal, two families were returning home in their respective power boats. As night fell, the vessels proceeded eastbound on the C & D Canal, each at a speed of about 40 miles per hour. The lead vessel traveled approximately 100 yards ahead of the following vessel, and about 30 feet to starboard. The operator of the lead vessel overtook the plaintiffs' 22-foot Cutty Cabin (which was traveling at only 15-20 miles per hour), leaving it to port. Although visibility was good, he did not see the Cutty Cabin until he was alongside or past it. Apparently, the operator of the following vessel likewise failed to see the Cutty Cabin. Within seconds, the following vessel "in essence, ran over" the plaintiffs' Cutty Cabin.

The operator and passengers on the Cutty Cabin suffered serious injuries and filed suit against the operators of both the lead vessel and the following vessel in Delaware State Court. The operator of the lead vessel filed a motion for summary judgment to

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dismiss the claims against him, arguing that since his vessel safely overtook and never came into physical collision with the plaintiffs' vessel, he owed the plaintiffs no duty of care and could not be held liable for any negligence on the part of the following vessel.

The trial court rejected the argument in *Kuczynski v. McLaughlin*, No. 08-175-JRS, 2003 Del. Super. Lexis 300 (Del. Super. Aug. 27, 2003). The Court observed that anyone who operates a vessel on navigable waters can expect to encounter other vessels and should know that carelessness may result in a collision. According to the Court the mere fact that the lead boat happened to avoid a collision with the slower boat did not necessarily discharge the lead boat's duty of care "to the plaintiffs and to all other vessels operating on the C & D Canal" that evening. The Court held that even assuming that the lead vessel had not violated any Rules of the Road, it still owed a general duty of care to other boaters "traveling in close proximity." Consequently, the court denied the motion for summary judgment and found that the plaintiffs were entitled to present their arguments against the lead vessel to a jury for a determination of liability.

Regulatory Developments and Other Cases of Interest

National Park Service Proposes New Rules for Boating and Water Use Activities

The National Park Service is accepting comments through December 24, 2003, on a proposed revision to Title 36, Part 3, of the Code of Federal Regulations. Part 3 regulates boating and water use activities in areas administered by the Park Service. Proposed changes will address, among other things, operation of power-driven vessels by minors, personal flotation devices, personal watercraft, marine sanitation devices, wreck removal, and vessel noise emissions. 68 Fed. Reg. 51,207 (Aug. 26, 2003).

Coast Guard Seeks Applications for National Boating Safety Activities Grants

68 Fed. Reg. 58,120 (Oct. 8, 2003).

The Coast Guard is accepting applications for fiscal year 2004 grants, to be used to promote recreational boating safety. Application packages are due by January 15, 2004. Applicants must be non-governmental, nonprofit, public service organizations and must undertake activities at the national level.

The Coast Guard is particularly interested in developing a "National Annual Safe Boating Campaign"; a "Recreational Boating Safety Outreach and Awareness Conference"; a closer partnership between state, federal, and industry organizations; a program to encourage public participation in the adoption of voluntary safety standards; a training course for boating accident investigators; a study to estimate and evaluate the rate at which recreational boaters' wear PFDs; and a study of navigation light installation practices on recreational boats. In addition, the Coast Guard wishes to enter the next phase of its "Recreational Boating Study/Survey Analysis," and also "seeks a grantee to research and analyze the danger posed to recreational boaters by barges, both under tow and being pushed, under the conditions of reduced visibility."

For further information, please consult the Federal Register for October 8, 2003, Volume 68, page 58,120.

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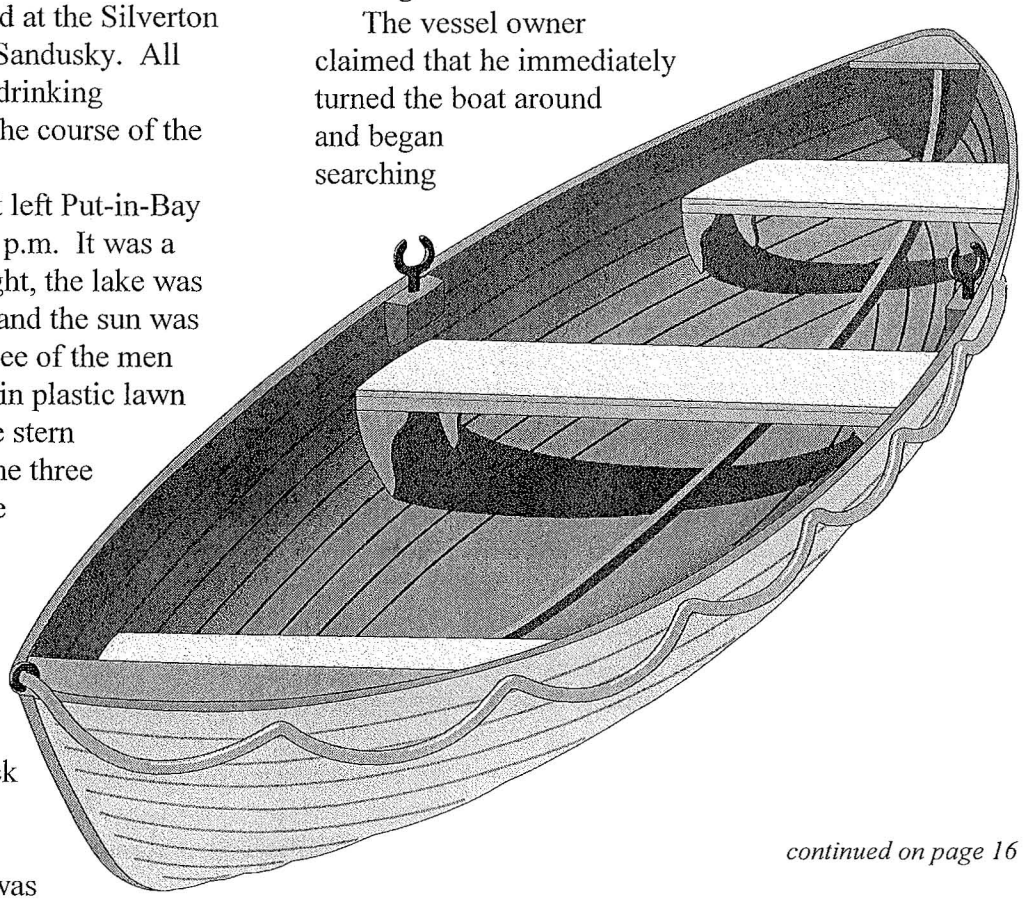
Insurer Settles Claim for Death of Overboard Drowning Victim

On August 9, 2000, a group of union employees set out from Sandusky, Ohio, on three pleasure boats for a day of fun and sun – and a little business – at the Lake Erie Islands. After a luncheon meeting on Kelley's Island, the group progressed to Put-in-Bay to sample the fare at various local bars, one of which served buckets of beer. The owner/operator of one of the boats, a 41-foot Silverton, had only a couple of drinks and then slept the rest of the afternoon. Around 7:30 p.m., six of the men gathered at the Silverton to return to Sandusky. All admitted to drinking throughout the course of the afternoon.

The boat left Put-in-Bay around 8:00 p.m. It was a beautiful night, the lake was fairly calm, and the sun was still up. Three of the men were seated in plastic lawn chairs on the stern deck, with the three others on the raised fly bridge with the owner. One of the three men seated on the stern deck lay down on the deck because he was "tired." The second man climbed half way up the ladder to the bridge and was talking to the men up there. After "only a minute" the second man descended the ladder and noticed that the remaining man who had been sitting in the chair was no longer there. He looked in the salon and bathroom, but they were empty. The man went back outside and announced that Steve was missing! No one heard or saw anything suspicious - not even the man lying on the deck with his head just 18 inches from Steve's feet. No one was wearing a watch to note the time. All agreed that the sun had not yet set when they noticed he was missing.

The vessel owner claimed that he immediately turned the boat around and began searching along his GPS path. After making one pass, admittedly not traveling as far back as all remembered last seeing Steve, the owner called the Coast Guard. The first Coast Guard boat was on scene within six minutes. Steve's body was discovered the next evening floating just a short distance from the Coast Guard station. There were some scratches on his body but no apparent injury that might have caused his death. An autopsy performed the next day revealed a blood alcohol level of .26 without significant decomposition of the body.

The drowning victim's widow made a claim against the boat owner, who then filed a limitation of liability



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action in federal court. The court lifted the injunction prohibiting the plaintiffs from pursuing a state court action after the plaintiffs filed a stipulation agreeing to return to federal court in the event of a judgment in excess of the limitation fund (about $222,000) and agreeing to a division of the limitation fund, if necessary, between the widow, two adult children and the decedent's worker's compensation carrier.

Suit was filed against the boat owner in state court on behalf of decedent's estate, the widow and two adult children to recover damages under the general maritime law and Ohio law.
The plaintiffs argued that the defendant boat owner was negligent for failing to use due care for the safety of the decedent, and for failing to conduct a proper search and rescue. The defendant argued that the victim tried to relieve himself over the side of the boat but accidentally slipped and fell overboard and that neither he nor the other passengers were intoxicated. Despite testimony from the witnesses that the victim did not appear to be intoxicated, the coroner testified that someone with a BAC of .26 would have been slurring his speech and unable to walk steadily. The plaintiffs contended that the boat owner knew the men had been drinking all afternoon. The boat owner continued on page admitted that he took no steps to ensure that decedent or the other passengers put on life vests, stayed inside the salon, or took other precautions for their own safety.

The plaintiffs also argued that the boat owner defendant failed to conduct a proper search and was negligent in not notifying the Coast Guard immediately. The coroner testified that the victim was alive while in the water (i.e., he didn't have a heart attack and fall overboard) and could have survived long enough to be rescued.

The victim was 56 years old at the time of his death and in good physical condition. He was a boater himself and a good swimmer. He held a leadership position in the union's national office, earning close to $100,000 per year. The plaintiffs settled the case for $925,000 prior to trial, obtaining policy limits from the underlying carrier who insured the boat and additional funds from the carrier providing defendant's personal umbrella policy.

The Editors wish to thank Julia R. Brouhard of Ray, Robinson, Carle & Davies P.L.L. of Cleveland, Ohio for contributing this article.

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