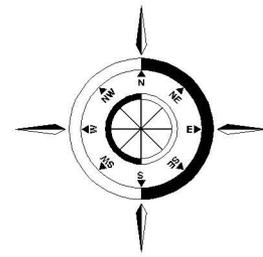


BOATING BRIEFS



Thomas A. Russell, Chairman
Volume 13 Number 2

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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

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No Coverage for Damage Due to Latent Defect

In 2002, the starboard diesel engine of Remy Fox's power boat exploded. The boat was insured by Northern Insurance Company. Northern denied coverage for the cost of replacing the engine on the grounds that the loss was the result of a latent defect. Fox sued Northern, his insurance broker and the engine manufacturer, MAN Engines & Components, Inc., in the U.S. District Court for the Eastern District of Pennsylvania. Fox claimed that he was owed coverage under the Northern policy for the replacement cost of the engine. In addition Fox sought punitive damages and damages for alleged violations of Pennsylvania consumer protection and insurance trade practices statutes by Northern. In a prior proceeding the district court dismissed all of the plaintiff's claims other than

breach of contract.

Northern moved for summary judgment on the remaining contract claim. In *Bull Star Ltd. v. Jack Martin & Assoc., Inc.*, 2004 U.S. Dist. LEXIS 16682 (E.D.Pa. 2004), the district court granted Northern's motion for summary judgment and dismissed the remaining claims against Northern.

The district court noted that the claims arose from a marine insurance policy and therefore were within the court's admiralty jurisdiction pursuant to 28 U.S.C. § 1331. However, citing the U.S. Supreme Court's decision in *Wilburn Boat* and noting that the coverage dispute turned solely on interpretation of the policy, the court held that Pennsylvania law applied to the claims at issue.

Northern maintained that

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the cost of replacing the boat's engine was excluded from coverage under the applicable policy. Northern's policy contained the following grant of cover: "We will cover the insured yacht against direct accidental physical loss or damage or any loss caused by a latent defect in the insured yacht, except as otherwise excluded..." The policy exclusions included the following language: "We will not pay for any of the following, or for loss or damage caused by or resulting from any of the

following...: [T]he cost of replacing or repairing any latent defect, any manufacturing defects or defective or improper design of the insured yacht."

In response to Northern's motion the plaintiff argued that the explosion of the engine was caused by a single defective component, a piston, and that he was therefore entitled to coverage for the damage to the remainder of the engine. In reaching its decision the district court relied on the un rebutted opinion of Northern's expert. The expert's report concluded that the explosion resulted

from the use of pistons of an inferior metal compound which were incompatible with the characteristics and operating parameters of the diesel engine. Based on this opinion the district court concluded that the explosion was caused by the design of the piston in relation to the rest of the engine, rather than a latent defect in the piston itself. In these circumstances the court held that the entire engine was defective, and the cost of replacement was thereby excluded from coverage under the Northern policy, which, according to the court, was unambiguous.

Second Circuit Clarifies Insurer's Obligations to Non-Permissive Users

In *Clementi v. Commercial Union Ins. Co.*, 92 Fed. Appx. 826; 2004 U.S. App. LEXIS 4694 (2nd Cir. 2004), the U.S. Court of Appeals for the Second Circuit addressed and clarified an yacht insurer's coverage obligations to "permissive users."

In July, 1999, several teenagers including Connor White, Sara Clementi and Franklin Lopez, sneaked into a locked marina and took the power boat GROUP THERAPY for a joy ride on Lake Erie. The ignition keys were in an unlocked compartment on the boat.

Connor White was thrown from the boat and sustained serious injuries when he was struck by the boat's propeller.

The boat owners filed a petition seeking exoneration or limitation of their liability pursuant to the Shipowner's Limitation Act, 46 U.S.C. App. § 181 et seq., in the U.S. District Court for the Western District of New York. Connor White filed a separate personal injury action against the boat owners and Sara Clementi. Clementi demanded that the boat's insurer provide her with a defense to White's

claims, maintaining that she was a permissive user under the policy. The insurer rejected the demand on the grounds that Clementi was not an insured under the policy.

Clementi filed a declaratory judgment action against the insurers in the same court and the case was consolidated with the boat owner's limitation action. The district court ruled that the boat owners had no liability to Connor White and were entitled to complete exoneration. In the same

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Government Obtains Discretionary Function Protection in Fourth Circuit

In an *en banc* decision, the U.S. Court of Appeals for the Fourth Circuit overruled the Court's own prior decisions and held that maritime claims against the U.S. Government under the Suits in Admiralty Act ("SAA") are subject to an implied discretionary function exception. *McMellon v. United States*, 2004 U.S. App. LEXIS (2004). The decision brings the Fourth Circuit into agreement with all other federal circuits which have addressed the issue.

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."

The *McMellon* case arose

from injuries sustained by jet ski operators on the Ohio River in West Virginia in August, 1999. The operators of the jet skis 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 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 entered summary judgment in favor of the United States, finding that although the government was not immune from suit, in this particular case the Corps of Engineers had no duty to warn the jet skiers of the dam. *McMellon v. United States*, 194 F. Supp.2d 478 (S.D.W.Va. 2002). The plaintiffs

appealed.

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 previously 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, in 1975 the Fourth Circuit Court of Appeals considered the argument and refused to imply a discretionary function exception in the SAA. *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975). The *Lane* decision was applied throughout the Fourth Circuit for more than twenty-five years.

In 2003, over a strong dissent, a panel of the Court of Appeals for the Fourth Circuit reversed the district court's decision in *McMellon*

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Operator's Criminal Conviction Voids Insurance Coverage

In *Littlefield v. Acadia Ins. Co.*, 2004 U.S. Dist. LEXIS 8410 (D.N.H. 2004), the U.S. District Court for the District of New Hampshire held that no insurance coverage was available under a yacht policy for an operator who was convicted of negligent homicide in a boating accident.

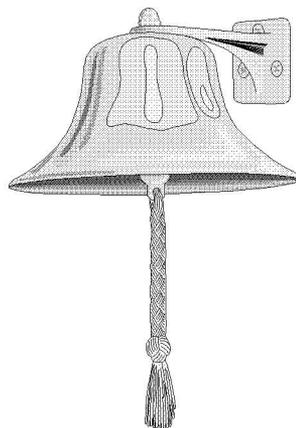
In August, 2002, a power boat operated by Daniel Littlefield, the boat owner's son, collided with another boat on Lake Winnepesaukee and killed a passenger on that boat. Littlefield was criminally charged and convicted of negligent homicide in connection with the passenger's death. The passenger's estate filed a civil suit for damages against Littlefield in state court. The boat's insurer, Acadia, denied coverage and refused to provide a defense to Littlefield. Littlefield filed a declaratory judgment action against Acadia.

The Acadia policy excluded coverage for "any loss, damage or liability willfully, intentionally or criminally caused or incurred by an insured person." Acadia moved for summary judgment in its favor on the question of coverage.

In its motion Acadia

argued that coverage was excluded because the loss in question was "criminally caused" by Littlefield within the meaning of the policy exclusion. In response Littlefield argued that the term "criminally caused" in the policy was ambiguous because it appears in the same sentence with the words "willfully" and "intentionally" without reference to negligence, thereby permitting a reasonable insured to conclude that only willful or intentional crimes are excluded.

The district court rejected Littlefield's argument and entered summary judgment in favor of Acadia, finding that "it is well understood that negligence can be criminal when it results in death."



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v. United States, 338 F.3d 287 (4th Cir. 2003). The panel agreed with the district court's finding that under the SAA the United States cannot avail itself of the "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 Government filed a petition for rehearing of the case by the Fourth Circuit, *en banc*, solely on the discretionary function exception issue. Writing for the Court, Judge Traxler reviewed the history of the SAA and decisions from other federal appeals courts. In a lengthy plurality opinion, the Fourth Circuit overruled both *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975) and the prior panel decision in the *McMellon* case. The case was remanded to the district court for a determination of whether the facts of the case warranted application of the discretionary function exception.

DOHSA Preempts Recovery of Non-Pecuniary Damages Under State Law

In November, 1998, Lien Tran and Hong Quy Vo drowned when a 19 foot Cobia boat on which they were passengers capsized approximately 25 nautical miles off the coast of Georgia. The decedents' representatives filed suit in a Georgia state court against the boat's manufacturer and others. In addition to seeking pecuniary losses under the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (DOSHA), the plaintiffs also sought to recover damages for the decedents' pain and suffering under a Georgia survival statute.

The defendants filed a motion for summary judgment, arguing that recovery of non-pecuniary damages pursuant to state law is precluded in a case governed by DOHSA. The trial court granted the defendants' motion, ruling that state courts are prohibited from applying state law based claims when DOHSA applies. The plaintiffs appealed.

In *Vo v. Yamaha Golf Car Co.*, 267 Ga.App. 742, 600 S.E.2d 594 (Ga. Ct. App. 2004), the Georgia Court of Appeals affirmed

the lower court's ruling and held that where DOSHA applies it provides the sole remedy in a death action and therefore preempts application of state law causes of action.

The plaintiffs' complaint in *Vo* alleged the right to



recover non-pecuniary damages for the decedents' conscious pain and suffering under a Georgia state survival statute. DOHSA applies to all maritime causes of action for deaths which occur more than "one marine league" or three nautical miles offshore of any state.

DOHSA provides a cause of action to the decedent's survivors and only permits recovery of compensatory, pecuniary losses resulting from the death.

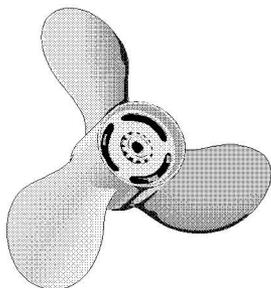
In reaching its decision, the Georgia Court of Appeals discussed the U.S. Supreme Court's decisions in *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986) and *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998), noting that neither decision addressed the specific issue before the court in *Vo*, that is, whether state law survival actions are preempted by DOSHA. In the *Tallentire* case the Supreme Court held that DOHSA precluded the recovery of non-pecuniary damages by a survivor (loss of society and consortium) under a state wrongful death statute, but expressly left open the question of whether damages for pain and suffering recoverable under a state survival statute were also preempted. In the later *Dooley* case, the plaintiffs claimed non-pecuniary damages for the decedent's pain and suffering under the general maritime law of the United States. In *Dooley*, the

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Supreme Court held that DOHSA contains a survival cause of action which limits recovery to pecuniary losses and, therefore, preempts application of a survival cause of action under the general maritime law.

The Georgia Court of Appeals held that the Supreme Court's decision in *Dooley* "changed the law" and brought into question the relevance of decisions permitting a state law survival action to supplement DOSHA in cases decided prior to *Dooley*. Applying *Dooley*, the Court held that the Supreme Court's rationale in precluding the right to recover non-pecuniary damages under the general maritime law in a DOHSA case applies with equal force to non-pecuniary damages pursued under a state law survival statute. Accordingly, the Court held that the plaintiffs' recovery was limited to pecuniary losses under DOSHA and that the claims for the decedents' pain and suffering under Georgia state law were preempted.



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opinion the district court held that Clementi's declaratory judgment action against the insurers was "moot" light of its decision in the owner's limitation action. *Group Therapy Inc. v. White*, 280 F.Supp.2d 21 (W.D.N.Y. 2003). Clementi appealed the district court's judgment.

On appeal the Second Circuit affirmed the district court's ruling that the boat's owners were entitled to exoneration from liability. The Court of Appeals held that "under federal maritime law a boat owner owes no legal duty to a person who is aboard for purposes inimical to legitimate interests of the owner" and, therefore, the owners owed no duty to White who was a trespasser.

However, the Second Circuit held that the district court had erred in dismissing Clementi's coverage action against the insurers on the grounds that the claim was moot. The Court observed that although the coverage dispute arose from the same set of operative facts, the decision to exonerate the owners was not dispositive of Clementi's claims against the insurers.

Notwithstanding the reversal of the district court's judgment, the Second Circuit addressed Clementi's claims directly in the appeal and remanded with instructions to dismiss her Complaint against the insurers. The

court observed that it would be improper to dismiss Clementi's claims by way of summary order unless "it could be concluded as a matter of law that there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured..." Clementi maintained that she was a "permissive user" entitled to coverage because she was given permission to board the boat by Franklin Lopez (who instigated the theft), purportedly without knowledge of the identity of the true owners. The Court of Appeals held that such a "derivative" claim of permissive use is legally insufficient to create a right to insurance coverage. The court concluded that permissive user status cannot exist without a direct consensual link between the true owner and the individual claiming permissive user status. In these circumstances the court held that there was no legal basis whatsoever on which the insurers might be obligated to indemnify Clementi and, accordingly, her action should be dismissed.

Expert Opinion Excluded in Pleasure Boat Accident Case under *Daubert*

In his decision in *Roane v. Greenwich Swim Committee*, 330 F.Supp.2d 306 (S.D.N.Y. 2004), Judge Charles Haight of the U.S. District Court for the Southern District of New York ruled that certain expert opinions offered by the plaintiff were inadmissible under the standards developed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The plaintiff, Steven Roane, was a participant in the Greenwich One Mile Swim in July, 2000. Walter McDermott was the owner and operator of a 27 foot power boat and had volunteered to provide assistance during the event. Roane tired during the swim and signaled for assistance. McDermott went to his aid. As McDermott's boat approached, Roane was instructed to board the vessel via the swim platform which extended approximately thirty inches from the stern of the boat and was equipped

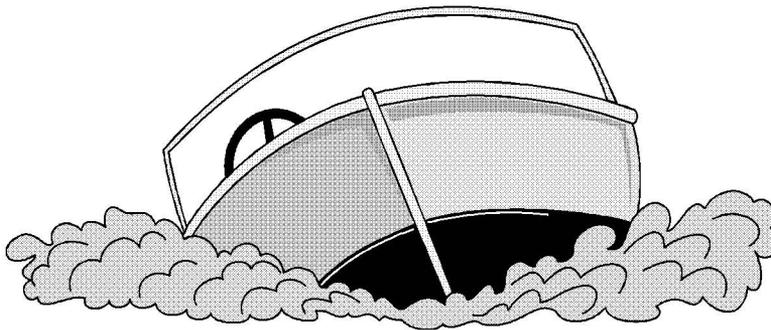
with a swim ladder. After several unsuccessful attempts to board the boat, Roane slipped into the water beneath the boat, was struck by the starboard propeller and sustained severe injuries.

Roane filed suit against McDermott, the Greenwich Swim Committee and the boat's manufacturer, S2 Yachts, Inc. The suit alleged diversity of citizenship as the basis of the court's subject matter jurisdiction. The manufacturer filed a motion to strike certain expert opinions offered by Roane in support of his allegations that his injuries were caused by design or manufacturing defects and for summary judgment in its favor on the product liability claims.

Before turning to the issues raised by the manufacturer's motion, the district court engaged in a lengthy analysis to determine whether the plaintiff's claims

fell within the court's admiralty jurisdiction and were therefore governed by federal maritime law. The court concluded that all claims fell within the court's admiralty jurisdiction under the tests articulated by the U.S. Supreme Court. In considering whether Roane's claims against McDermott the Greenwich Swim Club satisfied the test for admiralty jurisdiction over tort-based claims, the court characterized those claims as "life salvage." Observing that claims for life salvage are traditionally determined by a federal court pursuant to admiralty jurisdiction, the district court concluded that such claims bear a relationship to traditional maritime activity, thereby satisfying one prong of the two prong jurisdictional test.

In the course of the litigation Roane produced an expert report prepared by Mr. Rick van Hemmen. The report identified various factors which allegedly contributed to Roane's injuries and was offered in support of the plaintiff's product



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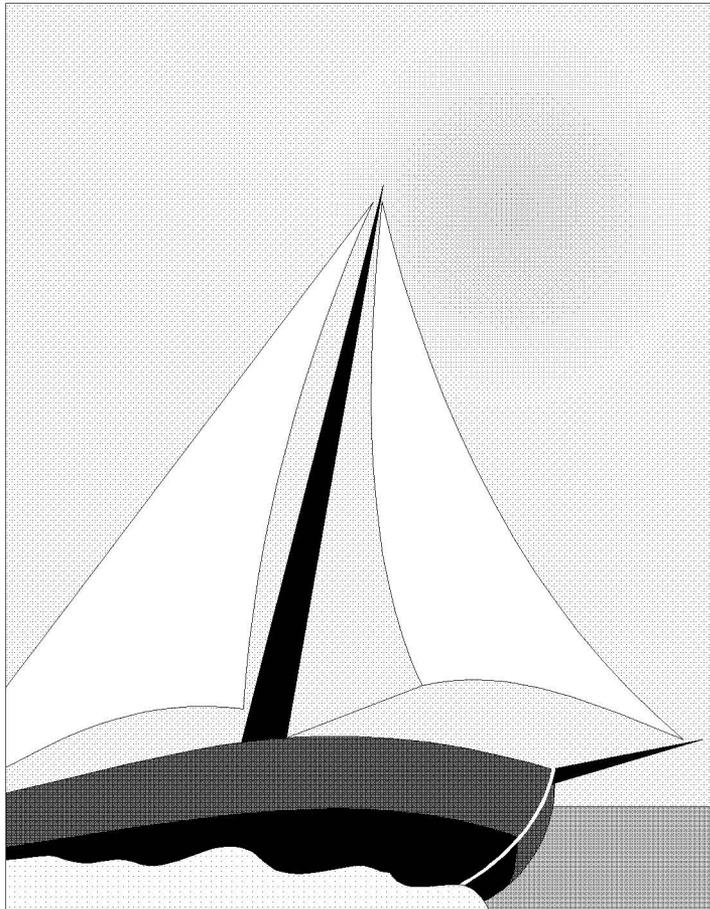
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claims against the manufacturer as well as the negligence claims against McDermott and Greenwich Swim Club. The boat's manufacturer moved to exclude the expert's opinions regarding alleged manufacturing defects.

In his report the plaintiff's expert concluded that the design of the boat's swim platform was defective in that the design placed swimmers dangerous close to the outdrives. The expert suggested alternative designs which would have in his opinion reduced the risk. The expert also concluded that the manufacturer failed to provide warnings to the operator regarding the risk to swimmers in the vicinity of the swim platform and that the failure to warn contributed to the plaintiff's injuries.

The expert's report recited that the opinions were based on inspection of photographs of the boat, review of the plaintiff's injuries and medical records and analysis of deposition testimony taken in the case. The manufacturer argued that the opinions relating to

alleged improper design and failure to warn must be excluded by the court under the Supreme Court's *Daubert* decision because the expert: (a) conducted no tests to support his opinions; (b) never physically observed the boat; (c) included no measurements, drawings or calculations in his report; (d)



offered no evidence of the actual use of the proposed alternative designs; and, (e) did not subject his theories to peer review or publication.

In addressing the manufacturer's motion to exclude the expert's opinions, the district court made it clear that the expert's

qualifications as an engineer, designer, naval architect and risk assessment consultant were not at issue. However, the district court found that the methodology used by the expert to reach his conclusions failed to satisfy the test of reliability set forth by the Supreme Court in *Daubert*. In *Daubert* the

Supreme Court held that a district court should consider four factors to determine whether expert testimony is sufficiently reliable: (1) whether a theory or technique can be and has been tested; (2) whether it has been subject to peer review and publication; (3) whether it has a high known or potential rate of error; and, (4) whether it is generally accepted in the relevant scientific community.

Having determined that the *Daubert* standard was not satisfied, the district court held that the expert's opinions regarding defective design and failure to

warn were inadmissible. In these circumstances the court held that plaintiffs could not make out a prima facie case of liability against the manufacturer, thus entitling the manufacturer to summary judgment in its favor.

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Other Recent Cases of Interest

Admiralty Jurisdiction

***Ramirez v. Butler*, 319 F.Supp.2d 1034 (N.D.Ca. 2004).** Plaintiff sued marina and others for alleged wrongful conversion of two sailboats. The boats were sold at auction after the marina asserted a lien for unpaid slip fees and other charges. As diversity of citizenship was lacking, the plaintiff asserted admiralty jurisdiction as the basis of the court's subject matter jurisdiction. The defendants moved to dismiss for lack of jurisdiction. Although the alleged conversion admittedly occurred on navigable waters and had a "substantial relationship to traditional maritime activity," the district court concluded that the alleged wrong did not have "a potentially disruptive impact on maritime commerce" of a nature sufficient to satisfy the second prong of the test for admiralty tort jurisdiction as set forth by the U.S. Supreme Court in *Sisson v. Ruby*, 497 U.S. 358 (1990) and *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

***Petition of Lavender*, 2004 U.S. Dist. LEXIS 14763 (S.D.Fl. 2004).** Owners of recreational boat which caught fire and damaged four

other boats, all of which were in dry storage on land, filed a petition for exoneration or limitation of liability pursuant to the Shipowner's Limitation Act, 46 U.S.C. § 181 et seq. The claimants moved to dismiss for lack of admiralty subject matter jurisdiction. The district court concluded that admiralty jurisdiction was lacking due to the fact that the fire occurred on land and posed no hazard to maritime commerce.

***Van Deurzen v. Yamaha Motor Corp.* 2004 Wisc. App. LEXIS 777 (Wi. Ct. App. 2004).** The Wisconsin Court of Appeals affirmed the trial court's finding that a jet ski accident on Little Lake Butte des Morts on the Fox River in Wisconsin was governed by federal maritime law. The accident resulted in serious injuries to the plaintiff, fourteen year old Steven van Deurzen. The plaintiffs filed suit two weeks after the third anniversary of the accident against the manufacturers of the jet skis and others. A few days before trial the plaintiffs informed the court that they intended to rely on federal maritime law rather than Wisconsin state law. During the trial the plaintiffs presented the testimony of an Army Corp of Engineers

employee who testified that the location of the accident was considered a navigable waterway by the Corp. Based on this testimony the trial court indicated that it would probably rule in favor of applying maritime law. In response the defendants moved to dismiss the complaint as time-barred under the three year federal maritime statute of limitations in 46 U.S.C. App. § 763. The trial court entered a judgment J.N.O.V., dismissing the case as time-barred. On appeal the plaintiffs below argued that the trial court's application of maritime law was in error. The Court of Appeals held that the plaintiffs were judicially estopped from arguing that the claims were not governed by maritime law, notwithstanding evidence presented on appeal that the waters in question are not currently capable of sustaining maritime commerce.



Attorneys Fees & Punitive Damages

***DeRossi v. National Loss Mgmt.*, 328 F.Supp.2d 283 (D.Ct. 2004).** Boat owner brought action against his insurers after the insured yacht sank in Lake George. In addition to seeking coverage under the policy, the insured's Complaint sought recovery of attorneys fees and punitive damages based on alleged violations of Connecticut statutes governing unfair trade practices and unfair insurance practices. The district court dismissed the plaintiff's claims under the Connecticut Unfair Insurance Practices Act on the grounds that no private cause of action exists under the statute. The district court also dismissed the plaintiff's claims for attorneys fees and punitive damages under the Connecticut Unfair Trade Practices Act. The court held that the plaintiff's state law claims under CUTPA were in conflict with established principles of federal maritime law governing the availability of an award of attorneys fees or punitive damages. In these circumstances the court concluded that application of the state statute in an insurance dispute was preempted by federal law under the doctrine established by the Supreme Court in *Wilburn Boat*.

(Thanks to Committee Member Fred Lovejoy for bringing this case to the Editor's attention.)

***Petition of Meier*, 223 F.R.D. 514 (W.D.Wi. 2004).** Boat owner filed petition for exoneration or limitation of liability under the Shipowner's Limitation Act, 46 U.S.C. App. § 181, et seq. in connection with a boating accident and resulting death on the waters of the Rock River in Wisconsin at a location between two dams. The district court dismissed the action for lack of subject matter jurisdiction, concluding that the waters on which the incident occurred were not navigable for the purposes of admiralty subject matter jurisdiction. The owner offered evidence that the Army Corp of Engineers considered the Rock River to be navigable. However, the incident occurred at a location between two lockless dams. Thereafter the claimants filed a motion under F.R.C.P. 11 and 28 U.S.C. § 1927 seeking an award of attorneys fees against the owner, alleging that the owner's filing of the limitation action was unreasonable and ungrounded in law. In support of their motion the claimants alleged that they had placed the owner's counsel on notice of the jurisdictional defects prior to

filing a formal motion and that the notice was "ignored." The district court found that the owner violated F.R.C.P. 11 by failing to conduct a reasonable investigation of the governing principles of law and the specific location of the incident before filing the action. The court awarded attorney fees to the claimants.

Bankruptcy

***Delph v. Dilk*, 311 B.R. 758 (S.D.In. 2004).** In 2001, a power boat owned and operated by Daniel Dilk collided with Randall Delph's boat, resulting in serious injuries to Delph. Dilk was intoxicated at the time of the accident. Thereafter Dilk and his wife filed for bankruptcy protection. Delph filed an adversary complaint in the bankruptcy proceeding seeking a determination that any damages awarded to Delph as a result of his injuries were not dischargeable in bankruptcy. Specifically Delph argued that his claim was not subject to discharge under 11 U.S.C. § 523(a)(9), which exempts from discharge any debts resulting from "death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using

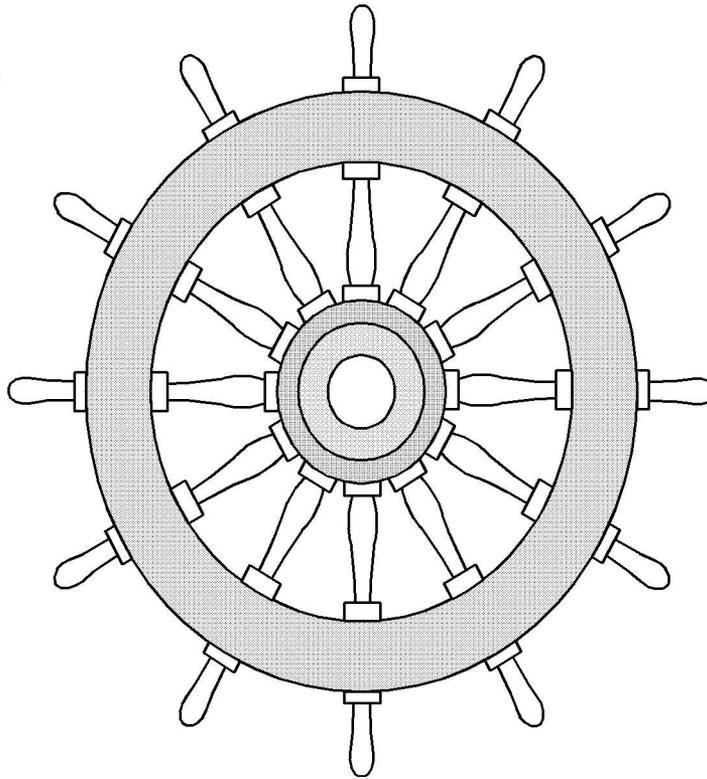
alcohol, a drug or other substance.” The debtor moved to dismiss Delph’s adversary complaint, arguing that the term “motor vehicle” in the statute does not include a motorboat and, therefore, Delph was not entitled to relief under that section.

Recognizing that a literal interpretation of the statute would seemingly preclude application to water craft, the bankruptcy court found that it was both entitled and compelled to look beyond the literal meaning to avoid a result that would conflict with the statutes’ purpose. After reviewing the legislative history, the bankruptcy court concluded that Congress never intended the statute’s application to be limited to road vehicles and that the failure to specifically include the term “water craft” in the statute was the result of an oversight. Accordingly, the court held that Congress intended “motorboats” to fall within the purview of the statute, making claims against a debtor for damages resulting from a boating accident non-

dischargeable in bankruptcy.

Criminal

State of Wisconsin v. Hoffman, 2004 Wisc. App. LEXIS 773 (Ct. App. 2004). Appeal from conviction for homicide by negligent operation of a vehicle. Lawrence Hoffman was the owners and operator of a 37 foot Sea Ray power



boat. While operating on Lake Michigan in 1999, Hoffman’s boat collided with a small fishing boat, killing one of the occupants. Hoffman’s boat was operating on autopilot prior to the incident. Hoffman left the helm for a brief period prior to the collision but a passenger, Levernier, remained at the helm during

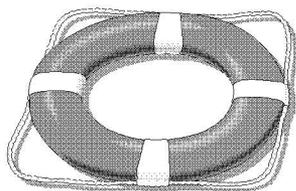
his absence. On appeal from his conviction Hoffman argued that the trial court’s jury instructions were inadequate in various respects. In particular Hoffman claimed that the trial court committed reversible error by refusing to submit a jury instruction on negligent entrustment, the centerpiece of Hoffman’s defense. Hoffman requested an instruction which assumed that he had entrusted operation of the boat to the passenger Levernier and instructed the jury that he could not be found liable unless the jury concluded that he know or should have known that Levernier would fail to operate the boat in a reasonable manner. The Court of Appeals rejected Hoffman’s points of error and affirmed the conviction.

Commonwealth of Pennsylvania v. Lehman, 2004 Pa.Super 324 (Sup.

Ct. 2004). The state appealed from an order of the trial court suppressing evidence of a boat operator’s intoxication on the grounds that the evidence was obtained without reasonable suspicion of criminal activity or probable cause to stop the defendant’s power boat. A Coast Guard officer and a

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local law enforcement officer received an unsolicited tip that the defendant was seen leaving a bar with an open container of alcohol and boarding his boat. The officers pursued and stopped the defendant's boat on Lake Erie. They did not observe any erratic or unusual operation of the boat prior to the stop. Upon boarding the defendant's boat the officers detected the smell of alcohol. Field sobriety tests were given and the defendant was arrested and charged with boating under the influence. The trial court found that the officers lacked probable cause to stop and board the boat, thereby making it illegal under the U.S. and Pennsylvania Constitutions. As a result, the trial court entered an order suppressing all evidence obtained as a result of the stop. On appeal, the Superior Court affirmed the trial court's findings and specifically rejected the Coast Guard officer's testimony that the sole purpose of stopping the defendant's boat was to conduct a routine safety



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In the same opinion, the district court also addressed the plaintiff's cross-motion for summary judgment to strike the defendants' affirmative defense alleging that Roane's execution of a waiver form effectively released McDermott and Greenwich Swim Club from liability for his injuries. The form signed by Roane prior to the race stated that he agreed to "waive and release any and all rights and claims for damages I may have...for any and all injuries suffered by me..." McDermott and Greenwich Swim Club argued that Roane released all claims against them by signing the form. Although noting that the word "negligence" need not always appear in a liability waiver form to render it effective, the district court concluded that "words of similar import" clearly conveying that a party will not be liable to the signer for his own negligence must be present if the word "negligence" does not appear. The court observed that the waiver form signed by Roane contained no language indicating that the defendants were relieved of injuries resulting from their own negligence and, accordingly, that the waiver form was unenforceable.

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