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

BOATING BRIEFS

Frank P. DeGiulio, 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

Limitation Action Dismissed for Lack of Admiralty Jurisdiction; Claimant's Request for Sanctions Denied

In *Petition of Johnson*, 2007 U.S. Dist. LEXIS 20467 (D. Conn. March 2, 2007), the U.S. District Court for the District of Connecticut dismissed a limitation action for lack of jurisdiction where the underlying collision occurred on a lake that was entirely within the borders of one state and had no connecting waterways capable of supporting interstate or foreign commerce.

On a July evening in 2005, a Formula 223LS collided with a Fever Fountain on Candlewood Lake in western Connecticut. Gary Anderson, the owner and operator of the Fountain, brought a negligence suit in state court against Mathew Johnson, the owner and operator of the Formula. Johnson then filed a federal limitation action, which Anderson moved to dismiss for lack of subject matter jurisdiction. Anderson also moved for Rule 11 sanctions against Johnson's attorneys, claiming the limitation petition was frivolous because there was no possibility of the court exonerating him or limiting his liability given the circumstances of the collision.

In view of the uncontested evidence that Lake Candlewood was situated wholly within the state of Connecticut and had no outlets that were passable by vessels, the court readily concluded that the lake was not navigable for purposes of admiralty tort jurisdiction. Surveying the numerous appellate decisions which have held that the Limitation Act is not an independent basis for federal jurisdiction, the court concluded that the action could proceed only if the collision itself would have given rise to admiralty jurisdiction. Inasmuch as the lake was not navigable, the "location" requirement for admiralty tort jurisdiction was not satisfied.

Johnson relied on *Richardson v. Harmon*, 222 U.S. 96 (1911), a ship-to-shore allision case in which the U.S. Supreme Court held that a district court had jurisdiction to hear a limitation action even though at the time of that decision (prior to the Admiralty Extension Act) such an incident would not have qualified as a maritime tort. While agreeing that *Richardson* "undeniably holds that the Limitation of Liability Act is capable of conferring independent jurisdiction beyond admiralty jurisdiction," the court was persuaded by the weight of authority in the U.S. Courts of Appeal and concluded that *Richardson* has no application where the underlying accident occurred on non-navigable waters.

The court issued a separate opinion denying Anderson's request for Rule 11 sanctions against Johnson's counsel. 2007 U.S. Dist. LEXIS 20461 (March 2, 2007). Anderson contended that it would have been impossible for Johnson to limit his liability given the evidence that he had been speeding and suddenly reduced his speed moments before collision, that he failed to observe the lights on Anderson's vessel, and that he had been arrested for (1) operating the vessel recklessly, (2) violating Connecticut's Rules of the Road, and (3) violating a local speed ordinance. Anderson also claimed that the limitation action was an improper attempt to take the case out of state court and force a settlement.

The court noted that attorneys are generally entitled to rely on a client's objectively reasonable representations and that sanctions may be imposed only where the attorney's submission is utterly lacking in support. In this case Johnson and the three other individuals aboard his vessel had stated that they saw no lights on Anderson's vessel before the collision. Accordingly, there was at least some evidentiary basis for filing the limitation action and claiming a right to exoneration or limitation, and thus no sanctions were warranted.

Insurance Coverage

Uberimmae Fidei in the Virgin Islands

In *AGF Marine Aviation & Transport v. Cassin*, 2007 U.S. Dist. LEXIS 6749 (D.V.I. Jan. 22, 2007), the U.S. District Court for the District of the Virgin Islands held that overstating a vessel's purchase price in an insurance application is a violation of the doctrine of *uberimmae fidei* and is a basis for voiding the policy.

In March 2000, Richard Cassin obtained marine insurance on the SV FALCON, an 85-foot pilot-house Formosa Ketch he purchased in 1997. The policy was issued by AGF Marine Aviation. Although he paid only $400,000 for the vessel, he claimed on the application for insurance that the purchase price of the vessel was $600,000. AGF issued a marine insurance policy to Cassin in the amount of $600,000 covering the FALCON from April 1, 2000 to April 1, 2001. When the FALCON sank in November 2000, after colliding with a submerged shipping container off the coast of Grenada, Cassin filed a claim on the policy.

In reviewing the claim, AGF discovered that Cassin had reported the purchase price as $600,000 when in fact he purchased the vessel for only $400,000. AGF filed an action against Cassin, seeking a declaration from the federal court that the Policy was void *ab initio*. AGF moved for summary judgment on the basis that Cassin's misstatement of the purchase price amounted to a material misrepresentation which violated the doctrine of *uberrimae fidei* and was a ground for voiding the policy.

One of the policy provisions stated that the insurance agreement would be subject to the "well established entrenched principles and precedents of substantive United States Federal Admiralty law," but issues not encompassed by such well established, entrenched, federal admiralty law would be subject to the "substantive laws of the state of New York." Thus, the court sought to determine whether the doctrine of *uberrimae fidei* is established federal admiralty law.

Faced with no help from the Third Circuit Court of Appeals, which had not yet ruled on the issue, the court looked to other jurisdictions and found that (1) the Second, Ninth and Eleventh Circuits had held that the doctrine is establish federal admiralty law, (2) district courts in the Third, Fourth and Seventh Circuits have employed the doctrine of *uberrimae fidei* in the context of marine insurance contracts, and (3) only the Fifth Circuit has explicitly stated that the doctrine is not "entrenched federal precedent."

Agreeing with the majority of federal courts, the court found the doctrine of *uberrimae fidei* to be established federal admiralty law, and applied the doctrine to Cassin's policy, while stating that the Policy was subject to New York law only in areas not governed by the doctrine. Relying on testimony from expert witnesses which indicated that AGF would not have issued Cassin a policy had it known that the vessel had been purchased for $400,000 instead of $600,000, the court found Cassin's incorrect statement of the purchase price to be a material misrepresentation violating the doctrine and voiding his policy. Accordingly, summary judgment was entered in favor of AGF.

Lay-Up Warranty Requires Engine Winterization

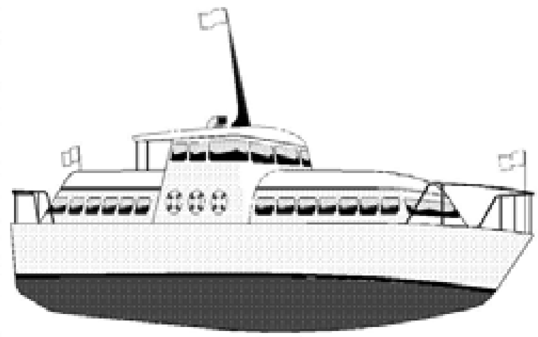
New Hampshire Insurance Co. v. Dagnone, 475 F.3d 35 (1st Cir. 2007).

Nicholas Dagnone owned a 49-foot 1993 bluewater yacht, which he insured with New Hampshire Insurance Company ("NHIC"). In 2003, Dagnone renewed his policy for the period of September 18, 2003 until September 18, 2004. The policy stated as follows:

> 1. RESTRICTIONS ON THE USE OF YOUR YACHT: There are certain restrictions on the use of your yacht under this policy. We shall not cover losses that occur while your yacht is being used in any way that is prohibited by this policy.
>
> . . .
>
> (d) Your yacht must be laid-up and out of commission during the period shown on the declarations.

The "declarations" to which the policy referred stated: "Waranteed [sic] that the described yacht shall be laid up and out of commission and not used by the insured for any purpose during the period from 10/31 (at 12:01 am) to 4/15 (12:01 am)."

Dagnone contracted with a local captain to winterize his yacht and take it from Goat Island to Hinckley Yacht Services, a boat yard and marina in Portsmouth, Rhode Island. On November 22, 2003, the captain motored Dagnone's yacht to the Hinckley marina, docked the yacht there, and left the keys in the yacht; at this time all of the procedures for winterizing the yacht had been completed except for anti-freezing the engines. Dagnone's yacht remained docked at Hinckley marina from November 22 until December 6, 2003, when a storm struck the marina causing the yacht to break loose from the dock and suffer $38,327 in damages, after which time the yacht was taken out of the water and the anti-freezing of the engines was performed. (We previously reported in 15 BOATING BRIEFS NO. 1 (2006) on the outcome of Dagnone's lawsuit against the Hinkley marina.)



Dagnone filed a claim with NHIC for the damage to his yacht. NHIC denied the claim, asserting that Dagnone had failed to comply with the provisions in the policy requiring that the yacht be "laid up and out of commission" between October 31 and April 15. The trial court agreed with NHIC and granted summary judgment in its favor. Dagnone appealed, and the First Circuit affirmed the trial court's ruling.

Because the contract of marine insurance was concluded in New York and both parties were New York residents, the First Circuit looked to New York law to interpret the contract. Dagnone contended that the policy only excluded coverage for "losses that occur while your yacht is being used," and because his yacht was not in fact "being used" at the time of the accident, no exclusion was applicable. The court disagreed, stating that the yacht was still "being used," in the sense that it was in the water rather than being "laid up and out of commission." Moreover, the court concluded that full winterization was required to render the yacht "laid up and out of commission." Because Dagnone had not taken the final step to winterize his boat, namely to anti-freeze the engines, it was not "laid up and out of commission." NHIC accordingly was not responsible for covering the damage to Dagnone's yacht.

Offshore Navigation Limit Extended By "Special Agreement"

Grande v. St. Paul Fire & Marine Ins. Co., 460 F. Supp. 2d 170 (D. Me. 2006).

Frank P. Grande, a resident of Maine, purchased a 44-foot sailing vessel in Florida, with financing provided by his cousin. Without revealing his cousin's interest in the vessel. Grande contacted the Charter Lakes Marine Insurance agency to obtain insurance on the new vessel. Grande had used Charter Lakes to place insurance on the vessel he previously owned.

Grande's previous insurance policy, issued by St. Paul Fire and Marine Insurance Company ("St. Paul"), contained a navigational limit which read: "Atlantic coastal waters of the United States between Eastport ME and Saint Marys, GA not more than 100 miles from shore. Coastal Atlantic - Maine." Before leaving Florida on the new vessel, Grande contacted Charter Lakes to confirm that insurance was in place for his trip from Florida to Maine, for which Grande paid an additional premium of $150. According to Grande, he informed Charter Lakes that he would be making the trip "as the crow flies" (which would take the vessel more than 100 miles offshore) and Charter Lakes told him the insurance was in place and he was "good to go."

During the trip from Florida, off Cape Hatteras, North Carolina, Grande observed four water spouts in the distance and took evasive action by traveling east, beyond 100 miles from shore. At this point one of the lower shrouds that secured the mast snapped and it was clear the mast was itself in danger of snapping. The condition of the Grande's vessel and severe weather eventually made it necessary for a Coast Guard helicopter to rescue Grande and his crew and to abandon his vessel more than 100 mile offshore. Grande filed a notice of claim with Charter Lakes, which was denied by St. Paul because Grande was outside of the navigational limits as defined by the Declarations Page of his policy. Grande soon thereafter received a copy of his insurance policy from St. Paul, which gave the navigational limitation as "Atlantic coastal waters of the United States between Coconut, FL and Long Cove, ME not more than 100 miles from shore."

Grande filed suit against Charter Lakes and St. Paul, alleging breach of contract and various other claims and arguing that there was a special agreement between him and St. Paul that there would be no 100-mile limit for his trip from Florida to Maine. The district court originally granted judgment as a matter of law for Charter Lakes and St. Paul. As previously reported in 15 BOATING BRIEFS NO. 1 (2006), the First Circuit reversed that decision, holding that there were questions of fact as to whether there was a "special agreement" between Grande and St. Paul to provide coverage for the trip "unconstrained by a 100-mile limit," and as to whether Grande's cousin's interest in the vessel was material to the risk insured by St. Paul.

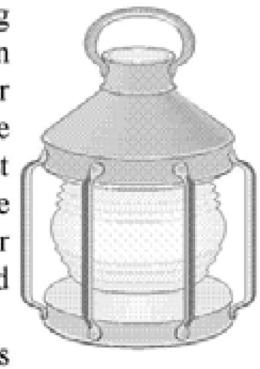
After a jury trial, the jury returned a verdict for Grande against St. Paul and Charter Lakes for $79,579. St. Paul and Charter Lakes then filed a consolidated motion for judgment as a matter of law or for a new trial, asserting that was no evidentiary basis for the jury's verdict that there was a special agreement between the parties that coverage for the trip from Florida to Maine was not subject to the 100-mile limit, and arguing that no reasonable jury could conclude that Grande did not misrepresent or conceal material facts.

The court found that substantial evidence supported the jury findings that the parties had entered into a special agreement and that Grande's cousin's ownership interest was not material to the issuance of the policy. The court noted that it could grant a new trial only if the verdict was "against the clear weight of the evidence, such that letting it stand would result in a miscarriage of justice." Giving deference to the witness testimony presented at trial, the court concluded that St. Paul and Charter Lake had failed to meet this extremely high burden.

Racing Exclusion

The Continental Insurance Co. v. Collinsworth, 2006 AMC 746 (Fla. 5th Cir. Ct. 2006)

Two high performance boats, capable of reaching speeds over 110 mph, owned and operated by Collinsworth and Crockford, respectively, collided, killing Collinsworth and seriously injuring Crockford. The Continental Insurance Company ("Continental") provided coverage for Collinsworth's vessel. Crockford filed an action seeking to recover damages for his injuries sustained in the collision.



Continental filed its own action for declaratory judgment claiming that a "racing exclusion" contained in Collinsworth's policy barred coverage for Crockford's claims. The issue for the trier of fact was whether Crockford and Collingsworth were racing at the time of the collision. The case was the subject of an earlier decision in the Florida Fifth District Court of Appeal (reported in 14 BOATING BRIEFS NO. 1 (2005)), which held that the term "any speed race" as used in the policy meant "any contest of speed," whether officially sanctioned or not. On remand the court conducted a bench trial and issued its findings of fact.

At trial multiple witnesses testified that Collinsworth, Crockford and others would often "cruise side by side going approximately 80 mph," but were not racing when they would operate their vessels in this manner. Crockford testified that he and Collinsworth were not involved in "a contest of speed" or "trying to outrun each other" at the time of the collision. The court concluded that the evidence was uncontroverted that the two men had not planned or agreed to race prior to the collision, finding it significant that at the time of the collision neither boat "was traveling at anywhere near the top speed of that boat." Continental provided any evidence to support its contention that due to the lake conditions 80-85 mph was the top speed Collinsworth and Crockford could have gone on the day of the accident. The judge further determined that Continental's witnesses did not know the intent of Collinsworth and Crockford and simply "assumed" or "speculated" that the men were racing because the boats were traveling side by side at what the witnesses considered to be a high speed.

The court accordingly found that Continental had not met its burden of establishing by the greater weight of the evidence that Collinsworth was engaged in a race at the time of the accident, and instead concluded that the objective evidence and factual testimony supported Crockford's testimony that the boats were not racing but rather were pacing each other at the time of the collision. The racing exclusion therefore did not exclude coverage for claims arising from the collision.

The Editors wish to thank Roger Vaughan, Esq. of Tampa for bringing this decision to their attention.

Broker Authority

In *Markel American Insurance Co. v. Madonna*, 448 F. Supp. 2d 234, 2006 AMC 1758 (D. Mass. 2006), the court held there was no coverage where the insurance broker, acting as an agent of the insured, attempted to procure coverage but never received a response from the insurer.

Robert Madonna owned two vessels and insured them with Markel American Insurance Company. To obtain such coverage, Madonna had contacted Cape Wide, an insurance broker, which in turn had contacted XS Brokers Insurance Agency, Inc. XS Brokers was a "marketing general agent" of Markel and had a contract to sell Markel's insurance products.

Around June 2003, Madonna sold the two insured vessels and purchased two new vessels. Madonna approached Cape Wide, giving them instructions to transfer the Markel policies to the two new vessels, which had a greater value than the previously-insured vessels. Cape Wide sent a fax to Markel, requesting that the policies be transferred in accordance with Madonna's request; Cape Wide had no authority to bind Markel directly. The undisputed facts established that Markel never responded to these requests, never issued any insurance for these vessels, and never increased the premiums to cover the increased value of the vessels.

In December 2003, one of the new vessels burned and was a total loss. When Madonna sought recovery for his loss, Markel denied having received Cape Wide's fax and accordingly denied coverage. Markel filed an action for declaratory judgment, and Madonna brought claims against Cape Wide and Markel to recover for his losses.

Markel moved for summary judgment on the basis that Cape Wide was acting as Madonna's agent, not Markel's; therefore, Cape Wide's failure to procure coverage for the vessel could not result in any liability for Markel. Relying on *Travelers Indem. Co. v. Nat'l Indem. Co.*, 292 F.2d 214, 220 (8th Cir. 1961), the court agreed with Markel that when an insurance agent is employed to procure insurance, "he is the agent of the person for whom the insurance is procured insofar as matters in connection with the procurement are concerned." The court further stated that because Cape Wide had no fixed and permanent relationship with Markel, and merely submitted applications to Markel, Cape Wide was acting as an insurance broker and was therefore the agent of Madonna. The court found that Cape Wide had no apparent authority to bind Markel, reasoning that it was only Markel's actions, and not Cape Wide's actions, towards Madonna that could create apparent authority. As there was no evidence whatsoever that Markel's conduct caused Madonna to reasonably believe that Cape Wide was Markel's agent, no apparent authority existed.

Madonna also failed in his contention that he was a third-party beneficiary of the agency relationship between Cape Wide and Markel. The court reasoned that because there was no actual contract between Cape Wide and Markel which would have required Markel to issue a policy just because Cape Wide applied for coverage, Madonna could not recover as a third-party beneficiary. Accordingly, Markel was entitled to summary judgment declaring that it had no obligation to cover the loss.

Theft of Vessel

Gaffey v. Acadia Insurance Co., 453 F. Supp. 2d 236 (D. Mass. 2006).

Acadia Insurance Company ("Acadia") issued Brian Gaffey a policy of insurance for his vessel for the period October 10, 2002 to October 10, 2003. The policy provided coverage for any "sudden and accidental, direct, physical loss of or damage to the insured property due to an external cause," but Acadia would not provide coverage if the vessel was stolen "unless there are visible marks of forcible entry or removal, or the entire yacht is stolen."

In May of 2003, Gaffey orally agreed to purchase a new vessel from a yacht broker if the broker could arrange for the sale of the insured vessel. After a sea trial of the new vessel proved unsatisfactory, the broker returned Gaffey's deposit, and Gaffey considered the deal to be terminated.

In August of 2003, the broker contacted Gaffey to inform him that he had a buyer for the insured vessel. Gaffey arranged for the insured vessel to be transported to the broker's facility and signed a purchase and sale agreement. The buyer of the insured vessel wired the entire sale price to an account held by the broker. While attempting to set a closing date and arrange for payoff of the insured vessel's mortgage, the broker disappeared as did the insured vessel.

Gaffey was later informed that the buyer had taken control of the insured vessel after wiring the purchase money to the broker. Gaffey filed a claim with Acadia reporting that the vessel had been stolen. Acadia in turn denied coverage, maintaining that no theft of the vessel had occurred. Gaffey sued Acadia, and each side moved for summary judgment.

Acadia maintained that there was no "sudden and accidental, direct, physical loss of or damage to the insured property due to an external cause" because it was actually the purchase money (which was not covered by the policy), and not the vessel, which the broker had stolen. Acadia asserted that implicit in the authorization Gaffey gave to the broker to proceed with the sale was the authorization to transfer the vessel to the buyer's possession. The court reasoned, however, that the sale had never occurred because Gaffey never authorized the broker to remove the vessel from the broker's facility or transfer the vessel before the mortgage was paid off. Moreover, Gaffey could not have transferred the Certificate of Title as it was still in the possession of the mortgagee. The court therefore concluded that when the broker removed the insured vessel from his facility prior to the mortgage payoff, the broker stole the boat and not the purchase money. Accordingly, the court found that there was coverage under Acadia's policy and entered summary judgment for Gaffey.

Jet Ski Rentals

Owner and Lessor of Jet Ski Exonerated Against Personal Injury Claims

In companion decisions, the U.S. District Court for the Southern District of Florida held that Royal Caribbean Cruise Lines ("RCC"), the owner and lessor of a jet ski, had no liability for personal injuries sustained by the lessees when their rented jet ski "crashed into an island" (yes you read it correctly) in the Bahamas in July, 2003. *Complaint of Royal Caribbean Cruise Lines*, 459 F. Supp. 2d 1275 and 459 F. Supp. 2d 1284 (S.D. Fla. 2006).

Keith Howard and his son Mark, a minor, passengers aboard RCC's *Sovereign of the Seas*, rented a jet ski from RCC as participants in a guided jet ski tour. The father Keith signed two detailed waiver and release forms for himself and his son Mark which included language releasing RCC from any liability in connection with the operation of the jet ski. RCC filed suit for Exoneration or Limitation of its Liability under the Shipowner's Limitation Act, 46 U.S.C. § 181 *et seq.* The Howards filed their claims in the Limitation Action alleging various theories of liability including negligence by RCC for failing to warn or educate them regarding the inherent characteristic of "off-throttle steering loss," unseaworthiness of the jet ski, and breach of Florida State statutes governing jet ski rental operations. RCC and the Howards each moved for summary judgement in their favor. The Court noted in its opinion that there were unresolved questions of fact regarding whether Keith Howard's failure to wear his eyeglasses while operating the jet ski contributed to the crash into the island and whether the RCC tour leader failed to enforce RCC's own rules for safe operation.

RCC maintained that the written releases signed by Keith Howard barred both the father and son from obtaining any recovery from RCC for their injuries. The court first considered the enforceability of the release against the father, Keith, and held that the waiver and release language barred the father from obtaining any recovery from RCC under any theory of liability and that RCC was therefore entitled to summary judgment on the father's claims. However, the court held that the waiver and release was not enforceable against the son, Mark, and did not bar his claims against RCC. In arguing that the release barred the son's claims, RCC relied on various decisions from around the country which have held that releases signed by parents on behalf of their minor children are valid and enforceable. The District Court distinguished these decisions on the basis that all involved releases associated with activities organized by schools, churches, and other similar non-profit organizations. The Court held that releases signed by parents on behalf of minor children which relate to an activity run by a private, for-profit business are invalid and unenforceable against the minor.

Having determined that the release did not bar the son's claims, the court then considered the various theories of liability advanced against RCC. With respect to the claim that the jet ski was unseaworthy, the court held the doctrine of unseaworthiness was inapplicable because Mark Howard was a passenger aboard the *Sovereign of the Seas* and the jet ski itself. In reaching its holding the district court relied on the Supreme Court's decisions in *Moragne v. States Marine Lines*, 398 U.S. 375, (1970) and *Yamaha Corp. v. Calhoun*, 516 U.S. 199 (1996) for the proposition that the doctrine of unseaworthiness can apply only to seamen and maritime workers and does not extend to passengers.

The court then considered Mark Howard's claims based on alleged violations of Florida statutes pertaining to jet ski rental operations. Relying on the Supreme Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the court held that Mark Howard's tort claims against RCC were governed exclusively by substantive federal maritime law and that Howard was precluded from relying on any state statutes or law for the purposes of establishing liability on the part of RCC.

Finally, the court turned to Mark Howard's arguments that RCC was negligent because the inherent characteristic of "off-throttle steering loss" rendered the jet ski "defective" and because RCC allegedly failed to adequate warn and educate the users of the dangers posed by the characteristic. The court found that the "off-throttle steering loss" characteristic did not render the jet ski defective and that RCC had provided a detailed and through instruction session in advance of the tour which was adequate to educate the users on the proper operation and inherent characteristics of the jet ski.

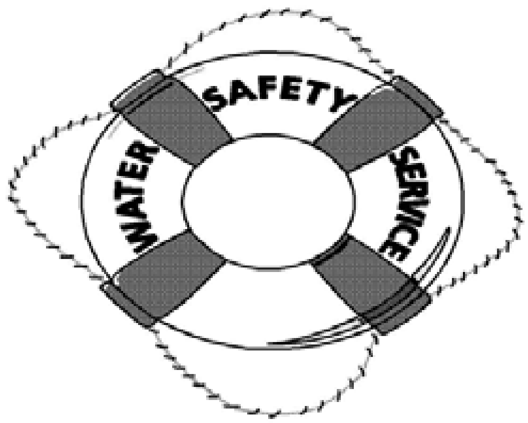
Wake Jumping: An Open and Obvious Danger

Hodges v. Summer Fun Rentals, Inc., 203 Fed. Appx. 89 (9th Cir. 2006).

While operating a personal watercraft ("PWC") that he had rented from Summer Fun Rentals, Mason Hodges jumped the wake of a passing vessel, fell off the PWC, and was apparently struck by another PWC that was being operated by his friend. Hodges' leg was amputated below the knee, and he sued Summer Fun Rentals for negligently failing to warn him about the dangers of wake jumping.

The district court held that Summer Fun had no duty to warn Hodges that wake jumping was dangerous because the danger was open and obvious.

In a 2-to-1 decision, the Ninth Circuit affirmed, stating that while the question of whether a risk is obvious is one of fact and thus should be decided by a trier of fact when reasonable minds may differ, in this case the grant of summary judgment was proper. The majority concluded that "reasonable minds could not differ with respect to whether it is open and obvious that (1) one might fall off a PWC while, during, or after jumping a wake or (2) collide with another vessel while, during, or after jumping a wake. These dangers are obvious to any person of ordinary intelligence." Thus, the grant of summary judgement in favor of Summer Fun was upheld.



Negligence and Negligent Entrustment

Alarcon v. Rasanow, 2006 Ohio 5804 (Ohio Ct. App. 2006).

Amanda Alarcon was riding as a passenger on a rented personal watercraft ("PWC"), when it collided with another vessel. The Sail and Power Boat Center ("SPBC") had rented the PWC to Jeffrey Piorkowski, who was operating it. Alarcon was injured in the collision and sued SPBC for negligence and negligent entrustment. The trial court dismissed both claims against SPBC on summary judgment.

The appellate court affirmed the dismissal of the negligence claim, holding that SPBC owed no duty to Alarcon as she was the passenger and not the person renting the PWC. Even if Alarcon had rented the PWC directly, there was no evidence that SPBC would have owed Alarcon any duty beyond ensuring that the PWC was in proper working order and that there were no visible impediments to Alarcon operating it.

The court also affirmed the dismissal of the negligent entrustment claim, noting that the Supreme Court of Ohio has never applied the doctrine of negligent entrustment to the lending or borrowing of boats. The court also stated that Alarcon did not satisfy the elements of a negligent entrustment claim, namely that (1) the vehicle was driven with the owner's permission; (2) the entrustee was in fact an incompetent driver; and (3) the owner knew at the time of the entrustment that the entrustee was incompetent or unqualified to operate the vehicle, because there was no evidence that Piorkowski was in fact an incompetent operator.

Marinas

First Circuit Declines to Enforce Exculpatory Clause in Marina Slip Agreement

Broadley v. Mashpee Neck Marina, Inc., 471 F.3d 272 (1st Cir. 2006).

Mark Broadley fractured his ankle and was left with a permanent loss of function when, at Mashpee Neck Marina, his foot became caught in a gap between the main dock and a floating dock where his vessel was moored. Broadly sued, asserting that his injury was caused by Mashpee's negligence. Mashpee in turn asserted that the exculpatory clause in the marina slip agreement precluded Broadley from bringing a suit for personal injury due to Mashpee's negligence. The clause read as follows:

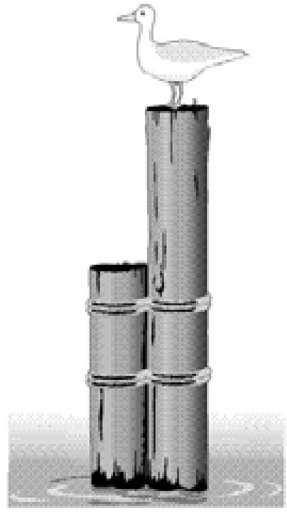
> The OWNER [Broadley] warrants and [covenants] that . . . the OWNER . . . will [not] make any claims, demands, causes of action of any kind and nature, or obtain or enforce any judgments, executions or levies thereon . . . against MARINA, its officers, directors, agents, servants, or its employees, arising out of any damage, loss, personal injury or death suffered by [him]. . . . The OWNER . . . agree[s] and covenant[s] that [he] will defend, indemnify and save MARINA harmless from any and all of such claims, demands, causes of action, judgments and executions, and the MARINA shall be entitled to responsible attorneys fees in the event of breach of the OWNER's covenant hereunder.

Broadley contended that under admiralty law, a party may limit but may not completely absolve itself from liability for ordinary negligence; and that the clause was over-broad boilerplate language and therefore unenforceable insofar as it absolved Mashpee of liability for gross negligence and intentional wrongdoing. The trial court reformed the exculpatory clause to limit it to ordinary negligence and accordingly granted summary judgment for Mashpee.

On appeal Broadley argued that under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), a party may not completely absolve itself of liability for ordinary negligence. The First Circuit asserted that no consensus existed as to the interpretation of *Bisso* and that the court could uphold an exculpatory clause directed to mere negligence, so long as this intention was expressed clearly in contracts entered into freely by parties of equal bargaining power, and provided that the clause does not provide for a total absolution of liability.

In examining the trial court's reformation of the exculpatory clause, the court avowed that reformation is normally appropriate where the language somehow fails to express the actual intention of the parties and is conformed merely to reflect their actual intent or, where the contents have been fraudulently misrepresented by one party, to conform the contract to the terms conveyed to the defrauded party. The court, in refusing to reform the exculpatory clause, cited the extreme over-breadth of the clause and the plainness of its illegality, the boilerplate character of the contract and lack of specific negotiation, the absence of an explicit reference to negligence which would provide better warning, and the attorney's fees clause. Accordingly, the trial court's grant of summary judgment was reversed and the case remanded for further proceedings.

Wharfinger's Duty of Care and Causation



Anchor Charters, LLC ("Anchor Charters") owned the S/Y "LEDA" and stored her at Harbortown Marina, which was operated by Old Park Investments, Inc. ("Old Park"). During Hurricane Frances, while the LEDA was moored at Harbortown Marina, the port aft piling to which the yacht was moored broke, allowing the LEDA to move freely in its slip and causing damage to the yacht. Anchor Charters brought a claim against Old Park alleging negligence, misrepresentation, negligent storage, trespass, and wrongful lien, all based up an assertion that the port aft piling broke because it had deteriorated due to shipworm. The matter was tried at a bench trial, and the court issued its findings of fact and conclusions of law in *Old Park Invs., Inc. v. S/Y LEDA*, 469 F. Supp. 2d 1201 (S.D. Fla. 2006).

Relying on *Trade Banner Line, Inc. v. Caribbean S. S. Co., S.A.*, 521 F.2d 229, 230 (5th Cir. 1975), the court stated that Old Park, as a wharfinger, owed a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel, but was not the guarantor of the safety of a ship coming to its wharf. Old Park's duty only included the responsibility to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, would be known to it and not reasonably known to the ship owner. Therefore, to establish a wharfinger's liability for the sinking of a vessel at the wharf, the vessel owner must sustain a case of negligence against the wharfinger.

The court held that in this matter, Anchor Charters failed to demonstrate that it was more likely than not that any alleged negligence by Old Park was the proximate cause of the damage to the LEDA. This conclusion was based upon the fact that Anchor Charters' expert witness did not utilize the correct data when determining that the port aft piling's fracture was likely due to shipworm and that numerous other pilings in the marina broke as a result of the 105-mph winds of Hurricane Frances. Accordingly, the court entered judgment in favor of Old Park.

Florida's Marina Evacuation Statute and the Louisiana Rule

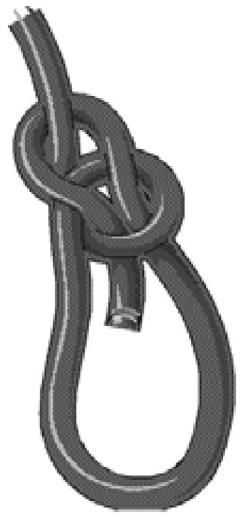
Stuart Cay Marina v. M/V Special Delivery, 2007 U.S. Dist LEXIS 21703 (S.D. Fla. March 27, 2007)

Mary Phipps and her husband, Eric Oster, lived aboard the M/V SPECIAL DELIVERY, a 97-foot aluminum crew boat. The boat was moored at Stuart Harbor Marina, located approximately ¼ mile south of Stuart Cay Marina. A marina, owned by Allied Marine, is located in between Stuart Harbor and Stuart Cay. Both Phipps and Oster held 100-ton Coast Guard licenses and had once used the vessel to perform passenger charters. In the event of an evacuation of Stuart Harbor, Phipps pre-selected a safe harbor on the Okeechobee waterway.

On the morning of September 2, 2004, the National Oceanic and Atmospheric Administration ("NOAA") issued an initial Hurricane Warning for the east coast of Florida. This warning included the area encompassing Stuart Harbor, Allied Marine, and Stuart Cay. Hurricane Frances was then blowing with sustained winds near 145 mph. The following evening, Frances weakened to a strong Category 2 storm with sustained winds close to 105 mph and higher gusts. The storm made landfall on the evening of Saturday, September 4 as a Category 2 hurricane.

Phipps, having determined that the vessel's mooring capability was superior at Stuart Harbor, did not attempt to relocate to the safe harbor location. She also mistakenly believed that the lock to the St. Lucie canal was closed which, had it been true, would have precluded passage.

Phipps and Oster secured the SPECIAL DELIVERY to 6 mooring pilings using approximately twenty lines and used fire hose segments to prevent chafing of those lines. They then deployed two large anchors at the vessel's stern and employed a diver to ensure that the propeller was clear.



After weathering half the storm, the vessel broke free of its moorings at Stuart Harbor and drifted northerly, finally coming to rest at Stuart Cay's docks. Allied Marine alleged that the vessel allided with its docks while drifting toward Stuart Cay. Both Stuart Cay and Allied Marine alleged dock damage, and Stuart Cay also asserted a claim for trespass due to the unauthorized use of its dock facilities during the hurricane and for five days thereafter. At the completion of discovery, Stuart Cay moved for summary judgment against defendants Phipps and Oster on the issue of liability on the basis that a vessel adrift is presumptively at fault if it strikes another's property. Phipps and Oster cross-moved for summary judgment, claiming that as a matter of law they had no duty to remove the vessel from Stuart Harbor Marina.

The court indicated that, while Admiralty is separate and distinct from common law, it "incorporates the general law of torts when not inconsistent with the law of admiralty." In admiralty law, a drifting vessel is presumptively liable for damages unless it can show that the drifting was the result of an inevitable accident which nautical skill and precaution could not avoid (an Act of God). This principle is known as the Louisiana Rule and is derived from the observation that moving vessels do not ordinarily collide with stationary objects in the absence of negligence. The Rule shifts the burden of persuasion onto the moving vessel to prove it was not negligent.

Defendants Phipps and Oster argued that a Florida statute changed the long-standing presumption of negligence established by the Louisiana Rule. *Florida Statute § 327.59* provides that marinas may not adopt any policy which requires vessels to be removed from a marina following the issuance of a hurricane watch or warning. Defendants relied on the Florida case of *Burklow & Associates, Inc. v. Belcher*, 719 So.2d 31 (Fla. 4th D.C.A. 1998). The *Burklow* court stated that "to the extent that a marina owner's action for property damage was based solely upon failure of defendant boat owners to move their vessels from [a] marina after issuance of [a] hurricane watch or warning," the action was barred by the Florida statute.

The district court was not convinced. Distinguishing the facts in *Burklow* from the present case, the court held that the Louisiana Rule should apply. Unlike in *Burklow*, the defendants did *not* have a contract for dockage with either plaintiff. Further, the court noted that the plaintiffs did not enforce any policy requiring the defendants to move the SPECIAL DELIVERY. Rather, plaintiffs asserted that defendants were negligent because they did not move the vessel before the storm, despite having ample opportunity to do so.

The court indicated that, having concluded that a moving vessel struck a stationary object (making it presumptively negligent), the vessel owner's must bear the heavy burden of establishing they had "exhausted every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required." The court noted that, even assuming the storm was an Act of God, the defendants still failed to establish they took every such reasonable and prudent precaution in preparation of the storm. However, the court conceded that there could be conflicting expert testimony relating to the prudence of remaining in Stuart Harbor and whether the steps taken to secure the vessel were appropriate. Therefore, the court found that summary judgment was improper.

Products Liability and Repair

"Gross Negligence" Voids Limitations in Repair Contract

The Louisiana Fourth Circuit Court of Appeal held in *Harkins v. M.G. Mayer Yacht Servs.*, 2006 La. App. LEXIS 3022 (La. Ct. App. 4th Cir. 2006), that a warranty limitation contained in a yacht repair contract was unenforceable because the repair company performed the work in a grossly negligent manner.

In August 1999, John Harkins brought his 62-foot sailing vessel, the S/V "APPARATION" to M.G. Mayer Yacht Services, Inc. ("Mayer") for numerous repairs. Mayer had painted the hull of the APPARATION on a previous occasion. Harkins requested that Mayer install a dripless shaft system and repair the yacht's refrigeration unit, which was completed by Mayer and a subcontractor.

Before the work began, Harkins signed Mayer's work order form, which provided that Mayer's materials and workmanship would be defect-free for 60 days after completion of the work and that Mayer's responsibility in the event of a defect would be limited to replacing the defective item. The form disclaimed all implied warranties and further required that any "claim for damages for negligence or otherwise, or for defective workmanship or material [be] made to Mayer in writing within sixty (60) days after delivery of vessel or completion of the work, whichever first occurs."

Shortly after the work was complete Harkins noticed that the refrigeration system was not working, that the vessel's new paint job had dulled, and that white streaks were now present on his deck. Mayer sent employees to Harkins' home to repair the damage to the paint, but the employees worsened the damage by applying a bleaching and abrasive cleaning solution. Mayer allegedly never addressed the refrigeration problem.

Several months later Harkins noticed that the engine of his vessel was not functioning properly and discovered that there were no set screws in the dripless shaft unit, which was the cause of the engine's problems. Harkins eventually also had to furnish his vessel with an entirely new refrigeration system.

Harkins filed suit against Mayer and after conducting a trial the court awarded him $44,088.28 for, among other things, the damages and expenses associated with the shaft system failure, the cost of the new refrigeration unit, and the cost of a new paint job.

Mayer appealed, arguing that the trial court should have given effect to the work order's warranty limitation, that the damages awarded for paint repairs were excessive, and that the trial court improperly awarded damages for betterment of the refrigeration system.

The appeals court stated that under admiralty law, the implied warranty of workmanlike performance may give rise to liability even where the contractor is not negligent. In examining the terms of the work order, the court asserted that a key consideration is whether an exculpatory clause is being applied to intentional, reckless, or grossly negligent behavior or rather to ordinary negligence. Under general maritime law, "gross negligence" can be defined as "reckless and wanton misconduct." With regard to the dripless shaft system, the appeals court found that Mayer's failure to install the set screws was grossly negligent behavior because it was a failure to follow the manufacturer's instructions. In light of such conduct Mayer could not enforce the contractual limitations.

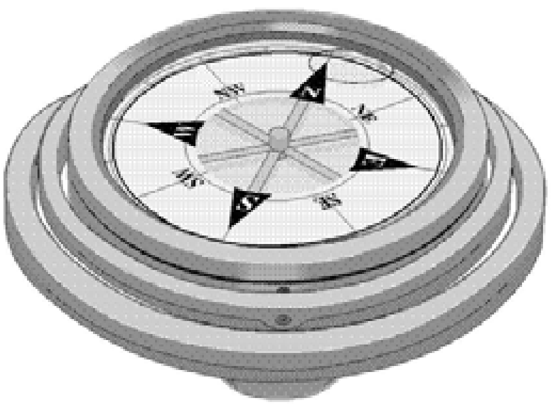
With regard to the paint job, because there was evidence that Mayer's employees removed some of the grip surface of the paint job and caused damage around the stanchions thus impacting safety features and exposing the boat to undue wear and tear, the court ruled that awarding the cost of a new paint job was proper. The court noted, however, that under the general maritime law, damages are not recoverable for betterment of the thing repaired, and therefore Harkins should have been awarded only the cost of bringing the refrigeration system back into good order, and not the cost of an entirely new refrigeration system.

Privity and the Implied Warranty of Merchantability

Zabit v. Ferretti Group, 2006 U.S. Dist. LEXIS 79022 (N.D. Cal. 2006).

In April of 2000, William Zabit purchased a 1999 Ferretti yacht in Florida. The yacht came with a limited warranty from Ferretti providing that "accessories, components or parts which are not Materials warranted hereunder, including only for purposes of reference but not limited to ... *engines* ... will be covered by the warranties of their separate manufacturers and are not warranted hereunder." The yacht's two engines were not manufactured by Ferretti but by Caterpillar, Inc., who issued a separate warranty for the engines.

In or about September 2002, Zabit received information suggesting that the yacht should not be used because the engines were defective and could result in harm to the owner or others and could fail at sea. After an extended period of negotiations, Caterpillar agreed to replace the yacht's engines only after Zabit agreed to incur all costs and resulting losses involved in the removal and replacement of the engines. Zabit, claiming he had suffered a substantial loss because of the engine problems, sued Ferretti and Caterpillar for violations of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*, breach of the implied warranty of merchantability, and fraud.



Caterpillar, in relevant part, filed a motion to dismiss the implied warranty of merchantability claim on the ground that Zabit could not establish the requisite contractual privity, as privity only existed between Caterpillar and Ferretti and not with Zabit directly. Zabit attempted to argue that privity was not required for claims of breach of implied warranty when a claim for violations of the MMWA is also asserted.

The court, in dismissing Zabit's claim, stated that under Florida or California law, privity of contract is required to maintain a claim for breach of the implied warranty of merchantability. The court reasoned that although Caterpillar did issue a written warranty with respect to the engines, there were no facts alleged to show that Zabit relied on that warranty when he decided to purchase the yacht; therefore, there was no basis to relax the requirement that there be privity of contract between Zabit and Caterpillar. Accordingly, Zabit's complaint was dismissed as to Caterpillar.

Expert Witness Qualifications

Rabozzi v. Bombardier, Inc., 2007 U.S. Dist. LEXIS 21724 (N.D.N.Y. 2007).

Mario Rabozzi asserted that he sustained a permanent injury to his left eye while using a pressure washer to clean a 1996 SeaDoo Speedster jet boat manufactured and distributed by Bombardier, Inc., ("Bombardier"). While in the process of power-washing the vessel's speed sensor assembly, the vessel's paddle wheel broke apart causing its remnants to hurtle through the air, striking Rabozzi in the eye. Rabozzi sued Bombardier on the theories of negligence, breach of implied warranty of fitness and merchantability, strict products liability, and loss of consortium.

Bombardier moved, *in limine,* to preclude the testimony of Rabozzi's expert witness, arguing that he did not have the proper qualifications to be an expert in the matter and had failed to utilize reliable methodology in performing his analysis and reaching his opinions. Relying on *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the court stated that there must be a sufficient nexus between the witness's expertise and the subject about which he intends to testify. Although Rabozzi's expert witness had engineering experience, he had never designed or manufactured any marine vessels, let alone recreational boats or jet boats or their component parts, and therefore his expertise was too far removed from the subject matter and he was not qualified to testify as an expert.

Additionally, the expert's proposed testimony about a safer alternative design failed the four-pronged *Daubert* methodology test in that: (1) the expert had not tested his design; (2) he had not subjected it to peer review or publication; (3) his design did not have a "known rate of error," since it had not been tested; and (4) the expert had not shown general acceptance either of his design or of his methodology.

With the expert's testimony excluded, there was no remaining evidence to support Rabozzi's claims and therefore Bombardier was granted summary judgment.

Maritime Jurisdiction

Negligent Davit Installation: Jurisdiction and Statute of Limitations

Burke v. Quick Lift, Inc., 464 F. Supp. 2d 150 (E.D.N.Y. 2006).

In 2000, Dr. Joseph Burke purchased a Carver yacht from Staten Island Boat Sales, who, before the sale was completed, hired Quick-Lift to install a "low-profile hydraulic yacht davit" on the yacht. While using the davit to hoist a dinghy onto the yacht, the davit's top plate broke away from the fiberglass decking that held it to the yacht, severely injuring Burke's wife. Further inspection of the davit arm revealed other deficiencies in its installation, including, but not limited to, the failure to install a bottom plate beneath the fiberglass decking, the failure to thru-bolt the top and bottom plates, and the use of self-tapping machine screws to secure the decking to the davit arm.

Burke sued Quick Lift and Staten Island Boat Sales alleging negligent installation, and also filed a derivative claim for loss of consortium. Both defendants moved to dismiss the complaint as untimely.

As an initial matter, the court found that Burke's claims fell within the court's admiralty jurisdiction because the complaint alleged facts showing: (1) that the alleged tort occurred on or over navigable waters; (2) that the type of incident alleged had a potentially disruptive impact on maritime commerce; and (3) that the conduct at issue bore a substantial relationship to a traditional maritime activity. The court noted that for purposes of admiralty jurisdiction, a tort "occurs" where the negligence "takes effect, not where the negligent act occurred," and therefore the tort occurred on navigable waters when Burke's wife was injured, not where the davit was installed. The court secondly found that the improper installation, and subsequent failure, of a device designed to lift small boats from the water onto a vessel while the vessel is docked in navigable waters, posed more than a fanciful risk of disrupting commercial activity at ports and on waterways. Finally, the third prong of admiralty jurisdiction was fulfilled because, according to the court, manufacturing and designing pleasure boats bore a substantial relationship to traditional maritime activity.

The defendants asserted that Burke missed the four-year statute of limitations for a breach of warranty claim under New York law or, in the alternative that Burke had missed the three-year limitations period applicable to maritime tort claims. On the issue of statute of limitations, the court, citing *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, (1986), reiterated that with admiralty jurisdiction comes the application of substantive admiralty law. The court found that Burke's claim was a maritime tort claim for personal injury arising from Quick Lift's breach of duties imposed by federal maritime law, thereby triggering the Uniform Statute of Limitations for Maritime Torts (46 U.S.C. § 30106), which provides that "a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." Under the Maritime Limitation Statute, as a general rule, a claim accrues when the plaintiff knows or has reason to know of the injury that forms the basis of the action. Burke's claim therefore accrued on the date of davit's malfunction, not at the time of the davit's installation; therefore Burke had filed his complaint in a timely fashion and the court denied the defendants' motion to dismiss.

Theft of Vessel During Warranty Work

Denton v. Ocean Marine Group, Inc., 2007 U.S. Dist. LEXIS 22789 (S.D. Miss. 2007).

In July of 2005, John Denton purchased a Regal 2680 cabin cruiser, engines, and a trailer from Ocean Marine Group ("OMG"). According to Denton, as part of the sales contract OMG promised to repair any defects and provided an express or implied warranty that the vessel was fit for its intended use. The vessel soon began to show cracks in the hull and other defects which required repairs. Denton returned the vessel to OMG to effectuate the necessary repairs; however, while in dry dock at OMG's facility the vessel was stolen. Denton sued OMG on various tort, contract, warranty and bailment claims, invoking the court's admiralty jurisdiction. OMG moved for dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

The court reasoned that Denton's tort claims did not bring the case under the court's admiralty jurisdiction because the claims failed the locality test, inasmuch as the theft of the vessel did not occur on navigable waters. The court further held that Denton's breach of contract and warranty claims did not invoke the court's admiralty jurisdiction because under the holding of *Richard Bertram & Co. v. Yacht Wanda*, 447 F.2d 966, 967 (5th Cir. 1971), a contract for the sale of a vessel is not a maritime contract. Denton attempted to argue that the repair contract was a separate maritime contract; however, the court disagreed, stating that the obligation to repair the vessel flowed directly from the sales contract and the warranty provided by OMG to Denton. The court reasoned that Denton's bailment claim also failed to invoke the court's admiralty jurisdiction, as a bailment action is a tort action involving the negligence of the bailee; therefore, Denton still had the burden of satisfying the locality test in order to invoke the court's admiralty jurisdiction. Accordingly, Denton's action was dismissed for lack of subject matter jurisdiction.

Launching a Vessel

Mahony v. Low Country Boatworks, LLC, 465 F. Supp. 2d 547 (D.S.C. 2006).

Sheila Mahony, owner of the M/V "ESSENCY," delivered the vessel to Low Country Boatwinds via truck. Pursuant to an agreement between Mahony and Low Country, Low Country was to remove the ESSENCY from the truck and launch it into the waters contiguous to the Intracoastal Waterway. Low Country launched the vessel without servicing or inspecting it, and as a result the vessel became partially submerged. Invoking the court's admiralty jurisdiction, Mahony sued for negligence and breach of warranty of workmanlike performance, alleging Low Country had failed to inspect the vessel prior to launching, install the drain plug prior to placing the vessel into the water, and properly supervise its agents and employees in the procedures employed in launching the vessel. Low Country filed a motion to dismiss for lack of subject matter jurisdiction.

The court, ascertaining that contracts to repair vessels are maritime contracts, and that contracts to store a vessel are maritime contracts, extended this reasoning to hold that a contract to launch a vessel is likewise a maritime contract. Accordingly, the court had subject matter jurisdiction over Mahony's contract claim.

The court then turned to Mahony's tort claim, noting that in order to invoke the court's admiralty jurisdiction, the tort (1) must have occurred on navigable waters or the an injury suffered on land must have been caused by a vessel on navigable waters, and, (2) must have a substantial connection to a traditional maritime activity.

Mahony's tort claim met the locality test because the incident that ultimately gave rise to Mahony's cause of action was the actual placing of the ESSENCY into navigable waters. The court also determined that the tort claim met the first prong of the maritime connection test because general features of the case presented a potential for disruption to maritime commerce as the damage caused by a negligent launch could be so extensive as to sink a commercial vessel. The second prong of the maritime connection test was also met, the court reasoning that if storage and maintenance of a vessel at a marina within navigable waters bears a substantial relationship to traditional maritime activity, so too did launching a vessel into navigable waters.

The court also stated that there would be ancillary jurisdiction over the tort claim, even if the test for maritime tort jurisdiction failed. Accordingly, the court had subject matter jurisdiction over Mahony's claims and Low Country's motion to dismiss was denied.

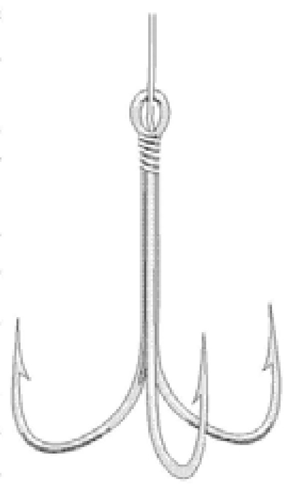
Navigable Waters

Meche v. Richard, 2007 U.S. Dist. LEXIS 17196 (W.D. La. Feb. 26, 2007).

Jody Meche and his two sons were frogging after dark in a 20-foot boat on Lake Rycade in Louisiana when they were fired upon from a distance. Meche ordered his two sons to get down and yelled at the shooter to cease fire. Meche then approached the shooter, Glenn Richard, who was holding a rifle. When Meche asked Richard why he was shooting at him and his sons, Richard responded that they were on private property and he wanted them out of the lake.

Meche filed suit against Richard in the Western District of Louisiana invoking the court's admiralty jurisdiction. Richard moved to dismiss the matter for lack of admiralty jurisdiction. Specifically, Richard claimed that Lake Rycade was not part of the navigable waters of the United States, and that the activities giving rise to Meche's claims did not bear a sufficient nexus to traditional maritime activity in that the incident had no potentially disruptive influence on maritime commerce.

In order to determine whether Lake Rycade was part of the navigable waters of the United States, the court looked to two factors discussed by the Fifth Circuit in *Sanders v. Placid Oil Company*, 861 F.2d 1374 (5th Cir. 1988). First, the court looked to "whether the Lake is used or susceptible of being used in its ordinary condition as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Second, the court looked to whether the waters of the Lake "form in their ordinary condition by themselves, or by uniting with other waters, a continuing highway over which commerce is or may be carried on with other States of foreign countries in which such commerce is conducted by water."



As to the first factor, the court found that despite the seasonal non-navigability of the Lake, as well as various man-made and often illegal obstructions to navigability, the historical nature of the area indicated that the Lake had been used for commercial purposes and travel throughout its history, and to the present day is used as a highway of commerce over which trade and travel are conducted. The court noted that despite the fact that tug boats and barges could not access the Lake, the unique nature of the Lake and the Atchafalaya Basin of which the Lake was a part made it traversable by other forms of transport – namely "go-devils", "bateaux", and "pirogues" – for the commercial purposes of hunting, trapping, and fishing.

As to the second factor, the court found that the Lake connected to the Whiskey Bay Pilot Channel through a slough and through the Atchafalaya River, which ultimately connected to the Vermilion Bay and then to the Gulf of Mexico. Thus, Lake Rycade constituted part of the navigable waters of the United States.

The court then turned its attention to whether the incident was sufficiently connected to maritime activity to invoke admiralty jurisdiction. The court looked to the test announced by the United States Supreme Court in *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The *Grubart* test requires the court to first assess the general features of the type of incident involved to determine whether the incident has "a potentially disruptive impact on maritime commerce." Second, the court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

After describing the incident giving rise to Meche's claim as "intentional rifle fire at a vessel on navigable waters," the court determined that the first *Grubart* factor was satisfied because the incident necessarily had a potentially disruptive impact on maritime commerce. As to the second factor, the court concluded that Richard's conduct amounted to "intentional obstruction of vessels' navigation in navigable waters," which necessarily bore a substantial relationship to traditional maritime activity. Thus, the court concluded, admiralty jurisdiction was properly invoked by Meche in his claim against Richard.

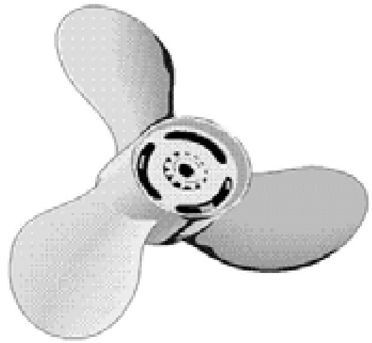
Salvage

Triplecheck, Inc. d/b/a Sea Tow Miami v. Creole Yacht Charters, Ltd.,
2007 U.S. Dist. LEXIS 20902 (S.D. Fla. 2007).

On February 19, 2005, the owner of the M/Y "ANACONDA" discovered that the vessel was taking on water while moored outside of a residential home. The vessel's owner called Triplecheck, and others, to assist in preventing further water from entering the vessel. O'Hare, a captain who had performed a few odd jobs on the ANACONDA, was also called because he lived locally.

When Triplecheck arrived the vessel's bow was in the water (although the degree of submersion was disputed at trial), and Triplecheck assisted by plugging holes in the vessel, pumping water out of the vessel, and towing the vessel to Jones Boat Yard. O'Hare signed both Triplecheck's U.S. Open Form Salvage Agreement and Jones Boat Yard's paperwork. Triplecheck subsequently brought an action for salvage against the ANACONDA and her owner, Creole Yacht Charters, and the case was tried at a bench trial.

Creole Yacht Charters asserted that O'Hare had no authority to bind the owner or the vessel contractually and that Triplecheck therefore could not enforce the salvage contract. The court disagreed, finding that because the owner was present during Triplecheck's salvage operation but stood back and allowed O'Hare to take command of the situation and act on behalf of the ANACONDA as far as Triplecheck was concerned, O'Hare was the vessel's apparent agent. Finding that a salvage contract therefore existed, the court granted a salvage award of $30,000.00 (5% of the vessel's salved value) plus prejudgment interest based upon Triplecheck's work and the six-factor test expounded in *The Blackwall*, 77 U.S. 1, 14 (1870).



Government Liability

Discretionary Wreck Marking and Removal

Cranford v. United States, 466 F.3d 955, 2006 AMC 2537 (11th Cir. 2006).

On August 9, 2003, a motor vessel operated by Howard Melech and carrying Eddie Cranford and Melech's brother struck a submerged object, killing Melech and injuring both Cranford and Melech's brother. It was revealed that the submerged object was a former United States Army mine planter deliberately sunk in the 1930s to serve as a breakwater. At the time of the allision, the wreck was marked with a telephone-pole-type piling, a flashing light, and a red triangle sign. Cranford, Melech's widow, and Melech's brother sued the government of the United States claiming negligence in marking the wreck and in refusing to remove the same. The district court dismissed the case on the ground that the United States had not waived its sovereign immunity, finding that the marking of the wreck and refusal to remove it fell within the "discretionary function exception" that has been judicially applied to claims under the Suits in Admiralty Act and the Public Vessels Act.

On appeal, the Eleventh Circuit scrutinized whether the government's conduct met the discretionary function exception under the two-step test developed in *United States v. Gaubert*, 499 U.S. 315 (1991). The *Gaubert* test weighs (1) whether the government's conduct involved an element of judgment or choice, and (2) whether the government's judgment or choice was grounded in considerations of public policy. The Eleventh Circuit was convinced that marking a wreck is a discretionary function as decisions in marking a wreck involve social, political, and economic policy considerations, such as taking into account the knowledge and customs of international mariners, balancing the needs of pleasure and commercial watercraft, and evaluating agency resource constraints, which include but are not limited to financial concerns.

The court also determined that when a vessel is sunk for a legitimate public purpose by the government, such as creating a breakwater, the removal requirement in the Wreck Act, 33 U.S.C. § 409, does not apply. Accordingly, the government met the requirements of the *Gaubert* test and the court affirmed the finding that the marking of the wreck and refusal to remove the same fell within the discretionary function exception.

Plaintiffs have petitioned for review in the U.S. Supreme Court, which, as of the time of this printing, has not decided whether to hear the case.

Criminal Liability

Morris v. State, 214 S.W.3d 159 (Tex. Ct. App. 2006).

On July 17, 1999, the JULIE V and a Wellcraft Nova Spyder collided on Lake Conroe in Texas. As a result of the collision, three passengers aboard the JULIE V were killed. Reginald Eugene Morris was found to have operated the Wellcraft at the time of the collision, and was charged with three separate counts of intoxication manslaughter. After a jury rejected Morris's claim that he was not competent to stand trial, he was convicted on all three counts and sentenced to 18 years in prison.

On appeal, Morris relied on the Inland Navigation Rules to argue that his vessel had the right-of-way, and thus the accident could not have been caused by any act or omission on his part even despite his intoxication. Morris additionally claimed that the JULIE V's operator failed to maintain a proper lookout or yield the right-of-way.

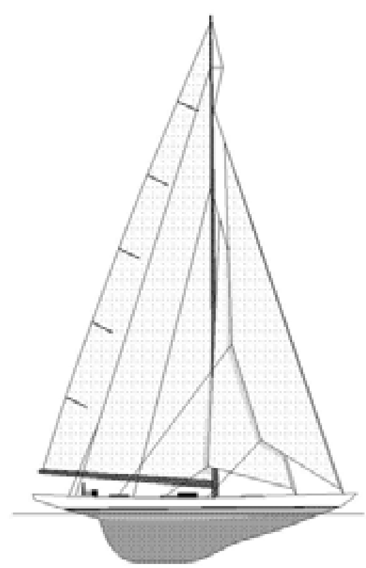
The Ninth District Court of Appeals of Texas disagreed, stating that "the Inland Navigation Rules do not create an absolute right-of-way for the vessel on the right, as the vessel is permitted to take action to avoid collision by her maneuver alone," and that the Rules "allow departure from these Rules if necessary to avoid immediate danger." Citing *United State v. Reliable Transfer*, 421 U.S. 397 (1975), for the proposition that liability for property damage in a maritime collision is to be allocated among parties proportionate to their comparative degree of fault, the court concluded that Morris' contention that his vessel had the right-of-way was only one factor among many for the jury to consider in determining who was responsible for the accident. The court found that there was enough evidence from which a jury could have concluded that his fault was sufficient to have caused the resulting fatalities, and upheld his conviction.

Jury Finds Sailboat Owner and Operator Not Negligent in Traumatic Head Injury Case

On March 23, 2007, a jury in the Court of Common Pleas of Chester County, Pennsylvania, returned a verdict for both defendants on the issue of negligence in the case of *Lepone v. Brown*, Docket No.: 05-05374. In doing so, the jury found in the defendants' favor with respect to several navigational rules which were directly at issue in the case.

On July 18, 2003 the plaintiff, Joseph Lepone, was a passenger aboard the defendants' 37-foot sailboat ("COURAGE") during a trip in the Chesapeake Bay from Havre de Grace to Baltimore, Maryland. Aboard the vessel were the owner (defendant O. Hampton Brown, III), his wife (defendant Susan Brown), their two young children, and the plaintiff. Mr. Lepone had been a family friend of the Browns for about ten years prior to this trip, and had previously sailed this same trip on the COURAGE on about a half dozen occasions. Immediately prior to the accident it was a hot, sunny day with no wind, and the water was flat. The COURAGE was operating under power, traveling at approximately three knots. Mrs. Brown was at the helm, and Mr. Brown and their two children were in the cabin and cockpit. Mr. Lepone – 77 years old at the time – was sitting in a portable chair at the bow of the sailboat with his feet propped up on the lifeline and his eyes closed.

Mrs. Brown noticed a large power cruiser approximately 75 feet long about 200 yards off her port bow. When she first observed the vessel ("DESTINY"), it was not traveling at a high rate of speed, was not creating a wake, and was going to cross in front of COURAGE far enough ahead so as not to pose any danger. As the two boats closed to where DESTINY was approximately 50 yards off her port bow, she noticed it had changed course and speed. DESTINY had veered toward its starboard, was traveling at a much greater speed and creating a significant wake, and was now going to cross much more closely in front of COURAGE. Mrs. Brown called out to Mr. Lepone, who did not hear her because his hearing was impaired. She steered into the wake to avoid "rolling" the sailboat and throwing Mr. Lepone overboard. Unfortunately Mr. Lepone still fell out of his chair and onto the deck of the boat. As the boat continued to pitch up and down from the wake, he tried to stand up but slipped, fell, and struck his face on the deck.



A few weeks later Mr. Lepone developed headaches and a CT scan revealed a massive subdural hematoma. He underwent a craniotomy and multiple evacuations to remove the blood from his brain. He had a seizure from the bleeding and very nearly died. Mr. Lepone spent several weeks in the hospital, followed by several more in an in-patient skilled nursing facility. After many months of therapy he regained a significant amount of his speech and cognitive abilities, but never returned to normal.

At trial plaintiff pursued two main theories of liability against the defendants: 1) defendant Susan Brown failed to

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maintain a proper look-out while at the helm, in violation of Rule 5 of the Inland Navigational Rules, 33 U.S.C. § 2001 *et seq.*; and 2) both defendants allowed him to improperly "bow ride," which is a dangerous activity. The defendants claimed Susan Brown did maintain a proper look-out and there was nothing she could have done to avoid the unanticipated actions of DESTINY. They further contended DESTINY – not COURAGE – violated the Navigational Rules, specifically Rule 15 which governs crossing situations and required DESTINY (the "give-way" vessel) to permit COURAGE (the "stand-on" vessel) to cross in front of it. The defendants additionally claimed there is no true definition of "bow riding," and asserted there was nothing unreasonably dangerous about permitting Mr. Lepone to sit at the bow under the conditions present, particularly in view of his prior experience on the COURAGE and the fact he failed to protect himself by having his eyes closed. After a one-week trial and two-hour deliberation, the jury agreed with the defendants and found them not negligent. Efforts made by the defendants prior to trial to locate the owner/operator of DESTINY were unsuccessful, as no home port was observed.

The Editors thank Matthew S. Marrone, Esq., of Lucas & Cavalier, for submitting this article.

NBSAC Vacancies

The Coast Guard is accepting applications for seven postitions on the National Boating Safety Advisory Council. The Coast Guard seeks two representatives of State boating safety programs, three representatives of boat and associated equipment manufacturers, and two representatives from the general public or from national boating organizations. Further information is published in the Federal Register for April 26, 2007 (Vol. 72, No. 80, pp. 20862-63), and application forms are available at http://www.uscgboating.org/nbsac/applications.htm. Applications should be submitted by August 17, 2007.

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