BOATING BRIEFS

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

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SPRING 2015
VOL. 24, No. 1

USCG Policy Shift in Recreational Sphere: On-Water Instruction for Recreational Licenses

In 2011, the United States Coast Guard ("USCG") initiated a national consensus-driven process to develop entry-level, on-water performance skill-based standards, to complement current classroom standards, for all recreational boat operation. That on-water project served as the catalyst for the USCG's current drive to organize and integrate boating education standards under one National System of Standards for Recreational Boat Operation. Implementing this national system will provide a home for all recreational boating entities to synergistically serve the boating public; ultimately increasing their ability to enhance the safety and enjoyment of our nation's boaters. Further, this system will foster awareness of and cooperation among recreational marine education entities (organizations, states, industry educators) and more importantly, serve as a springboard to grow the entire recreational marine industry.

This newsletter summarizes the latest cases and other legal developments affecting the recreational-boating industry. Articles, case summaries, suggestions for topics, and requests to be added to the mailing list are welcome and should be addressed to the editor.

Inside this Issue

As the on-water boating skills being developed, in alignment with classroom knowledge standards, are rolled out as American National Standards (ANS), course designers will have free access to these national standards for voluntary incorporation in boating education curriculum. Educational experts believe this will raise the quality of entry-level boating education across the country and at the same time, grow public awareness of the availability and benefits of on-water boating education. As public awareness and demand for on-water education increases, the need to expand the pool of qualified instructors with the proper credentialing to meet that demand will rise accordingly.

As plans for a USCG National System of Standards take shape, leaders in recreational boating education have identified a key barrier to the expansion of on-water recreational boating instruction. Current regulations require recreational boating instructors to earn a commercial Merchant Mariner license ("OUPV") to deliver powerboating, canoeing/paddling, sailing, etc. courses, even though the scope and responsibilities of these boating safety instructors differ substantially from professional mariners. Recreational boating safety instructors do not require the same level of expertise or advanced security protocols. Rather, they have a recreation focus, are typically seasonally employed, younger

in age and modestly compensated. The requirements for Merchant Mariner licensing go beyond what recreational boating instructors need to deliver safe, high quality education, and are cost prohibitive and impractical in the recreational boating safety education environment. Entities providing recreational boating safety courses need a tailored solution that keeps the boating public safe within a business model that make economic sense for all.

To address this need, on-water recreational boating community leaders have a proposed solution to the OUPV license issue that works within the emerging USCG National System of Standards for Recreational Boat Operation. This solution involves implementing a USCG National Recognition System ("Recognition System") for boating education entities that comply with high quality training standards, follow best practices and instruct using ANS standards. Entities providing boating safety education would apply to be a USCG "Recognized Entity". USCG Recognized Entities would earn specialized OUPV license umbrella status—qualifying its instructors to deliver Recognized Entity designed on-water courses under the body's umbrella status. To ensure on-going quality and safety, each Recognized Entity would self-certify that its instructors properly maintain the established proficiency requirements to teach the curriculum.

Moreover, the USCG National System of Standards for Recreational Boat Operation is designed to be inclusive (open to all), non-dominant (equal standing for all) and USCG branded to foster national credibility and uniformity. Creating a USCG recognition system offers an opportunity to cement a positive inclusive, non-dominant, credible pathway to benefit all boating safety entities/educators and the expanding boating public. On-Water recreational boating safety education leaders are exploring potential legal pathways to implementing a Recognition System, including a specialized OUPV license umbrella component, that will help expand instructor pools, attract recreational boaters, increase boater safety and enjoyment (returning boaters), reduce fatalities/injuries, and ultimately foster the growth of the entire recreational marine industry.

Thank you to Joanne M. Dorval, Project Administrator for U.S. COAST GUARD On-Water Standards Grant. ■

FEDERAL LEGISLATION AND REGULATION

U.S. Virgin Islands Uninspected Vessels May Now Carry 12 Passengers

As part of the implementation of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, uninspected passenger vessels may now carry up to twelve (12) passengers in the United States Virgin Islands provided the vessels are certified under the United Kingdom Yellow Code (for motor vessels) or Blue Code (for sailing vessels). The act brings United States uninspected passengers vessels in the Virgin Islands into parity with British Virgin Islands and United Kingdom. vessels, which can carry up to twelve passengers rather than six. The Coast Guard issued Maritime Safety and Security Bulletin 03-15 of March 2, 2015 to clarify the requirements for vessels wishing to carry up to twelve passengers. ■

Coast Guard Issues Marine Safety Information Bulletin on Parasailing After Collisions with Aircraft

The USCG published MSIB 03-15 of March 16, 2015, to address flight safety rules regarding parasailing vessels after two incidents last summer where aircraft towing banners collided with parasailing rigs towed by vessels. The bulletin reminds operators that the Federal Aviation Authority regulates parasailing activities and that they must therefore follow Federal Aviation Authority rules prescribing flight limitations, notice, and marking requirements. The bulletin also encourages parasail operators to be proactive and vigilant in

avoiding low-flying aircraft, and to coordinate regular safety meetings with low-flying aircraft operators in their geographic region. ■

Coast Guard Authorization Act Passed by House; Awaits Senate Vote

In May the United States House of Representatives passed HR-1987, the Coast Guard Authorization Act. The bill makes several changes to federal law relevant to recreational maritime interests, including:

• Section 312 would allow Certificates of Documentation to be effective for 5 years; currently Certificates are only valid for one year and must be renewed annually.

• Section 510 would amend the Jones Act, 46 U.S.C. § 30104, to bar claims by nonresident aliens employed on foreign passenger vessels if the injury or death arose outside United States territorial waters. This provision is similar but broader in scope to that found in § 30105, which bars claims by nonresident aliens working on oil rigs if the injury or death occurred within the continental shelf of a foreign country.

• Section 503 would require the Comptroller General to submit a report to Congress describing actions that could be taken to improve the efficiency of the National Vessel Documentation Center ("NVDC"), including by transferring the NVDC's operations to Coast Guard Headquarters in Washington, D.C.

• Section 309 would update the data the USCG provides manufacturers to determine weight of engines when conducting flotation tests; engines have grown considerably heavier since this data was last updated over twenty (20) years ago.

• Section 304 would amend 46 U.S.C. § 4302 to change the definition of model year for recreational vessels and equipment. Currently model years span from August 1st to July 31st; under the new legislation a model year would begin June 1st and span to the following July 31st. Presumably the drafters intended for the year to span from June 1st to the following May 31st. ■

STATE LEGISLATION AND REGULATION

New York & New Jersey Lower Boat Taxes

New York has capped its vessel sales and use tax at the first two hundred and thirty thousand dollars ($230,000.00) of a vessel's value; tax rates vary in New York by jurisdiction but range around eight percent (8%), equating to a tax cap of eighteen thousand to nineteen thousand dollars ($18,000.00 - $19,000.00) depending on locale.

New Jersey capped its seven percent (7%) statewide vessel sales and use tax at twenty thousand ($20,000.00), bringing it roughly in line with New York's new cap. The bill was passed by the legislature and awaits the Governor's signature. ■

Florida Caps Tax on Yacht Repairs

Florida has capped its vessel repair tax at sixty thousand ($60,000.00). Florida charges a six percent (6%) sales tax on yacht repairs, so yacht owners paying for over one million dollars ($1,000,000) in repairs will benefit from the repair tax cap. ■

Washington State Passes Marine Tourism Bill, Allows Large Yachts 180 Days Tax-Free

Washington's new law allows yachts greater than seventy-eight feet (78') owned by limited liability companies to cruise Washington waters up to one hundred and eighty (180) days before being subject to Washington's ten percent (10%) vessel tax. Prior to the law, yachts greater than seventy-eight feet (78') and owned by an limited liability company were subject to that tax after sixty (60) days, while other yachts could remain up to one hundred and eighty (180) days. ■

Hawaii Mandatory Boating Safety Training Goes Into Effect

Since November, Hawaii has begun enforcing its mandatory boater education rule, requiring all motor vessel operators to have undergone a boating safety course and to show proof of certification on demand. ■

Michigan Lowers BUI Limit to .08%

Michigan has joined the growing trend of states equating the legal limit for operating vessels to the limit for operating automobiles. The legal limit in Michigan is now point zero eight percent (.08%) blood alcohol content, the same limit for driving a car. ■

Uniform Certificate of Title for Vessels Act (UCOTVA) Gains Momentum

This year Connecticut and Washington, D.C. joined Virginia in adopting the Uniform Certificate of Title for Vessels Act. The Alabama and Mississippi legislatures have both introduced but not yet passed the ("Act"). The Act provides for a uniform titling system throughout the United States that dovetails with the Uniform Commercial Code, and requires state titles for vessels to be "branded" if they have suffered significant damage. If the USCG approves the procedures under the Act, preferred ship mortgage status would be granted to mortgages and security agreements on state-titled vessels pursuant to 46 U.S.C. § 31322(d). ■

SALVAGE

Low-Level Salvage, Even by Professional Salvor, Yields Low-Level Award

Girard v. M/Y Quality Time, No. 14-10931, 2015 WL 65491 (11th Cir. Jan. 6, 2015)

A thirty-nine (39) foot Meridian yacht, THE QUALITY TIME, struck a submerged object one night near Key West and began taking on water. The operator anchored the vessel and called the Coast Guard, who evacuated the passengers and deployed a pump to dewater the vessel. Meanwhile, a professional salvor heard the distress call and came to the scene. The Coast Guard pump was not working effectively, so the salvor deployed his own pump, donned diving gear and entered the water, applied a temporary patch from outside the hull, and completed the dewatering. The salvor then towed the vessel to a boatyard. Winds were twenty (20) knots or less, seas were two feet or less, and the entire operation took about three hours.

The salvor filed a salvage action *in rem*. The district court found that the salvor acted promptly and efficiently but that the operation involved little danger or specialized skill. The court awarded the salvor seventeen thousand dollars ($17,000) – equivalent to ten percent (10%) of the vessel's post-casualty value plus a two percent (2%) uplift due to his status as a professional salvor. Dissatisfied with the award, the salvor took an appeal.

While conceding that the district court's factual findings were accurate, the salvor argued that the award did not account for the risk and skill involved in the operation and that the circumstances mandated an award of no less than thirty-three percent (33%) of the vessel's post-casualty value.

The circuit court noted that a salvage award is to be based on the factors announced in *The Blackwall*, 77 U.S. 1, 2002 AMC 1808 (1869). Those factors are:

(1) The labor expended by the salvor;
(2) The promptitude, skill, and energy displayed by the salvor;
(3) The value of the equipment used by the salvor and the danger to which that equipment was exposed;
(4) The risk incurred by the salvor;
(5) The value of the property saved; and
(6) The degree of danger from which the property was rescued.

The salvor asserted that the fourth *Blackwall* factor—the risk incurred by the salvor—should be evaluated in comparison with hazards ordinarily encountered by those "who go to sea" and not in comparison with (the presumably

greater) hazards encountered by professional salvors. The appellate court disagreed and held that the risks encountered by a professional salvor in undertaking a salvage operation are to be measured in relation to the hazards normally encountered in the salvage business, not to the hazards encountered by seafarers in general. Because the risks encountered here were of the type ordinarily encountered by a professional salvor, the district court was not required to render a more liberal reward. (And recall that the district court had already given the salvor a two percent (2%) uplift due to his status as a professional salvor.)

The salvor also argued that an award of thirty-three percent (33%) of the vessel's post-salvage value was more consistent with the public policy of encouraging salvors and was mandated based on comparisons to previous awards. The appellate court held that fixed percentages and comparisons to previous awards were not an absolute guide in determining a salvage award, which is to be based on the facts and circumstances unique to each case. Again the court upheld the district court's determination.

Lastly, the salvor argued that the district court erred in not awarding prejudgment interest. As the district court's order made no mention of prejudgment interest, the circuit court remanded the case to allow the lower court to consider an award of prejudgment interest.

Thanks to Carroll Robertson of BoatU.S. for bringing this case to our attention. ■

Challenges to an Arbitration Provision in a Salvage Contract Must Specifically Challenge the Arbitration Clause in the Complaint, and Not Merely Challenge the Contract as a Whole

Farnsworth v. Towboat Nantucket Sound, Inc., 790F.3d 90, 2015 AMC 1586 (1st Cir. 2015)

Yacht owner Farnsworth executed a "no cure, no pay" salvage contract containing a binding arbitration provision with Towboat Nantucket Sound ("TNS"), and TNS salvaged the yacht. After the parties submitted to arbitration, Farnsworth filed a complaint with the United States district court seeking a preliminary injunction against the arbitration and a declaration that the salvage contract was unenforceable, arguing that he had signed the contract under duress. The district court denied the injunction, the arbitration ended in favor of TNS, and the court granted TNS's motion to confirm the arbitration award despite Farnsworth's objection that the contract, including the arbitration provision, was signed under duress.

The First Circuit, following the Supreme Court in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010), held that questions as to the validity of a contract as a whole are properly decided by the arbitrator, whereas validity challenges lodged specifically at the arbitration clause are properly decided by the courts. As the validity of the arbitration provision was thus severable from the validity of the contract as a whole, Farnsworth was required to specifically challenge the arbitration clause in his federal complaint, even though the basis of his challenge to the contract as a whole (duress) logically applied to every clause of the salvage contract. As Farnsworth failed to challenge the arbitration clause specifically in his complaint and failed to later amend the complaint to do so, the First Circuit affirmed the district court's confirmation of the arbitration award. ■

MARITIME LIENS

Sailor Has No Maritime Lien for Breach of Contract Unconnected With a Specific Vessel

Spooner v. Multi Hull Foiling AC45 Vessel 4 Oracle Team USA, Case No. 15-cv-00692, 2015 U.S. Dist. LEXIS 33716 (N.D. Cal. March 18, 2015)

Spooner, a member of the Oracle Racing Team, filed suit in rem against an Oracle catamaran and *in personam* against Oracle Racing, Inc., the defending America's Cup champion, for wrongful termination of a "maritime service contract."

At Spooner's request, the United States Marshal in San Francisco arrested components of an AC45 catamaran, packed in three shipping containers destined to Bermuda. Oracle moved to vacate the arrest, arguing that Spooner had no maritime lien because his contract did not specify any particular vessel on which Spooner was to serve. After a post-arrest hearing, the magistrate judge agreed with Oracle and vacated the arrest.

Having served for eleven (11) years previously as a sailor for Oracle, Spooner signed on behalf of Allegro Yachting Ltd. (evidently a company formed by Spooner) a new agreement titled "Heads of Terms for AC35-Sailing Team-Joseph Spooner." The contract characterized Spooner as a "Sailing Team Member" and stated that Allegro "shall procure that [Spooner] shall provide, perform, and deliver such duties and services required of him as a member of the Sailing Team of [Oracle]." But the contract did not identify any particular vessel on which Spooner was to work. Indeed, the contract stated that "nothing in this Heads of Terms or otherwise guarantees that [Spooner] will be part of the crew for any particular race or regatta…."

Anticipating that the thirty-fifth (35th) Cup would take place in the United States, Spooner (a citizen of New Zealand) applied for and obtained an athlete visa using the Oracle contract to support his application. Spooner then conducted repair work on an Oracle AC45 vessel in San Francisco. Later, Bermuda was selected as the site of the thirty-fifth (35th) America's Cup. Oracle issued a "relocation plan" to move its operations to Bermuda. Spooner thought that his relocation compensation would not cover the cost of relocating his family to Bermuda, and he requested a salary increase from twenty-five thousand dollars ($25,000.00) per month to thirty-eight thousand dollars ($38,000.00) per month. When Oracle told him that the compensation was not negotiable, Spooner requested mediation. Oracle then terminated the contract.

After the post-arrest hearing, the court concluded that Spooner's claim for wrongful termination did not support a maritime lien. While his contract obliged Spooner to serve "as a member of the Sailing Team," it did not specify what vessel or vessels Spooner would work on. (The contract also included non-maritime components, namely that Spooner would participate in publicity and fundraising events.) Therefore, the arrest was vacated, but without prejudice to Spooner's *in personam* claims.

Thank you to Alberto J. Castañer-Padró, of CASTAÑER LAW OFFICES P.S.C. for this summary. ■

SHIP MORTGAGE AND FINANCING

Mortgagee Barred From Insurance Recovery Where Policy Made Out to LLC's Sole Shareholder

AIG Centennial Ins. Co. v. O'Neill, 782 F.3d 1296 (11th Cir. 2015)

In an opinion that should caution marine lenders to proactively cross-check lending documents with vessel titles and insurance policies, the Eleventh Circuit affirmed a Florida District Court's holding that a mortgagee had no rights under the standard mortgage clause in the insurance policy because the policy mistakenly insured not the LLC owner of the vessel, but rather than the sole shareholder of the LLC owning the vessel.

O'Neill purchased a sport-fishing vessel with a two million and three hundred and fifty thousand dollars ($2.35 million) loan from Bank of America, and had the boat insured by AIG. O'Neill formed an LLC to take ownership of the vessel, with himself as the sole shareholder. The mortgage

named the LLC as the mortgagor, with O'Neill as a personal guarantor. O'Neill delegated the work of filling out the insurance application to his secretary, who mistakenly listed O'Neill in his personal capacity as the owner of the vessel, whereas in fact the LLC owned the vessel. Thus O'Neill was listed as the named insured on the policy, rather than his LLC. The policy did contain a standard mortgage clause to protect the vessel's mortgagee. Litigation ensued after serious structural issues were discovered on the vessel.

The District Court held on bench trial that as a matter of law, despite the standard mortgage clause in the insurance policy, Bank of America had no rights under the mortgage clause because the mortgage was made out to the LLC as owner of the vessel, whereas the insurance policy was made out to O'Neill in his personal capacity. Reviewing the lower court's conclusion of law *de novo*, the 11th Circuit affirmed.

The case is also notable for its demanding application of *uberrimae fidei*. The court held that O'Neill's misrepresentations were "material" and therefore voided the policy, where (a) O'Neill's application mistakenly listed the appraisal price of two million and three hundred and fifty thousand dollars ($2.35 Million) as purchase price of two million and one hundred and thirty thousand dollars ($2.13 Million); and (b) where O'Neill disclosed under "prior losses" a boat fire that resulted in a total loss, but failed to disclose damage to a propeller and an engine blowout in a sailboat. ■

PRACTICE AND PROCEDURE

Removal of Maritime Actions Prohibited Under Saving to Suitors Clause Despite 2011 Revisions to Removal Statute

Cassidy v. Murray, 34 F. Supp. 3d 579 (D. Md. July 24, 2014)

The 2011 amendment to the removal statute, 14 U.S.C. § 1441, has generated disagreement between jurisdictions as to whether the Saving to Suitors clause still prohibits removal to federal court of maritime claims when no other independent jurisdictional basis for removal exists. Maryland now follows the historic rule, that removal is indeed prohibited.

Cassidy brought suit against Murray in state court for tort damages related to a recreational boating accident on navigable waters, which Murray removed to the U.S. District Court for the District of Maryland. The question before the court on motion to remand was whether the 2011 revisions to the removal statute at 14 U.S.C. § 1441(b) allowed free removal of maritime claims when no federal question or diversity jurisdiction exists.

Prior to the 2011 revisions some courts, led by the Fifth Circuit in *In re Dutile*, 935 F.2d 61 (5th Cir. 1991), held that § 1441(b), rather than the Saving to Suitors clause, was the basis for the prohibition against removal of maritime claims where no independent jurisdiction existed. After § 1441(b) was amended to remove language upon which the *Dutile* opinion relied, some courts, notably the Southern District of Texas in *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772 (S.D. Tex. 2013), interpreted the change in language of § 1441(b) to mean that admiralty claims are freely removable regardless of whether an independent basis for jurisdiction exists.

The District of Maryland, following the Supreme Court's reasoning in *Romero v. Int'l Terminal Operating Co.*, 258 U.S. 354 (1959), held that the Saving to Suitors clause itself operates to prohibit removal where no independent basis for federal jurisdiction exists, and therefore the 2011 revisions to § 1441(b) had no effect on removability. Finding no federal question or diversity jurisdiction existed, the District Court remanded the case. ■

Rule B attachment pre-empts IRA exemptions from attachment.

Jensen v. Rollinger, 2014 U.S. Dist. LEXIS 127121 (W.D. Tex. September 11, 2014)

Jensen filed a Rule B action to attach assets held by Rollinger in IRA accounts held by Edward Jones, to enforce a maritime lien arising from a defaulted Preferred Ship Mortgage. The question presented on Rollinger's motion to vacate the Rule B attachment, was whether the attachments were barred by a Texas law exempting IRA accounts from attachment or garnishment.

The District Court followed the Supreme Court's *American Dredging* analysis in holding that where the Texas remedy exempting IRA's from attachment worked material prejudice to the characteristic features of Rule B attachment, the Texas exemption for IRA's was pre-empted by Rule B. ■

No admiralty jurisdiction for diving accident in shallow water

Ficarra v. Germain, 2015 AMC 730 (N.D.N.Y. 2015)

A New York District Court remanded a case for lack of admiralty jurisdiction where a claim occurred on navigable waters but failed the *Grubart* "connection" test.

Ficarra was a passenger on Germain's 38-foot powerboat on Oneida Lake, which is connected to the New York Erie Canal System. Ficarra was paralyzed after backflipping from the vessel in three to six feet of water. Determining that the incident occurred on a navigable waterway and therefore satisfied the *Grubart* "location" test, the court applied a straightforward analysis of whether the incident satisfied the two-part "connection" test.

Finding the "general features" of the incident as "an injury to a recreational passenger who jumped from a recreational vessel in a shallow recreational bay of navigable waters," the Court opined that this type of incident would not be "likely to disrupt" maritime commerce, and therefore did not pass the first part of the connection test.

The court went on to describe that the "general character" of the alleged tortfeasor's activity was "anchoring a recreational vessel in a shallow recreational bay without adequately warning a passenger about the risks of diving in." Finding that this activity was more related to swimming and diving than to a traditional maritime activity, the court accorded with Fourth Circuit precedent in a nearly identical case and found that this activity failed to satisfy part two of the *Grubart* "connection" test. Thus, the Court held that the connection between the alleged tort and maritime activity was too tenuous to support admiralty jurisdiction, and remanded.

Thank you to James Mercante for bringing this case to our attention. ■

PRODUCTS LIABILITY

California jury finds one warning label was not enough; appeals court approves 3:1 punitive-damages ratio for manufacturer's "callousness"

Colombo v. BRP US Inc., 230 Cal.App.4th 1442 (2014)

In this "inadequate warnings" case, stemming from gruesome injuries sustained by two young women in a personal watercraft (PWC) accident, a California appellate court held that a jury was entitled to impose punitive damages against a PWC manufacturer in excess of the 1:1 ratio established by the U.S. Supreme Court *in Exxon v. Baker*.

The case arose from a jet-skiing outing on Mission Bay in San Diego, California. One of the plaintiffs, Haley, had never been on a PWC, while the other, Jessica, had ridden a PWC on a few occasions. Plaintiffs went jet-skiing with Haley's sister, her sister's boyfriend, and the boyfriend's roommate, Brett, who worked for a jet-ski shop and (without permission) borrowed PWCs from the shop for the group to ride. None of these

individuals were wearing a wet suit; Haley and Jessica each wore two-piece bathing suits.

Brett operated the PWC on which Haley and Jessica were passengers. According to testimony, at one point the girls were thrown from the PWC, became upset with the way Brett was operating the PWC, and asked Brett to take them back to shore. After Plaintiffs re-boarded the PWC, Brett "applied full throttle in order to get the [] PWC on a plane, but he felt a pull and saw [P]laintiffs had fallen back into the water, this time directly behind the PWC." As Plaintiffs were not wearing wetsuits or other protective clothing, the force of the PWC's water jet caused serious and permanent orifice injuries to both of them.

Plaintiffs sued the PWC's manufacturer ("BRP"), the rental shop that owned the PWC, and Brett. Plaintiffs alleged that BRP failed to adequately warn of the need to wear a wet suit or protective clothing.

The PWC had a warning label under the handlebars on its console that included the word "WARNING." As summarized by the California Court of Appeal, this label further stated that:

[S]evere injuries to 'body cavities' can occur 'as a result of falling into water or being near [the] jet thrust nozzle' . . . '[n]ormal swimwear does not adequately protect against forceful water entry into lower body opening(s) in males or females,' and, thus, '[a]ll riders must wear a wet suit bottom or clothing that provides equivalent protection.

Haley and Jessica both testified that if this information had been placed on the back of the PWC, where it could be more readily seen by a passenger, they would have read the warning and paid attention to it by either not riding the PWC or by obtaining proper attire.

At trial, the jury found each defendant to be one-third at fault and also awarded punitive damages against BRP. In particular, the jury found that the PWC was defective due to a lack of inadequate warnings and that this defect was a "substantial factor" in causing Plaintiffs' injuries. The jury awarded Haley approximately $1.5 million and Jessica about $400,000 in compensatory damages as against BRP. Furthermore, the jury found that BRP had shown a "reckless or callous disregard for the rights of others" and therefore awarded Haley and Jessica each another $1.5 million in punitive damages. On appeal, BRP challenged the jury's "substantial factor" finding and the award of punitive damages.

First, BRP contended that there was insufficient evidence that placing a second warning label on the back of the watercraft (where passengers could more readily see it) would have prevented the injuries. BRP specifically argued that the only support for the jury's finding was Plaintiffs' self-serving testimony that they would have read and heeded a rear warning label, along with certain expert opinion testimony which BRP claimed was inadmissible.

The California Court of Appeal quickly dispelled BRP's argument regarding Plaintiffs' self-serving testimony that they would have read a warning and acted to protect themselves if the warning had been placed where a passenger could more readily see it. The court noted that the jury instructions, which BRP did not challenge on appeal, expressly provided that the jury could consider Plaintiffs' testimony when deciding whether Plaintiffs had satisfied their burden of showing that the PWC was defective by virtue of inadequate warnings. The court held that such evidence was credible and supported the finding that "BRP's conduct in failing to give[P]laintiffs a warning similar to the one given to the operator was a substantial factor in causing [Plaintiffs] harm."

As noted above, the jury also awarded each plaintiff $1.5 million in punitive damages. BRP appealed these awards, arguing that punitive damages were unwarranted, or alternatively, that the awards were excessive.

At trial, the jury was instructed that if they determined that BRP's conduct was a substantial

factor in bringing about Plaintiffs' injuries then they was also to decide "whether BRP's conduct manifests reckless or callous disregard for the rights of others, or shows gross negligence, or actual malice or criminal indifference." The Court of Appeal concluded that "under a preponderance standard of proof [] the record contains sufficient evidence to support the jury's punitive damages finding." In the court's view, the evidence supporting punitive damages included the following:

- BRP's product safety manager testified that he had been deposed in 9 or 10 orifice injury cases;

- BRP knew before Plaintiffs' accident that passengers could fall off the back of a PWC and be severely injured by the jet thrust if they were not wearing protective clothing;

- As a result of their knowledge of the potential for such injuries, BRP warned against rapid acceleration, and warned of the need for protective clothing (presumably the court was referring to the warning placard on the front of the watercraft);

- BRP considered placing additional written warning labels in locations other than under the front console of the watercraft, but ultimately decided against this, despite knowledge that a backseat passenger might not see the front console warning;

- BRP decided not to place warnings on the back of the PWC because of a concern about "dilution effect" and "having more panels or warning labels about the same subject";

- BRP's product safety manager acknowledged that the risk of not wearing protective clothing to prevent orifice injuries was not readily apparent to anyone walking up to use the PWC;

- A safety and warnings expert testified to the existing label's inadequacy;

- There was evidence that, as early as 1995, BRP was aware that a competitor was using multiple warnings on its PWCs, including one on the back of its PWC, explicitly addressing the possibility of orifice injuries;

- Another expert testified that the jet stream nozzle posed a danger that most people would not recognize without a warning; and

- In safety videos of the same model of PWC involved in the accident, there were images of people riding the PWC without protective clothing (though there was no evidence that Plaintiffs or anyone involved in the accident here had seen the video).

Based on this evidence, the Court of Appeal held that the jury had reasonably found "that BRP engaged in conduct that manifested a reckless or callous disregard for the rights of plaintiffs by not adequately warning them of the known and severe risk of orifice injury and how to avoid or reduce the risk."

Finally, BRP argued that under maritime law the punitive damages awarded to each plaintiff could not exceed the amount of their respective compensatory awards. As support, BRP cited the maritime case of *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), in which the U.S. Supreme Court held that punitive damages in cases of reckless (but non-malicious) conduct should not exceed the amount of compensatory damages. But the California Court of Appeals opined that this 1:1 ratio was not a hard and fast rule in cases of recklessness. Instead, the court described a "scale of blameworthiness," with cases of mere "recklessness" capped at the 1:1 ratio as set forth in *Exxon*, and with cases involving "callousness" allowed some higher ratio. The court found that BRP's decision not to install a second warning label was "on the higher end of the scale of blameworthiness" and therefore affirmed the award of punitive damages. For one of the plaintiffs, this meant that the ratio of compensatory damages to punitive damages was more than 3:1.

Thank you to Ben Harner of Thompson Coburn LLP for this summary. ■

TORTS

Lacking agency relationship, resort not liable for acts of excursion boat

Craig v. Sandals Resorts International, 2014 WL 6610342 (E.D.N.Y. Nov. 20, 2014)

Mark Lane and his family were vacationing at the Veranda Hotel in the Turks & Caicos. Shortly after arriving, they asked a hotel employee to identify a good place to snorkel. The employee directed them to an area adjacent to the hotel, provided them with snorkeling gear, and instructed them to swim out past a series of yellow buoys. Six years earlier, a swimmer had been struck by a boat and killed in that same area.

Meanwhile, the neighboring Beaches Resort (wholly owned by Sandals) arranged for a group of its guests to go on an inner-tubing excursion. Guests were to ride in an inner-tube towed by a speedboat traveling at high speed. The captain of the speedboat was not a Sandals employee, but the resort did make his services available to guests as part of an all-inclusive package.

While Lane and his eight-year-old son were snorkeling in the area designated by the Veranda Hotel employee, the speedboat towing the Sandals guests passed through the area, striking Lane. He died of his injuries that same afternoon.

Lane's wife, individually and as executrix of his estate, filed suit in the Eastern District of New York against both Sandals and Veranda. Sandals moved dismiss for failure to state a claim, and Veranda moved to dismiss for lack of personal jurisdiction and for *forum non conveniens*.

As Plaintiffs did not allege that the speedboat captain was an employee of Sandals, the threshold issue was whether he was acting as Sandals' agent when his boat struck Lane such that Sandals would be vicariously liable for his conduct. Applying New York law, the court noted that Plaintiffs had no prior contact with Sandals and had not been led to believe that the captain was acting on behalf of Sandals. As such, there was no argument that the captain acted by virtue of any apparent authority. Plaintiffs therefore needed to show that the captain acted with actual authority.

"Actual authority" is the power of an agent to do an act on account of the principal—an act that the agent is privileged to do because of the principal's manifestations to him. To establish actual agency a plaintiff must demonstrate: (1) manifestation by the principal that the agent will act for him; (2) the agent's acceptance of that undertaking; and (3) an understanding between the parties that the principal is to be in control of the undertaking. The existence of actual agency depends upon the actual interactions of the putative agent and the principal, and not on the perception of a third party.

Plaintiffs argued that Sandals sent its guests on the inner-tubing excursion without ever indicating to them that the vessel's captain was not a Sandals employee. Plaintiffs also claimed that Sandals held the captain out as its agent for the purposes of taking its guests inner-tubing. Nonetheless, the court held that these arguments were unpersuasive since the perceptions of Sandals' guests were irrelevant to the issue of actual agency.

Plaintiffs then argued that, as Sandals was an all-inclusive resort, the captain's fees were paid by Sandals and not the guests. The court held that the payment of fees was, without additional facts in support of the allegations of agency, insufficient to establish that the captain performed any particular act under Sandals' control. As such, no actual agency existed and the court granted Sandals' motion to dismiss.

The court then turned to Veranda's motion to dismiss for *forum non conveniens*.

A plaintiff's choice of forum, if motivated by legitimate reasons, is generally entitled to great deference when suit is commenced in a plaintiff's home forum. As Plaintiffs lived within the Eastern District of New York, the court held that

their motivation was indeed legitimate and that their choice of forum weighed against dismissal. Still, the parties did not dispute that the Turks and Caicos provided an adequate alternative forum in which to adjudicate their dispute. Therefore, the court went on to examine the private and public interest factors involved.

Private factors include: access to evidence, availability of compulsory process for attendance of unwilling witnesses, the cost of procuring the attendance of willing witnesses, the possibility of viewing the accident scene, and other factors bearing on the ease, speed, and cost of discovery and trial.

In this case most of the evidence and witnesses were located in the Turks and Caicos. By comparison, the Eastern District of New York would only be convenient for Plaintiffs and their experts. Discovery would be concentrated in the Turks and Caicos, the location of the percipient witnesses there meant that much of the eyewitness evidence would be limited to depositions rather than live testimony.

Public interest factors include: the administrative difficulties that occur when litigation is "piled up in congested centers instead of being handled at its origin," the problems of imposing jury duty on a community with no relation to the litigation, the convenience of persons affected by the litigation, and the "local interest in having localized controversies decided at home."

Plaintiffs argued that the United States had a strong interest in providing relief to its citizens and that the Veranda Hotel had marketed itself to New York residents. Veranda countered that the Turks and Caicos had an interest in ensuring tourists' safety and protecting its resorts from the vagaries of U.S. litigation. Lastly, Veranda argued that the action would require the application of Turks and Caicos law, not New York law.

Balancing both the private and the public interest factors, the court held that—despite the deference given to Plaintiffs' choice of forum—the "strong pull of the private and public factors favoring resolution in the [Turks and Caicos] outweigh[ed] the deference." The court therefore dismissed the action as to Veranda, on the condition that it not challenge jurisdiction or process in the Turks and Caicos or raise any statute of limitations defense attributable to the delay between the original filing and a reasonable time for re-filing the action there.

Thank you to Joseph Kulesa of Fischer &Fischer for this summary. ■

BOATING BRIEFS is a publication of the Maritime Law Association of the United States, Committee on Recreational Boating.

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