Bitter End Bulletin

Committee on Marine Torts and Casualties

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Owner at the Helm: A Fine Line in Limitation

By Mark Tabala

Recently released, *In re Denver* is a limitation of liability case pending in the U.S. District Court of Massachusetts. No. 21-cv-11841, 2022 U.S. Dist. LEXIS 161930 (D. Mass. Sept. 8, 2022) (Burroughs, J.). Mr. Denver sought to limit his liability for an accident which occurred in Boston Harbor on July 17, 2021. Multiple injuries and one death resulted from the casualty.

Mr. Denver's vessel, M/V MAKE IT GO AWAY, which he both owned and operated, struck a navigational aid east of Castle Island. There were seven passengers aboard. The navigational aid, daymarker No. 5, was a fixed aid used to warn deep-draft ocean-going vessels of shallow water. The aid is maintained by the Coast Guard, has a green light that flashes, with four pilings into the sea floor. At the time of the incident, there was also a dredging project ongoing in Boston Harbor, with two vessels involved in the project.

Up until the allision, Mr. Denver was taking all proper precautions such as navigating at the appropriate speed, using the same track line, etc. However, Mr. Denver did not see the pilings with the moon being set, and the pilings not being illuminated on the way back. The dredging project's background lights also blocked out the light on top of daymarker. Mr. Denver's vessel struck the daymarker and, while no one was ejected, the passengers voluntarily entered the water once the vessel began to take on water.

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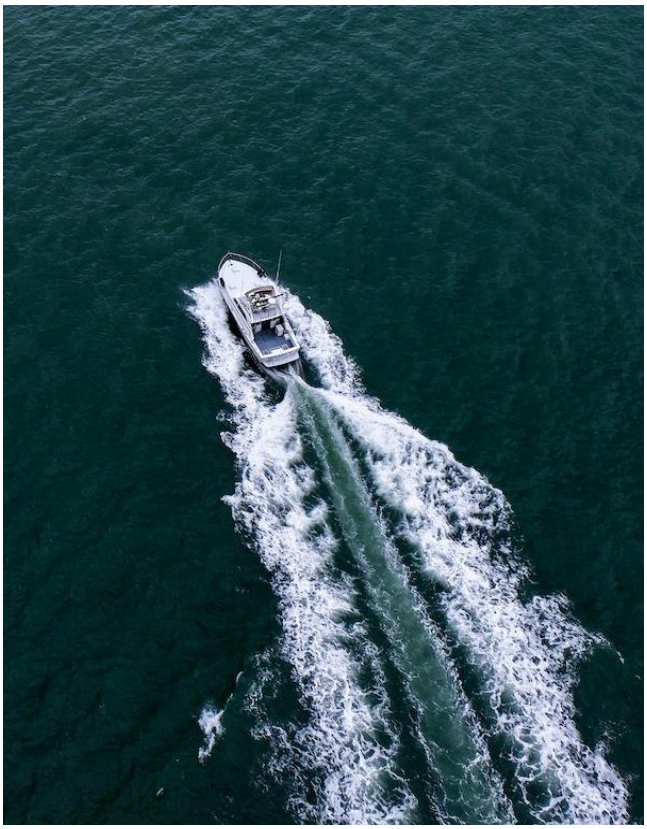
As the passengers began to swim, another vessel approached with the intent to offer aid, but soon after left with no aid given. During this time, one passenger drowned despite efforts by other passengers and Mr. Denver to save her. Mr. Denver asserts that all injuries and damages including the death were the fault of the vessel that left without providing aid, as well as other third parties.

Mr. Denver sought to limit his liability under the Limitation of Liability Act, which requires the owner to prove lack "privity or knowledge." As a refresher, the definition of those two requirements is the "participation of the owner in some fault or act of negligence... or some personal knowledge of which he is bound to avail himself." The claimants in *In re Denver* argue that because Mr. Denver was navigating the vessel at the time of the allision, he could be the only one liable for the negligence. In support of their position, claimants cited the cases of *Martin* and *Fecht*—where courts previously held that owners could not limit their liability because they owned and controlled the craft at the time of the negligence. Holding that the owner's operation of a vessel at the time of the accident does not categorically defeat a limitation action, the court in *In re Denver* looked to the *Bensch* decision. There, an appellate court allowed a limitations case to go forward because the complaint showed plausible evidence that the owner was not at fault or negligent. The District Court of Massachusetts was persuaded by *Bensch* because it applied the "bedrock principles" the Supreme Court put forward in the cases of *Twombly* and *Iqbal* and allowed the vessel owner the benefit of discovery. According to the court, Mr. Denver's complaint had just enough factual allegations to survive a motion to dismiss—alleging that he was not at fault while other parties were (e.g., the Coast Guard failed to properly illuminate the pilings and the Unidentified Vessel fled without aiding). Ultimately, the court denied the claimants' motion to dismiss.

In re Denver casts doubt on a presumption that the owner who was at the helm during an accident should summarily lose his or her right to limitation. This is a notable deviation from cases such as *Martin* and *Fecht*, where the owners at the helm were denied limitation because they were in control of the vessel at the time of the incident.



The *In re Denver* decision casts doubt on a presumption that the owner who was at the helm during an accident should summarily lose his or her right to limitation.

Intrastate Lake Not Subject to Admiralty Jurisdiction—But Was There a Relationship to Traditional Maritime Activity?

By Tanis Merrick

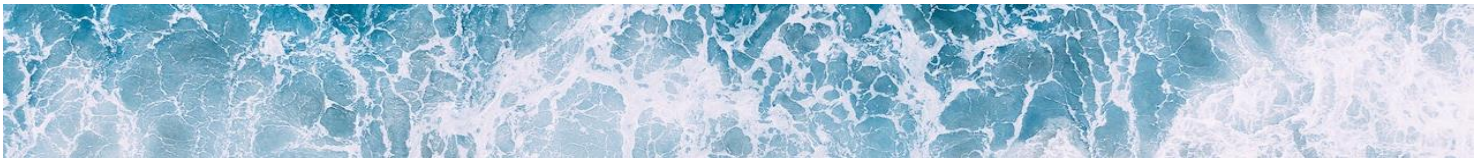
Maritime practitioners generally know how to decide if a case falls under admiralty jurisdiction. We know that whether a water-borne casualty actually falls under admiralty jurisdiction is determined by the age-old maritime locality test, but how often do we take the time to methodically consider each element of the test? In the recent case *Mullins v. Dominion Energy South Carolina Inc.*, a district court in South Carolina found that the defendant Dominion Energy's attempt to remove a boating fatality case on an intrastate lake in South Carolina failed to meet the requirements for federal or admiralty jurisdiction. No. 3:21-CV-03165-SAL, 2022 WL 1498293, (D.S.C. May 12, 2022). The court's analysis is a reminder that judges interpret some prongs more consistently than others.

The plaintiffs in *Mullins* filed an action in state court against Dominion Energy after their daughter, a passenger on a pontoon vessel, was struck and killed by the limb of a dead tree while the operator attempted to dock the pontoon in Lake Murray, South Carolina. Dominion Energy, operator of the Saluda Hydroelectric Project 516 which includes Lake Murray, owned the portion of the bank where the dead tree was located. In their complaint, the plaintiffs brought a premises liability claim under state survival and wrongful death acts and sought actual and punitive damages. Defendant removed the case to federal court under federal question jurisdiction, exclusive federal jurisdiction, diversity jurisdiction, and admiralty jurisdiction.

The court evaluated whether admiralty jurisdiction existed under 28 U.S.C. § 1333 by using the two-part locality test to evaluate whether the tort (1) occurred or originated in navigable waters, and (2) whether the alleged wrongdoing relates to historic maritime activity. In its evaluation of the first prong, the court found that the lake was a closed body of water, was located wholly intrastate, and did not have the ability to be used for commercial shipping or maritime commerce.

Some readers may be surprised by the court's reasoning that, even if the first prong of the locality test were met, the second prong of the locality test still failed. To determine whether the litigation was sufficiently related to traditional maritime activity, the court evaluated (1) whether there was a general risk for the incident's characteristics to interrupt commercial maritime activity and (2) whether there was a substantial relationship between the maritime activities or incident and traditional maritime activity. In *Mullins*, the court first found that there was no risk of the incident's features to interrupt maritime commerce because the incident occurred on a lake with no commercial activity, near a residential shoreline. Second, the court found that the incident bore no relationship to traditional maritime activity because the incident involved only one dead tree along the shoreline and the complaint did not allege that the incident was a result of an obstruction to navigation.

At its core, the accident in *Mullins* was an allision resulting in a casualty. For admiralty jurisdiction to exist when a tort occurs on or between pleasure vessels, the U.S. Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company*, upheld the requirement that the plaintiff must show the tort had a potential to disrupt maritime commerce. In *Mullins*, the court determined that Plaintiff failed to carry its burden and demonstrate any potential for disrupting maritime commercial activity. However, if an allision within a commercially-maintained hydroelectric dam project cannot be classified as having even *some* potential for disrupting maritime commerce, litigants may wonder what facts are sufficient to obtain admiralty jurisdiction under prong two.



A "Bad Day" on the Willamette River Leads to Possible Expansion of Multi-Claimant Exception

By Adam Deitz

On June 4, 2021, two commercial passenger jet boats operated by the same company were involved in a head-on collision along the Willamette River in Oregon. The incident resulted in multiple claims for personal injury among the dozens of passengers aboard each vessel at the time of the incident—including a claim from singer songwriter, Daniel Powter, who is famous for his chart-topping 2005 song "Bad Day." The owner of the jet boats sought protection from claims under the Limitation of Liability Act of 1851 (46 U.S.C. §§ 30501, *et seq.*). *In re Willamette*, No. 3:21-CV-1354-SI (D. Or. Oct. 31, 2022).

The issue in *In re Willamette* was not atypical: could the multiple limitation claimants agree to a stipulation, stay the limitation proceeding, lift the monition, and proceed before a jury in state court on the non-limitation aspects of the case?

The basic case landscape addressing this question is well trodden. The Supreme Court has long recognized that tension exists between the Limitation of Liability Act and the Saving to Suitors Clause (28 U.S.C. § 1333(1)): "One statute gives suitors the right to a choice of remedies, and the other statutes gives vessel owners the right to seek limitation of liability in federal court." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 448 (2001). In resolving this tension, courts have recognized exceptions to the district court's exclusive jurisdiction where:

A. the limitation fund exceeds the value of all the claims ("adequate fund" exception),
B. there is only a single claimant ("single claimant inadequate fund" exception), or
C. there are multiple claimants who are able to act as a single claimant through use of appropriate stipulations ("multi-claimant inadequate fund" exception).

The claimants in *In re Willamette* persuaded the judge that stipulation to binding mediation on the issue of priority was enough to protect the vessel owner.

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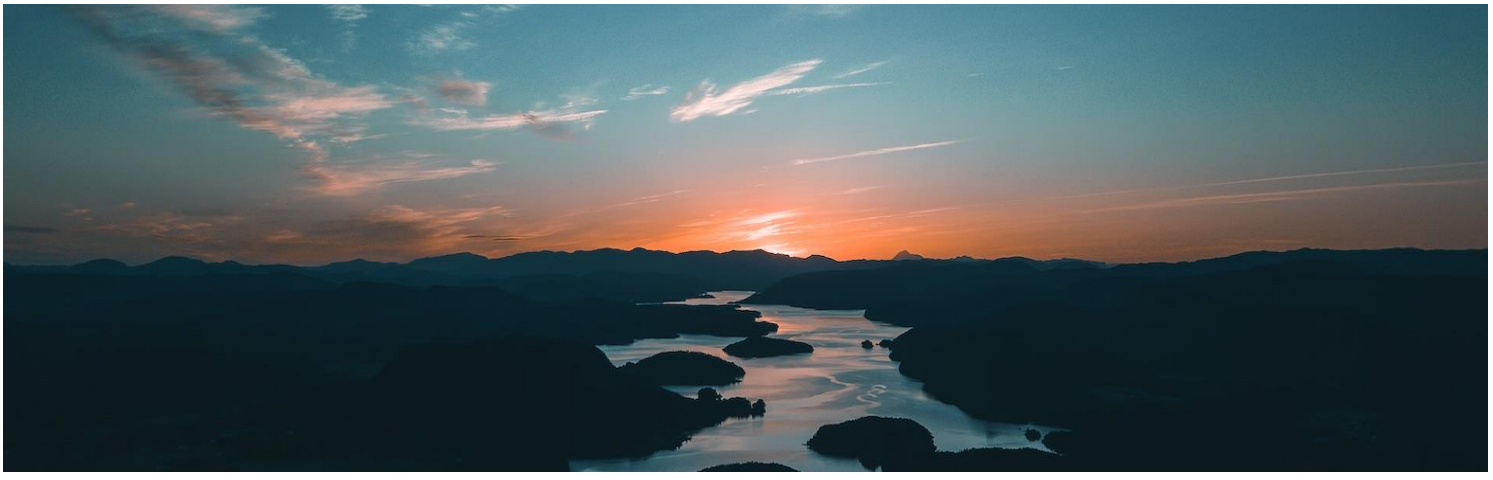
Case law varies among the circuits, but in summary terms, a court has discretion to find that multiple claimants have entered adequate stipulations where they agree that:

1. they waive the right to claim *res judicata* based on any judgment rendered against the vessel owner outside of the limitation proceeding;
2. they concede the district court's exclusive jurisdiction to determine limitation of liability issues;
3. in the event there is a judgment against the vessel owner (or any other liable party who may cross-claim or claim over against the vessel owner), and the judgment exceeds the value of the limitation fund, the claimants agree not to seek to enforce the excess judgment pending the resolution of the limitation action;
4. there is an irrevocable priority of claims; and
5. if the vessel owner is held responsible for attorneys' fees and costs of a claimant or any other party seeking indemnification, such claims shall have first priority.

However, a common issue faced by multiple claimants when attempting to weave adequate stipulations is: how do we prioritize our claims? The claimants in *In re Willamette* persuaded the judge that stipulation to binding mediation on the issue of priority (after liability and damages are decided by a jury in state court) was enough to protect the vessel owner. The exact stipulation language for priority was:

> *"4. Claimants stipulate and agree to there being an irrevocable priority of claims in the Limitation Action on a pro rata basis in proportion to their respective claims/injuries to be determined by a binding mediation within thirty (30) days following resolution of the State Court Action."*

Some admiralty practitioners may argue that allowing claimants to agree to binding mediation is just the most recent example of the multi-claimant exception swallowing *Lewis v. Lewis & Clark Marine*. Others could be pleased that multiple claimants who agree to cooperate may now have a better chance of trying their case collectively in front of a state court jury. But one thing is likely agreed across the board—this area of law is murky at best and unpredictable outcomes can result from judicial discretion.



Bitter End Bulletin Seeks Contributors

By Adam Deitz

As famously stated by Connecticut's P.T. Barnum: "*There's no such thing as bad publicity.*"

The Committee on Marine Torts and Casualties as well as the editor of *Bitter End Bulletin* invite contributors of all backgrounds and experience levels to provide articles, updates, and other content for this quarterly periodical.

- Are you a maritime tort practitioner with an interesting legal issue that you would like to write about?
- Are you a young lawyer looking for exposure to the MLA?
- Are you a law student looking for writing experience?

If your answer is "yes," don't be shy—get in touch with the editor of the *Bitter End Bulletin*.

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