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First Circuit upholds sailor's $1.4 million award but rejects prejudgment interest on loss of future earnings

Nevor v. Moneypenny Holdings, LLC, 842 F.3d 113 (1st Cir. 2016)

Readers may recall our report last year about the case of Kenneth Nevor, a professional yacht-racing sailor injured during a personnel transfer at sea. Nevor was transferring from a 52-foot state-of-the-art sailboat—named the *Vesper*—onto a 35-foot rigid inflatable—named the *Odd Job*. The transfer occurred in choppy seas, and the vessels were not tied together. Nevor slipped on the tender's gunwale tube and was left clinging to the *Vesper*'s lifeline. He fell to the deck of the tender and tore his bicep tendon. A subsequent surgery left him unable to straighten his arm, and he could not return to his career as a professional racer.

Nevor brought Jones Act and unseaworthiness claims against his former employer, Moneypenny Holdings, LLC. After a four-day bench trial, the court found that Moneypenny was negligent by conducting the transfer in choppy seas and by failing to implement safety procedures for underway transfers. The court also found that the tender was unseaworthy because its gunwale tube was not treated with nonskid.

With a working-life expectancy of 30 years, Nevor was awarded over $700,000 for loss of earnings, past and future. He was also awarded $750,000 for pain and suffering, for a total award of over $1.4 million. The trial court then added prejudgment interest on the entire award, using Rhode Island's 12% interest rate. This brought the final judgment to over $2.3 million.

Moneypenny appealed, challenging both the award of damages and the availability of pre-judgment interest. (Moneypenny did not, however, challenge the trial court's use of Rhode Island's 12% interest rate.)

Moneypenny argued as an initial matter that the trial court's award of economic damages was based on speculation—in particular, supposition that Nevor had he not been injured would have gone on to enjoy a career as an elite and highly compensated sailor. But given the deference owed to the trial court's findings of fact, the circuit court discerned no clear error and upheld the award of economic damages.

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.

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Moneypenny also made two arguments against the award of prejudgment interest. First, Moneypenny argued that Nevor's success on the Jones Act claim precluded any award of prejudgment interest. Second, Moneypenny maintained that the district court erred in awarding interest on future damages (i.e., future lost earning capacity and future pain and suffering).

The circuit court acknowledged that Moneypenny's first argument presented a matter of first impression. Success on a general maritime claim like unseaworthiness is generally accompanied by an award of prejudgment interest. On the other hand, in a pure Jones Act action the prevailing view is that there should be no recovery of prejudgment interest. When it comes to a mixed action, i.e., where a seaman prevails on both Jones Act and unseaworthiness claims, there is a split of authority as to whether prejudgment interest should be allowed.

Given the trial court's finding that the tender was unseaworthy and that this unseaworthiness substantially contributed to Nevor's injuries, the circuit court held that Nevor should not be denied prejudgment interest merely because he also prevailed on his Jones Act claim.

Having established that prejudgment interest was available, the court turned to Moneypenny's second argument. Agreeing with Moneypenny, the court held that prejudgment interest should not be awarded on damages that have yet to accrue. That is to say, prejudgment interest "must be limited to items of loss that were in the rear-view mirror at the time of the damages award and the concomitant entry of judgment."

On remand, the trial court would therefore need to recalculate the award of prejudgment interest—omitting interest on items of loss not yet accrued, such as future wage loss and future pain and suffering. ■

Torts

Tenth Circuit: No duty to warn boat renters about weather forecast

In re Aramark Sports & Entertainment Services, LLC, 831 F.3d 1264 (10th Cir. 2016)

This case arose from a fatal boating accident on Lake Powell. Three couples had rented the boat from Aramark. The boat was a Category C Baja 202 Islander, described by the manufacturer as having "limited ability to withstand wind and sea or water conditions" and designed to operate in winds only up to 31 mph. Aramark did not warn the boaters about these limitations.

The day before the trip, when the contract was signed, the weather forecast called for 15-23 mph winds and gusts up to 37 mph. The next day, before they set out, Aramark told the boaters about the weather channel on the boat's radio but did not provide them with the updated weather forecast, which called for sustained winds of 25-35 mph and gusts as high as 55 mph.

During the return trip the boat encountered heavy weather, took on water, and sank. Two of the couples died. Aramark, as the boat's owner, filed a petition under the Limitation of Liability Act. The district court denied the petition on the merits, finding that Aramark breached a duty to warn its customers about the weather forecast. According to the district court, the accident was foreseeable in light of the boat's limited capabilities and the predicted weather conditions, and therefore Aramark had a duty not to allow the boaters to venture out onto the lake. Aramark appealed.

After finding that appellate jurisdiction existed under 28 U.S.C. § 1292(a)(3), which allows an interlocutory appeal from a decision that determines a right or liability of a party to an admiralty case, the Tenth Circuit reversed and remanded.

The appellate court disagreed with the district court's decision to impose a duty based on the foreseeability of danger. In a negligence case, the appellate court explained, foreseeability is used to assess whether a person acted with reasonable care. But rather than automatically imposing a duty whenever danger is foreseeable, one must first determine whether, as a matter of policy, a duty should be imposed at all.

Here the question was whether Aramark had a duty to warn about the weather forecast, a duty not to rent the boat because of the weather forecast, and a duty to warn of the boat's limited capability in high winds.

The court held that Aramark had no duty to provide a weather forecast to its customers since the forecast was available to them with minimal effort—i.e., by listening to the weather channel on the boat's radio. Since there was no duty to provide a weather forecast, neither was there a duty to shut down the rental business based on the weather forecast. "Imposing a duty that so limits personal choice in the context of recreation would be particularly inappropriate," the court wrote.

But the situation was different with respect to Aramark's not warning its customers about the boat's limited capabilities. "We can think of no reason of policy or principle to excuse Aramark from negligence for failure to warn a renter of a boat's limitations." Because the facts underlying this particular failure-to-warn claim were not well developed, the case had to be remanded. ■

Hitting a wave is not a "collision" under the Rules of the Road

In re Buccina, 657 F. App'x 350, 2016 AMC 2285 (6th Cir. 2016) (unpublished)

Plaintiff was riding as a passenger in a boat on the Maumee River in Ohio and was allegedly injured when the boat struck a large wave or wake generated by another vessel. Plaintiff claimed that the incident was a "collision" and that the boat's operator had violated the Rules of the Road. Plaintiff sought to invoke the Pennsylvania Rule, which places the burden on the vessel owner to prove that a violation of a statute or regulation did not cause the injury. The trial court held that the Rules of the Road address collisions between vessels, not contact with waves, and that the Pennsylvania Rule was therefore inapplicable.

Plaintiff moved to certify the issue for an interlocutory appeal, and the trial court obliged. The question certified was "[w]hether a 'collision,' as that term is used in Inland Navigation Rules 6 and 8, occurs when a vessel strikes a wake or wave, but not another vessel, so as to invoke the [Pennsylvania Rule]."

But the Sixth Circuit declined to hear the appeal, finding there to be no substantial argument that striking a wave would qualify as a collision under the Rules of the Road. Seemingly no court had applied the Rules of the Road in a case like this. Moreover, "from a common sense perspective, the idea that a collision occurs when a moving boat strikes a wave would seem to be an unworkable concept since boats, once launched, are repeatedly and continually hitting waves. Defining collision so broadly would lead to too many disputes whenever a driver of a boat comes into contact with a wave—which happens virtually every time a boat enters the water."

A concurring judge thought that the issue was not entirely free from doubt but nevertheless agreed with the dismissal of the appeal because the plaintiff did not present a compelling reason for interlocutory review. ■

Salvage

Eleventh Circuit: "Necessity" not necessary for salvage award

Girard v. M/V Blacksheep, 840 F.3d 1351 (11th Cir. 2016)

The *M/Y Blacksheep*, a 125-foot yacht, was anchored a few hundred feet offshore near the Galleon Marina in Key West. During a test of the engine, the port propeller shaft dislocated from the gearbox coupling, and the yacht began taking on water. The captain made a distress call, indicating his location and requesting assistance in pumping water from the vessel's bilge.

Within four minutes, Arnaud Girard, a professional salvor, responded. The *Blacksheep*'s captain confirmed that he wanted Girard's assistance, and Girard began the dewatering operation with a high-capacity pump.

Girard, along with a co-salvor, then dove under the *Blacksheep* and repositioned the vessel's propeller shaft closer to its proper location. Girard then installed a temporary patch to restrict the flow of water into the vessel. The Coast Guard placed a similar patch inside the vessel. The *Blacksheep* was later towed to the dock.

Girard brought a salvage case *in rem* against the *Blacksheep*. One year later, following a two-day bench trial, the district court ruled for the *Blacksheep*, concluding that no award was due because Girard failed to show that his services were necessary to rescue the vessel from peril. In reaching this ruling, the district court relied on *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), which identified three elements for a salvage award: (1) a maritime peril from which the vessel or other property could not have been rescued without the salvor's assistance, (2) a voluntary act by a salvor who is under no official or legal duty to render the assistance, and (3) success in saving, or in helping to save, at least part of the property. While finding that the *Blacksheep* was in peril, the trial court determined that Girard failed to prove that the vessel "could not have been rescued without the salvor's assistance," i.e., that the salvor's actions were necessary to save the vessel.

On appeal, Girard argued that such a showing of "necessity" was not required. Rather, he submitted that once a "marine peril" is established, the first element of a salvage award has been satisfied. Given the Supreme Court's holding in *The Sabine*, 101 U.S. 384 (1879), the circuit court agreed.

The Sabine requires three elements for a salvage award: (1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part. The circuit court held that *Klein*'s "necessity" requirement was inconsistent with *The Sabine* and with the public-policy interest in encouraging would-be salvors to come to the aid of ships in distress. Thus, salvage claimants in the Eleventh Circuit will no longer need to prove that, but for their assistance, the vessel would not have been rescued.

In light of this ruling, the circuit court remanded the case so that the district court could ascertain whether Girard's actions contributed to saving the *Blacksheep*, and if so, to determine an appropriate salvage award. ■

Jurisdiction

Eleventh Circuit rejects portage as a basis for admiralty jurisdiction

Tundidor v. Miami-Dade County, 831 F.3d 1328 (11th Cir. 2016)

A passenger on a boat operating in one of Miami's drainage canals hit his head on a water main on the underside of a low-lying bridge. The canal was connected to another canal, which itself led to the Miami River, which in turn emptied into Biscayne Bay and the Atlantic Ocean. The canals were partially obstructed by several low-lying bridges and other structures. More importantly, before flowing into the Miami River, the water passed through a "water control structure" with underwater gates that regulated drainage and prevented saltwater intrusion. Boats could not navigate through this structure, and beside the structure was a sign that read: "DANGER — NO BOATING BEYOND THIS POINT."

The injured passenger sued Miami-Dade County, the owner of the water main, in admiralty. The County moved to dismiss for lack of subject-matter jurisdiction, arguing that the canal on which the accident occurred was not navigable for purposes of admiralty jurisdiction. The district court agreed and dismissed the complaint. The Eleventh Circuit affirmed.

The appellate court explained that one of the criteria for admiralty tort jurisdiction is that the tort must occur on navigable waters (or must be caused by a vessel on navigable waters). A waterway is considered navigable for purposes of admiralty jurisdiction if it is presently capable of supporting interstate or foreign commerce.

Because the canal at issue was confined within a single state and could not support interstate or international commerce, the canal was not subject to admiralty jurisdiction. The Eleventh Circuit relied on cases from other circuits involving artificial structures, such as dams, that acted as barriers to commercial maritime activity and that therefore deprived the federal courts of admiralty jurisdiction over torts occurring on those waters.

The mere fact that the canal might once have been navigable or that Congress might have the power to regulate the waterway under the Commerce Clause had no bearing on the question of whether the waterway was presently subject to admiralty jurisdiction. The Eleventh Circuit noted that "extending jurisdiction to waters incapable of commercial activity serves no purpose of admiralty jurisdiction."

In a further attempt to ward off dismissal, the plaintiff relied on an affidavit from another boater who stated that he had rowed a canoe to an embankment near the water control structure, carried the canoe over land past the structure, and then relaunched the canoe and resumed his trip. The court concluded that such "portage" over land was not a practicable way of conducting interstate commerce and therefore did not render the canal navigable for purposes of admiralty jurisdiction. ■

Sales

Boat dealer held liable for $24 million in class action over "document fees"

McKeage v. TMBC, LLC, 847 F.3d 992 (8th Cir. 2017)

A boat dealer headquartered in Missouri but with outlets across the country had a nationwide practice of charging buyers a $75 "document fee" over and above the purchase price. The fee purported to cover the cost of filling out the sale contract, bill of sale, power of attorney, and title and registration documents. The dealer's standard sale contract, used in transactions nationwide, included a Missouri choice-of-law

provision and a "loser pays" fee-shifting provision.

A buyer in Missouri sued the dealer, claiming that by charging a document fee the dealer was engaging in a "law business" in violation of a Missouri statute that prohibits non-lawyers from "drawing or . . . procuring . . . or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights." Anyone violating the statute is subject to treble damages (i.e., three times the amount he charged to prepare the document).

A nationwide class action against the dealer was eventually certified, and the trial court granted summary judgment for the plaintiff-buyers, finding that the imposition of the document fee constituted a "law business" in violation of Missouri law. Based on the Missouri choice-of-law clause in the dealer's standard contract, the court applied Missouri law even to sales that occurred outside Missouri, and calculated the total award by trebling all the document fees collected in transactions governed by the Missouri choice-of-law provision. The judgment against the dealer came to over $21 million. The trial court declined, however, to award counsel fees over and above that amount and instead directed that plaintiffs' counsel be paid out of the common fund. Both sides appealed.

The Eighth Circuit affirmed the imposition of liability. Under Missouri law, the fact that the dealer's employees were filling out standard forms did not mean that they were not engaging in a law business. At a minimum, a power of attorney was a legal document as to which the dealer was prohibited from charging a preparation fee. "[T]he act of charging a fee for the preparation or completion of that document constitutes unauthorized law business, even when a non-lawyer does not exercise any legal judgment in completing the form."

The appellate court also rejected the dealer's argument against applying the Missouri statute to sales outside Missouri. By including a Missouri choice-of-law clause in its contracts, the dealer had elected to have its conduct in respect of those contracts governed by Missouri law. This was not a case in which the state of Missouri itself was attempting to assert police power outside its borders.

Finally, the appellate court held that the "loser pays" provision in the contracts obligated the dealer to pay the reasonable fees of plaintiffs' counsel. The district court therefore erred by requiring that counsel fees be paid out of the common fund. Such fees were to be paid by the dealer, on top of the principal award, bringing the total judgment to over $24 million. ■

State Legislation

Eugene Samarin of Annapolis submitted the following state-law summary, which was prepared with assistance from Logan Pearce, a law student at the Roger Williams University School of Law.

Connecticut

People operating a paddle craft are now required to wear life jackets between October 1 and May 31. They do not need to wear one between June 1 and September 30, but must have one life jacket on hand per person in case of emergencies.

Florida

Proposed legislation would make marijuana THC concentration higher than 5 nanograms per milliliter of blood a criminal offense of boating under the influence. *HB 237*.

Proposed legislation would also prohibit anyone under the age of 16 from operating vessels powered by a motor of 10 horsepower or greater unless that minor is under the supervision of a person over 21 years of age or the minor is participating in a school-sanctioned activity. Further, a parent, guardian or supervising adult, if found to be under influence while supervising a minor, would commit a misdemeanor of the second degree. *HB 1227 (referred to transportation committee).*

Private residential multifamily docks grandfathered-in to use sovereignty submerged lands by January 1, 1998, may moor a number of boats that exceed the number of units within the private multifamily development as previously authorized. The owner or operator of a vessel or floating structure may not anchor or moor such that the nearest approach of the anchored or moored vessel or floating structure is within 150 feet of any marina, boat ramp, boatyard, or other vessel launching or loading facility, 300 feet of a superyacht repair facility, 100 feet outward from the marked boundary of a public mooring filed (this does not apply to government, construction or dredging, commercial fishing vessels, or vessels actively engaged in recreational fishing if persons onboard are actively tending hook and line fishing gear or nets). *HB 7043 (enrolled).*

Idaho & Kentucky

In response to 33 CFR § 174.16(b), which dictates that all boat Hull Identification Numbers (HIN) are valid/formatted correctly and can be verified at time of renewal registration. For all 1972 or newer manufactured vessels without a HIN or with an incorrectly formatted HIN, it will be necessary for your boat to be in compliance prior to the 2018 renewal period.

Idaho is requiring mandatory verification of each vessel's hull identification number and that all boat owners provide a "unique identifier" for every owner listed on a boat's title or bill of sale. This unique identifier can be one of two things: a driver's license and a date of birth for Idaho residents only; or a tax identification number such as a social security number, employer identification number, or individual tax identification number. *Idaho Code §67-7004.*

Starting in 2018, Kentucky boaters will need to verify all Hull Identification Numbers (HIN) when renewing or applying for new registration. *2016 Ky. Rev. Stat. 186A.015 (2017).*

Maryland

Proposed legislation would make "bow riding" illegal. *HB0160.*

Minnesota

Effective May 1, 2017, "Sophia's Law" (*SF 2678*) brings the Minnesota definition of enclosed accommodation compartment in line with ABYC standards. It also prohibits any new boats from being operated on Minnesota waters without a carbon monoxide detection system. All boats 19 feet or longer will also now be required to have carbon-monoxide warning labels; these labels will be supplied by the Department of Natural Resources. *Minn Stat. §86B.532 (2016).*

Montana

Effective July 1, 2017, boaters operating in Canyon Ferry and Tiber will be required to launch and exit Tiber and Canyon Ferry Reservoirs at designated boat ramps, unless they are officially certified as local boaters by FWP. Local boaters would not be required to decontaminate their boat each time they leave Tiber or Canyon Ferry but they still must stop at inspections stations where they will be expedited through after a brief interview. Also, watercraft owners must complete educational training on aquatic

invasive species and sign an agreement with FWP pledging to only use the boat at either Tiber or Canyon Ferry Reservoir. *HB 622 (transmitted to governor on 5/1/2017).*

North Carolina

"Sheyenne's Law" imposes stronger charges and penalties against impaired boaters who cause a death or serious injuries. *N.C.G.S.A. §75A-10.3(f) (2016).*

Oregon

Wildlife poachers will face tougher penalties starting in 2017, and if you're convicted of breaking wildlife laws three times in 10 years, a judge will now order the seizure of your gun, boat, or anything else you used to commit that crime. *ORS 496.705, 496.992 and 498.042.*

Utah

Starting this year, those who have gone boating at Lake Powell or Deer Creek Reservoir must remove the drain plugs from their boats and not replace them until they get home. If your boat has been slipped or moored at Lake Powell for two or more weeks, you must do the following before leaving the reservoir:

- Call the Utah Division of Wildlife Resources aquatic invasive species specialists at Lake Powell to arrange an inspection of your boat.
- If mussels are found on your boat, you will be directed to a private business. You will have to pay the business to professionally decontaminate your boat.
- If the specialist finds that mussels have attached themselves to your boat, you must let the boat dry for the required amount of time—18 days in the spring and seven in the summer—before launching anywhere else in Utah. The dry time is in addition to getting your boat professionally decontaminated.

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