

Long Island

Boating World



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Mercante's Sea Trials



Boom, Bang, What's That Smell?

You've heard the term "getting the crap knocked out of you" but can it really happen? Can someone get injured by contact with another vessel even though there is no collision? And, can it be that sailors can make their own laws applicable to a race that supercedes even the rules of the road that govern all of boating?

The answers are yes.

Boom

It happened recently during a sailing race. A woman was seated on the rail of a Hunter 140 sailing vessel assisting as race crew, in charge of the jib. The skipper controlled the mainsheet and tiller. During the race, another vessel participating in the race came within two feet of the Hunter, but had the right of way. The Hunter was the "give-way" vessel and thus had to yield the right of way and was obligated to take necessary action to avoid collision. Since the Hunter did not take any evasive action, the other skipper (who had the right of way), seeing that a collision was imminent, yelled out "jibe" and then jibed his vessel. The two vessels were so close that the skippers were actually communicating their intentions and commands verbally to one another. The jibe worked to avoid collision between the two vessels. However, the woman seated on the rail was not paying attention and did not see the other vessel's boom swinging in her direction.

Bang

The boats did not collide. However, the boom swung hard over and the part of the boom that extended beyond its own vessel struck the woman in the upper part of her neck causing her to fall forward into the cockpit with her eyes closed and writhing in pain. The woman struck by the boom was in and out of consciousness.

What's that smell?

Luckily, the woman sustained no fractures. Nonetheless, she initiated an admiralty lawsuit against both vessels in which she sought monetary damages for a *loss of taste and smell*. Even her claim for medical expenses was limited to expenses that were related to loss of smell and taste.

She first noticed this condition ten days after the accident when she could not smell her dog's feces. Her taste was affected, too. She could not taste her lobster eggs Benedict at her regular breakfast place and repeatedly sent the meals back. She even gained twenty pounds, allegedly because of her continued attempts to taste food and because she had to pour salt on her food to get any flavor.

Maritime law applied because of the genuine salty flavor of the dispute. The accident happened on a boat in "navigable waters" and involved injuries occurring on board a vessel during a sailboat race, thereby bearing a significant relationship to a "traditional maritime activity." (Members of the *Atlantis Anglers* fishing club on Long Island know this because of my admiralty law talk last month to that now well-versed fishing organization).

In admiralty, liability for a collision or other type of maritime casualty is based on a finding of fault. The mere fact of impact has no legal consequence. The operator's conduct has to be measured against that of a reasonably prudent skipper under similar circumstances. Generally, the place to start is to determine whether either vessel violated the nautical "rules of the road." Specifically, the steering and sailing regulations known as the COLREGS govern vessels' duties and obligations when in sight of one another.

Oddly enough, sailors in an organized race can opt out of the rules of the road, if the participants all agree in advance to abide by an alternate set of rules. There is not much case precedent on this point, but a U.S. Court of Appeals held that *by entering a regatta with sailing instructions which unambiguously set forth special, binding "rules of the road," the participants waive conflicting COLREGS and must sail in accordance with the agreed-upon rules*. So, for example, if a race committee determined that the race would be governed by the International Yacht Racing Rules (IYRR), not the COLREGS, and all participants agreed to these rules, that agreement forms a private contract between the participants and supercedes the statutory collision regulations.

The courts that have upheld this anomaly cite to the facts that a race is a private activity and to the strong public policy favoring the private settlement of disputes. By this method, the race committees have jurisdiction over casualties, protests, and appeal procedures. For example, the Sailing Instructions for a race will typically establish the conditions to which race participants agree to be bound and more importantly, the mechanism for determining who among competing yachts has infringed those rules of conduct.

Now, back to the woman who got the smell of feces and taste of lobster knocked right out of her. Yes, she was awarded some money by the federal judge, who found her complaints to be credible. The judge determined after listening to live testimony at trial that there was a "temporal proximity" of the accident to her difficulty smelling her dog's feces and inability to taste food at local restaurants. However, the judge found the woman to be 40% at fault for her injury for not paying attention to what was going on in the race, particularly demonstrated by the fact that she considered the commands being barked out by the two captains while the vessels were in close proximity just *chit-chatting*. The judge found the skipper of her vessel (the give way vessel) 35% at fault, and the other vessel, which had the right of way but came too close (within two feet of a collision) 25% at fault.

Conclusion

As this case demonstrates, in admiralty law, as in life, you should not have to get hit in the head to wake up and smell the roses. Just pay attention!

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