



Mercante's Sea Trials



Marine Insurance: Getting "Nauti" Aboard a Dinghy

Sailors have more fun and one recent case appears to have confirmed that statement until the tragic *twist* to the *tryst*.

After a sailboat regatta, one participant's yacht called *Hansel*, and another, the *Gretel* (fictitious names) were towed back to the yacht club by a Rigid Inflatable Boat ('RIB' or dinghy) owned by a crew member aboard *Hansel* tied alongside the dinghy, and *Gretel* rafted alongside *Hansel*. Thus, in order to access either yacht, one would have to step down off the dock into the dinghy, then cross-over to the yachts.

No surprise that after the races, the yacht club held a party. One of the guests was aptly named Layla, who met the owner of *Hansel* at the party and they shared some cocktails together. Layla became highly intoxicated and was reportedly asked to leave the bar. The owner of *Hansel* invited Layla to see his yacht. However, the couple never made it aboard. Rather, they stepped down into the dinghy and ended up having sexual relations there. The duo was interrupted by a crew member of *Gretel* who was attempting to access that yacht from the dinghy, but much to her surprise, the dinghy was already occupied. The startled *Gretel* crew member basically said, 'whoops,' excused herself and left. Apparently, having come to her senses from the interruption, Layla asked the owner of *Hansel* to leave her alone on the dinghy and the sailor scurried away and crashed for the night in a camper on the premises. Tragically, it was not a happy ending for Layla. She was reported missing the next day and her body was recovered from the harbor two days later not far from the two sailing yachts. Her death was found to be consistent with drowning and her blood alcohol level was extremely high (.29) at the time of death according to a coroner's report.

Not taking this lying down, the estate of Layla filed a lawsuit in state court claiming negligence and gross negligence against the owner of *Hansel* arising out of Layla's death. The *Hansel's* marine insurance company had initially provided a defense to the owner of *Hansel* (it's insured), but then in an examination under oath, the sailor admitted that the couple had never 'made it' aboard his vessel and that he did not have the permission of the dinghy's owner to be aboard the dinghy for *that* purpose and, in fact, did not know who owned the dinghy. Based on this sworn testimony, the insurer informed *Hansel's* owner that his marine insurance policy did not provide

any coverage. That's when the real fireworks began. The insurer filed a 'declaratory judgment' action in federal court under admiralty jurisdiction seeking a judicial confirmation that the insurer had no duty to defend or indemnify its insured against the lawsuit filed by Layla's estate.

One issue became sailors' etiquette with respect to "rafting" boats together - - namely, whether a sailor has 'implied permission' to traverse a boat that is rafted off to get to one's own boat.

The *Hansel's* marine insurance policy, as most do, agree to pay those amounts that the vessel owner (the insured) is "legally liable to pay for an occurrence which results from the ownership, maintenance, use or operation of the insured vessel." A marine policy also typically provides coverage for bodily injury and property damage arising out of the vessel owner's "permissive use of a private pleasure vessel" that is not owned by the insured. In other words, if you are using someone else's vessel with permission of that person, your own marine policy may cover you for a bodily injury or property damage that arises from your permissive use of that vessel. Here, the marine insurance company took the position that because *Hansel's* owner admitted he did not have the RIB owner's permission to actually 'use' the dinghy, no coverage was afforded under *Hansel's* insurance policy. It was undisputed that the owner of *Hansel* did not have express or implied permission to actually *use* the dinghy for any purpose (other than to travers across it) not to mention the illicit purpose.

The federal district judge stated that the *Hansel* owner had, at best, implied permission to traverse the dinghy to access his own sailboat, consistent with sailors' custom. Admittedly, the *Hansel* owner did not have permission to engage in sexual relations in the dinghy or to use it for any other purpose than for crossing over to his own boat. Nonetheless, in a valiant effort to secure insurance coverage, *Hansel's* owner argued that the implied permission to traverse the dinghy provided implied permission to use the dinghy in anyway his wished. The court did not take the bait.

Accordingly, the trial court concluded that because *Hansel's* owner did not have *any* authority for 'permissive use' of the dinghy outside the scope of just crossing over it, his marine insurer was not required to provide *Hansel* any insurance coverage and the insurer's motion to dismiss the insured's claim for coverage was granted.

But, Layla's estate was not giving up that easy. The estate appealed the decision to an appellate court. The higher court found certain questions of fact remained in dispute and sent the case back to the federal district judge (trial court) for further factual development. As the appellate court saw it (from a different perspective), the trial court's focus on the two '*doing what they were doing*' in the dinghy was a '*red herring*.' The appellate court suggested that the details of their encounter on the dinghy adds nothing to the real issue, namely, when they ceased their inter-action and *Hansel's* owner left the dinghy, Layla was just sitting on the dinghy before preparing to exit herself. Under this scenario, the appeals court said that the case should be reviewed again by the trial court because a reasonable inference could be drawn by a jury that Layla fell in the water as she was attempting to leave the dinghy. In other words, it could be just as likely concluded that the reason they both got into the RIB was to gain access to the *Hansel* and that Layla drowned while she was getting off the RIB, a use for which they both did have implied permission.

The marine insurer was not convinced and when the case was sent back to the trial court, the insurer moved for a summary judgment a second time. The marine insurer continued to assert that the *Hansel* owner would only be covered by insurance not only if the loss arose out of his permissive use of the inflatable dinghy but also with proof that Layla entered the water and drowned after stepping on or off the dinghy. Because there was no evidence whatsoever (other than pure speculation) as to *where* or *how* Layla entered the water and drowned, the trial court judge once again granted the insurer's summary judgment motion and dismissed the *Hansel* owner's claim for insurance coverage.

Conclusion

It is interesting in law how two courts can take such different 'twists' of the same set of facts. And, only in the specialty field of maritime law can a fish species be invoked to classify one set of these facts as a '*red herring*.'

James E. Mercante () is a partner and heads the admiralty practice at Rubin, Fiorella & Friedman LLP, and is a Commissioner on the Board of Commissioners of Pilots of the State of New York.