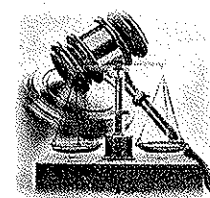




Mercante's Sea Trials

Cigarettes, Fire and Videotape!

(Preserving Evidence is Critical)



After a few months hiatus from Sea Trials due to commitments to real-life cases in the world of admiralty law . . . we're baaaaack! If you have any affinity for the sea, you will enjoy cases that involve boats, ships, jet skis, tug boats, cruise ships, marine insurance, marine brokers, charterers, shipowners, P&I Clubs, fishing vessels, collisions, allisions, salvage, pollution, wrecks, seamen, captains, pilots, marinas personal injury and fire.

Evidence is key

The common denominator in all legal cases is "evidence." The credible evidence dictates the outcome of the case. In an admiralty case, evidence comes in all forms, such as witness testimony, a party's own statement, photographs, nautical charts, marine electronics, vessel components, and the vessel itself. Preserving evidence is not only a good idea, but it is required by evidentiary rules, and the failure to do so, called "spoliation" of evidence, can result in sanctions against the party who had the obligation to preserve it. An admiralty case we recently concluded concerned a fire at a Long Island marina that originated on one vessel, spread to numerous other vessels and the marina. There were cross-allegations by the parties of evidence spoliation.

Where there's 'smoke', there's fire!

A fire originated aboard the motor yacht *Noteworthy* while unmanned and docked at a marina. The fire spread to several other vessels berthed nearby and to the marina's dock, resulting in property damage and losses valued in excess of \$1 million. The *Noteworthy* burned and sank and was nearly completely destroyed by the fire with only the charred wreckage of the hull remaining. In the days following the fire, a *cause and origin* investigation was conducted by the Nassau County Fire Marshal as well as several fire experts appointed by marine insurers for each vessel that sustained damage in the fire. Evidence from the *Noteworthy* and the marina's electrical system was evaluated. Hundreds of photographs were taken by these experts over the course of five separate inspections and certain evidence selected by the experts was preserved.

On behalf of the owner of *Noteworthy*, we commenced an admiralty proceeding in the federal court seeking exoneration from or limitation of liability to the post-casualty value of the destroyed vessel, i.e. to exonerate the owner or cap his liability since the vessel owner ("petitioner") had no "privity" or "knowledge" of *how* or *why* the fire started. Indeed, not one of the fire investigators could determine the cause of the fire even after numerous inspections.

One theory suggested that a marina mechanic may have boarded the vessel to change oil filters, as requested, and that the 'smoking mechanic' may have left a lit cigarette in the salon of the vessel that eventually caused a combustion fire. The marina and the mechanic both denied that the mechanic had boarded the petitioner's vessel that day, so throughout the case the cause of the fire remained in dispute and undetermined.

Where's the video?

Naturally, a flare-up of lawsuits ignited shortly after the smoke subsided. Numerous New York admiralty law firms were involved in the case. While the

lawsuit was pending, but well after the fifth inspection of the remains of the *Noteworthy*, the vessel's hull was accidentally disposed of by an independent salvage company. All claimants, including the marina, seized on this mistake to seek adverse sanctions against the petitioner, and his marine insurer, for 'spoliation' of evidence, namely (i) to dismiss the petitioner's limitation of liability proceeding, and (ii) a ruling that the fire was caused by an *unseaworthy* condition aboard the vessel.

The case took another sudden twist when it was learned in deposition testimony that the marina failed to preserve its video surveillance camera that was pointed right at the entrance to the dock where the *Noteworthy* was berthed.

Spoliation of evidence

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." A party seeking sanctions for spoliation has the burden of proving that the alleged spoliator has an obligation to preserve the evidence, acted culpably in destroying it and that the evidence would have been relevant to the aggrieved party's case. The obligation to preserve evidence arises when the party has notice that the evidence is relevant to the litigation or when a party should have known that the evidence may be relevant to future litigation. Pursuant to this obligation, anyone who anticipates being a party or is a party of a lawsuit must not destroy "unique, relevant evidence that might be useful to an adversary." The Federal Rules of Civil Procedure require parties to preserve electronically-stored information as well. Here, there was little dispute that there was an obligation to preserve the remains of the vessel. However, the vessel owner was not 'culpable' for the mistaken disposal of the vessel by an independent salvage company.

The surveillance system at the marina was a digital video recorder where the video data from the camera is recorded into a hard drive without a video tape or CD disk generated. However, despite the massive fire, the marina did not take any steps to preserve this evidence. Thus, fighting fire with fire, we answered claimants' spoliation motion relating to the vessel with a spoliation motion relating to the surveillance system. The marina argued that it had no obligation to preserve the surveillance footage because no one requested the data to be preserved and that it had no reason to believe a litigation would result from the fire. United States Magistrate Judge Kathleen Tomlinson, disagreed and determined that the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party *should have known* that the evidence may be relevant to future litigation. The Magistrate Judge authored a 34-page Report and Recommendation, which is a comprehensive treatise on "spoliation" in admiralty law, to federal judge Sandra J. Feuerstein. Magistrate Judge Tomlinson reiterated that twelve boats and a portion of the dock were destroyed by the fire and, therefore, the marina's position that since the fire started on the petitioner's boat, the marina had no reason to believe litigation would result from that fire without merit.

The question, according to the court, was not

whether the marina believed it could be held responsible for the damages caused by the fire, but whether "a party should have known that the evidence may be relevant to future litigation." Because the marina owner "unquestionably" was on notice given the sheer breadth of the damage which resulted from the fire, there was certainly a reasonable probability that litigation would ensue, triggering the duty to preserve all evidence, including the surveillance video footage. The footage, according to the court, would have helped resolve some of the disputed facts in the case regarding who boarded the vessel that day, when the vessel owner came and went, and what activity the marina mechanic was engaged in that day and whether he was smoking on the dock and, if so, where. As a result, the marina had a duty to preserve the surveillance footage.

The marina argued that it did not act intentionally in overriding the surveillance video because no one ever asked the marina to preserve the tape. The Magistrate Judge rejected this as "circular reasoning" because the duty to preserve the crucial surveillance video arose on the day of the fire and was not dependent upon a discovery request seeking the production of the surveillance footage. Accordingly, the Magistrate Judge found the marina was "at the very least, negligent in failing to preserve the surveillance footage."

The recommendation of the Magistrate Judge was adopted in most part by United States District Judge, Sandra J. Feuerstein, Eastern District of New York. Judge Feuerstein noted in her decision that in order for the claimants to obtain such "severe sanctions" relating to the disposed vessel, they had to demonstrate that the lost evidence would have been favorable to it, something that claimants did not do. As for the sanction against the marina, Judge Feuerstein required the marina to bear the cost of retaining an expert to conduct a forensic examination of the surveillance system to determine if the video footage from the date of the fire could be retrieved.

In addition, the federal judge allowed the owner of *Noteworthy* and his marine insurer to assert a claim against the marina for the destruction of his vessel. The claimants (other vessel owners) had no recourse against the marina because they failed to timely assert a claim against the marina in the litigation.

The *M/V NOTEWORTHY* decision is published in American Maritime Cases, 2009 AMC 1355 (E.D.N.Y. 2009).

Conclusion

There is a reason for the phrase "key evidence." Such evidence can unlock the door to a hotly-contested case and, like a beacon, guide a judge or jury to resolve disputed issues of fact. When such evidence is disposed of or otherwise lost, as this case demonstrates, it is like throwing away the key!

JAMES E. MERCANTE, admiralty partner with Rubini, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York, defended the owner of *M/V Noteworthy* and his marine insurer in this case. E-mail address: jmercante@rubini-fiorella.com. The information in this article must not be construed as legal advice and laws may vary from jurisdiction to jurisdiction.