



# Mercante's Sea Trials



## I Jump - Therefore I Sue

by James Mercante

One recent case falls into a category similar to the children's book *A Series of Unfortunate Events*, or more aptly described as a series of stupid events. Nonetheless, the injured party commenced a lawsuit and after many strike-outs finally scored with a jury.

### Might as well jump!

The owner of an 18-foot ski boat and three guests went out for a day of wake-boarding on a lake. The boat was powered by a 135 horsepower stern drive engine (inboard/outboard) manufactured by a reputable boat and marine engine manufacturer. The stern drive, equipped with propeller, was hydraulically lowered into and raised out of the water for use. While underway, one of the two tow ropes unhooked from the boat and fell into the water. One of the guests decided to jump in the lake behind the boat to retrieve the rope. He did so apparently without notifying the driver. Then the driver put the boat in reverse and backed up over his guest. The spinning propeller shredded the guest's leg which ultimately had to be amputated at the hip joint. A series of stupid events, yes, but this would not be a *SEA TRIALS* column without a lawsuit. The guest sued both the manufacturer of the engine and the vessel, alleging that the boat was defectively designed because of its use of an "unguarded" propeller.

### Third time's a charm

The case proceeded to a jury trial *three* times in federal court. The first two juries could not reach a verdict, so those trials ended with no runs, no hits, and probably a few errors. Not to be deterred, the plaintiff took one more at-bat and the third jury concluded that there was indeed a design defect in the vessel and engine by virtue of the unguarded, exposed propeller. The jury awarded damages to the plaintiff. The engine manufacturer decided to appeal from the jury's award of damages to the ill-advised diver.

To recover on a design defect claim, a plaintiff typically must prove three elements, namely that (i) the product was defectively designed so as to render it unreasonably dangerous, (ii) a safer alternative design existed, and (iii) the defect was a leading cause of the injury for which the plaintiff seeks to recover. Simply put, the main question in a design defect case is whether there was a reasonable alternative design that at a reasonable cost would have reduced the risk of harm.

### Not very "appealing"

The Court of Appeals heard oral arguments and carefully reviewed the evidence and the elements of a design defect theory of liability. The court determined that each of the criteria was adequately presented at trial and with suf-

ficient and credible evidence. The first question was whether the outdrive was defectively designed so as to render it unreasonably dangerous. In this regard, the injured plaintiff had presented evidence at trial of the number and severity of reported propeller injuries and had submitted a proposed alternative design that would not adversely impact the engine's utility. Expert witnesses testified at trial that the proposed alternative was actually a safer overall design, not excessively expensive and would eliminate propeller injuries. Another witness, a vessel owner, testified that he considered an exposed propeller to be dangerous and that he would have purchased a propeller guard had one been available. With the totality of this testimony, the court found on appeal that enough evidence had been submitted at trial to prove the design was defective.

The next element of proof was if a safer alternative design existed. Here, in response to the engine manufacturer's contrary contentions, the appellate court determined that an injured plaintiff is not required to *build* and to *test* a prototype of the alternative design to show technological feasibility, but is merely required to prove that the alternative design was "capable of being developed." (Citation omitted). At trial the plaintiff's team also presented testimony of an inventor and builder of an alternative design to safeguard a spinning propeller. That expert testified that the cost of building a propeller guard with a shield was just \$150 for each item, plus an additional \$100 if the vessel owner chose to weld the guard and shield onto the boat, for a total of just \$400. The appellate court found this trial testimony to be sufficient evidence of economic feasibility of an alternative design. The Court of Appeals did not struggle with the notion that the exposed and unguarded propeller was a contributory cause of the injury.

The appellate court then considered the engine manufacturer's argument that an improper instruction was given to the jury by the trial judge prior to the jury's beginning deliberations. Once again the Appellate Court found no merit to the "defective" jury instruction argument and determined that the jury was *clearly* and *correctly* instructed that a design defect is one that makes a product unreasonably dangerous based on the utility of the product and the risk involved. The court would not overturn the jury's ruling on the basis of an alleged improper jury instruction and presumed that the jury did indeed follow the judge's instruction carefully. Moreover, even had the instruction been an erroneous one, the Appellate Court found that the challenged jury instruction would not have affected the outcome of the case and noted that "perfection is not required as long as the instructions were generally correct and any error

was harmless."

Thus, after three jury trials and an appeal, the guest who jumped overboard from a moving boat and was run over was able to recover against the engine and boat manufacturer for his injuries.

### Liability in the making

While this decision may seem surprising to some, this had been brewing since a 2002 United States Supreme Court decision in *Spritsma v. Mercury Marine*, where, in a propeller fatality case, the United States Supreme Court held that (1) despite the engine manufacturer's arguments, the Federal Boat Safety Act (FBSA) did not preempt common law claims arising out of a failure to install propeller guards over a boat's propeller, and (2) the Coast Guard's decision not to adopt any federal regulation requiring propeller guards did not preempt a personal injury claim resulting from an exposed propeller. In *Spritsma*, the Supreme Court remanded the case back to the trial court for further proceedings consistent with its opinion on the so-called "preemption" argument. Not surprisingly, that case was never heard from or reported again, so the defendants undoubtedly settled the case feeling that the axe was about to fall with regard to the lack of propeller guards.

Interestingly, as a result of numerous propeller injuries, a "propeller guard sub-committee" had been established by the Coast Guard, which, at some point, recommended in favor of "educational and awareness campaigns" and publishing a series of articles aimed at avoiding boat-propeller accidents which was to include warning signs and installing propeller guards.

### Conclusion

As result of the United States Supreme Court's earlier decision and the recent ruling reported herein, one should not be surprised to see boats on the market and in the water with warning signs at the stern and/or equipped with propeller guards - just in case one of your guests decides to jump overboard while you are underway.

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