Mercante's Sea Trials

Even A Collision Has Its Limits

This scenario is based on actual facts and a recent federal court decision involving a collision at sea. The adage is true that *a collision at sea can ruin your whole day.* Sometimes, its impact lasts longer!

Say a pleasure craft collided with a commercial fishing vessel and due to the force of the impact, the fishing vessel was severely damaged. The fishing vessel was insured for $200,000 and sustained about $197,000 in damages. However, the "fair-market value" of the fishing vessel was greater than it was insured for according to the vessel owner. In addition, the commercial fisherman sought money damages for "loss of use" of his vessel, i.e., fishing charter income from passengers.

While this scenario seems simple enough, it raises numerous legal issues under admiralty law. Can you answer the following?

(i) What amount is the owner of the fishing vessel entitled to recover from his own marine insurance policy?

(ii) Is the fishing vessel a "total loss" or a "constructive total loss" ("CTL")?

(iii) What is a CTL?

(iv) After being paid by its insurer, would this fishing vessel entitled to recover any further money in a liability suit against the owner of the recreational vessel?

These questions were answered in a well-reasoned admiralty decision issued recently by a federal judge in New Jersey, the Honorable Joseph E. Irenas. We represented the owner of the recreational vessel in the lawsuit by the fishing vessel owners, *J.J.C. Boats Inc. v. Hlywiak.*

Collision at Sea

The collision occurred off the coast of Cape May, New Jersey, in heavy fog, between a pleasure craft called *50/50*, a 25-foot Bayliner Trophy, and a 62-foot fiberglass, passenger-carrying fishing vessel owned by J.J.C. Boats, Inc. called *TWILIGHT*.

After fishing with three friends aboard the *50/50* for about 45 minutes in patchy fog, the operator and his friends decided to return to shore. On the return trip, *50/50* entered an area of dense fog and the operator prudently began reducing the throttle from the 15 to 17 mph he had been traveling. *50/50* then saw the outline of a commercial fishing vessel (*TWILIGHT*) underway directly ahead and *50/50* pulled back on the throttles. The two vessels collided. Due to the fog, *50/50* could not see the other vessel until seconds before impact. The captain of the *TWILIGHT* had observed the *50/50* at least *one mile* away by radar.

Although J.J.C. Boats was paid by its marine insurer for the fishing vessel's "agreed hull value" ($200,000), as stated in the insurance policy, J.J.C. Boats nonetheless brought a claim in federal admiralty court against the owner and operator of the *50/50*. We retained top South Shore commercial fishing captain, Tom Weiss, of F/V *CAPTAIN AL* out of Point Lookout, New York, as a marine liability expert to consult with regard to prudent operation of vessels at sea in fog and proper steps to take upon observing another vessel by radar target. However, it soon became clear that *liability* was not the main issue in the case but, rather, *damages*. These are the two parts of every case. In other words, the issue we raised was whether or not J.J.C. Boats was entitled to any money from the owner of the *50/50* beyond what J.J.C. Boats had already been paid by its marine insurer under its hull policy.

Anatomy of a Claim

As in most collision cases, a marine surveyor was dispatched to inspect the damage to each vessel and provide repair cost estimates. The insurer for J.J.C. Boats, Insurance Company of North America ("INA"), received an estimate for repairs to the *TWILIGHT* of $197,272. As a result, J.J.C. Boats submitted to INA a signed "*Proof of Loss*" for the total value of its marine insurance policy, i.e., $200,000.

Judge Irenas noted that two categories of damages arise from a collision between vessels: (1) **total** loss of a vessel and (2) **partial** loss of a vessel. The well-settled rule is that:

In cases of *total loss* by collision, damages are limited to the value of the vessel with interest thereon. The probable net profits of a charter may be considered in cases of delay occasioned by a *partial loss* where the question is as to the value of the use of the vessel pending her repairs . . . but in cases of *total loss* the probable profits of a charter not yet entered are always rejected. This was the ruling in an admiralty case from 1897 called *THE UMBRIA*.

Admiralty Jargon

The *TWILIGHT* collision involved a "*constructive total loss*" (CTL), which in admiralty is distinguishable from an actual "*total loss*". An actual total loss occurs, as per Judge Irenas' example, when a vessel sinks to the bottom of the ocean and cannot be recovered. A vessel is considered a constructive total loss when the cost of repairs is greater than the vessel's fair-market value immediately before the casualty.

In a 1954 admiralty case, *Calmar S.S. Corp.*, famous Judge Learned Hand discussed the theory of the doctrine of constructive total loss, stating:

"When a ship is wrecked, but not lost or broken up into such fragments that it ceases to be a ship at all, an insurer is liable only for the expense of restoring her to a former condition. On the other, if she is on a strand and has become unnavigable as she lies, it is often true that for practical purposes this expense is not full indemnity, for the insured has neither the immediate benefit of the ship, nor of the expense, whose payment after long delay may be very far from making him whole. To meet what would otherwise be a failure of the policy to accomplish its purpose, the doctrine of 'constructive total loss' was devised, *which gives the insured the privilege of compelling the insurer to pay the full amount at once in exchange for the transfer of the wreck.*"

Since J.J.C. Boats was paid the full *agreed value* that was listed in its insurance policy, we pointed out that the "fair-market value" at the time of the accident is equivalent to the policy's agreed value of $200,000. J.J.C. Boats argued instead that the fair-market value of the *TWILIGHT* was much greater than $200,000 due to extensive upgrades and modifications over the years, yet J.J.C. neither upgraded its insured value nor provided proof of a higher value to the court.

There is a Choice

The court found that *TWILIGHT*'s owner had a choice when it submitted its claim to its insurer.

1) It could have claimed a partial loss of the *TWILIGHT*, thereby seeking to have the vessel repaired for $197,272 and that would also entitle J.J.C. Boats to damages for "*the value of the use of the vessel pending her repairs.*" But, if J.J.C. Boats chose this option, it would have been without the immediate benefit of its fishing vessel while the repairs were completed.

2) Alternatively, it could have claimed a "constructive total loss" (CTL) and sought the full $200,000 value of the INA policy. However, as part of the "privilege" of receiving the full amount of the policy at once and avoiding payment after a long delay, J.J.C. Boats was required to abandon the *TWILIGHT* and transfer title to its insurer.

TWILIGHT's owner, after considering its options, decided to claim a constructive total loss of the *TWILIGHT*, receive the $200,000 value of the INA policy, and transfer title to INA. Accordingly, Judge Irenas ruled that J.J.C. Boats was not permitted to seek damages from the Hlywiaks for its "*loss of use*" of the *TWILIGHT* because such damages are only permitted in cases of partial loss.

J.J.C. Boats also sought to recover increased damages from the Hlywiaks even though it surrendered title to the *TWILIGHT* in exchange for the full value of the policy. This cause of action was for the difference between the policy's "agreed hull value" and what J.J.C. claimed the actual value of its ship was on the open market. But, the surrender of title upon the insurer's payment of the CTL was an abandonment of the *TWILIGHT* by J.J.C. Boats, which had significant consequences.

The owner's abandonment of the *TWILIGHT* to its insurer vested the insurance company with all claims and rights for the constructive total loss of the vessel. According to

Continued on page 35

Mercante's *Sea Trials*

Even A Collision Has Its Limits

Continued from page 34

the court, this includes any claim for damages from the Hlywiaks that might exceed the value of the insurance policy. Indeed, the owner lost its interest in the *TWILIGHT* after its insurer accepted a constructive total loss of the vessel, and J.J.C. could not thereafter seek damages for the fair market value of the *TWILIGHT* even if that value exceeded $200,000. Therefore, citing admiralty precedent, the Court precluded J.J.C. Boats from claiming any additional damages in excess of the hull insurance proceeds which it had already recovered.

Conclusion

If it seems as if a legal issue involving admiralty law lurks around every turn of the bilge - - it's true. Sometimes the outcome is dictated by the vessel owner's own choice. An admiralty lawyer can help you make an educated decision.

The answers to the legal issues:

(i) $200,000
(ii) CTL
(iii) If you don't know, read article again!
(iv) Negative.

JAMES E. MERCANTE, admiralty partner with Rubin, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York, represented the Hlywiaks in this case together with Michael E. Stern, Esq. E-mail address: jmercante@rubinfiorella.com. The information in this article must not be construed as legal advice and laws may vary from jurisdiction to jurisdiction.