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ADMIRALTY LAW

Expert Analysis

# Texting Liability Hits the High Seas And So Far, It's a Rough Voyage

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As the waterways embrace new businesses, litigation is sure to follow. Now you can catch a water taxi or commuter ferry and get just about anywhere around the city. But, recent marine casualties demonstrate that operators of watercraft and water taxis can be lured into inattention as readily as their landlubbing counterparts.

Recently, a New York water taxi operator lost situational awareness and collided with another vessel while sending text messages on his mobile phone, see *In re Fire Island Ferries,* 2018 U.S. Dist. LEXIS 18599, 2018 AMC 395 (E.D.N.Y. 2018). This and similar incidents afloat are calling attention to the use of mobile phones by those operating vessels.

Dangers caused by distracted car drivers are well known. Mobile phones are said to be a leading cause of car crashes, and since 2001, New York has statutorily prohibited mobile phone usage by drivers, see NY CLS Veh & Tr §1225-c.

Interestingly, there has been little discussion and no New York legislation pertaining to mobile phone usage upon navigable waters. However, it is not totally off the radar either. Cellphone usage underway is a violation of Rule 5 of the U.S. Coast Guard Navigation Rules—more commonly known as the "rules of the road," which require boaters to maintain a proper "lookout" by sight and sound, 33 CFR § 83.05. For instance, in the aforementioned case, the court found that the operator violated the lookout rule because his text messaging prevented him from seeing the other boat approaching the water taxi on a collision course. The admiralty decision, written by Judge Denis R. Hurley, explain, "The problem from [the water taxi owner's] perspective is not that [its captain] served as the sole lookout but that he did so negligently. By texting moments before impact he failed to see what almost certainly would have been visible to a reasonable person exercising appropriate caution had he been looking ahead, viz. the "white hull"of the [other vessel] approaching from his starboard."

In admiralty law since 1874, when a vessel violates a statutory duty or regulatory "rule of road," designed to prevent collisions at sea, such violation will be presumed to have been the cause of the collision, see *The Pennsylvania*, 86 U.S. 148 (1874). To overcome the presumption, the vessel in violation bears the burden to prove not only that the violation did not cause the collision but could not have contributed to the collision, *In re Otal Investments,* 494 F3d 40 (2d Cir. 2007). The result is that mobile phone use by a vessel operator involved in a casualty can become

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difficult to overcome in view of the statutory lookout rule violation.

**Duck!**

When a collision between vessels is caused by a districted operator, a claimant may attempt to hoist liability upon the vessel owner. For vessel owners, liability to affected third-parties can be surprising and substantial.

In a highly publicized case dubbed the "duck boat accident" in 2010, a tugboat pushing a 250 foot sludge barge rammed into a 33 foot duck tour'boat on the Delaware River in broad daylight. The casualty was captured on video. **Click here to view.** The duck boat had been stranded in the middle of the river with 34 passengers and two crew members after experiencing engine issues during one of its tours. Thus, the captain anchored the boat and waited like a sitting duck for help to arrive when it was run down by the 250-foot barge full of sludge and pushed underwater. Two passengers drowned and dozens of others were injured. Turned out that the tugboat operator was on his mobile phone at the time of the incident. The operator was charged criminally under the Seaman's Manslaughter Statute for negligent homicide caused by a seamen, 18 U.S.C. §1115. The operator pleaded guilty based, in part, on his use of a personal cellphone while operating the tug. He was sentenced to a year in prison. The owner of the tug filed a Limitation of Liability Action (Limitation Action) pursuant to 46 U.S.C. 30501, in an attempt to limit its liability to the value of the tug and barge based on the argument that the owner had no "privity'" or "knowledge" of mobile phone usage aboard its vessels, *In re K Sea Operating Partnership,* 10-cv-05750 (E.D. Pa. 2010). Prior to the court issuing a ruling on the owners Limitation Action' defense, the duck boat and tugboat owners reached a settlement with all claimants in the amount of $17 million.

OMG … There's more! In February 2013, a San Francisco ferry collided with a speedboat in the San Francisco Bay, killing the boat operator and seriously injuring his friend onboard, see *Holzhauer v. Golden Gate Bridge Highway & Transportation District*, 2016 U.S. Dist. LEXIS 173732 (N.D. Cal. 2016). At the time of the collision the ferry captain was distracted on a personal cellphone call. Here again, the ferry owner filed an admiralty Limitation Action in California federal court, arguing that it had no privity or knowledge of cellphone use aboard its vessels. Despite that the ferry operator's call was personal and not business related, the ferry owner defense did not hold water and the court denied the ferry owner's plea to limit liability. In the ruling, the federal Judge explained that "the shipowner's burden is not met by simply proving a lack of actual knowledge, for privity and knowledge is established where reasonable inspection would have led to the requisite knowledge." Notably, the ferry owner had no policy restricting cellphone use by its operators. Adding to this, the evidence suggested that the ferry owner was aware that its operators were carrying personal mobile phones while working and did not restrict their use.

The owner of the New York water taxi similarly attempted to have its liability limited to the value of its vessel. Interestingly, the vessel owner treated all electronic devices in the wheelhouse, including radar and cellphones, as a tool that the captain has at his disposal when navigating the vessel. The owner had a verbal policy in place that required captains to avoid all unnecessary distractions while operating the vessel. This verbal policy, however, was determined by the court to be inadequate because it did not specifically address the issue of texting. Further, the court held that the owner "which again bears the proof, did not present any evidence suggesting that it was somehow unaware that its captains were engaging in the dangerous practice of using their cellphones for personal reasons while underway; to the contrary, that evidence there is on the subject indicates that [the owner] knew of the practice and took no specific steps to address the associated dangers. That makes the company complicit in the wrongdoing," 2018 U.S. Dist. LEXIS 18599 (E.D.N.Y. 2018).

However, in 2007, a vessel owner was entitled to limit its liability for personal injury and property damage that resulted in part from cellphone distractions aboard its vessel. In In *In re Omega Protein,* 2007 U.S. Dist. LEXIS 17917

(W.D. La. 2007), *affd*. 548 F.3d 361 (5th Cir. 2008), a fishing vessel collided with an offshore oil platform while its captain was on a personal phone call. The vessel owner was successful in proving it lacked privity or knowledge of the captain's distraction resulting in his failure to keep a proper lookout. The court stated that a vessel owner may be entitled to limit its liability where, as here "the acts of negligence did not result from any lack of competence on the part of the crew, but rather are merely mistakes of navigation." 2007 U.S. Dist. LEXIS 17917 (W.D. La. 2007). The court held that the captain was a competent master and rejected an argument that the owner should have had additional protocols in place, such as the use of an anti-collision alarm. The U.S. Court of Appeals for the Fifth Circuit affirmed, holding that the captain "did not have a pattern of improper or unsafe behavior. Rather, he had a spotless record in his 20 years of working the menhaden fishery as a pilot and captain." 548 F.3d 361 (5th Cir. 2008). The Fifth Circuit elaborated that "the privity or knowledge standard does not require a vessel owner to take every possible precaution; it only obliges the owner to select a competent master and remedy deficiencies which he can discovery through reasonable diligence." 548 F.3d 361 (5th Cir. 2008).

Likewise, in a collision with a fixed platform case resulting in a vessel sinking and oil spill, which the author handled, a federal court held that the vessel captain's cellphone calls to the oil platform did not cause him to lose situational awareness in the moments leading up to the collision in *Water Quality Insurance Syndicate v. United States*, 225 F. Supp. 3d 41 (D.D.C. 2016).

## Who Ya' Gonna 'Call'?

Even the Coast Guard has caught the wave. In 2009, a Coast Guard boat collided with a passenger vessel off the coast of South Carolina, injuring half a dozen passengers. While that must have been embarrassing enough, the NTSB subsequently investigated the incident and determined that the collision occurred because the Coast Guard Officers on watch were texting and talking on their personal cellphones. **Click here to view.**

A few weeks later, a U.S. Coast Guard patrol boat struck a 24-foot recreational craft off the coast of San Diego, California, during the city's annual holiday boat parade. An 8-year old boy onboard the recreational boat died and four other people onboard sustained serious injury. Once again, the NTSB concluded that the crew's cellphone use prevented the crew from effectively maintaining a proper lookout. **Click here to view.** The incident launched criminal proceedings before a General Court-Marshall against three of the Coast Guard officers who were on watch at the time of the incident. Criminal charges against the U.S. Coast Guard operator included negligent homicide, but a jury convicted only on dereliction of duty. The families onboard the recreational boat filed claims against the United States for wrongful death and personal injuries, which was settled before trial, *Deweese v. United States of America*, No.: 10-cv-00360 (S.D. Cal. 2010).

In light of these hazards and casualties, the NTSB released recommendations for the Coast Guard to implement a policy regarding personal cellphone use onboard its vessels. **Click here to view** the NTSB news release. **Click here to view** the Coast Guard cellphone/texting device policy.

## Get the Message?

It's evident that the mobile device of social necessity may become a mobile public hazard ashore and afloat. Has it gotten to the point that selecting a competent master means checking his or her mobile phone at the wheelhouse door before taking the helm? Maybe that's a stretch, but it does appear in bold font that clearly articulated policies restricting cellphone use and text messaging while underway are likely becoming the new norm for vessel owners employing a crew. Moreover, it would not be surprising if legislation restricting mobile phone use on New York state waters rings loud on the horizon.