



Mercante's Sea Trials

Biting the Hand that Tries to Save You!



No doubt all mariners took notice when the fishing boat capsized a couple of months ago in the Gulf of Mexico with four fishing buddies on board. They were all in top physical shape, either former or present players in the National Football League. But they were no match for the high rolling waves that swamped the boat and swept them away. A search and rescue was initiated by the United States Coast Guard and about 36 hours later, only one of the four was found, clinging to the overturned hull. The other men were never located despite massive Coast Guard patrols, both marine and aviation.

The Coast Guard is often the first to be notified when a marine casualty occurs, by May Day, cell phone or otherwise. I had my own situation this past summer when one of three treble hooks of a swimming plug embedded deep into my son Dylan's bicep with a bluefish flopping around on one of the other hooks. Every whip of the tail caused the sharp hooks to protrude deeper into his skin. Damn bluefish! Fortunately, we were close to the Short Beach Coast Guard Station at Jones Inlet and motored over there for a quick extraction.

The Coasties answered my VHF call and were running down to the dock as I landed my boat minutes later. The men in blue responded fast and admirably with concern, a first aid kit, and large set of pliers. But, to my amazement, the big hulk of a petty officer, who looked like he could be an NFL player himself, would not cut the hook with the pliers - told me it was for "liability reasons" and not within their mandate to do that kind of thing. I thought he was kidding until he handed me the pliers and told me to "have at it sir...I am not authorized to do this". I cut the hook and the Coastie cleaned and dressed the wound. We were thankful and my son was impressed with them. I sent them a thank you note.

On the way home....with the bluefish Dylan wanted to repay by cooking its goose and eating it for lunch, Dylan asked, "Why wouldn't the Coast Guard cut the hook?" Of course, he asked the right guy, being that I had once been a U.S. Department of Justice attorney for the civil division, admiralty and aviation branch, where our clients were the federal agencies of the United States, including the U.S. Navy, Army Corps of Engineers, Federal Aviation Administration, and the Coast Guard. But it's not easy to explain to a 14-year old the answer to a question that many have asked over the years and a federal judge recently answered, or I should say reiterated. Simply stated, the Coast Guard was right, he could not cut the hook for liability purposes. The Coast Guard has often responded to a casualty, whether it be a salvage job, tow, search and rescue or first aid, and when it goes badly, they get sued. Can be summed up in five words....*No Good Deed Goes Unpunished!*

Coast Guard to the Rescue

A recent federal court decision from the Virgin Islands (St. Croix) sums it up further in a fact pattern similar to the Gulf of Mexico tragedy. In the Virgin Islands case, however, everyone survived, but the Coast Guard got sued anyway. In

Azille v. United States of America, decided November 13, 2008, three fishermen sued the United States for damages arising out of the Coast Guard's allegedly negligent search efforts after plaintiff Azille's boat took on water and capsized off the Virgin Islands one April morning. The three departed St. Croix en route to St. Thomas to sell a large catch of fish. They were aboard a 26-foot boat called *A Light in the Dark*. During the trip, the container holding the one-and-a-half tons of fish shifted, causing the boat to take on water at an alarming rate. Unable to access his VHF radio, one of the fishermen called his daughter by cell phone and gave an approximate position off Buck Island in close proximity to St. Thomas. The girl then called the Coast Guard and relayed the information and the cell phone number. The Coast Guard promptly launched a rescue boat to search for plaintiffs and called Azille to confirm his position. The men were unable to provide a latitude and longitude but estimated by "seaman's eye" that they were four to five miles south of Buck Island. The Coast Guard advised the men to start throwing the catch overboard, but apparently not willing to depart so readily with their profits, the plaintiffs, according to the judge's decision, delayed in doing so and the vessel thereafter capsized. Prior to capsizing, the men had fired all their flares and then the cell phone stopped working. Once in the water, the men had no access to any signaling or communications devices.

The Coast Guard soon arrived at the reported position and found nothing. A second Coast Guard boat and a search and rescue helicopter joined the search, reporting to the area where a white flare had been spotted to the east. Two other Coast Guard helicopters joined the efforts in the afternoon and one of them deployed a datum buoy to measure the force and direction of the current. Despite the extensive search for hours, the Coast Guard came up dry. A private sailing vessel found all three men in the water the next morning a mile off Culebra, Puerto Rico, about 27 miles to the west of the accident site.

The Coast Guard spent over eighteen hours searching for the three men, covering an area of about 192 nautical miles. But, the unsatisfied plaintiffs sued to recover for their injuries claiming that the Coast Guard was negligent in its efforts to find them. Specifically, they claimed the Coasties directed the helicopter in the opposite direction (east) from where plaintiffs were drifting (west).

Suing the King

So, the question, which has been answered by courts before, is: *Can a person sue the Sovereign?* The answer is yes, but it must be on the Sovereign's own terms.

It is well settled that the United States has "sovereign immunity" except where it consents to be sued. In a maritime action, that consent comes from the *Suits in Admiralty Act* (SIAA). In the SIAA, sovereign immunity is expressly waived where a civil action in admiralty could have been brought against a private person (46 U.S.C. Section 30903). However, there is a catch. The fed-

eral courts have implied an exception to the SIAA - known as the "discretionary function" exception. According to the U.S. Supreme Court, the purpose of the exception to maritime suits against the government (which results in the retention of sovereign immunity) is to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy." A discretionary act is one that involves choice or judgment. Courts have applied a two-part test to determine if the exception governs the conduct being challenged. *First*, a court considers whether the government conduct or action is "a matter of choice," that is, a matter of discretion. *Second*, a court must determine whether the judgment or decision at issue "is the kind that the discretionary function was designed to shield." The federal court in the Virgin Islands said that the conduct in question was the general decision to search for the plaintiffs and the judgments made regarding how to conduct the search, i.e. to send the helicopters in the direction where they thought a flare was spotted, which was opposite the direction of the current flow.

If there was a regulation that mandated the Coast Guard's response to a distress call, then the government's action would not be one involving discretion and it would be actionable. The court reviewed Coast Guard regulations and found that they were under no obligation to attempt a search and rescue of the plaintiffs at all. See 14 U.S.C. Section 88. This no doubt comes as a big surprise to many mariners.

The court went on to say that the Coast Guard's decision about where and how to search for plaintiffs involved elements of choice on such things as which and how many aircraft and vessels to use and how long to search. Indeed, the court determined that all the decisions involved judgment calls, i.e. the area to be searched based on the reported position, information from the datum marker buoy, wind and sea and current conditions, and the white flare sighting. These were "discretionary judgments" according to the court. The judge found support in the U.S. National Search and Rescue Supplement (NSS) and a Coast Guard Addendum to the NSS, both of which provide guidance to the Coast Guard in its search and rescue efforts. These documents refer to Search and Rescue as being "both an art and a science relying greatly on the creativity and experience of the personnel involved" and that Coast Guard personnel are "expected to exercise broad discretion and to exercise sound judgment in performing the functions discussed." And, lastly, the Addendum to the NSS states that the guideline "creates no duties, standard of care or obligations to the public and should not be relied upon as a representation by the Coast Guard as to the manner or proper performance in any particular case."

The Coasties' own guidelines certainly make what they do sound "discretionary" and these guidelines may simply be designed for legal protection. Nonetheless, this carried the day in the eyes of the federal judge who concluded that the Coast Guard's decision to search for the plaintiffs

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and its judgments about how to conduct the search were indeed discretionary acts. Thus, this case, and others before it, held that the Coast Guard's decision to engage in search and rescue and its decisions regarding how to proceed in that rescue, are susceptible to policy analysis and, therefore, are protected by the discretionary function exception to the Suits in Admiralty Act. The court cited another case that suggested that such decisions by the government are *quintessential examples of the kind of judicial second-guessing and intervention in policymaking decisions that the discretionary function exception was designed to prevent*. As a result, the three men could not recover against the United States for their injuries and the lawsuit was dismissed.

Accordingly, sovereign immunity remains alive and well and so did the three fishermen. The Coast Guard did not sink the boat and apparently did all that they could pos-

sibly do under the circumstances, similar to the treble hook in Dylan's bicep, where they would not extract it for fear of a lawsuit and liability. With lawsuits like the Virgin Island case, can you blame the Coasties for being gun shy?

Conclusion

Mariners do not want the Coast Guard to shy away from helping those in need, and it is safe to say we do not want the standard response to become the equivalent of "No, you cut the hook." Better than the five words mentioned earlier, we would rather be able to rely on these: *A friend in need is a friend indeed.*

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