

ADMIRALTY LAW

Expert Analysis

Admiralty 2, Navy 0

*The captain wired in he had water comin' in And
the good ship and crew was in peril
And later that night when his lights went outta sight
Came the wreck of the Edmund Fitzgerald
—“The Wreck of the
Edmund Fitzgerald”
Song by Gordon Lightfoot*

By
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There is rarely a sole fault collision at sea. Even the U.S. Navy is not immune from this principal. Despite the Navy's dominating presence at sea, a recent pair of fumbles placed the Navy's ship-handling squarely on the radar.

Destroyers Destroyed

On June 18, 2017, the USS FITZGERALD, a guided missile destroyer valued at \$1.8 billion, collided in darkness with the container ship ACX CRYSTAL in a heavily congested shipping lane off the coast of Japan. Prior to the incident, the FITZGERALD was proceeding on a collision course with not one, but three vessels. Two of those vessels took evasive action to avoid collision. The third vessel, the 728-foot

ACX CRYSTAL, inexplicably on autopilot in the channel, collided with the starboard side of FITZGERALD when the destroyer turned directly in front of the other ship and was not detected. Seven Navy sailors died, two sailors sustained traumatic brain injury, and the steel warship sustained millions of dollars in damage. As the destroyer began to take on water with ship and crew in peril, the sailors onboard were ordered to lock watertight doors to prevent sinking, thereby trapping their shipmates behind closed doors. The deceased sailors ranged in age from 19 to 37 years old.

On the heels of that crash, on Aug. 21, 2017, the guided missile destroyer USS JOHN S. McCAIN collided with a loaded oil tanker ALNIC off the coast of Singapore, resulting in the death of 10 Navy seamen ranging in age from 21 to 39 years old. Admiralty litigation is pending in the Southern District of New

York. *In re Energetic Tank*, 1:18-cv-01359 (S.D.N.Y. Feb. 15, 2018). At the time of the collision, JOHN S. McCAIN was transiting through one of the busiest shipping lanes in the world. On the bridge, JOHN S. McCAIN's crew erroneously believed that they had lost steering during a transfer of control modes. In the midst of the confusion, the JOHN S. McCAIN proceeded across the heavily congested channel and crossed the bow of the 30,000-ton tanker ALNIC. It was reported that no one on the JOHN S. McCAIN had situational awareness of the ALNIC's relative position or that they were on a collision course until the crash. Below decks, some crewmen thought their warship was being attacked or had run aground, unaware that they had collided with a tanker. All 10 of the sailors who died were in a berthing compartment that took a direct hit from the bow of the tanker. The compartment instantly became inaccessible and flooded. See Department of the Navy Memorandum for Distribution, at 49, *Impact of the Collision*.

The two Navy Captains were relieved of command and the Vice Admiral in charge of the Seventh Fleet was removed. Seventeen sailors from the FITZGERALD and JOHN S.

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McCain are presently facing non-judicial punishment. Geoff Ziezulewicz, *Navy: 17 sailors disciplined for Fitzgerald and McCain collisions*, Navy Times (Feb. 1, 2018).

Admiralty Actions

The Navy recently received a \$27 million settlement from the owners/insurers of the cargo ship ACX CRYSTAL involved in collision with USS FITZGERALD; however, this covered a fraction of its total losses. See Geoff Ziezulewicz, *Ship Owners to Pay U.S. Government for Fitzgerald Collision*, Navy Times (Jan. 11, 2019). The foreign ship did not admit liability, but it certainly did not help that its vessel was on autopilot in darkness in the middle of a congested sea lane with no crew on watch. That is liability. These acts or omissions are in direct violation of international "Rules of the Road" governing navigation. On the other hand, while the settlement terms are murky, it does not appear that the United States has paid anything yet to the CRYSTAL container ship owner.

As for the sailors, it is unlikely that the USS FITZGERALD crew can obtain admiralty jurisdiction against the CRYSTAL owners in a U.S. court because the CRYSTAL was a Philippine flagged ship and the collision occurred in Japan.

Similarly, the owners of the tanker ALNIC that collided with the USS JOHN S. McCain are not U.S. residents and the ship was flying the flag of Liberia. However, the Navy claimants were able to seek recourse in a New York federal court because the tanker vessel owners took the first shot by filing an admiralty petition here for Exoneration from or Limitation of Liability under 46 U.S.C.

§30501. *In re Energetic Tank*, infra. In its petition, the owners of the tanker cite to the Navy's critical investigation report and seek to be exonerated from liability or to limit liability to \$16.7 million, the value of its vessel after the collision. The U.S. filed a claim for damages to its warship in the ALNIC's limitation proceeding and the owners of the tanker countered with a claim against the United States pursuant to the Suits in Admiralty Act (SIAA), 46 U.S.C. §30901 and Public Vessels Act, 46 U.S.C. §31101, for damages to its tanker. Without other options, the injured sailors and families of the fallen seamen aboard the USS JOHN S. McCain have each filed claims in the tanker owner's admiralty action as well.

No Recourse

A professional mariner may bring an action against his or her employer for negligence pursuant to the Jones Act. 46 U.S.C. §30104. The act was developed in light of the unique risks presented to seafarers who may spend months away from home and subject to the rigors of sea. However, the sailors in the Navy enjoy no such remedy. The *Feres* doctrine prevents military members from suing the United States where the injuries arise out of or are in the course of activity incident to military service. *Feres v. United States*, 340 U.S. 135 (1950). The rationale for the *Feres* doctrine is to subject all personnel to uniform rules governing compensation for injuries sustained in military service. *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995). In addition to an outright ban on suing its employers, military members are also unable to sue a vessel (or aircraft) manufacturer for

products liability so long as the product complies with the specs provided in the military instructions. *Stencel Aero Engineering v. United States*, 431 U.S. 666 (1977).

For example, the *Feres* doctrine barred a Navy servicewoman from a personal injury recovery after her boat was hit by a Navy serviceman operating another vessel. The vessels were rented for recreational purposes from a Navy-run recreational center. See *Bon v. United States*, 802 F.3d 1092 (9th Cir. 1986). Nine years later in the Second Circuit, the *Feres* doctrine did not bar a Navy serviceman's recovery after he was injured ashore in a motor vehicle accident with another Navy seaman. The pivotal issue was that both men were "on liberty" from their ships in Guam at the time of the collision. *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995). However, in *Osik v. United States*, 1999 U.S. App. LEXIS 28461 (2d Cir. 1999), a Navy sailor was off duty and running a personal errand on a military base when he was struck by a Commander's vehicle, resulting in injury. The Second Circuit held that the sailor's claim was barred by the *Feres* doctrine. The court explained: "[T]he accident need not occur while the military member is on duty. Because Osik received his injuries on base, the allegedly negligent party was an on-duty officer, Osik received care from military medical facilities, and the accident was reviewed by military personnel . . . *Feres* mandated dismissal of Osik's claims." *Id.* at *4.

Navy Standards Differ

The U.S. Navy is highly regarded for its attention to readiness. It may

be surprising, but U.S. Navy officers are not subjected to the same mariner licensing requirements as are professional civilian mariners. Professional mariners are issued licenses by the U.S. Coast Guard as engineers or navigation officers. One of the most important aspects of a mariner's licensing is testing and knowledge of the international "Rules of the Road," also known as the Collision Regulations (COLREGS). The Navy is not regulated by the U.S. Coast Guard and thus naval officers operate the U.S. warships without obtaining a professional mariner license.

All ships are required to obey the Navigation Rules. In its report on the USS FITZGERALD casualty, the Navy concluded that in the 30 minutes leading up to the collision, neither the FITZGERALD nor the CRYSTAL took action to reduce the risk of collision until approximately one minute prior to impact. Department of the Navy Memorandum for Distribution, p. 5, *Events Leading to the Collision*. The failure to take action to avoid collision violates Rule 8 the Navigation Rules. After the collision, the sailors on watch were tested on the Navigation Rules and failed to exhibit sufficient knowledge. In a steaming report, the Navy determined that the collision was also due, in part, to the Navy's "failure to plan for safety; failure to adhere to sound navigation practice; failure to execute basic watch standing practices; failure to properly use available navigation tools; and failure to respond deliberately and effectively when *in extremis*." *Id.*

In maritime law, when a vessel violates a statutory duty or Navigation

Rule (i.e., a COLREG), such violation is presumed to have been the cause of the collision. It shifts the burden of proof. This was the 1874 ruling in *The Pennsylvania*, 86 U.S. 148 (1874). To overcome the presumption, the vessel owner must show that the violation could not have caused the collision. *In re Otal Investments Ltd.*, 494 F3d 40 (2d Cir. 2007).

NTSB Stands Down

Typically, the National Safety Transportation Board conducts investigations into marine collisions and other seafaring casualties. However, the collision investigation of the two Naval combatants FITZGERALD and USS JOHN S. McCAIN were conducted by the Navy itself. A portion of that investigation was then distributed as a "lessons learned" report to the public. A question arises as to whether the Navy's report may be used as evidence in a U.S. court. In *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988), a Judge Advocate General's Corps (JAG) report was held admissible as evidence under the public record exception to the hearsay rule. In that case, the family of an Air Force veteran killed in the line of duty was precluded from recovering against the airplane manufacturer because the JAG report cited several instances of actual operator error. In comparison, an NTSB report and a U.S. Coast Guard report is specifically excluded from evidence under 49 U.S.C. §1154(b) and 46 U.S.C. §6308(a), respectively. However, there is no specific exclusion for Navy reports. Thus, it would appear that the Navy's report for the USS JOHN S. McCAIN and USS FITZGER-

ALD collisions may be admissible in a U.S. federal court as a public record under FRE 801(c). Likely for this reason, only a portion of the Navy report was released as part of the public record. Indeed, by virtue of not releasing that information to the public, the confidential portion of the report arguably could be precluded from evidence as it is not a "public" record under the federal rules of evidence.

Conclusion

The Navy might consider contracting out its shipboard navigation to Coast Guard licensed civilian mariners with proper security clearances. While this is highly unlikely on Navy combatant ships, precedent exists aboard non-combatants. Meanwhile, the U.S. Navy will overhaul its shipboard procedures and readiness training to ensure that two back-to-back collisions like these do not become another seafaring tragedy song like "The Wreck of the Edmund Fitzgerald."