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COMMENTS

LIMITATION OF LIABILITY— Unjustly Applied to Pleasure Craft

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MORE THAN seven million pleasure craft—driven, for the most part, by persons with little mechanical ability and even less knowledge of the sea, its traditions, and its hazards[1]—presently fill the waters of the United States.[2] The law has not kept pace with the rapid growth of this industry. An antiquated law[3] deprives the injured of the right to sue for just compensation.

Carelessness Results in Mayhem

In California, under the Boating Law of 1959,[4] registration of pleasure craft is accomplished by application on an appropriate form, and payment of a five-dollar fee for a three-year period. In most other states, this is done under the federal regulations promulgated by the Coast Guard.[5]

Thus, the boats themselves are regulated, but there is a definite failure on the part of the government to regulate those who drive them. Nowhere are the drivers of these boats required to be licensed; nowhere is the driver's knowledge of the boat and its capacities tested; nowhere is the driver's age or mental capacity or sight essayed. Consequently we have many drivers who are not capable of manipulating these maiming, and sometimes lethal, weapons.

Mayhem, as defined by the California Penal Code, has taken place, ". . . if the injury inflicted deprives the person injured of a member of his body or the usual uses of the severed organ."[6]

This impersonal statement of the law is a frightening description of what too often happens at the hands of boaters who are careless or incapable. For example, in *Buehler v. Hilton,*[7] a motorboat pulling a water skier made a sharp turn and a young woman fell out of the craft. As she was struck by the propeller, an arm and leg, were severed. In

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1 WINTER, MARINE INSURANCE 301 (3d ed. 1952).

2 *Yachting,* January 1958, p. 115.

3 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-96 (1952).

4 14 CAL. ADM. CODE §§ 5000-6696.

5 DIVISION OF SMALL CRAFT HARBORS, DEP'T OF NATURAL RESOURCES (Calif.), ABC's OF CALIFORNIA BOATING LAW 5 (1961).

6 CAL. PEN. CODE § 203.

7 Buehler v. Hilton, No. 77081, Sup. Ct., San Bernardino Co., Cal., Oct. 13, 1953.

the ensuing trial, she was awarded 256,000 dollars; but this can hardly compensate a young woman for going through the rest of her life with only one arm, one leg. In the case of *Wittsche v. Davis*,[8] similarly, a small girl was run over by a driver who was drunk. At fourteen, this child was condemned to go through life with no legs. Her 160,000 dollar settlement cannot pay for that, although it will begin to pay the bills.

As Dean Pound has expressed it, carelessness becomes a more frequent and more serious threat to the general security than aggression.[9]

Who Should Pay?

In the past decade there have been some one hundred cases in the United States involving motorboats.[10] The suffering, pain, and humiliation that follow these injuries should be compensated for. Hospital bills, funeral expenses, bills for artificial limbs empty someone's pockets. But whose pockets?

Surely, it is only equitable that he who is to blame should pay. And still, such compensation is patently inadequate, for as was succinctly stated to one jury, "Would you [pick up one hundred brand new thousand-dollar bills and put them in your pocket] . . . if you knew that, in return, you'd have to submit to having a leg . . . torn off—that when you were well again you would have to look forward, for the rest of your natural life, to wearing [an artificial limb] every day?"[11]

Though the award may be inadequate relative to the injured party, the payment thereof would nevertheless be far beyond the means of most persons; and few persons can afford to risk the possibility of having to pay such an award. Thus, insurance is provided to cover such liability.

Marine Insurance

Generally speaking, in California, marine insurance covers loss or damage to persons or property in connection with a marine, or loss or damage arising out of its construction, repair, or maintenance.[12]

Unless California Insurance Code section 533—which states that a wilful act of the assured causing the loss sought to be recovered for negates liability—or the illegal purpose exclusion clause found in most policies applies, the insurer assumes liability for all losses proximately caused by the perils insured against, and traditionally, these are the perils of the sea.[13] A policy for marine insurance has been spoken of as an absolute contract to indemnify for loss from such perils.[14]

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[8] (D.C.N.D. Cal. 1949).

[9] 21 NACCA L.J. 375 (1958).

[10] CCH release, July 26, 1960.

[11] BELLI, READY FOR THE PLAINTIFF! 52 (2d ed. 1957).

[12] CAL. INS. CODE § 103(b).

[13] 28 CAL. JUR. 2d *Insurance* § 456 (1956).

[14] Tyson v. Union Ins. Soc., 8 F.2d 356 (N.D. Cal. 1924).

Perils of the sea, as defined by the California Harbor and Navigation Code are storms and waves; rocks, shoals, and rapids; other obstacles though of human origin; changes of climate; confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea.[15]

The Small Craft

Since small craft is presently developing into a unique problem and specifically applicable laws have been enacted, specific coverage has been provided. Most homeowner or Comprehensive Personal Liability policies cover liability for bodily injury or property damage, medical payments to the injured whether the policy holder is liable or not, and all costs of defending suits whether the policy holder is liable or not, on boats which use outboards of less than ten horsepower.[16]

A type of hull insurance, however, called Yacht insurance, which insures all types of pleasure craft, whether their motive power is sail or mechanical device, is the most popular form of coverage for pleasure craft.[17] This type of policy is divided into three parts: 1) hull insurance which covers the boat itself, both while navigating and during the out-of-season lay-up; 2) a coverage similar to the protection and indemnity insurance, which covers liability for loss of life, personal injury and property damage, and workmen's compensation; and 3) medical payments.[18]

These yacht policies, along with "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land,"[19] are subject to marine law and interpretation.

Federal Jurisdiction: Application of Federal Statute

The United States Constitution gives the federal judiciary jurisdiction over all admiralty and maritime cases.[20] Therefore, federal regulations may be imposed in these cases where a maritime nature is evident. Consequently, although no amount of money can fully compensate for the loss of a limb, and although any amount awarded will be relatively minute, the insurers may call for the application of a unique federal rule to lower the liability of the insured, and their own liability, yet more.

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[15] CAL. HARB. & N. CODE § 422. Collision is also a peril, on the theory of proximate cause, so long as wind or waves are involved, Peters v. Warren Ins. Co., 13 U.S. (14 Pet.) 370 (1840); accidental striking of a foreign object such as ice is also included, Newton Creek Towing Co. v. Aetna Ins. Co., 163 N.Y. 114, 23 App. Div. 152 (1900).

[16] THE ROUGH NOTES CO., INC., Boat Ins.–1321.2, Chart a Course of Protection 4 (1960).

[17] WINTER, *op. cit. supra* note 1 at 300.

[18] *Id.*

[19] 46 U.S.C. § 740 (1958).

[20] U.S. CONST. art. III, § 2.

In 1851, the United States adopted a "Limitation of Liability" statute.[21] It states that the liability of the owner of a boat for an act done without his privity or knowledge shall *not exceed the value of the interest of said owner in said vessel* and freight then pending.

Procedural Development

For twenty years after its enactment, the statute was seldom applied.[22] Then in *Norwich & N.Y. Transp. Co. v. Wright*,[23] the requirements for its operation were established. Among other provisions, it was construed to include collisions as well as injuries to cargo, and it was provided that when limitation was granted, if the vessel and its freight (though in such a state as to be of diminished value) were handed over to a trustee for the benefit of the suing parties, the owner would be discharged; and it was stated that if they were totally lost, the owner would be discharged of further liability.

The case further established that the district court sitting as a court of admiralty would have jurisdiction of these cases. More specifically, the federal courts have exclusive jurisdiction of this special proceeding, but this does not remove the case from the state court. It merely stays proceedings in the state court. The federal court may, however, completely dispose of all claims for damages if it denies the owner's right to limitation.[24] This is left to the court's discretion.

After this case, the statute was frequently applied, and it was nearly impossible to show the shipowner to have privity and knowledge. A typical case is *The Petition of Liebler*.[25] A swimmer was thrown from a speeding motorboat and was killed. The owner's husband was driving, in the owner's presence. The negligence of the husband and the speed with which he drove were determined to be the cause of death. Limitation was granted, however, the court stating that though the owner was present, she had no knowledge of the operation since the husband was experienced in driving, and took no directions from her.

The key problems with this statute seem to be in the definitions of the phrase "privity and knowledge." In *Liebler*, privity was defined as "some fault or neglect in which the owner of the vessel personally participates"; knowledge was held to be "some personal cognizance or means of knowledge of which the owner is bound to avail himself." Privity and knowledge turn on the facts of the particular case.[26]

Insurance Proceeds in Limitation

The purpose of a limitation proceeding is to provide, in an equitable fashion, a marshalling of assets.[27] One question which has long occu-

[21] 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-96 (1952).

[22] 27 INS. COUNSEL J. 62 (1960).

[23] 80 U.S. (13 Wall.) 104 (1871).

[24] 45 CAL. JUR. 2d *Shipping* § 11 (1958).

[25] 19 F. Supp. 829 (W.D.N.Y. 1937).

[26] Coryell v. Phipps, 317 U.S. 406 (1942).

[27] Petition of Texas Co., 213 F.2d 479 (2d Cir. 1954).

pied the courts, is the following: Do these assets include the proceeds of insurance?

There are a very few states, of which California is one, which persist in construing procedural rules very liberally.[28] But even these states have found no answer, up to the present time, for this question.

In *Place v. Norwich & N.Y. Transp. Co.*,[29] in 1886, the Supreme Court held that a shipowner should be able to contract with his insurance company for indemnity against loss of his investment. Possibly stemming from this decision, it was held for many years that the liability insurance of the shipowner was not available for payment of claims beyond the amount of the limitation fund, if limitation was granted. The answer to this question seemed to be clearly a negative one. And up until 1954, there was little room for speculation.

Then in 1954, in *Maryland Cas. Co. v. Cushing*,[30] direct action against liability insurers by injured claimants was allowed. Of the situation, Mr. Justice Black said, "Liability insurance is not bought to guarantee reimbursement for loss of a shipowner's property. Its purpose is to pay for damage done to others by the shipowner or his agents. . . ."[31] Public policy holds that liability insurance exists for the protection of the injured, as well as the insured. The decision in this case, however, was not explicit, since four members of the court favored the direct action, four wanted to deny it, and one favored a policy of wait and see. The single justice wanted to be sure the federal limitation proceeding would not be interfered with. This decision did, however, weaken the previously unshaken theory of *The City of Norwich.*

The Limitation of Liability statute was held to include pleasure craft within its scope in *Feige v. Hurley*;[32] and in *The Alola*[33] it was stated that a motorboat is a vessel within the meaning of the statute. Hence, this statute, enacted solely for *commercial* reasons, now works to the detriment of the injured plaintiff in many *pleasure craft* cases.

Avoidance of Application

Recently, however, application of this statute has frequently been avoided. The theory now proceeded on is straight negligence.

One of the many techniques used to fix liability is the use of a safety regulation with a criminal penalty attached to either suggest or to mandate the answer to the question, "was the defendant negligent?"[34] There is, for example, the Federal Boating Act of 1958,[35] the

[28] 28 FORDHAM L. REV. 215 (1959).

[29] 118 U.S. 468 (1886).

[30] 347 U.S. 409 (1954).

[31] *Id.* at 434 (dissent).

[32] 89 F.2d 575 (6th Cir. 1937).

[33] 228 Fed. 1006 (E.D.Va. 1915).

[34] Foust, *The Use of Criminal Law as a Standard of Civil Responsibility in Indiana*, 35 IND. L.J. 45 (1959).

[35] 46 U.S.C. §§ 527(a)-(h) (1958).

preamble of which states that it is to promote boating safety on the navigable waters of the United States, her territories, and the District of Columbia. The body of the act states that "no person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person,"[36] and if this should be violated, the violater may be fined up to 2,000 dollars, be imprisoned for up to one year, or both. In the case of *Davis v. United States*,[37] the defendant was held guilty under this section and fined 1500 dollars and sentenced to six months imprisonment.

If the statute violated specifically provides for civil recovery by the injured party, liability follows breach as a matter of law. If civil recovery is not specified, however, breach of a criminal law enacted primarily to protect a class of people of which plaintiff is a member, and to prevent the very type of injury which has occurred, is followed by recovery through use of this violation in the civil litigation to establish a breach of the standard of care legally provided.[38]

In *Rothman v. U-Steer-It,* [39] the plaintiffs rented a boat which exploded while they were riding in it. The boat was shown to be unseaworthy, but had plaintiffs tried to recover on the admiralty doctrine of unseaworthiness, a species of liability without fault, which means a dangerous condition of which the owner has no knowledge or notice,[40] the defendant would have been entitled to limitation.[41] If limitation were granted, recovery could have been of no greater amount than the twenty-five dollar value of the boat. This result was circumvented by proceeding on a straight negligence theory. To prove knowledge and notice, a double-charge was established:[42] the plaintiffs' experts showed how the deterioration of the motor could have been prevented. By explaining the process of prevention, and showing there should have been an attempt at it, the plaintiffs showed constructive knowledge of the defect if preventive measures were taken, or actual notice by being the creator if they were not taken. Consequently, *full* recovery was allowed.

Conclusion

The effect, then, of this antiquated statute is obvious. Though it was not designed to grant immunity, but only to limit liability, relatively speaking, it does so anyway. The injured swimmer, skier or seaman who receives a paltry sum, in the face of what he loses, might as well be granted a package of "Lifesavers" to ease his suffering.

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[36] 46 U.S.C. § 526(1) (1958).

[37] 185 F.2d 938 (9th Cir. 1950).

[38] 35 IND. L.J. 45 (1959).

[39] 247 F.2d 803 (5th Cir. 1957).

[40] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[41] RASSNER, *Motorboat Explosion; Use of Experts in Reconstruction of the Facts,* in BELLI SEMINAR 556, 558 (1959).

[42] *Id.* at 560.

As was expressed by Mr. Justice Black in the *Maryland Cas. Co.* case, Limitation of Liability wasn't enacted to encourage investment in insurance companies by limiting their liabilities.[43]

Black further stated that the commercial reasons for the statute have passed. Today if shipping is to be aided it is done by subsidies out of the public treasury, not at the expense of the injured.[44]

The present trend is toward more narrow construction of the Limitation of Liability statute. It has been suggested that a double standard might be called for; that cases involving large vessels might call for application of the statute, and cases involving pleasure craft should be strictly dealt with. This attitude is too liberal. The statute is outmoded, even as applied to large vessels. It should be repealed for the sake of justice.

[43] 347 U.S. 409, 433 (dissent).

[44] *Id.* at 437 (dissent).