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PENNSYLVANIA

MARITIME

THE DUCK BOAT CASE



John J. Snyder

Jack Snyder, Chair of Rawle & Henderson's Catastrophic Loss Group, **William Carr**, partner, and their trial team successfully defended Ride The Ducks International (RTDI) and Herschend Family Entertainment Corporation (HFEC) in the maritime litigation arising out of the allision of a tug-driven barge and a tourist duck boat on the Delaware River on July 7, 2010, which resulted in the deaths of two Hungarian students and numerous injuries to other passengers aboard the amphibious vessel.



William J. Carr

The wrongful death and personal injury cases were originally filed in the Philadelphia County Court of Common Pleas, but were removed to the U.S. District Court for the Eastern District of Pennsylvania based on diversity of citizenship. A strategic decision was made to plead the *Limitation of Shipowners' Liability Act of 1851* as an offensive weapon in the litigation to not only ensure that the litigation remained in federal court, but also to utilize the provision of the Act which required all claimants to litigate their claims in a single proceeding in a non-jury bench trial. If successful, the parties would be exonerated or the liability of RTDI and HFEC would be limited to the value of the duck boat. The owner of the tugboat *Caribbean Sea*, K-Sea Transportation, Inc., likewise asserted limitation of liability in federal court and the two actions were consolidated.

Duck boats are inspected annually and certified by the U.S. Coast Guard, meaning the vessels, in all respects, are in conformity with the applicable vessel inspection laws and the applicable rules and regulations. The fundamental purpose of the Coast Guard inspection is to document that the vessel is seaworthy and safe. Before operating on the Delaware River, DUKW 34 was determined to be fit for service and was issued a Certificate of Inspection (COI) by the U.S.C.G. Sector Delaware Bay.

"Ride The Ducks" tours in Philadelphia generally consist of an approximately fifty-minute land tour of historical Philadelphia, followed by an approximately twenty-minute water tour along the Delaware River near Penn's Landing. The accident occurred during the water portion of the tour near the end of the duck boat's third trip of the day. RTDI had never encountered a passenger injury of any type on a duck boat tour while on the water in more than 33 years of operation and with more than 12 million guests before the day of this incident.

An *allision* is the running of one ship into another ship that is stationary and is distinguished from a *collision*, which is significant in that the alliding vessel bears primary responsibility for the accident

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under maritime law. In this instance, DUKW 34 had become disabled and was at anchor off of Penn's Landing and was run down from behind by the 250-foot sludge barge *Resource*, owned by the City of Philadelphia. The *Caribbean Sea* was pushing the *Resource* in a hip-tow configuration under a contract with the City. The *Resource* was empty and riding high on the water at the time of its allision with DUKW 34.

Maritime law has long upheld the presumption that when a moving vessel allides with a stationary object, the moving vessel is presumed to be at fault, and has the burden of demonstrating a contributing fault by the stationary object. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895).

A determination of whether a shipowner is entitled to limit its liability involves a two-step analysis. As stated in *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir.1976): "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge. *Coryell v. Phipps*, 317 U.S. 406, 409, 63 S.Ct. 291, 293, 87 L.Ed. 363 (1943); *Coleman v. Jahnce Service, Inc.*, 341 F.2d 956, 958 (5th Cir.1965), cert. denied, 382 U.S. 974, 86 S.Ct. 538, 15 L.Ed.2d 465 (1966).

This burden is not met by simply proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining knowledge exist, or where reasonable inspection would have led to the requisite knowledge. *China Union Lines, Ltd. v. A.O. Andersen & Co.*, 364 F.2d 769, 787 (5th Cir.1966) cert. denied, 386 U.S. 933, 87 S.Ct. 955, 17 L.Ed.2d 805 (1967). Thus, knowledge is not only what the shipowner knows, but what he is charged with discovering in order to apprise himself of conditions likely to produce or contribute to a loss. *Avera v. Florida Towing Corp.*, 322 F.2d 155, 166 (5th Cir.1963).

Approximately 12 minutes before the allision, the RTDI Captain saw and smelled smoke coming out of the engine bay of DUKW 34 when the vessel was adjacent to Penn's Landing. The Captain suspected a possible fire onboard and immediately implemented emergency fire procedures, which were completed

in about 1 minute. Following the implementation of the emergency fire procedures, the smoke dissipated and no further evidence of fire was seen by the Captain. A tow vessel was immediately dispatched by RTDI to retrieve DUKW 34 from the river.

The navigation channel in the area of Penn's Landing begins approximately 136 feet from the bulkhead and is 400 feet wide extending eastward towards New Jersey. DUKW 34 was disabled and sitting in a stationary position approximately 270 feet from the bulkhead in front of Penn's Landing, and well within the western half of the navigation channel, waiting to be towed.

The pilot of the *Caribbean Sea*, First Mate Matthew Devlin, was operating the tug boat for several miles from the air conditioned lower wheelhouse, with the radar and the radios turned off, while talking on his personal cell phone and surfing the internet on a company issued laptop. There was no lookout stationed on the barge and the tug boat's upper wheelhouse was unmanned at the time of the incident, which severely restricted any view of the river ahead. Contrary to the findings of the NTSB, it was conclusively established through scientific measures that the tug and barge were on the wrong side of the shipping channel and on a heading directly towards Pier 5 on the Penn's Landing waterfront.

The allision was wholly avoidable because the tug and barge had more than 2,000 feet of navigable water in which to maneuver between DUKW 34 and the New Jersey shoreline, as it was customary under local maritime practice to navigate outside the channel. However, this K-Sea crew was dispatched out of K-Sea's Staten Island, NY office and received no navigational guidance for the Delaware River from K-Sea's Philadelphia personnel.

DUKW 34 became fully obscured from view from the lower wheelhouse of the *Caribbean Sea* approximately 6 minutes before impact. The Captain of DUKW 34 attempted to contact the tug boat numerous times to inform them that DUKW 34 was disabled, but no response was ever received back from the tug boat. Although it was common for tug boat operators and other vessels to ignore radio calls from the DUKW boats, the Captain perceived that his calls were heard based on the orientation of the tug and barge, which appeared to be "crabbing" through the water and altering its course to starboard. Because of the tug

and barge combination's speed and position relative to DUKW 34 as it approached, as well as the curvature of the river in that area, an allision would not appear likely to the occupants of DUKW 34 until less than 90 seconds before impact. Utilization of a multidimensional, scientifically accurate re-creation of the time before the allision was prepared in order to depict in much greater detail the perspective from onboard DUKW 34.

The deckhand on the *Caribbean Sea* did not perform the required hourly safety checks in restricted waters while on watch on July 7, 2010 in violation of K-Sea policy and prudent seamanship. Otherwise he would have noticed that Mate Devlin was operating from the lower wheelhouse while talking on his personal cell phone, which are both unacceptable and unsafe conditions. During exhaustive discovery, it was uncovered that every crew member onboard the *Caribbean Sea* routinely used their personal cell phones while on watch. In fact, a comparison of Devlin's personal cell phone records and his watch schedule for his assignments during the year preceding the accident show that he regularly used his personal cell phone while on watch.

It was also discovered that K-Sea had no comprehensive policy in place regarding utilization of the proper wheelhouse, the proper placement of a lookout, or the personal cell phone and computer use by its crew members while on duty. These duty distracters can cause a loss of situational awareness with devastating results. More than three years earlier, a captain for K-Sea suggested to K-Sea management that the company develop a policy regarding cell phone usage by crew members and publish it in an official K-Sea document. Unfortunately that was never done.

There was also a significant management indicator of the Mate's lack of ability with regard to operational decision-making of this type when he grounded the tug "*Nathan E. Stewart*" on March 27, 2009. Mate Devlin blamed the grounding on a mechanical steering problem that could not be confirmed or replicated following the accident. This grounding incident was not fully investigated despite K-Sea's President acknowledging a possible loss of situational awareness as a cause of the grounding. Mate Devlin was not retrained, monitored, or scrutinized by K-Sea to ensure that he was capable of safely navigating its vessels.

Within hours of sinking DUKW 34, K-Sea provided Devlin with criminal legal counsel paid for by the company. Devlin immediately asserted his 5th Amendment rights and refused

to cooperate with investigators or law enforcement. Devlin subsequently pleaded guilty to one count of misconduct by a ship operator causing death and is currently serving a sentence of more than one year in federal prison.

The NTSB findings allege that the radiator cap had come off of DUKW 34 sometime prior to the accident thereby causing the vessel to become disabled on the water. It was alleged that RTDI was negligent for their policies and procedures and for having poorly trained personnel both in their maintenance department and onboard their vessel, which allegations were vigorously disputed. RTDI was also criticized for failing to have their passengers don life jackets sooner and for alleged violations of U.S. Coast Guard regulations, which allegations were also vigorously defended against on many fronts.

The Pennsylvania Rule is "a presumption in admiralty law that a statutory violation by a party to a collision is a cause of the damage unless it is established that the violation could not have caused or contributed to the collision." *Am. River Transp. Co. v. Kavo Kaliakra S.S.*, 148 F.3d 446, 449 (5th Cir. 1998). The Pennsylvania Rule holds that if a vessel is involved in a collision as a result of a violation of a statute intended to prevent collisions, then the vessel must show that the violation could not have been a cause of the accident. *In re Mid-South Towing Co.*, 418 F.3d 526, 534 (5th Cir. 2005). The Pennsylvania Rule also applies to allisions. *Trico Marine Assets, Inc. v. Diamond B Marine Servs., Inc.*, 332 F.3d 779, 786 (5th Cir. 2003).

Under Rule 5 of the Inland Navigation Rules, the *Caribbean Sea* had a duty to maintain a proper lookout by sight and heading as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation. The crew of the *Caribbean Sea* did not maintain a proper lookout as required by Rule 5 (*33 U.S.C. Chapter 34 Sec. 2005*). Further, the *Caribbean Sea* failed to post a lookout out on the barge so that she could take proper and effective action to avoid the allision.

Under Rule 18 of the Inland Navigation Rules, the *Caribbean Sea* had a duty to keep out of the way of a vessel not under command or a vessel restricted in her ability to maneuver, such as the disabled and anchored DUKW 34. Under this statute, K-Sea would be liable for the deaths, injuries and destruction of property beyond the value of the tug and barge if it had privity and knowledge before the start of the voyage of the acts

of negligence or conditions of unseaworthiness that caused the accident. Moreover, K-Sea would not be entitled to limitation of liability if the ship was unseaworthy due to an incompetent crew or faulty equipment. *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 431-32 (5th Cir.1968), *cert. denied*, 394 U.S. 943, 89 S.Ct. 1272, 22 L.Ed.2d 477 (1969).

K-Sea argued that its liability should be limited because the allision was caused by the negligence of its mate. *Complaint of Tug Ocean Prince, Inc.*, 584 F.2d 1151, 1159 (2d Cir. 1978). Where, as here, the shipowner's negligent act caused the alleged injury, such as by hiring an incompetent crew member, failing to adequately train the crew in safe navigation practices, or by not ensuring that safe navigation policies and procedures are followed. RTDI argued that all of the requirements of "privity" were satisfied.

Jack Snyder and Bill Carr argued that RTDI was entitled to exoneration from liability due to the superseding intervening cause of K-Sea and its criminally negligent mate. Even if the court were to find that RTDI had some fault, it was argued that K-Sea and its mate committed acts that superseded, in terms of cause, the alleged faults of RTDI. *Exxon Co., U.S.A. v. Sofec, Inc.* 517 U.S. 830, 116 S. Ct. 1813 (1996) (upholding superseding cause defense in maritime law). A superseding cause is any intentionally harmful act, force of nature, or criminal event, unforeseeable by the defendant, which intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's alleged injury and proximately causes that injury.

Following an unsuccessful mediation in 2011, and in a condensed court-ordered case management schedule, the RTDI trial team performed months of intense discovery which included more

than 50 depositions, review of nearly half a million pages of documents, and consultation with more than a dozen expert witnesses and consultants. Ultimately, the case favorably resolved for RTDI and HFEC during the third day of trial in the U.S. District Court for the Eastern District of Pennsylvania before U.S. District Court Judge Thomas N. O'Neill, Jr.

The RTDI team's trial strategy, which included the use of technology and compelling visual communication strategically blended to more effectively clarify this complicated case to the Court, was successful in bringing about the favorable resolution of the case. Opening statements utilized party admissions made during video depositions, actual video of the incident, photogrammetry, interactive exhibits, and scientifically re-created multidimensional depictions of how the incident occurred and, more importantly, where it occurred, thereby squarely laying blame for the incident on K-Sea Transportation. The case against K-Sea continued to improve with the aggressive and relentless cross-examination of the crew onboard the *Caribbean Sea* during the first two days of trial, which led Judge O'Neill to recommend that U.S. District Court Judge John R. Padova meet with the various parties in an attempt to resolve the matter. At the end of the day, the claimants had to consider the possibility that RTDI would be completely exonerated of liability or that HFEC would prevail on the limitation of liability action and their recovery would be limited to the value of DUKW 34 following the accident.

In The Matter of The Complaint of Ride the Ducks International, LLC and Herschend Family Entertainment Corporation et al., USDC ED PA 11-cv-079-TON

John J. Snyder focuses his trial practice on the defense of catastrophic injury, with particular emphasis on construction, industrial, pharmaceutical, medical malpractice and product liability matters. He is a very experienced litigator, having tried a large number of trials to verdict in Philadelphia and the surrounding counties. Jack and the Catastrophic Loss Group specialize in receiving high exposure cases weeks to months before trial, and trying the case to verdict. He is an active member of the bar in the states of Pennsylvania, New York and New Jersey. He is also admitted to practice in the federal courts of Pennsylvania as well as the U.S. Court of Appeals for the Third Circuit.

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