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ADMIRALTY LAW

Liability Waiver Decision a Step Forward for Entrenching Uniformity

By James E. Mercante

Funny how admiralty law can be so different from other fields of law. Indeed, that's what admiralty attorneys like about it…unique, sometimes ancient, and, like a tangled fishing line, often confusing to non-marine practitioners.

Some admiralty law, such as marine salvage, is so old that it "pre-dates the Christian Era by nine hundred years," as Judge Edward R. Korman observed in the Staten Island Ferry salvage decision.[1]

Admiralty cases are litigated mostly in federal court. For this reason, most federal judges have a firm grip on maritime law and seem to like it. After all, it's always been known as a 'gentlemen's practice' where an oral agreement or a handshake between attorneys is respected. Admiralty is one of the recognized specialities to which the federal "judicial power shall extend," as noted in the U.S. Constitution, Article III, Section 2.

Entrenched and Uniform

Federal district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. §1333(1). When there is federal admiralty jurisdiction, the court will apply substantive admiralty law.[2] If a maritime case is brought in (or removed to) federal court on the basis of 'diversity' jurisdiction, the court will apply maritime law.[3] And, a state court will apply admiralty law to a maritime-related contract or tort action. One test to determine whether a contract is maritime and subject to admiralty law adopted by the Second Circuit in a marine insurance dispute is whether or not the insurance contract had "genuine salty flavor,"[4] meaning whether the insurance policy at issue insured against mostly maritime-related risks as opposed to land-based exposures.

Uniformity of maritime law throughout the nation is important and desired by admiralty practitioners so that different principles of law will not apply if, for example, a casualty occurs in New York versus New Jersey waters.

Courts may apply state law in a maritime case but only where there is no 'entrenched' admiralty rule on a particular subject.[5] The term maritime law and admiralty law, as this article evidences, are interchangeable, the latter a by-product of the English admiralty system.

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Admiralty law is either statutory such as the Vessel Owner's Limitation of Liability Act (46 U.S.C.A. §30501 et seq.) and International Navigation Rules (33 U.S.C.A. §1601 et seq.), or is judge-made common law known as 'general maritime law' such as the criteria for a salvage award announced by the U.S. Supreme Court in 1869 in *The Blackwall*, 77 U.S. 1 (1869).

Liability Waivers

One area where maritime and New York state law diverge is in the enforceability of liability waivers. In admiralty, an operator of an inherently risky recreational activity (such as wakeboarding, scuba diving, jet skiing, and white water rapids excursions) may contract to disclaim liability even for their own negligence if the contractual wording passes muster. If the terms are clear and unambiguous, a signed pre-accident waiver containing an exculpatory clause typically absolves the business owner or operator of liability for recreational accidents that take place on navigable waters. To be enforceable, the exculpatory terms must also not be inconsistent with public policy and not be an adhesion contract.[6]

Thus, in admiralty law, a carefully drafted liability waiver, at least in the context of risky marine recreational activities, will likely hold water. A scuba diver perished at the famous shipwreck of the ANDREA DOREA 100 miles off Montauk, N.Y., and a clearly worded liability release was enforced defeating a wrongful death claim.[7]

A recent decision of the Western District of New York, *Brozyna v. Niagara Gorge Jetboating*, issued by U.S. District Judge John J. Curtin, provides a good summary of state and federal law involving pre-accident liability waivers. The case involved a passenger aboard a jet boat in the Niagara River who was injured during a whitewater excursion through rapids, in navigable waters known as "The Whirlpool" and "Devil's Hole."[8] The case was originally filed in state court but removed to federal court based on diversity of citizenship of the parties and admiralty jurisdiction. (28 U.S.C. §§1332 and 1333).

Each passenger was required to sign a "Participation Agreement," which the injured plaintiff signed, but denied reading. The terms of the agreement referred to the risks and hazards of jetboating and released and discharged the excursion company from all liability including negligence on the part of the company.

The plaintiff admitted attending the compulsory safety briefing prior to boarding during which a detailed description of the excursion and warnings of the risks were given. During the excursion, the soon to be plaintiff suffered an acute spinal compression fracture.

The agreement was clearly written and plainly worded so it was not challenged on the basis of ambiguity. As to the issue of not having read the agreement, that argument was rejected due to settled contract law that parties are bound by the contracts they sign whether or not the party has read » Page 7

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Waivers

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the contract as long as there is no 'fraud, duress or some other wrongful act of the other party.'[9] Plus, the plaintiff had informed consent by virtue of attending the safety briefing prior to the excursion.

Lastly, there was no showing that the agreement was a contract of adhesion, i.e., take it or leave it proposition with no opportunity for negotiation or an inequitable bargaining position. It was a strictly voluntary activity.

Plaintiff's only remaining argument in opposition to a summary judgment motion, was that the waiver of liability was void as a matter of public policy under New York's General Obligations Law (GOL) §5-326 which states in part that:

> Every covenant, agreement or understanding in or in connection with...any contract...ticket of admission or similar writing, entered into between the owner or operator or any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities...which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment...shall be deemed to be void as against public policy and wholly unenforceable.

If no entrenched maritime rule existed, the state's GOL would apply to defeat the liability waiver. However, Judge Curtin cited numerous federal maritime decisions evidencing that there is indeed a clearly stated rule in maritime jurisprudence in favor of allowing parties to enter into enforceable agreements to allocate the risks inherent in marine recreational activities.[10]

Conclusion

The *Brozyna* court correctly followed maritime law on the issue of liability waivers, and the case was disposed of summarily. The decision represents another step forward in entrenching uniformity in admiralty law.

1. *In the Matter of the Complaint of The City of New York, as owner and Operator of the M/V ANDREW J. BARBERI*, 534 F.Supp.2d 370 (EDNY 2007); 2008 AMC 1182, 1186.
2. *East River S.S. Corp. v. Transamerica DeLaval Inc.*, 476 U.S. 858, 864 (1986).
3. *Roane v. Greenwich Swim Comm.*, 330 F.Supp.2d 306, 311 (SDNY 2004).
4. See *Folksamerica Reinsurance Co. v. Clean Water of New York Inc.*, 413 F.3d 307, 311 (2d Cir. 2005).
5. *Wilburn Boat Co. v. Fireman's Fund Ins.*, 348 U.S. 310 (1955).
6. *Murley ex rel. Estate of Murley v. Deep Explorers Inc.*, 281 F.Supp.2d 580, 589-90 (EDNY 2003).
7. Id.
8. *Brozyna v. Niagara Gorge Jetboating, Ltd.*, 10-cv-00602, 2011 WL 4553100 (WDNY Sept. 29, 2011).
9. *Tuskey v. Volt Information Sciences Inc.*, 2001 WL 873204 at *3 (SDNY Aug. 3, 2001).
10. *Brozyna v. Niagara Gorge Jetboating, Ltd.* at *5.