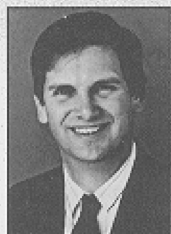
Boat Bailments

What Every Claimsperson Needs to Know About Marina Liability for Storage of Vessels

Dr. Walter Jacoby left his prized 36' foot sloop "Altair," at a boatyard for winter storage and repair. The repairs were completed and the boat was placed on a cradle for winter storage. Within a few days, the *Altair* fell off of her cradle on her port side. At trial, the boatyard's expert testified that the cradle was adequate, but did not explain the cause of the failure. Jacoby's expert testified that the cradle was not adequate. Who has the burden of proof? Who should pay for the damages?



Steven E. Leder

■ *Steven E. Leder is an attorney with Niles, Barton & Wilmer in Baltimore.*

When boat owners leave their boats with marinas for storage or repair, it usually gives rise to a "bailment." The bailment relationship raises an inference of negligence against the marina operator which makes it easier for boat owners to recover for damage to their boats and more difficult for marina operators to escape liability. In Jacoby's case, he was able to recover his damages from the boatyard based on this inference. *Johnson's Branford Boatyard, Inc. v. Yacht Altair*, 260 F. Supp. 841 (D. Conn. 1966).

What is a bailment?

A bailment requires four elements:

1. Property, such as a boat;
2. A contract (oral or written) regarding possession without transfer of title to the boat;
3. Delivery of the boat to a marina or

boatyard; and

4. Acceptance by the marina or boatyard of the boat.

Ordinarily a marina meets these elements in providing for winter storage or repair. A slip agreement, on the other hand, does not create a bailment because there is neither delivery or acceptance of possession by the marina operator, nor does the boat owner usually has unrestricted access to his boat. The boat owner must prove each element to establish a bailment relationship and to recover.

What must each side prove?

A boat owner must prove delivery of the boat to the marina operator in good condition and return of the boat in bad condition or failure to return. Once a bailment is proven, the ball is in the marina operator's court. The operator must then move forward with its own evidence.

The marina operator is not an insurer; it is not responsible every time a boat is damaged while in its care. The marina operator's duty of care calls for ordinary and reasonable care under the circumstances. The marina operator may prove this in one of two ways. It may show how the loss occurred and that the loss did not involve any negligence on its part. Alternatively, it may show that it used "reasonable care" and regardless of how the loss occurred, the loss was not due to its negligence.

What is reasonable care?

We live in troubled times. When a vandal sets fire to a boat or a thief steals a stern drive, the boat owner usually believes the marina operator did not use "reasonable care." The marina operator argues that it is not an insurer of the boat owner's property. How do the courts determine whether a marina has exercised reasonable and ordinary care in the protection of the boats and its charge? There is no black-and-white test. They look at the circumstances in each case in determining the standard.

The marina operator's duty to safeguard the boats in its charge is established by custom and practice among local marina operators, the value of the boats in its charge and the history of losses caused by theft or vandalism in the area. The manner in which other marinas in the area have operated provides a context for judging whether in a particular case sufficient precautions were taken. If reasonable care is judged by the average marina operator, it makes sense to compare what the marina operator at issue did with others in the area. However, meeting the industry standard will not insulate the marina operator from liability. The court must be convinced that local custom and practice is reasonable under the circumstances.

The value of the boat in the marina operator's charge should also be included in calculating the reasonableness of the precautions. It is reasonable to expect the marina operator to offer more protection to a million dollar yacht than to an old wooden skiff. Which protective measures the courts consider depends on the cause of the loss. The most common causes of loss are theft, fire, and sinking, although the losses may also be caused by accident or intruders.

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Protecting boats from intruders

Notice of prior thefts or vandalism heightens the duty of care owed by the marina operators. If there is a thief operating in the area, a reasonable person takes extra precautions.

A checklist of some common measures taken to prevent harm from third persons has been developed through case law. Although no one factor seems conclusive, the courts give weight to and consider the cumulative effect of such factors as fencing and locks, watchpersons, lights, and burglar and fire alarms.

■ **Fencing.** Fencing varies in type from barbed wire to white picket; in height, from three feet to 20 feet; and in extent from partial to complete. The courts recognize that navigable waterways cannot be fenced and few marinas have complete fencing to prevent access from the land. Even complete fencing may be found an inadequate security measure if intruders can easily circumvent it. Further, the type and extent of fencing must be balanced with other protective measures.

■ **Watchpersons.** The presence of watchpersons may deter intruders. Watchpersons may detect and expel trespassers and vandals. In the case of fire, watchpersons may extinguish small fires and call the fire department for large fires. Where there have been previous problems with theft or vandalism, the courts emphasize the lack of a night watchperson. The courts have criticized their absence even where few or no marinas in the area have had watchpersons. On the other hand, absent previous problems with intruders, courts have been satisfied with measures short of a watchperson.

■ **Lighting.** Lighting is almost always considered by the courts. Good lighting may deter intruders and assist their detection. General illumination, rather than direct lighting, usually results in dark spots and may be a negative factor. While the absence of adequate lighting may be evidence of negligence, lighting alone is insufficient security to avoid liability.

■ **Alarms.** Burglar and fire alarms detect, rather than prevent, problems. Experts frequently testify at trial about the availability of electronic alarm systems to prevent vandalism, theft, and fire. Few courts, however, have considered such precautions critical. In the future, with the proliferation of in-home alarm systems and the advance of technology, such evidence is likely to become more persuasive and courts may give it more weight.

In *Leyendecker v. Cooper*, 1980 AMC 1061 (D.Md.), a 23-foot, 1977 Mako was in the boat yard for repairs. The mechanic put a lock on the trailer tongue to prevent an intruder from using a ball attachment and hauling away the boat on the trailer. The marina was located in an industrial zone, conducive to theft. No fencing surrounded the yard and no watchperson monitored the boats. In the morning the boat was gone. The court noted that "[t]he point is not whether it is possible to absolutely preclude the possibility of theft, but rather whether the marina owner has done what is reasonably necessary for an ordinary prudent marina owner to safeguard the valuable boats in his care." *Id.* at 1065. There the court held that "reasonable care requires that [the marina operator] take some measures,

such as private security service, to protect the boats it stores." *Id.* at 253.

Where there is a history of vandalism or theft, a marina must take reasonable precautions to safeguard the boats in its care. These precautions must include more than poor lighting and partial fencing. Where there are no additional precautions taken, the courts may focus on the absence of a night watchperson. The courts use a reasonableness standard and so should a marina.

Accidental loss due to fire

The standard by which the marina is judged may be set by custom and practice of the local marina industries, by state statute or by the National Fire Protection Association's publications, such as NFPA 303: "Marinas and Boat Yards" (1990 Ed.).

The courts consider many of the same factors with accidental fires as they do with intentionally set fires. The protective measures can be divided into three types: prevention, detection and extinguishing. Principal safety measures are:

- Building construction
- Housekeeping
- Alarm systems
- Smoke detectors
- Watchpersons
- Sprinkler systems, extinguishers and other special fire fighting equipment

Does a building meet the fire code? Where are flammables such as gasoline or paint stored? Watchpersons not only prevent vandalism but can report and perhaps put out fires before they spread. The courts look to the availability and accessibility of hydrants, extinguishers, sprinklers, smoke detectors and of the marina itself.

In *Fireman's Fund America Ins. v. Capt. Fowler's Marina, Inc.*, 343 F.Supp. 347 (D.Mass. 1971), a yacht, *The Cathy*, was to be stored over the winter at Capt. Fowler's Marina in Revere, Mass. A fire broke out in the adjacent boat and spread to *The Cathy*. The court held that the marina had not used reasonable care in protecting the boat for three reasons:

a. The marina had not complied with the NFPA Standards; i.e., it hadn't provided "the necessary equipment to control the spread of fire"; located "portable fire extinguishers ... throughout the property within 50 feet of any point"; or provided an "adequate water supply for fire fighting."

b. No night watchperson was employed to detect and control small fires or report major fires promptly.

Accidental sinkings

Sinkings vary so much that no single list of considerations is appropriate. However, courts do look at how other marinas operate in the area, whether watchpersons or other attendants were present, how the boat is secured and the condition of the boat.

In *MOAC v. Marine Corp.*, 1981 AMC 768 (D.Mass. 1980), the court held the marina operator negligent in the sinking of a boat at its berth. There, two or three dock boys were assigned to watch 70 boats during a heavy rain. The dock boys failed to cover the two or three open boats or even to notice a problem in time to prevent the sinking.

In *Wentz v. Hartge*, 132 F.Supp. 527 (D.Md. 1955), a 44' cabin cruiser sank at its slip. The court found that the sinking was due to removal by the owner of the drain plugs in its "maximum silencers" during winterization. There was no custom at the boatyard or contract to open the hatches and check the amount of water in the bilges absent exterior evidence. Further there was no promise to pump water from time to time. Hence, the court found no negligence by the boatyard.

Acts of God

When a boat sinks, burns, or gets blown off its cradle, the marina operator frequently asserts that it was an "Act of God" for which it is not responsible. The marina operator has a burden of proving not only that the storm constituted an "Act of God," but also that it was free from negligence contributing to the damage.

To constitute an Act of God, a storm should be sudden and severe. Cases have excused losses where the wind was 70 or 75 mph or higher. If the only damage was to one boat, the "Act of God" defense is unlikely to succeed. The courts look for evidence of damage to other boats, automobiles or property in the area. Eyewitness testimony as to the sound of the wind, and the effect of the wind on the witness has been considered. A virtual laundry list of types of evidence which may establish an "Act of God" is found in *Hicks v. Tolchester*, 1984 AMC 2027, 2030 (D.Md.).

Exculpatory provisions in marina contracts

Marinas use a number of methods to manage their risks. One method is to include in its contracts with boat owners an express agreement to release it from liability and to shift the risk of loss to the boat owner; i.e., an exculpatory provision.

Both exculpatory clauses and indemnity agreements are tools for managing risks, but should not be confused. Indemnity agreements provide for reimbursement of the amount of damages. An indemnity agreement shifts the responsibility from one person who has been compelled to pay damages to another. An exculpatory agreement exempts a person from liability. The difference has been characterized as a sword (indemnity) and a shield (exculpatory agreement). These provisions appear in slip agreements, winter storage contracts and repair contracts. A properly drawn exculpatory clause is valid absent statutory prohibition, although they are frowned on by the courts and strictly construed.

Exculpatory provisions may be attacked due to lack of specificity because they are against public policy, or contracts contrary to a specific statute.

Six factors determine violation of public policy

Maryland and at least nine other states employ a six-factor test in determining when an exculpatory clause violates public policy. Those factors are:

1. [The transaction] concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

2. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

3. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

4. In exercising a superior bargaining

power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

5. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Schrier v. Beltway Alarm Co., 73 Md. App. 281, 296-98, 533 A.2d 1316, 1323-24 91987), quoting *Tunkl v. Regents of the Univ. of Calif.*, 60 Cal. 2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963).

Not all six factors need to be present for the clause to be void.

In *Rogers v. Yachts America, Inc.*, 1983 AMC 417 (D.Md. 1982), the court rejected an exculpatory clause because its wording did not specifically exculpate the marina for its own negligence. The court stated:

"While Maryland law permits parties to agree to exculpatory clauses ... it is doubtful that the language of [the agreement] is sufficiently explicit as to the parties' intention to absolve the marina of liability for its own negligence." *Id.* at 420 (dicta).

Exculpatory clauses are agreements which concern the risk of harm to the boat owner's property which may be caused by the marina, and which deprive the boat owner of his right to recover damages from the marina. A number of state statutes declare exculpatory provisions void or voidable in particular contexts. One such statute is the Uniform Commercial Code's prohibition in the context of the storage of goods by warehousemen (Commercial Law Article §7-204(2)). This statute was applied to a marina operator in the previously described case *Fireman's Fund America Ins. Co. v. Capt. Fowler's Marina.*

Conclusion

Actions against marinas turn on the facts. The legal standard is one of reasonableness. Therefore, digging out the facts in detail and weighing them with an unjaundiced eye will enable an accurate evaluation of a claim. Exculpatory clauses, although not favored, are enforceable. They are, however, subject to attack. ▲