NEGLIGENT RESCUE

Ross Diamond III
Mobile, Alabama
(251) 432-3362

"No good deed goes unpunished"

"Of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property". Judge John R. Brown, in ***Grigsby** v. **Coastal Marine Service of Texas, Inc***., 412 F. 2d 1011(5th Cir. 1969)

The claim for negligent rescue, where the victim is injured or killed (or the vessel in distress is destroyed) during the course of a rescue attempt is not analogous to a case in which the rescuer is injured, and the same legal principles do not apply. In determining the liability of a vessel owner to an injured rescuer, the admiralty laws allows a considerable latitude in judging the conduct of the rescuer. Under the "Amphibius Good Samaritan" Doctrine established in ***Grigsby v. Coastal Marine Service of Texas, Inc.***, the assumption of risk by the rescuer is not a defense. Also, the rescuer is given, vicariously, the unseaworthiness remedy owed by the vessel owner to the seamen in distress. In ***Furka v. Great Lakes Dredge & Dock Co.***, 824 F. 2d 330(4th Cir. 1987) the court correctly held that in determining whether a person attempting a rescue was guilty of contributory fault, the correct standard was whether the rescuer was wanton and reckless both in perceiving the need of rescue and in the undertaking of it. Obviously, if a claim against a rescuer for the death of a victim were litigated on this basis, it would be doomed to failure.

The other issue which should not be involved at all in a negligent rescue case is a question of any negligence on the part of the victim in creating the circumstance which prompted the rescue attempt. Any negligence on the part of the victim preceding the beginning of the rescue attempt is not to be considered in apportioning liability for the negligent rescue that follows.

Fox v. United States, 934 F. Supp. 1133 (N. D. Cal. 1996):

> "The relevant negligence of the person rescued is not that which causes the initial accident but rather that which, whether occurring before or after the accident,

> relates to the rescue and either worsens the victim's condition or hinders the rescue."

The correct standard to be applied to determine the liability of the rescuer was established in the lead case of ***Berg v. Chevron, U.S.A., Inc.***, 759 F. 2d 1424 (9th Cir. 1985) which, while agreeing with ***Grigsby*** and ***Furka***, held that the proper standard of care is "that a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." Judge Brown had recognized this in ***Grigsby***, from which the Fourth Circuit quoted: "Liability for negligent salvage is limited to situations in which the salvor, through want of due care, has worsened the position of the victim." The court also recognized that the principle established in ***Furka***, that there must be evidence of wanton or reckless behavior on the part of the rescuer, was the standard traditionally applied to the conduct of plaintiffs injured in rescue situations.

A section of the **Federal Boat Safety Act, 46 U. S. C. §2303(c)** also applies a negligence standard:

> "An individual . . . gratuitously and in good faith rendering assistance at the scene of a marine casualty without objection by an individual assisted, is not liable for damages as a result of rendering assistance or for an act or omission in providing or arranging salvage, towage, medical treatment or other assistance when the individual acts as an ordinary, reasonable and prudent individual would have acted under the circumstances."

The court in ***Berg v. Chevron*** felt that this section "embodies the same standard of care" set forth in that case.

(It is interesting to note that ***Berg v. Chevron*** was a companion case and involved the same casualty as ***Evich v. Connelly***, 759 F. 2d 1432 (9th Cir. 1985)), the case which gave us, briefly, the hope that the estate or non-dependent family of a deceased might be able to recover the loss of the deceased future income.)

Berg v. Chevron reached the same conclusion, but did not cite, an earlier decision in ***United States v. Sandra & Dennis Fishing Co.***, 372 F. 2d 189 (1st Cir. 1967), which involved a

rescue attempted by the Coast Guard. That case had also held that there will be liability on the part of the rescuer only if negligence during the attempt at a rescue worsens the position of the victim, or if there is reckless and wanton conduct in performing the rescue.

There generally is no liability for failure to attempt a rescue, if the rescue itself is not commenced. Neither maritime common law or federal statutes place an affirmative obligation upon a private vessel, or the Coast Guard, to undertake to rescue life or property. ***United States v. Devane*****,** 306 F. 2d 182 (5th Cir. 1962); ***United States v. Gavagan***, 280 F. 2d 319 (5th Cir. 1960).

There are exceptions, two of which are created by statute. Another section of the Boat Safety Act, 46 U.S.C. §2304(a) provides:

> "A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board."

In ***Martiniz v. Puerto Rico Marine Mgmt, Inc.***, 755 F. Supp. 1001 (S.D. Ala. 1990) the court held that, once the rescuing vessel came upon the vessel in distress, this section imposed a duty to provide assistance to the persons on board the vessel in distress.

Another statutory exception is contained in 46 U.S.C. §2303(a), which applies to vessels involved in collisions or other casualties:

> "The master or individual in charge of a vessel involved in a marine casualty shall-(1) Render necessary assistance to each individual affected to save that affected individual from danger because of the marine casualty, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or to the individuals on board; . . . . "

Under 46 U.S.C. §2301, this statute applies only to vessels operated on United States waters and to vessels owned in the United States operated on the high seas.

Where the statute did not apply to a foreign vessel on the high seas, a maritime common law duty to rescue has been imposed on a party whose fault in part created the need for the rescue. In ***Hunley v. Ace Maritime Corp.***, 927 F. 2d 493 (9th Cir. 1991), the M/V EASTERN

GRACE was the vessel at fault in a collision. It steamed away without attempting a rescue. The court held the owner liable for damages resulting from the failure to rescue, holding that the law of admiralty has always sought to courage and induce men of the sea to go to the aid of life and property in distress." The obligation to undertake to rescue "is all the more imperative where the prospective rescuer played a part in the original accident itself."

The defendant, 50% at fault in causing the collision, was also found solely liable for an injury to a seaman from a third vessel which came to assist the vessel in distress.

EXAMPLES OF CASES WON AND LOST

Ironically, the lead case of ***Berg v. Chevron U.S.A.*** involved a marine casualty which turned into a legal disaster for the widow of Ogie Berg, who was captain and part-owner of a fishing boat which had hit some rocks and punctured the stern lazarette. At the request of the fishing boat, it was taken in tow by the ALASKA STANDARD, a Chevron tanker. During the tow, the ALASKA STANDARD asked the crew of the fishing boat three different times if they would like to come aboard, and each invitation was declined. Capt. Berg was asked once per hour whether his vessel was in danger of sinking and each time he answered no. The weather deteriorated during the tow, with the winds reaching 50 knots, seas running 10 to 15 feet, and snow limiting visibility to 50 yards. The decision was made to anchor near an island off the coast of Alaska. Berg was asked whether he wished to have the fishing boat brought alongside the tanker or whether its crewmen wanted to come aboard the ALASKA STANDARD, both of which were declined. Later, and shortly after the fishing boat reported that all was in order, Berg radioed that the vessel was capsizing and that the crew was trapped in the wheelhouse. The crew of the fishing boat put on survival suits and abandoned the boat, without informing the tanker. The captain of the tanker, thinking the crew was trapped inside the fishing boat, ordered

it to be pulled alongside. The towing line, which had been supplied by the fishing boat, parted in the process. The captain of the tanker considered several options, including lowering lifeboats or inflatable rafts, or throwing ring buoys, but determined that some options created too great a hazard to his own crew due to the seas and weather, or would be a futile effort because he believed the fishing boat crewmen were still trapped inside the boat. In a non-jury trial, the District Court had nonetheless found the ALASKA STANDARD to be negligent as to one or more of seven different points contained in his factual findings. Berg's estate was warded $1,200,000.00. In the appeal, the Ninth Circuit held that each of the seven findings of fact made by the District Court were clearly erroneous, finding that the record could not support any finding of negligence on the part of the ALASKA STANDARD which worsened the positions of the victims. The judgment was reversed and rendered.

As to the Coast Guard, the government cannot be held liable for errors in judgment which delay the start of a search and rescue operation. ***McLaughlin v. United States,*** 671 F. Supp. 72 (D. Md. 1997). Nor can the government be held liable where the Coast Guard errs by confusing the vessel in distress with another vessel, resulting in hours of lost search time. ***United States v. DeVane,*** 306 F. 2d 182 (5th Cir. 1962). However, where the Coast Guard actually undertakes to perform a rescue, and does so negligently, ***United States v. Sandra & Dennis Fishing Corp.*** 372 F. 2d 189 (1st Cir. 1967) provides an education in proving fault on the part of the Coast Guard. There, a fishing boat had lost its rudder and called the Coast Guard requesting a tow. A patrol boat was sent out and undertook to tow the fishing boat into the harbor. In findings of fact discussed at length by the Court of Appeals, the patrol boat was found to have a fathometer which was defective, a compass with a 3 degree error, and an inaccurate and unreliable loran. After starting the tow, the weather deteriorated. Later, the loran on the patrol boat failed

completely, and the commander of the patrol boat negligently failed to ask the fishing vessel for a loran position. The commander of the patrol boat towed the vessel directly toward a buoy marking and extensive shoal area known as the Rose and Crown, which he mistook for the buoy marking the shoal for the buoy marking the entrance to the harbor channel. As a result, the fishing boat was towed onto the shoal, where it was overturned and sank by the weather, and five of the fishing boat crewmen were killed. The extensive findings of fact as to the fault on the part of the Coast Guard made by the District Court were affirmed.

Martinez v. Puerto Rico Marine Mgmt, Inc., involved a fishing boat which began taking on water through the hull about 200 miles into the Gulf, on a voyage from Mobile to Honduras.

Fox v. United States was Ken Rosenthall's case which led to the writing of his paper on this subject. The case involved a sailboat which became caught in a storm and high seas off the coast of California. The boat had lost its sails and was taking on water from the high waves. It established radio communication with the USS FLINT, a Navy ship which was en route to California. The owner of the sailboat requested a position fix and additional pumps to get the water out of the hull. The captain of the USS FLINT, upon seeing the sailboat, determined that it was in danger of sinking (which apparently was not true at the time) and decided that he would take the crew off of the sailboat and tow it into port. Another Navy vessel in the area offered the use of a zodiac in getting the crew off of the sailboat, which offer the FLINT refused initially. The FLINT also turned down an offer by the Coast Guard to fly out some pumps to drop to the sailboat. Finally, the captain of the FLINT decided to accept the offer for the use of the Zodiac from the other Navy vessel, about the same time as the engine on the sailboat quit. Even though he knew the Zodiac was on the way, the captain of the FLINT decided to approach the sailboat to within 100 feet and shoot lines to it, instead

of moving away under the conditions. The sailboat, without power, came up along the starboard side of the FLINT and was bumped along its side until the mast snapped off. Three of the crewmen either jumped or were dumped into the water. In spite of efforts to retrieve them, Mr. Fox drowned and the other two sustained serious injuries. In a decision reported at 934 F. Supp 1133 (N.D. Ca. 1996) the District Court granted a motion to exclude pre-rescue negligence on the part of the captain and crew of the sailboat, holding that pre-rescue negligence would not be admitted for the purpose of assessing comparative fault between the United States and the plaintiffs, unless the evidence is related to the rescue itself. After a non-jury trial, the District Court found that the captain of the FLINT was negligent in failing to stand by at a safe distance from the sailboat, and wait on the zodiac to remove the crew. The District Court applied the doctrine of ***Berg v. Chevron***, to find liability on the part of the government, because this negligent conduct worsened the position of the victims. The District Court did assign 10% fault to the captain of the sailboat, based on his agreement to have the FLINT, longside and send out a line. In an unreported opinion, the judgment was affirmed by the Ninth Circuit on August 12, 1998.