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What Happened?

By Marilyn Raia

Sometimes courts render decisions that at first seem unfair or perhaps illogical. When given further consideration however, the decisions were usually the right ones. This column reviews two cases correctly decided based on the law, not on what might have been perceived as the equities of the situation.

Recoverable Damages for Sunken Barge

King Fisher Marine Service, Inc. v. The NP SUNBONNET, et al, 1984 AMC 1769 (5th Cir. 1984) addressed the measure of damages for a barge that sank while under tow. Fisher, president of King Fisher Marine, had been looking for several years for a barge suitable for use as a dry dock. He saw a magazine ad for a barge that had been used as an undersea mat for a drilling rig. The barge was basically a steel box with four internal compartments and two attached pontoons. After inspecting the barge, Fisher was satisfied it had internal integrity. He bought it for \$30,000. Fisher arranged for Newport Marine Services to tow the barge. The barge sank while under tow only two days after Fisher bought it, due to Newport Marine's negligence. The barge was never recovered.

Fisher sued Newport Marine. The district court held Fisher could recover \$232,996.75 on account of the loss based on what it found to be the fair market value of the sunken barge. It determined the fair market value by considering Fisher's expenditure of \$30,000 for a replacement barge that required repairs of \$202,996.75 to bring it to a condition similar to that of the barge that sank. The court reasoned Fisher's expenditure of \$232,996.75 was reasonable given an estimated cost of \$1 million to build a replacement barge of similar specifications, and an estimated cost of \$600,000 to combine two smaller barges into one of a similar size as the one that sank.

Newport Marine appealed contending, among other things, that the damages awarded were excessive in light of Fisher's having paid only \$30,000 for the barge. It argued the fair market value of the sunken barge was what Fisher had paid for it. The Fifth Circuit disagreed and affirmed the district court's award. It began its analysis with the fundamental principle that when a vessel is lost, its owner is entitled to recover "the monetary equivalent and thereby to be put in as good a position pecuniarily as if his property had not been destroyed."

As a general rule, the "monetary equivalent" is the market value of the vessel at the time of its loss. However, the court rejected the argument that the barge's market value was what Fisher paid for it two days earlier. That is because the evidence established the barge was not purchased for use merely as a large floating steel box. Rather, the court held the lost barge had "special qualities" as a base for a dry dock that met legitimate commercial needs not accounted for in the \$30,000 purchase price. It noted Fisher recognized and took advantage of an opportunity to purchase a suitable dry dock platform at a low cost. Accordingly, he could recover the amount expended to get back to the same position he would be in had the original barge not sunk.

Newport Marine also challenged the district court's award of prejudgment interest on the whole damages of \$232,996.75 starting on the date of the sinking. It argued Fisher did not begin to spend \$202,996.75 to repair the replacement barge until sixteen months later, and should not recover prejudgment interest on any amount before it was spent. The Fifth Circuit rejected this argument too. It held prejudgment interest is usually awarded in admiralty cases from the date



of the loss and is not a penalty but compensation for the use of money to which the plaintiff is entitled. While the owner of a totally lost vessel is not entitled to recover for the loss of use of that vessel, he is entitled to recover the value of the vessel at the time of loss, and interest. The court held even though Fisher spent money at a later time to replace the sunken barge, he was deprived of its value as soon as it sank, and in the interim, Newport Marine had the use of the funds to which Fisher was entitled.

Misrepresentation Voids Insurance

C.N.R. Atkin v. Smith, 1996 AMC 2876 (N.D.Ca. 1996) addressed how marine insurance can be lost even if the insured knows nothing about a misrepresentation made on his behalf. Smith owned a vessel, **Sybarite**, and hired Cummings as a crewmember after interviewing him twice and checking his references. He had no knowledge of Cummings' criminal record.

Whenever Smith was away from the Sybarite, Cummings remained aboard and in charge. Cummings held himself out as captain of the vessel and Smith referred to him as such in correspondence with his former insurer. Smith believed Cummings performed his duties as captain in an exemplary fashion.

While the Sybarite was in Thailand undergoing repairs necessitated by a partial sinking, Smith asked Cummings to obtain hull and machinery insurance for the vessel. Cummings contacted an insurance broker who placed the insurance with four Lloyd's underwriters who imposed four conditions. Those conditions included a satisfactory application. Cummings filled out the application on Smith's behalf. In response to a question asking "have you or any person you have allowed or may allow to use your craft ever been charged with or convicted for any offense involving dishonesty of any kind...", Cummings stated "no" based on 1) his belief that the question applied to Smith; and 2) his interpretation of "use" to mean taking the boat for his own benefit or purposes rather than operating it at Smith's direction. Cummings said he asked the insurance broker whether the question applied to him or Smith, and was told the insurers were interested only in Smith's background.

The completed application was sent to the underwriters who agreed to insure the Sybarite for \$500,000 for one year. A "cover note" and an invoice for the \$14,000 policy premium were sent to Smith. Smith paid the premium and did not know the underwriters had relied on the information in the application Cummings submitted when agreeing to insure the **Sybarite**.

Nine months after the coverage began, and when the Sybarite was in American Samoa, Cummings was arrested for a probation violation and returned to the United States to face charges. Unbeknownst to Smith, years before, Cummings had been charged with various felonies including perjury, making a false statement to obtain a passport, and fraud involving title to, the identity of, and a security interest in a vessel. He had pleaded guilty to fraud and no contest to the other charges. He served time in prison and was on probation when hired by Smith for a crew position on the **Sybarite**.

After departing American Samoa with a new crew, the Sybarite suffered several mechanical problems, which culminated in the sinking of the vessel. Smith made a claim under the hull insurance policy Cummings had obtained on his behalf. The insurers sued Smith for rescission of the policy and a judgment of no coverage based on Cummings' misrepresentations in the application. Smith sued the insurers for breach of contract and "bad faith." The court entered summary judgment in the insurers' favor, holding the hull policy void due to the non-disclosure



of Cummings' criminal record, and leaving Smith with no compensation for his \$500,000 loss.

The court held the doctrine of *uberrimae fidei* applicable. Under that doctrine, an insured has a duty to reveal every fact within his knowledge that is material to the risk, whether or not the insurer asks about it. The duty is codified in California where Smith resided.

Smith argued the word "use" in the question on the application was ambiguous. According to his expert, in the marine insurance industry, the word refers to the insured's friends and guests, not crewmembers. The court disagreed and held even if "use" were ambiguous, Cummings should have disclosed his criminal background, which fact was material to the risk and affected the insurers' assessment of it.

Smith argued he was personally "innocent" of any misrepresentation. He also argued Cummings was not in control of the **Sybarite** at the time of the sinking, and there was no causal connection between the sinking and Cummings' failure to disclose his criminal background. Finally, Smith argued Cummings' failure to disclose his criminal background amounted to barratry, an act committed by a vessel's master for unlawful or fraudulent purposes contrary to his duty to the vessel's owner. The court rejected the arguments. While stating, "equity is a part of the law of admiralty", the court held it was not free to make an exception and create a different rule contrary to the California statute, which imposes a strict disclosure requirement on applicants for marine insurance.

The results in both of these cases might seem unfair because of their facts. Newport Marine had to pay \$232,000 for losing a barge that cost its owner only \$30,000. And Smith lost his insurance even though he played no role in, and was unaware of, the misrepresentation to his insurers. However, even though appearing unfair at first, the results in both cases were right based upon well-established law.