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Pay Attention!

By Marilyn Raia

Accidents and injuries happen on vessels. Sometimes the vessel owner is to blame for being negligent or having an unseaworthy vessel. However, compensation for an injury on a vessel may be denied if the injured party did not notice or pay attention to an open and obvious condition.

An open and obvious condition is one that should be obvious by the ordinary use of one's senses, most often, one's eyesight. Whether a condition is open and obvious is determined from an objective, rather than a subjective point of view. That is, the subjective point of view of the injured party is not relevant in determining whether a certain condition was open and obvious. Instead, the judge or jury must consider what a reasonable person would perceive.

If a condition is open and obvious, a vessel owner does not have a duty to warn of its presence. And absent the duty to warn, the injured party cannot establish negligent failure to warn as a basis for compensation. An open and obvious condition has precluded a recovery for many different categories of persons injured on a vessel, including a pilot, a seaman, a longshoreman and a passenger.

Pilot Boarding Vessel

Meyers v. ***M/V Eugenio C***, 919 F.2d 1070 (5th Cir. 1990) involved a passenger liner that went aground when arriving in Louisiana shortly after a pilot boarded. Efforts to refloat the vessel were unsuccessful. The next morning, a second pilot, Meyers, was sent to the vessel to relieve the first pilot. At that time, the vessel was grounded with her bow facing into 25-30 mph winds. Meyers piloted the crew boat in 3-5 foot seas to get to the vessel. The vessel's crew rigged a rope ladder for Meyers to use to board. As he was climbing the ladder, the rough seas caused him to hit and injure his knee. He sued the vessel owner for his knee injury alleging, among other things, that the vessel owner should have warned him about the danger in boarding the vessel in rough seas.

The district court found in favor of the vessel owner. The Fifth Circuit affirmed. It held a vessel owner is not required to warn of an open and obvious condition if the person asserting the duty to warn "was in a better position by virtue of training or experience, to appreciate the danger." It held Meyers was an expert and the rough seas he navigated in to reach the ***M/V Eugenio C*** were "undeniably open and obvious."

Crewmember on Stairway

Members of a vessel's crew are also charged with notice of open and obvious conditions. Patterson v. Allseas USA, Inc. 2005 AMC 1811 (5th Cir. 2005) illustrates the point. Patterson was a crewmember on a pipe laying vessel. After conducting a safety tour aboard his vessel, he and a subordinate crewmember, Williamson, inspected some standing water on the port crossover deck. To access the deck, they used the port crossover stairway. They went up the stairway without incident. Both men walked into the standing water to determine where drain holes should be drilled so that the standing water would not present a safety hazard. Without drying their boots, Patterson and Williamson descended the stairway with Williamson in the lead. Patterson did not use either of the handrails on the stairway. Williamson used one handrail. Halfway down the stairway, Patterson slipped and fell into Williamson who was able to remain on the stairway because he was holding onto the handrail. Patterson hurt his back and underwent three surgeries.

Patterson sued his vessel owner employer arguing, among other things, the vessel was unseaworthy. The district court dismissed the unseaworthiness claim reasoning water on the crossover deck was neither unusual for a vessel on the high seas nor dangerous. The district court also dismissed Patterson's claims based on alleged negligence in the design and maintenance of the crossover deck and stairway. However, it imposed vicarious liability on the employer based on the theory Williamson was negligent when not warning Patterson about the danger associated with going down the stairway wearing wet boots. Patterson's damages award was reduced by 65% based on his own comparative fault.

The Fifth Circuit reversed the district court's judgment and entered judgment for the employer. While recognizing a vessel owner's duty to warn employees of dangers not reasonably known to them, it held the employer did not have a duty to warn its employees about dangers that are open and obvious. It held Patterson should have known wet boots presented a hazard, and nothing Williamson could have told him would have increased Patterson's knowledge about that danger when he walked out of the standing water onto the stairway.

Longshoreman on Winch Deck

Longshoremen also have a duty to be aware of their surroundings on a vessel when engaged in stevedoring operations. When they fail to pay attention, they likely will be denied a recovery for injuries they suffer as a result.

Celestine v. Lykes Brothers Steamship Co. Inc. 729 F.Supp 691 (N.D. Ca. 1989) involved a longshoreman who injured himself when tripping over a spare heavy lift wire coil stored on the winch deck of the vessel he was working on. The coil was lying on the open deck in daylight with nothing obstructing the view of it. Celestine had walked past the coil several times during his shift without incident but eventually tripped over it. He sued the vessel owner for his injuries under the Longshore and Harbor Workers Compensation Act, alleging the vessel owner failed to turn the vessel over to the stevedores in a safe condition because of the coil left on the deck.

The district court entered judgment in favor of the vessel owner. The court held the "turnover duty" was not breached because the defect causing the injury was open and obvious. It also held the vessel owner did not have a duty to anticipate that a longshoreman would ignore the presence of the coil, which was four feet in diameter and one foot high. Moreover, it recognized the longshoreman had a duty to inspect the area in which he would be working and correct any tripping hazards.

Passenger on Dance Floor

Passengers on cruise ships are also charged with knowledge of open and obvious conditions they may encounter. Salazar v. Norwegian Cruise Line Holdings Ltd. 2016 AMC 1602 (S.D. Fla 2016) involved a passenger who injured his shoulder when falling in liquid on the dance floor in one of the ship's discos.

After drinking three or four beers before dinner and two glasses of wine at the captain's dinner, cruise passenger Salazar went to one of the ship's discos. As he sat with friends at a table, he saw several passengers dancing on the dance floor with drinks in their hands. Salazar got up from his table and walked toward the DJ booth under blinking strobe lights. He slipped on liquid that had spilled on the floor, injuring his shoulder.

He sued the vessel owner alleging negligence in caring for the safety of passengers and in

failing to warn of dangers such as spilled liquid on the dance floor. The district court entered judgment in favor of the vessel owner. It held a cruise ship operator did not have a duty to warn passengers of open and obvious dangers, that is, dangers that should be obvious "by the ordinary use of one's senses." It reasoned Salazar had sufficient notice of the potential for spilled drinks and a slick floor because he could observe passengers at various levels of intoxication drinking and dancing. The court also found a reasonable person could have seen liquid accumulated on the floor when the strobe lights were on.

Passenger on Cabin Roof

Even passengers on private pleasure craft may be deprived of a recovery for personal injuries if caused by an open and obvious danger. In Craig v. Kaplan, 238 Cal.App.2d 581 (1965), Craig, a passenger on a 42-foot yacht, climbed onto the roof of the main cabin for sunbathing while the vessel was at anchor in the channel near Catalina Island. A 2-inch railing was around the roof of the main cabin. While on the main cabin roof, Craig stood and looked toward the shore. A large vessel passed by causing the yacht to roll sharply and Craig to lose her balance, strike the railing, fall overboard, and injure herself. She sued the vessel owner alleging he should have warned her about the various dangers she faced being on the roof of the main cabin.

The court entered judgment against Craig when she rested her case at trial because the evidence was insufficient to establish any duty was owed to her by the vessel owner. The court held the vessel owner had a right to assume Craig knew 1) the Catalina channel "is not a mill pond" and 2) boats of all sizes and types are rocked by ocean swells and wakes of other boats. It also held the vessel owner had no duty to warn Craig of open and obvious conditions. The court noted Craig had been on the main cabin roof once before the incident and could not have failed to notice the 2-inch railing around the roof or the difficulty in maintaining her balance when the vessel was rolling.

The law imposes a duty on persons aboard a vessel to pay attention to their surroundings. If they are injured due to an open and obvious condition, they may be deprived of the right to recover from the vessel owner.