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## Don't Do That

By Marilyn Raia

Every once in a while, but hopefully not too often, a new case comes into the law office that makes the lawyer want to turn back time and advise the client: "don't do that." Unfortunately, the clients cannot always get sound legal advice ahead of time and unpleasant consequences may follow an ill-considered course of action.

## Don't Chase an Escaped Bull

Mello v. Young Brothers, Ltd. 2016 WL 5853716 (D. Haw. 2016) involved a longshoreman, Mello, who was employed by Young Brothers in Hawaii. Young Brothers was hired to discharge and unload a bull that had been brought to Honolulu on a barge for delivery to Lazy L Ranch. Lazy L Ranch's employee brought a cattle trailer to the pier to receive the bull. However, the cattle trailer was broken. The bull escaped from it and ran onto the pier. After learning that the bull had escaped from the trailer, Mello chased it to prevent it from injuring others. In the process, he was seriously injured by the bull. He also claimed to have suffered emotional distress, depression, insomnia, and anxiety as a result of the incident.

Mello received benefits under the Longshore and Harbor Workers' Compensation Act. He then sued Lazy L Ranch, the barge on which the bull had been transported to Honolulu and its owner, and Young Brothers. He alleged the district court had admiralty jurisdiction over the action [see Pacific Maritime Magazine, November 2013] based on the location of the incident and the nature of the activity being undertaken at the time of the incident. The District Court disagreed. It reasoned: 1) the harm occurred on land and not on the navigable waters of the United States; and 2) the broken cattle trailer which led to the escape of the bull did not constitute an injury caused by a vessel. The court also noted Mello did not allege a breach by the barge owner of a duty to provide a seaworthy vessel. Rather, he alleged Lazy L Ranch provided a defective trailer. Because Mello did not allege a claim arising under admiralty law, his suit was dismissed.

## Don't Talk on a Cellphone While Operating a Ferry

A cellphone is a convenience but the choice to use one at the wrong time can be deadly as well as costly. In *Holzhauser v. Golden Gate Bridge, Highway & Transportation District*, 2017 WL 3382316 (N.D. CA. 2017), a speedboat owned by Rhoades and operated by Holzhauser with Rhoades aboard as a passenger collided with the ferry **San Francisco** on San Francisco Bay. The ferry was owned by the Golden Gate Bridge, Highway & Transportation District. Holzhauser was killed in the collision and Rhoades was seriously injured. The master of the **San Francisco** was using his cellphone to speak with shoreside bridge district personnel immediately before the collision and did not see the speedboat until it was too late to avoid a collision.

The bridge district filed a complaint for exoneration or limitation of liability [see Pacific Maritime Magazine, January 2016 – "**El Faro** – Can the Vessel Owner Limit Its Liability?"] which proceeding was joined with the action filed by Holzhauser's widow and David Rhoades against the bridge district. The jury found in favor of Holzhauser's widow and David Rhoades. It apportioned 70 percent fault to Holzhauser and 30 percent fault to the bridge district. The bridge district then asked the court to limit its liability to the value of the **San Francisco** after the collision.

The parties agreed that the 30 percent fault allocated to the bridge district by the jury was likely based on the ferry master's use of his cellphone which distracted him and prevented him from seeing the approaching speedboat in time to avoid a collision. The district court noted the bridge district had no policy regarding the use of cellphones by its ferry masters while operating the ferries. Moreover, it found the bridge district knew its ferry masters carried personal cell phones aboard the ferries and permitted their use. The court held the bridge district did not meet its burden of showing the ferry master's cellphone use was beyond its privity or knowledge. Accordingly, the bridge district could not limit its liability.

## Don't Ignore or Threaten an Injured Seaman

Injuries occurring aboard a vessel should be taken seriously. In *Bobola v. F/V Expectation*, 2017 AMC 463 (D.Mass. 2016) seaman Bobola suffered an injury to his elbow on the *F/V Expectation*, a fishing vessel owned by Bobola's employer, Nordic Fisheries. The injury occurred while Bobola was waiting for the starboard drag to be set onto the deck. A swinging club stick smashed his elbow into the side of a cutting box with such force that it ripped the sleeve off of his heavy coat causing deep bruising and swelling.

After the incident, Bobola suffered extreme pain and told a fellow crewmember that he might need to return to port for medical treatment. The crewmember told him "you don't want to do that" and reported to the first mate what Bobola had said. The next day, the first mate warned Bobola "rough weather could result in a fall over the rail and being lost at sea." Bobola worked for the next four days because of what he believed to be a death threat by the first mate. During that time, the vessel's captain pressured the injured Bobola to keep pace with the other crewmembers. When Bobola's injury prevented him from doing so, the captain made the other crewmembers work longer hours which gave rise to animosity toward Bobola. The vessel's engineer called Bobola "a crybaby" for requesting medical treatment. According to Bobola, the captain and engineer fostered the crew's animosity toward him and warned him that they "could not guarantee his safety from the irate crew."

After arriving in port, Bobola went to the hospital and there received painkillers. While on painkillers he went to Nordic Fisheries' office to discuss the injury. The manager asked him to sign something he could not read or understand because of the painkillers and then paid him only one-quarter of a share instead of a full share.

Representing himself, Bobola sued Nordic Fisheries as well as the vessel's master, first mate, and the other crewmember who had threatened and harassed him after he was injured. Bobola alleged a negligence claim under the Jones Act, which allows an injured seaman to bring a civil action against his employer for negligence. Bobola alleged the vessel's master negligently left the boat in gear while bringing the starboard drag onto the deck, which caused his injury. Bobola alleged a negligence claim against the vessel's master, first mate and other crewmember personally under a federal statute allowing any person to bring an action against a vessel's master, mate, engineer or pilot for negligence or willful misconduct. Bobola also alleged a claim for intentional infliction of emotional distress against the master, the first mate, and the other crewmember who had threatened and harassed him. He did not, however, allege any physical symptoms as a result of the emotional distress.

The district court dismissed the Jones Act claims against the master and other crewmembers because such claims may be brought only against an injured seaman's employer. The district court allowed the negligence claim to proceed against the master but dismissed the negligence

claims against the first mate and the other crewmember because insufficient facts were alleged demonstrating negligence on their part. While acknowledging there may be good reasons to limit the rights of employees to sue their superiors and coworkers for workplace injuries, the district court believed it was compelled to allow the negligence claim against the vessel's master to proceed.

The district court denied the motion to dismiss the intentional infliction of emotional distress claim against the master, the first mate, and the other crewmember even though Bobola did not suffer any physical symptoms resulting from the emotional distress. It noted the courts apply a very high standard to claims for the intentional infliction of emotional distress, and look to see if the conduct at issue was "extreme and outrageous, beyond all possible bounds of decency in a civilized community." It found the allegations of Bobola's complaint, namely, that the first mate threatened to kill him and throw him overboard at sea, and that the master and other crewmember encouraged animosity toward him, were sufficient to allow that claim to proceed to trial.

Juries sometimes impermissibly use 20/20 hindsight to evaluate a defendant's conduct. Foresight before engaging in the conduct is likely to yield far better results.