

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ARLENE TUNNEY and	:	
KENNETH MAXWELL,	:	
Plaintiffs	:	CIVIL ACTION NO.
v.	:	3-98-CV-1472 (JCH)
	:	
DENNIS McKAY,	:	
Defendant	:	NOVEMBER 27, 2000

**MEMORANDUM OF OPINION**

**I. INTRODUCTION**

This action is a negligence case arising from a collision during a boat race on the Long Island Sound.<sup>1</sup> The plaintiffs, Arlene Tunney (“Tunney”) and Kenneth Maxwell (“Maxwell”), sued the defendant, Dennis McKay (“McKay”), for negligence. Tunney and Maxwell contend that, during a sail boat race on July 20, 1996, McKay failed to keep a reasonable lookout, failed to provide warning of his approach, and failed to maneuver his sailboat to avoid collision. As a result of this alleged negligence, Tunney and Maxwell claim to have suffered physical injuries as well as mental anguish. They seek money damages for physical injuries, damage to

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<sup>1</sup> Originally filed in Connecticut Superior Court, the case was removed to this court pursuant to 28 U.S.C. § 1441.

Maxwell's boat, and pain and suffering. Although she originally sought lost earnings, Tunney withdrew this claim at trial.

McKay denies he was negligence and asserts that the collision was caused, in whole or in part, by the negligence of Tunney and Maxwell. McKay filed a counterclaim alleging that Tunney and Maxwell's negligence caused the collision. In his counterclaim, McKay alleged that the plaintiffs' negligence caused damage to his boat, "Bolero," and that he incurred significant expense as a result.

## **II. FINDINGS OF FACT**

Tunney and Maxwell were, at all material times, citizens of Connecticut. McKay was, at all material times, a citizen of Massachusetts.

On July 20, 1996, the parties were participating in the "Rum Challenge" sail boat race at the Essex Yacht Club. The race was held on the Long Island Sound off Old Saybrook, Connecticut. McKay was aboard "Bolero," a 36 foot sailing vessel owned by him. Crew members on "Bolero" included Kevin Shenk, Laura Young, Richard Haviland, Peter Borkoski, Rob Budington, Dick Ward and Judy Schwenk. The plaintiffs were aboard "The Last Drop," a 30 foot sailing vessel owned by Maxwell. Crew members on "The Last Drop" included Robert Bantel, Keith

Sullivan, William Littell, and Michael Longo. Just before the finish line of the “Rum Challenge” race, “The Last Drop” and “Bolero” collided.

On the day of the race, visibility was good, but the wind was strong at 20 knots per hour and with gusts up to 25-30 knots per hour.<sup>2</sup> The seas were rough, with waves of 4 to 6 feet.

At the time of the collision, Tunney and McKay were at the helm of their respective sailboats. “Bolero” and “The Last Drop” were coming from a navigational mark off the shore of Plum Island, east/southeast of the finish line. Because the two boats were in different classes, they were not racing against each other. However, they were both approaching the finish line at the same time. The finish line of the race was approximately 100 yards long, marked by the Race Committee boat at the southwest end and the pin boat at the northeast end.

At all times prior to the collision and material to this case, “Bolero” was sailing on a port tack and was bearing towards the race finish line. “Bolero” was in last place in her division and if it had finished 10 seconds or so later in order to avoid a collision, she would not have affected its race results.

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<sup>2</sup> A knot, or 1 nautical mile per hour, is approximately 1.15 miles per hour.

Prior to the collision, “The Last Drop” altered her course several times to reach the finish line. Sailboats alter course by tacking, which is the act of changing from one directional position to another. Starboard tack means the wind is coming from the right of the helmsman and the sails are on his left. Port tack means the wind is from the left and the sails are on the right. As “The Last Drop” came within minutes of crossing the finish line, she was on a port tack. She then tacked to starboard, then again onto port tack, and then finally onto starboard tack just seconds prior to the collision.

No crew member on “Bolero” had been assigned specifically as the lookout. However, Richard Haviland, a crew member on “Bolero,” saw “The Last Drop” when it was approximately 100 yards away from “Bolero” and acted as a lookout from that point on. Haviland was acting as the jib trimmer, situated on the starboard side of “Bolero.” A jib trimmer controls the forward sail on the boat. Haviland noticed “The Last Drop” ahead of the “Bolero” to the right on starboard tack and notified McKay. McKay directed Haviland to monitor the progress of

“The Last Drop” at that point because McKay’s view of “The Last Drop” was blocked by the “Bolero’s” sails.<sup>3</sup> Haviland continued to monitor “The Last Drop.”

When “The Last Drop” tacked from port onto starboard the first time, Haviland notified McKay of the change in “The Last Drop’s” course, which McKay acknowledged. When “The Last Drop” then tacked from starboard onto port tack, which was the same tack that “Bolero” was on, Haviland notified McKay of the change in “The Last Drop’s” course, which McKay also acknowledged.

While “The Last Drop” and “Bolero” were both on port tack, there was no possibility of a close crossing situation because they were headed toward the race finish line in the same direction. As they approached the finish line, however, “The Last Drop” made its last tack onto starboard, too close to “Bolero” for McKay to take successful evasive action. Haviland immediately notified McKay of “The Last Drop’s” change in tack. McKay assessed the situation by ducking under the boom of “Bolero’s” mainsail in order to sight the “The Last Drop.” He determined that the two sailboats were on a collision course and turned his wheel hard to starboard. He ordered that “Bolero’s” sails be let out, and attempted to alter course in order to

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<sup>3</sup> Because McKay was on port tack, “Bolero’s” sail blocked his line of sight towards his starboard, or right side, where “The Last Drop” was located.

pass to the stern of “The Last Drop.” However, there was insufficient time under the conditions to avoid hitting “The Last Drop,” and the two boats collided within approximately three boat lengths before the finish line.

At no time did Tunney, in her navigation of “The Last Drop,” make any effort to avoid the collision with “Bolero.” Crew members on “The Last Drop” hailed to “Bolero” two to three times prior to the collision. However, due to the noise from the wind and waves, the defendant did not hear the hails from “The Last Drop.” When “The Last Drop” made her final tack onto starboard in an attempt to reach the finish line, Tunney failed to provide McKay sufficient time and distance in order to safely navigate “Bolero” and thus Tunney caused the collision.

Tunney testified that she held her starboard course consistently. She also testified that she made direct eye contact with McKay prior to the collision. However, Littell testified that he was not able to make eye contact with McKay prior to the collision even though he was situated on “Bolero” in the closest proximity to Tunney. Littell was unable to see McKay because the sails of “Bolero” were between McKay (on the port side) and “The Last Drop.” Thus, the court does not accept Tunney’s claim that it was reasonable or prudent to maintain her course

because she had made eye contact with McKay prior to the collision. “Bolero’s” mainsail was blocking her line of sight to “Bolero’s” port, or left, side where McKay was located.

Tunney claimed that the final starboard tack was made at a safe distance from “Bolero” and provided ample time for McKay to yield to her.<sup>4</sup> She testified that the distance between “The Last Drop” and “Bolero,” when “The Last Drop” turned on its final starboard tack and Tunney first saw “Bolero,” was 200 feet. She perceived that distance as being equivalent to the distance from the witness stand to back of the courtroom. In fact, the distance from the witness stand to the back of the courtroom is about 60 to 70 feet, less than one-third the distance estimated by Tunney as the space separating “The Last Drop” from “Bolero.”

Tunney’s testimony about length of time and distance between “The Last Drop” and “Bolero” when she turned onto her last starboard tack is further undermined by the sworn statement of one of her crew members, Robert Bantel, Jr., (“Bantel”) given to the Department of Environmental Protection (“DEP”) during its investigation of the accident. Def. Exh. 518. Bantel gave his statement

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<sup>4</sup> Under the Rules of the Road, the boat on starboard tack has the right of way in relation to a boat on port tack. See 33 U.S.C. foll. § 1602, R 12.

immediately after the accident.<sup>5</sup> He discussed where and when Tunney changed to starboard tack for the last time prior to the collision. Tunney testified that her final tack to starboard was made at least one minute prior to the collision and that the committee boat, forming part of the race finish line, was 300 to 400 feet away—approximately 10 to 15 boat lengths from the finish line. However, Bantel stated that “The Last Drop” tacked from port onto starboard at a distance of only 3-4 boat lengths from the finish line and did so in order to cross the finish line.<sup>6</sup> Tunney admitted that tacking to starboard 3-4 boat lengths in front of another boat would not be proper and would not provide the other boat sufficient time to avoid a collision.

Bantel’s contemporaneous statement corroborates the version of events offered by McKay and Haviland by demonstrating that “The Last Drop” made her final tack onto port only 3 to 4 boat lengths from the finish line and into the path of “Bolero,” thereby causing a collision to become unavoidable. “Bolero” could have

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<sup>5</sup> Bantel was listed as a witness for the plaintiffs but was not called to testify at trial. His statement was admitted into evidence at trial by McKay, without objection.

<sup>6</sup> As she approached the finish line, “The Last Drop’s” course was such that it would likely not cross the finish line, but rather pass to the north of the pin boat.



remained on a port tack until being unreasonably forced to undertake emergency navigational measures in order to attempt to avoid “The Last Drop” on its now starboard tack.

When boats are on opposite tacks and on a collision course, the time of impact is the distance between them divided by 1.4. Thus, if the boats were 3-4 boat lengths apart (90-120 feet), the place of collision would be approximately 64 to 86 feet away. On the day in question, “The Last Drop” and “Bolero” were traveling at approximately 6 knots per hour which equates to approximately 10 feet per second. Thus, at those distances, McKay would have only approximately 6 to 8 seconds to realize “The Last Drop’s” change of course, assess his options, and take evasive measures in rough seas and high winds to avoid the collision. In the conditions on that day with a 13,000-pound boat, 6 to 8 seconds was insufficient time to respond and avoid a collision.

### **III. CONCLUSIONS OF LAW**

#### **A. Jurisdiction**

Because the alleged tort occurred on navigable waters, the court has admiralty jurisdiction in this case under 28 U.S.C. § 1333. In addition, all parties are diverse

and the amount in controversy is greater than \$75,000.00, giving the court diversity jurisdiction under 28 U.S.C. § 1332.

### **B. Plaintiffs' Claim**

The complaint alleges two causes of action against McKay, both of which sound in negligence. “The essential elements of a cause of action in negligence are well established: duty, breach of that duty, causation, and actual injury.” See Mafucci v. Royal Park Limited Partnership, 243 Conn. 552, 566 (1998); Peerless Ins. Co. v. Tucciarone, 48 Conn. App. 160, 166 (1998).

Both parties in this case owed each other a duty to observe the “rules of the road” under the 1972 International Regulations for Preventing Collisions at Sea (“COLREGS”). 33 U.S.C. foll. § 1602, et seq; see Ching Sheng Fishery Co., Ltd. v. United States, 124 F.3d 152, 158 (2d Cir. 1997). The COLREGS require vessels to take reasonably prudent measures to avoid a collision. See id. Rule 5 of the COLREGS provides that “Every vessel shall at all times maintain a proper look-out by sight as well as by hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation

and of the risk of collision.” See 33 U.S.C. foll. § 1602, R 5. Tunney and Maxwell claim that McKay violated Rule 5 by not assigning someone as a lookout.

No crew member on either boat was given the sole role of lookout. On both boats, however, at least one crew member acted as a lookout while performing other duties. McKay and Haviland both testified that Haviland was assigned the task of lookout on the “Bolero.” Haviland was the jib trimmer on the “Bolero.” He noticed the plaintiffs’ vessel on its first starboard tack and warned McKay of “The Last Drop’s” movements from that point on. Maxwell, acting as lookout on “The Last Drop,” testified that he does not remember whether he saw “Bolero” prior to the final starboard tack or not. Thus, Haviland was monitoring “The Last Drop” before Maxwell even saw “Bolero.” Haviland’s actions thus provided an appropriate lookout based on the circumstances and conditions.

Rule 8 of the COLREGS provides in relevant part:

Any action to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship. . . . Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance.

See 33 U.S.C. foll. § 1602, R 8. The plaintiffs argue that the clear visibility on July 20, 1996, means the defendant and his crew had an opportunity to see “The Last

Drop” on starboard tack as it approached the finish line and, thus, should have hailed “The Last Drop” and could have avoided the collision at a safe distance.

McKay admits he and his crew saw “The Last Drop” prior to the final starboard tack and that neither he nor his crew members hailed “The Last Drop.” Haviland testified that he saw “The Last Drop” go from starboard tack to port tack, believed both boats would cross the finish line without any problem, but then saw “The Last Drop” tack to starboard again. At that point, hailing would not have prevented the collision because there was no time for either boat to change course. Littell testified that the crew on “The Last Drop” did not become aware of “Bolero” until they were on their last starboard tack. Therefore, the crew on “The Last Drop” noticed the “Bolero” even after the “Bolero” crew had seen them. Visibility was not the problem in this case. A combination of the conditions on the water, the wind, and the last tack to starboard by Tunney caused this accident. The fact that the “Bolero” crew could see “The Last Drop” did not help when there was not sufficient time to react to its final tack. Thus, McKay did not violate Rule 8 of the COLREGS.

Under Rule 12 of the COLREGS, a vessel on starboard tack has the right of way in relation to a vessel on port tack. 33 U.S.C. foll. § 1602, R 12. Rule 17 of the COLREGS provides in pertinent part:

(a) (i) Where one of two vessels is to keep out of the way the other shall keep her course and speed. (ii) The latter vessel may however take action to avoid collision by her maneuver alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in accordance with these Rules. (b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

See 33 U.S.C. foll. § 1602, R 17. Tunney was on starboard tack just before the collision and argues that, therefore, she had the right of way and was supposed to maintain their course. However, Rule 17 establishes that she had an obligation to avoid the collision by taking the action that would best aid to avoid the collision. In this case, such action would have been to stay on port tack.

Although Tunney and Maxwell testified that they repeatedly hailed McKay's boat, they also admitted that they saw no alteration in his course. Tunney chose to tack to starboard at a point that made the collision unavoidable.

Tunney and Maxwell argue that, because the crew members of the "Bolero" did not hail "The Last Drop," they did not know of the danger and the boats

entered the zone of convergence wherein only McKay could avoid the collision.

According to Tunney and Maxwell, the fact that “The Last Drop” made two precise turns that resulted in preventing contact amidship demonstrates that Tunney was under control and was responding well. Even if that is true, Tunney could have avoided the collision prior to this point by not making a final turn to starboard at a point that left insufficient space for McKay to be able to avoid a collision. The decision not to left McKay without enough time to respond, by hailing or maneuvering, and, therefore, unable to avoid the collision. Thus, McKay did not violate Rule 12 or 17 of the COLREGS.

The court concludes that under the circumstances present on the day of the “Rum Challenge,” Tunney did not allow McKay sufficient time and space to avoid a collision with her vessel. She miscalculated the time and distance for her last tack and, in light of the heavy winds and white caps combined with the speed of the boats, there was insufficient time for “Bolero” to avoid the accident. Under the circumstances, McKay did not breach his duty to follow the rules of the road under the COLREGS. Rule 2 of the COLREGS states that:

[n]othing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these

Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. [ ] In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, . . . which may make a departure from these Rules necessary to avoid immediate danger.

33 U.S.C. foll. § 1602, R 2. When McKay was forced to take emergency evasive maneuvers due to Tunney's imprudent navigation, he took reasonably prudent measures to avoid the collision. McKay observed the rules of the road and took all reasonably prudent measures to avoid the collision that was made unavoidable by Tunney's negligence in turning her sailboat onto a convergent course with McKay's sailboat in close proximity to the race finish line. "The existence of duty is a question of law and only if such duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand." See Maffucci v. Royal Park Limited Partnership, 243 Conn. 552, 566, 707 A.2d 15 (1998) (emphasis added).

Under the particular facts of this case, the court cannot, as a matter of law, conclude that McKay breached any duty that he owed to Tunney and Maxwell. McKay acted reasonably and prudently under the circumstances of an imminent collision caused by Tunney's failure to provide McKay with sufficient time and space

to assess the need for, undertake, and complete emergency evasive maneuvering of his sailboat to avoid a collision. Thus, Tunney and Maxwell have failed to establish that McKay was negligent.

### **C. Defendant's Counterclaim**

McKay filed a counterclaim against Tunney and Maxwell, alleging that their negligence caused the collision between "The Last Drop" and "Bolero." However, McKay did not offer any evidence of the damages he suffered. The elements in a negligence cause of action are duty, breach of that duty, causation and damages.

Medcalf v. Washington Heights Condominium Assn., 57 Conn. App. 12, 16

(2000). Because McKay failed to offer any evidence of damages suffered, the court finds for Tunney and Maxwell with respect to the counterclaim.<sup>7</sup>

## **IV. CONCLUSION**

For the foregoing reasons, judgment is entered for the defendant.

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<sup>7</sup> The court notes further that McKay appears to have intended to drop the counterclaim as his proposed findings of fact and conclusions of law make no reference to any damages sought.



**SO ORDERED.**

Dated at Bridgeport, Connecticut this 27th day of November, 2000.

\_\_\_\_\_/s/\_\_\_\_\_  
Janet C. Hall  
United States District Judge