University of Miami Law Review

Volume 31
Number 4 *1976 Developments in Florida Law*

Article 3

9-1-1977

Admiralty

Brendan P. O'Sullivan

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BRENDAN P. O'SULLIVAN*

This article examines what has been a troublesome area of admiralty law for Florida courts and practitioners, the Florida boating law. Through case and statutory analysis the author demonstrates that the Florida law conflicts with federal maritime law by imposing a higher standard of care for boat operators and a more limited scope of liability for boat owners. The author points out that Florida courts have engaged in strained readings of the Florida statute in order to make it conform to federal maritime law and concludes that such readings are not warranted and that the Florida Statute should be declared invalid.

I. INTRODUCTION

In 1959 the Florida legislature enacted section 371.52 of the Florida Statutes which declared that boats of all classifications were dangerous instrumentalities.[1] In addition, the statute contained provisions for imposing a specific standard of operator care and a limited scope of owner liability for all boat operations.[2] Certain Florida courts immediately perceived that these latter two provisions raised questions of possible conflict with federal maritime law and thus were of doubtful validity.[3] However, other courts, possibly

* Associated with Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, Florida.

1. Fla. Laws 1959 ch. 59-400 § 1 (current version at FLA. STAT. § 371.52 (1975)). The current text of § 371.52 is:

> All boats, of whatever classification, shall be considered dangerous instrumentalities in this state and any operators of such boats shall, during any utilization of said boats, exercise the highest degree of care in order to prevent injuries to others. Liability for negligent operation of a boat shall be confined to the person in immediate charge or operating the boat and not the owner of the boat, unless he is the operator or present in the boat when any injury or damage is occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or negligence in observing such care and such operation as the rules of the common law require.

2. *Id.*

3. *E.g.*, Cashell v. Hart, 143 So. 2d 559, n.4 (Fla. 2d Dist. (1962).

because of a lack of awareness of the potential applicability of federal maritime law, recognized no conflict and mechanically applied the Florida Statute.[4]

During 1976 the issue remained unresolved, with certain courts blindly following the statute[5] and others ignoring it entirely.[6] Thus, whenever a Florida practitioner handles a suit involving a boating accident which has occurred upon navigable waters, he is faced with an unsettled problem concerning the validity of the Florida boating safety statute. This article will attempt to point out aspects of the problem which have been resolved and will suggest lines of reasoning concerning the unsettled areas. The discussion will center on the applicable standard of care and on the scope of a boat owner's liability.

II. STANDARD OF CARE

Section 371.52 provides that all vessels shall be operated with the highest degree of care in order to prevent injuries to others.[7] By imposing this burden upon Florida boat operators, Florida has created a standard of care higher than the standard of "reasonable care under the circumstances" which federal maritime law requires.[8] While it is true that this provision may be a valid exercise of the

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Federal maritime law applies to all suits arising out of incidents which occur upon the navigable waters of the United States. Just v. Chambers, 312 U.S. 383 (1940). State law may supplement or modify this federal maritime law where applicable, but state law must yield when it is hostile to the characteristic features of federal maritime law or inconsistent with federal legislation. *Id.* at 392 (dictum). *Accord*, Askew v. American Waterways Operators, Inc., 411 U.S. 325, 338 (1973) (dictum).

4. *E.g.*, Burton v. Varner, 296 So. 2d 641 (Fla. 3d Dist. 1974).

In addition, Florida courts have confused the question of whether to apply state law or federal maritime law with the question of the existence of admiralty jurisdiction. Still v. Dixon, 337 So. 2d 1033 (Fla. 2d Dist. 1976). In *Still* the appellate court reversed the dismissal of a trial court of a complaint brought by the owner of an allegedly abandoned boat against a tower for negligence and breach of a towage contract. Since the alleged damages exceeded $2500, the trial court, a Florida circuit court, clearly had jurisdiction to try the case under the "savings to suitors" provision of the Judiciary Act of 1789, ch. 20, § 6, 1 Stat. 73, at 76-77 (1789) (current version at 28 U.S.C. § 1333 (1970)) and FLA. STAT. § 26.012(2)(a) (1975). The trial court, nevertheless, had dismissed the suit, erroneously believing that since the cause of action was incidental to a maritime towage contract, jurisdiction was exclusively with the federal courts. 337 So. 2d at 1034.

5. Bird v. Korza, Civil No. 74-532-11 (Fla. 6th Cir. Dec. 6, 1976) (stipulation and order dismissing the cause of action and all cross-claims).

6. Palmer v. Ribax, Inc., 407 F. Supp. 974 (M.D. Fla. 1976).

7. FLA. STAT. § 371.52 (1975); *see* note 1 *supra* for the full text of the statute.

8. *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

police power by Florida,[9] it is equally true that Florida may not establish a standard of care for the imposition of liability for boat operation if the standard irreconcilably conflicts with that of federal maritime law.[10]

In *Branch v. Schumann*[11] the Fifth Circuit concluded that such an irreconcilable conflict did exist. In *Branch* an attempt to save the application of the Florida statute had been made by arguing that it supplemented rather than contradicted federal maritime law.[12] The Fifth Circuit rejected the argument:

> We cannot agree that the Supreme Court in *Kermarec* simply set forth a minimum standard of care which any state, in its discretion, may supplement by imposing a stricter burden on the owner of a vessel in relation to his conduct toward guests. Any such supplementation necessarily entails alteration of an admiralty norm in direct contravention of the quest for uniformity and the Supreme Court's *Kermarec* mandate that the defendant's conduct be measured by maritime standards [i.e., reasonable care under the circumstances].[13]

At the time *Branch* was decided, the Federal Motor Boat Act of 1940[14] was in effect. This Act imposed criminal penalties upon anyone operating a boat in a negligent manner.[15] It neither imposed civil penalties nor provided a cause of action for anyone injured as a result of negligent operation in violation of the Act. A civil suit logically could have been implied under the Act, but the applicable standard of care would have been the reasonable care standard already imposed by federal maritime law.[16]

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9. *See, e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

10. *See* note 3 *supra*.

11. 445 F.2d 175 (5th Cir. 1971).

12. *Id.* at 178.

13. *Id.*

14. Federal Motorboat Act of 1940, ch. 155, §§ 1-21, 54 Stat. 163 (partially repealed 1971).

15. *Id.* §§ 13, 14.

16. *See* St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974). In *St. Hilaire* the Eighth Circuit struck down an Arkansas statute which set a lower standard of care than the reasonable standard of care required by federal maritime law. The court also concluded that the state statute conflicted with the standard of care for civil actions implied from the Motorboat Act of 1940:

> The federal act established a standard of conduct in 46 U.S.C. § 526*l* prohibiting negligence or carelessness in the operation of a boat, and the state statute in question prevented the application of that standard in civil actions. The state

In 1971 the 1940 Motorboating Act sections dealing with negligent operation were repealed and replaced by the Federal Boat Safety Act.[17] The Boat Safety Act imposed civil as well as criminal penalties for negligent operation of boats.[18] Like the Motorboat Act, the Boat Safety Act did not expressly provide for a civil action for someone injured as a result of a violation of the Act. The Boat Safety Act did have one important provision relating to civil actions, however, a savings provision: "Compliance with this chapter or standards, regulations, or orders promulgated hereunder shall not relieve any person from liability at common law or under state law."[19]

This savings provision raises the question of whether Congress intended to permit states to set higher standards of care for determining liability for accidents arising upon local waters, even though the waters were also the navigable waters of the United States.[20] If so, the rule set forth in *Branch* no longer would be applicable. The higher standard of care set by the Florida statute, rather than being in direct contravention of the federal maritime norm, would be authorized by the savings provision as a supplement to the standards contained in the Boat Safety Act. However, the more logical conclusion is that the savings provision of the 1971 Act was intended merely as a codification of existing maritime law. Under this view the *Branch* decision would still control, and federal maritime law would set the proper standard of care.

There are no judicial decisions construing the savings provision

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statute thus conflicts with the federal standard and must necessarily fall.

Id. at 981.

For a general discussion of the feasibility of implying civil remedies from criminal statutes, *see* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

17. 46 U.S.C. §§ 1451-89 (Supp. V 1975).

18. 46 U.S.C. § 1483(b) (Supp. V 1975).

19. 46 U.S.C. § 1489 (Supp. V 1975).

20. Two factors militate against this view. First, the intent of Congress in enacting the Federal Boat Safety Act was to reduce boating accidents primarily by compelling manufacturers to comply with safety standards to be promulgated by the Secretary of Transportation. S. REP. No. 92-248, 92d Cong., 1st Sess., reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1333, 1341. Second, in its comments on the savings provision, the Committee on Commerce stated: "The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. REP. No. 92-248, *supra*, note 20 at 1352.

Conversely, the Commerce Committee noted that an additional purpose for the Act was to encourage greater state participation in boating safety efforts.

of the 1971 Act. Until such a decision is rendered the rule in *Branch v. Schumann*[21] will remain the controlling law governing standard of care.

III. Boat Owner Liability

Section 371.52 of the Florida Statutes provides that liability for negligent operation of a boat in Florida waters is confined to the person in "immediate charge or operating the boat."[22] The statute prescribes that the owner of the boat is not liable for negligent operation unless he is operating the boat or is present on board at the time the negligent act occurs.[23] Applied literally, section 371.52 protects an owner from liability for injuries caused by one to whom the owner has negligently entrusted the boat. Federal maritime law, however, does not afford such protection to a boatowner.[24]

The District Court of Appeal, Fourth District encountered this problem in *Jowanowitch v. Florida Power & Light Co.*[25] The trial court had dismissed a complaint against the owner of a sailboat who allegedly had been negligent in entrusting the boat to another party who caused an accident. On appeal, the Fourth District considered the effect of section 371.52 in such a situation:

> As to the effect of the statute, it is our conclusion that same was not intended to grant a boat owner immunity from liability to an injured person where the boat owner fails to use reasonable care in entrusting the boat to another and, as a proximate result of such negligence, injuries are occasioned to a third party.[26]

By using this construction the court was able to avoid making a decision as to whether the statute was in conflict with federal maritime law and thus invalid.[27]

Most subsequent decisions have either analyzed the owner lia-

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21. 445 F.2d 175 (5th Cir. 1971).

22. Fla. Stat. § 371.52 (1975); *see* note 1 *supra* for the full text of the statute.

23. *Id.*

24. Cashell v. Hart, 143 So. 2d 559 (Fla. 2d Dist. 1962).

25. 277 So. 2d 799 (Fla. 4th Dist. 1973).

26. *Id.* at 800.

27. *Id. Accord*, Cashell v. Hart, 143 So. 2d 559 (Fla. 2d Dist. 1962). *Cashell* was decided before section 371.52 became effective. However, in footnote 4 the *Cashell* court considered the effect of the statute on a negligent entrustment situation, had the statute been effective. The court stated that it was not the intent of the legislature to give an owner immunity in such a situation.

bility problem inadequately or have failed to consider it at all.[28] In *Burton v. Varner* the District Court of Appeal, Third District affirmed the dismissal of a suit against a boat owner not present in his boat when a water-skiing accident occurred.[29] The *Burton* court relied on the literal language of section 371.52 and surprisingly cited to *Jowanowitch*. Similarly, in *Bird v. Korza*, a Florida Circuit Court dismissed a suit against a defendant boat owner because he was not present in the boat at the time of the accident as required by section 371.52.[30]

Logically, the Fifth Circuit's ruling in *Branch v. Schumann*[31] should by analogy control the boat owner liability problem. This analogy would dictate that the Florida statute should not be judicially restructured by adding provisions but should yield to federal maritime law. Although suggestions of this analogy have been present,[32] there is no explicit judicial decision on point.

IV. CONCLUSION

Florida courts, and in turn Florida practitioners, are faced with a dilemma. If the courts apply the Florida boating statute as written, they do so apparently in direct contravention of federal maritime law. If they retain the exceptions which have been judicially created to reconcile the statute to maritime law, they vitiate the letter and the spirit of the statute. Florida courts would do best to abandon section 371.52, permitting it eternal repose, and to navigate toward the clear waters of established, uniform maritime law in boating accident litigation.

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28. Burton v. Varner, 296 So. 2d 641 (Fla. 3d Dist. 1974); Bird v. Korza, Civil No. 74-532-11 (Fla. 6th Cir. Dec. 6, 1976) (stipulation and order dismissing the cause of action and all cross-claims).

29. 296 So. 2d 641 (Fla. 3d Dist. 1974).

30. Civil No. 74-532-11 (Fla. 6th Cir. Dec. 6, 1976) (stipulation and order dismissing the cause of action and all cross-claims).

31. 445 F.2d 175 (5th Cir. 1971).

32. Green v. Ross, 338 F. Supp. 365 (S.D. Fla. 1972). In *Green* the court commented regarding section 371.52: "Plaintiff concedes that under Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971), defendant Ross cannot be held to the high standard of care created by F.S.A. § 371.52." *Id.* at 367.