

# **TRAVEL LAW: RECREATIONAL BOATING ACCIDENTS: DUTY TO WARN OF BAD WEATHER**

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This week we examine the duty to warn tourists of the possibility of bad weather which may have a negative impact upon their vacation experience.

## **The Aramark Case**

In *In re Aramark Sports and Entertainment Services LLC*, 2014 WL 4270941 (D. Utah 2014), the Court noted that Aramark was “a concessionaire for the U.S. National Park Service in the Glen Canyon National Recreation Area (operating several marinas on Lake Powell including) Wahweap...Dangling Rope, Halls Crossing and Bullfrog. Aramark will rent a power boat to anyone who is eighteen years or older and has a valid driver’s license. No previous boating experience is required. Lake Powell’s main channel is 186 miles long when the lake is at high water. In the spring, the water is cold and the weather is frequently windy.

The weather is erratic and can quickly change. In April, wind speeds often exceed thirty miles an hour and can reach fifty miles an hour. Te weather can be calm at one part of the lake but have high winds and waves at another.

### **Arriving At Wahweap Marina**

"In April 2009, the three couples (the Prescott Party) went on vacation together to Lake Powell...checked in the resort at the Wahweap Marina area (and) went to Aramark's boat rental office to rent a boat for the next day...a rental agent for Aramark... discussed Mr. Brady's previous boating experience, the Prescott Party's plan to travel to Rainbow Bridge, which would take a full day, and the weather forecast for Saturday, April 25, the day (they) would be on the lake. The weather forecast was based on National Weather Service data collected at 3:44 a.m. that Friday morning predicted the weather on Saturday...'Breezy ...between 15 and 25 mph with gusts as high as 37 mph'...Mr. Prescott was given a copy of the weather forecast (and told by the rental agent) that he would be given an updated weather report the next day before the Prescott Party departed on the boat. But this did not happen".

### **The Boat Rented**

"Boat 647 is just over twenty feet in length and can hold eight passengers. U.S. Coast Guard regulations do not require boats over twenty feet in length to have positive floatation, and Boat 647 did not. (A boat with positive floatation has the ability to float and not sink for a period of time even if filled with water.) Boat 647 had a marine band radio that could receive and monitor both the haling channel...and the weather channel ...The Baja 202 Islander...can withstand an upper limit wind speed of 31 miles per hour...The manual warns: 'It is only the most experienced operator and crew that may be able to operate a boat safely under these conditions'".

### **The Weather Forecasts**

"The National Weather Service (NWS) maintains a website that is available to the public...employees in Aramark's boat rental office often accessed (the website and it was their) general practice to keep the marine band radio on...during working hours to monitor the weather...At various times (after the Prescott Party was given the one and only weather forecast discussed above), on April 24 and April 25 the (NWS) updated the weather information...at 3:18 p.m. on April 24...announced a wind advisory in effect from 8 a.m. to 7:00 p.m. on Saturday (the day of boat trip) predicting 20 to 35 (mph) winds and gusts around 45

(mph) in the late morning and afternoon...A new 7-day forecast, if generated for the Prescott Party when they arrived to pick up Boat 647 would have reflected these changes...(Subsequently the NWS predicted) sustained winds increasing to 25 to 35 (mph) and gusts to around 55 (mph) late in the afternoon".

### **Stopping Boat Rentals**

According to several Aramark employees boats would not be rented if the winds were 25-35 mph. However, the Court concluded that the new NWS forecasts were not conveyed to the Prescott Party either before or after they left on their trip and an Aramark employee "did nothing to locate Boat 647" after "she heard (at approximately 10:30 a.m. on Saturday) the (NWS) wind advisory on Channel 16 and...knew that high winds were predicted".

### **Negligence**

"After the Prescott Party left Dangling Rope, the channel became more open and the water was choppier...No one in the Prescott Party was wearing a life jacket. When they reached... Padre Bay...the water grew rougher and spray came over the bow (and started flooding the boat which sank resulting in the

drowning of four of the six passengers). "The court...concludes that Aramark had frequently in the past recognized that high winds would be dangerous to boaters. Aramark should have been aware, if it was not, that high winds were forecast for April 25, 2009. And it was foreseeable to Aramark that if those who had rented Baja 292 Islanders for a trip on Lake Powell the morning of April 25, 2009, were allowed to depart, the boats could sink because of the high winds. It was further foreseeable to Aramark that if the boats sank, particularly in the cold April water, the passengers could suffer injury and even death. Aramark breached that duty when it allowed the Prescott Party to leave... Regardless of whether the members of the Prescott Party made wrong choices while on the boat (e.g., not wearing life jackets), the harm was, at least in part, the result of Aramark's initial negligence and so Aramark 'bears some responsibility for the accident'".

### **The Glenview Park Case**

In *Glenview Park District v. Melhus*, 540 F. 2d 1321 (1976) Glenview advertised a 15 mile canoe trip down the Fox River (which) "Under ordinary conditions ...was shallow enough for wading (but) The Fox on September 30 was at flood stage and at places has risen over its banks with the result that trees on the

banks were in the water as well as water being closer to overhanging branches. (While the Melhus family was canoeing on The Fox River their) canoe struck a low hanging limb which raised the canoe and spilled the family into the river. Dr. Melhus drowned in 8 to 10 feet of water". In discussing the issue of negligence the Court noted that "It appears clear to us that Glenview, having undertaken this program for the public and having make preliminary investigation presumably in the interest of the safety of that public, could not just blandly assume that conditions along the river would remain immutable. Had Dr. Melhus been properly and sufficiently warned of the dangers of overhanging branches near the edge of the river's banks, Glenview would be in a better position to argue that it had fulfilled its duty of due care. The record establishes no such warning, primarily because the co-supervisors of the trip were aware that the Fox River was at flood stage on the day of the mishap".

### **Limitation Of Liability Act**

The U.S. Limitation of Vessel Owner's Liability Act allows boat and ship owners to limit their liability for passenger claims to the value of the vessel unless the ship owners or its employee's negligence caused the accident and/or the ship owner had "knowledge or privity" of the negligence or unseaworthiness

of the vessel [Travel Law 3.02[3]]. Both the Aramark case and the Glenview Park case involved petitions brought in U.S. federal courts by the vessel owners to limit their liability to the value of Boat 647 (Aramark) and the ill fated canoe (Glenview Park). Both petitions were denied since the Court in each case found the likelihood of negligence by petitioners' employees [for another recent case involving a recreational boating accident on Oneida Lake in New York State and another petition by a boat owner to limit liability for the quadreplegic injuries sustained by a passenger see *Ficarra v. Germain*, 5:14-CV-00869 (BSK/ATB) N.D.N.Y. 2014].

### **Other Bad Weather Cases**

A claim of failing to warn of bad weather may arise within the context of a spoiled vacation [see *Fleming v. Delta Airlines* [1973] (failing to warn of bad weather for flying); *Krautsack v. Anderson* [2016] (plaintiff embarked on a two-week \$38,000 safari to East Africa "scheduled during what would ordinarily be the dry season (but) plaintiff's safari experience was marred by heavy rainfall reportedly due to the phenomenon known as 'El Nino'...Plaintiff alleged that shortly before leaving on safari, he obtained information that the countries on the tour were experiencing heavy rainfall (but) 'was assured by (travel agent)

that the information he had received was incorrect and that the tour would neither be disrupted nor made more difficult because of the rain'. Plaintiff claimed these representations were false"; jury verdict dismissing all claims); *Harvey v. American Airlines* (1986) (vacation ruined because of inclement weather; no duty to warn of rainy weather)].

Justice Dickerson has been writing about *Travel Law* for 39 years including his annually updated law books, *Travel Law*, Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2015), and over 350 legal articles.

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