

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ALLAN BROWN,)	
)	
Plaintiff)	
v.)	
)	Civil No. 97-222-P-C
ROGER MICHAUD,)	
)	
and)	
)	
DOLPHIN MARINE, INC.)	
)	
Defendants)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

The plaintiff, Allan Brown, brings an action against the defendants, Roger Michaud and Dolphin Marine Services, Inc., pursuant to general maritime law. Jurisdiction is conferred on this Court by 28 U.S.C. §1333.

The plaintiff claims that because of the defendants' negligence damages were sustained to his vessel *Sea Timber*. The defendants filed cross-claims against one another asking for indemnification and/or contribution. Defendant Michaud also filed a claim against Defendant Dolphin, alleging that Dolphin's negligence caused the damage sustained to his vessel *Asigo*.

The Court conducted a bench trial on the matter in Portland on February 11th and March

¹ Pursuant to 28 U.S.C. 636(c) (1993) the parties have consented to proceed before the United States Magistrate Judge.

2nd 1998.² The parties have filed post-trial proposed findings of fact and conclusions of law for the Court's consideration. After considering the evidence and the arguments advanced by the parties, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

I. Findings of Fact

1. The plaintiff, Allan Brown, is a resident of Brunswick, Maine. At all times material to this lawsuit, the plaintiff owned the vessel *Sea Timber*, a twenty-nine foot lobster-style boat.

2. The defendant Roger Michaud is a resident of Orr's Island. At all times material to this lawsuit, Michaud owned the vessel *Asigo*, a thirty-four foot Irwin fiberglass sailboat.

3. At all times relevant to this lawsuit, the defendant Dolphin Marine Services, Inc., operated a marina at Basin Point, Harpswell, Maine.

4. Dolphin is a Maine Corporation closely held by the Saxton family. The Saxton family has operated Dolphin for the last twenty years.

5. Dolphin provides various marine services that includes renting moorings, and hauling, launching and storing vessels. Dolphin maintains about seventy moorings and also operates a restaurant, work shed and a shop. In October 1996, the moorings at Dolphin mostly consisted of double bridles with chafing gear. However, Dolphin did have moorings with single bridles that

² The Court is satisfied that Wil Gagnon was not properly subpoenaed by Dolphin because Dolphin failed to pay the witness fee as required by F.R. Civ. P. 45(b). ("Service of a subpoena therein shall be made by delivering a copy thereof, to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law.") Without payment of the witness fee the subpoena is void. *See, C.F. & I. Steel Corp. V. Mitsui & Co. Inc.*, 713 F.2d 494 (9th Cir 1983). Having failed to provide evidence that the witness fee was paid, the Court concludes that Wil Gagnon was not properly subpoenaed and therefore did not need to appear and testify.

did not have chafing gear.

6. In accordance with the practice of other marinas in Maine, a Dolphin employee checks the vessels moored at Dolphin at least once a day to make sure that they are properly moored.

7. Dolphin's practice was to attempt to contact the owners of vessels at Dolphin when weather may impact the safety of the vessels moored at Dolphin.

8. Often a vessel owner would moor the vessel at Dolphin and, if Bill or Don Saxton was unavailable, notify one of Dolphin's employees that the vessel was left to be hauled. The message would then be related to Bill or Don Saxton. Dolphin would then haul the vessel and bill the customer. This informal process was common at Dolphin.

9. In October 1996, Dolphin had two phone numbers a person could call, 833-5343 and 833-6000. The first number connected the person to the shop and the latter number connected one to the restaurant. Dolphin listed the restaurant number on their letterhead and invoices. It was not uncommon for a person to leave a message with a Dolphin employee at the restaurant for another Dolphin employee.

10. During the summers the plaintiff moored *Sea Timber* at Orr's Island. On October 11, 1996 the plaintiff powered his vessel from Orr's Island to Dolphin to have the vessel hauled out of the water and taken to his home. The plaintiff docked his vessel and spoke with Bill Saxton, the manager of Dolphin Marine. The plaintiff asked if Dolphin could haul his vessel to his home for winter storage. Saxton told the plaintiff that he could haul the vessel and directed the plaintiff to a mooring marked "AND".

11. The plaintiff moored the vessel at the mooring "AND". The mooring had two bridles with chaffing gear. The plaintiff secured the vessel by drawing two mooring pennants through

the vessel's bow chocks. He also used chafing gear on the pennants by tying the chafing gear in place and aligning the gear with the chocks.

12. A launch operated by Dolphin brought the plaintiff onshore. Once onshore the plaintiff spoke with Don Saxton. The plaintiff offered Don Saxton the keys to the *Sea Timber* so that Dolphin could position the vessel to be hauled. Don Saxton told him he did not need the keys because Dolphin uses another vessel to push and move vessels into position to be hauled. The plaintiff left the marina and went home.

13. The defendant, Roger Michaud, moored *Asigo* at Dolphin during the summers of 1984 to 1989. Each year Dolphin would haul the *Asigo* for winter storage at Dolphin's facility and then launch *Asigo* in the spring.

14. In 1989, Michaud hired Bill Saxton to install a mooring near his home at Orr's Island. Michaud then began mooring *Asigo* at Orr's Island during that summer. However, with the exception of one year, 1994-5, Michaud still used Dolphin to haul *Asigo* for winter storage and to launch *Asigo* in the spring.

15. After 1989, Michaud would tell Bill Saxton or leave a message with a Dolphin employee that he wanted *Asigo* hauled for winter storage. Michaud never had a problem getting Dolphin to haul *Asigo*. Dolphin usually took one to three weeks to haul a vessel left at a mooring to be hauled.

16. On the afternoon of October 6, 1996 Michaud and his wife, Peggy Michaud, delivered *Asigo* to Dolphin to be hauled for winter storage. When the Michauds arrived most, if not all, of the inner moorings were taken. The Michauds sailed by the dock and were told by someone from the dock to take an outer mooring. They picked up an outer mooring that had one bridle and no

visible chafing gear on the bridle. If chafing gear was on the rope, the gear had slid down the rope to where it was not visible. In previous years Michaud moored *Asigo* at Dolphin moorings that only had a single bridle without chafing gear. Michaud did not have chafing gear on *Asigo*.

17. Roger Michaud took the single bridle and placed the bridle over the cleat on the starboard bow. When Michaud left *Asigo*, she was in seaworthy condition without damage to her hull, engine, machinery or equipment.

18. The Michauds secured the vessel for winter storage and were taken ashore by a Dolphin launching boat. The Michauds do not know which Dolphin employee operated the launch boat.

19. Once ashore the Michauds looked, but could not find, Bill Saxton or any other Dolphin employee to tell them they were leaving *Asigo* to be hauled. Roger Michaud then personally left a message at the restaurant for Bill Saxton that he left *Asigo* at a mooring to be hauled for winter storage. The Michauds then went home.

20. On the morning of October 7, 1996 Roger Michaud called Dolphin at the restaurant number. In previous years, Michaud had called and successfully left messages for Bill Saxton at that number. Michaud was told that Bill Saxton was not available so Michaud asked the person to give Saxton the message that on the previous afternoon he left *Asigo* for hauling and winter storage.

21. At no time did Michaud or Dolphin enter into a written agreement regarding Dolphin hauling *Asigo* and storing it at Dolphin. Instead, Michaud relied on his experience of previous years of mooring his vessel at Dolphin's facility and notifying an employee at Dolphin that he wanted *Asigo* hauled. Michaud never had a problem getting *Asigo* hauled in a timely manner in

previous years and no one at Dolphin ever complained about the manner Michaud used when leaving *Asigo* at Dolphin for winter storage.

22. At no time between October 8, 1996 and October 22, 1996 did the Michauds or any one at Dolphin attempt to contact one another regarding *Asigo*. At no time between October 7, 1996 and October 22, 1996 did the Michauds attempt to board or use *Asigo*.

23. Weather reports from the National Weather Service "NWS" are broadcasted on VHF radio through NOAA Weather Radio "NOAA". Although the exact words written by the NWS are not repeated verbatim by NOAA, the Court is satisfied that all relevant information contained in the NWS printed reports are reported over the radio by NOAA.

24. The custom among marina operators is to listen to NOAA for weather forecasts.

25. On October 19, 1996, the NWS issued a gale warning³ that included the Harpswell area and also indicated that winds in excess of 40 knots could be expected for the area on October 20, 1996. In the early morning of October 20, 1996 the NWS, issued a storm warning⁴ for the Harpswell area. NOAA repeated the storm warning several times on October 20th and 21st 1996.

26. Bill Saxton and Don Saxton did not know what wind speeds were indicated when a gale warning or a storm warning was issued. When they listened to the radio for forecasts they only paid attention to the wind speeds that were forecasted, not the warnings that were issued.

27. Bill and Don Saxton listened to NOAA radio on October 19th and the morning of

³ A gale warning is issued when winds are expected to be between 39 to 54 mph (34 to 47 knots).

⁴ A storm warning is issued when winds are expected to be over 54 mph (47knots).

October 20th but do not recall hearing wind speeds forecast in excess of 50 knots. However, the Court is satisfied that a storm warning was forecast throughout the day which indicated that winds could exceed 50 knots.

28. Bill Saxton did not listen to the radio forecast again on October 20th. On the evening of October 20th, Saxton listened to the weather forecast on television and was not concerned by what he heard.

29. Although the NWS issued a storm warning on the morning of October 20th no Dolphin employee attempted to notify owners that their vessels may be in danger as they had in the past.

30. Saxton worked at the marina on October 20th. Saxton finished checking the moorings on the vessels around mid-afternoon when the winds died down and there was slack water. On the following morning, October 21st, Saxton attempted to check the moorings on the vessels but the seas were too rough to do so.

31. Around midnight on October 21st, winds blew through the Harspswell area at above 50 knots. The wind speeds corresponded to the NOAA weather report regarding a storm warning.

32. Bill Saxton and Don Saxton were at Dolphin and observed the vessels tied up at Dolphin's moorings from a pick-up truck. Bill Saxton also had spotlights with him so he could observe how the vessels weathered the storm.

33. Bill and Don Saxton first observed *Asigo* after she broke from her mooring and drifted towards and then into the sailboat *Wing*. Shortly after *Asigo* drifted into *Wing*, *Wing* broke from its mooring and the two vessels drifted into the plaintiff's vessel, *Sea Timber*. *Sea Timber* held its mooring for about fifteen to twenty minutes and then broke her mooring.

34. The three boats drifted onto the rocky ledge. All three boats sustained damage as the elements pounded the vessels.

35. Five vessels separated themselves from the moorings at Dolphin that stormy evening. In addition to *Asigo*, *Wing*, and *Sea Timber*, the vessels *Rua* and *McCavity* broke their moorings. *Rua* was also moored at Dolphin on a single bridle with no chafing gear and chafed through its mooring. *McCavity* was placed on a double-bridle mooring with chafing gear but also chafed through and broke from its mooring.

36. The morning after the storm, October 22nd, the plaintiff arrived at Dolphin and observed that *Sea Timber* was no longer on her mooring. He thought that *Sea Timber* had been hauled but then discovered *Sea Timber* on a rocky ledge with *Wing* and *Asigo*.

37. The plaintiff then met Bill Saxton. Saxton told him he was going to call him but was very busy. Saxton described to the plaintiff how the *Sea Timber* parted from its mooring. The plaintiff said that he did not have insurance and asked Saxton to look into whether Dolphin's insurance would cover the damage.

38. A Dolphin employee called Penny Michaud on the morning of October 22nd. The employee informed her that *Asigo* broke from its mooring the previous evening and ran aground. Penny Michaud then called Roger Michaud, who was on a business trip in Milwaukee, to inform him what happened. She then went to Dolphin to inspect the condition of *Asigo*. She took several photographs of the damage to *Asigo* but never spoke to anyone while at Dolphin.

39. Roger Michaud first visited Dolphin on the morning of October 23rd. He looked at *Asigo* and made arrangements with Dolphin to have *Asigo* removed from the rocky ledge as soon as possible.

40. Dolphin removed *Asigo* on October 25th and placed it on a mooring. Dolphin also placed two water pumps in the cabin of *Asigo* to pump out water in the cabin. A Dolphin employee called Penny Michaud and told her that they placed *Asigo* on a mooring and placed two pumps in the cabin. She was told that the vessel seemed to be fine.

41. Contradictory testimony exists as to whether *Asigo* was filled with water once it was ashore. The Court is satisfied that water filled *Asigo*'s cabin when it washed ashore and that no additional damages were sustained to *Asigo* when it was placed back on a mooring.

42. When the Michauds returned to Dolphin the following day they noticed that *Asigo* was sitting low in the water. They took a launch out to the vessel and observed that the cabin was full of water. Roger Michaud left *Asigo* and went to speak with Bill Saxton. He told Saxton to take *Asigo* out of the water as soon as possible. Dolphin hauled *Asigo* out of the water on the same or following day.

43. As a result of washing ashore on a rocky ledge, *Sea Timber* sustained damages to her hull in the amount of \$10,500.

44. As a result of washing ashore, *Asigo* sustained damages to her hull and water damage to her mechanical and electrical systems. The repairs to *Asigo* totaled \$31,033.59.

II. Conclusions of Law

A. Bailment

A bailment is “the delivery of goods by their owner to another for a specific purpose, and the acceptance of those goods by the other, with the express or implied promise that the goods will be returned after the purpose of the delivery has been fulfilled.” *Goudy & Stevens v. Cable Marine*, 924 F.2d 16 (1st Cir.). When the bailor demonstrates delivery of the bailed object and

the failure of the bailee to return the thing bailed in the same condition, the bailor makes out a *prima facie case* of negligence against the bailee. *Id.* The burden of proof does not shift to the bailee, however the bailee has the duty to “come forward with the evidence to explain [its] default by showing facts and circumstances sufficient in law to exonerate [it] from liability for the damage. *Id.* (quoting *Chanler v. Wayfarer Marine Corporation*, 302 F. Supp. 282, 285, 1969 A.M.C. 1435, 1439 (D. Me. 1969)).

The inference of negligence is on the bailee because “the bailee is generally in a better position than the bailor to ascertain the cause of the loss”. *Id.* Therefore it is more likely that the bailee can explain what destroyed the bailed good. Accordingly, this Court has not hesitated from finding that a bailment relationship existed when a vessel was delivered for repair or storage. *See, Trawler Jeanne d’ Arc, Inc.*, 260 F.Supp. 124 (D. Me.1966); *Chanler v. Wayfarer Marine Corp.*, 302 F. Supp. 282 (D. Me. 1969).

An exception to applying the inference of negligence exists if the bailee did not have exclusive possession of the damaged bailed property. *Id.*; *Also see, Fletcher v. Port Marine Center* 1990 A.M.C. 2877 (D. Mass. 1990). The reason for this exception is that if the bailee and the bailor had equal access to the damaged bailed good the bailee is in no better position to explain what happened to the bailed good than the bailor.

Regarding the exclusive possession requirement, the First Circuit noted that “. . . the fact that the bailee’s possession over the thing bailed must be exclusive for the presumption to apply does not mean that any act of dominion by the bailor over the vessel would also negate the

inference.⁵ Rather it implies that possession and control must be of such a nature as to permit a reasonable trier of fact to infer that the bailee is in the better, or sole position, to explain what actually happened.” *Id.* Accordingly, this Court must determine if the bailee was in the better or sole position to explain what happened the night of the storm.

No doubt exists that Dolphin was in the best position to explain what actually happened to the damaged vessels. As to the *Sea Timber*, an express oral contract was made between Brown and Dolphin. After Brown moored the *Sea Timber* at Dolphin he spoke with Don Saxton. Brown asked him if Dolphin could haul *Sea Timber* to his home and Saxton said Dolphin could do so in the next few days. The Court is satisfied that the parties entered into a contract to have *Sea Timber* hauled to Brown’s home.

The Court also finds that an implied contract existed between Michaud and Dolphin. Michaud moored *Asigo* at Dolphin two weeks before a storm separated *Asigo* from its mooring. Michaud left two messages with Dolphin employees that he wanted *Asigo* hauled out for the winter. Michaud left similar messages with Dolphin employees in past years and *Asigo* was always hauled without incident. Nor was Michaud the only one to follow this practice. The owners of the vessels *Rua* and *McCavity* testified to following a similar practice when leaving their vessels to be hauled. Accordingly, the Court is satisfied that an implied contract existed between Michaud and Dolphin to have *Asigo* hauled for the winter.

⁵ The First Circuit cites numerous cases when "mere access" to the vessel by the bailor did not destroy the inference of negligence by the bailee. *See, Pan American Petroleum Transportation Co. v. Robbins Dry Dock and Repair Co.* 281 F. 87 (2nd Cir. 1922); *Harrison Brothers Dry Dock v. J.R. Atkins*, 193 F.Supp. 386 (S.D.Ala. 1961); *Johnson's Bradford Boat Yard v. The Yacht Affair*, 260 F. Supp. 841 (D. Conn. 1966); *The English Whipple Yard v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

Brown and Michaud contracted to have their vessels hauled for the winter and did not attempt to access their vessels once they moored them at Dolphin. Dolphin admitted that they checked all the vessels moored at Dolphin every day to make sure that they were properly moored. Therefore, for the entire week before the storm, Dolphin had the best opportunity to check and see if the vessels were properly moored and ascertain why the vessels parted from their moorings. Additionally, Bill and Don Saxton were in the best position to see what happened to the vessels the night of the storm. In fact, the Court relies on Bill Saxton's testimony to describe how *Asigo*, *Wing* and *Sea Timber* were driven onto the rocky ledge the night of the storm. Dolphin was in the best, if not sole, position to describe what caused the vessels to part from their mooring and cause the damage.⁶

Accordingly, the Court holds that Dolphin was a bailee of the vessels *Asigo* and *Sea Timber*. Further, the Court holds that the plaintiff, Allan Brown and the defendant, Roger Michaud have established a *prima facie* case of negligence on the part of Dolphin. Dolphin must therefore produce sufficient evidence to negate the inference of negligence that applies to it as bailee. For the foregoing reasons, the Court finds Dolphin has failed to provide sufficient evidence to negate the inference of negligence that applies to it as bailee.

⁶ Dolphin places much significance on the fact that the owners had equal access to their vessels. The First Circuit has made clear that access to the vessel does not destroy the inference of negligence on the bailor. *Goudy*, 924 F.2d at 19. In *Goudy*, the Court placed great significance on the fact that the plaintiff or his agent did, in fact, access the vessel every day and worked with the defendant's employee in making repairs to the vessel. Therefore, when the vessel sunk after it was launched, the defendant was in no better position than the plaintiff to ascertain what happened to cause the vessel to sink because both took part in repairing the vessel. Both parties had equal access and *equal ability* to explain what caused the vessel to sink.

As explained above, that is not the case here. In this case Dolphin was clearly in the best, if not sole, position to explain what happened to cause the damage to the bailed goods, i.e. the vessels.

Act of God

Dolphin attempts to rebut the inference of negligence by asserting that an inevitable accident or an Act of God caused the damage to *Asigo* and *Sea Timber*. For Dolphin to prevail on this defense, it must establish that the accident “could not have been prevented by the use of that degree of reasonable care and attention which the situation demanded. . . .” *Trawler Jeanne d’Arc, Inc. v. Casco Trawlers, Inc.*, 260 F. Supp. 124 (D. Me. 1966). The Court finds that having had sufficient notice of the upcoming storm, the defendant fails to meet its burden in establishing the defense.

Dolphin maintains that the unanticipated nature of the storm is best demonstrated by the testimony of Bill Saxton, Don Saxton and Tom Butler (a local fisherman), all witnesses who were present when the storm occurred. All three witnesses testified that the strength of the storm was greater than expected. However, the proper inquiry is whether a prudent marine operator would have been caught unawares by the force of this storm.

The Court is satisfied that a prudent marine operator would have monitored the reports on NOAA radio and understood the wind speed associated with the gale and storm warnings.⁷ Had Dolphin monitored the weather forecasts it could have prepared *Asigo* to weather the storm. Instead, Dolphin left *Asigo*, a vessel in their care, custody and control, moored solely by a single pennant with no chafing gear. The witnesses described winds exceeding 60 knots which, although strong, is within the winds speeds forecasted when the NWS issues a storm warning.

⁷ Dolphin argues that the situation in this case is analogous to the situation of another case that involved a strong windstorm. *Chanler v. Wayfarer Marine Corp.*, 302 F.Supp. 282 (D. Me. 1969). The Court disagrees. In *Chanler*, the weather report gave the defendants no notice of the coming storm that packed winds in excess of 50 knots. Here the defendants had almost 36 hours to prepare vessels for the storm.

Had Dolphin acted in a prudent manner *Asigo* would have been properly moored to weather the storm and would not have separated from its mooring causing damage to herself and to *Sea Timber*.⁸

Louisiana Rule

Under admiralty law, a presumption of fault exists against the owner of a vessel whose vessel parts from its mooring and allides with another vessel that is moored. This rule is often referred to as the *Louisiana Rule*. *The Louisiana*, 70 U.S. (3 Wall) 164, 18 L.Ed. 85 (1866); *Hood v. Knappton Corp.*, 986 F.2d. 329 (9th Cir. 1993). The burden of going forward with the evidence and the burden of proof shifts to the vessel owner whose vessel parted its mooring. *Id.* Therefore, Dolphin argues that Michaud has the burden of proving that he was not negligent when *Asigo* parted from its mooring.

The *Louisiana Rule* does not apply in this case because Dolphin, not Michaud, was responsible for *Asigo*. Dolphin acted as bailee over *Asigo* and was therefore responsible for the vessel. "In maritime law, as in common law, a bailee is responsible for exercising due care in the keeping of the good that has been entrusted to him." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d. 880 (7th Cir. 1993). The presumption associated with the *Louisiana Rule* is rebutted because Dolphin, as bailee at the time of the storm, was responsible for exercising due care to

⁸ The Court considered both the testimony of Michael Carr and William Blood. The Court found their testimony regarding the sufficiency of the moorings to have minimal relevance in this case because even if the Court were to find that *Asigo* was on a mooring that had a double bridle and chafing gear, Dolphin was responsible, as bailee, to ensure that *Asigo* was properly moored to weather the storm that NOAA radio forecasted.

make sure that *Asigo* was properly moored.⁹

Damages

Having found Dolphin acted negligently, the plaintiff is entitled to prevail on its claim against Dolphin. The plaintiff is not entitled to a judgment against Defendant Michaud because at the time *Asigo* broke from its mooring, she was in the care, custody and control of Dolphin. Although the plaintiff received an estimate of \$15,000 he paid \$10,500 for the repairs to the hull of *Sea Timber*. Accordingly, the Court finds for the plaintiff as against Defendant Dolphin in the amount of \$10,500, plus interests and costs, for the damage sustained to *Sea Timber* that resulted from Dolphin's negligence.

I also conclude that Defendant Michaud is entitled to prevail on his claim of negligence against Dolphin. As a result of Dolphin's negligence, *Asigo* suffered extensive damage to the hull and to the interior of the cabin. Michaud paid \$31,053.59 to repair the damage suffered by *Asigo*. Accordingly, the Court finds in favor of Michaud as against Dolphin in the amount of \$31,053.59, plus interests and costs, for damage sustained to the *Asigo*.

Conclusion

Judgment shall be entered in favor of the plaintiff as against Dolphin in the amount of \$10,500 and in favor of Michaud as against Dolphin in the amount of \$31,033.59.

⁹ Having found that a bailment relationship existed and that Michaud was not negligent, the Court will not address Dolphin's assertion that Michaud's negligence was the superseding cause of the damage to the *Sea Timber*.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on April 1, 1998.