

08-1224-cv
Messina v.
White

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2008

(Argued: April 20, 2009 Decided: July 31, 2009)

Docket No. 08-1224-cv

In the Matter of the Complaint of KEVIN MESSINA, as
Owner of the Wave Runner Sunset Runner, for
Exoneration from and Limitation of Liability.

KEVIN MESSINA,

Petitioner-Appellant,

- v. -

JOHN A. WHITE, MICHAEL MURRAY,

Claimants-Appellees.

Before: KEARSE, SACK, and LIVINGSTON, Circuit Judges.

Appeal from a judgment of the United States District Court
for the Eastern District of New York, Viktor V. Pohorelsky,
Magistrate Judge, denying jet ski owner's request pursuant to
46 U.S.C. § 30505 for exoneration from, or limitation of,
liability for maritime accident.

Affirmed.

JAMES E. FORDE, New York, New York
(Hill, Betts & Nash, New York,
New York, on the brief), for
Petitioner-Appellant.

1 ANDREW S. BUZIN, New York, New York
2 (Bradley S. Zimmerman, The Jacob
3 D. Fuchsberg Law Firm, New York,
4 New York, on the brief), for
5 Claimaint-Appellee White.

6 DOUGLAS FALCH, White Plains, New York
7 (Penino & Moynihan, White Plains,
8 New York, on the brief), for
9 Claimaint-Appellee Murray.

10 KEARSE, Circuit Judge:

11 Petitioner Kevin Messina appeals from a final judgment of
12 the United States District Court for the Eastern District of New
13 York, following a bench trial before Viktor V. Pohorelsky,
14 Magistrate Judge, denying his petition under the Limitation of
15 Liability Act, 46 U.S.C. §§ 30501-30512, for exoneration from, or
16 limitation of, liability for any injuries to claimants John White
17 and Michael Murray resulting from the allision of a water craft,
18 owned by Messina and operated by Murray, with White. The district
19 court denied Messina's petition, finding that the accident was the
20 result of negligence and unseaworthiness, of which Messina did not
21 lack "privity or knowledge," 46 U.S.C. § 30505(b). On appeal,
22 Messina contends that the district court erred in finding that the
23 vessel was unseaworthy and in imputing privity and knowledge to
24 him. Finding no error in the district court's findings of fact or
25 conclusions of law, we affirm.

1 I. BACKGROUND

2 The basic events are undisputed. Messina is the owner of
3 the Sunset Runner, a water craft of the type commonly referred to
4 as a wave runner or jet ski. On February 20, 2004, Murray and
5 White, among others, were guests at Messina's beach house in
6 Florida, on the Gulf of Mexico. While the Sunset Runner was being
7 operated by Murray, towing Messina on an inner tube attached to
8 the Sunset Runner by a 50-foot rope, and White was standing next
9 to a beached wave runner, the Pelican Runner, also owned by
10 Messina, the inner tube carrying Messina struck White and knocked
11 him into the Pelican Runner.

12 A. Messina's Suit for Exoneration or Limitation of Liability

13 In December 2006, White commenced an action against
14 Messina and Murray in New York Supreme Court, Kings County,
15 seeking an unspecified amount of damages for injuries resulting
16 from the accident. The Limitation of Liability Act (or the "Act")
17 provides that, within six months after receiving a claim, a vessel
18 owner may bring a civil action in federal court, seeking a
19 judgment exonerating him or limiting his liability. See 46 U.S.C.
20 § 30511(a). When the owner brings such a suit and posts security
21 in accordance with 46 U.S.C. § 30511(b), the pursuit of all claims
22 against the owner related to the matter in question ceases,
23 pending determination of the petition for exoneration or
24 limitation of liability. See id. § 30511(c).

1 In March 2007, Messina commenced the present action in the
2 district court. His amended complaint, in accordance with
3 § 30511, petitioned for a judgment pursuant to 46 U.S.C. § 30505,
4 which provides, in pertinent part, that the liability of a vessel
5 owner for injuries from a collision "occasioned[] or incurred[]
6 without the privity or knowledge of the owner" "shall not exceed
7 the value of the vessel and pending freight," id. §§ 30505(a) and
8 (b). The complaint alleged that the February 20, 2004 allision
9 was not the fault of the Sunset Runner or Messina and requested
10 judgment either exonerating Messina from liability for any
11 injuries that resulted from the accident or limiting his liability
12 to the value of the Sunset Runner and the inner tube, which the
13 complaint alleged totaled \$6,286.61.

14 Both White and Murray filed answers disputing Messina's
15 entitlement to exoneration or limitation of liability. White
16 asserted that he had a claim for damages for his injuries; and
17 Murray claimed entitlement to contribution from Messina with
18 respect to any judgment that might be entered against Murray in
19 favor of White. The parties agreed to have the trial as to
20 Messina's entitlement under the Act conducted by a magistrate
21 judge.

22 B. The Trial and the Findings of the District Court

23 At the one-day bench trial, the witnesses testified to the
24 basic events described above. In addition, White testified that
25 prior to the accident, Messina had been towed by Murray for some

1 20-25 minutes, during which White heard Messina yelling to Murray
2 to go faster. (See Trial Transcript February 6, 2008 ("Tr."), at
3 111.) At one point, Murray had begun to bring Messina back to
4 shore, but Messina wanted to continue. (See id.) According to
5 deposition testimony from Murray that was introduced at trial, it
6 was at that point that Messina instructed him to go faster. (See
7 id. at 150-51.) When Murray subsequently brought Messina toward
8 the shore, leading to the accident, White did not see them because
9 he was facing the beached Pelican Runner and had his back to the
10 Gulf. Messina, in the inner tube, crashed into White's back,
11 knocking White into the Pelican Runner.

12 Messina testified that shortly after Murray had begun
13 towing him, he asked Murray to go faster because Murray "was going
14 extremely slow. He was being very cautious." (Tr. 48.) At some
15 point, Messina noticed some of his guests on the beach gesturing
16 that they wanted to have a ride, and he instructed Murray to take
17 him ashore. (See id. at 81-82.) Murray complied by executing a
18 boomerang-shaped turn, designed to propel the inner tube carrying
19 Messina to the shore. Messina said he did not know exactly how
20 fast the tube approached the shore; but, he testified, "I was
21 brought in at a little bit higher speed than--than I think was
22 good" (id. at 32); Murray "did bring me in too fast" (id. at 51).

23 Messina testified that he was heading toward White, who
24 had his back turned. (See Tr. 75-76.) Messina testified that he
25 yelled a warning (see id. at 33); White testified that he heard
26 no such warning (see id. at 111-13).

1 Messina testified that he had had no reason to believe
2 that Murray had ever before operated a wave runner in an unsafe
3 manner. Messina said he was aware that operating a water craft
4 requires more skill if it is towing a tube than if it is not (see
5 Tr. 54), and he testified as follows:

6 Q. . . . [P]rior to the--to going--to giving
7 Michael Murray permission to ride the Sunset Runner,
8 you never asked him whether he towed anybody on an
9 inner tube before, did you?

10 A. Yes, I did.

11 Q. And you asked him whether he had towed
12 someone of your size on an inner tube before?

13 A. No.

14 (Id. at 63; see also id. at 112 (Messina was about 5'10" or 5'11"
15 tall and weighed close to 300 pounds).)

16 Murray, in his deposition testimony, stated that he had
17 operated wave runners for many years, "since [his] earliest
18 memory" (Tr. 133-34 (internal quotation marks omitted)). He
19 testified that he had no conversations with Messina about wave
20 runner safety. (See id. at 141.)

21 In a decision announced on the record on February 11,
22 2008 ("Decision Tr."), the district court concluded that Messina
23 was not entitled to exoneration or limitation of liability,
24 finding that the Sunset Runner was unseaworthy and was operated
25 negligently, and that these conditions were within the privity and
26 knowledge of Messina. The court noted that "[t]he burden of
27 proving negligence or unseaworthiness rests with the claimant";
28 but "[t]he burden of proving lack of knowledge or privity rests

1 with the petitioner." (Decision Tr. 5.) The court found, inter
2 alia, that

3 [p]rior to the incident, Murray had been towing
4 Messina aboard the inner tube for about 20 minutes.
5 During that time Messina directed Murray's operation
6 of the wave runner by instructing him to increase the
7 speed at which it was moving.

8 (Id. at 3.) The court noted that at one point, Murray approached
9 the shore to allow Messina to disembark, but retreated because
10 Messina wanted to continue; after more towing, Messina instructed
11 Murray to take him to the shore. (See id. at 3-4.) The court
12 found that

13 [a]s he approached the shore the second time,
14 Murray guided the inner tube toward the shore at a
15 speed greater than prudent given the presence of
16 other people at the shore.

17 As he approached the shore for the purpose of
18 guiding Messina ashore the second time, Murray failed
19 to see John White and two other persons standing at
20 or near the shoreline. Murray also failed to see the
21 other wave runner which had been beached at the
22 shoreline and alongside of which John White was then
23 standing.

24 As a result of his failure to see White and the
25 wave runner at the shoreline, and as a result of the
26 greater than prudent speed at which he was guiding
27 the inner tube ashore, Murray's operation of The
28 Sunset Runner caused the inner tube to strike White
29 at or very near the shoreline causing the injuries
30 suffered by White.

31 (Id. at 4.)

32 The court noted as a matter of law that "[a] vessel is
33 unseaworthy if it is being operated by an incompetent crew" (id.
34 at 6 (citing Matter of Guglielmo, 897 F.2d 58, 61 (2d Cir. 1990)
35 ("Guglielmo"))). Finding that "Murray was not sufficiently
36 competent to operate The Sunset Runner while towing an inner tube

1 and while attempting to guide an inner tube to the shore," the
2 court concluded that "Murray's lack of competence to operate The
3 Sunset Runner while towing an inner tube and attempting to guide
4 the inner tube to the shore rendered The Sunset Runner
5 unseaworthy." (Decision Tr. 7.) The court concluded that "[t]he
6 claimants have met their burden of proving that acts of negligence
7 and conditions of unseaworthiness caused the injuries suffered by
8 White," based on its findings that, inter alia,

9 Murray operated The Sunset Runner in a negligent and
10 incompetent manner by attempting to guide the inner
11 tube in which Messina was riding to the shore in an
12 area where other persons and water craft were
13 positioned.

14 Murray operated The Sunset Runner in a
15 negligent and incompetent manner when attempting to
16 guide the inner tube to the shore by driving it at a
17 speed greater than prudent.

18 Murray operated The Sunset Runner in a
19 negligent and incompetent manner when attempting to
20 guide the inner tube to the shore by failing to keep
21 a proper lookout.

22 (Id. at 6-7 (emphases added).)

23 The district court noted that the determination as to
24 "whether acts of negligence or conditions of unseaworthiness are
25 within the 'knowledge or privity' of the owner is a fact specific
26 undertaking." (Id. at 5.) As to those issues, it found that

27 [p]rior to permitting Murray to tow the inner
28 tube that day, Messina asked Murray whether he had
29 ever towed an inner tube and Murray replied that he
30 had. This is the only evidence adduced by Messina as
31 to his knowledge of Murray's prior experience in
32 operating a wave runner while pulling an inner tube.

33 (Id. at 3.) The court noted as a matter of law that

1 [w]here an owner entrusts his vessel to another
2 to operate, it is not enough for a boat owner to
3 harbor a subjective belief that the operator is
4 competent. Ignorance of a reason to suspect
5 incompetence is not enough. Any belief that the
6 operator is competent must be based upon evidence of
7 competence that renders the belief objectively
8 reasonable.

9 (Decision Tr. 6 (citing Guiglielmo, 897 F.2d at 62) (emphases
10 added).) It found that

11 [b]ecause Messina entrusted The Sunset Runner to
12 the operation of Murray, and because he has not
13 provided evidence that would justify his subjective
14 belief in Murray's competence, the unseaworthiness of
15 The Sunset Runner was within his knowledge or
16 privity.

17 (Decision Tr. 8.) The court concluded that

18 [t]he petitioner, Messina, has failed to meet
19 his burden of establishing that the above acts of
20 negligence and condition of unseaworthiness were
21 without his knowledge or privity.

22 Because Messina directed Murray in the operation
23 of The Sunset Runner, both as to the speed to be
24 maintained and as to instructing Murray to guide him
25 ashore in the inner tube, Messina directed the
26 specific course of conduct that caused White's injury
27 and the conduct fell therefore within Messina's
28 knowledge or privity. See In Re Singapore Navigation
29 Company, 540 F.2d [39,] 44 [(2d Cir. 1976)].

30 Messina has not demonstrated that he had
31 sufficient evidence of Murray's competence to operate
32 The Sunset Runner in guiding an inner tube to the
33 shore. Messina's statement that he had no reason to
34 believe Murray was not competent to operate The
35 Sunset Runner is not sufficient as it is simply a
36 subjective belief unsupported by adequate evidence to
37 make the belief objectively reasonable.

38 (Decision Tr. 7-8 (emphases added).) The court concluded that
39 "[b]ecause the acts of negligence and the condition of
40 unseaworthiness that caused John White's injuries w[ere] within
41 the knowledge and privity of the petitioner, the petition for

1 limitation of liability must be denied. See 46 USC Section
2 30505." (Decision Tr. 8.) Judgment was entered accordingly.

3 II. DISCUSSION

4 On appeal, Messina contends that the district court should
5 have found him blameless on the basis that he entrusted the wave
6 runner to an operator whose competence he had verified, that the
7 accident was caused by a pure navigational error by the competent
8 operator, that such an error does not constitute unseaworthiness,
9 and that the navigational error could not be imputed to Messina.
10 We reject these contentions because Messina's premises are not
11 supported by the record and are contrary to the factual findings
12 of the district court, which are not clearly erroneous.

13 A. The Limitation of Liability Act

14 The Limitation of Liability Act, 46 U.S.C. §§ 30501-30512,
15 which from 1983 to 2006 was codified at 46 U.S.C. App. §§ 181-189,
16 and appeared prior thereto in, inter alia, Rev. Stat. §§ 4281-
17 4287, 4289 (1875), provides, with exceptions not pertinent here,
18 that

19 the liability of the owner of a vessel for any claim,
20 debt, or liability described in subsection (b) shall
21 not exceed the value of the vessel and pending
22 freight. . . .

23 (b) Claims subject to limitation.--Unless
24 otherwise excluded by law, . . . liabilities subject
25 to limitation under subsection (a) are those arising
26 from any embezzlement, loss, or destruction of any
27 property, goods, or merchandise shipped or put on

1 board the vessel, any loss, damage, or injury by
2 collision, or any act, matter, or thing, loss,
3 damage, or forfeiture, done, occasioned, or
4 incurred, without the privity or knowledge of the
5 owner.

6 46 U.S.C. §§ 30505(a) and (b) (emphases added). "[P]leasure
7 craft," as well as commercial vessels, "are subject to the Act's
8 limitation on liability." Guglielmo, 897 F.2d at 61.

9 The phrase "privity or knowledge" is a "term of art
10 meaning complicity in the fault that caused the accident."
11 Blackler v. F. Jacobus Transportation Co., 243 F.2d 733, 735 (2d
12 Cir. 1957); see, e.g., Tug Ocean Prince, Inc. v. United States,
13 584 F.2d 1151, 1159 (2d Cir. 1978) ("Tug Ocean Prince"), cert.
14 denied, 440 U.S. 959 (1979); The 84-H, 296 F. 427, 431 (2d Cir.
15 1923), cert. denied, 264 U.S. 596 (1924); see also Potomac
16 Transport, Inc. v. Ogden Marine, Inc., 909 F.2d 42, 46 (2d Cir.
17 1990) ("Privity and knowledge under the statute have been
18 construed to mean that a shipowner knew or should have known that
19 a certain condition existed." (internal quotation marks omitted)).
20 "In the case of individual owners, it has been commonly held or
21 declared that privity as used in the statute means some personal
22 participation of the owner in the fault or negligence which caused
23 or contributed to the loss or injury." Coryell v. Phipps, 317
24 U.S. 406, 411 (1943) (citing The 84-H, 296 F. 427). "Where the
25 owner's negligent act caused the alleged injury . . . all of the
26 requirements of 'privity' are satisfied." Tug Ocean Prince, 584
27 F.2d at 1159 (other internal quotation marks omitted). The effect
28 of the Act and its predecessors is "to enable the vessel owner to

1 limit his risk to his interest in the ship in respect to all
2 claims arising out of the conduct of the master and crew . . . ,
3 while leaving him liable for his own fault[and] neglect." The
4 84-H, 296 F. at 431; see, e.g., In re City of New York, 522 F.3d
5 279, 283 (2d Cir. 2008) ("Instead of being vicariously liable for
6 the full extent of any injuries caused by the negligence of the
7 captain or crew employed to operate the ship, the owner's
8 liability is limited . . . unless the owner himself had 'privity
9 or knowledge' of the negligent acts.").

10 "Privity, like knowledge, turns on the facts of particular
11 cases." Coryell, 317 U.S. at 411. In considering a vessel
12 owner's petition for exoneration or limitation of liability, the
13 district court will normally be required to conduct a two-step
14 inquiry. First, the court must determine whether the accident was
15 caused by conduct that is actionable, for "[i]f there was no fault
16 or negligence for the shipowner to be 'privity' to or have
17 'knowledge' of within the meaning of the statute, there is no
18 liability to be limited," The 84-H, 296 F. at 432, and the owner
19 would then be entitled to exoneration. As to the question of
20 whether the accident was caused by actionable conduct, the burden
21 of proof is on the claimant. See, e.g., Guglielmo, 897 F.2d at
22 61; In re Marine Sulphur Queen, 460 F.2d 89, 99 (2d Cir.), cert.
23 denied, 409 U.S. 982 (1972). If the claimant carries that burden,
24 the owner then has the burden of proving that the actionable
25 conduct or condition was without his privity or knowledge. See,
26 e.g., id. at 101.

1 Certain well established admiralty principles are relevant
2 to these issues in the present case. First, a vessel owner has a
3 duty to use "due and proper care" to provide a competent crew.
4 Tug Ocean Prince, 584 F.2d at 1155; see, e.g., Guglielmo, 897 F.2d
5 at 61. An injury occurring because of the owner's neglect of that
6 duty is within the owner's privity. See, e.g., id. at 61; Tug
7 Ocean Prince, 584 F.2d at 1155. To satisfy the due-and-proper-
8 care standard, the owner's belief in the competence of the person
9 to whom he is entrusting the vessel must have an objectively
10 reasonable basis. See, e.g., Guglielmo, 897 F.2d at 61-62. A
11 vessel owner is not entitled to limited liability as a matter of
12 law merely because he subjectively believed the person he has
13 allowed to operate his craft was competent. "[I]gnorance of a
14 reason to suspect incompetence is not enough. . . . [I]t is not
15 enough for a boat owner to harbor a subjective belief that an
16 operator is competent. That belief must be based on evidence of
17 competence that renders the belief objectively reasonable."
18 Guglielmo, 897 F.2d at 62; see, e.g., id. at 61 ("Boat owners may
19 not assume that would-be operators are competent until proven
20 otherwise."). When an owner entrusts the operation of his vessel
21 to an inexperienced person, he destroys any argument he might have
22 had for limitation of his liability. See, e.g., Tug Ocean Prince,
23 584 F.2d at 1159. "Whether the evidence available to a boat owner
24 concerning a non-professional operator is sufficient to support a
25 reasonable belief in the operator's competence is up to the trier

1 of fact to determine in light of all the circumstances."
2 Guglielmo, 897 F.2d at 62.

3 Second, "[s]eaworthiness is a relative term depending upon
4 its application to the type of vessel and the nature of the
5 voyage. The general rule is that the vessel must be staunch,
6 strong, well equipped for the intended voyage and manned by a
7 competent and skillful master of sound judgment and discretion."
8 Tug Ocean Prince, 584 F.2d at 1155 (emphasis added). Thus, a
9 vessel being operated by an incompetent captain or crew is
10 considered unseaworthy. See, e.g., id.; Potomac Transport, Inc.
11 v. Ogden Marine, Inc., 909 F.2d at 47; Guglielmo, 897 F.2d at 61.
12 Further, "[i]t is hornbook law that when a moving vessel strikes a
13 stationary object an inference of negligence arises and the owner
14 of the vessel then has the burden of rebutting such inference."
15 Tug Ocean Prince, 584 F.2d at 1159 (internal quotation marks
16 omitted).

17 In sum, although "the mere presence on board of an owner
18 does not constitute such privity as will preclude limitation of
19 the owner's liability," Complaint of Interstate Towing Co., 717
20 F.2d 752, 754 (2d Cir. 1983); see, e.g., Blackler v. Jacobus
21 Transportation Co., 243 F.2d at 735, if the owner, "by prior
22 action or inaction set into motion a chain of circumstances which
23 may be a contributing cause even though not the immediate or
24 proximate cause of a casualty, the right to limitation is properly
25 denied," Tug Ocean Prince, 584 F.2d at 1158.

1 B. Application to the Present Case

2 In reviewing a judgment entered after a bench trial, we
3 are to "give due regard to the trial court's opportunity to judge
4 the witnesses' credibility," and we "must not . . . set aside" the
5 district court's findings of fact "unless [they are] clearly
6 erroneous." Fed. R. Civ. P. 52(a)(6); see, e.g., Anderson v.
7 Bessemer City, 470 U.S. 564, 573-74 (1985); Banker v. Nighswander,
8 Martin & Mitchell, 37 F.3d 866, 870 (2d Cir. 1994). "Under this
9 standard, factual findings by the district court will not be upset
10 unless we are 'left with the definite and firm conviction that a
11 mistake has been committed.'" FDIC v. Providence College, 115
12 F.3d 136, 140 (2d Cir. 1997) (quoting United States v. U.S. Gypsum
13 Co., 333 U.S. 364, 395 (1948)). "Where there are two permissible
14 views of the evidence, the factfinder's choice between them cannot
15 be clearly erroneous." Anderson v. Bessemer City, 470 U.S. at
16 574. We review the district court's conclusions of law, and its
17 application of the law to the facts, de novo. See, e.g., Henry v.
18 Champlain Enterprises, Inc., 445 F.3d 610, 617-18, 623 (2d Cir.
19 2006); FDIC v. Providence College, 115 F.3d at 140.

20 We see no error in the district court's application of the
21 above principles in the present case, nor any clear error in its
22 essential findings of fact. Although Messina argues that he was
23 entitled to exoneration or limitation of liability on the basis
24 that he entrusted the Sunset Runner to a competent captain and
25 that a mere navigational error by a competent captain does not
26 make a vessel unseaworthy, these arguments are meritless given

1 that the district court, as set forth in Part I.B. above, found
2 that Messina had not produced sufficient evidence to show that he
3 had an objectively reasonable basis for believing that Murray was
4 competent to operate the Sunset Runner while towing Messina.
5 Although Messina argues that he "had verified that Murray had
6 towed people with an inner tube in the past" (Messina brief on
7 appeal at 18 (citing Tr. 63)), the record provides no support for
8 this assertion. Messina's testimony at the cited page, the
9 relevant portion of which is quoted in full in Part I.A. above,
10 was simply that he "asked" Murray whether Murray had towed anyone
11 on an inner tube before (Tr. 63); and although the district court
12 apparently assumed that Murray had responded affirmatively,
13 nowhere in the record is there any evidence of what Murray
14 answered. In response to our inquiry at oral argument as to
15 whether there was any evidence as to Murray's answer to Messina's
16 question, Messina's counsel stated, "It does not appear that it
17 came out in the record"

18 Further, Messina's contention that the accident was caused
19 by a mere navigational error on the part of Murray that should not
20 be imputed to Messina is likewise meritless given the district
21 court's explicit findings of fact as to how and why the accident
22 occurred. As set forth in Part I.B. above, the court found that
23 the accident had been occasioned by "acts of negligence and
24 conditions of unseaworthiness" in several ways, including Murray's
25 directing the inner tube carrying Messina toward an area where
26 there were other people, and operating the Sunset Runner "at a

1 speed greater than prudent" (Decision Tr. 4, 6), and that "Messina
2 directed Murray in the operation of The Sunset Runner, both as to
3 the speed to be maintained and as to instructing Murray to guide
4 him ashore in the inner tube" (id. at 7).

5 These findings are amply supported by the evidence.
6 Messina testified that when Murray started out slowly and
7 "cautious[ly]," Messina instructed him to go faster. (See Tr.
8 48.) White and Murray also testified that Messina had directed
9 Murray to go faster. (See id. at 111, 150-51.) After Messina
10 directed Murray to get him back to the shore because his guests
11 wanted to ride the inner tube, Messina knew the tube was
12 approaching the shore too fast. (See, e.g., id. at 32 ("I was
13 brought in at a little bit higher speed than--than I think was
14 good"); id. at 51 (Murray "did bring me in too fast"); id.
15 (Messina "[w]ithout a doubt" would have crashed into the Pelican
16 Runner itself if White had not been standing where he was).) And
17 although Messina was coming in too fast and was heading directly
18 toward White, who had his back turned (see id. at 75-76), there is
19 no evidence that Messina instructed Murray either to slow down or
20 to retreat to deeper water in order to make a new attempt to get
21 Messina to shore at a more appropriate pace.

22 Finally, although Messina contends that the district
23 court, in making its findings, misapplied the law by citing
24 Singapore Navigation Co., S/A v. Mego Corp., 540 F.2d 39 (2d Cir.
25 1976), because that case involved a deviation from route, we see
26 no error. The district court, in citing Singapore Navigation (see

1 Decision Tr. 5-6, 7), did not suggest that the present case
2 involved a deviation; it cited only to the page of that opinion at
3 which we held that the vessel owner was not entitled to limitation
4 of liability for the loss because its president had "personally
5 ordered the deviation and the deviation was causally connected to
6 the loss," 540 F.2d at 44. The personal participation parallel is
7 inescapable here, where Messina's inner tube crashed into White
8 because it was moving too fast to be stopped, and where Messina
9 had previously told Murray to go faster and did not tell him to
10 slow down, even as Messina could see that the inner tube was
11 rushing toward White, who was standing at or near the shoreline
12 with his back turned.

13

CONCLUSION

14 We have considered all of Messina's arguments on this
15 appeal and have found them to be without merit. The judgment of
16 the district court denying Messina's petition for exoneration or
17 limitation of liability is affirmed.