

An Update on Propeller Injury Cases

By: R. Ben Hogan, III and Jamin Hogan
For Southern Trial Lawyers New Orleans February 16, 2012

In the 20 years since the Eleventh Circuit reversed and rendered the \$4.5 million dollar propeller guard verdict in Ashley Elliott v. Brunswick, 903 F. 2d 1505 (11th Cir 1990), a lot has happened. For a dozen or so years propeller guard cases were largely unsuccessful. Some, like the Court In Elliott, found that the hazard of the open propeller was open and obvious so there could be no defect for failure to have a propeller guard. One example was Beech v OMC in Alabama. 584 So. 2d 447 (Ala. 1991). [The Mississippi Supreme Court held the opposite in Seymour v Brunswick, 655 So. 2d 892 (Miss. 1995) four years later.] Many federal district courts, the Michigan and Illinois Supreme Courts, the Eleventh Circuit and the Fifth Circuit all held that the entire matter was preempted by the Federal Board Safety Act of 1971, and the Coast Guard's refusal to mandate propeller guards after studying the issue. The Texas Supreme Court was alone in deciding there was no preemption in a great opinion in Moore v Brunswick, 889 SW 2d 246 (Tex. 1994).

In the Eleventh Circuit case, Lewis v Brunswick, the U.S. Supreme Court granted certiorari, 522 US 978 (1997), and the Solicitor General argued along with us for non-preemption. It was wonderful to watch the attorney from the SG's office masterfully handle the preemption issue. All nine justices were in agreement. Before the court could render a decision, however, the defendant offered the moon and case settled. This "bought the law" for four years. The decision probably written for Lewis was finally issued in Sprietsma v Mercury Marine, 537 US 51 (2001), holding that preemption did not apply to propeller guard lawsuits. Texas had been right.

For the last ten years the propeller guard theory has not been preempted and has been available in most jurisdictions. In 2001 the Coast Guard issued a notice of proposed rule making that would require propeller guards on some boats, and said that pump jets were a viable alternative. 66

Fed. Reg. 63647 (April 2001). The notice cited a Coast Guard-sponsored study that found that propeller guards were feasible for non-planing (slow-moving) water craft, but possibly not faster craft. It found that, based on cadaver testing, severe leg injuries can happen from the guard itself at any speed above 13 miles per hour, and therefore questioned the feasibility of a propeller guard as a safety device at high boat speeds. T. Kress and J. Snider, "Evaluation of a Boat Motor Cage-Type Propeller Guard as a Protection Device for the Human Leg." (August 1991). The proposed regulation is in limbo. For the foreseeable future, it is up to the courts to address hazards from open propeller designs.

It has now come full circle. In May of 2011, the Fifth Circuit affirmed a jury verdict based on the propeller guard theory based on Texas law. The non-published opinion in *Brochtrup v. Mercury Marine, Case 10-50534*, held opposite what Elliott case had determined more than two decades earlier, namely that propeller guards were shown by the evidence to be a safer overall design under Texas law. As in *Ashley Elliott*, the plaintiffs in Brochtrup relied upon testimony from an inventor of a propeller guard. Also as in *Elliott*, the boat involved was a planing craft, not a pontoon boat or houseboat. Unlike *Ashley Elliott*, the court of appeals did not go behind the jury and reinterpret the evidence.

The case most recently handled by this writer involved the pontoon boat accident in Florida. A 10 year old child was seated on the front deck of a pontoon boat controlling at 5 miles per hour. The children were doing what was called "bow riding" - an unsafe and illegal practice. The child's parents were not on the boat because she was spending the night with friends. The little girl fell off the front of the boat, went between the pontoons and her legs were severely cut by the propellers. The case against the boat engine manufacturer alleged that the engine, which had the label "Pontoon Series," should have been a pump jet or had propeller guards since it was known that it would be marketed with the pontoon boat. By testing, we showed that a pump jet worked fine with the boat, and even improved its performance in some ways. The case against the pontoon boat manufacturer alleged that

the platform forward of the safety rails allowed bow riding, an unsafe practice that was invited by the design. The same manufacturer offered another pontoon boat whose forward railing was at the front of the bow, and would not have allowed bow riding. (See below) There were also claims against the adults in the boat, and the company that leased the boat. All claims settled over the course of two mediations.



Twenty years ago it was hoped that a favorable affirming opinion in the Ashley Elliott case would lead to propeller guards or pump jets as a standard feature on boats intended to operate around people in the water. That has not happened. It may still happen. It will take more courageous lawyers who are willing to take up the flag and continue to charge toward the fortress wall.