

Collisions causing damage while racing

Insurance claims and protest decisions

The *Racing Rules of Sailing* are written to allow boats to move in close proximity with one another and without contact between boats while they are racing. Unfortunately, from time to time, collisions do occur that cause damage.

SAIL CANADA has been asked for advice on what is the best way of dealing with such situations and, particularly, the basis for the SAIL CANADA prescription to rule 67 and its relationship to insurance claims for the cost of damages.

When boats enter a race conducted under the *Racing Rules of Sailing*, the published notice of race and sailing instructions set out the conditions for participation. A private contract results between the participants requiring compliance to those conditions.

The *Racing Rules of Sailing* provide a procedure for the resolution of who is at fault when rules are broken. The accepted authority is the protest committee, not the civil courts.

When damages occur during sailboat racing, the civil courts only become the location of litigation over who is at fault if the protest procedures laid out in the racing rules are not followed.

This is expressed in the SAIL CANADA prescription to rule 67, which reads:

Rule 67 – Damages

SAIL CANADA prescribes that a boat that has been found by a protest committee to have broken a rule and caused damage shall be considered at fault for the purposes of rule 67.

A similar prescription has been in the SAIL CANADA rule book for many years and our experience is that it has been widely accepted by insurance companies to decide whose insurance company pays for the damages. The costs of the physical damages to the boats are usually established by boat repair professionals.

If a competitor does not go through the protest procedure and obtain a decision, then there is no determination of fault under the racing rules and the competitors will have great difficulty in establishing liability.

It is essential, therefore, that any competitor involved in a collision causing damage in a race lodge a protest or a request for redress with the race committee and have that protest /redress request heard. This will determine which boat(s), in the words of the SAIL CANADA prescription to rule 67, “... to have broken a rule ...”

We were then asked “What if the protest committee makes a mistake?” It is, of course, possible for a protest committee to make an error. There is an appeal procedure in the *Racing Rules of Sailing* set up specifically to correct such errors. (The exception would be when an international jury is present or when a non-appeal status has been properly granted to an event.)

The SAIL CANADA Appeals Committee handles between 10 and 20 appeals a year – not necessarily all involving collisions – for review of protest committee decisions. Some of the appeals are first referred to a provincial or area appeals committee. Those appeals committees are composed of experienced judges and their decisions usually satisfy the appellants. However, if the appellants are still not satisfied the cases can be further appealed to the SAIL CANADA Appeals Committee for final confirmation or revision.

SAIL CANADA's experience is that the incidence of protest committee errors is low and errors that may occur are readily corrected when sailors follow the protest/appeal procedures laid down in the *Racing Rules of Sailing* and the SAIL CANADA prescriptions to Appendix R.

On what legal precedents the above procedures are based?

They are based on a number of precedents in English law over the last hundred years which were reviewed and supported by a decision of the United States Court of Appeals for the First Circuit in 1995 which firmly entrenched the *Racing Rules of Sailing* (formerly the *International Yacht Racing Rules*) as the authority on which fault is determined.

The case in question was a protest heard by an international jury in France involving *Charles Jourdain v Endeavour* in the Mediterranean in October 1992. The damages claimed by *Charles Jourdain* were large, involving a claim of US \$15.4 million for neck whiplash and other injuries plus US \$600,000 for physical damage to the yacht.

The findings in this case were reviewed in an article written by International Judge, Mary Pera, for the IYRU (now ISAF) Judges' Forum in August 1995. Not available in an electronic form, the report has been re-typed. The 1995 document refers to the IYRU and the *International Yacht Racing Rules*. The revised document includes references to ISAF and the *Racing Rules of Sailing*.

The article is as follows:

CHARLES JOURDAIN vs. ENDEAVOUR

Extract of a report by Mary Pera published in the IYRU Judges' Forum # 17 of August 1995

An important case which will affect judgements of law courts in all countries, and certainly those whose systems are based on English law, has recently been decided in the United States. It sets the International Yacht Racing Rules (now the Racing Rules of Sailing) firmly in place, greatly strengthening the earlier decisions of a hundred years ago.

In October 1992 the 72 ft. *Charles Jourdain* (formerly *Juno*) and the 120 ft. ex-J class *Endeavour* were sailing in separate races in the same event in the Mediterranean. *Charles Jourdain* established an overlap from clear astern at least 60 ft. to leeward of *Endeavour*. In spite of having ample room and opportunity to keep clear [the wording of the *International Yacht Racing Rules*, rule 37.3], *Endeavour* held her course until her boom hit *Charles Jourdain's* backstay. Serious damage resulted from their collision. The protest was heard by an international jury and *Endeavour* was disqualified under the *International Yacht Racing Rules*, rule 37.1 [now *Racing Rules of Sailing* rule 11].

Charles Jourdain then took the matter to the courts in an effort to get damages. The case was heard by the US District Court of Maine in September 1994.

In a worrying decision the court stated: "There is no dispute that the COLREGS [IRPCAS] provide the rules which govern the behaviour of these particular boats. Although they were both involved in races, which were governed by the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*], the rules of a private racing organisation do not and cannot pre-empt the application of COLREGS which have been adopted by treaty to govern world-wide. Thus we look to COLREGS for the controlling rules in this case."

Thus this court ignored the international jury's findings, and turned to the COLREGS: Under COLREGS, *Charles Jourdain* was the overtaking yacht and obliged to keep clear, though the court found both yachts at fault (60% *Charles Jourdain* and 40% *Endeavour*).

All this seemed to lead to the conclusion that we might as well scrap the racing rules, at least at sea; for no insurance company could be expected to insure yachts that obeyed different rules from those that the courts would apply. However, the decision was appealed and heard earlier this year in the United States Court of Appeals for the First Circuit before three judges, the Chief Judge being Juan R. Torruella, who, at that time, was also an IJ representing Puerto Rico.

The court's decision, reversing the issue of liability, is worth quoting at some length for it is of great importance to anyone interested in the legal framework within which our sport takes place.

"The history of the COLREGS shows that they were enacted because of the need to establish a code of international rules of the road for maritime traffic throughout the world. However, nothing in their history ... indicates that they were meant to regulate voluntary private sports activity in which the participants have waived their application and in which no interference with non-participating maritime traffic is implicated.

"Surprisingly, considering the extent and history of maritime and yachting tradition ... there is a dearth of applicable jurisprudence, although older reported English cases reveal that these questions have not altogether avoided judicial scrutiny over the years.

“The cases we have found however, are helpful to the extent that they establish the principle that when one voluntarily enters a yacht race for which published sailing instructions set out the conditions of participation, a private contract results between the participants requiring their compliance therewith.

“The legally binding nature of the obligations created by the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*] and the Sailing Instructions is not altogether a new or revolutionary concept. In 1897, in *The Santanita*, a case involving a collision between two racing yachts sailing under the rules of the Yacht Racing Association (of Great Britain), the House of Lords concluded that the owners were bound by the Association’s rule making one yacht liable for all damages notwithstanding the liability limitation provisions of the *Merchant Shipping Act*. In *Clarke v Thayer* [a US case of the same date, 1897] the court held that a yacht club’s racing rule bound a member of the club participating in a club regatta notwithstanding a conflicting navigation law of the United States.”

Later cases to the same end are cited and the decision then outlines Part VI of the *International Yacht Racing Rules* [now Part 2 of the *Racing Rules of Sailing*] and continues: “These mechanisms were agreed to by the parties. [They] agreed to the substantive rules for determining fault, they agreed to the adjudicating forum and they were appraised of the procedures. They appeared before the forum, submitted to its jurisdiction, presented evidence and argument and thereafter were served with that body’s findings and final decision. Thus [both yachts] were contractually bound to race by the rules of the road contained in the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*] and to resolve issues related to fault according to these rules...”

Furthermore, the procedures established by the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*] meet the requirements of due process; there is appropriate written notification of their allegations, notice is given of the hearing; the parties are allowed to appear and present evidence and witness testimony; They may also cross-examine opposing witnesses and argue orally; and generally, engage in all those accepted activities held so dear by common law lawyers. Finally, a written decision, in which findings of fact are made and fault apportioned, is issued to all interested parties. Equally important, the evidence is heard soon after the events take place by a panel of experts who are fully versed in the niceties of the activity in question. It is hard to find fault with such a process, particularly when it is exactly what the participants agreed to.

“Insistence on blind application of COLREGS to the facts of this case is not only unsupported by any historical imperative in this legislation and contrary to the weight of the sparse relevant authority, it is logically unsound. Such application would turn on its head and render rife with uncertainty the thousands of private yacht races that take place throughout the United States and world-wide in which participants voluntarily agree to be bound by the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*]. The decision could even have a serious negative impact on such international races as the America’s Cup or the yachting events of the forthcoming Olympic Games in Atlanta. Under such logic, notwithstanding agreement by Olympic participants to abide by the *International Yacht Racing Rules* [now the *Racing Rules of Sailing*] and to have protests decided by international juries, they could thereafter regurgitate any issues in the courts under the COLREGS. Such absurdity is difficult to countenance, and cannot have been contemplated by Congress or the treaty negotiating authorities when the COLREGS were adopted.”

Coming to the question of damages, the court quoted the *International Yacht Racing Rules*, rule 76.1 [now the *Racing Rules of Sailing*, rule 67] and approved of an interpretation in an earlier case “[The] courts are the rightful location of litigation over yacht racing damages unless [national] racing authorities provide in essence, for private resolution.” There being no agreement about the determination of the damages, the court decided that *Charles Jourdain* was entitled to claim and prove that the damages caused by *Endeavour* were based upon the determination of fault by the international jury.

The outcome of all this should be a firm base for solving future problems.

Rules [marked] were revised to include references to the ISAF
Racing Rules of Sailing for 2013-2016

First revised by Graham Hayward in 2007.

Additional revisions were done by the SAIL CANADA Racing Rules Committee in 2013.

Leo Reise – Rules Committee Chairman

Some Frequently Asked Questions about damage

Question 1. When my boat is involved in a collision, how do I establish who is at fault under the *Racing Rules of Sailing*.

Answer 1 By protesting the other boat(s) using the protest procedure in the *Racing Rules of Sailing* or requesting redress under rule 62.1(b). Under the 2013-2016 rules, rule 62.1(b) also includes a vessel, meaning any vessel including a power vessel or one not racing.

- The *Racing Rules of Sailing* are the accepted legal method of establishing fault when boats enter a race conducted under the *Racing Rules of Sailing*.
- The services of protest committees are both readily available and without cost to the sailors.
- Protest hearings are heard promptly by a panel of judges well versed in the sport while the incidents are still fresh in everyone's minds.
- Hearings meet all the evidential requirements of due process.
- The decision of the protest committee defines who is at fault in respect of damages (rule 67 as prescribed by SAIL CANADA).
- The preamble to Part 2 of the *Racing Rules of Sailing* defines when the rules apply between racing boats.

Question 2. How do I “protest” a collision causing damage?

Answer 2.

- Immediately hail “Protest” and, if the boat is 6 metres hull length or more, immediately display a red flag. Follow rule 61(a). Note that when an incident obviously causes damage or injury, rule 61.1(a)(4) only requires a protesting boat “shall attempt to inform the other boat within the time limit of rule 61.3.” The hail and red flag are not therefore mandatory when damage or injury is obviously evident. The protest committee may extend the protest time limit if there is good reason to do so.
- The protest shall be in writing and conform to the provisions in 61.2. Normally at an event, a protest form will be available but if not, written on the back of a place mat will satisfy the rule. The protest must be filed within the time limit (rule 61.3) but as noted, with good reason, the protest committee may extend the time limit.
- Always check the Official Notice Board for the protest hearing schedule (rule 63.2) and be sure to attend it (rule 63.3).

Question 3. When my boat is involved in a collision, how do I establish who is responsible for paying for damage if no boat lodges a valid protest within the required time limit?

Answer 3.

- If a protest or request for redress has not been filed, there is no provision under the *Racing Rules of Sailing* that will provide assistance. Without a protest decision or a decision to grant redress because your boat has been damaged by a boat breaking a rule of part 2 or a vessel that was required to keep clear, the decision of the responsibility for damages is left to the insurance companies or the courts.

Question 4. How do I follow up with my insurance claim?

Answer 4.

- Request a copy of the decision in writing including the facts found, the applicable rules, the decision and the reasons for it, and any penalties imposed or redress given (the details specified in rule 65.1), preferably at the time you are informed of the decision but no later than the 7 day time limit (rule 65.2).
- Submit a copy of these documents to your insurance company together with your report of the incident and estimates of repairing (all) damages.

Question 5. What if the other party (parties) accept responsibility?

Answer 5.

- Always follow the recommendations given in answer 1 above. The protest will be your only written record by a disinterested accepted authority of the details of the incident including deciding the party at fault.

If you do not file a protest see the answer to Question 3.

Question 6. What if I think that the protest committee decided wrongly?

Answer 6

- There are two possible avenues: request a reopening or file an appeal.

Request a Re-opening

- When the decision is delivered, ask for a written copy of the decision.
- Consult promptly with other experienced sailors and/or judges to see if they agree with your opinion. (See the SAIL CANADA web site for a listing of experienced judges in your area.)
- If, after consultation, you are still convinced that an error has been made, request a re-opening of the protest within the 24 hour time limit (rule 66) giving your reasons in writing. (The sailing instructions may alter this time limit.)
- If a protest committee, subject to appeal (rule 70.1), refuses a re-opening or reaches the same decision as before in a re-hearing, and you still believe that an error has been made, you may appeal the decision to the SAIL CANADA appeals committee.

Appeal a Protest Committee's Decision

- Request a copy of the decision in writing, including the facts found, the applicable rules, the decision and the reasons for it, and any penalties imposed or redress given (all the details specified in 65.1), preferably at the time you are informed of the decision but no later than the 7 day time limit (rule 65.2).
- To make an appeal, follow the requirements laid down in the *Racing Rules of Sailing* and the SAIL CANADA prescription to Appendix R, making sure that this is done within 15 days of receiving the written decision or the decision not to reopen the hearing.
- If the committee was an international jury, or the protest committee had been granted a no appeal status (rule 70.5), there is no appeal and you will have to abide by its decision.

Question 7. What if one of the boats involved retires from the race?

Answer 7.

- A boat may retire from a race for many reasons. It does not mean that she has admitted responsibility for damage. Always protest when there is damage and follow the steps outlined in the answer to question 2.
- The boat that retired cannot be further penalised due to rule 44.1 and 44.4(b) but the protest hearing should still take place to establish the facts found and the decision for the purposes of rule 67. Alternatively, in the facts found area of the protest, have the representative of the boat that retired write that she retired in acknowledgement of the infringement, date and sign the statement.

SAIL CANADA Racing Rules Committee

Andrew Alberti Kathy Dyer
Rick Hatch Robert Stewart
Leo Reise, Chairman
March 31, 2013