

Collisions causing damage while racing

Insurance claims and protest decisions

Although the *Racing Rules of Sailing* are written to avoid contact between boats while they are racing, unfortunately, from time to time, collisions occur that cause damage.

The CYA has been asked for advice on what is the best way of dealing with such situations and, particularly, the basis for the CYA prescription to rule 68 and its relationship to insurance claims for the cost of damages.

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

Under the *Racing Rules of Sailing* therefore, the protest committee for an event is the accepted authority for determining fault when collisions occur – not the civil courts. This is because the CYA/ISAF racing rules provide a procedure for the resolution of who is at fault when rules are broken.

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 CYA prescription to rule 68, which reads:

CYA prescribes that a boat that is penalized for causing damage under rule 64 for a breach of these rules shall be considered at fault for the purposes of rule 68.

A similar prescription has been in the CYA rulebook 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. Boat repair professionals usually establish the costs of the physical damages to the boats.

While most insurance companies accept protest committee decisions without any argument, there is no guarantee that this will always be so. If it is a large loss, any company can choose to take the situation to the courts. However, the courts will have access to the protest committee's written findings and decision, which will be available as evidence when the courts consider the case.

However, in order to benefit from the *Racing Rules of Sailing* in the determination of fault, a competitor has to comply with the rules. The procedure in the rules for determining fault is by means of the decision of a protest committee. 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.

Note: For a list of “Frequently asked Questions” see pages 6 to 9

It is essential, therefore, that any competitor involved in a collision causing damage in a race shall lodge a protest with the race committee and have that protest heard. This will determine which boat(s), in the words of the CYA prescription to rule 68, have committed “a breach of these rules.”

We were then asked, “What if the protest committee makes a mistake?” The Racing Rules of Sailing also covers this situation. It is, of course, possible for a protest committee to make an error – to err is human, after all – but there is an appeals procedure in the *Racing Rules of Sailing* set up specifically to correct such errors.

There are about 10 appeals a year in Canada – not necessarily all involving collisions – that pass through appeals committees for review of protest committee decisions. These appeals committees have experienced international judges on their panels and their reviews of protests most usually satisfy the appellants. Finally, if the appellants are still not satisfied with the initial appeals committee’s review of the protest committee’s decisions, or if there is no established Provincial appeals committee, cases can be further appealed to the CYA appeals committee for final confirmation or revision.

CYA’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 CYA prescriptions to Appendix F.

We were then asked on what legal precedents the above procedures are based.

They are based on precedents in English law over the last hundred years which were reviewed and supported by an important decision of the United States Court of Appeals for the First Circuit in 1995 which firmly entrenched the *Racing Rules of Sailing* (in those days 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 Mary Pera for the IYRU Judges’ Forum in August 1995. Unfortunately this article is not available in an electronic form and it has therefore been re-typed and revised to include the references to ISAF and the *Racing Rules of Sailing* – since the 1995 document refers to the IYRU and the *International Yacht Racing Rules* – i.e. to the “old” rules.

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. An international jury heard the protest 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 US District Court of Maine heard the case 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 worldwide. 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 courts 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 worldwide 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 68] 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* based upon the determination of fault by the international jury.

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

Revised to include references to the ISAF *Racing Rules of Sailing* for 2005–2008.

Graeme Hayward
CYA Racing Rules Committee

Some Frequently Asked Questions about damage

Question 1. When my boat is involved in a collision, how do I establish who is responsible for paying for damage?

Answer 1

- By protesting the other boat(s) using the protest procedure in the *Racing Rules of Sailing*.
- 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*. See the *Charles Jourdain v Endeavour* case.
- 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. See again the *Charles Jourdain v Endeavour* case.
- The decision of the protest committee defines who is responsible for damages (rule 68 as prescribed by CYA).
- Note that the *Racing Rules of Sailing* only apply between boats that are racing. See the preamble to Part 2 of the *Racing Rules of Sailing*.

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). However, note that when an incident obviously causes damage or injury, rule 61.1 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. In addition the protest committee can consider extending the protest time limit, if there is good reason to do so.
- Complete a protest on a protest form (rule 61.2) and file it with the race committee within the time limit (rule 61.3).
- Find out when the protest hearing is scheduled (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 protest within the required time limit?

Answer 3.

- This becomes difficult because the *Racing Rules of Sailing* provides a time constraint under rule 61.3 for the lodging of protests. This time constraint is based on the premise that protests will normally be heard promptly while witnesses and a competent protest committee are available.
- Once the time constraint has passed, it becomes increasingly difficult to assemble witnesses while everyone's memories are fresh.
- Thus, if none of the competitors involved in a collision elects to protest, there is no decision as to who may have broken a rule of the *Racing Rules of Sailing* and therefore, no decision as to who was at fault.
- If there is no protest ruling, the contestants will have to revert to civil law to decide who may be at fault and it will be rare to find a judge in a civil case with experience in determining fault in the very particular situations that occur when racing sailing boats.
- An alternative solution might be to leave it to the insurance companies involved who will often apportion the total damages equally between the contestants – one of whom may not have broken a rule of Sailing. The usual result in these circumstances is that often each contestant's future insurance premiums are increased to cover the collision.

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

Answer 4.

Request written copies from the protest committee of the facts found, the applicable rules, the decision and the reasons for it, and any penalties imposed or redress given within the 7 days 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 procedure is not antagonistic – it is essentially a method of having a disinterested body determine the facts, etc. It is also the accepted way of determining who was at fault.

If you do not file a protest and do not follow it through, you will have failed to establish fault and, if the other party does not carry out his undertaking to discharge his responsibility – i.e. pay for – the damage, you will have nothing to establish who is responsible for what.

In such a case, because you will not have conformed to the *Racing Rules of Sailing*, you will have difficulty in proving liability and may well have to pay to repair damages to your own boat.

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

Answer 6

- **Ask the protest committee 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 CYA 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.
- If it was an international jury that made the decision there is no appeal and you will have to abide by its decision.
- 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 CYA appeals committee.

To make an appeal, follow the requirements laid down in the *Racing Rules of Sailing* and the CYA prescription to Appendix F, making sure that this is done within the allowable 15-day time limit.

Question 7. What should a protest committee do in the case of an invalid protest involving damage?

Answer 7.

- Hear the protest under rule 60.3(a)1 and/or the last paragraph of rule 63.5.

Note: Rule 63.5 requires the protest committee to decide the meaning of “serious.” It is recommended that protest committees should consider that any collision that may result in an insurance claim, be considered as serious enough to meet the requirement of rule 60.3(a)1. Often the degree of seriousness is difficult to determine until after the time of the hearing and it is better to err on the side of deciding to hear a damage protest than to refuse to hear it on the basis of not being “serious.”

To avoid this dilemma, it is recommended that standard sailing instructions alter rule 60.3(a)1 by deleting the word "serious" where it occurs.

Question 8. What if one of the boats involved retires from the race?

Answer 8.

- 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 penalized 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 68.

CYA Racing Rules Committee

Graeme Hayward, Chairman
Andrew Alberti Bill Cheek
Kathy Dyer Don Martin
Franck Pellerin Lynn Watters

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