

**Decker vs. OMC: A Scorecard of the Trial**  
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Audrey Decker was struck by the propeller of a small boat on 23 May 1999. Her case came before the Collier Circuit Court, Collier County FL in June 2009.

Details of the case are provided on our [Decker OMC Propeller Trial by the Numbers](#) page.

This report identifies critical points and issues raised during the trial and makes suggestions for improving Decker's case based on them if the case is retried. It ends with a scorecard for those points and issues, based on our opinion of which side won each issue and how important that issue was to the outcome of the trial.

Almost all information provided here was gleaned through coverage of the trial provided by Aisling Swift in the Naples Daily News. We are merely organizing, refining, and scoring it.

## **The Issues**

**Use of alcohol** - Naples Daily News indicates the Deckers were drinking alcohol prior to the incident. This appears to have led her attorneys to using Crashworthiness Doctrine instead of the more conventional product liability approach.

**Crashworthiness Doctrine** - generally does not permit discussion of what was going on before the accident. Using this approach leaves the jury wondering what was going on and why they are not privy to that information. OMC's lead attorney, Jay O'Sullivan, repeatedly tried to expose the jury to conditions before the incident.

**Test Boat vs. Actual Boat** - OMC tested the proposed guard on the actual boat involved in the accident, Deckers crew tested it on a similar boat, but not the exact boat. Decker's team could have eliminated this issue if they had used the same boat.

**"Warning" on OMC Propeller Guards** - OMC sold a small propeller guard from the 1960s thru the 1980s for protecting the propeller in certain situations. Its installation instructions included this statement, "It is not intended for giving protection to swimmers." Decker's team failed to counter with many products bearing similar labels from companies trying to legally cover themselves. For example, Q-Tips say not to use them to clean your ears, but people cleaning their ears are a major consumer of Q-tips and the manufacturer knows that. "Water wings" / inflatable armband floats used by children are labeled not to be used as a lifesaving device. Wouldn't you rather have your kid wearing them if they got in trouble vs. nothing at all? The jury could have been exposed to more examples of companies trying to cover themselves. Deckers attorneys might be able find someone who went to an OMC dealer looking for a safer boat around their children and were sold the guard for that purpose.

**Only Two Alternatives Presented** - Deckers attorneys presented OMC's guard and Guy Taylor's guard as examples of how the propeller could have been protected. Presenting more guards may have confused the jury with different objections being raised by the defense against each guard, but it left the jury thinking that when the OMC guard was eliminated by its "warning" and cancelation of your warranty, there were no remaining alternatives.

**Entrapment** - OMC pushed entrapment issues. Decker's team only responded with the lack of a single known legal case based on entrapment. Some more effort by Decker's team might have silenced this point.

**Propeller Profits** - Deckers team contended OMC failed to promote their guard due to it reducing the number of damaged propellers and cutting into profitable sales of replacements. \$40 million was tossed around as the funds in play, but from the Naples Daily News coverage, it was uncertain if that was sales or profits, and how exactly how many years those funds represented. Decker's team also lost the right to show financial data from an old deposition, said to have been sealed. They failed to point out the extreme profit margins on OEM propellers and the high volumes of these small propellers. We have likened propellers to prescription drugs before. Once they are developed and the tooling is acquired, it cost little to make them, they are sold at tremendous markups, and it takes an expert and some testing to find the very best one for your situation. Although propeller profit motives was a good point for Decker's attorneys, it looks like the point could have been made more strongly.

**Voided Warranty** - OMC voided drive warranties for those installing propeller guards. The jury saw this as OMC saying they were not good for the outboard, could cause other hazards, etc. Decker's team did not appear to push this issue very hard. Examples of companies voiding warranties for installing accessories they have internally motivated reasons for trying to block could have been used to explain the situation. For example, outboard manufacturers threatening not to warranty outboards unless they use their high priced "branded" motor oils during the warranty period, when the same protection was available much more economically from other suppliers.

**\$60 Million to One Defense Expert** - during the trial, Robert Taylor, an expert for the defense, testified he estimated his company (Design Research Engineering) had been paid \$60 million to defend manufacturers in propeller cases. He has testified in 65 trials and given 325 depositions. Decker's team asked him how many propeller guards that money could have purchased. Their intent was to show the industry was spewing money to defend itself instead of investing in solutions that could have prevented Decker's accident. Timing of the \$60 million was not precisely defined in the Naples Daily News coverage. Mr. Taylor testified some back in the 1980s and then formed his company in 1995. His services were not needed in much of the 1990s through 2002 when the industry used Federal Preemption as its defense. Some more questions leading to dollars per year during his active years might have brought this spending into better focus. In addition, pointing out this was only one company involved in the

defense, and did not include any expenses for their legal teams. An estimate might have been made of the industry's total propeller case defense expenses. It sounded like the defense could have been beaten a lot harder with the \$60 million number.

**Ran Over Her When Came Back Around** - O'Sullivan contended Fred Decker ran over her when he brought the boat back around to look for her after she fell overboard. OMC tried to make the jury think the accident was the Decker's own fault. Naples Daily News coverage did not include any efforts of Decker's team to counter that point. If they had made some convincing arguments they might have removed this point from the jury's mind. For example, although it was reported she could not swim, most non-swimmers violently thrash about after falling overboard. Fred Decker would have seen her flailing in the water if she was conscious or able to respond, therefore she was struck when she fell in, or unconscious/unresponsive. If she was unconscious/unresponsive, why would she be unconscious/unresponsive after falling over the side of the boat - because she was struck when she fell in.

**U.S. Coast Guard Says Propeller Guards Can Prevent Propeller Accidents** - Don Kueny, OMC's retired chief engineer, and an expert for the defense, testified the U.S. Coast Guard says most propeller injuries can be prevented by a propeller guard.

**Loss of Federal Preemption** - for most of the 1990s and up to December 2002, the industry used Federal preemption as their defense. They said the Coast Guard did not require guards on all boats, therefore states could not require guards on any boat. Once they got that defense going, it worked great. Cases were quickly summarily dismissed, until they lost the Sprietsma case, and the defense. The Spriestma ruling was, in part, why the Decker case was triable.

**Women on the Jury** - the six person jury was composed of four women and two men. Its composition might have made it more sympathetic to the horrific injuries suffered by Decker.

**"She Still Looks Nice in a Swim Suit"** - The defense pointed out Decker's reconstructive breast surgery was not obvious in a swimsuit. Women on the jury may have taken offense to that remark. Female jurors may have had a more personal understanding of the issues surrounding accident breast reconstruction and found defense comments repulsive. Note - the phrase in quotes was not specifically used in the trial, it just represents the intent of defense comments.

**Trial Venue** - Naples Daily News pointed out several times, this court is a tough jurisdiction in which to win a medical malpractice or product liability case. Plaintiff verdicts in such cases are rare. Decker's attorneys surely knew this going in. We wonder if they explored other venues that might have been more favorable.

**Magnitude of Injuries** - Audrey Decker's injuries were very severe and continue to significantly affect her quality of life ten years later. The severity and longstanding problems caused by those injuries were a major component of the plaintiff's case.

**Decker's Presence at the Trial** - Her presence at the trial allowed the jury to view her appearance firsthand, and get a feel for her quality of life.

**Uncertainty of What Struck Decker's Head** - Decker's team based their case on her injuries being caused by propeller strikes. Crashworthiness Doctrine relied on them proving her injuries were enhanced by the drive not having a propeller guard. In an effort to limit their potential liability, the defense contended Decker's head injuries were caused by her head striking something other than the propeller (the skeg, the drive, the bullet, etc.). Decker's team did not seem to have a good counter to this. As a result, her head injuries seemed removed from the table. The Defense seemed hard to pin down on exactly what they thought she hit. A defense expert, Kelly Kennett, testified in an earlier trial (Listman) that Decker had been hit in the head by a propeller. In this case he testified her head was hit by the "bullet." The defense seemed to oscillate between her head being struck by the drive, by the bullet, by the skeg, or by anything except the propeller. Decker's team did not appear to call them on their vacillations. Decker's attorneys might be able to do more to prove her head was struck by the propeller.

**Outboard Defective When Placed on the Market** - The jury was not convinced. This is the most critical issue of the trial. Decker's team has some work to do if this case is retried. Her attorneys could identify propeller accidents with similar outboards to pound their case home. They could even bring in some of those previously injured with similar outboards to testify of their experiences.

**We've Never Lost a Case** - Jay O'Sullivan, lead attorney for OMC asked one of Decker's experts if he had ever been on the winning side. An objection blocked the answer, but O'Sullivan got his point across. Decker's attorneys made no efforts to point out how many cases have been settled by the defense.

**Confusion Over How She Fell In** - several witnesses, including Audrey Decker herself, left plenty of confusion about exactly how she fell in (boat turning left or right, her falling over one side, maybe going over backwards, etc). Defense experts testified the boat had to be going relatively fast and turning very hard to throw her out for her to be hit by the propeller (rear of the boat sliding around to hit her). This seemed confusing with O'Sullivan (but none of his experts) contending she was hit when the boat came back around to look for her. A large boat wake could eject a passenger from a pedestal swivel seat on a 13 foot boat about any direction at any time if they were not prepared for it, especially if they were preparing to stand, adjusting themselves on their seat, or reaching for something. Fred Decker said earlier in the Naples Daily News, the boat hit a wake and she was ejected. Decker's team failed to use this to counter the higher speeds the defense tried to leave in the jury's minds. The defense won this point by convincing the jury the Decker's contributed to their problem by their higher speeds. Presenting a boat wake as the source of the ejection becomes difficult under the crashworthiness doctrine being applied by Decker's team. During the trial, a juror sent a note to the judge asking if the other boats on the lake mentioned by Fred Decker could have changed the water conditions and the case. After some discussion with the

attorneys, the judge said it was a good question, but they could not answer it. The juror was to rely on the evidence and use their common sense.

**Defense Witnesses Sounded Like Potential Guard Customers** - two defense witnesses sounded like they might buy a propeller guard. Monty Hinkle, Florida Fish and Wildlife Conservation Commission said, "It could protect manatees, fish, people, it could help." Kevin Avinon, Florida Fish and Wildlife Commission investigations supervisors said "sure" when asked if a ring guard would be better than no protection at all. When asked if he would buy one, he said, "There is a lot of ifs in there, If it were 100 percent safe and didn't affect performance, then I wouldn't mind owning one." Decker's attorneys could have leapt on him with seat belt parallels. Seat belts are not 100 percent safe. Seat belts cause some fatalities themselves (such as people trapped in cars after accidents and the car burns, they drown, etc), but the pluses far outweigh the minuses. Do you use seat belts? What is different between the risks of seat belts and the time it takes to use them, vs. any minuses of propeller guards? Would you like to rethink your statement about them having to be 100 percent safe and having no affect on performance?

**Late Witness Not Admitted** - a young man, 11 eleven years old in 1999, came on the scene shortly after the accident. He recently came forward to testify. His testimony may have convinced the jury Decker was struck in the head by the propeller. His testimony was not admitted due to its lateness and him possibly being influenced by media coverage of the accident.

**We First Became Aware of Propeller Accidents in 1965** - Don Kueny, OMC's retired chief engineer, contended OMC first became aware of propeller accidents in 1965. While this is a minor point considering 1965 was still over 30 years prior to Decker's accident, it annoys us. We would like to have seen them challenged on that point using a comprehensive literature search and some of the very high profile accidents like the August 1953 Boni Buehler accident. We would like to see OMC have to eat their words on this one. Some of their own test and field personnel might have been injured by propellers before 1965. Posting some inquiries on Lighthouse and approaching some OMC old timers like Ralph Lambrecht at Boat & Motor Dealer might turn up some injuries to their own personnel. There used to be a website called the Lighthouse that many ex-OMC employees hung around. It seems to be gone now.

**O'Sullivan's Courtroom Demeanor** - Jay O'Sullivan, lead attorney for OMC has a pretty challenging, testy, antagonistic courtroom presence. The jury might be a little less likely to side with OMC because of his courtroom actions, but plaintiff witnesses and attorneys might be intimidated or rattled by him allowing OMC to score some points they might have otherwise missed. In this case, even if he raised the ire of the jury, they still found in his favor. From the Naples Daily News coverage, its tough to determine if his conduct led to any information being admitted, or withheld that benefitted OMC's positions. You have to give it up to him. He won the case and that's what he gets paid for.

**Age of the Boat** - The accident happened in 1999 on a 1988 boat. The boat was now built about twenty years ago. One of the jurors was interviewed after the trial by Naples Daily News. It sounded like the jury thought the only alternative at that time (1988) was the OMC guard. They felt OMC's guard was designed for logging applications, and OMC voided your warranty if you used it, pretty much removing it as an option. There were actually several guards available in that time frame, with many more since then, plus several other approaches for mitigating propeller injuries. If it were a more recent accident, involving a more current boat, things might have been easier for Decker's attorneys.

**Horsepower and Speeds** - a 25 (or 28) horsepower motor in a 13 foot boat minimizes many issues the industry raises at higher speeds (blunt trauma, handling issues, performance decreases, fuel consumption, etc). They tried raising them here, but the impact seemed minimal in the news coverage. If it had been a larger, faster, higher horsepower vessel things would have been tougher for Decker's team.

**Speed at Time of Accident** - OMC tried to convince the jury the boat was going faster than the Deckers said in order to eject her and to swing around and hit her with the drive. They tried to hint their speed bordered on recklessness and contributed to her ejection. OMC failed to note, many people fall over the side and are struck by propellers of boats that are not sliding around. Flow around the hull, how a person enters the water, movements by the person, wakes and currents are among the variables that can sweep a person's body toward the propeller. It seemed like Decker's team did not attack them on this one. Decker's team also failed to try to pin the defense down. O'Sullivan kept saying she was hit when the boat came back around, if so, the boat did not have to be going fast and turning sharp. They can't have it both ways.

**Performance and Handling** - OMC contended the Gale Guard slowed down the boat and created some handling difficulties. Decker's team said the impact was minimal and supplied some video to prove it. No efforts seem to have been made to optimize performance after the guard was installed (find the best prop, switch to stainless steel prop, remove unused items from the boat, tune up the engine, clean the hull, etc.) Yes, those things could be done without the guard, but typically are not. They could be done to recover a portion or all the performance lost from installing a guard.

**Optimizing Gale Guard Design and Installation** - no efforts were made to minimize drag of an installed Gale Guard. Areas that could be explored include roughing its surface, forming trip wires in its surface, using an elliptical cross section ring, purposefully vibrating the ring, investigating increases in thickness of the band (due to the separation step in normalized drag curves and low operational speeds), integrating the ring's attachment points (pre forming attachment points in the drive to create less drag than external bolts and nuts), and by optimizing contours of the combined system (guard plus drive). More on these and related approaches can be found on our [Propeller Guard With Reduced Drag](#) page. While that page primarily focuses on cage type guards, many of the same approaches can be applied to rings.

**Audrey Decker's Age** - she is currently 64, placing her in her early 50's at the time of the accident. Had she currently been young, vibrant and full of life (like Boni Buehler was back in the 1953 accident or like Alison McWeeny ejected by a boat wake July 4th, 2009) the jury might have been more receptive to her situation.

**Plaintiff Experts Not Using Guards** - OMC attorneys asked plaintiff expert witnesses if they used propeller guards on their boats or on boats of close family members. They did not. OMC scored some points with that question.

**Decker's Have Not Campaigned for Propeller Safety** - OMC tried to make an issue of the Decker's thinking propellers were unsafe, but doing nothing to prevent similar injuries to others, including not warning those to whom their old boat was sold. We have visited with numerous families in situations somewhat similar to the Deckers. Typically, once things quiet down a bit after the accident, they exhibit some desire to do something about the problem, but they are still too caught up in the aftermath to follow through. Some return years later to make contributions to the cause. The Deckers apparently have not yet done so, other than telling their story to the press. They still face many challenges, but it might help both themselves and others if they became involved in the propeller safety effort. Many victim's families participate by becoming involved through [SPIN](#). Others have set up their own independent efforts. We provide some information on advocacy movements in this area in the Propeller Safety Advocates section of our [Propeller Guard Information Center](#). The Decker's ages and the extent of her injuries may not allow them to take on an advocacy role.

## Scorecard

The following pages are a scorecard based on the issues we identified. We scored each issue depending on which side won and the relative importance of that specific issue to the outcome of the trial. Points were awarded per the Points Table below.

Points Table	
Score	Definition
NA	Not Applicable
0	Neutral Point, Neither Side Won
1	Won, But Only a Minor Issue for the Respective Side
2	Won, a Major Issue for the Respective Side

Scorecard Table	Defense OMC		0	Plaintiff Decker	
	2	1	0	1	2
Use of Alcohol		X			
Crashworthiness Doctrine				X	
Test Boat vs. Actual Boat		X			
“Warning” on OMC Propeller Guard Instructions	X				
Only Two Alternatives Presented			X		
Entrapment		X			
Propeller Profits				X	
Voided Warranty	X				
\$60 Million to One Defense Expert					X
Ran Over Her When He Came Back Around		X			
U.S. Coast Guard Says Propeller Guards Can Prevent Propeller Accidents				X	
Loss of Federal Preemption					X
Women on the Jury			X		
“She Still Looks Nice in a Swim Suit”				X	
Trial Venue	X				
Magnitude of Injuries					X
Decker’s Presence at the Trial					X
Uncertainty of What Struck Decker’s Head	X				
Outboard Defective When Placed on the Market	X				
We’ve Never Lost a Case		X			
Confusion Over How She Fell In		X			
Defense Witnesses Sounded Like Potential Guard Customers				X	



Scorecard Table	Defense OMC		0	Plaintiff Decker	
	2	1	0	1	2
Late Witness Not Admitted		X			
We First Became Aware of Propeller Accidents in 1965				X	
O'Sullivan Courtroom Demeanor			X		
Age of Boat		X			
Horsepower and Speeds				X	
Speed at Time of Accident		X			
Performance and Handling				X	
Optimizing Gale Guard Design and Installation			NA		
Audrey Decker's Age		X			
Plaintiff Experts Not Using Guards		X			
Decker's Have Not Campaigned for Propeller Safety		X			
<b>Score in Each Category (Number of X's times value of an "X")</b>	<b>-10</b>	<b>-12</b>	<b>0</b>	<b>8</b>	<b>8</b>
<b>Sum</b>	<b>-6</b>				

While Decker's attorneys did a great job, the defense clearly won the case. This was more obvious in hindsight after Naples Daily News interviewed a juror. Decker's attorneys failed to prove the outboard was defective. Everything else was a moot point.

If the case is retried, both teams will be trying to slide the X's toward their side and hang onto the ones they have. Decker's team learned a lot and could now provide a more convincing case. However, just like our local college football team gets a little better each year and thinks they will be invincible this upcoming season, they forget their opponents are getting better too. In this trial, both sides saw the other side's players and their best plays. If they meet again, both teams will be trying to improve their game by strengthening their existing players, recruiting some new players to fill in some weaknesses, and drawing up some new plays. The Defense will be even more practiced and polished because they keep their team on the road defending other prop

cases. Just like in football, if they meet again, it will be tougher on Decker's team after a long layoff with no games. But, if Decker's team elects to go on the road and represent others injured by propellers, it may get more interesting in the future. Their side will begin to become more polished too.

NOTE - we were not present at the trial. Our scoring is based on Naples Daily News coverage of the trial and from previous trials. Those present at the trial might feel differently about which side won a particular issue and the relative importance specific issues to the jury.

Several economic issues were raised during the trial (potential lost wages, costs for future medical care, cost of past medical care, etc). We did not list them in our chart because they did not have direct bearing of the decision of the outboard being defective or not. They would have come into play IF the jury had decided the outboard was defective as sold AND that defect was the proximate cause of Audrey Decker's injuries.

We welcome any comments you may have about our rating of the issues vs. how the jury actually perceived them, especially from those present at the trial, including jury members and alternates.

If anybody has any comments about our coverage of this case, please email them to [polsong@virtualpet.com](mailto:polsong@virtualpet.com)

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## **Thank You**

We would remiss if we did not again thank Aisling Swift and the Naples Daily News for their timely and tremendous coverage of the trial.