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From Boating Law and Liability

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An Overview of Maritime Law

Stephen M. Calder, Esquire

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Preamble

This overview is intended to be a general introduction to some of the issues that arise in cases governed by admiralty practice and maritime law, particularly in the federal courts. As is true in other practice areas, maritime law evolved over a considerable period of time, and continues to do so. Procedures for the handling of claims have been modified and refined in order to adapt to the changes that have occurred in our courts, as well as the relatively recent phenomenon of recreational boating on a large scale. Nevertheless, many fundamental principles have remained intact, such that maritime law is an unusual mix of ancient traditions and modern approaches to the resolution of disputes.

The Source of Admiralty Law and Jurisdiction

The family tree for the law governing boats and boating can be traced back to the Code of Hammurabi, the Egyptian and Phoenician merchant fleets, the Rhodian law that governed commerce in the Mediterranean, and later the Rolls of Oleron that recorded rules and customs applicable to the wine trade. It is said that Eleanor of Aquitaine and her son, Richard I, were responsible for the incorporation of the Rolls of Oleron into the laws of England, which eventually found their way into the maritime law of the United States.

In its original form, the term “Admiralty” referred to the specialized court that was established to oversee the Royal Navy, and later encompassed the judicial hierarchy that applied to all cases involving ships and ocean commerce. The word “maritime” simply described the general nature of the types of cases that were heard, and the laws that applied to them. Over time, the differences between “admiralty” and “maritime” lost their significance, and the two words are now used interchangeably.

Article III of the Constitution states that “the judicial power shall extend ... to all cases of admiralty and maritime jurisdiction.” The Judiciary Act of 1789 endowed the courts of the United States with original jurisdiction over admiralty and maritime cases, and at the same time acknowledged and preserved the authority of the States’ courts. The grant of jurisdiction was styled as a comprehensive assignment of exclusive authority to the federal courts, which was then qualified by a significant, and quite broad, exception:

“That the district courts shall have, exclusively of the courts of the several States, . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . .”

The modern statement of the federal courts’ admiralty jurisdiction, as set forth in 28 U.S.C. Section 1333, does not explicitly refer to “common law,” but is no less expansive:

“District courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . .”

The exclusive authority of the federal courts therefore encompasses those remedies that only arise in the specialized context of maritime commerce and have no equivalent counterpart in the common law. In a sense, the federal courts can be said to have assumed the role that was played by the High Admiralty Court in England for adjudicating the cases and administering the remedies that are unique to the maritime world. For example, the right to assert a claim against a vessel *in rem* must be pursued in a federal court, because it is “the consequence of exclusive jurisdiction that state courts ‘may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction.’” *American Dredging Co. v. Miller*, 510 U.S. 443, 446, 114 S.Ct. 981, 985 (1994), quoting *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S.Ct. 274, 277 (1924).

To address the problem of certain claims arising in the gray area between land and sea, Congress enacted the Extension of Admiralty Jurisdiction Act in 1948. (46 U.S.C. App. § 740, now codified at 46 U.S.C. § 30101). The Act provides that

“the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.”

Perhaps the most well-known example of the effect of the Extension Act arose in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043 (1995). The Supreme Court held that the federal courts had admiralty jurisdiction over claims arising out of the flooding of a tunnel and multiple buildings in Chicago, which stemmed from piling work performed seven months earlier by a crane barge in the Chicago River.

Still, because the state courts continue to serve as the courts of general jurisdiction for all matters of law and equity, Section 1333 preserves their traditional status as the primary arbiters of civil disputes, whether those disputes are governed by common law, statute, equitable principles, or even maritime law when the matters at issue have counterparts in land-side law. Given the number and scope of remedies that arise from common law, state courts and federal courts share concurrent jurisdiction over many, if not most, cases involving pleasure boats.

Moreover, the U.S. Supreme Court has acknowledged the deference that is due the state courts in maritime matters where the state courts and the federal courts share jurisdiction. In the context of the procedural remedy provided in the removal statute (28 U.S.C. Section 1441 *et seq.*), the Court has held that when suit on a maritime claim is filed in a state court, and the defendant removes the case solely on the grounds that the federal district court has admiralty jurisdiction, the plaintiff is entitled to have the case remanded to the state court as the court which first had jurisdiction over the matter. The plaintiff's right to proceed in state court will be

trumped only if the district court also possesses subject matter jurisdiction on some basis other than admiralty jurisdiction. *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468 (1959).

What is a Maritime Claim?

Historically, the determination of whether or not a dispute is maritime in nature, such that admiralty jurisdiction can appropriately be exercised, has been determined on the basis of three criteria: (1) whether a “vessel” is involved; (2) whether the occurrence takes place on “navigable waters” of the United States; and (3) whether the occurrence “bears a significant relationship to traditional maritime activity.”

A “vessel” has been defined to include “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005) (citing the Revised Statutes of 1873 at 1 U.S.C. § 3).

The definition of “navigable waters” was first articulated by the Supreme Court in 1871, and is essentially the same used today; waters are deemed to be “navigable when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce.” *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1871). Because the reference to “commerce” is made in the context of determining the federal courts’ jurisdiction over admiralty matters, commerce necessarily means “interstate commerce,” and therefore in addition to the rivers, bays and coastal waters that provide navigable access ways to the ocean, those rivers and lakes that support commerce between different States are deemed to be “navigable.” *Id.*

Notwithstanding the modern surge in recreational boating and related lawsuits, the historical emphasis on commercial maritime activity for determining the maritime nature of a

claim and deciding jurisdictional matters has persisted, albeit with a slightly altered statement of the relevant criteria that takes into account the reality that many occurrences now involve pleasure boats. Incidents involving vessels on navigable waters give rise to admiralty jurisdiction if (1) the particular incident is one which “has a potentially disruptive impact” on maritime commerce, and (2) the general nature of the “activity” being conducted at the time of the incident bears a significant relationship to traditional maritime activity. There is no requirement that the particular activity at the time of an occurrence involve actual navigation or operation of a boat, so long as the activity can be viewed as one whose nature is traditionally maritime. *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892 (1990) (admiralty jurisdiction exists over claims arising from fire caused by washer/dryer unit on pleasure yacht docked in marina); *Sinclair v. Soniform Inc.* 935 F.2d 599 (3d Cir. 1991) (admiralty jurisdiction exercised over claim by diver injured by negligence of crew because dive boat was engaged in commercial activity); *Windsor Mt. Joy Mutual Ins. Co. v. Brunswick Corp.*, 1992 A.M.C. 1114 (D.N.J. July 26, 1991) (admiralty jurisdiction exists over claim by injured swimmer based on negligent operation of a pleasure boat).

What Law Applies to Maritime Claims?

As to that part of the admiralty jurisdiction of the federal courts which is exclusive, the remedies that have particular significance are the right to assert a cause of action directly against a vessel *in rem* for certain tort claims and contractual liens; the right to pursue a *quasi in rem* action against a vessel owner, and obtain pre-judgment security, by “attaching” the vessel when the owner is “not found” in the district and the federal court does not have personal jurisdiction; and the right of a vessel owner to petition the federal court for exoneration or limitation of liability under the Limitation of Liability Act, now codified at 46 U.S.C. Section 30501, et seq.

The arrest and attachment of vessels is a body of law unto itself. Basically, under appropriate circumstances, certain tort claims and liens arising from mortgages, repair contracts or the supply of “necessaries” provide the basis for a maritime “arrest” of the vessel which establishes the district court’s jurisdiction over the vessel and provides security for the claim. Similarly, *quasi in rem* claims can be pursued by obtaining a court order “attaching” the vessel as the property of the absent owner. The vessel owner has the option of posting a bond or other acceptable security in order to obtain the vessel’s release from arrest or attachment, but in the case of pleasure boats, a foreclosure proceeding on a mortgage or the assertion of a claim in excess of the boat’s value will most often result in a disposition of the vessel at a marshal’s sale.

The Limitation Act was originally enacted in 1851 for the purpose of encouraging investment in the building of vessels and promotion of maritime commerce. When a vessel is involved in a casualty or occurrence that may render the owner liable for property damage, personal injury or death, the Act permits the vessel owner to file a petition requesting complete exoneration from liability for all claims arising out of the occurrence, and in the alternative, requesting limitation of its liability to the residual value of the vessel as of the time immediately after the occurrence. Exoneration from liability means exactly that, while limitation of the owner’s liability is dependent upon a finding that the owner had no “privity or knowledge” of the vessel’s fault, such as a momentary lapse by a captain or crew who was otherwise competent. “In the case of individual owners, it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury.” *Coryell v. Phipps*, 317 U.S. 406, 411, 63 S.Ct. 291, 293-4 (1943).

In *Coryell v. Phipps*, for example, a vessel caught fire while in storage because gas fumes had collected in the engine room, even though the boat had previously been inspected and declared to be in good condition. Because the damage was caused by a defect in the boat, the owner was held liable; however, since the owner had hired and relied on competent individuals to conduct routine inspections that failed to reveal the defect, the owner did not personally participate in the fault that caused the fire, and the owner was granted limitation of his liability. Caveat: The opposite conclusion could be reached as to a corporate owner, since the knowledge of a corporation necessarily is measured by the knowledge of the corporation's employees and agents.

The remedy of the Limitation Act does not extend to a vessel owner's "personal contracts," such as contracts for services, repair or salvage, and as one would expect, a pleasure boat owner cannot limit his liability for his own tortious conduct. For example, in the context of the tort of negligent entrustment, it has been held that a petition for limitation of liability should be dismissed as a matter of law, on the reasoning that if the owner was not negligent for entrusting the boat to another, then the owner is not liable and has no need for limitation, whereas if the owner was negligent, then necessarily he has privity and knowledge of his own conduct and limitation is not available. *Joyce v. Joyce*, 975 F.2d 375 (7th Cir. 1992). Likewise, the pleasure boat owner who is aboard her craft, or even at the helm, will have difficulty persuading a court that she did not have "privity or knowledge" of the cause of an accident. However, the court's decision-making process in limitation cases follows a traditional sequence of first determining the cause or causes of the accident, then making specific findings as to liability, and then based on those findings, reaching a conclusion as to whether or not the owner did have privity or knowledge of the true cause of the accident. As a result, it does not

necessarily follow that the boat owner can never be entitled to limitation simply because she was on board at the time of the incident.

The vessel owner's petition for exoneration or limitation of liability must be filed with a federal court within six months after receipt of written notice of claim. Any previously-filed lawsuits are stayed, and plaintiffs seeking recovery for damages are required to file their claims with the federal court in which the owner's petition is pending, similar to a bankruptcy proceeding, so that one court obtains a "concurus" of all claims and all issues in one proceeding. If the occurrence resulted in the loss or destruction of a pleasure boat, its residual value is zero, and an award granting the owner limitation of his liability means that the claimants recover nothing. However, depending on the circumstances, and assuming the claimant or claimants provide satisfactory stipulations that preserve the federal court's exclusive jurisdiction over the issue of whether or not the owner is entitled to limited liability, the situation is reversed, such that it is the limitation proceeding that is stayed pending the outcome of the claimants' lawsuits. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993 (2001).

The Limitation Act has been described as an outdated relic with no relevance in a modern world where compensation for injured plaintiffs is the rule and vessel owners maintain liability insurance as a routine business practice. A few district courts have even refused to enforce the Limitation Act on the basis that public policy should not permit a vessel owner and its insurers to avoid full responsibility for the damage caused by the vessel. However, the majority of the courts have either stated that owners of recreational vessels are entitled to pursue the remedies provided by the Act, or have applied the Act to a pleasure boat without discussion. *See, for example, Matter of Guglielmo*, 897 F.2d 58 (2d Cir. 1990); *Complaint of Lenzi*, 1991 A.M.C. 1531 (E.D. Pa. Mar. 22, 1991), *aff'd per curiam*, 958 F.2d 363 (3d Cir. 1992); *Complaint of*

Shaw, 846 F.2d 73 (4th Cir. 1988); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *In re Young*, 872 F.2d 176 (6th Cir. 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990); *Pritchett v. Kimberling Cove Co., Inc.*, 568 F.2d 570 (8th Cir. 1977); *In re Complaint of Hechinger*, 890 F.2d 202 (9th Cir. 1989); *In re Complaint of Keys Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990). In fact, the U.S. Supreme Court has issued opinions concerning the Limitation Act in three pleasure boat cases without any indication that the Act did not apply: *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687 (1941); *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 291 (1943); and *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892 (1990).

In recent years, Congress has addressed the Limitation Act on two occasions. In 2006, the Limitation Act was re-codified and published with only minor changes and refinements. In April 2010, the Limitation Act came under scrutiny when the offshore drilling unit “Deepwater Horizon” exploded, causing 11 deaths, injuries to 17 others, and massive pollution. Several members of Congress reacted by introducing a number of bills that would have repealed the Limitation Act and altered maritime law governing personal injury and death in significant ways. One of these bills, H.R. 5503, was approved by the Judiciary Committee and passed by the House of Representatives in July 2010.

The fervor of reform subsided, perhaps due to the Republican acquisition of control in the House, and the only proposal that still survives is S. 183, the “Deepwater Horizon Survivors’ Fairness Act” introduced by Senators Rockefeller, Schumer and Whitehouse in January 2011. The bill was referred to the Senate Committee on Commerce, Science and Transportation, and thus far, there has been no indication of any significant activity. Even if S. 183 were enacted, the changes effected in maritime law would not be nearly as dramatic as those contained in the early proposals, because the proposed amendments apply only to claims arising out of the Deepwater

Horizon disaster. The amendments would provide that solely for purposes of “a claim for personal injury or wrongful death arising from the blowout and explosion of the mobile offshore drilling unit Deepwater Horizon that occurred on April 20, 2010,” the Limitation Act would not apply; an action for wrongful death “may be brought in law or in admiralty;” and for actions under the Jones Act and the Death on the High Seas Act, recovery would be permitted for non-pecuniary damages, defined as “the loss of care, comfort, companionship, and society.”

As to contract claims, admiralty jurisdiction is not dependent on the vessel’s presence in navigable waters at the time the contract is made or performed, and an agreement can be a “maritime contract” even if performed on land. A clear and precise definition of what constitutes a “maritime contract” has eluded the courts, perhaps because of the many factual permutations that arise when agreements affect persons and property on both land and water, but a few guidelines for particular types of contracts have been derived. Briefly, a contract involving a pleasure boat is viewed in the same manner as a contract involving a commercial vessel; therefore contracts to provide supplies or equipment for a boat, or to make repairs, are deemed to be maritime contracts, as are contracts for in-water slips, docking, anchorage, and even short-term storage of a boat on land. On the other hand, contracts for the construction or sale of a boat are not maritime, nor are contracts for long-term storage of a boat on land, as the boat is deemed to have been “removed from navigation.”

A marine insurance policy is a maritime contract over which the federal courts have admiralty jurisdiction, and so long as the insurance does not apply to a boat under construction, the policy is interpreted according to maritime law. Even then, if the particular issue raised by the parties is not governed by an established maritime doctrine, the Supreme Court has directed

that the courts must look to state law to interpret the policy. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368 (1955).

Lastly, an interesting quirk in the law governing maritime contracts is the absence of a Statute of Frauds; as a general matter, assuming the evidence is sufficient, oral agreements are enforceable. *See T.N.T. Marine Services, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983).

As to those maritime claims over which the state and federal courts share jurisdiction, it has long been the general view that to the extent possible, such claims must be determined in accordance with "federal maritime law," regardless of which court decides the case. In the course of ruling that a district court exercising admiralty jurisdiction must apply maritime law, the Supreme Court noted in 1986 that general maritime law is "drawn from state and federal sources," and constitutes "an amalgam of traditional common law rules, modifications of those rules, and newly created rules." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 866, 106 S.Ct. 2295 (1986). In a companion case, the Supreme Court addressed the handling of maritime claims in the state courts, and said:

"[T]he 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that substantive remedies afforded by the States conform to federal maritime standards."

Offshore Logistics, Inc. v. Tallentine, 477 U.S. 207, 223, 106 S.Ct. 2485, 2495 (1986).

As the Supreme Court itself anticipated, significant modifications have been made over time and maritime law has expanded. For example, in 1996 the Court held that when a non-seafarer suffers personal injury or death within the territorial waters of a State, and no federal statute applies, the nature and scope of the damages that are recoverable is not confined to

“federal maritime law,” and the damages are deemed to be “supplemented” by the remedies which are available under state law for personal injury and death, even though the issue of liability for a tort occurring on navigable waters is determined according to federal maritime law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619 (1996).

Admiralty Practice and Procedure

When admiralty jurisdiction is exercised by a federal court, significant procedural differences may come into play. For example, the Seventh Amendment right to a jury trial does not extend to cases falling within admiralty jurisdiction, and therefore in the absence of a statute providing otherwise, a district court whose subject matter jurisdiction is premised solely upon admiralty decides the case without a jury. *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646 (1963). A plaintiff filing suit in federal court who wishes to preserve the right to a jury must invoke an alternate basis for subject matter jurisdiction, such as diversity. *See Fed. R. Civ. P. 38(e)*. In the alternative, even if a district court would have both admiralty jurisdiction and another type of subject matter jurisdiction over a claim, Rule 9(h) gives a plaintiff the option of expressly designating the action as an admiralty or maritime claim, and thereby triggering the applicability of Rule 38(e) and a bench trial without a jury.

As in any other lawsuit, the defendant responding to an admiralty or maritime claim has the right to file a third party complaint, but there is no need for the plaintiff to assert an independent claim against the third party defendant. The original defendant in a maritime action can assert direct liability on the part of the third party defendant to the plaintiff, and the third party defendant is required to respond to both the joinder complaint and the plaintiff's original complaint. *Fed. R. Civ. P. 14(c)*.

Maritime claims within admiralty jurisdiction also are subject to different procedures for purposes of appeal. In admiralty cases where the district court decides the issue of liability prior to resolution of the issue of damages, as is customary in actions filed under the Limitation Act, the aggrieved party is entitled to file an immediate interlocutory appeal as of right to the Court of Appeals. 28 U.S.C. § 1292(a)(3).

Collisions, Fault and Presumptions

In the event of a collision, a vessel owner can be held liable *in personam*, and the vessel can be held liable *in rem*. The court's allocation of fault between the vessels involved in a collision is driven by the determination of whether or not the vessels were "seaworthy," and whether or not the vessels and its personnel complied with the many statutes and rules that govern the fitness of the vessel and crew and the navigation of the vessel. The condition of a vessel need not be perfect and the vessel owner is not a guarantor or insurer that the vessel will be accident free; a vessel and its crew need only be reasonably fit and equipped for the intended use. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926 (1960).

Until 1975, the respective liability of two vessels involved in a collision was determined according to rules of sole fault and equal division of damages: if one vessel was solely or predominantly at fault, the court could assign all responsibility for the damages to that vessel, but if comparative fault could not be determined or both vessels were at fault, then regardless of which vessel might be more culpable, the total damages resulting from the collision were equally divided between the two vessels. In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708 (1975), the Supreme Court held that damages in collision cases should be apportioned in accordance with the relative fault of the parties involved, and that liability should be divided evenly only when a fair measurement of the parties' comparable fault is not possible. *Reliable*

Transfer represented a substantial step in the modernization of U.S. maritime law, and the principle recognized in that case has since been extended well beyond collision cases. The Court's holding, however, did not eliminate certain presumptions and evidentiary standards dating back to the 1800's. Among the key presumptions that still apply today are the Louisiana Rule, the Pennsylvania Rule and the Oregon Rule.

These so-called "rules" are named after the vessels involved in the Supreme Court decisions that established the doctrines. The presumptions applied under these rules pertain to certain categories of collisions and evidentiary issues. The rules not only assign to one party the burden of producing evidence and the ultimate burden of proof, they can also have a determinative effect upon the court's findings on the appropriate allocation of fault.

The Louisiana, 70 U.S. 164 (1865), held that when a vessel is drifting or breaks from its moorings and causes damage to other vessels or property, the vessel is presumed to be at fault. The presumption is based on the common sense notion that in the absence of evidence to the contrary, the drifting vessel was mishandled or was improperly moored, and fairness requires that the vessel owner, as the only entity in possession of evidence pertaining to the vessel's condition, bear the consequences if evidence is not produced. The vessel owner then has the burden of producing evidence, and the burden of proving, that the incident resulted from an inevitable accident or *vis major* "which human skill and precaution . . . could not have prevented." The presumption is, therefore, rebuttable, but if it appears that other persons in the same place and in the same circumstances were able with nautical skill to secure their vessels and avoid damage, then the presumption is not rebutted.

In *Fischer v. S/Y Neraida*, 508 F.3d 586 (11th Cir. 2007), the Eleventh Circuit held that vessel owners are not required to demonstrate the hindsight or type of wisdom that comes with

the occurrence of the particular event; rather, the standard is one of prudent seamanship and ordinary care and reasonableness, as measured by the circumstances that are known prior to the event. In *Petition of United States*, 300 F. Supp. 358 (E.D. La. 1969), *affirmed* 425 F.2d 991 (5th Cir. 1970), vessels broke loose from their moorings during a hurricane, and the owners successfully rebutted the presumption of fault by showing that proper care was exercised in mooring them, and that the hurricane was unusually violent and caused unprecedented devastation in the area. By comparison, the Fifth Circuit upheld the application of the presumption in *In Re Signal International LLC*, 579 F.3d 478 (5th Cir. 2009), on the basis of a finding that Hurricane Katrina was forecast as a Category 4 storm, but actually passed through the particular area with lesser intensity, such that the vessel owners had failed to prove that reasonable care would not have prevented the damage.

The Oregon, 158 U.S. 186 (1895), held that when a moving vessel allides¹ with a stationary vessel or fixed object, the moving vessel is presumed to have been at fault. The Oregon Rule is superficially quite similar to the rule established in *The Louisiana*, but there are important differences. *The Louisiana* dealt with the situation where a vessel is not under its own power and adrift, moving with wind and current, and then comes into contact with another vessel or other property; accordingly, the entire focus of the case is directed to the reason that the vessel came to be adrift and cause the damage that was done. In the situation addressed in *The Oregon*, however, the offending vessel is manned and is navigating under its own power, but for some reason is unable to avoid contact with the fixed object. As a result, the court must inquire into all of the circumstances regarding the navigation of the offending vessel, the actions of the personnel on board, and the events leading up to the contact with the fixed object. Necessarily,

¹ A collision occurs when two moving vessels come into contact; an “allision” occurs when a moving vessel comes in contact with a stationary vessel or other fixed object.

most if not all of the evidence regarding these matters is in the hands of the owner of the offending vessel, and therefore it is presumed under the Oregon Rule that the owner of the fixed object has established the initial premise that the vessel and those on board were negligent for failing to avoid the fixed object.

The vessel owner can rebut the presumption by producing evidence and carrying the burden of proving that prudent seamanship and reasonable care were exercised. The types of situations where a vessel owner might defeat the presumption are many; for example: (1) when the fixed object is sunken and not visible, and the moving vessel could not reasonably be expected to know of its location; (2) when the fixed object is a pier or piling normally contacted in the course of mooring a vessel, and the contact was of a kind that the object should reasonably be expected to withstand; (3) when the fixed object is moveable and itself is obligated to stay clear of vessel traffic, such as a draw bridge; (4) when the fixed object itself is in violation of a statutory duty and is the true cause of the allision. Even if the presumption is deemed to apply and the vessel owner is found to be at fault, that finding alone does not eliminate the claimant's usual burden of proving that the fault of the moving vessel was the legal cause of the damages claimed. The proportionate fault of the fixed object is an open issue that must also be considered by the court as a contributing factor.

The Pennsylvania, 86 U.S. 148 (1874), established a rule that, unlike the Louisiana Rule and the Oregon Rule, applies not to fault but rather to causation. The Pennsylvania Rule states that if a vessel is in violation of a statutory provision designed to prevent collisions at the time of the collision, then the vessel owner bears the burden of proving not only that the statutory violation did not cause the collision, but also the burden of proving that the violation *could not have contributed* to the collision. Without doubt, that burden is exceedingly heavy, and does not

usually involve a simple fact that the vessel owner can easily prove. As a result, some courts have questioned the continued validity of the Pennsylvania Rule in light of the Supreme Court's directive in *Reliable Transfer* that a court must consider all of the facts and determine the respective fault of all parties involved. Nevertheless, the Pennsylvania Rule remains intact, and it has been recognized that the Pennsylvania Rule need not mandate extreme sanctions for every technical violation of a maritime rule. Instead, the presumption of causation authorized by the Pennsylvania Rule can be used to assist the court's analysis and presumably achieve ultimate fairness in the assessment of responsibility for the occurrence of a collision:

*"The Pennsylvania did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable or remote. As this Circuit's progeny of *The Pennsylvania* reveals, fault which produces liability must be a contributory and proximate cause of the collision, and not merely fault in the abstract."*

In re Mid-South Towing Co., 418 F.3d 526 (5th Cir. 2005). Again, even if fault *per se* on the part of a vessel is established by application of the Pennsylvania Rule, the court must still evaluate the evidence and determine the appropriate proportions of the overall fault that should be assigned to the parties and vessels involved.

In the determination of a vessel's role in the occurrence of a collision, the overall fitness of a vessel is placed at issue, as reflected in the condition of its structure and navigational equipment and also in the fitness of the crew as judged by their training, licensing, and experience. The decisions made by the captain, the actions of the crew, and the vessel's speed and movements prior to the collision are evaluated in the context of the laws and regulations that apply to the vessel and to the waterway where the collision occurs, and are assessed in respect of compliance with the Rules of the Road, whether the "Inland Rules" that apply to near coastal

waters or the “International Rules” that apply at sea. The Rules of the Road apply to the navigation of both commercial and pleasure craft, and cover a wide range of circumstances, such as the appropriate actions to take and the signals to give when boats are meeting or overtaking one another, and compliance with the indications provided to mariners by lights, buoys and other markers. Among the Rules most commonly at issue are Rule 5, pertaining to maintenance of a lookout; Rule 6, which requires travel at a safe speed under the prevailing circumstances; Rule 7, which requires vessel operators to anticipate and assess the risk of collision; and Rule 8, which requires vessel operators to take early avoidance action that will be readily apparent to the other vessel and, if necessary, reduce speed or stop.

The violation of any Rule, depending on the circumstances, is a key factor in the court’s consideration of the degree of fault and the extent to which the violation contributed to the occurrence of the collision. The driving force of the Rules might be best characterized by the over-riding principle that a boat operator who takes appropriate action and complies with the Rules in every respect may arguably have the “right of way,” but there is no such thing as the right of way; every boat operator retains at all times a continuing obligation to be aware of the risks and to take reasonable steps to avoid collision. This principle holds true even when the boat operator has been placed *in extremis* by the negligent navigation of another vessel, although the measures taken by the boat operator in the midst of a dire situation will be judged with leniency.

In this context, it is noteworthy that even after a casualty has occurred, the boat operator still has continuing obligations. Pursuant to 46 U.S.C. Section 2303 governing “Operation of Vessels Generally,” the boat operator is legally required to provide assistance to persons who have been injured or are at risk:

- (a) The master or individual in charge of a vessel involved in a marine casualty shall – (1) render necessary assistance to each individual affected to save that affected individual from danger caused by the marine casualty, so far as the master or individual can do so without serious danger to the master’s or individual’s vessel or to individuals on board; . . .
- (b) An individual violating this section or a regulation prescribed under this section shall be fined not more than \$1,000 or imprisoned for not more than two years. . . .
- (c) An individual complying with subsection (a) of this section or gratuitously and in good faith rendering assistance at the scene of a marine casualty without objection by an individual assisted, is not liable for damages as a result of rendering assistance or for an act or omission in providing or arranging salvage, towage, medical treatment, or other assistance when the individual acts as an ordinary, reasonable and prudent individual would have acted under the circumstances.

Similarly, 46 U.S.C. Section 2304 requires a master or individual in charge of a vessel to “render assistance to any individual found at sea in danger of being lost,” subject to the same potential penalties of a fine and imprisonment.

How Does a Court Assess Relative Fault?

The opinion of the Eleventh Circuit in the limitation proceeding of *In re Superior Construction Co.*, 445 F.3d 1334 (11th Cir. 2006), is instructive as to the analytic process for the determination of relative fault.

One December evening, William Brock was driving his 25-foot powerboat with 12 passengers in the Cedar River in Jacksonville, Florida, when they struck a stationary work barge. All of the passengers were seriously injured -- the total damages verdict was ultimately in excess of \$19 million. Mr. Brock’s blood alcohol level was well above the limit for legal intoxication, even when tested three hours after the accident, and it was determined that at the time of the allision, the boat was traveling at a speed of at least 22 knots. The barge’s owner filed a petition

under the Limitation Act seeking exoneration from any responsibility for the incident, and in the alternative, requested limitation of its liability to the value of the barge.

The Court's approach is interesting because the case involved the interplay of navigation rules and regulations, the presumptions provided by the Pennsylvania Rule and the Oregon Rule, and the significance of the boat operator's intoxication. The Eleventh Circuit followed a logical sequence for the analysis of the accident that took into account the applicable statutes, rules and presumptions. First, because a moving vessel had struck a stationary barge, the Oregon Rule applied and imposed on the boat operator the initial presumption that he was at fault, and had the burden of proving that he was not at fault, or that the collision was caused by some fault on the part of the barge. Upon proof that the barge was in violation of a statute or regulation intended to prevent collisions (or allisions), the presumption under the Oregon Rule falls away, and the presumption of the Pennsylvania Rule attaches, such that in order to avoid a finding of fault and causation, the barge owner has the burden of proving that the violation could not have contributed to the occurrence. If the barge owner, in turn, proved that the boat operator was also in violation of a statute or regulation, then the boat operator would have the same burden of proving that his violation could not have contributed to the occurrence, or his fault would be deemed a cause of the allision. If neither the barge owner nor the boat operator carried their burden under the Pennsylvania rule, then both were at fault, both contributed to the allision, and the court then proceeds to apportion the comparative fault between the two.

The evidence showed that the accident occurred near a bridge where the navigation channel was 120 feet wide, but because the barge was moored parallel to the bridge and blocked most of the channel, the available passage way for the boat was only some 38 feet wide. The mooring of the barge in this manner violated a federal statute that provides: "It shall not be

lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft. . . .” 33 U.S.C. Section 409. The barge owner was not able to prove that blocking most of the channel, at night, could not have been a factor in the occurrence, and therefore the Pennsylvania Rule required a finding that the barge’s fault was a contributing cause.

Naturally, the barge owner responded that the legal intoxication of the boat operator had been proven, and argued that Mr. Brock’s drunken state was obvious and it was “impossible” as a matter of law for a court to conclude that his intoxication could not have played any role in causing the accident, and that a court must always assign some measure of fault to an intoxicated operator. The evidence was conflicting on the reliability of the toxicology test performed on Mr. Brock, but the Court assumed for the purposes of its opinion that his degree of intoxication violated state and federal laws, and that Mr. Brock was therefore required to prove his intoxication could not be a cause of the collision. While the presumption supplied by the Pennsylvania Rule imposes a heavy burden, the Court noted the burden is not insurmountable and, interestingly enough, held that Mr. Brock had indeed carried his burden of proof.

The Court pointed to expert testimony that regardless of the operator’s intoxication, his operation of the boat prior to the collision was in fact proper in all respects, and did not reflect any impairment of motor skills or mental alertness. Moreover, of the ten navigational lights on the barge, only three of them were operating, and some of the passengers (who were not intoxicated) testified that the barge was virtually “invisible” until a few seconds before the collision occurred. In short, the Court found that even if Mr. Brock had been completely sober, he would not have been able to see and avoid the barge blocking the channel, and held that the barge owner was 100% responsible for the collision and was not entitled to limitation of its liability.

Personal Injury and Death

Subject to specific statutes governing certain remedies, such as suits against the government, the general statute of limitations for actions based on “personal injury or death arising out of a maritime tort” is three years. 46 U.S.C. § 30106. As explained in Professor Pelaez’s discussion of cruise ship liability, that time limit can be altered by contract or by conduct. Caveat: Under the Suits in Admiralty Act, 46 U.S.C. § 30901, *et seq.*, and the Public Vessels Act, 46 U.S.C. § 31101, *et seq.*, suit can be filed for damages caused by the government and its vessels, but the limitation period for suit is two years.

The general duty owed by a vessel owner is similar to the traditional duty at common law, namely the exercise of reasonable care under the circumstances. The maritime law did not adopt the hierarchy of different classes of persons or variations in the scope of the vessel owner’s obligations; the duty of reasonable care is the same for “all who are on board for purposes not inimical to [the vessel owner’s] legitimate interests.” *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S.Ct. 406, 410 (1959). More stringent duties are owed to one class of individuals, namely seamen who are engaged in the service of the vessel and are entitled to file suit against the vessel owner/employer under the Jones Act and general maritime law. For them, the degree of negligence to be proven is slight, the standard for causation is minimal, and they are uniquely entitled to assert personal injury claims based on a breach of a warranty of seaworthiness, a type of liability without fault that is not generally available to others. For other persons such as passengers, the vessel owner is not an insurer of their safety, although the definition of the reasonable care that is required is dependent on whether or not the

particular risks involved are normally encountered on land. *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988).

Other familiar concepts of land-side tort law are also incorporated into maritime law, as in the definitions of negligence and causation, and a preference for reducing a plaintiff's damages on the basis of comparative conduct rather than barring all recovery on evidence that plaintiff was negligent or assumed the risk of being injured. Indeed, the Supreme Court decided 120 years ago that a plaintiff's contributory negligence would not bar recovery in a maritime case. *The Max Morris*, 137 U.S. 1 (1890). Thus, consistent with the Supreme Court's opinion in *Reliable Transfer*, liability in maritime personal injury cases is assessed according to the rule of "pure comparative negligence." The plaintiff's damages award is reduced by the percentage of fault attributed to the plaintiff, whatever that percentage may be. If plaintiff is assessed 1% of the fault and defendant is assessed 99% of the fault, plaintiff recovers 99% of the damages award; if plaintiff was 99% at fault, then plaintiff recovers 1% of the damages.

Maritime law also incorporates the doctrine of strict liability for product manufacturers and suppliers as well, along with the concept that no recovery should be available for pure economic loss in the absence of property damage or bodily injury. *East River S.S. Corp. v. Transamerica Delaval, supra*; *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134 (1927). Similarly, the measure of damages under maritime law for personal injuries has been recognized to include past and future loss of wages, loss of earning capacity, past and future medical expenses, pain and suffering, and the like. See *Pfeiffer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523, 103 S.Ct. 2541 (1983).

The scope of the right to recover "non-pecuniary damages," meaning such items as loss of society, loss of consortium, and punitive damages, for injury on the high seas is not entirely

clear. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), the Supreme Court held that recovery for wrongful death of a seaman under general maritime law could not include loss of future earnings or loss of society as such items were not recoverable under the statutes that address wrongful death, namely the Jones Act and the Death on the High Seas Act. That bar to recovery of non-pecuniary damages was initially interpreted as being applicable to personal injury cases generally, but in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S.Ct. 2561 (2009), the Supreme Court cast doubt on the entire issue with a holding (in a 5 to 4 decision) that punitive damages are recoverable for failure to pay maintenance and cure to a seaman; it remains to be seen how far that ruling may extend.

As to deaths of non-seafarers occurring on the “high seas,” meaning more than three miles from shore, it seems clear that the remedies available will be defined solely by the Death on the High Seas Act, 46 U.S.C. Section 30301 et seq. See *Dooley v. Korean Air Lines*, 524 U.S. 116, 118 S.Ct. 1890 (1998). In territorial waters of the States, however, the maritime rules governing damages recoverable by non-seafarers will be supplemented by state law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619 (1996).

Marina Issues

Marinas have been problematic locations for recreational boaters because of the heightened risks that accompany navigation in close quarters with docks, other boats and shallow water, and from the problems that beset the moored (and unmanned) craft.

As to navigation, the Rules of the Road apply and must be followed, although there is an increased likelihood that a boater may need to invoke the exception in Rule 2 that states “due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, *which may make a departure from these Rules*

necessary to avoid immediate danger.” Furthermore, when navigating in close proximity to other vessels or docks, a boat operator is required to be mindful of the size of the wake produced by the boat, as liability is likely to attach for damage caused by the wake to structures that are properly constructed, or to vessels that are moored properly or are being handled safely.

The berths provided by a marina must be reasonably safe, and the marina owner must keep the berths free from dangers or warn the boat operators. The services provided by a marina to a boat owner, such as hauling and launching a boat, are generally required to be performed in accordance with the “warranty of workmanlike service.” Claims against a marina can, of course, be premised on negligence, on the grounds that the marina failed to warn the boat owner of a known danger, or did not exercise the normal care that is appropriate and expected of marinas for the service being performed.

Claims for damage to a boat may also be premised on a bailment theory. A bailment arises if the boat is delivered to the marina for a specific purpose, such as storage or repair, and the marina accepts the boat and takes possession. If the boat is lost or is returned in damaged condition, the boat owner is presumed to have demonstrated a prima facie case of negligence on the part of the marina. The marina presumably possesses the only available evidence pertaining to the events surrounding the damage, and therefore has the burden of proving the absence of negligence in the handling of the boat, failing which the marina is liable for the damage.

In *New Hampshire Ins. Co. v. Dagnone*, 2006 A.M.C. 1920 (D.R.I. July 10, 2006), a marina was sued for damage to a boat that broke loose from its mooring during a storm. The marina had moved the boat to a protected position in response to forecasts of heavy weather, but the gale passed directly over the marina and was unexpectedly severe. Because the marina’s

precautions were deemed to be reasonable in the context of the information that was available, the marina escaped liability.

The existence of a bailment turns on the nature of the arrangements between the owner and the marina, and particularly the degree of control exercised by the marina over the boat. In *Northern Ins. Co. of New York v. Point Judith Marina*, 579 F.3d 61 (1st Cir. 2009), the boat owner had a slip agreement with the marina and a contract to decommission the boat, store it on land for the winter, and then commission the boat for launch in the spring. During the winter, the owner arranged for an independent mechanic to service the engines, and when the boat was being readied for launch in the spring, the owner visited the marina several times. When the vessel sank at her berth over a weekend, the owner claimed the marina was negligent for failing to discover and repair a sliced exhaust hose that allowed water to enter the stern, and it was theorized that the bilge pump had not worked and must have been turned off. Because the evidence of the marina's negligence was not conclusive, the owner argued that unless the marina could prove it was free of any negligence, the marina should be held liable as a bailee. However, it was held that because the marina did not have exclusive control over the boat during storage and during launch preparations, no bailment arose.
