A LANDLUBBER'S GUIDE TO RECREATIONAL BOATING LAW 2018

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TABLE OF CONTENTS

> There is nothing--absolutely nothing - half so much worth doing as simply messing about in boats."
> - Kenneth Grahame, *The Wind in the Willows*

I. In General

A. *Themes of Maritime Law*

Maritime law traces its early forms to the Code of Hammurabi, the Phoenicians and the Island of Rhodes.[1] It developed separately from the more familiar common law. The general maritime law is "drawn from state and federal sources" and constitutes "an amalgam of traditional common law rules, modification of those rules, and newly created rules."[2]

There was a debate during the last century as to whether pleasure boats should be included in the maritime jurisdiction. In *Foremost Insurance Co. v. Richardson*[3] and *Sisson v. Ruby,*[4] the Supreme Court held that torts involving pleasure boats were within the maritime jurisdiction and emphasized the need for uniformity in the

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[1] 1 Thomas J Schoenbaum, Admiralty and maritime Law 2 (5th ed. 2011).

[2] *E. River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 865 (1986).

[3] 457 U.S. 668 (1982).

[4] 497 U.S 358 (1990).

application of maritime law to "*all* operators of vessels on navigable waters".[5]

The Supreme Court changed course on the uniformity theme in *Yamaha Motor Corp. v. Calhoun*.[6] There, the Supreme Court rejected the view that federal law was the exclusive basis for recovery, and permitted state law remedies to "supplement" the damages available for death actions. This was true even though the tort liability issues were determined under federal maritime law.[7]

B. *Comparative Fault, Joint & Several Liability and Apportionment of Fault*

Until the Supreme Court decided *United States v. Reliable Transfer Co.*, in collision cases, damages were allocated according to the rules of sole fault and equal division of damages.[8] Where one vessel was solely or predominantly at fault, responsibility could be assigned solely to that vessel. If the court could not determine comparative fault or if both vessels were at fault, the damages were divided equally regardless of which vessel was more at fault.

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[5] *Foremost Ins. Co. v. Richardson*, 457 U.S. at 675.

[6] 516 U.S. 199 (1996).

[7] *Id. at* 200-201.

[8] 421 U.S. 397 (1974). The rule was divided damages established by the Supreme Court in *The Schooner Catharine,* 58 U.S. (17 How.) 170 (1854).

In Reliable Transfer, the Supreme Court adopted allocation of fault in collision cases according to each party's proportionate or comparative share.[9] Liability is divided evenly only where comparative fault cannot be determined. The allocation of fault rule was extended to maritime personal injury actions.[10] The defendants remain jointly and severally liable.[11]

However, the rules for settling maritime cases with multiple defendants are somewhat different. In *McDermott, Inc. v. Am Clyde,* the Supreme Court adopted a proportionate share approach. [12] Actions for contribution are barred and the plaintiff's damages are reduced by the proportionate share of the negligence of the settling parties.[13] Thus, the non-settling defendants pay only their proportionate share of liability for damages. The non-settling defendants bear the burden of presenting evidence at trial to establish the settling defendant's liability.

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[9] *Id*. at 411.

[10] *Leger v. Drilling Well Control, Inc*., 592 F.2d 1246, 1249 (5th Cir. 1979).

[11] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

[12] 511 U.S. 202 (1994).

[13] *Id*. at 217; *Boca Grande Club, Inc., v. Florida Power & Light Company, Inc*., 511 U.S. 222 (1994) ("[A]ctions for contribution against settling defendants are neither necessary nor permitted").

II. General Test For Admiralty Jurisdiction.

A. Does maritime jurisdiction apply in the first place? There is a three-part test: (1) Is a "vessel" involved? (2) did the occurrence take place on "navigable waters?" and (3) did the occurrence "bear a significant relationship to traditional maritime activity?"[14]

1. *What Is a Vessel*?

Admiralty law makes no distinction between commercial and recreational vessels. Congress has defined "vessel" as including "every description of watercraft or artificial contrivance used, or capable of being used, as a means of transportation on water."[15] Therefore, the term "vessel" includes sailboats, motorboats and personal watercraft. One court commented:

> No doubt the three men in a tub would also fit within our definition, and one probably could make a convincing case for Jonah inside the whale.[16]

However, in *Lozman v. City of Riviera Beach, Florida,* the Supreme Court found that a houseboat with a plywood structure, with

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[14] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*., 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S 358 (1990) (Limitation of Liability action arising out of a marina fire starting on a yacht causing damage to other boats and the marina); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) (collision of two pleasure boats on a river in Louisiana); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) (airplane crashed into navigable water on takeoff).

[15] 1 U.S.C.A. §3.

[16] *Burks v. American River Transp. Co*., 679 F.2d 69, 75 (5th Cir. 1982).

an empty bilge space underneath the main floor to keep it afloat, was not a vessel. The Court reasoned:

> Not every floating structure is a "vessel." To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not "vessels," even if they are "artificial contrivance[s]" capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so. Rather, the statute applies to an "artificial contrivance ... capable of being used ... as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). "[T]ransportation" involves the "conveyance (of things or persons) from one place to another."[17]

The Court held that a structure does not fall within the scope of the statutory phrase ("vessel") unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.[18]

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[17] 568 U.S. 115, 121 (2013).

[18] *See also, Armstrong v. Manhattan Yacht Club, Inc.* 2013 WL 1819993 (E.D. N.Y. 2013) (floating clubhouses is not a vessel).

2. *Did the occurrence take place on "navigable waters?"*

The Supreme Court defined "navigable waters" for the first time almost 150 years ago in *The Daniel Ball*, as a waterway that is "navigable when they are used or are susceptible of being used in their ordinary condition, as highways for commerce."[19] Intrastate commerce is not enough.[20] Therefore, if a waterway does not connect to an interstate water highway or to the open sea, it is not navigable. Practically this means that a body of water is "navigable as a matter of law" if it used for interstate commerce. If it is not used, but could be used for interstate commerce, it is "navigable."[21]

Whether a body of water is navigable is a question of fact.[22] If there is a dispute, you may ask the local office of the Army Corp of

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[19] 77 U.S. 557, 563 (1870). *See also, U.S. v. State of Utah,* 283 U.S. 64, 82-83 (1931); *Ex parte Boyer,* 109 U.S. 629, 632 (1884) (a highway for commerce between ports and places in different States).

[20] *See, e.g., Alford v. Appalachian Power Co.*, 951 F.2d 30 (4th Cir. 1991).

[21] *Utah v. U. S.,* 403 U.S. 9 (1971); *U.S. v. State of Utah,* 283 U.S. 64 (1931); *Economy Light & Power Co. v. U.S.,* 256 U.S. 113 (1921).

[22] 1 Thomas J. Schoenbaum, Admiralty and Maritime Law §3-3, at 74 n.13 (3d ed. 2001).

Engineers if they have made a determination of navigability.[23] Their determination, or the determination of any governmental agency, should carry substantial weight with the court. The Corp may provide you with an affidavit stating that the waterway is or is not navigable. The United States Coast Guard definition of navigable waters is that unless Congress has declared waters non-navigable all waters are navigable.[24] Accidents that occur on non-navigable waters are not subject to maritime jurisdiction.

a. Lakes & Rivers

Admiralty jurisdiction in lakes and rivers arises in three types of waterways: those connecting two or more states; those located in a single state but that combine with others to connect two or more states; and those landlocked entirely within a single state. The first two are almost universally found to be within the maritime

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[23] The United States Army Corps of Engineers' definition of navigable waters of the U.S., found at 33 C.F.R. § 329.1, provides:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

[24] 33 C.F.R. §2.05-25 Navigable Waters of the United States; Navigable Waters; Territorial Waters.

jurisdiction.[25] There is admiralty jurisdiction even if the commerce or transit at issue is all in one state.[26] Lakes totally within one state, landlocked lakes, are not within the admiralty jurisdiction.[27] Rivers that were previously navigable but have been dammed up and are no longer navigable are not within the admiralty jurisdiction.[28]

3. *Does that activity "bear a substantial relationship to traditional maritime activity?"*

The Supreme Court has not made a distinction between commercial and pleasure vessels as to this element of the test.[29] The occurrence satisfies this part of the test if (1) it had "the potentially

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[25] *Price v. Price,* 929 F.2d 131 (4th Cir. 1991) (lake on the border of Virginia and North Carolina); *Finneseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983) (lake on the border of Kentucky and Tennessee). *See, generally,* John F. Baughman, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States,* 90 Mich. L. Rev. 1028 n. 149 (1992).

[26] *See In re Garnett*, 141 U.S. 1, 15-17 (1891).

[27] *Stother v. Bren Lynn Corp.,* 671 F. Supp. 1118 (W.D. La.), *aff'd.,*834 F.2d 1023 (5th Cir. 1987); *Minix v. Fellers*, 654 F. Supp. 1127 (N.D. Cal. 1987); *Oseredzuk v. Warner Co*., 354 F. Supp. 543 (E.D. Pa. 1972), *aff'd.,*485 F.2d 680 (3d Cir. 1973), *cert. denied,*415 U.S. 977 (1974); *Doran v. Lee,* 287 F. Supp. 807 (W.D. Pa. 1968); *Macgowan v. Cox*, 487 Fed.Appx. 930, 2012 WL 3892645 (5th Cir. 2012)(Tex.)

[28] *Three Buoys Houseboat Vacations U.S.A. v. Morts*, 878 F.2d 1096 (8th Cir. 1989) *vacated and remanded,*110 S. Ct. 3265, *modified,*921 F.2d 775 (8th Cir. 1990)*), cert. denied,*112 S. Ct. 272 (1991); *Adams v. Montana Power* Co., 528 F.2d 437 (9th Cir. 1975).

[29] *Sisson v. Ruby,* 497 U.S at 364.

disruptive impact" on maritime commerce, [30] and (2) the general nature of the "activity" being conducted at the time of the incident bears a significant relationship to traditional maritime activity.[31]

The requirement of a potentially disruptive impact on maritime commerce is very weak. Judge Scalia argued in *Sisson v. Ruby,* that it should simply be abandoned.[32] Whether there is actual disruption of maritime commerce is not at issue. The incident must be of the type that has the potential to disrupt maritime commerce.[33] The test focuses on the general category rather than the specifics of the incident. Almost all maritime accidents will fulfill this requirement. Rescue or salvage operations; incidents that might leave debris, pollution, or damaged vessels in the water; or that in any other way might have impeded the passage of commercial vessels, would all have the potential to disrupt maritime commerce.

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[30] *Id.* at 362 ("Certainly, such a fire has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels. Indeed, fire is one of the most significant hazards facing commercial vessels.")

[31] Id. at 364 ("Our cases made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose").

[32] *Id.* at 364 n.2.

[33] *Id.* at 363.

The test for whether the occurrence bears a significant relationship to maritime activity does not focus on whether the "particular circumstance of the incident" involved a traditional maritime activity, but rather on the "general conduct from which the incident arose."[34] The relevant activity may be the storage and maintenance of a vessel at a marina on navigable waters,[35] navigation of vessels generally,[36] or air travel (as a substitute for ship travel) over water.[37]

Therefore, docking a vessel at a marina or operating a yacht, motor boat or personal watercraft on navigable waters has a substantial relationship to traditional maritime activity.[38] Similarly, where a guest falls off a boat and drowns the admiralty jurisdiction applies.[39]

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[34] *Id.*

[35] *Id*. at 365.

[36] *Foremost Ins. Co. v. Richardson,* 457 U.S. at 675-677.

[37] *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. at 269-270.

[38] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. at 206.

[39] *Matthews v. Howell*, 359 Md. 152, 171 (2000).

a. Swimmers

Swimmers struck by a moving pleasure boat are within admiralty jurisdiction because the direct cause of the injury is the negligent navigation or operation of the vessel.[40] Swimmers who are injured without involvement of a boat are not within the admiralty jurisdiction.[41]

b. Water-skiers

This issue does not appear settled. For example, in *Southern v. Thompson*,[42] the Fourth Circuit found no admiralty jurisdiction where a water skier sued the towing boat operator for injuries sustained when he was sprayed with water by a second skier being towed by the same boat. The same year, in *Hogan v. Overman,*[43] a different panel of the Fourth Circuit found admiralty jurisdiction where the complaint alleged negligent navigation by the water-skier. With water-skiers, as with swimmers, the key seems to be the allegation of a navigational error.

B. Does a "potential hazard to maritime commerce arise out of [the] activity?"

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[40] *See, e.g., Price v. Price,* 929 F.2d 131, 1991 AMC 2176 (4th Cir. 1991).

[41] *See, e.g., Rubin v. Power Auth. of State of N.Y.,* 356 F. Supp. 1169 (W.D.N.Y. 1973); *Chapman v. City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967).

[42] 754 F.2d 151 (4th Cir. 1985).

[43] 767 F.2d 1093 (4th Cir. 1985).

III. Related Admiralty Matters

A. Must suit be brought in Federal Court?

For most maritime actions, jurisdiction is concurrent in the state and federal court. 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 conferred original jurisdiction over admiralty and maritime cases upon the Courts of the United States. This grant included a significant 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.[44]

So, the exclusivity of the federal courts is limited to those remedies that did not exist at common law, such as vessel arrests and Shipowner's Limitation of Liability actions.

B. Right to a jury

If the Plaintiff brings his claims solely in admiralty in federal court, he has no right to a jury.[45] However, if the plaintiff has an independent basis for subject matter jurisdiction, such as diversity of

[44] The current statement of the federal courts' maritime jurisdiction is found at 28 U.S.C. §1333.

[45] *See, e.g., Cruz v. Hendy International Co., 638 F.2d 719 (5th Cir. 1981).*

citizenship, he may have a jury trial in federal court for *in personam* claims. There is a right to a jury trial in state court.

C. Choice of Law

Federal admiralty law dictates the substantive choice of law if the matter is within the admiralty jurisdiction.[46] Where the state courts share jurisdiction with the federal courts, regardless of which court decides the case, "federal maritime law" applies. The Court, in *Offshore Logistics, Inc. v Tallentine,* explained:

> [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 the substantive remedies afforded by the States conform to governing federal maritime standards.[47]

State substantive law may fill the gaps if it does not conflict with maritime law or "interfere with the uniform working of the maritime

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[46] *Byrd v. Byrd,* 657 F.2d 615, 617 (4th Cir. 1981); *Matthews v. Howell*, 359 Md. 152, 171 (2000); *Pine Street Trading Corp. v. Farrell Lines, Inc.,* 278 Md. 363, 379-80, 364 A.2d 1103, 1114 (1976); *Orient Overseas Line v. Globemaster Baltimore, Inc.,* 33 Md.App. 372, 382 n. 1, 365 A.2d 325, 334 n. 1 (1976) *cert. denied,* 279 Md. 684 (1977).

[47] 477 U.S. 207, 222-23 (1986).

legal system."[48] In some cases, such as the interpretation of insurance contracts, the federal admiralty choice of law is state law, where there exists no judicially established admiralty rule on the issue and no reason to "fashion" one.[49] There is also a role for state law in wrongful death actions brought by passengers and guests (so called "non-seafarers") where the loss is within territorial limits.[50] In those cases, the state wrongful death statute and survival statute may supplement the general maritime law remedies.

IV. Personal Injury and Death Actions

A. *Who May be sued*

The owner, the operator and the boat itself may be sued *in rem* to enforce a maritime lien.[51] Maritime law treats the vessel as a person. It may be sued in rem and may be liable for torts and contracts.[52] In *The Barnstable,* the Supreme Court stated, "the ship itself is to be treated in some sense as a principal, and as personally

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[48] *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990).

[49] *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955).

[50] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. at 629.

[51] 46 U.S.C. §971 *et seq*. *See, e.g., Miles v. M/V Hansa Caledonia,* 245 F. Supp. 2d 1261, 1262 (S.D. Ga. 2002).

[52] *See, e.g., Merchs. Nat'l Bank of Mobile v. Dredge Gen. G.L. Gillespie*, 663 F.2d 1338, 1345 (5th Cir. 1981).

liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer."[53] The personal injury is said to create a maritime lien upon the vessel, which may be seized and held liable to enforce the lien.[54]

Further, boat repairers and manufacturers and product manufacturers may be sued.

B. Duty of Care to Those Aboard a Boat

The duty of care owed depends upon the status of the plaintiff – Jones Act seaman or "non-seafarer". The paid captain or crew on a recreational vessel is a Jones Act seaman.[55] Non-seafarers include passengers, guests or visitors. A passenger is a person who pays for his passage.[56] A "guest" or "visitor" is a person other than a passenger or member of the crew who is aboard with the express or implied permission of the ship owner or operator of the vessel. Someone who pays for his passage on a cruise ship or water taxi is a passenger.[57]

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[53] 181 U.S. 464, 467 (1901).

[54] *Merchs. Nat'l Bank*, 663 F.2d at 1345.

[55] 46 U.S.C.A. § 30104 (formerly cited as 46 App. .U.S.C.A. §688).

[56] *The Vueltabajo,* 163 F. 594 (S.D. Ala. 1908).

[57] Tickets frequently contain limitations of liability and contractual limitations in the time to file suit.

1. Passengers & Guests

The Supreme Court puts passengers, guests, visitors and others collectively into the category of "non-seafarers"; that is "persons who are neither seamen covered by the Jones Act, …nor longshore workers covered by the Longshoremen and Harbor Workers' Compensation Act."[58] For passengers, guests and visitors, the standard is defined by *Kermarec v. Compagnie General Transatlantique,*[59] which held that:

> The owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

The difference between the "reasonable man" standard on land and on a vessel, is more factual than legal. The "reasonable man" standard at sea requires the operator and owner of a recreational boat to exercise good seamanship and the care of a reasonably prudent mariner. This depends upon, among other things, the location of the accident, the type of boat involved, the weather, water and wind conditions, other vessel traffic, the activities of the boat at the time of the accident, the movement of the boat and other vessels, and the movements of those aboard.

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[58] *Yamaha Motor Corp. v. Calhoun*, 516 U.S. at 205 n.2.

[59] 358 U.S. 625 (1959).

The duty of good seamanship may be breached by leaving land without determining the weather conditions, failing to monitor the weather conditions while on the water, neglecting to return to shore in the face of bad weather, failing to warn those aboard of boat movements, overloading the boat with passengers or other heavy cargo, operating the boat while intoxicated with alcohol or drugs, permitting passengers to sit in a dangerous location, permitting an incompetent or inexperienced person to operate the boat, creating an excessive wake, colliding with another boat or jet ski, striking a bridge, dock or other fixed object or grounding a boat.

2. Jones Act Seamen

99% of recreational boating claims involve non-seafarers. Occasionally, you may be confronted with a Jones Act seaman; *e.g.,* a paid captain or a crew member of the other boat involved in a collision with your insured boat. The Jones Act, 46.U.S.C. App. §688, applies to seaman and provides a remedy for injuries or death due to an employer's negligence during employment without regard to where the accident takes place. Jones Act negligence is different from traditional land-based negligence. The Jones Act makes the employer liable in negligence if it contributed to the accident "even in the slightest

degree."[60]

Seaman may also maintain a cause of action for unseaworthiness under the general maritime law.[61] Seaworthiness requires an owner to "furnish a vessel and appurtenances reasonably fit for their intended use." [62] A breach of the warranty of seaworthiness may be:

> slippery decks; a heavy load; a defective hull; defective or damaged equipment or appliances (e.g., engines, generators, pumps, pipes); failure of navigational equipment (but not failure to maintain radar); obstructions on deck; defective hatches; and the possibility of arrest.[63]

Unseaworthiness is distinct from negligence in that seaworthiness is a warranty – the wrongful conduct of the defendant is not relevant. Negligence concerns the reasonableness of the defendant's conduct. A vessel owner owes no duty of seaworthiness to nonseafarers such as guests and passengers aboard the vessel.[64]

Further, seamen have the right to maintenance and cure. "Maintenance" is the right of a seaman to food and lodging if he falls ill

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[60] *Boudoin v. Gaudet Boat Rentals,* 36 F.3d 90 (5th Cir. 1994).

[61] *See, e.g*. *Mitchell v. Trawler Racer, Inc.* 362 U.S. 539 (1960).

[62] *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

[63] Nicolas R. Foster, *The Seaworthiness Trilogy: Carriage of Goods, Insurance and Personal Injury*, 40 SANTA CLARA L. REV. 473, 481-482 (2000).

[64] *See, e.g., Rutledge v. A&P Boat Rentals, Inc.,* 633 F. Supp. 654 (W.D. La. 1986*); Grelewicz v. Kuchta,* 2006 WL 2632071*3 (N.D.Ill.2006).

or becomes injured while in the service of the ship.[65] "Cure" is the right to necessary medical services.

C. Duty of Care to Those on Other Vessels

The captain has a duty to use the care of a reasonably prudent mariner.[66] He must observe "reasonable care and prudence, not only against present dangers, but against impending perils," and to take "seasonable measures of precaution."[67] The standard of care may be set by a statute, such as the Navigational Rules ("rules of the road"),[68] by speed limits, by U.S. Army Corp of Engineers establishing anchorages, or by the custom of reasonably prudent seamanship.

D. Duty to Provide Assistance.

After an accident, the boat operator has an obligation to provide assistance to persons who have been injured or are at risk.[69]

E. Collisions in General.

Collisions are frequently the result of excessive speed, the failure to maintain a proper look out and the consumption of alcohol.

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[65] *The Osceola*, 189 U.S. 158 (1903).

[66] *See, e.g., The Adventuress*, 214 F. 834 (D.C. Mass. 1914). *See generally*, AmJur Boats § 36.

[67] *The Adventuress*, 214 F. at 838.

[68] 33 C.F.R. § 83.01 *et seq*.

[69] 46 U.S.C.A. §2303.

F. Presumptions and Inferences.

The plaintiff has the burden of proving that the defendant vessel was negligent and that its negligence caused the damages. Three presumptions may shift the burden; the Louisiana Rule, the Pennsylvania Rule and the Oregon Rule.

The Louisiana Rule holds that a drifting vessel that causes damage is presumed to be at fault.[70] The vessel owner then has the burden of proving that the "drifting was inevitable accident, or a *vis major*, which human skill and precaution, and a proper display of nautical skill could not have prevented."[71]

The Oregon Rule holds that when a vessel, moving under its own power, strikes a stationary object, there is a presumption that the moving vessel was at fault.[72] This presumption, like the Louisiana *Rule,* may be overcome by a preponderance of the evidence that: (1) the allision was the fault of the stationary object; (2) that the moving

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[70] 70 U.S. 164 (1865).

[71] *Id.* at 173.

[72] 158 U.S. 186 (1945). *Cf., The Louisiana*, 70 U.S. 164 (1865) (the moving vessel drifted rather than moved under its own power into the stationary object.).

vessel acted with reasonable care; or (3) that the allision was an unavoidable accident.[73]

The boat operator may defeat the presumption, for example, where (1) the fixed object is sunken or otherwise, not visible and the operator could not reasonably be expected to know of its location; or (2) where the fixed object is in violation of a statutory duty and is the true cause of the allusion.

Stationary objects, such as bridges[74] and moored vessels must be built, maintained and operated so as not to impede navigation.[75]

Where the presumption is applied, the plaintiff must still prove that the fault of the moving vessel was the legal cause of the damages claimed. There may also be proportionate fault between the operator and the fixed object.

The Pennsylvania Rule states that where a vessel is in violation of a statutory provision designed to prevent collisions, then the vessel owner has the burden of proving, not only that the statutory violation

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[73] *Fischer v. S/Y Neraida,* 508 F. 3d 586, 593 (11th Cir. 2007).

[74] While injuries suffered by bridges over navigable inland waters due to being struck by vessels were not always admiralty or maritime matters, they were made so by Congress in 1948 in the Admiralty Jurisdiction Extension Act (46 U.S.C.A. Appx. §§ 740 *et seq*.).

[75] *See Ana Rosa Inland Authority v. F. Ruston & Son, Inc.,* 303 F.2d 576 (5th Cir. 1962).

did not cause the collision, but also the burden of proving that the violation could not have contributed to the collision.[76]

The Pennsylvania Rule, unlike the Louisiana Rule and the Oregon Rule, not only creates a presumption of fault but also "creates a shift in the burden of proof as to causation."[77] For the Pennsylvania Rule to apply, the Rule violated must be a statutory rule rather than a court-developed rule. The Pennsylvania Rule only applies to collisions.[78] The Pennsylvania Rule was not intended to mandate fault for every technical violation of a maritime rule. The Fifth Circuit observed:

> *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, not merely fault in the abstract.[79]

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[76] *The Pennsylvania*, 86 U.S. 125, 136, (1873).

[77] *Green v. Crow,* 243 F.2d 401, 403 (5th Cir. 1957); *See, e.g., Alaska Packers, Inc. v. O.S. East Point*, 421 F.Supp. 48 (W.D. Wa. 1966).

[78] *Southard v. Lester,* 260 F. App'x 611 (4th Cir. 2008).

[79] *In re Mid-South Towing Co.,* 418 F. 3d 526 (5th Cir. 2005).

To rebut the Pennsylvania Rule, the defense may show that the violation was not relevant to the casualty, that the violation was not the proximate cause of the collision, or that the violation occurred when the vessel was *in extremis.* Even where the Pennsylvania Rule applies, the court may consider the proportions of fault of each party.

Where there is a conflict between the Pennsylvania Rule, the Oregon Rule or the Louisiana Rule, the Pennsylvania Rule prevails.[80]

G. Res Ipsa Loquitur

The Supreme Court defined the doctrine as follows:

> When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such, as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.[81]

The traditional example of *res ipsa loquitur* is where a barrel falls out of a second story warehouse and strikes a passerby.[82] Since the barrel was in the exclusive possession of the occupier of the warehouse, and barrels don't normally fall out of second story windows without

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[80] *The Victor*, 153 F.2d 200, 204 (5th Cir. 1946).

[81] *In San Juan Light & Transit Co. v. Requena*, 224 U.S. 89, 98-99 (1912).

[82] William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 183 (1949).

negligence, the circumstances raise an inference of negligence on the part of the occupier of the warehouse. The doctrine just raises an inference and can be rebutted.[83]

Examples of how the doctrine has been applied by the courts include the following:

- In boat explosion cases, for example, the Courts sometime find *res ipsa loquitur* factually appropriate for application,[84] and other times they find it factually inappropriate.[85]
- Where a water skier was run over by the towing boat it was error not to instruct the jury on *res ipsa loquitur*.[86]
- In several boat fire cases the trial court properly refused to instruct the jury on the doctrine.[87]

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[83] *Petition of Reading,* 169 F Supp. 165(D.C. N.Y 1958); *Deal v. Thrasher* 182 F2d 739 (4th Cir. 1950).

[84] *Petition of Bogan*, 103 F. Supp. 755 (DC NJ 1952).

[85] *The Wheeler-Shipyard Hull, 1 F. Supp. 402* (D.C. N.Y. 1932); *Caplinger v Werner,* 311 S.W. 2d 201 (Ky. 1958).

[86] *Shahinian v. McCormick,* 30 Cal.Rptr. 521 (1963).

[87] *Noble v. Nieznany,* 239 Ga.App. 547 (1999); *Cross v. Roberson,* 2003 WL 22114106 (Cal.App. 4 Dist.)(unreported); *Smith v. Hawthorne Machinery Co.,* 2003 WL 1826274 (Cal App. 2003)(unreported).

- Where a wife claimed her back injury, which occurred when the boat bounced up and down, the court rejected the application of the doctrine.[88]

V. Defenses

A. Comparative Negligence

Comparative negligence applies to personal injury actions brought by guests and passengers. The negligent behavior of the passenger only reduces the amount of the recovery.[89] When the term "contributory negligence" is used in admiralty it refers to mitigation, rather than a bar, to recovery.[90]

B. Assumption of Risk

Assumption of risk is not a defense in admiralty.[91]

C. Last Clear Chance

"Last clear chance" is a common law defense to contributory negligence. It provides that where the defendant has the last clear chance to avoid the harm, the plaintiff's contributory negligence is not

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[88] *Felton v. Felton,* 1999 WL 381814 (4th Cir. 1999)(Md.)(unpublished).

[89] *Nygren v. American Boat Cartage, Inc.,* 290 F. 2d 547 (2d Cir 1061).

[90] *See, e.g. Dubose v. Matson Navigation Co*. 403 F. 2d 875 (9th Cir. 1968).

[91] *DeSole v. U.S.,*1989 WL 201607 (D. Md. 1989), *reversed*, 947 F. 2d 1169 (4th Cir. 1991).

a proximate cause of the accident. Last clear chance is not a defense in admiralty.[92]

D. Statute of Limitations

There is generally a three-year statute of limitations for passengers and guests.[93] However, passenger tickets may contractually limit the time in which to bring suit.

VI. Death Actions

A. History

One hundred years ago, in *The Harrisburg,* the Supreme Court held that the general maritime law provided no remedy for wrongful death.[94] Recovery was permitted under state law wrongful death statutes, at least within territorial limits.[95] Congress reacted to this and similar rulings by enacting two statutes in 1920: The Death on the High

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[92] *Prudential Lines, Inc. v. McAllister Bros., Inc*., 801 F.2d 616 (2d Cir. 1986); *Hercules, Inc. v. Stevens Shipping Co.,* 765 F.2d 1069, 1075 (11th Cir. 1985).

[93] 46 U.S.C.A. § 30106 (formerly cited as 46 App. U.S.C.A. §763a.)

[94] In 1877, the first mate on the schooner Tilton drowned when it collided with the Steamship Harrisburg in Massachusetts territorial waters. In *The Harrisburg,* 119 U.S. 199 (1886), the Supreme Court ruled that wrongful death acts were statutory and may not be created by judicial decree.

[95] *See e.g. The Hamilton,* 207 U.S. 398 (1907).

Seas Act (DOHSA)[96]; and the Jones Act.[97] Neither of these statutes applied to recreational boaters within territorial limits. Hence, there continued to be a gap in federal maritime law, which was filled by the state wrongful death remedies.

In *Moragne v. States Marine Lines, Inc.,*[98] the Supreme Court reversed *The Harrisburg* and held that the general maritime law did provide a remedy for wrongful death.[99] In recognizing a general maritime law cause of action for wrongful death, the Supreme Court reasoned that DOHSA, while "leaving unimpaired" the state remedy within territorial waters, did not preclude judicial recognition of a general maritime law action in accidents occurring in state territorial waters.[100]

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[96] 46 U.S.C.A. § 30301, *et seq*. (formerly cited as 46 App. U.S.C.A. § 761, et seq.)

[97] 46 U.S.C.A. § 30104 (formerly cited as 46 App. U.S.C.A. §688.)

[98] 398 U.S. 375 (1970).

[99] Edward Moragne, a longshoreman was killed while working aboard a vessel in Florida territorial waters. His widow, Petronella Moragne, sued under Florida's wrongful death statute.

[100] "[W]here DOHSA applies, neither state law, *see Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207,232-233 (1986) nor general maritime law, *see Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978) can provide a basis for recovery of loss-of-society damages." *Zicherman v. KAL*, 516 U.S. 217 (1996).

Since *Moragne,* most courts have held that the *Moragne* cause of action preempts state law remedies within territorial waters.[101] Thus, the negligence standard is "reasonable care under the circumstances" set forth in *Kermarec v. Compagnie Generale Transatlantique.*[102] Further, the courts sometimes apply the standards of the Federal Boat Safety Act of 1971, which establishes penalties for negligent or grossly negligent operation of a vessel and for boating while intoxicated. [103]

In *Yamaha Motor Corp. v. Calhoun,* the Supreme Court held that where the decedent died in state territorial waters, the survivors and the estate have the option of pursuing state law wrongful death remedies to supplement general maritime law death actions. [104] Where the decedent died on the high seas (outside of state territorial waters), the DOHSA applies and precludes the application of state law or general maritime law wrongful death remedies.

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[101] *See, e.g. S.S. Helena,* 529 F.2d 744, 753 (5th Cir. 1976); *Nelson v. United States,* 639 F.2d 469, 473 (9th Cir. 1980); *Preston v. Frantz*, 11 F.3d 357 (2d Cir. 1993); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 410-411 (1953); *Carey v. Bahama Cruise Lines,* 864 F.2d 201, 206-208 (1st Cir. 1988); *Capozziello v. Brasileiro*, 443 F. 2d 1157 (2d Cir. 1971) ("That the district court's diversity, rather than its admiralty, jurisdiction had been invoked does not change the applicable [maritime] law");*Shield v. Bayliner Marine Corp,* 822 F.2d 81, 83 (D. Conn. 1993); *Sletten v. Hawaii Yacht*, 1993 WL 643379 (1993); *Churchill v. F/V Fjord,* 857 F.2d 571 (9th Cir. 1988).

[102] 358 U.S. 625 (1959).

[103] 46 U.S.C. §2301, *et seq*.

[104] 516 U.S. 199 (1996).

On remand, the Third Circuit Court of Appeals held that federal choice of law rules govern which state law applies.[105] The court also held that Pennsylvania law, the state of the decedent's residence, governed compensatory damages.[106] Further, Puerto Rican law, the place of the accident, rather than the residence of the decedent, governed punitive damages.[107] Finally, liability is governed by federal maritime law, not state law due to the need for uniformity.[108]

B. Location of Accident & Choice of Law

1. Death on the High Seas Act

If the Plaintiff's decedent died more than a marine league (3 nautical miles) from the shore, DOHSA applies.[109] DOHSA applies to aircraft accidents over navigable waters.[110] DOHSA was amended in 2000 by the Commercial Aviation Exception Act, which applies to commercial air crashes more than 12 nautical miles from shore and provides more generous remedies.

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[105] *Calhoun v. Yamaha Motor Corp*., 216 F.3d at 345.

[106] *Id*. at 340, 347, 351.

[107] *Id*. at 347-348, 351.

[108] *Id*. at 351.

[109] 46 U.S.C.A. § 30302 (formerly cited as 46 App. USCA § 761).

[110] *Dooley v. Korean Air Lines,* 524 U.S. 116 (1998); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978).

DOHSA is just a wrongful death action; it is not a survival action. DOHSA preempts state wrongful death actions. DOHSA beneficiaries include the personal representative of the deceased for the benefit of the spouse, parents, children and dependent relatives. Suit may be brought either in state court or federal court.[111]

a. DOHSA Damages

Damages are limited solely to financial and economic loss for non-seafarers, unless they die in an aviation accident.[112] The Commercial Aviation Exception Act (the "Act"), amends DOHSA to permit emotional hardship, but not punitive damages, for deaths resulting from commercial aviation accidents that occur more than 12 nautical miles from shore. The amendment also provides that state law, federal law, common law or any other applicable law governs those within 12 nautical miles.[113] The Act applies to deaths occurring after 1996. Thus, seaman and recreational boaters killed on the high seas (more than 3 nautical miles from shore) may recover pecuniary damages only.

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[111] *Id.*

[112] *Dooley v. Korean Air Lines,* 524 U.S. 116 (1998).

[113] *Brown v. Eurocopter S.A.,* 111 F.Supp.2d 859, (2000).

Non-seafarers killed on the high seas (more than 12 nautical miles from shore) in commercial aviation accidents may recover, in addition to pecuniary loss, loss of care, comfort and companionship.

2. Death Within Territorial Waters

While the legal standard for substantive liability in maritime personal injury cases is set exclusively by federal maritime law, whether damages available in maritime law may be supplemented with state law remedies remains uncertain.[114] Non-seafarers killed within territorial waters may recover state law elements of damage.[115] The effect of the plaintiff's selection of a general maritime law or state wrongful death action may affect the schedule of beneficiaries, liability and damages. The beneficiaries in a *Moragne* wrongful death action include the personal representative of the decedent and the spouse,

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[114] *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993,* 121 F.3d 1421, 1428 (11th Cir. 1997) (personal injury plaintiffs not entitled to seek nonpecuniary damages under general maritime law); *O'Hara v. Celebrity Cruises, Inc.,* 979 F. Supp. 254, 256 (S.D.N.Y. 1997) ("[T]here is no antagonism to … supplementing federal remedies with those available under otherwise applicable state law.")

[115] *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996)

parents, and dependent children of the decedent.[116]

VII. Personal Injury

Elements of damage for personal injury under maritime law are lost earning capacity, medical and other expenses; and pain and suffering.[117]

Punitive damages are recoverable for negligence where there is proof of "conduct which manifests reckless or callous disregard for the rights of others,… or gross negligence or actual malice or criminal indifference."[118] The seminal case is *Exxon Shipping Co. v. Baker*, where the court defined "reckless" as:

> Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it…Recklessness may consist of

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[116] *See, e.g., Savoie v. Nolty J. Theriot, Inc.,* 396 F. Supp. 973, 976 (E.D. La. 1972); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.* 466 F.2d 903 (8th Cir. 1972); *See, e.g.*; *Brateli v. United States,* 1996 AMC 1980, 1982-85 (D. Alaska) (awarding nonpecuniary damages for nondependent parent beneficiaries in wrongful death cases); *Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F.3d 1084, 1090-93 (2d Cir.1993) *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1060, 127 L.Ed.2d 380 (1994); *Miles v. Melrose,* 882 F.2d 976, 989 (5th Cir.1989), *aff'd sub nom. Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *Anderson v. Whittaker Corp.,* 894 F.2d 804, 811-12 (6th Cir.1990)(financial dependency of parents required).

[117] *Pfeifer v. Jones & Laughlin Steel Corp.,* 678 F.2d 453 (3d Cir. 1982), *vacated*, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983) *disapproved of by Culver v. Slater* Boat Co., 688 F.2d 280 (5th Cir. 1982); Schoenbaum, Admiralty & Maritime Law §5-16 (5th ed. 2011); *Kelly v. Bass Enterprises Prod. Co*., 17 F. Supp. 2d 591, 598 (E.D. La. 1998).

[118] *Protectus Alpha Nav. Co. Ltd. v. North Pac. Gran Growers, Inc*., 767 F. 2d 1379, 1385 (9th Cir. 1985).

> either of two different types of conduct. In one the actor knows, or has reason to know ... of facts which create a high degree of risk of ... harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure.[119] (Internal quotes and citations omitted.)

The Court also held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[120] Further, the Court held that"[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[121]

VIII. Exoneration or Limitation of Liability

A. The Limitation of Liability Act

Congress passed the Limitation of Shipowners' Liability Act in

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[119] 554 U.S. 471, 494 (2008).

[120] *Id. citing State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 501 (2003).

[121] *Id.*

1851.[122] The Act permits the owner of the vessel to limit his liability to the value of his interest in the vessel and her pending freight after a casualty, as long as the loss occurred without the privity or knowledge of the owner. In addition, for personal injuries or loss of life, a floor is set with a separate fund of $420 per gross ton.[123] Pleasure vessels are specifically exempt from this $420 fund.[124] The purpose of the Act is to encourage investment in ship building and maritime commerce by permitting investors to limit their liability to the amount of their investment. [125] This is similar to the purpose of permitting shareholders of a corporation to limit their liability to the amount of their investment. Obviously, this purpose has no application to recreational vessels. Nonetheless, the Act applies to recreational vessels.[126]

B. Who May Limit Liability?

The Limitation Act provides that "the owner of a vessel may bring a civil action in a district court of the United States for limitation of

[122] 46 U.S.C.A. §§30501 et seq. (formerly 46 App. U.S.C.A. U.S.C.App. §181-189).

[123] 46 U.S.C.A. §30506(b).

[124] 46 U.S.C.A. §30506(a).

[125] *See Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 67 (1919).

[126] *See, e.g., Sisson v. Ruby,* 497 U.S 358 (1990).

liability under this chapter."[127] The sole member of a limited liability company which was the title-holder of a vessel was considered the "owner" within the meaning of the Act.[128] "Owner" is defined to include "a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement." That is, the charterer may limit where there is a complete transfer of possession, command, and navigation of a vessel from the owner to the charterer.[129] Thus, a bareboat charterer should be eligible to file under the Act. The charterer is said to be the owner *pro hac vice.* Further, one court denied a motion to dismiss a petition for exoneration or limitation where a son was involved in a collision while operating a vessel owned by his parents.[130] The court reasoned that the "[t]itle ownership is not dispositive of the issue of who is an "owner" for purposes of the Act…."[131] Factors such as who pays for

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[127] 46 U.S.C.A. §30511(a).

[128] *In re Aloha Jetski, LLC*, 920 F. Supp. 2d 1143 (D. Hawaii 2013).

[129] *Complaint of Tom-Mac, Inc*., 76 F.3d 678 (5th Cir. 1996).

[130] *In re Tourtellotte,* 2010 WL 5140000 (D.N.J. Dec. 9, 2010).

[131] *Id*.

storage of the vessel and who skippers the vessel, as well as who has possession and control of the vessel must be considered.[132]

On the other hand, the Eighth Circuit held that a vessel's manager who employed the towboat's crew did not exercise sufficient control or dominion over the vessel to be considered an owner pro hac vice for limitation purposes. [133] Note, the owner may not limit liability for his personal contracts.[134]

C. Privity or Knowledge

Privity or knowledge will be found where the acts of negligence or unseaworthiness that caused the casualty were known or should have been known by the vessel owner at the time the vessel left the dock.[135]

> As used in the statute, the meaning of the words 'privity or knowledge,' evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss,

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[132] *Id*. at *2.

[133] *In re American Milling Co.,* Ltd. 409 F. 3d 1005 (8th Cir. 2005).

[134] *Pendleton v. Benner Line,* 246 U.S. 353 (1918).

[135] *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976), *rehearing denied*, 532 F. 2d 1375 (5th Cir. 1976).

> without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, or constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions.[136]

"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."[137]"Knowledge" includes those faults where the owner was aware of the defect. Privity and knowledge are deemed to exist if knowledge could have been obtained from reasonable inspection.[138] "Privity or knowledge" can be actual or constructive.[139] If a negligent condition could have been discovered by the exercise of reasonable diligence, the court may find constructive

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[136] *Lord v. Goodall, etc., Steamship, Co.*,15 F.Cas. 884 (1877).

[137] *Coryell v. Phipps,* 317 U.S. 406, 411 (1943).

[138] *China Union Lines, Limited v. A. O. Andersen & Co.,* 364 F.2d 769 (5th Cir. 1966); *Complaint of Hercules Carriers, Inc*., 566 F. Supp. 962 (M.D. Fla. 1983), *order aff'd,* 768 F.2d 1558 (11th Cir. 1985); *Panama Canal Co. v. Compania Nacional De Navegacion*, *S.A.,* 463 F. Supp. 330 (D.C.Z. 1978).

[139] *In Re Rhoten, 397 F. Supp. 2d. 151, 165 (D. Mass. 2005), citing Carr v. PMS Fishing Corp.,* 191 F.3d 1 (1st Cir. 1999).

knowledge.[140] However, "mere negligence, pure and simple" is not "privity or knowledge."[141]

Where the owner is aboard he may have difficulty convincing a court that he did not have "privity or knowledge" of the cause of the accident, but it is not necessarily fatal to his limitation petition.[142] Where the owner is not aboard, navigational errors are not attributable to him. However, he may face allegations of negligent entrustment or that he was aware of some unsafe condition.[143]

D. What is A "Vessel"?

Admiralty law makes no distinction between commercial and recreational vessels. Congress has defined "vessel" as including "every description of watercraft or artificial contrivance used, or capable of being used, as a means of transportation on water."[144] The court commented in *Grays Landing Ferry Co. v. Stone,* a case involving a 15-foot rowboat used as a ferry for hire, "neither size, form,

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[140] *Id.*

[141] *Deslions v. LA Compagnie General Transatlantique,* 210 U.S. 95, 122 (1908).

[142] *Cf. In re Cirigliano*, 708 F. Supp. 201, 103 (D. N. J. 1989) (fact that owner is operating the vessel is not sufficient to grant summary judgment to claimant).

[143] *DiNenno v. Lucky Fin Water Sports, LLC*, 837 F.Supp.2d 419 (D.N.J.2011) (Boat rental company defeats negligence entrustment claim).

[144] 1 U.S.C.A. §3

equipment nor means of propulsion are determinative factors."[145] Jet skis too are vessels under the Act.[146] The definition of vessel is evolving. See discussion, *supra,* at p.4-5.

E. Time For Filing

The owner must file a Limitation of Liability proceeding within six months of receipt of the first written notice of claim.[147] A Limitation of Liability action may also be brought as a counterclaim.

F. Venue

The complaint may be filed in any district in which:

1) the vessel has been attached or arrested; or if not,
2) in any district in which the owner has been sued; or if not,
3) in the district in which the vessel may be; or if not,
4) in any district.[148]

G. The Limitation Fund

The vessel owner must tender to the court the value of the vessel in money or bond. Alternatively, the vessel owner may transfer the vessel to a trustee appointed by the court.[149] The value of the vessel is

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[145] 46 F. 2d. 394, 395 (3rd Cir. 1931).

[146] *Id*.

[147] 46 U.S.C.A. § 30511(a).

[148] Fed. R. Civ. P. Supplemental Rule F(9).

[149] 46 U.S.C.A. § 30511(b).

the market value of the vessel after the casualty. It can be established by an affidavit from a marine surveyor.

H. Federal Jurisdiction Only and No Right To A Jury Trial.

Limitation Actions are actions *in rem*. Since the saving to suitors clause does not reach actions *in rem,* state courts do not have jurisdiction over Limitation of Liability actions.[150]

I. Duty To Report.

There is a duty to report marine casualty involving death, serious personal injury, material loss of property, serious injury to a vessel or significant harm to the environment within five days to the U.S. Coast Guard.[151] The Coast Guard has authority to investigate and its investigation may lead to criminal charges.[152] The Coast Guard investigation is not admissible in a civil proceeding.[153]

The National Transportation Safety Board ("NTSB") also has jurisdiction to investigate "any major marine casualty or any casualty involving public and nonpublic vessels."[154] The NTSB and the Coast

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[150] 28 U.S.C.A. § 1333; *Lewis v. Lewis & Clark Marine, Inc*., 531 U.S. 438, 452 (2001).

[151] 46 U.S.C.A. §6101.

[152] 46 U.S.C.A. §6301.

[153] 46 U.S.C.A. §6308.

[154] 49 C.F.R. §§ 8501.15 (2000).

Guard may investigate separately or together.

It is frequently useful to have counsel involved in making the required notification to the Coast Guard and representing the insured at any Coast Guard investigation. A notice drafted by the insured, or a statement from the insured may end your liability defense before it starts.

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