

A Landlubber's Guide to Recreational Boating Law 2013



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The Landlubber's Guide To Recreational Boating Law

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 roots to ancient times and developed separately from the more familiar common law. Article III of the Constitution recognized the importance of maritime law by vesting jurisdiction in the federal courts. In *Southern Pacific Railroad Co. v. Jensen*,¹ *Moragne v. States Marine Lines, Inc.*² and other cases, the Supreme Court made clear that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country."³ This theme of uniformity underlies many of the decisions by both the Supreme Court and the lower courts since *Moragne*.

There was a debate during the last century as to whether pleasure boats should be included in the maritime jurisdiction. In

¹ 244 U.S. 205 (1917).

² 398 U.S. 375 (1970).

³ *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 402 citing *The Lottawanna*, 21 Wall. 558, 575 (1875).

*Foremost Insurance Co. v. Richardson*⁴ and *Sisson v. Ruby*,⁵ the Supreme Court held that torts involving pleasure boats were within the maritime jurisdiction and emphasized the need for uniformity in the application of maritime law to “all operators of vessels on navigable waters”.⁶

In 1996, the Supreme Court changed course in *Yamaha Motor Corp. v. Calhoun*.⁷ There, the Supreme Court rejected the view that federal law was the exclusive basis for recovery, displacing all state wrongful death remedies with those available under the general maritime law.⁸

Thus, the interplay between the themes of uniformity and “the humane and liberal character of proceedings in admiralty”⁹ continues to play out.

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

⁴ 457 U.S. 668 (1982).

⁵ 497 U.S. 358 (1990).

⁶ *Foremost Insurance Co. v. Richardson*, 457 U.S. at 675.

⁷ 516 U.S. 199 (1996).

⁸ *Calhoun*, 516 U.S. at 200-201.

⁹ *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970) quoting *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865).

- a. Until the Supreme Court decided *United States v. Reliable Transfer Co.*, in collision cases, damages were divided equally regardless of relative fault.¹⁰
- b. *Reliable Transfer* adopted allocation of fault according to each party's proportionate or comparative share.¹¹
- c. The allocation of fault rule was extended to maritime personal injury actions.¹²
- d. The defendants remain jointly and severally liable.¹³
- e. In settling maritime cases with multiple defendants, however, the rules are somewhat different.
- f. In *McDermott, Inc. v. AmClyde*¹⁴ the Supreme Court adopted a proportionate share approach. Actions for contribution are barred and the plaintiff's damages are reduced by the proportionate share of the negligence of the settling parties.¹⁵ Thus, the non-settling defendants pay only their proportionate share of liability for damages. The non-settling defendants bear

¹⁰ *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1974).

¹¹ *Reliable Transfer*, 421 U.S. at 411.

¹² *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979).

¹³ *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

¹⁴ 511 U.S. 202 (1994).

¹⁵ *Boca Grande Club, Inc., v. Florida Power & Light Company, Inc.*, 511 U.S. 222 (1994) ("contribution claims settling defendants are neither necessary nor permitted").

the burden of presenting evidence at trial to establish the settling defendant's liability.

II. General Test For Admiralty Jurisdiction.

Does maritime jurisdiction apply in the first place? There is a two part test: (1) the "locality test"; and (2) the "connection" test which has two parts.¹⁶

- The locality test; that is, did the tort occur on *navigable waters or result in injury on land as a result of a vessel on navigable waters?*
- The "connection test" asks:
 - Does a "potential hazard to maritime commerce arise out of [the] activity?"
 - Does that activity "bear a substantial relationship to traditional maritime activity?"¹⁷

¹⁶ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

¹⁷ *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).

A. *The Locality Test*

The locality test requires that a tort occur on "navigable" waters or that an injury on land be caused by a vessel on navigable waters.¹⁸

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."¹⁹ 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.²⁰

However, recently in *Lozman v. City of Riviera Beach, Florida*, 133 S. Ct. 735 (2013), addressed whether a houseboat that was plywood structure with empty bilge space underneath the main floor to keep it afloat is a vessel.

¹⁸ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* supra; *Admiralty Jurisdiction Act*, 46 App.U.S.C.A. § 740.

¹⁹ 1 USCA §3.

²⁰ *Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982)

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.”²¹

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. A floating home moored in a city marina, which was rudderless and incapable of self-propulsion did not qualify.

²¹ Id. At 740-741.

2. Navigable Waters

A waterway is navigable if, in its natural state, it may be used as a highway for interstate commerce.²² Intrastate commerce is not enough.²³ 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 if a body of water is used for interstate commerce it is “navigable as a matter of law.” If it is not used, but could be used for interstate commerce, it is “navigable.”²⁴

Whether a body of water is navigable is a question of fact.²⁵ If there is a dispute, you may ask the local office of the Army Corp of Engineers if they have made a determination of navigability.²⁶ Their determination, or the determination of any

²² *U.S. v. State of Utah*, 283 U.S. 64, 82-83 (1931); *The Daniel Ball*, 77 U.S. 557 (1870); *Ex parte Boyer*, 109 U.S. 629, 632 (1884)(a highway for commerce between ports and places in different States”).

²³ *See, e.g., Alford v. Appalachian Power Co.*, 951 F.2d 30 (4th Cir. 1991).

²⁴ *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).

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

²⁶ The United States Army Corps of Engineers definition of navigable waters of the U.S. is in 33 CFR Part 329 and 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

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.²⁷

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 jurisdiction.²⁸ There is admiralty jurisdiction even if the commerce or transit at issue is all in one state.²⁹ Lakes

the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

²⁷ 33 CFR Sec. 2.05-25 Navigable Waters of the United States; Navigable Waters; Territorial Waters.

²⁸ *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).

²⁹ *See In re Garnett*, 141 U.S. 1, 15-17 (1891).

totally within one state, landlocked lakes, are not within the admiralty jurisdiction.³⁰ Rivers that were previously navigable but have been dammed up and are no longer navigable are not within the admiralty jurisdiction.³¹

B. The Connection Test

1. 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.³²

The test 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."³³

The relevant activity may be the storage and maintenance of a vessel at a marina on navigable waters,³⁴ navigation of vessels

³⁰ *Stoother 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.)

³¹ *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).

³² *Sisson v. Ruby*, 497 U.S. at 364.

³³ *Id.*

³⁴ *Id.* at 365.

generally,³⁵ or air travel (as a substitute for ship travel) over water.³⁶

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.³⁷

Similarly, where a guest falls off a boat and drowns the admiralty jurisdiction applies.³⁸

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.³⁹ Swimmers who are injured without involvement of a boat are not within the admiralty jurisdiction.⁴⁰

b. Water-skiers

This issue does not appear settled. For example, in *Southern v. Thompson*,⁴¹ the Fourth Circuit found no admiralty

³⁵ *Foremost Ins. Co. v. Richardson*, 457 U.S. at 675-677.

³⁶ *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. at 269-270.

³⁷ *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. at 206.

³⁸ *Matthews v. Howell*, 359 Md. 152, 171 (2000).

³⁹ See, e.g., *Price v. Price*, 929 F.2d 131, 1991 AMC 2176 (4th Cir. 1991).

⁴⁰ 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).

⁴¹ 754 F.2d 151 (4th Cir. 1985).

jurisdiction. There 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 a second Fourth Circuit case, *Hogan v. Overman*,⁴² a different panel found admiralty jurisdiction where the complaint alleged negligent navigation. With water-skiers, as with swimmers, the key seems to be the allegation of a navigational error.

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

This is a very weak requirement. Judge Scalia argued in *Sisson*, that it should simply be abandoned.⁴³ 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.⁴⁴ 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

⁴² 767 F.2d 1093 (4th Cir. 1985).

⁴³ *Id.* at 364 n.2.

⁴⁴ *Id.* at 363.

have impeded the passage of commercial vessels, would all have the potential to disrupt maritime commerce.

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. The United States Constitution, Article III, Section 2, vests federal courts with jurisdiction over admiralty and maritime matters. However, the "savings to suitors" clause in the Judiciary Act of 1789 codified at 28 U.S.C. §1333, gives plaintiffs the right to file a claim in a state court instead of a federal court whenever the injured party is seeking a common law remedy.⁴⁵ Therefore, state courts are competent to adjudicate admiralty actions where the defendant is a person (*in personam*) rather than a vessel (*in rem*) and money damages are sought.

⁴⁵ *Auerbach v. Tow Boat U.S.* 303 F.Supp.2d 538, 542 (D.N.J.2004).

B. Right to a jury

If the Plaintiff brings his claims solely in admiralty in federal court, he has no right to a jury.⁴⁶ However, if the plaintiff has an independent basis for subject matter jurisdiction, such as diversity of 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

If the matter is within the admiralty jurisdiction then federal admiralty law dictates the substantive choice of law.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 legal system."⁴⁸ In some cases, such as the interpretation of insurance contracts, state law, rather than federal maritime law, applies where there exists no judicially established admiralty rule on the issue and no reason to

⁴⁶ See, e.g., *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981).

⁴⁷ *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).

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

“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*

1. The Owner, the Operator and the Boat itself may be sued *in rem* to enforce a maritime lien. 46 U.S.C. §§971 et seq.⁵¹

a. 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*⁵³ the Supreme Court stated:

[T]he ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer.” The personal injury is

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 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).

⁵³ 181 U.S. 464, 467 (1901).

said to create a maritime lien upon the vessel, which may be seized and held liable to enforce the lien.⁵⁴

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

B. Duty of Care to those aboard a Boat

1. The Duty of Care depends upon the person's status.

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

2. Passengers & Guests

The Supreme Court puts passengers, guests, visitors and

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

⁵⁵ 46.U.S.C. App. §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.

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 stark. 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, the other vessel traffic, the activities of the boat at the time of the accident, the movement of the boat and other vessels, whether the vessel was moving or anchored, and the movements of those aboard.

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

⁵⁹ 358 U.S. 625 (1959).

The duty of care requires the operator and owner to exercise good seamanship practices and the care of a reasonably prudent mariner at all times. Good seamanship practices or the care of a reasonably prudent mariner depends on the location of the accident, the type of boat involved, the water conditions, the current, weather conditions, other vessel traffic, the activities of the recreational boat at the time of the accident, whether the recreational boat was anchored, the movements of the boat(s) involved in the accident, etc.

The duty of good seamanship may be breached by leaving land without determining the weather conditions, failure to monitor the weather conditions while on the water, or neglecting to return to shore in the face of bad weather, failure 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.

3. Jones Act Seamen

99% of your claims will 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 is "that condition in which a ship should be to enable her to counter whatever perils of the sea a ship of her kind, and laden as she is, may fairly be expected to encounter in performing the voyage concerned."⁶² A breach of the warranty of seaworthiness may be:

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 *E.R. Hardy Ivamy, Marine Insurance* 317 (1974).

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 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

1. The captain has a duty to use the care of a reasonably prudent mariner.⁶⁶ He must observe "reasonable care

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).

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.

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. *Res Ipsa Loquitur*

1. 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.⁶⁹

2. The traditional example of *res ipsa loquitur* is where a barrel falls out of a second story warehouse and strikes a passerby.⁷⁰ Since the barrel was in the exclusive possession of the occupier of the warehouse, and barrels don't normally fall out

⁶⁷ *The Adventuress*, 214 F. at 838.

⁶⁸ 33 U.S.C. §§2001-2073.

⁶⁹ *In San Juan Light & Transit Co. v. Requena*, 224 U.S. 89, 98-99 (1912)

⁷⁰ William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 183 (1949).

of second story windows without negligence, the circumstances raise an inference of negligence on the part of the occupier of the warehouse.

3. Examples include the following:

a. In boat explosion cases, for example, the Courts sometime find *res ipsa loquitur* factually appropriate for application,⁷¹ and other times they find it factually inappropriate.⁷²

b. In a case where a water skier was run over by the towing boat it was error not to instruct the jury on *res ipsa loquitur*.⁷³

c. In several boat fire cases the trial court properly refused to instruct the jury on the doctrine.⁷⁴

d. Where a wife claimed her back injury, which occurred when the boat bounced up and down,

⁷¹ *Petition of Bogan*, 103 F. Supp 755 (DC NJ 1952).

⁷² *The Wheeler-Shipyard Hull*, 1 F. Supp. 402 (D.C. N.Y. 1932); *Caplinger v Werner*, 311 S.W. 2d 201 (Ky. 1958).

⁷³ *Shahinian v. McCormick*, 30 Cal.Rptr. 521 (1963).

⁷⁴ *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).

the court rejected the application of the doctrine.⁷⁵

e. The doctrine just raises an inference and can be rebutted.⁷⁶

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.⁷⁷ When “contributory negligence” is applied in admiralty it is used to mitigate rather than bar recovery.⁷⁸

B. *Assumption of Risk*

Assumption of risk is not a defense in admiralty.⁷⁹

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

⁷⁵ *Felton v. Felton*, 1999 WL 381814 (4th Cir. 1999)(Md.)(unpublished).

⁷⁶ *Petition of Reading*, 169 F Supp 165(D.C. N.Y 1958); *Deal v. Thrasher* 182 F2d 739 (4th Cir. 1950).

⁷⁷ *Nygren v. American Boat Cartage, Inc.*, 290 F. 2d 547 (2d Cir 1061).

⁷⁸ *See, e.g. Dubose v. Matson Navigation Co.* 403 F. 2d 875 (9th Cir. 1968).

⁷⁹ *DeSole v. U.S.*, 1989 WL 201607 (D. Md. 1989), *reversed*, 947 F. 2d 1169 (4th Cir. 1991).

contributory negligence is not a proximate cause of the accident.

Last clear chance is not a defense in admiralty.⁸⁰

D. Statute of Limitations

There is generally a three year statute of limitations for passengers and guests.⁸¹ 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.⁸² Recovery was permitted under state law wrongful death statutes, at least within territorial limits.⁸³ Congress reacted to this and similar rulings by enacting two statutes in 1920: the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 et seq.; and the Jones Act, 46 U.S.C. §688. Neither of these statutes applied to recreational boaters within territorial

⁸⁰ *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).

⁸¹ 46 U.S.C. §763a.

⁸² 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.

⁸³ See e.g. *The Hamilton*, 207 U.S. 398 (1907).

limits. Hence, there continued to be a gap in federal maritime law, which was filled by the state wrongful death remedies.

In 1970, in *Moragne v. States Marine Lines, Inc.*⁸⁴ the Supreme Court reversed earlier decisions (*The Harrisburg, supra*) and held that the general maritime law did provide a remedy for wrongful death.⁸⁵ 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.⁸⁶

Since *Moragne*, most courts have held that the *Moragne* cause of action preempts state law remedies within territorial waters.⁸⁷ Thus, the negligence standard is "reasonable care under

⁸⁴ 398 U.S. 375 (1970).

⁸⁵ Edward Moragne, a longshoreman was killed while working aboard a vessel in Florida territorial waters. His widow, Petronella Moragne, brought suit under Florida's wrongful death statute.

⁸⁶ "[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).

⁸⁷ 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,

the circumstances” set forth in *Kermarec v. Compagnie Generale Transatlantique*.⁸⁸ Further, the courts sometimes apply the standards of the Federal Boat Safety Act of 1971,⁸⁹ which establishes penalties for negligent or grossly negligent operation of a vessel and for boating while intoxicated.⁹⁰

In *Yamaha Motor Corp. v. Calhoun*⁹¹, 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. 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. On remand, the Third Circuit Court of Appeals held that federal choice of law rules govern which state law applies.⁹² The court also held that Pennsylvania law, the state of the decedent’s

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).

⁸⁸ 358 U.S. 625 (1959).

⁸⁹ 46 U.S.C. §2301 *et seq.*

⁹⁰ 46 U.S.C. §2302 (a) (b) & (c).

⁹¹ 516 U.S. 199 (1996).

⁹² *Calhoun v. Yamaha Motor Corp.*, 216 F.3d at 345.

residence, governed compensatory damages.⁹³ Further, Puerto Rican law, the place of the accident, rather than the residence of the decedent, governed punitive damages.⁹⁴ Finally, liability is governed by federal maritime law, not state law due to the need for uniformity.⁹⁵

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 miles) from the shore, the DOHSA applies.⁹⁶ The Supreme Court somewhat unexpectedly applied DOHSA to an aircraft accident over navigable waters. 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.

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

⁹³ *Id.* at 340, 347, 351.

⁹⁴ *Id.* at 347-348, 351.

⁹⁵ *Id.* at 351.

⁹⁶ 46 U.S.C.S. Appx. §§ 761 et seq.

relatives. Suit may be brought either in state court or federal court.⁹⁷

a. DOHSA Damages

Damages are limited solely to financial and economic loss for non-seafarers, unless they die in an aviation accident.⁹⁸ 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 provided that state law, federal law, common law or any other applicable law governs those within 12 nautical miles.⁹⁹ 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.

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.

⁹⁷ *Id.*

⁹⁸ *Dooley v. Korean Air Lines*, 524 U.S. 116 (1998).

⁹⁹ *Brown v. Eurocopter S.A.*, 111 F.Supp.2d 859, (2000).

2. Death Within Territorial Waters

Non-seafarers killed within territorial waters may recover state law elements of damage.¹⁰⁰ The effect of the plaintiff's selection of a general maritime law or state wrongful death action may effect 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, parents, and dependent children of the decedent.¹⁰¹

VII. Personal Injury

Pecuniary damages are recoverable; e.g., medical expenses¹⁰² and lost wages -- past and future.¹⁰³

Punitive damages are recoverable for negligence where there is proof of "conduct which manifests reckless or callous

¹⁰⁰ *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996)

¹⁰¹ 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).

¹⁰² See e.g. *Sweeney v. Car/Puter Intern. Corp.*, 521 F.Supp. 276 (D. S.C. 1981); *Schumacher v. Cooper*, 850 F. Supp. 438, 449 (D. S.C. 1994); *Todd v. Schneider*, 2003 WL 23514560 (D.S.C. 2003).

¹⁰³ See, e.g. *Sweeney v. Car/Puter Intern. Corp.*, 521 F.Supp. 276, 287 (D. S.C. 1981).

disregard for the rights of others,... or gross negligence or actual malice or criminal indifference.”¹⁰⁴ The seminal case is *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), 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 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.¹⁰⁵ (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.”¹⁰⁶ Further, the Court held that “[w]hen compensatory damages are substantial, then a

¹⁰⁴ *Protectus Alpha Nav. Co. Ltd. v. North Pac. Gran Growers, Inc.*, 767 F. 2d 1379, 1385 (9th Cir. 1985).

¹⁰⁵ 554 US at 494.

¹⁰⁶ *Id.* citing *State Farm Mut. Automobile Ins. Co.. v. Campbell*, 538 U.S. 408, 501 (2003).

lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹⁰⁷

VIII. Collision And Allision

A. Definition of terms.

- a. A “collision” occurs when two moving bodies encounter each other.
- b. An “allision” occurs when one moving body encounters a stationary object, such as a moored vessel, a bridge or a channel marker.

B. Duty of Care.

- a. A vessel owner can be held liable *in personam* and the vessel can be held liable in rem.
- b. Liability for collisions is based upon general concepts of:
 1. prudent seamanship and reasonable care,
 2. statutory and regulatory rules governing the movement of vessels (this may include state or local rules provided they do not conflict with federal statutes), and

¹⁰⁷ *Id.*

3. recognized customs and usages (provided they do not conflict with state or federal law).¹⁰⁸
- c. The most frequent basis of liability is the violation of the “rules of the road”. The International Rules were developed by Treaty.¹⁰⁹ The Inland Rules apply inside the lines of demarcation set by the Coast Guard.¹¹⁰ The International Rules and the Inland rules are for the most part uniform.
- d. “When ships get into trouble on the water, there are many wise men on shore.”¹¹¹

C. Presumptions and Inferences.

- a. The plaintiff has the burden of proving that the defendant vessel was negligent and that its negligence caused the damages.
- b. Where a vessel was in breach of a statute or regulation, under the Pennsylvania Rule it has the burden of proving that the violation was not and

¹⁰⁸ Schoenbaum, Admiralty & Maritime Law §13-1 (4th ed. 2004).

¹⁰⁹ International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§1601-1608.

¹¹⁰ 33 U.S.C. §§2001-2038.

¹¹¹ Schoenbaum, Admiralty and Maritime Law §14-1 p.87 (4th ed. 2004).

could not have been a contributing cause of the collision.¹¹²

- i. The impact of the *Pennsylvania Rule* is that that it “creates a shift in the burden of proof as to causation.”¹¹³
- ii. For the *Pennsylvania Rule* to apply, the rule violated must be a statutory rule rather than a court-developed rule.
- iii. The *Pennsylvania Rule* only applies to collisions.¹¹⁴
- iv. 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

¹¹² *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

¹¹³ *Green v. Crow*, 243 F.2d 401, 403 (5th Cir. 1957); *See, Alaska Packers, Inc. v. O.S. East Point*, 421 F.Supp. 48 (W.D. Wa. 1966).

¹¹⁴ *Southard v. Lester*, No. 07-1105 (4th Cir. 2008).

proximate cause of the collision, not merely fault in the abstract.¹¹⁵

- v. 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*.
- c. In collision cases, the *Oregon Rule* states that when a moving vessel moving under its own power that strikes a stationary object, there is a presumption that the moving vessel was negligent.¹¹⁶ The *Louisiana Rule* applies the same presumption to a drifting vessel.¹¹⁷
- d. The presumptions of fault under the *Oregon Rule* and the *Louisiana Rule* may be overcome by a preponderance of the evidence that (1) the collision was the fault of the stationary object; (2) that the

¹¹⁵ *In re Mid-South Towing Co.*, 418 F. 3d 526 (5th Cir. 2005).

¹¹⁶ *The Oregon*, 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.

¹¹⁷ 70 U.S. 164 (1865).

moving vessel acted with reasonable care; or (3) that the allusion was an unavoidable accident.¹¹⁸

- i. The boat owner may defeat the presumption, for example, where (1) the fixed object is sunken, 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.
- e. Stationary objects, such as bridges¹¹⁹ and moored vessels must be built, maintained and operated so as not to impede navigation.¹²⁰
- f. Where there is a conflict between the *Pennsylvania Rule*, the *Oregon Rule* or the *Louisiana Rule*, the *Pennsylvania Rule* prevails.¹²¹

¹¹⁸ *Fischer v. S/Y Neraida*, 508 F. 3d 586, 593 (11th Cir. 2007).

¹¹⁹ 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.).

¹²⁰ See *Ana Rosa Inland Authority v. F. Ruston & Son, Inc.*, 303 F.2d 576 (5th Cir. 1962).

¹²¹ *The Victor*, 153 F.2d 200, 204 (5th Cir. 1946).

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.¹²²

E. Rules of the Road.

a. There are four parts to the Rules of the Road:

- i. General:
- ii. Steering and Sailing Rules:
- iii. Lights & Shapes:
- iv. Sound and Light Signals.

b. General Rules.

i. The General Prudential Rule is the most important rule.

1. The captain is responsible not only for complying with the rules, but avoiding collision.
2. Compliance with the rules is not enough
3. This rule is codified in Rule 2(a).¹²³

ii. *In Extremis* rule:

¹²² 46 U.S.C. section 2303.

¹²³ See Inland Navigational Rules Act of 1980, 33 U.S.C. §2002 (a) (2000).

[W]here one ship has, by wrong manoeuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manoeuvred with perfect skill and presence of mind.¹²⁴

1. This rule has been codified in Rule

2(b).¹²⁵

c. Rules of Navigation -- Steering and Sailing Rules.

i. Rules 4-10 Conduct of Vessels in Any Condition of Visibility.

1. Rule 5 requires vessels to maintain a proper lookout by sight, sound and "all available means appropriate."

2. Rule 6 requires vessels to proceed at a "safe speed."

3. Rules 7 and 8 each require each vessel to use "all available means" to determine if a risk of collision exists and to take action to avoid collision.

¹²⁴ *The Blue Jacket*, 144 U.S. 371, 392 (1892).

¹²⁵ See Inland Navigational Rules Act of 1980, 33 U.S.C. §2002 (b) (2000).

4. Rule 9 & 10 provide the procedure in a narrow channel or a vessel traffic separation scheme.¹²⁶

ii. Rules 11-18 Conduct of Vessels in Sight of One Another.

1. These rules outline the rules where two vessels are in sight of each other in an "overtaking", "head-on", or "crossing" situation.

iii. Rule 19 Conduct of Vessels in Restricted Visibility.

1. The vessel is required to proceed at a safe speed and have her engines ready for immediate application of full power. Each vessel is also required to attend to radar and sound signals. Further, the rule outlines course alternatives in the event a close-quarters situation develops.

¹²⁶ A traffic separation scheme is a system of routing devised to allow heavily trafficked ports to avoid collision between vessels. They have been described as the maritime counterpart of air traffic control patterns.

iv. Definitions.

1. Stand-on boat: The boat that should maintain its course and speed.
2. Give-way boat: The boat that must take early and substantial action to avoid collision by stopping, slowing down or changing course.

v. Pecking Order.

1. A vessel not under command, such as an anchored or disabled vessel.
2. A vessel restricted in its ability to maneuver, such as a vessel towing, laying cable or picking up navigation.
3. A vessel constrained by draft, such as a large ship in a channel.
4. Fishing vessels.
5. Sailboats – under sail only-not using engine
6. Power boats.

vi. Meeting Head-on: Power vs. Power.

1. Neither vessel is the stand-on boat.
Both should keep to the starboard
(right).

vii. Meeting Head-on: Power vs. Sail.

1. The powerboat is the give-way boat.
The sailboat is the stand-on boat.

viii. Crossing Situations: Power vs. Power.

1. The vessel on the port (left) is the give-way boat.
2. The vessel on the starboard (right) is the stand-on boat.

ix. Crossing Situations: Power vs. Sail.

1. The power boat is the give-way boat.
2. The sailboat is the stand-on boat.

x. Overtaking.

1. Power vs. Power.
 - a. The vessel which is overtaking is the give-way boat.
 - b. The vessel being overtaken is the stand-on boat.

2. Power vs. Sail.

- a. The overtaking vessel is the give-way vessel.
- b. The vessel being overtaken is the stand-on boat.

xi. Sailboat Priority Generally.

1. Determined by position with relationship to the wind.
2. The windward side is the side opposite to that on which the mainsail is carried.

xii. Sailboat Priority – Wind on Different Sides.

1. When each has the wind on a different side, the vessel which has the wind on the port side shall keep out of the way of the other.

xiii. Sailboat Priority – Wind on Same Side.

1. When both have the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

xiv. Sailboat Priority – Wind Undetermined.

1. If a vessel with the wind on the port side sees a vessel to windward and cannot determine with certainty whether the other vessel has the wind on the port or the starboard side, she shall keep out of the way of the other.

d. Rules 20-37: Concerning Vessel Lights, Signal Shapes, and Sounds.

- i. The rules specify the color, location and intensity of each light.
- ii. Require masthead light, stern light and red port and green starboard.
- iii. What the lights tell the approaching vessel.
 1. By observing red and green side lights and the bow light you can tell the other boat's course.
 2. If you can see all three lights, the other boat is approaching head on.
 3. If you can only see the red side light, the other vessel is proceeding to the observer's port side.

4. If only the green side light is visible,
then the other vessel will pass to the
starboard.

F. Collisions In General.

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

G. Apportionment of Liability.

Liability for collision is apportioned based upon each
parties' percentage of fault. Prior to *United States v.*
Reliable Transfer Co.,¹²⁷ the rule was divided damages
established by the Supreme Court in *The Schooner*
Catharine.¹²⁸ Under the divided damages rule, a court
would aggregate the loss or damage to both vessels and
divide them equally.¹²⁹

a. *Reliable Transfer* adopted allocation of fault
according to each party's proportionate or
comparative share.¹³⁰

¹²⁷ *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

¹²⁸ 58 U.S. (17 How.) 170 (1854).

¹²⁹ *United States v. Reliable Transfer Co.*, *supra*.

¹³⁰ *Reliable Transfer*, 421 U.S. at 411

IX. Exoneration or Limitation of Liability

A. *The Limitation of Liability Act*

Congress passed the Limitation of Shipowners' Liability Act in 1851.¹³¹ 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.¹³² Pleasure vessels are specifically exempt from this \$420 fund.¹³³ 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.¹³⁴ This is similar to the purpose of permitting shareholders of 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.¹³⁵

¹³¹ 46 USC §§30501 et seq. (formerly 46 U.S.C.App. §181-189).

¹³² 46 USC §30506(b).

¹³³ 46 USC §30506(a).

¹³⁴ See *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 67 (1919).

¹³⁵ See, e.g., *Sisson v. Ruby*, 497 U.S. 358 (1990).

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 liability under this chapter."¹³⁶ 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.¹³⁷ "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.¹³⁸ Thus, a bareboat charterer should be eligible to file under the Act. The charter is said to be the owner *pro hac vice*. Further, one court denied a motion to dismiss a petition for exoneration of limitation where William Tourtellotte was involved in a collision while operating a vessel owned by his parents.¹³⁹ The court reasoned that the "[t]itle ownership is not dispositive of the issue of who is an "owner" for purposes of the Act..."Factors such as who pays

¹³⁶ 46 U.S.C. App. §30511(a).

¹³⁷ *In re Aloha Jetski, LLC*, ___ F. Supp. 2d ___ 2013 WL 391141 (D. Hawaii 2013)

¹³⁸ *Complaint of Tom-Mac, Inc.*, 76 F.3d 678 (5th Cir. 1996).

¹³⁹ *In re Tourtellotte*, 2010 WL 5140000 (D.N.J. Dec. 9, 2010).

for storage of the vessel and who skippers the vessel, as well who has possession and control of the vessel” must be considered.¹⁴⁰

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.¹⁴¹). Note, the owner may not limit liability for his personal contracts.¹⁴²

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.¹⁴³

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

¹⁴⁰ 2010 WL at *2.

¹⁴¹ *In re American Milling Co., Ltd.* 409 F. 3d 1005 (8th Cir. 2005).

¹⁴² *Pendleton v. Benner Line*, 246 U.S. 353 (1918).

¹⁴³ *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976), rehearing denied 532 F.2d 1375 (5th Cir. 1976).

loss, 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.¹⁴⁴

So the owner must have actually participated in a negligent act to be in "privity." "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."¹⁴⁵"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.¹⁴⁶ "Privity or knowledge" can be actual or constructive.¹⁴⁷ If a negligent condition could have been discovered by the exercise of reasonable diligence, the court may

¹⁴⁴ *Lord v. Goodall, etc., Steamship, Co.*, 15 F.Cas. 884 (1877).

¹⁴⁵ *Coryell v. Phipps*, 317 U.S. 406, 411 (1943).

¹⁴⁶ *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).

¹⁴⁷ *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).

find constructive knowledge.¹⁴⁸ However, “mere negligence, pure and simple” is not “privity or knowledge.”¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹

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.”¹⁵² The court commented in *Grays Landing Ferry Co. v.*

¹⁴⁸ *Id.*

¹⁴⁹ *Deslions v. LA Compagnie General Transatlantique*, 210 U.S. 95, 122 (1908)

¹⁵⁰ *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).

¹⁵¹ *DiNunno v. Lucky Fin Water Sports, LLC*, 837 F.Supp.2d 419 (D.N.J.2011) (Boat rental company defeats negligence entrustment claim).

¹⁵² 1 USCA §3

Stone,¹⁵³ a case involving a 15 foot rowboat used as a ferry for hire, “neither size, form, equipment nor means of propulsion are determinative factors.”¹⁵⁴ Jet skis too are vessels under the Act.¹⁵⁵ 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.¹⁵⁶ 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.

Federal Rules of Civil Procedure, Supplemental Rule F(9)

G. The Limitation Fund

¹⁵³ 46 F. 2d 394 (3rd Cir. 1931).

¹⁵⁴ 46 F. 2d. at 395.

¹⁵⁵ *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1229-1230 (11th Cir. 1990).

¹⁵⁶ 46 U.S.C.A. § 30511(a).

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.¹⁵⁷ The value of the vessel is 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.¹⁵⁸

X. Investigative Checklist

This checklist lists some general information you may need for all accidents and some questions directed at specific categories of loss.

A. General Statement

1. Happening of the accident
2. Damages

B. Vessel, parties and witnesses

1. Boat description: type, make, year, length and configuration of boat
 - a. Safety equipment
 - b. Inspections

¹⁵⁷ 46 U.S.C.A. § 30511(b).

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

- c. Coast Guard Auxiliary courtesy inspections
- 2. Names, ages, addressees and telephone numbers of the people involved (make certain that you have full names and good addresses for all persons involved)
 - a. Relationship of each person to each vessel
 - b. Ownership of the vessel
 - i. Names and addresses of all persons with an ownership interest and a description of the interest owned by each
 - c. Guests
 - d. Passengers (those who pay for their passage)
 - e. Paid crew (seaman)
- 3. State registration or federal documentation of the vessel
 - a. The documentation number and person designated as master of the vessel
 - b. If registered under a state numbering act, provide
 - i. The name of the state that issued the number
 - ii. The registration number
 - iii. The name and address of the person designated as the registered owner
- 4. Insurers
 - i. Primary
 - ii. Excess
 - iii. Homeowners' policy
- 5. Operator's previous boating experience, record and education
 - a. Age and general education
 - b. Special training or instruction
 - c. Licenses (none required for vessels less than 65 feet unless it is carrying passengers for hire. However, still very useful to know)

- d. Hours of experience in operating the boat involved in this accident
- e. Hours of experience in operating other boats
- f. Size and description of each boat
- g. Dates and places of operation
- h. Types of waters (rivers, lakes, bays, open-ocean)
- i. Other accidents involving the operation of a boat
 - i. date, time and nature of such accident
 - ii. persons involved
 - iii. claim, suit settlement or judgment
- j. Ticket or citation by marine police or Coast Guard
- 6. Alcoholic beverages or drugs (including prescription drugs) on board. Alcohol consumed within twenty four hours
- 7. Instructions and warnings given to guests; *e.g.* don't stand up in a small boat, how to use life saving equipment
- 8. Safety check on equipment before leaving the slip

C. Location of Accident and Conditions

- 1. Itinerary of vessel from start of the voyage to location of the accident
 - a. Where was the boat docked
 - b. Where was the boat taken after the accident
 - c. Familiarity with the area
 - d. Name of the body of water where the accident occurred
 - i. Ocean, tidal waters or non-tidal waters
 - e. Time and place of the beginning of the trip
 - f. Location of any stops
 - g. Time and duration of any stop
 - h. Destination

- i. Estimated time of arrival
- 2. Charts
 - a. showing depth, channels, landmarks, aids to navigation restricted or prohibited areas
 - b. Open, semi-protected, or protected waters
 - c. Direction and rate of current
 - d. Tides
 - e. Speed limits
 - f. Buoys, signs or other indications in area
 - g. Customary use of area
- D. Weather and sea conditions
 - 1. Did the operator check the weather forecast before leaving the dock
 - 2. Obtain weather bureau records
 - a. Location of reporting stations
 - b. Storm warnings
 - c. Wind velocity and direction
 - 3. What were the weather and sea conditions at the start of the trip
 - a. Clear, foggy, rainy, snowy and other
 - b. Visibility: good, fair, or poor (Rule 6, reduced visibility requires reduced speed)
 - 4. Water: calm, rough, or moderate
 - 5. Direction and approximate speed of current
 - 6. Wind conditions: light, moderate, strong or storm
 - 7. What were the weather and sea conditions immediately prior to the accident
 - a. Same as above
 - 8. The weather and sea conditions at the time of the accident
 - a. Same as above.

E. Bodily Injury Accidents

1. Relationships between those involved
 - a. Family, romantic, friends, coworkers, business, employee-employer
2. Purpose of the day's activities; *e.g.* cruise, fish, water ski, recreational or business purpose
3. Movement aboard the vessel
 - a. Location of the injured person (and all others) on the vessel prior to the accident
 - b. Movement of the injured person at the time of the accident
 - c. Movement of the injured person as a result of the accident
4. Instructions and warnings given to the injured person
5. Slip & Falls
 - a. Condition of vessel generally
 - b. Non-skid decks
 - c. Foreign substance on the deck
 - d. location and nature of ladders
 - e. Exact location of the fall
 - f. Shoes: nonskid soles, business shoes

F. Explosions/Fires

1. Propulsion System
 - a. Engine and type of fuel used for engine
 - b. Method of ventilation of bilges and other enclosed areas
 - c. Date fuel lines were last inspected and by whom
 - d. Fuel tanks type and design
 - i. Size, number and location
 - ii. Last inspected
 - iii. Were tanks equipped with vent pipe

- e. Date tank was last filled
- f. Inspections
- g. Maintenance/repair history

2. Stove

- a. Type, make, condition
 - i. If installed after boat manufacture, identity of installer and date installed
- b. Type of fuel used
- c. Location of fuel tank
- d. Ventilation
- e. Last inspected
- f. Prior problems with stove
- g. When was stove last used and by whom

3. Electrical system

- a. When installed
- b. Who installed it
- c. Subsequent modifications
- d. Prior difficulty
- e. When last inspected
- f. Battery & charging device history

4. Fire Control Devices

- a. Portable or fixed
- b. Type, size
- c. Last date inspected

G. Sinkings

- 1. Repair record of vessel
- 2. Places to look
 - a. Shaft log: The hole where the drive shaft goes through the bottom with an inboard propulsion system. The stuffing box is on the inboard side of the shaft log and keeps the water from flooding the

boat.

- b. Through-hull fittings are opened and closed by ball seacocks (bronze or plastic valves) or gate-valves that use sliding gates
- c. Mufflers: Backfires can blow a hole in a plastic muffler. Corrosion can eat a hole in an aluminum muffler. Electrolysis can eat a hole in a stainless steel muffler.
- d. Outdrive Boots: rubber boots subject to deterioration
- e. Other Through-hull fittings below the water line
 - i. Transducers
 - ii. Raw water intake strainers

H. Drowning

- 1. Lifesaving devices available
- 2. Personal Flotation Devices (PFD): Type I through V

I. Night-time Collisions

- 1. Lights: What lights were being displayed by each vessel at the time of the collision
- 2. Other lights on in the cabin, wheelhouse, or on deck
- 3. Color, location and intensity of each light
- 4. Note: The required lights for power-driven vessels underway are described by Rule 23
 - a. Displaying other lights which may be mistaken for the prescribed lights is prohibited by Rule 20
 - b. By observing red and green side lights and the bow light you can tell the course of the other boat
 - c. By observing the lights on the other boat along with your boat's course and speed, you can determine the danger of collision
- 5. What lights were observed on the other vessel
- 6. Was the red sidelight visible to those aboard your vessel

7. Note: All vessels approaching from “two points abaft¹⁵⁹ the starboard beam”¹⁶⁰ are privileged boats. Every forty-five degrees of direction are divided into 4 “points”. So a vessel just to the stern of the widest part of the boat to the bow on the right hand side is privileged.
- a. This is the “danger zone” The vessel in whose danger zone the vessel approaches must take any action necessary to avoid a collision.
 - i. The red and green lights are like traffic signals. The green light means you have the right of way and the operator must maintain his course. The red light means you are in the danger zone and must avoid the collision. When the red sidelight is visible in this zone it indicates that the other vessel is approaching from the starboard and has the right-of-way.
 - b. If the red light was visible, state:
 - i. how long before the collision
 - ii. evasive action taken
 - c. Whistle signals (these signals are more honored in the breach than the observance)
 - i. Did anyone aboard your vessel hear the whistle signal?
 - ii. Describe the signal.
 - iii. Did your operator answer?
 - iv. Did anyone hear a subsequent four (4) blast signal?
8. Did anyone in the boat indicate that he or she was apprehensive in any way? If so state:
- a. The identity of the person making the complaint
 - b. The substance of the statement or complaint

¹⁵⁹ Astern.

¹⁶⁰ the extreme width of a vessel.

- c. How long before the accident was the complaint made
 - d. Location and situation of the boat at the time of the complaint.
- J. Boat Operators: Each operator of the boat on the day of the accident:
- 1. Name and address
 - 2. Experience
 - a. With boats in general
 - b. With similar boats or this boat.
 - 3. Licenses. The Federal Boat Safety Act of 1971 and other laws require the licensing of commercial vessel operators.
 - a. There are two categories of licenses: vessels carrying six passengers or fewer and one for vessels carrying six passenger or more.
 - i. The Six Pack license: "Operator of Uninspected Passenger Vessels License" permits the holder to operate a vessel carrying 6 or fewer passengers. See 46 CFR 10.467.
 - ii. The Master's upgrade is by tonnage (25, 50 or 100 gross tons).
 - iii. Master's upgrade permits the operation of inspected as well as uninspected vessels.
 - 4. Whether the operator was the owner; if not, whether he operated the boat with the owner's permission.
 - 5. The time and place where the helmsman began operating the boat.
 - 6. The time and place he terminated his operation.
 - 7. Whether the boat experienced and mechanical malfunctions or problems of any type whatsoever while he operated the boat.
 - 8. If a sailboat, was it under sail, under power, or both?

- K. Damage to vessels.
1. Point of impact of the vessels on each other?
 2. What damage was sustained to each vessel?
 3. Has either vessel been repaired? (When two vessels are on an intersecting course the vessel that has the other vessel on its starboard side must keep out of the way. Rule 15. Therefore, the damage may be important in determining liability).
- L. What was the compass bearing at the time the approaching vessel was first observed?
1. Did that bearing change as the vessels approached?
 2. If so, state what change was observed?
 3. If not, state what the operator of each vessel did as a result of the continued constant compass bearing of the approaching vessel. Rule 7 indicates that the possibility of collision can be ascertained by watching the compass bearing of an approaching vessel. If the bearing remains constant then the possibility is evident).
- M. Lookouts (Rule 5).
1. Was a guest, crewman or passenger assigned as a lookout?
If so, state:
 - a. The name, address, telephone number of each such person
 - b. The location in the vessel from which the lookout was maintained
 - c. Whether that person continued to act as a lookout at all times prior to the collision
 - d. Why did that person not see the approach of the other vessel
 - e. Why did that person not warn the operator of the approach of the other vessel
- N. Statements given to:

1. Investigators
 2. Reporters
 3. USCG, DNR or other investigations
 4. Personal Injury Damages
- O. Duty To Report.
1. 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.¹⁶¹ The Coast Guard has authority to investigate and its investigation may lead to criminal charges.¹⁶² The Coast Guard investigation is not admissible in a civil proceeding.¹⁶³
 2. The National Transportation Safety Board (“NTSB”) also has jurisdiction to investigate “any major marine casualty or any casualty involving public and nonpublic vessels.”¹⁶⁴
 3. The NTSB and the Coast Guard may investigate separately or together.

¹⁶¹ 46 U.S.C. §6101.

¹⁶² 46 U.S.C. §6301.

¹⁶³ 46 U.S.C. §6308.

¹⁶⁴ 49 C.F.R. §§ 850.1.15 (2000).

4. 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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