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CONTINUING DEVELOPMENTS IN PRODUCTS LIABILITY LAW IN THE MARITIME FIELD

Chemical cargos that blow the hatch covers off a ship, containerships that break in half at sea due to defective welds, fishing nets which shred before the fish are caught, shore cranes that topple over on ships and longshoremen, swimmers chewed up by unguarded propellers, bottoms that fall out of overweight containers, and chartered vessels put out of service by defective engines.

These are all real situations, the by-product of our modern technological world which has created very sophisticated and advanced innovations in the business of marine transport. But those advances also create new risks never anticipated by the maritime laws when King Richard the Lionheart adopted the Codes of Oleron, the American Congress enacted the Act Relating to Limitation of Shipowners Liability in 1851, or even when the Hague Visby Rules came into force in 1977..

How, then, does maritime law handle the problem of property damage that may occur when modern technology proves to be defective?

Perhaps modern products liability law would seem to be a natural fit into the maritime law, providing the admiralty courts with the tools necessary for handling the increasingly dangerous risks created by technology. Products liability law carries two very important concepts within its structure: first, there is liability of the manufacturer or seller to persons harmed who are not in direct privity of contract with manufacturer or seller, and secondly there is the concept of ‘strict’ liability, meaning that the injured party need not demonstrate any negligence on the part of the seller or manufacturer. The rationale for these concepts is that when complex products, whose design and construction are really best known to the manufacturer, enter the stream of commerce, and can have a dangerous impact on innocent bystanders, policy has dictated that the laws be expanded to protect the public by easing the burden of proof against the manufacturer whose product causes unreasonable dangers and risks.

But maritime law in the U.S. has lagged on adopting product liability concepts. Indeed the American courts for more than a century have followed the 1842

English decision in *Winterbottom v. Wright*, which held that a seller was not liable for damages caused by defective goods except to the actual purchaser of the product who was in privity of contract. Holding a seller liable to everyone "downstream" who could potentially be harmed was simply too unpredictable and incalculable.

It was not until 1986 that the U.S. Supreme Court finally erased whatever doubts remained as to the place of products liability law in maritime jurisdiction, and ruled the "it is no longer seriously contested that the legal theories of strict liability in tort now so prevalent on land can be applied to suits in admiralty." The Supreme Court noted that "Products liability grew out of a public policy judgment that people (and their property) need more protection from dangerous products than is afforded by the law of warranty".

The "heart" of U.S. Products Liability law is set forth in Section 402A of the Restatement Second of Torts, which has been adopted into the common maritime law. The Restatement provides:

> *Special Liability of Seller of Product to user or Consumer.*
>
> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user, or consumer, or to his property, if
>
> (a) the seller is engaged in business of selling such a product, and
>
> (b) it is expected to reach the user or consumer, in such condition in which it is sold.
>
> (2) the rule stated in subsection (1) applies although
>
> (a) The seller has exercised all possible care in the preparation and sale of his produce, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The Restatement contains this caveat:

> The Institute expresses no opinion as to whether the rules stated in this Section may apply
>
> (1) to harm to persons other than users of consumers;
>
> (2) to the seller of a product expected to be processed or otherwise changed before it reaches the user or consumer; or
>
> (3) to the seller of a component part of a product to be assembled."

The most recent case in the development of product's liability in maritime law involves the case of *In re DG HARMONY*, a vessel that suffered a fatal explosion and fire below deck while carrying several containers of calcium hypochlorite, or Cal Hypo, which is used for purifying water and swimming pools. The product is extremely sensitive to heat, and begins to decompose, according to the IMDG Code, when temperatures exceed 55 degrees C. for a period of more than 24 hours. As the cargo decomposes, it releases hydrogen gas, making it very volatile. Several vessels have become victims of carrying Cal Hypo both below and on deck.

In respect to the DG HARMONY, over $50,000,000 in lawsuits were filed against the manufacturer and seller of the Cal Hypo, a US company called PPG. The suits were filed by other cargo owners aboard the ship whose goods were lost in the explosion and fire, by slot Charterers who sought indemnity for suits filed against them in both North and South America by their customers, and by the Owner for the loss of the hull.

The case is presently on appeal.

The trial court found that both the shipowner and innocent cargo interests could recover from PPG, the shipper of the Cal Hypo, on a theory of failure to warn under the law of products liability: "A manufacturer has a responsibility to instruct consumers as to the safe use of its product and to warn consumers of dangers associated with its product of which the seller either knows or should know at the time the product is sold". The court noted that the term "sale" in products liability law is merely descriptive, and it now understood in American law to mean whether the manufacturer placed the goods into the 'stream of commerce by any means."

The trial judge in the *DG HARMONY* case held that there were a number of "red flags" which should have given PPG cause to investigate the dangers presented by its product and to warn the carrier. These red flags include the fact

that PPG knew the of the increased risks of shipping the cargo in large drums; it knew that the containers were not ventilated; it knew that there had been a series of fires and explosions on other ships that previously carried its cargo; and it knew of the findings of its own internal testing on the product which demonstrated that Cal Hypo could begin to decompose at temperatures far less than 55 degrees Celsius. Consequently, "the warnings provided by PPG were inadequate and misleading".

The trial court, quoting from an earlier case, the *Pavlides*, and concluded:

"Holding (the manufacturer) to the legally mandated standard of expertness, we find that the manufacturer should reasonably have foreseen that a disaster like that which happened here could occur if warning adequate to inform an ordinary person of the specific dangers were not given. Consequently is had a commensurate duty to provide such warning. "

It should be noted that as a consequence of the DG HARMONY explosion, and several earlier explosions on other ships, most ocean container carriers today will not carry the cargo under any circumstance. Similar bans have been made by major shipowner involving cargos of direct reduced iron ore pellets, computer scraps, wet hides, and creosote.

In conclusion, there is a growing recognition by the courts in the Untied States that the maritime trade can be the harbinger of unknown risks, perils and hazards, including the very cargos carried on merchant ships. By incorporating the Product Liability law used on land into the maritime law, the courts are recognizing that there are a whole class of persons who previously did not receive the protection of the law when unknown risks and dangers manifest themselves. The class of previously unprotected persons includes innocent cargo owners whose goods are damaged aboard ships carrying cargos with inherent dangers, passengers on ships who suffer injuries due to failure of ship's structure or equipment that otherwise appears safe, and Charterers of vessels and owners of used vessels that have defective construction or design preventing them from completing their service. While product's liability law may appear to be a field that has no limits or controls, creating its own dangers, in fact, because product liability law is derivative of tort law, it is subject to the "economic loss rule". That rule of damages prohibits recovery of purely economic loss, and limits the tort action to only the actual physical harm.

WILL PUNITIVE DAMAGES EVER DIE?

Let me start off by stating that there will be no funeral in the near future for punitive damages in maritime law in the United States. But the Supreme Court is considering whether to hear argument on whether punitive damages have gone too far, and whether there should be a serious cap on this extreme sanction permitted by public policy to provide punishment and deterrence where the Master or crew act recklessly.

Historically, going back to 1818, the U.S. Supreme Court has held that punitive damages may not be imposed on a shipowner for tortious acts of the Master or the crew unless the owner directed, countenances or participated in the wrong. *The Amiable Nancy*. And for the next 150 years the maritime courts in the U.S. strictly refused to allow vicarious punitive damages in maritime cases.

Indeed, outside to the 9th Circuit, which is the federal Court of Appeals that oversees the West Coast of the US, the law today remains that punitive damages are not recoverable against an Owner of a vessel for acts of the Master or crew unless it can be shown that the owner authorized or participated in the act. *CEH, Inc. v. F/V Seafarer.*

However, as perhaps some of you are aware, the 9th Circuit became a maverick court with the *Exxon Valdez* case.. At the end of the trial in Alaska, the jury awarded punitive damages totaling $5 billion dollars against Exxon, and $5000 against Capt. Hazelwood, and all in favor of fishermen in Alaska whose fishing grounds were polluted by the oil from the grounded vessel. This was on top of compensatory damages totaling approximately $500 million and $125 million dollars in criminal penalties already imposed on Exxon, as well as Exxon's own out of pocket costs of $2.1 billion in clean up expenses. The punitive damages were mandated because of the jury's finding of 'recklessness'. It is important to note that the instructions to the jury required the jury to find Exxon reckless so long as they found Captain Hazelwod reckless. However, the jury was instructed not to consider any harm to the environment in their determination of punitive damages because "punitive damages to the environment had already been resolved through the government's proceedings". In spite of the judge's instruction, the jury made the largest award in US history for punitive damages against Exxon, which certainly must have been partly based on the damage to the environment.

The 9th Circuit concluded on appeal that it did not agree with Exxon that maritime law and due process barred punitive damages, even when the prior sanctions had already been paid by Exxon and should have vindicated the public interest. However, the Court of Appeals agreed that Exxon's argument could have an impact on the quantum of the punitive damages. Ultimately, after two more

appeals, the 9th Circuit struck down the $5 billion dollar award for punitive damages and suggested to the trial court that the punitive damages should be reduced to $2.5 billion, on the grounds that would result in a ratio of about 5:1 with the compensatory damages of $500 million. The concept of a ratio was taken from a recent US Supreme Court decision, *State Farm Mutual Auto v. Campbell,* in which the high court held that "even a 1 to 1 ratio of punitive to compensatory damages may reach the outermost limit of due process guarantee".

The Supreme Court in the *State Farm* case acknowledged that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence". There are three guidelines that must be considered in determining punitive damages to meet due process: (1) the degree of the reprehensibility of the misconduct, (2) the comparability of the punitive award the court penalties in similar cases, and (3) he disparity between the compensatory damages and the punitive award.

In spite of the guide lines provided by both the Supreme Court and the 9th Circuit, on remand, the trial court in the *Exxon Valdez* refused the math, and found that punitive damages should only be reduced to $4 billion dollars, on the grounds that was a ratio of 9:1 between the punitive damages and the compensatory damages, and so long as the ratio was "single digit", it does not violate due process.

More than 12 amicus briefs have been filed with the U.S. Supreme Court in the *Exxon Valdez* case, most supporting Exxon on the theory that punitive damages have become a run-away-train, and must be stopped. The critical arguments in favor of capping punitive damages include arguments that federal legislation, including the Clean Water Act, already contains civil and criminal penalties that cover cleanup costs and natural resource damages, and therefore legislation is already in place which provides sufficient punishment and deterrence for oil spills. There is no need for judge made maritime law to supplement the statutory remedies.

Other arguments being advanced in the appeal by Exxon to the Supreme Court include (1) the notion that punitive damages serve the same purpose as criminal penalties, but in respect to punitive damages the defendant is not afforded the protections applicable at criminal proceedings, including burden of proof, (2) the reality that juries are subject to few restraints and may even harbor "biases against big business", which creates a severe risk that the jury finding of damages has little relationship to the circumstances of the defendant's conduct, (3) juries lack the expertise, perspective and resources of expert regulatory agencies to determine what is an appropriate deterrence, (4) a large award of punitive damages constitutes a arbitrary deprivation of property and violates the

elementary notion of “fairness”, and, (5) the award of punitive damages could pit one state’s public policy against the next state with a different public policy.

In the end, the question that hopefully will be confronted by the Supreme Court should it hear the *Exxon Valdex* case, is whether there is any basis under public policy for allowing a civil jury to consider awarding punitive damages when the governmental regulatory agencies have already scrutinized the conduct and agreed upon an appropriate penalty? If not, then the award by a jury does nothing more than to provide a huge windfall to the plaintiff’s and their lawyers. As the Supreme Court wisely noted in *State Farm*, “if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on a rug again, even if it cost him ‘only’ $10,004, and he was not otherwise punished.”

In sum, punitive damages are not dead, but there is a serious effort to put shackles on this demon.

I thank you for giving me this opportunity to speak.