Admiralty Outline – Fall 2003

Overview

Admiralty is federal law, originating in Article III, § 2 of Constitution.

First Congress included Cases of Admiralty/Maritime in Judiciary Act.

Supremacy Clause.

b. If say that case is admiralty/maritime case, governed by admiralty law, is to say that substantive admiralty law applies.

Differences: statute of limitations, comparative laws for recovery, etc.

a. Main: trial by judge. From very beginning, admiralty cases are w/o juries. May be why someone brings suit in admiralty – to avoid the jury.

Admiralty cases can't be removed from state to federal courts.

a. but most admiralty cases can be brought in state courts unless qualify under diversity.
b. But federal admiralty law will be applied.

Jurisdiction arises under:

a. 28 USC 1331: federal question
b. 28 USC 1332: diversity
c. 28 USC 1333: admiralty & maritime.

BUT, Congress didn't choose to enact substantive law in the statutes – left to courts.

Courts mainly address three issues:

a. what is an admiralty case?
b. if it is, what is the admiralty rule?
c. construing the savings to suitors clause – eg, what types of cases does Congress mean to say that we only want federal courts sitting in admiralty to have jurisdiction over?

Basics of Admiralty

Requires: Locality + maritime nexus

- Executive Jet decision.
- DeLovio v. Boit (1815): Maritime insurance policies are within admiralty & maritime jurisdiction of US b/c maritime contracts include charter parties, affreightments, marine bonds, Ks for repairing, supplying & navigating ships, Ks between part owners – etc – AND insurance.

Historical limitations:

- Could only sue in rem
- Forbade actions in personam vs. shipowner, master.
- Rules precluding admiralty court from hearing matters arising w/in body of the country.
- Forbidding admiralty jurisdiction where no influence of tide.
- Forbidding admiralty jurisdiction involving building or sale of ship.
- ***The Thomas Jefferson (***SCOTUS, 1825): Action arising on Ohio to Missouri river is not in admiralty, because no influence of tide.

- Great Lakes Act (1845): extends jurisdiction to G. Lakes.
    - Becomes almost superfluous after Genesee Chief, but – still allows saving to suitors the right of jury trial if wanted.
    - Possible to have an equal protection argument – why in GL, but not other inland navigable waters. But no caselaw.
- **The Genesee Chief v. Fitzhugh** (SCOTUS, 1851): overrules the TJ. Holds that GL Act is Constitutional.
    - Lakes are inland seas
    - Hostile fleets have been encountered on them, prizes made, reason to have admiralty jurisdiction.
    - Nothing particular in the tide that makes waters suitable for admiralty.
    - Limiting admiralty in country with so many inland navigable waters is impracticable. (Policy).
- Post Genesee Chief admiralty jurisdiction:
    - Public navigable water
    - On which commerce is carried on
    - Between different states or nations
- **The Eagle** (SCOTUS, 1868): Tug towing brig & barge, tug caused collision.
    - Issue: since GL Act limited admiralty on GL to contract & tort where vessels are over 20 tons, since Genesee Chief, is there general jurisdiction over all vessels on GL?
    - Holding: Yes. **GL is pretty much obsolete – can use regular admiralty rules**.

Admiralty Jurisdiction in Contract Cases:

- **North Pacific Steamship v. Hall Brothers Marine** (SCOTUS, 1919): in personam action for unpaid repair bill.
    - Repairs at drydock count as admiralty claims. Doesn't matter if drydocked or afloat.
        - Contract for building ship isn't maritime.
        - Contract for repairing ship is maritime.
            - Once ship is launched, issues about the ship are maritime.
- **Kossick v. United Fruit** (SCOTUS, 1961): Seaman who made oral agreement with master about medical treatment has claim in admiralty – to say not maritime is too narrow.
    - Note: in maritime law, oral contract is valid under statute of frauds. The answer of the jurisdiction issue will lead to a different result, depending.
- **Exxon Corp. v. Central Gulf Lines, Inc**. (SCOTUS, 1991): Admiralty jurisdiction extends to claims arising from agency contracts – here, a contract for providing fuel.

        - Case overturns Minturn on narrow grounds. Lower courts should look at the subject matter of the agency contract to determine if the services were maritime in nature. (Supplying fuel to a ship was.)
    - Preliminary Ks:
        - some Ks that lead up to a maritime K aren't maritime, like a K to procure a maritime insurance policy – though the policy itself is.
        - Lease of vessel is maritime, but sale is not.
    - Mixed Ks:
        - K will not be within admiralty jurisdiction unless wholly maritime.
    - Exceptions: if maritime & non maritime elements are separable, admiralty court will exercise jurisdiction over the maritime part. If non-maritime portion is incidental, court will exercise admiralty over the whole thing.

Admiralty Jurisdiction for Tort Claims

- **Different test.**
- Palumbo v. Boston Tow Boat Co (Court of Appeals, MA, 1986): Claim without direct damage (like economic damages stemming from loss of clientele after accident) is not appropriate for admiralty jurisdiction under Admiralty Extension Act.

- **Admiralty Extension Act** (1948): extends admiralty & maritime jurisdiction to include all cases of damage or injury to person or property caused by vessel on navigable water, notwithstanding that damage may be done or consummated on land.
    - Prior to act, ship to shore claims weren't maritime, but common law. Bridges, wharves were considered land.
- **Locality** factor: where the tort takes place.
    - at common law, when conduct on land causes injury on **navigable waters** was admiralty, but not when conduct on water caused injury on land.
- **Nexus** factor: wrong must bear relationship to admiralty, must have maritime nexus. (Since 1972)
    - almost anything occurring on navigable waters will meet the nexus test.
- **Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.** (SCOTUS, 1995):
    - **Two pronged test for nexus** developed.
        a. Was event disruptive to maritime commerce?
        b. Was it a maritime activity?
        - Look up foremost & Sisson – determine exact jurisdictional tests for admiralty jurisdiction, differences in contract & tort.
        - **After Executive Jet must have:**

- **Incident out of which claim grew must have had disruptive influence on maritime commerce.**
- **Substantial relationship to maritime activity.**

- **Navigable Waters**
  - Jurisdiction inquiries rely on issue of whether matters in the suit had sufficient involvement with navigable waters – the maritime nexus.
  - Navigable waters – classic definition in The Daniel Ball: waters navigable that are either navigable in fact or can do so in conjunction with other waters in which they flow.
  - **Leblanc v. Cleveland** (2nd Circuit, 1999): Navigable requires that the body of water be capable fo supporting commercial maritime activity now, not just historically.
    - Can have seasonable non-navigability. But if not normally navigable and just occasionally navigable, then no admiralty jurisdiction.

- **Vessels**
  - **1 USC :** vessel includes every description of watercraft of artificial contrivance used, or capable of being used, as a means of transportation on water. (not very influential definition.)
    - **Parsons:** Erie canal boat is vessel (1903)
  - Vessel issue arises in number of contexts:
    - Tort caused by vessel
    - Maritime lien or ship mortgage
    - Jones Act
    - Limitation of Liability act.
    - Crew of vessel can't recover under Longshore & Harborworkers' compensation Act.
  - **Manuel v. PAW Drilling & Well** (5th Circuit, 1998): Rig 3, with no navigation, propulsion, or crew quarters was a vessel for purposes of admiralty jurisdiction & applicability of Jones Act.
    - **Look at:**
      - Purpose for which the craft is constructed
      - Business in which craft is engaged

Exclusive Jurisdiction of Admiralty Courts & Concurrent Jurisdiction of Common Law Courts

- **The Moses Taylor (SCOTUS, 1866):** man sued for breach of K b/c of conditions on the ship. Sought damages in state court; owner of vessel argued he had no jurisdiction b/c cause of action was one in admiralty. SCOTUS: clearly admiralty b/c related exclusively to service to be performed on the high seas and pertained solely to the business of commerce & navigation. Not within saving to suitors clause.
  - **Need to make sure I get more about savings to suitors.**

        - **Rounds v. Cloverport Foundry & Machine Co (SCOTUS, 1915):** Work for repairing & rebuilding steamboat is fine in common law; suit was in personam & attachment was in the suit; not other effect to proveid security for payment of personal judgment.
- **Admiralty Procedure since 1966**
    - FRCP 9(h): pleading admiralty & maritime cases and separate claim: diversity or federal question.
        - Places where it makes a difference if the claim asserted is an admiralty claim:
        - Special impleader (Rule 14(c))
        - No jury trial for admiralty (Rule 38(e))
        - Admiralty claim isn't subject to venue requirements that govern other actions (Rule 82)
        - Somewhat broader right to interlocutory appeal (28 USC §1292(a)(3))
        - Supplemental rules provide for separate procedures to be followed in distinctive types of proceedings – in rem, personal jurisdiction acquired through attachment, partition actions, actions for limited liability.
    - **Jury issue**:
        - Sphere Drake Insurance v. J. Shree Corp (SD of NY, 1999): insurance companies underwrite policies in London; D is merchant who insured gemstones, which were lost. Underwriters want declaratory judgment vs. Shree. Complaint is admiralty; compulsory counterclaims from D & demand of jury trial.
        - Split in authority about whether jury trial should be permitted.
            - Argument for jury trial is strongest for compulsory counterclaim that falls outside of the admiralty jurisdiction.
            - Even if filed in admiralty, court will likely try the whole thing to a jury.
    - **Personal Jurisdiction**
        - United Rope v. Seatriumph Marine (7th Circuit, 1991): United Rope asking to establish federal common law of personal jurisdiction (contrary to Omni case – held that personal jurisdiction may be created only by statute or federal rule with force of statute)
            - Court: unless state or federal law authorize personal jurisdiction over the D, court must dismiss.
            - State court has no jurisdiction under long arm statute. (never called on Wisconsin port).
            - Prof thinks this is narrow reading of due process.
        - Subsequent change: if sue in state court, can sue in federal court.
        - Nissho Iwai v. M/H Star Sapphire (SD of Texas, 1995): if no state jurisdiction in any state, may find federal jurisdiction – FRCP 4(k)(2).
        - Blueeye Navigation v. Oltenia Navigation (SD of NY , 1995): Charter suing for attachment pending London arbitration – trying to reach bank accounts. (Object of maritime attachment doesn't have to be maritime (unlike a suit in rem).

- Attachment doesn't prevail b/c couldn't find bank accounts in any of the banks – basically asking for future jurisdiction to do so. Court says no.
- Now there is a provision in the supplemental rules for procedure that have to make an ex parte showing that have prima facie case in admiralty.

- **Sources of Substantive Admiralty Law**
  - Maritime Authority of Congress
    - When conflict between federal legislation & state or common law, almost always SCOTUS will bow to Congress.
  - Nonstatutory federal maritime law vs. state law
    - More difficult; Conflict between admiralty law as created by judges vs. state law.
  - Ballard Shipping Co. v. Beach Shellfish (1st Circuit, 1994): in federal admiralty court, state law is preempted if it interferes with the proper harmony & uniformity of maritime law.
    - BUT, state courts are free to determine what the federal substantive admiralty law is. (Sometimes not clear.)
    - Kossick v. United Fruit (SCOTUS, 1961): Seaman/hospital K case. Issue here – whether the contract, while maritime, is "maritime and local" enough so that applying state law would not disturb uniformity of maritime law. SCOTUS: should be uniform, maritime law.

Maritime Tort Law

- Seamen have three remedies for on-the-job injuries:
  - Maintenance & cure: judicially created worker's compensation.
    - Doesn't require fault, or even causation.
    - Only requires that injury/illness manifests itself while in the service of the ship.
      - Exceptions:
      - Willful conduct (intoxication, disobedience to orders)
      - Maximum cure – no further benefits.
  - Jones Act
    - Very liberally interpreted for seaman both to evidence & causation.
  - Unseaworthiness
    - Doesn't matter how vessel became unseaworthy.
    - Even through not long enough for D to become aware.
    - Types: defects in crew, manning, defects in equipment, gear.

- **Seaman Status**
  - Who is a seaman is hotly contested, given the rights conferred under the Jones Act, unseaworthiness, and maintenance & cure.
  - Critera for seaman is the same for Jones Act, unseaworthiness, and M&C

- Judge Wisdom's test led for decades
    - Injured workman was permanently assigned to a vessel
    - If capacity in which he was employed, or duties he performed, contributed to the function of the vessel or accomplishment of its mission, or operation or welfare of the vessel in terms of maintenance during movements or during anchorage.
- At time of Jones Act, definition was:
    - All persons employed onboard ships & vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage.
- Effect of 1927 Longshore & Harbor Workers Compensation Act (LHWCA)
    - Provided workers' comp for workers hurt on navigable waters that excluded a master or member of a crew of any vessel (mutually exclusive from Jones Act.)
    - Difference between seaman/longshore benefits:
        - Seamen have better remedies
        - If have a weak claim, no fault, no unseaworthiness? Go for longshore benefits (since better than M&C).
        - But if have a shot at claiming damages under Jones Act, unseaworthiness – go for the seamen's remedies.
        - If case is doubtful – either/or – go for longshore benefits (start sooner), injured worker can collect compensation while lawyer investigates if he's a seaman.
            - If good case for seaman, the fact he's accepted benefits under the longshore act isn't prejudicial – can change mind & repay the longshore benefits after recovery as seaman.
            - Cynical procedure.
    - Chandris v. Latsis (SCOTUS, 1995): Definition of seaman.
        - Employee's **duties must contribute to the function of the vessel or the accomplishment of its mission**.
        - **Seaman must have connection to a vessel in navigation** (or identifiable group of vessels) **that is substantial in terms of duration & nature.**
            - Worker spending less than 30% of time in service of vessel in navigation should not qualify as seaman under Jones Act.
            - 5th C standard.
            - Rejection of voyage test (if working on vessel while navigating/contributing to mission – you're a seaman.)
                - why not? Don't want people walking in and out of coverage.

        - Vessel in navigation requirement precludes Jones Act coverage for workers assigned to vessels on non-navigable water (dry dock would be a jury question).
            - Possibility – mothball fleets (like in Martinez)
- Recurring questions in Seaman litigation:
    - Was apparatus or structure on which the work was done a vessel?
    - Was the vessel in navigation?
    - If seaman status is claimed on the basis of a work-connection with a group of vessels as opposed to a single on, was the group a fleet?
    - Was the worker's connection with the vessel or fleet substantial in duration?
    - Was the worker's connection with the vessel or fleet "substantial in nature?"
- Some courts require that worker's duties must take him to sea (out of sight of land) – others require exposure to the perils of the sea.
- If not longshoreman or seaman, coverage under state workman's compensation.

Longshore & Harbor Workers' Compensation Act
Enacted 1927, amended in 1972 & 1984

- Pre 1972: longshoreman injured, immediately could get benefits through stevedore. If sue third party vessel owner (and the vessel in rem) on grounds of negligence or unseaworthiness of vessel.
    - Implead the stevedore employer who caused unseaworthiness – get full indemnity – so employer pays compensation & also the third party vessel owner.
- Post 1972: Longshoreman injured, can only sue vessel owner for negligence, not unseaworthiness – but benefits are better.

- Contains two tests
    - Situs
        - Adjoining areas, after 1972
    - Status
        - Longshoremen include ship repairers, ship construction workers, ship breakers – any person engaged in maritime employment including any longshoreman or longshoring operations & any harbor worker.
        - Specifically excludes master or member of the crew of a vessel.
- Sun Ship v. Pennsylvania (SCOTUS, 1980): state may apply its workers' compensation scheme to land-based injuries that fall within the coverage of LHWCA.

        - Establishes overlap between LHWCA and state workers' comp.
        - If worker injured in overlap area and litigates, doctrines of claim preclusion & issue preclusion frequently foreclose other suits.
    - If non-seaman injured and excluded from LHWCA, look to maritime tort law.
        - Maybe argue that the nexus requirement of Executive Jet and a maritime nexus. (Eg, motorboat injures.)
        - May qualify within the exclusions of the longshore act.
    - Northeast Marine Terminal Co. v. Caputo (SCOTUS, 1977): injured workers (injured on waterfront) are entitled to compensation – in 1972 Congress extended coverage shoreward, broadening definition of navigable waters of the US to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."
        - But must be engaged in maritime employment.
            - Addition now of status test.
        - Eastern issue – RR workers covered by FELA & longshoremen covered by LHWCA. Which applies when train involved in unloading cargo?

Wrongful Death & Survival Actions – Death on the High Seas Act

- Wrongful death: to compensate decedent's dependents for losses suffered as a result of the death.
- Survival: allow an action the decedent had at the time of his death to survive and become an asset of the estate.
    - Eg, loss of future wages, pain and suffering until time of death.
- **Moragne v. States Marine Lines** (SCOTUS, 1970): there is an action at maritime law for death caused by violation of maritime duties.
    - Overturns The Harrisburg, which had three anomalies in it.
        - Within territorial waters, identical conduct violating federal law produced liability.
        - Identical breaches provide liability outside three mile limit, but not in territorial waters.
        - A true seaman has no remedy for death caused by unseaworthiness within territorial waters while a longshoreman does have the remedy when allowed by state statute.
    - Heavily litigated decision – SoL left open. Use doctrine of laches.
        - Laches: standard maritime law. No SoL in maritime; if wait "too long" you're barred from brining suit.
    - Gaudet case: loss of society damage & not just economic damages are recoverable under Moragne.

        - Fight becomes is there recover of non-economic damages (loss of society) as opposed to economic (loss of wages, income).
    - **Miles v. Apex Marine Corp (SCOTUS, 1990):** Jones Act precludes recovery for loss of society (applies when killed as a result of negligence), loss of future income isn't recoverable in survival action, general maritime cause of action for wrongful death of seaman, but damages don't include loss of society.
    - **Yamaha Motor Corp v. Calhoun (SCOTUS, 1996):** parents of teenager killed on jet ski in Puerto Rico can bring Moragne-type claim & state law claim (to get around Miles v. Apex), also want loss of society.
        - Court: state remedies remain when there's no federally applicable statute.
    - **Death on the High Seas Act**
        - Amended to cover commercial aviation accidents on the high seas;
            - If within 12 nautical miles, act doesn't apply.
            - Then apply Yamaha, state wrongful death
            - If beyond 12 miles out, no punitive damages.
    - Wrongful death analysis:
        - Who was the decedent & what was his status?
            - Seaman, worker?
        - Where is the situs?
            - High seas, territorial waters – if territorial, which state?

Limitation of Liability

- Congress enacted in 1851, amended in 1930s
- Carr v. PMS Fishing Corp (1st C, 1999):
    - LOL provides that owner's liability cannot exceed the value of its interest in the vessel & pending freight at end of voyage.
        - If sinks, not necessarily no value.
    - Limitation applies only if shipowner lacked privity or knowledge in the act or condition that led to the injury.
        - Can be actual or constructive knowledge.
        - Court must determine:
            - Whether negligence or unseaworthiness caused the accident &
            - Whether shipowner was privy to, or had knowledge of, the causative agent (whether negligence or unseaworthiness).
        - Claimant bears initial burden of persuasion for negligence and unseaworthiness.
        - Burden shifts to shipower to establish lack of privity &knowledge.
- What's eligible?
    - Seaman's claims under Jones Act

    - Unseaworthiness claims
    - Wage claims are NOT subject to LOL – unjust to say that wages went down with the ship.
- First party insurance owner has on destroyed vessel is his to keep: law doesn't compel shipowner to surrender his insurance in order to have limited liability.
    - But third party insurance is protected.
- Kreta Shipping, SA v. Preussag International Steel Corp (2nd C, 1999):
    - Shipowner can post a bond rather than surrender vessel while LOL claims are proceedings.
    - After posting the bond, all claims & proceedings against owner with respect to the matter in question shall cease.
- **LOL analysis:**
    - Is there liability?
    - Is the amount of damages greater than the alleged value of the vessel?
        - Is the amount of the vessel disputed?
        - Is owner entitled to LOL?
- In re Bethlehem Steel Corp (1981): determining the amount of the LOL fund is a matter or procedural law; courts can apply US maritime jurisdiction.

Carriage of Goods:

- **Internationally:**
- Charter parties: traditionally used in tramp shipping by private carriers. Lease of a vessel.
    - used to be for whole vessel.
    - Now less than all the space in a vessel.
    - Like moving company.
    - Parties thought to be equal bargaining powers.

- Bill of lading: used in liner trades by common carriers that sail on fixed routes following announced schedules and that are prepared to carry general cargos.
    - like UPS.
    - Three functions it serves:
        - **Contract of carriage** (or terms, or evidence of K)
        - **Document of title**, enabling shipper to sell goods while in carrier's possession by transferring to subsequent holder.
            - Not true normally of straight bills of lading,.
            - Negotiable bill of lading – person who holds it is entitled to the goods. Must present at port of discharge to get control of the goods.
            - Why?
                - Method of ensuring payment. Also goes with letter of credit.
                - Made out to shipper who names self as consignee, but endorse over to bank.

- Operates like **receipt of goods**, providing evidence of carrier receiving cargo from the shipper.

- Also, contact of towage: to tow barge & cargo, that's a form of contracted voyage. Or inland tow operator may operate barges, all inland.

- p. 317, n 5: bills of lading in ocean carriage used to be issued just for ocean carriage, but now with containers, a whole new set of arrangement covers the whole transport.

- **The Harter Act**
  - Conceived as compromise between cargo and carrier interests.

  - Carrier's liability for negligence of its agents and servants was at heart of compromise.
  - Carrier can't escape liability for negligence in care and custody of the cargo or for failure to use due diligence to furnish seaworthy vessel.
  - But if use due diligence to furnish vessel it would not be responsible for damage or loss resulting from faults or errors in navigation or in management of vessel.

  - What's difference between due diligence to make vessel seaworthy and unseaworthiness?
    - due diligence – due care, but not necessarily the absolute obligation.
    - Unseaworthiness is strict liability. (except for instantaneous unseaworthiness.)

  - Frequent issue: was damage to cargo caused by error in navigation or failure of carrier to keep vessel seaworthy or taking care of cargo.

- **Pre-COGSA, Harter Act:**

  - ***The Germanic (***SCOTUS, 1905):

    - Steamer reached pier heavily coated with ice, weight increased by snow. During unloading of cargo, the vessel sank and cargo damaged.
    - Carrier argues that danger could not have been forseen and that there was no negligence, attributing loss to gale and special circumstances.
    - Question: whether damage to cargo was "damage or loss resulting from faults or errors in navigation or in the management of said vessel" (and should liability be exempted.)

        - Court: ship not under management at the time of the unloading – if the primary purpose of the unloading was to affect the ballast of the ship, that would be management.

        - Test: look at the primary purpose of the act.
        - Here, the act was to remove the cargo, not to improve the ballast of the ship.

- **Negligent navigation & management:**
    - Carrier's defense based on negligence in navigation or management of vessel; but trend in US has been against carriers who rely on this.
    - Fine line exists between negligence in case and custody of the cargo & negligence in navigation or management of the vessel.

    - p. 319
- Relative application of Harter Act & COGSA after COGSA is adopted.
    - originally, the Harter act covered both domestic & international ship.
        - COGSA covers only international vessels (usually) by its own terms – to and from US and foreign port. Supercedes Harter to certain extent.
    - When does COGSA coverage begin?
        - Tackle to tackle.
        - Port to port – when it's picked up to be loaded to the vessel and continues until it's offloaded.
    - Harter Act applies:
        - P. 37
        - Section 190.
        - "or proper delivery…"
        - Harter covers when carrier takes custody of the goods (can be before they're loaded) and ends at delivery. (COGSA starts and ends just when it's on the vessel.)

        - COGSA: ocean carrier cannot relieve self from liability stated in COGSA – can't lessen it.
        - BUT…Many bills of lading contain invalid clauses – doesn't stop carriers from trying to lessen their liability.

    - 1303: liability creating provision:
    - 1304: immunity section – grounds for which a carrier is not liable.
    - 1307, p. 55: nothing prevents shipper from entering agreement exempting liability of carrier for damage before loading and subsequent to discharge.

    - Bills of lading are often issued after goods loaded on the vessel; otherwise couldn't be a receipt.
    - Courts tend to look at bills of lading as if they were agreed to.

- "Coast-wise option" – doesn't apply to goods shipped between two US ports, but Harter Act does. But parities can agree to COGSA applying.

- **Cargo Claimant's Action Under COGSA**
  - When cargo has been lost or damaged, the shipper, the consignee, or another party will suffer a loss. If cargo not insured, injured party will seek compensation from the carrier under the contract of carriage.
  - If cargo was insured, the insurer typically seeks same sort of recovery.

- Both COGSA & Harter Act include choice of law provisions calling for application of US law. So shipments to and from US are almost invariably covered as a matter of law.
  - Harter Act: before goods loaded on vessel & after goods are discharged, upon delivery.
  - Major distinction between COGSA and Harter: $500/package limitation on COGSA, none in Harter. Usually the goods are in excess of $500 per package.

  - Liability creating events, not caring for cargo properly, etc.: note 4, p. 320 – carriers want to show that they were negligent -- but if do good enough job to show unseaworthiness, still liable. (Rarely find shipowers arguing strenuously about this. Rather, they argue perilous sea.)

  - p. 321 – history of advent of regimes of law governing international carriage.
  - Review definitions in COGSA, p. 51
    - "Carried on deck & so carried."
    - Hazards much greater on deck.
    - But in modern container shipping, much of it is on deck.
    - carriers don't say it's on deck – want it covered by COGSA.

  - ***Bally, Inc. v. M/V Zim America*** (US Court of Appeals, 2nd Circuit, 1994): Bally engaged Odino to consolidate shipments of Italian leather goods. Odino booked cargo in question with Zim. Cartons were weighted before loading into ship, 301 cartons were loaded into the ship, cargo was sealed. On arrival, found missing 65 cartons.

    - Establish prima facie case when:
      - proving delivery of the goods to the carrier in question &
      - outturn by the carrier in damaged condition.

        - Rare to see bill of lading with damage/shortage on the face of the bill, even if the carrier knew that. Why? Screws up the financing. Could write another type of receipt.

- After proving prima facie case, burden shifts to carrier to show that damage or loss falls within a COGSA exception.

- Here, delivery with intact seal doesn't conclusively prove that loss didn't occur wheile the container was in the carrier's possession, but there was insufficient evidence for court to conclude that the cartons were missing from the container.

- Didn't provide written notice of missing cartons until 3 weeks later; even oral notice wasn't until 8 days afterwards. If P doesn't give timely notice, there's a presumption that the carrier delivered the cargo in good order.

- Also, outturn was when delivered when given to Bally's agent – no proof it came off the vessel short.

- Constructive delivery: at the end of the period before charging storage of goods.

- Ocean carriers sometimes try to get around "good order & condition" with clause about metal products: just b/c they were received in good order doesn't mean that they were free of rust. (9th circuit thinks it's OK.)

    - Notes, p. 337: describe burden of proof shifting:
    - four states.
        - P must establish prima facie case by proving delivery of gods to carrier in good condition and outturn by carrier in damaged condition.
        - D must prove that loss or damage falls within COGSA exception set forth in §4(2).
        - P must show that carrier's negligence contributed to the damage or loss.
        - D must segregate portion of damage due to excepted cause from that portion resulting from its own negligence.
            - Schnell v. The Vallescura (1934). If you can't apportion it out, then have to pay the whole thing.

- Excepted Perils:
    - Nautical fault
    - Error in navigation
        - The Germanic
    - Fire
        - Not liable for fire damage unless fire caused by design or neglect of such owner.
        - **Westinghouse Electric Corp. v. M/V "Leslie Lykes"**

- Famous admiralty judge in 5th Circuit.
- Fire made worse b/c of the way the ship was arranged to be loaded by the central office.
- Court: defense of fire protects carrier from losses resulting from steps taken to extinguish the fire, provided there is no actual fault or privity of the owner concerning origin of firefighting evidence.
- **must have managerial level.**
- Whenever dealing with ship-board fire, have special set of rules.
- No liability, not just limited, but NO liability unless the cargo can show that the carrier had some privity of knowledge with the fault that caused the accident.

- **Peril of the Sea**
  - Even if dealing with typhoon or hurricane, experts say that weather is foreseeable. Should have guarded against it.
  - Sometimes see cases where it was totally unexpected.
  - Almost always fail.
    - Thyssen Inc. v. S/S Eurounity
      - Warranted of vessel that free of defects, etc.
      - But water entered cargo's holds and testimony that sea water entry was inevitable b/c of perils of the sea vs. foreseeable b/c of negligent maintenance of hatches & seals.
      - Court: storms in north Atlantic are foreseeable and winds, waves, and cross-seas were to be expected – not a peril of the sea.

  - What is a peril of the sea?
    - different standards.
    - **English law is more generous.**

The Q Clause in COGSA

- Requires that the carrier prove that neither its negligence nor the negligence of its agents or servants caused the loss to limit liability.
- **Quaker Oats Co. v. M/V Torvanger** (US Court of Appeals, 5th Circuit, 1984)

  - Quaker Oats shipped five hundred metric tons of tetrahydrofuran (white chemical) from Mitsubishi Corporation in Tokyo to Houston. During the shipping process, one of the tanks was not full and peroxides formed. Sued carrier.

  - Parties agree dispute governed by COGSA.

        - DC found that Quaker had established prima facie case by producing evidence that the chemical was to specs on delivery to carrier and that part of it wasn't in that condition on arrival.
        - DC found that D rebutted by showing no negligence.
        - Court of Appeals: If all evidence is true, the evidence shows no cause for peroxide formation, but the formation must have resulted from some defect in the chemical or its processing for shipment, for which carrier wouldn't be responsible – which evidence doesn't prove – or that contamination was b/c of some failure of officers of vessels, which also isn't proved.
        - None of specific limiting exceptions applied, so fell back on the Q clause – carrier has the burden of proving that its fault didn't contribute to the accident.
    - **For purposes of this exception, the presumption of fault is not rebutted by simple proof of the carrier's own due diligence, evidence within its knowledge and control during the period of the shipment of the cargo entrusted to its care.**

      Rather, to rebut, the carrier must further prove that damage was caused by something other than its own negligence.

<u>The Package Limitation</u>
Limiting the amount of damages per package to $500

Fishman & Tobin Inc. v. Tropical Shipping & Construction Co.
US DC, Southern District of Florida, 1999

- COGSA doesn't define package, but courts have construed term to mean the result of some preparation of the cargo for transportation which facilitates handling, but which does not necessarily conceal or enclose the goods.
- Shippers are the best people to determine if they should place risk of loss on carrier or third party insurer rather than gamble on the liability limitation.

Henley Drilling Co. v. McGee
US Court of Appeals, First Circuit, 1994

- D transported drilling equipment for P, P arranged cargo insurance with underwriter (McGee).
- On return trip, rig disappeared.
- Question: fair opportunity of notice of limitation of liability?
    - Court: yes, actual and constructive notice is good enough.
- Question: limitation of liability under package limitation – limited to $500?
    - Court: yes. Underwriter has to pay up for the value of the rig; carrier is limited to $500.

Deviation

General Electric Co. v. SS Nancy Lykes
US Court of Appeals, Second Circuit 1983

- Nancy Lykes deviated, got into storm, GE's cargo was washed overboard.
- Court holds that this was not a reasonable deviation. Unreasonable deviations are breach of COGSA and contract of carriage.
- Unreasonable deviation is when in absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable dangers that would have been avoided if no deviation occurs.
- if just for fuel cost savings – that's unreasonable.
- But…carrier shouldn't be held liable for losses following a deviation unless the deviation is the cause of the loss – some courts have accepted in dicta, but not others. (But, **Burden is on the carrier to prove the lack of causal relationship to escape liability**.)

Negligent Third Parties
Extending the benefit of the package limitation

Robert C Herd & Co. v. Krawill Machinery Corp
SCOTUS, 1959

- Goods to be transported to Spain; while loading a case, dropped into harbor and damaged it.

- Whether provisions of COGSA § 4(5) or parallel provisions of ocean bill of lading can limit liability to $500 b/c of negligent stevedore.

- Petitioner contends that liability limiting provisions of COGSA and bill of lading should limit liability of stevedore & carrier AND that even if only limit liability of the carrier, it is protected by carrier's limitation under theory and holding in Collins.

- Court: nothing in provisions, history or environment of the act should limit the liability of negligent agents of the carrier. AND that agent is liable for all damages caused by his negligence unless exonerated by statute or valid contract binding on the person damaged.

- And to the decision by including what came to be known as a Himalaya clause inc contracts/bills of lading.

Wemhoener Pressen v. Ceres Marine Terminals, Inc (Handout).

Charter Parties
demise/bareboat charter
charterer takes possession and operates ship during period of charter as his own.
Can permit shipping company to expand base of operations temporarily.

voyage charter

- arrangements made for length of the voyage. Owner provides the vessel's master and crew and maybe pays normal operating expenses.
- Charter typically specifies who pays costs of loading and discharge.
- In owner's interest to ensure that every aspect of the operation proceeds expeditiously.
- Demurrage most commonly litigated issue:
  Charterer is permitted certain amount of time – laytime – for loading and unloading the vessel. If operations exceed the allowed time, then the charterer must pay demurrage at rate established by charter party as form of liquidated damages for the delay.

time charter

- arrangements made for period of time. Owner provides the vessel's master and crew and maybe pays normal operating expenses.
- Charterer's interest to proceed expeditiously. Charter party will contain a great deal more information about the vessel.
- Underlap & overlap

Slot or space charter

If only for certain part of the ship, not the whole ship.

Maritime Liens and Ship Mortgages

- if party has a maritime lien, can sue vessel in rem.
- If party can sue vessel in rem, it means there's a maritime lien.
- Interchangeable terms.
- Suing in rem is one of hallmarks of admiralty practice.
- If sue in rem –
  - Get jurisdiction over vessel
  - Have bond posted in place of vessel. (Security)
  - (remedy, jurisdiction, security) – very practical significance.

The personification theory

- **Harmer v. Bell**: "The Bold Bucchleugh" (Privy Council, 1852).
  - Scottish steamship ran down and sank the William. Suit brought in England, but ship left for Scotland before process could be served.
  - Owners then sued in Scotland & attached.
  - Vessel sold to Daniel Harmer; while action still pending, returned to England; arrested under High Court of Admiralty there.
  - Owner protested and contested.
  - Admiralty judge ruled that he had jurisdiction & that sale of the vessel hadn't released it from responsibility for collision.
  - Harmer appealed; court directed parties to reargue question whether the sale of the vessel without notice to the purchaser discharged the vessel from liability.

- **Court: maritime lien doesn't include or require possession.**
    - Maritime lien means a claim or privilege on a thing to be carried into effect by legal process, explains the process as in rem, when claim or lien is given, then Admiralty is only court to enforce it.
    - The claim or privilege travels with the thing into whoever's possession vessel may come.

- US courts have accepted this theory. (England has rejected).
- Maritime lien differs radically from liens in UCC or mechanic's lien.
    - **Most maritime liens are based on judge-made law.**
    - **Need not be recorded, except for ship mortgages.**
        - required to have only for this. Other than that, no recording requirement.
    - Secret liens, order of priority is same type following inverse order – last in time, first in right.
    - In real property: two kinds. Possessory (like for work done on car, don't release car), on mortgage – foreclose on the lien, action.
    -

Laches: most courts will say can't let this go on forever – must bring it on in time not barred by laches. If haven't brought required lawsuit within analogous SoL in foreclosure of mortgage, then barred by doctrine of laches. .

Maritime liens provide successful claimant with ability to have vessel sold free and clear of all liens, even those not before the court.

By contrast, when court orders the sale of a vessel pursuant to an attachment in an in personam proceeding, the buyer acquires only the interest of the D, subject to all other interests and liens.

Having a maritime lien often means being able to prevail over claimants who don't.

But only in US court sitting in admiralty – if goes as far as sale.

Maritime lien attaches to vessel and includes all of the components, accessories and appurtenances.

Can be litigated to decide what's part of it.

Often questions, when talking about what's a vessel.

Commercial fishing gear, etc? Sometimes it is appurtenances, sometimes not.

Maritime lien may provide P with a claim against a vessel even though the P has no in personam claim against the current owner.

- **Cavcar Co. v. M/V Suzdal** (3rd Circuit, 1983): Vessel can be liable in rem for breach of contract of carriage by operator of the vessel when the vessel's owner is not personally liable in personam.
    - Owner holding bill of lading says breach of K in not delivering vessels.
    - Can't find them to sue in personam, but sues in rem for breach of carriage contract & recovers.
    - Why weren't they liable for what happened personally?
        - Only the carrier would be liable – the issuer of the bill of lading.

- How to justify this by the doctrine?
  - owner must have known that someone would be carrying cargo from Philadelphia to Iran.
- What if vessel sank?
  - no one to sue in personam – but might be justifiable.

COGSA contemplates that ships will be liable for breach of COGSA duties -- §1303 (8) – also could be used as justification; contemplated as easy as 1936

Courts haven't carried personification theory to logical extreme of regarding vessel as a separate person for all purposes.

Person in unlawful possession of liability doesn't mean injured party can sue in rem.

Other limitations: Dismissal or settlement of in rem claim will bar religitation of in personam action on the grounds of res judicata. (for same damage).

In rem actions can be transferred despite fact that vessel could not be arrested in transferee district.

Claims that give rise to maritime liens

- **The Saigon Maru** [Osaka Shosen Kaisha v. Pacific Export Lumber Co.] (SCOTUS, 1923): Vessel master stops loading timber on the vessel despite what shipper wants. Cargo owner files libel in rem to arrest the vessel.
  - Lien created by the law must be mutual and reciprocal; lien of cargo owner on ship is limited by the corresponding and reciprocal rights of the shipowner on the cargo.
  - Was there a maritime claim?
    - can't have maritime lien unless have a maritime claim?
    - Yes – breach of charter party. Classic maritime contract.
  - But court says no maritime lien.
    - Cargo is bound to the ship and the ship to the cargo.
    - b/c the wood didn't make it onto the ship, the wood never attached to the ship.
  - Case litigated by Erskin Wood (though his side lost).
- **Rule that no lien attaches to executory K isn't limited to Ks of affreightment, but all Ks.** K ceases to be executory at point when performance is deemed to have begun.
  - Passengers do not have lien until they board vessel.
    - prof wasn't aware they ever had a lien.
  - Cargo needs only to be delivered to the custody of the master or someone authorized by him to receive it.
  - Time charterer must begin his performance well before cargo is loaded on vessel.
- **When cargo is shipped under voyage or time charter, the shipowner has a lien on its freight on the charterer's cargo.**

        - Liens created by agreement of the party – prof has never heard of charter party that didn't have lien clause in it, not created by law, just parties agreement – that if owner doesn't get paid rent from first charter and that charter is subcharter, he had a lien on what that charter is owed. Or has lien on the cargo.
        - Common and sometimes result in poor cargo owner paying double freight.
            - Cargo would have action back.
        - Class of maritime liens created solely by agreement of parties.
    - **The Pacific Cedar** [Krauss Bros. Lumber Co. v. Dimon Steamship Corp.] (SCOTUS, 1933): no distinction between lien asserted for overpayment of freight by mistake and those for overpayments made but induced by other means.
        - Inconceivable to prof that lien would be lost by delivering cargo and consignee receiving goods.
            - might have been thinking about case where ship's possessory lien can be lost on delivering cargo; but that's the ship's lien, no the cargo's lien against the vessel.
        - Dissent: secret liens should not be extended by construction, analogy, or inference, or to circumstances where there is ground for serious doubt.
            - didn't like idea of maritime liens.
    - Jones Act claims do not include maritime lien and can only be brought in personam.
    - BUT, seaman wages, maintenance & cure, and injuries by unseaworthiness give rise too maritime liens.
    - Cargo owner with general average claim (?) has maritime lien against the vessel.
    - After vessel is seized and in federal court custody, services provided to vessel do not give rise to maritime liens.

Federal Maritime Lien Act (FMLA)

- 1910, recodified since, but basic concepts remain the same.

P. 480 – person providing necessary for ship via person authorized can sue –

Look at statues.

Necessaries: including repairs, supplies, towage, marine railway, etc.

Provided to a vessel:

On the order of the owner or person authorized: can't just be random person.

IF meet these criteria, don't have to show that credit was extended to the vessel.

how would credit not be given to vessel: if didn't talk about vessel.

in old days, would have to show that expected was going to vessel.

- P. 31: only place for any recording a maritime lien is in ship mortgage act. (not here!) but this is an optional provision. §1332

Why do this? To screw up for selling vessel.

Step/tool to use to maybe promote payment of lien, even though legal efficacy & no requirement to record.

- Statute abolished home-port lien doctrine.

Providing necessities to vessels:

i. **Silver Star Enterprises v. Saramacca MV** (5th Circuit, 1996): maritime liens do not attach for the benefit of bulk lessors of containers to owners or charterers of multiple vessels. (Nothing was earmarked).
    1. don't know exactly which vessels the containers were on.
ii. Many of the disputes are litigated between competing lienors.
    1. why? When sale produces money insufficient to pay, then have argument about competing claims to see who gets paid.
iii. Nothing in FMLA requires that the necessary services have been provided in the US.
iv. **Necessaries include repairs, supplies, towage, and use of dry dock or marine railway**. Includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Isn't exclusive list.
    1. Stevedore services are necessary. Advertaising agency for cruise ship, liquor for crew of commercial vessel. Beer certainly is. Fumigation of baggage, etc. Lots can fit in.
    2. 5th Circuit: maritime insurance is necessary.
    3. 5th Circuit: Law firms do <u>not</u> have maritime liens for services in releasing vessel from seizure.

b. On the credit of the vessel: statute creates only a reubttable presumption that one who provides necessaries to a vessel extended credit to the vessel. Party attacking this presumption has the burden of establishing that the personal credit of the owner or chartere was solely relied upon.
    i. Merely billing the vessel's agent rather than the vessel's owner will not overcome the presumption.
c. **Presumed authority:** master, owners, officer or agent appointed by the charterer. Material man has no duty to inquire into the charterer's authority to beind the vessel, but no lien if he has actual knowledge of the clause or that person ordering services lacked authority to bind the vessel.
d. **Vessel in PDX that USCG & US Attorney's office think violated oil overboard;** criminal & civil offense. Will charge big money if prove those things happened. Want big bond before allow vessel to leave. What is gov't's priority?
    i. **Not expressed explicity, but analytically.**

Priority among Maritime Liens. Mostly this is judge created, except for ship mortgages.

e. **The John G. Stevens** (SCOTUS, 1898): Whether lien on a tug is to be preferred in admiralty to statutory lien for supplies furnished to tug in her home port before collision.
    i. Two issues:
        1. Is claim in tort for damages entitled to priority to claim in Contract?
            a. yes
        2. Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage a claim in tort?

a. Yes

f. **The William Leishear** (USDC, Md. 1927): priorities of maritime liens on schooner:
   i. Wages
   ii. Salvage
   iii. Tort liens, then Materials, supplies, wharfage.
   iv. (Generally not enough money to play all this)

- Inverse priority rule: latest claimant has priority.
- Note 2, p. 490: claims of the same class in one voyage, have priority of claims of previous voyage in same class. "The Voyage Rule."
  a. problem with the voyage rule if apply to other ships?
  b. What about commercial fishing voyage – is each load of fishermen a new voyage?
  c. Tugboats? Sometimes they may have particular voyage, someimtes they don't.
  d. Note 2, p. 490: courts follow analogous procedures.

- Make sure have a good ground on priorities.
  a. Rare to appeal in these claims, b/c the money's already gone.
  b. How to keep money sufficient to pay claim from being paid out, plus interest – client has to fund sizeable amount, has to cover interest. Clients decide too expensive. To get to the appellate court, that would be very expensive.

Ship Mortgages

- Until 1920, matter of state concern! Not even a maritime claim. Another example of Congress telling SCOTUS what the maritime law is.
- In order to have lien status, must qualify as a preferred ship mortgage.
- Ship mortgage is inferior to everything before or after except for necessaries (??? Check this).
- If meets these requirements, it is a maritime K.
- Three requirements, p. 492:
  - Must include whole vessel.
  - Must be filed with USCG with substantial requirements of section 1312(1). Technical form requirements.
  - Must cover <u>documented</u> vessel.
    - Two kinds of documented vessel
    - Enrolled – US Flag vessel.
    - Registered – foreign
- So what priority does ship mortgage have, compared to others?
  - In ship mortgage act of preferred maritime lien.
  - What are they, p. 492 listed.
- Governor & Company of Bank of Scotland v. Maria SJ M/V (1998): penalty wages IN THIS CASE not payable out of proceeds from the sale of the vessel; not as high of a prirority as regular seaman's wages.

- Preferred ship mortgage enjoys priority over all claims of a vessel with the exception of expenses & preferred maritime liens. Wages of crew are preferred maritime liens.

Bankruptcy

- On filing petition of bankruptcy, all litigation & pursuit of liens are stayed.
    - Can impact maritime lien claim
  - Judges not article III judges
- Bankruptcy courts have jurisdiction over the validity and priority of maritime liens.
  - Case law has opted in direction of …
    - Bankruptcy judge has full authority to administer the debtor's maritime property, including the power to sell a vessel free and clear of all liens.
    - Once bankruptcy petition is filed, in rem actions against the debtor's property much cease.
  - US v. The Chandon (9th Circuit, 1989):

Collision

a. **The Jumna** (2nd Circuit, 1906): an inevitable accident is one that isn't possible to prevent by exercise of due care, caution, and nautical skill. Generally attributed to an act of God.
    i. Test: could collision have been prevented by the exercise of ordinary care, caution, and maritime skill?
    ii. Case here b/c don't prove liability without proving someone's at fault.
        1. problem: why didn't anyone look at proper care and maintenance, products liability – sue rope maker.

b. Notes:
    i. Party seeking to recover damages must show fault on the part of the D.
    ii. Showing of fault is easier if vessel has violated a rule of navigation.
        1. navigational rules governed
    iii. Old rule: damages divided equally (!) no matter who sustained damages and how much they were (until Reliable Transfer).

c. **The Pennsylvania** (SCOTUS, 1874): establishes Pennsylvania Rule: strong presumption that statutory violation was a cause in fact of the accident.
    i. In such a case, the **burden rests on the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.** (!)
    ii. Pretty rugged burden of proof.
    iii. Frequently cited, even now.

d. Note: 1st Circuit didn't want to follow the Pennsylvania in a harsh case

e. **Hal Antillen N.V. v. Mount Ymitos MS** (5th Circuit, 1998):
    i. Courts do not favor giving effect to local customs involving deviations from the rules of navigation, and they will make an exception only when the customs are firmly established & well understood.

ii. Passes – in Mississippi River.

f. **Puerto Rico Ports Authority v. M/V Manhattan Prince** (1st Circuit, 1990): pilot & vessel could be jointly & severally liable for damage to dock while docking. Allision.
   i. **In extremis:** where one ship places another ship in position of extreme danger, the other ship will not be held to blame if she does something wrong.
   ii. When fully manned vessel accompanied by tugs strikes a pier head on, it ought to be presumed that the vessel was negligent (unless vessel proves otherwise).
   iii. But vessel owner gets 50% of damages from the pilot.
   iv. Important evidentiary point: USCG investigates & issues report; becomes public document. Is it admissible w/o calling the author? Yes – Beech Aircraft v. Rainey.

g. Notes:
   i. **Presumption of fault against vessel that strikes stationary object** is stout.
      1. but not as strong as Pennsylvania presumption.
   ii. No presumption if stationary object is submerged.

h. **Gaines Towing & Transportation, Inc. v. Atlantia Tanker Corp.** (5th Circuit, 1999):
   i. When vessel damaged in collision, amount of recovery depends on if it's a total loss or if partial damage justifies repair.
      1. **vessel is considered constructively total loss** when the damage is repairable but the cost of repairs exceeds the fair market value of the vessel immediately before the accident.
         a. Take the money & go.
         b. Can't recover for loss of use.
      2. **if partially damaged, owner is entitled to recover the reasonable cost of repairs** to restore to precasualty condition.

i. Note: *when vessel is totally lost, the damages are measured by the market value plus pending freight.* The Umbria (1897). Pending freight – what's loaded on the ship. Unfulfilled contracts – loss of profit.

j. **US v. Reliable Transfer Co (**SCOTUS, 1975): liability for damages in maritime collision or stranding will be **allocated among parties proportionately** to the comparative degree of fault; only allotted equally when parties are equally at fault or when not possible to proportion fault.
   i. **Very important admiralty case decided in the US.**
   ii. Damages for stranding – Coast Guard liable for 25%, but under old rules would have had to pay 50%.
   iii. Unfairness of divided damages rule: if only slightly at fault, would pay 50%.

k. Notes:
   i. Reliable Transfer doesn't abolish in extremis rule.
   ii. Reliable Transfer doesn't change joint & several liability.

1. SCOTUS case: Edmonds.

iii. but if you really can't determine who did what and apportion it, can still use divided damages rule.

Towage & Pilotage

- **Lone Star Industries, Inc v. Mays Towing Co**. (8th Circuit, 1991):
  - Iced-up barges – one sank.
    - hatches below water.
  - Tug is not a bailee of the vessel in tow.
  - For liability to attach to tug, P must show that something more than "receipt of a tow in good order and delivery in damaged condition."
  - Here, Lone Star's negligence constitutes a **superseding cause** – relieves Mays Towing of liability. (But for that cause, this wouldn't have occurred).
- Notes:
  - Many courts have stated that **towage contracts include implied warranties** that the tug is seaworthy and that the tow will be conducted with reasonable skill & diligence.
    - but if owned by the same company, it's affreightment situation, with usual receipt in good order conditions, etc.
  - **Owner of the tow is obligated to deliver it to the tug in seaworthy condition** & can be held responsible for damages to the tug, tow, or cargo resulting from the tow's unseaworthiness.
  - If tug is negligent in accepting an unseaworthy tow or in continuing to move a tow that exhibits unseaworthiness, sole responsibility may be imposed on it.
- **Dillingham Tug & Barge Corp v. Collier Carbon & Chemical Corp (**9th Circuit, 1983): not against public policy to enforce insurance provision in towage contract. Failed to show that the industry overreached. (As long as not monopoly situation, will be held valid.)
  - Inland barge towed on the open seas. Due care wasn't exercised by the tugs, and tow sinks.
  - Clause in contract requiring barge owner to name tug company on union's hull policy in the barge – waive subrogation against tug company. "Benefit of insurance clause" to exculpate tug from liability. 1 million dollar deductible. (!)
  - Bisso (old SCOTUS case): pure exculpatory clause in towing was invalid, but newer cases, that doesn't apply to international towage.

Pilotage

- **The Framlington Court** (5th Circuit, 1934): competent pilot must be aboard ship in order to render her seaworthy at inception of voyage.
  - Cargo from Newfoundland strands when master refuses to take pilot.
  - Court finds that pilot was competent, was dangerous not to take a pilot. Master had never been in the port before.
  - Vessel held unseaworthy for lack of a pilot.

- **Kotch v. Board of River Port Pilot Commissioners** (SCOTUS, 1947): states have sole authority to govern pilot associations, and if they want to engage in nepotism, they can.
- Notes:
  - Compulsory pilotage statutes are common.
  - States have right to regulate in-state piloted of vessels in foreign trade, while federal authority over pilotage in vessels in coastwise or domestic trade.
- **Evans v. United Arab Shipping Co.** (3rd Circuit, 1993): a pilot is not an employee of a ship (for Jones Act recovery). Either employees of pilots' association or independent contractors.
  - Pilots frequently injured getting on and off ship.
  - Always have reasonable care under general maritime law – locality and maritime nexus.
- When have compulsory pilot & compulsory pilot messes up and renders vessel liable in rem (The China, p. 421 noted), and vessel owner isn't liable in personam….as matter of public policy, impose liability in rem. Not sure if fits modern circumstances.
- **US v. Nielson (**SCOTUS, 1955):
  - P422

General Average

- Historical roots in Digest of Justinian & Laws of Oleron
- Unique in admiralty
- Average means "damage or loss of ship or cargo"
- Traditional use to use term average.
  - **General Average** is one borne proportionately by all property interests in the voyage. Owner of vessel, each owner of cargo on the ship. (including owner of damaged cargo: never is truly made whole).
  - **Particular Average** is borne solely by the owner of the property that has suffered a loss.
- **General Average is restricted to voluntary sacrifices and expenditures for the common benefit.**
  - Master's duty to calculate the amount of each party's contribution & make payment to the owner whose property has been sacrificed.
    - In practice, vessel owner will hire an average adjuster to calculate contributions.
    - The job when declaration of general average is made, adjuster looks at the value of cargo jettisoned, what was the value the ship incurred to continue the voyage, determine of the interests participants; ship & cargo. Take the loss they found and apportion it.
  - Sometimes Ks, sometimes litigated.
  - Ship has possessory lien on the cargo. Will give cargo only when there's a promise to pay portion of the sacrifice. (Normally insurance companies guarantee to pay it.)

- If involuntary, like theft, no general average situation.
  - Rules applied – bills of lading have clause saying york-something rules (look this up).
- Situation is not too uncommon: modern sacrifice isn't generally jettisoning cargo, but what does happen is that vessel accidentally strands itself, loses power, and then the expenses to avoid stranding, etc. can come up as general average. (The voluntary part is trying to avoid the peril.)
- Cost of repairing damage isn't general average claim, but the cost of unloading cargo, reloading, housing crew during repair – that is a general average claim.

- General Average is part of general maritime law.

The Sacrifice:

Barnard v. Adams (SCOTUS, 1850):

- three things required for general average:
  - **common danger,** in which ship, cargo & crew all participate
  - must be **voluntary jettison/action**
  - in an **attempt to avoid common peril must be successful.**
    - If not successful, no general average possible.
- Deliberately stranding the ship to save the cargo counts for general average.

Notes

long debated if voluntary stranding counts for general average.

Prof distinguishes between expense between voluntary stranding & involuntary stranding. (?) even if involuntarily stranded, can have general average sacrifice to avoid further damage.

Ralli v. Troop (SCOTUS, 1895):

- fire on the vessel; shoreside fire takes over.
- Sole object of the sacrifice must appear to be to save vessel & cargo.
- No general average when ship is destroyed by municipal authorities.

- Note: cargo owners say it's true we're not liable for general average, but still have damaged cargo here. Cargo owners want a recovery. Vessel owner would involve Fire statute of 1851, part of LOL Act. OR COGSA Fire exemption – to vessel owners & carriers (who issue bills of lading). Unless extinguishing acts are negligent & the vessel owner has privity of knowledge.

- Notes:
- Important things in determining sacrifice:
  - Purpose of the sacrifice

- Jettisoning cargo to save passengers is not general average act. No recovery. (Crappy result).
- Who ordered the sacrifice
- Fire damage & firefighting: damage to ship & cargo to fight fire is general average, but no compensation for damage from smoke or heat.

a. The Peril

Navigazione Generale Italiana v. Spencer Kellogg & Sons, Inc (2nd Circuit, 1937): danger should be real and substantial, even if catastrophe isn't imminent.

stuck in the mud – not a general average sacrifice. Brief mention of owner summoning tug to help. Expense for general average may have been the tug. Fuel not going anywhere.

Notes:

a. If peril but master is mistaken as to degree and takes more drastic action than necessary, general average can still be allowed.
b. General average disallowed where master was mistaken as to existence of peril.
c. Some expenses may be recovered even if incurred after period of peril.
d. **Professor**: suppose cargo was lost overboard due to crew negligence. Then responsibility of loss of cargo is obverse of general average. This is counterclaim to general average claim.
   - **So cargo owners don't contribute to general average claim when COGSA or other claim**.
   - In error of navigation situation, not the situation – exception in COGSA.

b. Vessel Fault

The Jason (SCOTUS, 1912): clause in bill of lading allows shipowner to share in contribution even when peril is vessel's fault b/c of Harter Act.

- **vessel stranded on Cuban coast, jettisons part of cargo to get off.** Get to port in NY and P whose cargo was jettisoned didn't want to pay b/c of crew negligence.

- Note: modern bills of lading include "new Jason clause" to cover shipowner sharing in contribution – designed to apply should bill of lading be governed by COGSA or another statue.

Salvage

- **Markakis v. S/S Volendam (DC, SD of NY, 1980):**
  - Crew of one ship goes to take on passengers from another ship; tow the other ship from the Cuban coast.
  - **To prevail in salvage award, P must show**:
    - marine **peril**

- service **voluntarily** rendered when not required as an existing duty or from a special contract
- **success** in whole or part, or that service rendered contributed to such success.
    - **No cure no pay.**
    - **No matter what happens.**

Here, court holds that even though ship's master was directed by company to assist, he can still recover.

Caselaw says that people whose duty it is to rescue people like fireboats, etc, aren't eligible for salvage. USCG may generate salvage awards → but that's wrong.

- Notes:

Salvage Act of 1912: codifies most salvage law – judge-made.

- even if vessels owned by same party, there's salvage rights.
- statute designed to protect master & crew.
- often the owner participates in the salvage award. Vessel owner is in some peril if master & crew are.
- Can be three way cut between master, crew & owner of vessel.
- Supplement has it – check on it. P. 41

Salvage is distinct from towage.

- if fee not agreed to, salvage gets higher award
- under salvage K, vessel & cargo is liable for payment
- Salvage K creates preferred maritime lien
- crew of salving vessel has additional rights under salvage K

Salvage of one's own ship: seamen already have a duty to help, so no salvage for own ship (risk of fraud)

- if you could do this, people might run around creating problems.

Statutory duty to stand by: in case of collision, vessels are required by statute to stand by and render assistance – bars salvage claim. But if just happen on it and help out, may be eligible.

- No cure, no pay – under general rule, no reward if nothing is saved (but partial success qualifies).
    - but also, check Salvage Convention, note 3: not many cases on it. This may supercede some of the case law, but hard to tell. EG, note three page 455, p. 2: salvor has right to recover expenses if vessel threatens environment. Doesn't seem to require success (?) Single expenses if make effort. Get twice expenses is succeeds. (Not sure if this supercedes no cure no pay rule.)
- Salvage efforts often involve more than one group.

- **Masters or owners generally sue in salvage for crew members' rights**: not subject to class action requirements of FRCP.

Margate Shipping Co. v. M/V JA Orgeron (5th C, 1998): salvage awards can be reduced or reversed only if based on incorrect principles of law, or misapprehension of the facts or is either so excessive or so inadequate as to indicate an abuse of discretion.

- Court reduces damage award b/c DC erred in calculating replacement cost of space shuttle engine.

Blackwall factors in determining amounts: 470

- labor expended by salvors
- salvors promptitude & skill
- value of salving property
- risk to salvors
- value of salved property
- risked to salved property

a. **Notes**:

- Environmental factors: no pay-no cure rule may be modified if salvor prevents environmental damage – may receive up to twice his expenses.
  - Misconduct, negligence or damage: salvors misconduct may reduce or eliminate an award.
  - looting is misconduct, but courts allow salvors to make reasonable use of items found on board the salved vesse.
- **Property subject to salvage:**
  - drydock permanently moored in Mississippi isn't salvageable. (1887 case).
  - But possible to have a non-vessel subject to cargo. Logs floating in the river used to be common hazard; no caselaw on if they could be subject to salvage.
  - Seaplane is subject to salvage.
  - Sunken navy plane is subject to salvage
  - Floating fish frames are subject to salvage
- Owner has right to refuse salvage
  - ww2 case; can you get salvage if vessel doesn't want to be saved? (Germans tried to sink own vessel to keep from being interdicted.) Court holds can get salvage anyway. Chance of that case recurring are nil.
- If owner abandons vessel, then can't contest salvage later.

- ***Sea Hunt Inc. v. Unidentified Shipwrecked Vessel*** **(4th Circuit, 2000):**
  - Spanish shipwrecks are entitled to same protections as US vessels, and are not abandoned unless by affirmative acts

- treaty of friendship & general relations from 1902.
- Property sued in rem has to be in jurisdiction, but here property is under water off shore.
- **Notes:**
  - If property is permanently abandoned, law of finds, not salvage, applies.
    - law of finds: finder gets 100%;
    - Salvor gets certain percentage.
  - 11th A prevents suits against states, which places salvor in difficult position when state claims historical wreck since salvage claim in rem can only be brought in federal court.
  - US can't abandon property w/o act of Congress.

- **Contract Salvage --**
  - Sometimes it's loose; vessel is in distress and owners get quick bids, and maybe don't put a price on it.
  - Common to leave compensation open to determination at a later date.
  - Often cautionary tale for owners of small vessels in distress.
  - Courts will only set aside grossly exorbitant amounts for salvage
  - It's illegal for individual in charge of vessel to fail to render assistance to person in danger at sea if can be done w/o serious danger.
- Early English practice was to deny life salvage awrd, but if life salvors also saved property, then court would be willing to award liberal amount of the salvage.
  - Americans followed this in most respects until early 20th C.
  - **1910 Salvage treaty says that salvors of human life are entitled to fair share**.
  - But Courts generally give life salvors few rights under the statute.
  - Now under US Salvage act, unless 1989 Salvage Convention supercedes it.

- **Marine Insurance**

  - General types:
    - First part insurance: protects insured against harms & losses to own person and property.
      - Eg, health insurance.
    - Third party insurance: protects against potential liability to others.
      - Eg, auto liability insurance.
  - Types of marine insurance policies:
    - **Hull insurance**, *provides vessel owners & others with interests in the vessel with* ***first party protection*** against some harms to ship & some third party protection.
    - **Cargo insurance:** affords first part protection (and sometimes third party protection) to shippers & buyers of goods

- **Protection & Indemnity (P&I) insurance,** which is third party insurance protecting insured marine operator against some potential liabilities.
    - Membership organizations; pay premium to be a member to be insured throughout the world. Pay per vessel premium.
    - On call 24 hours.
    - Even for charter fishing boats protected by these clubs.
- **Yacht policy**: for pleasure boat. Written like an automobile policy – both hull & P&I policy. So familiar in terminology that probably don't even thin it's a maritime claim. (If on navigable waters.)

- **Definitions:**
    - **Average**: just means a loss.
    - **Warranty**:
        - Strictly, a **promise that if broken voids the entire contract**.
        - In more relaxed sense, warranty is a **promise to try one's best**.
        - Also used to **signal particular exclusions from coverage**.
            - Eg, clause providing that an identified type of cargo is *warranted free of particular average* – means the insurer will not pay for partial losses for this type of cargo.
- **Standard Oil Co. v. United States** (SCOTUS, 1950):
    - Collision of tanker with minesweeper. Error on part of both vessels.
    - US abandons English rule that mere collision of ship with warship means falls under war clause of insurance policy.
    - Court determines that should use "the" proximate cause of each case to determine if loss is b/c of war risk. (why not 'a' proximate cause?)
        - Here, loss is not b/c of warlike operations. Was errors of navigation that caused the collision, not the minesweeping.

- **Notes**:
    - Deference to England is frequently shown and used as a guide, but isn't authoritative.
    - Proximate cause analysis leads to all sorts of wacky results.
        - Bananas rotted while ship stranded; would have covered losses from stranding, not decay. So what caused the rotting? Court holds the decay! No coverage.
    - Is there a better way?
        - Insured has burden of proof (Northwestern v. Linard) to show that loss arose from covered peril.
        - Insurer has burden to show that loss fell within an exclusion.
- **Calmar Steamship Corp. v. Scott** (SCOTUS, 1953):
    - Sometimes policies written for special situations – MS policies – often have hodgepodge. Not drafted by lawyers. Very bad language. Prof thinks that's why this case is here.
    - Ship diverted to Australia, sent around country, was strafed by Japanese.

- **Notes:**
  - Policies are often badly written.
  - Insurers do not make a practice of litigating fine points to avoid liability. (Gilmore & Black).
    - Authors take issue with this.
    - Professor: often think that underwriters do think about who their clients are.
  - **Constructive total loss:** insured of a vessel that has sustained damage beyond a certain point can declare an abandonment of the vessel.
    - England: constructive total loss point is reached when repairs would exceed value of ship.
    - US: when exceed half the value of a ship.
  - **Deviation** will void a policy. Returning to proper course doesn't bring the insurance policy back to life.
  - **Contract Reformation:** courts may reform to reflect the intention of the parties.
    - Including amount of insurance, term & duration of the risk, the property or interest covered by the policy, or the name of the person involved & ownership of the property.
  - ***Contra proferentem:*** construe against the drafter.
    - ***Sometimes drafted by brokers –*** depends on who broker represents.
- **Wilburn Boat Case:**
  - SCOTUS holds that marine insurance should be tried under state law, not federal.
    - IF no established federal maritime law, then look to state law.
    - Big issue: want to have uniformity for maritime claims! People HATE this case.
  - Side note: "**uberrimae fidei**" – utmost good faith that insured owes to insurer, to reveal everything that a prudent underwriter would consider material.
  - Generally this is well enough established to not have to resort to state law.
  - Common provision in fishing boat policies: warranted that vessel be used only within 100 miles off west coast of US. If boat off 150 miles, sinks, then breach of warranty. Breach of geographical warranty. Does Wilburn apply? Then what state law applies?
- **Craddock International Inc. v. WKP Wilson & Son, Inc. (**5th C, 1997):
  - Atypical case.
  - Broker who negligently cancels policy can't claim limitation of reduction of damages if loss caused by insured event, even if event caused by insured's lack of due diligence.
  - Third party liability to cargo owner was covered by P&I policy despite clause limiting coverage for "assured's own cargo" and fact that cargo had been named as additional insured under P&I.
- **Notes**:
  - **"open" or "floating" cargo policies**

        - common policy.
        - provisions designed to allow coverage to extend to future shipments without the necessity of continually rewriting the policy; but later-shipped cargo must be of the same general type.
    - Should be no implied warranty in seaworthiness. [Look this up.]
    - Brokers can make very costly mistakes; treated as agents of the insured, not the insurance company.
        - Professor: by statute, insurance agents, even if purport to be independent, are deemed to be agents of insurer.
- **Fernandez v. Haynie** (USDC, ED of Va, 2000):
    - Broker: switches coverage on insured; insurance company goes belly up. The issue is just if the contact to procure & maintain marine insurance falls within federal admiralty jurisdiction.
        - Exxon & progeny discourage bars to admiralty jurisdiction in contract cases.
- **Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.** (2nd C, 1972):
    - Owner had three types of policies.
    - where insurer of hull and machinery and barge owner, far from abandoning their interests in grounded vessel, had it towed to New York in vain hope of salvaging the hull, and **no governmental order was necessary to spur the removal, the costs of operation were not chargeable to insurer under protection and indemnity policy** which insured against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory."
        - There is a federal statute that says if you own vessel that sinks & obstructs navigation, have to mark with a buoy and then remove it at your expense. So common in P&I policy to have wreck removal clause.
- Notes:
    - P&I coverage can be supplementary to hull coverage—a group of "left over" things, caused by rare and catastrophic occurrences like the plague(!).
    - **Other insurance clauses:**
        - **Excess** clauses: policy kicks in when policy limits of other available insurance are exhausted are honored.
        - **Pro Rata** clauses: set out percentage of coverage the policy bears to the net amount of coverage available are less favored.
        - **Escape** clauses: providing that coverage ceases when other insurance covers the loss are somewhat disfavored.
        - When policies of the same type clash, a **doctrine of mutual repugnancy** comes into play, voiding both clauses. Result is that insurers must share in the loss in proportions determined by their policy limits.
- **Shaver Transportation Co. v. Travelers Indemnity** (USDC of Oregon, 1979):
    - Carrier and shippers sued to recover on a marine cargo policy for a loss incurred when caustic soda became contaminated while being loaded unto

the barge because of the carrier's failure to properly clean and inspect the barge's input lines.

- The District Court held that the loss was not covered under the perils of the sea clause, the free from particular average clause, the warehouse-to-warehouse clause, the marine extension clause, the shore coverage clause, the inchmaree clause, the negligence clause, or the general averages clauses.
    - **Peril of the sea clause:** says wasn't any peril of the sea. The cause of the loss was improper cleaning of the ship.
    - **Inchmaree clause:** shows up in a lot of marine insurance policies. Covers loss or damage to the insured property by machinery of vessel – and adds in or from faults or errors in navigation of the vessel. Added negligence of mariners.
- **Now Weyerhauser will sue Shaver directly?** Do they in the facts in this case?
    - Typically have dichotomy of recovery under COGSA/Harter Act – unseaworthiness.
    - Not reasonably fit to carry cargo of caustic soda. No doubt this recovery happened.

- **Notes**:
    - Warrantee of seaworthiness: traditional maritime insurance law implied warranty of seaworthiness in all voyage policies, including cargo policies. But since cargo can't know the condition of the vessel, cargo policies usually waive the warranty. (?)
    - **Inchmaree clause:** covers losses through bursting of boilers, breakage of shafts, etc.
    - **Eustem Generis:** doctrine applied to clause – perils of the sea – read this again in the book. Comes up frequently in marine insurance policies.
    - **All risk policies – aren't literally all risk. Have exclusions.**
        - In those policies, the burden is on insurance company to prove loss came within the exclusion.
            - Eg, rust on cargo of steel. Only question is if exposed to fresh water or sea water (before or during voyage).

    - **Return of premium:**
        - When insurer resists payment on policy-coverage grounds, the theory of its case is that the insured got the protection it paid for and is trying to get additional coverage in the policy; there's no good argument for insisting insurer return the unused portion of the premium.
        - But when insurer's theory is that the policy was voided by a misrepresentation or breach of warranty, the insurer must return the unused portion.