AN OVERVIEW OF THE LEGAL RIGHTS AND OBLIGATIONS OF OWNERS AND OPERATORS OF BARGES IN THE UNITED STATES

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INTERNATIONAL CONFERENCE

ON

"CHARTERPARTIES, CARRIAGE OF GOODS
BY SEAS AND INSURANCE.
AN OVERALL PERSPECTIVE".

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PREFACE

The author admonishes the reader that this paper is intended as a general and practical overview of the legal rights and obligations of owners and operators of Barges in the United States. It is not intended to be a legal compendium of the subject matter. Rather, it is the intent of the author to alert the legal practitioner of the dramatic increase utilization of Tugs and Barge in the transportation of ocean cargo and the legal liability of the cargo interests that he serves. This paper has been written for and within the confines of the Conference.

Unquestionably, the problems associated with sailing vessels was the origin of the tugboats.

The English sailing vessel owners realized that their vessels were really transporting goods from warehouse to warehouse rather than from land to land. If they were to successfully compete with the newly arrived American Clipper they had to reduce the time loss at the end of each voyage.

Many of the European ports like the English ports were located in awkward positions on rivers compared to ports located on the coasts. The awkward exist from these river ports together with unfavorable winds could holdup the vessel for weeks on end.

It appears that the first successful tugboat dates back to 1801 when the *Charlotte Dundas* was built for towing barges on the Forth and Clyde Canal in Scotland. The first towboat to appear on the Thames (about 1832) was the *Lady Dundas.*

The first tug to appear in the United States was the *Henry Eckford* built in 1825 to tow grain barges from the Great Lakes across New York State vie the Erie Canal then down the Hudson River to New York City and the first regular towboat service in New York Harbor was performed by the *Rufus W. King* in 1828.

With the development of the steamboat, river traffic expanded rapidly in the United States. In 1824, Congress past legislation to improve rivers and harbors on a planned basis. At the height of the American Civil War, river fleets were reportedly transporting more tonnage then that handled by all vessels in the British Empire.

However, after the Civil War the depleted river boat fleets were not rebuilt to any extent due primarily to the competition from the railroads. In 1850, there were only 9,000 miles of rails in the United States; by 1890 trackage had increased to almost 165,000 miles.

The railroads were so vicious in their fight to control inland water transportation that they would purchase river lines and tugboat operators with the intent to scrap them or actively compete with rates so low that competitors could not compete; eventually forcing them to simply go out of business. This kind of competition eventually lead to the passage of the Panama Canal Act by Congress in 1912 which not only authorized the construction of the canal itself, but also forced a division of ownership by railroads of water carriers.

In 1918 a Federal Manager was appointed to commandeer and put into service all available water transportation equipment on inland waterways and in 1920, Congress passed the Transportation Act to encourage the development of water transportation followed by the Inland Waterways Corporation of 1924 to establish and demonstrate the transportation capabilities of modern tugboats and barges.

Modern day tug and barge operations are here to stay! Today more cargo is traveling the Coastwide trades of the United States on barges then was ever carried on ships! The cargoes are coal, oil, containerized general cargo and even grain. 33,000 dead weight ton barges are now regularly employed in the U.S. Grain Trades to West Africa and Mediterranean Ports. A barge of this size is equivalent to the combined dead weight of three Liberty ships. Additionally, three Liberties would have required a combined crew of 120 persons. The complement of a tug and barge is about eight. As America lead the way with the RoRo and container ships we are now showing the world the economic advantages of barge transportation.

This past summer, CSX, which is SeaLand's parent Corporation, Norfolk Southern and the Burlington Northern railroads announced plans to provide rail service via barge across the Gulf of Mexico from the U.S. ports of Galvaston, New Orleans and Mobile to the Mexican Ports of Altamira, Veracurz and Coatzacoalcos. Each barge can carry up to 108 freight cars on each trip thereby increasing by 15,000, the 25,000 trailers and containers that presently enter Mexico from the United States annually by conventional rail.

Tug and Barge units provide for the transportation of commodities that otherwise could not be easily carried by ship. In 1992 four hull sections of a Naval Frigate were prefabricated at a factory located on Prince Edward Island, Canada and thereafter barged to the shipyard at St. John's New Foundland, Canada for completion. Also in 1992, a cross section of a U.S. atomic submarine was constructed at the Alabama factory of Chicago Bridge and Iron; barged down on the Black Tomahawk River, eventually making its way through Mobile; proceeding down the western coast of Florida around the Florida Keys and up the Atlanta Coast to Norfolk Virginia, for assembly at Newport News Shipbuilding and DryDock. Only a barge could have provided this flexibility.

Almost all heavy equipment is moved by barge to and from Alaska's, North Slope from Pugetsound. Most recently three barges hauling "building size" gas extraction plants were towed to Alaska for use in extending the life of the North Slope oil fields. And barges made the final connection in the transportation of eight 1,200 ton housing modulars that had been assembled at a yard in New

Iberia, Indiana; down the Mississippi, past New Orleans, through the Panama Canal, up along the Mexican and Californian Coast to the port of Seattle, on to their final destination in Alaska. Each of these housing modulars are taller than a ten story building and are part of a 1.5 billion project by Arco Alaska and British Petroleum to boast oil production of their North Slope fields. The barges were pushed through the icy water by three 9,000 horsepower Crowley tugs provided by Crowley American Transport, the largest Division of Crowley Maritime Corp. This Division employs 3,500 generates revenue of 750 million and operate a fleet of 38 oceangoing barges that serve South and Central American, Puerto Rico and the Caribbean. Crowley carriers about 30% of U.S. trade with Latin America.

There is no question of the utility and the versatileness of the tug and barge. The Normandy Invasion by the Allies would have never been successful without the use of tugs and barges. On June 6, 1944, 54 merchant ships were sunk so as to create an artificial break water. Thereafter, 1 million pound concrete hollow blocks called Mole-bries were towed across the channel from England via barge. These mole-bries were sunk so as to form instant piers from which ships could be unloaded with supplies and material so as to support the advanced of the greatest military assault in history.

Economics rather than tradition or sentiment will dictate the continued use of the tug and barge. The first company to do so was Matson Navigation. In 1963, the container barge *Islander* was built and entered the Hawaiian inter-island service. Since that time, Matson has been expanding its barge fleet with larger and more efficient vessels. Another company, Lykes Lines, opted for barges in 1970 on its Caribbean service. These barges have successfully replaced the Lykes fleet of C-1 type ships. Another noteworthy conversion was the *Lykes Innovator.* She was built in 1960 as the *Joseph Lykes,* a Gulfpride type ship. In 1971, she was "jumboized" and converted into a Gulfpacer class ship, i.e., a partial container ship. In the summer of 1992, she was transformed into a unmanned barge, retaining her cargo ship configuration and most of her cargo handling capability. The midship deck house and power plant were removed leaving the engine space available for conversion into an additional cargo hold. In 1985, Gulf Coast transit had the *Doris Guenther* built. This "notchtype" tug and barge unit has a capacity of 17,000 dead weight tons and frequents the grain trade, travelling between Alexandria, Egypt and New Orleans. Another example of conversion is the *S/S Lompoc.* Built in 1945, she served in the oil trades out of Los Angeles for 40 years and sailed under the flag of West Coast shipping. She was converted in 1991 at Mobile, Alabama and with her new configuration has the ability to carry 19,154 tons; she is presently in the grain trade.

In our world, the legal world, the barge is defined as dumb; it is unmanned, has no means of propulsion and cannot control its own movements. There is no place from which a crew member working on a barge can get a cup of coffee on a cold night or shelter from bad weather as there is no deck house. Since the barge is unmanned, there is no person to contact with regard to stability, tank soundings, cargo plans, etc. The responsible person usually has the title of superintendent, barge captain, owner's representative or perhaps the captain of the tug depending upon the circumstances. This person usually bases his operations on the tug. Most often the tug is contracted by the barge owner and the personnel aboard the tug have no interest in the barge until loading operations are completed and the barge is made fast. On a ship, the crew is concerned about the cargo. Lashings are routinely inspected and tightened as needed. No matter the hour of the day, the crew is ready to respond to any emergency. Bilge soundings are taken and pumped when necessary, ventilators are trimmed and the humidity of cargo holes is monitored. None of this happens on a barge. In a storm or in times of trouble, the nearest help is a quarter mile away; at the end of a tow line. Usually, until a storm moderates or port of refuge can be reached. There is no help for the cargo on a barge.

Three problems immediately come to mind with regard to the tug and barge fitted for sea service:

1) The tow line itself can actually be submerged or not visible at night trapping the unwary vessel to cross it (not realizing the barge behind is connected) with sometimes disastrous results or, fog situations can also lead the unwary vessel to cross with disastrous results,
2) The scope is incorrect, or improperly secured, or sized, which can lead to breakage and the consequent loss of the tow and,
3) The tow may be improperly fitted with skegs (or none at all) which can lead the tow to severe jawing motion which also leads to snapping of the tow line.

Of course, with the snapping of the tow line, or the intentional cutting in the case of a sever storm, the barge becomes a "loose cannon" with all sorts of collision, and environmental consequences. The ever increasing trend to avoid vessel manning (25 persons) to tug manning (8 persons) by creating integrated tug-barges or articulated tug-barges has led to ever increasing disaster at sea. It is the rule to rely on classifications society for vessel scantlings. However, this practice will change out of necessity. It must be remembered that scantlings for a tug are taken from a society's rule for tugs based on the actual length of the tug itself. The same is also true for the barge. In a seaway, the 30m tug connected to the 100m barge is, in reality a 130m vessel! Surveyors will be concerned with the following on behalf of Underwriters for cargo owners, shippers, vessel owners and vessel operators:

1) Is the barge certified for offshore services? The United States Coast Guard Certificate of Inspection will indicate so.

2) Is it a conventional barge in which the cargo is stowed, underdeck within the hull or does it carry a cargo on deck? The stability of conventional barges must comply with 46 CFR 170.170. The barge must have a Coast Guard approved trim and stability booklet or Coast Guard stability letter which the surveyor will utilize to assure loading complies with any limitation or restriction in the document.

If the barge carries deck cargo it must also meet the additional stability requirement of 46 CFR 174.015. This specifies a permissible height of cargo on deck which varies with the draft.

3) If the barge is loading bulk grain, it must have an approved Grain Loading booklet. It cannot carry cargo on deck when bulk grain is carried unless the grain loading booklet specifically provides for such carriage.

4) Is the draft of the loaded barge correct for the harbor density, within the limit, specified for the voyage and season *vis-a-vis* the load lines certificate? Citing draft marks and plimsoll marks is not sufficient.

5) Are all tanks and void spaces pumped dry? Liquid-free service must be eliminated or accounted for in stability calculations.

6) Are the cargo lashing adequate for the intended voyage taking due account of the free board and the fact that there will be no one to inspect the lashings for the duration of the voyage.

GENERAL DUTY OF THE TUG AND BARGE UNDER COMMON LAW

The owner of the tow owes the duty of furnishing a seaworthy vessel suitable for the conditions to be anticipated. This duty was succinctly stated in the *Director,* 1927 AMC 007 1295 as follows...*a vessel seeking the services of a tow boat holds itself out to be sufficiently stanch and strong, that is, seaworthy, to withstand ordinary pearls of the sea to be anticipated on a voyage; and a tug has also the right to assume that the tow will carry a competent and sufficient crew and is not liable for damages either from the unseaworthy conditions of the barge or for the failure of its owners to probably man and equipped the same.*

The duties of the owner of a barge must be taken in proper context; i.e., the rule in the *White City,* 1932 AMC, 468 285 U.S. 195 76 L.ed. 699, 52 Sup. Crt. 347 applies. That is, a tug engaged in a contract of towage is not a bailee. The receipt of the tow in good order and delivered, in damaged condition, raises no presumption of negligence. Negligence must be proved. The towage contract requires only that he who undertakes the tow shall carry out his undertakings with that degree of caution and skill which prudent navigators usually employ.

"When a contract is made to tow a vessel, the owner of the tow warrants the seaworthiness of his vessel and the owner of the tug is responsible for its safe navigation." Curtis Bay Towing, Co., v. Southern Litterag Corp., 200 F.2d 33,1952 AMC 2034 (4th Cir. 1952) See also *South, Inc., v. Moran Towing & Transportation* §360 F.2d 1002, 1966 AMC 1987 (2d Cir. 1966).

BARGE OWNER's DUTY TO FURNISH A SEAWORTHY TOW

Tugs are neither bailees or insurers of the tow. An inspection by a tug master does not supersede the implied warranty of seaworthiness of the barge owner. The tug owner is entitled to rely upon a statement or representation by the owner or crew of a barge that the vessel is in proper condition to be towed. *Maurice R.* 1933 AMC 273 F. Supp. 86 (EDNY); *Schuylkill v. Banks,* 1945 AMC 1500, 152 F.2d 405; (3rd Cir. 1945). *Wikstromn v. Julia C. Moran,* 1961 AMC 536 190 F. Supp. 250 (SDNY).

A surveyors approval of the seaworthiness of the towing arrangement is not conclusive as to the question of seaworthiness. Towers are obligated to provide reasonable care and skill as *"prudent navigators employ for the performance of similar services" Stevens v. The White City; King Fisher v. NP Sunbonnet,* 1724 F.2d 1181, 1984 AMC 1770 (5th Cir. 1884). Although a tug must furnish a competent master, which may be evaluated by his prudence and reasonableness, a master is merely obligated to use reasonable and ordinary care and skill, and a Court must afford him great discretion in judging his decisions. *Cargill, Inc. v. C&P Towing Co., Inc.,* 1991 AMC 101 (EDVA 1990).

In *Employers Insurance of Wausau, et al. v. Avondale Shipyard, Inc., et al.* 1986 AMC 2770, the Court held that *"the Captain's conduct must be judged from the perspective of forsight and under the ciucumstances as he faced them...simply showing that from the perspective of hindsight the Captain turned out to be wrong and that another course of action might have been successful is not sufficient".*

BARGE OWNER'S DUTY TO PROPERLY EQUIP THE VESSEL

The duty of the barge owner to supply a properly equipped vessel includes: adequate anchors, lights conforming to governmental regulations as regards their placement and number, adequate and proper lines; a vessel which is structurally sound, and a vessel with proper steering equipment on board.

ANCHORS

Courts have repeatedly held tows to be contributorily negligent for failure to have anchors as well as failure to use anchors when available. *Nanticok-Sea King* 1929 AMC 201, 29 F.2d. (5th Cir. 1929). There are numerous "Anchor" cases; the following are notable examples. *Ellenville-Manor* 1930 AMC 847, 40 F.2d. 47 (4th Cir. 1930) (barge failed to release its anchor); *Theodora Palmer,* 1931 AMC 108, 45 F.2d 621 (D.Md 1931), (barge captain failed to drop anchor); *Allied Chem & Dye v. Christina Moran* 1962 AMC 1198, 303 F.2d. 197 (2nd Cir. 1962) (tug ordered the barge to anchor and then proceed to harbor; during the night, the storm increased and the barge failed to drop a second anchor and was grounded).

On the other hand, Courts have frequently held that if the anchors, (had they been available) would not have averted the damage, then the absence of anchors or the failure to use them if available, is not at fault. *Revere,* 1933 AMC 1098, 63 F.2d. 775 (2nd Cir. 1933). *Huntington Stake Boat,* 1926 AMC 838, 14 F.2d. 477 (EDNY) (not negligence to fail to use spare anchors when it was safer to drift onto beach), and (mere failure of a barge to have an anchor is not the basis of liability in the absence of testimony that an anchor could have been used), *Hoperang,* 1965 AMC 2203, 345 F.2d. 451 (5th Cir. 1965).

LIGHTS

The duty of the barge to properly display lights is uniformly regulated by the various maritime nations. The rules are quite specific and detailed and a failure to comply is a statutory fault. In the case of the *Conoho* 24 Fed. 758, (1885) the Court stated in the strongest of terms following: *The law as to lights is imperative. It must be obeyed. It must be effectively obeyed. Obedience to the requirements of the law must be certain and unremitted. The master, or officer in charge, must know that the lights are continually up. Conjecture will not do.* In the case of *Asfalto,* 1931 AMC 1753 (2nd Cir. 931) (barge which did not show statutory bow light, which was removed at the request of the tug captain; were tug requested different lights, and the tow acceded to the tug's request, both the tug and barge were held at fault); *Black Point Glenside,* 1936 AMC 590 14 F. Supp. 43 (D.,Mass) (vessel in tow which had cast off its hawser and was running off its headway, was held at fault for continuing to display double lights at its stern); *Nyland, etc.,* 1957 AMC 1322, 151 F. Supp. 772 (D.Md 1997) (held the tow at fault because anchor lights improperly rigged); *Triangle Cement v. Cincinnati,* 1968 AMC 892, 393 F.2d. 936 (2nd Cir. 1968) (held an unmanned barge carrying improper lights to be as equally at fault as a vessel with which it collided).

LINES

A tug is not an insurer of its tow-lines, but it is required to make reasonable inspection of its towlines *H.S. Hayward,* 1927 AMC 489, 18 F.2d. 75 (2nd Cir. 1927). Nevertheless, the barge is held to the duty of providing adequate lines if that is the obligation it has assumed under its contract. *Sergeant Barge v. Patience,* 1944 AMC 871, 56 F. Supp. 200 (EDNY) and *Rose Goldreck,* 1934 AMC 1562 (SDNY) (towing lines of a barge slipped apart without satisfactory evidence as to the reason, was *prima facie* evidence of negligence on the part of the barge either in making fast a line or in using defective lines). Included in the tow's obligation with respect to its lines is also the proper handling of the lines as well. See *Henry Bird, Jr.*, 1927 AMC 822 (EDNY) (barge captain negligent in failing to lengthen tow lines); *Meta E.*, 1932 AMC 852 (EDNY) (barge failed to slacken lines and put out fenders). However, in *Michael Tracy and Barges*, 1930 AMC 890, 41 F.2d. 361 (EDNY), the barge in question was left in a Flotilla with lines sufficient for the entire tier. Another barge was carelessly rafted to the tier. Although the barge was unmanned and its lines failed due to excessive weight, the Court exonerated the barge. In *Bouchard v. Conners Marine*, 1942 AMC 972, 129 F.2d. 110 (2nd Cir. 1942) the Court held that the risk of casting off tow-lines too soon is assumed by the tug master, and the barge crew, who must control their lines when they are left in charge but also must obey the tug's order when they are in tow.

APPURTENANCES

In addition to being structurally sound and seaworthy in all respects, the barge must also provide necessary appliances and accessory equipment. The following cases demonstrate this obligation; *Conwar No. 20-Porter*, 1930 AMC 2013 (EDNY) (tow held liable for breaking of a rotten bitt); *Eastern Transp. Co., v. Nancy Moran* 1948 AMC 1301, 78 F. Supp. 646 (EDNY) (defective rudder, pumps which lacked hoses, and defective tow bitts); *Moran Towing and Transp. Co., Appeal* 1967 AMC 417 (ASBCA) (towing shackles furnished by the barge owner were defective), but in the *Frank*, 1926 AMC 852 (EDNY), the Court held that a barge not equipped with fenders which was damaged by striking the corner of a car float was not at fault inasmuch as having fenders aboard would not have prevented the damage anyway.

PRESUMPTION OF UNSEAWORTHINESS

There are literally hundreds of cases holding barges unseaworthy simply because they were *found* to be *"old and leaky"*. The U.S. Courts have applied a simple rule in these cases... *"ifthe barge sinks in fair weather and calm seas; it is presumed to be unseaworthy; absence of proof that it was improperly handled by the tug and there being no evidence offered as to its general seaworthiness, the barge is presumed unseaworthy."* *Murry Glenn*, 1930 AMC 550, 31 F. Supp. 820 (SDNY). In *Consolidated Grain & Barge Company v. Mareoria Conveyor Corp.*, 716 F.2d. 1077, 1081 (5th Cir. 1983) the Court held that were a barge in tow sinks in calm water for no ascertainable cause... *"in the absence of proof that the barge was improperly handled, the vessels' sinking is presumed to be a direct result of her unseaworthiness."* Likewise there are hundreds of cases holding barges to be unseaworthy *merely* because they were *"leaky and old"* and *unexpectedly* began taking on water. *Alice K.,* 1924 AMC 1465, 1926 AMC 34, 9 F.2d. 917 (SDNY) (damages were divided as between the tug and barge as tug left the barge unattended at a stake boat, knowing that it was leaky) *Miami,* 1930 AMC 1490, 43 F.2d 562 (EDNY) (barge sank at its pier; no unusual weather conditions nor any proof of collision).

BARGE PERSONAL

If a barge is manned it must have a competent crew. Employing competent men to inspect and maintain barges is illustrated in *Volunteer and Barges,* 1929 AMC 1577 (EDNY). In that case, the barge owner employed competent men to see to it that his equipment was kept in proper order. The one barge had an experience master aboard; the other had a barge master with little experience. In the latter case, the barge master was not produced nor were his qualifications proved. In the former, the owner was entitled to limit and in the latter limitation was denied. A barge that is designed for and intended to be operated as a manned tow must not only have a competent crew aboard but also the specific number as required by law sufficient to properly handle the tow, *Seaboard No. 20,* 1951 AMC 79, 191 F.2d 826 (2nd Cir. 1951), *Eastern Transp. Co., v. Nancy Moran,* 1948 AMC 1301, 78 F. Supp. 646 (EDNY) (barge certified for a crew of three men was not adequately manned by two men only one of which was an able bodied seaman); Goodwin-Wang 1929 AMC 158 (EDNY) (barge captain became unnecessary alarmed at weather conditions and cut his barge adrift); *Great Lakes Towing v. American S.S. Co.,* 1948 AMC 249 165 F.2d. 368 (6th Cir. 1948) (barge at fault in having a watchman on her stern who is not competent to properly inform the pilot of the vessels proximity to a Buoy); *President Lincoln - Flying Dragon* 1964 AMC 1841, (barge held liable when her crew improperly secured the tug's lines aboard her). However, in the 1961 case of *Allied Chemical v. Christina Moran,* 1961 AMC 2620, 190 F. Supp. 703 (SDNY) the Court found sympathy for the owners of barges with respect to the personnel aboard them. The Court held a barge responsible for its own internally economy i.e., line handling etc., but also held that this duty should be strictly limited because of the *"feckless folk"* who frequently man them. The barge owner also has a duty to see to it that the barge is loaded properly and that cargo is properly stowed. A tug may assume that the barge is properly loaded and that cargo is properly stowed, *Walter B. Pollock,* 1926 AMC 1019 (SDNY). However, the owner of the barge may be exonerated from negligence if he is able to prove that an independent stevedore negligently performed the loading. *Shamrock v. Schiavone - Bonomo Corp.,* 1960 AMC 628, 173 F. Supp. 39 (SDNY); *Slatington-Carfloat No. 9,* 1929 AMC 818.

TOW MUST FOLLOW TUGS INSTRUCTIONS

Were the tug is *"the dominate mind"* and not under direct orders of the barge, the barge must follow the tug's instructions. This duty is absolute, if a barge is derelict in this respect, it has no recourse to the tug. *Mohawk-Hartford,* 1953 AMC 1541, 20-7 F.2d. 626 (3rd Cir. 1953).

TUGS OBLIGATIONS TO UNSEAWORTHY AND IMPERILED BARGES

The duty to exercise reasonable care and Maritime skill will not be lessened even if the barge was unseaworthy at the beginning of the voyage. If the tug is placed on noticed of an unseaworthy condition in its tow; the tug is required to exercise reasonable care to safeguard the barge until the towage contract is performed or performance is excused. *Henry DuBois Sons Company v. Penn, R.R. Co.,* 1931 AMC 312, 42 F.2d. 172 (2nd Cir. 1931). The degree of caution required of a tug in approaching the hazards of the wind and sea are measured with reference to the known characteristics of the barge. *Ocean Burning, Inc., v. Moran Towing & Transp. Co., Inc.,* 1974 AMC 2307 (SDNY 1974).

The rule was well stated in the case of *Otto Candies v. Great American Insurance, Co.,* 221 F. Supp. 1014 1965 AMC 1028 (EDNY 1965)... *"towing vessel is not liable for the loss occasion by the unseaworthiness of the tow unless its unseaworthiness is disclosed or, it is so apparent that it would constitute negligence for the tug to attempt to proceed".*

The tug should not accept the barge unless it can be towed, with reasonable safety, under anticipated conditions with the towing equipment to be employed. If the unseaworthiness is so apparent that it will be negligent for the barge to attempt to proceed, the tug will be held liable for the loss.

Were negligence of the tug combines with the breach of the duty to provide a seaworthy barge contributes to the loss of the barge, damages will be apportioned according to the respective fault of the parties. *American Home & Assurance Co., v. L&L Marine Service, Inc.*, 688 F. Supp. 502, 1989 AMC 684 (W.D.Mo. 1988), affirmed 875 F.2d. 1351, modified 875 F.2d. 1351, 1989 AMC 1817 (8th Cir. 1989).

IMPERILED TOWS AND COLLISIONS

A tug is obligated under the implied terms of the towage agreement not to abandon its tow when the barge is endangered until all reasonable efforts to save the barge have been exhausted and the towage contract is performed or further performance is excused. See *Sears v. American Producer,* 1972 AMC 1647 (N.D.Ca 1972); *Henry Dubois Sons, v. Marcer,* 47 F.2d. 172, 1931 AMC 213 (2nd. Cir. 1931).

If the peril is not due to the fault of the tug and the pearl is not contemplated in the contract of towage, after all reasonable efforts to save the barge have been exhausted a towing vessel has the right to abandon the barge. *Sanclair v. Cooper,* 108 U.S. 352 (1883); *Southampton v. Purley* 1983 AMC 524 (New South Whales 1982).

If a towage contract contemplates that the barge may break away, and require rescue, requiring the tug to exercise its best effort in towing the barge and also provides for additional payment to the tug during rescue efforts; the tug has no right to abandon the barge or claim salvage for its rescue services. *Vessel Engineering and Development Corp., v. Barge ZPC* 404, 1989 AMC 2782 (D.Or 1989).

In any case, a tug is obligated not to abandon the tow, if the tow is endangered until all reasonable efforts to save it have been exhausted. But the question of whether or not the tug has done all it could is a question of fact, see *Waterman Steamship Company v. Shipowners & Merchants Towboat Co., Ltd.* 199 F.2d 600 1953 AMC 125.

In the case of a manned barge, the barge cannot sit ideally after a casualty has occurred. The barge owner has an affirmative duty to take steps necessary to mitigate damages. See *Bitumco 50,* 1926 AMC 853 (EDNY), were the barge captain failed to notify the tug of a leak in the barge and failed to call for assistance which was within easy reach. The tug was not held liable for the preventable sinking of the barge. An innocent barge will not be liable *In Rem* when it is brought into collision with another vessel or object, by the negligence of its tug. *NL-5-Chesapeak BayBridge - Tunnel,* (1968 AMC 1427 (E.D.Pa.) and *Go-Getter,* 1969 AMC 842 (D.ORE). Notwithstanding this general rule, attention is directed to 33 U.S.C.A. 408 and 33 U.S.C.A. 412 relating to damage to governmental aids to navigation.

In essence, §408 provides that it is unlawful to destroy, alter, deface, built upon, move, injure, obstruct, or in any matter impair the usefulness of any sea wall, jetty, navigational aid etc., and §412 prescribes the penalty on every master, pilot or engineer or persons acting in such capacity.

Illustrative, are the cases of *U.S. v. Tug Terry Buchanan,* 1956 AMC 646 138 F. Supp. 754 (SDNY) and *U.S. v. Tug Inland Chief and Dredge Astoria,* 1954 AMC 191 (D.Ore.).

Notwithstanding this interpretation, there is nothing contained in the legislative history of these two sections, 408 and 412 indicating that the U.S. Congress intended to impose strict liability for damage to navigational aids.

WARRANTY OF WORKMAN LIKE SERVICE

In the case of *James McWilliams Blue Star Line, Inc., v. ESSO Standard Oil Co.,* 245 F.2d 84 1957 AMC 1213 (2nd Cir. 1957), the Court equated the nature of a towing agreement to the relationship between a stevedore and a vessel and followed *Ryan Stevedoring Co., v. Pan Atlantic Corp.,* 350 U.S. 124, (1956 AMC 1955) *"the towing agreement...necessarily implied an obligation on the part of the (tower) to tow libellant's barge properly and safely. Competence and safety were essential elements of the towing service undertaken by the (tower). The very nature of the towing agreement implied a 'warranty of workman like services' that is comparable to a manufacturers warranty of sound of its manufactured product".*

EFFECTS OF APPLICATION OF WARRANTY OF WORKMAN LIKE SERVICES

Application of warranty of workman like services in towage agreements can bring into effect rules of *indemnity* as opposed to rules of *contribution,* governing the liability as between tug and barge with respect to liabilities to third-parties. See *Dunbar v. Henry Dubois Sons* 275 F.2d. 304 1960 AMC 1393 (2nd Cir. 1960), where the Court applied the doctrine of contribution with apportionment of damages to claims where both tug and barge were at fault in causing injuries to third-parties. See also *James McWilliams Blue Star Lines Inc., Supra,* holding indemnity rules should be applied were a breach of the warranty of workman like service by the tug brought into play an existing unseaworthy condition of the barge. There are recent cases indicating that the all-or-nothing concepts of traditional indemnity theories are being replaced by apportionment of damages based upon comparable fault. *Smith & Kelly Corp., v. S/S Concordia Tadj,* 718 F.2d. 1022, 1984 AMC 409 (11th Cir. 1983) and *Loose v. Offshore Navigation, Inc.,* 670 F.2d. 493, 1984 AMC 1216 (5th Cir. 1982). The rule which appears to be evolving is that damages will be apportioned according to comparative fault irrespective of whether liability is based on contribution or indemnity. Under this rule, there is no difference in outcome of apportionment of damages under either theory of liability.

CONTRACT OF TOWAGE?

OR

CONTRACT OF CARRIAGE?

A towage contract is a contract for the employment of one vessel to expedite the voyage of another; e.g., the employment of a tug to tow a cargo owner's barge from one point to another. However, when a tug and barge owned by the same person (or were either the tug or barge is bareboat-chartered to the same person) or utilized, by contract to tow cargo from one point to another, the contract is one of affreightment and *not* towage. *Sacramento, Navigation Co., v. Salz,* 1927 AMC 397, 273 US, 326. This case involved the transportation of a load of barley in a barge owned by the same company which also owned and operated the tug. The issue before the United States Supreme Court was whether the contract should be construed of as one of towage or as a contract of affreightment. The Supreme Court stated *"here, where there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods and plainly that contract was a contract of affreightment....the bill of lading declares that the cargo was shipped on board the barge. But it was to be transported; and this the barge alone was incapable of doing, since she had no power of self movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power".* If the contract is one of affreightment, *COGSA* limitations may apply. See *Bisso v. Inland WaterWays Corp.,* 349 U.S. 85, 1955 AMC 899 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing,* 372 U.S. 697, 1963 AMC 829 (1963).

Towage contracts frequently avoid the application of the rule of *Bisso v. Inland Waterways Corp.* which invalidates exculpatory causes in towing agreements, by requiring the owner of the barge to name the tug as *"an additional named insured"* on the barge hull policy with waiver of subrogation. Cases holding such clauses valid are *Dow Chemical Co., v. M.V. Roberta Tabor,* 815 F.2d. 1037, 1987 AMC 2170 (5th Cir. 1987); *Admiral Towing & Barge Company* 767 F.2d. 243 (5th Cir. 1985); *Dillingham Tug & Barge Corp., v. Collier Carbon & Chemical Corp.,* 707 F.2d. 1860, 1984 AMC 1990 (9th Cir. 1983).

The *Bisso* rule invalidates any attempt by the tug to exculpate itself from such liabilities which will not be covered by insurance. *Dow Chemical* makes clear that the barge operator who agreed to secure insurance naming the tug and waving subrogation but who subsequently elected to self insure, cannot recover from the tug damages for a loss, which would have been covered by the required insurance. See also *New England Fish Co., v. Western Pioneer, Inc.,* 509 F.2d. 865, 1983 AMC 2799 (WDWA 1981) which applied the doctrine of equitable estoppel to deny recovery to a shipper which agreed to name the barge as an additional assured and to obtain a waiver of subrogation but was unable to obtain such endorsement, and prejudiced the barge by failing to notify the barge of such failure. In *Hercules, Inc., v. Steven Shipping Co.,* 698 F.2d. 726, 1983 AMC 1786 (5th Cir. 1983), resolution of liability turned on whether the contract including a charter of the barge to carry poles and a charter of the tug, was a contract of carriage, governed by *COGSA* and *COGSA's* limitations *or* a contract of towage, subject to the *Bisso* restrictions on limitations, which otherwise would be permitted by the *Harter Act and COGSA.* The appeals court remanded the issue to the trial court for determination on that issue of fact.

The distinction between towage contracts and contracts of affreightment may be fine, but the distinction can determine the validity of exculpatory clauses with respect to liability of the tug, and determine application of the provisions for limitations on liability of Underwriters under the *Harter Act and COGSA.*

INSURANCE ISSUES OF SPECIAL NOTE

INSURABLE INTEREST

A good working definition of "Insurable Interest" is a person interested in a Marine Adventure who stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudice by its loss, or by damage thereto, or by the detention thereof, of may incur liability in respect thereof.

It would appear from this definition, contained in the *English Marine Insurance Act of 1906,* that anyone holding any type of title to or security interest in a Marine adventure will have an insurable interest in it. However, it is not always that simple. In the case of *O'Donnell Towing and Transp. Co., v. Marine Transit Corporation and Global and Rutgers Fire Insurance Co.,* 1934 AMC 762, the plaintiff-tugboat owner entered into a joint venture with Marine Transit Corporation to transport grain in barges owned by Marine Transit. Marine Transit was to insure the cargo with carriers liability insurance, to cover the interest of the plaintiff-tugboat and itself in the cargo, and the legal liability of each other. The cost of said insurance was to be borne equally by the parties.

A loss occurred, the cargo owner brought suit upon the Plaintiff, Towboat Company and recovered. The plaintiff Tugboat Company paid the judgment with funds received from another insurance policy covering the operation of the tug, and then brought suit on the policy Marine Transit, owner of the barges had procured for the joint venture. The policy was issued to Marine Transit Corporation "on account of whom it may concern".

The Court assumed, without deciding, that the policy covered and was intended to cover the plaintiff but found that typewritten riders to the policy limited coverage to a deficiency were there was prior insurance, therefore, the plaintiff could not recover.

In discussing the clause *"on account of whom it may concern,"* the Court stated that it would be applied to the interest of the party for whose benefit the insurance was intended by the person who procured or ordered the insurance, but the term would not carry for the benefit of a policy to a risk or interest not fairly within the contemplation of the parties. In the case of *F.A. Lowery and Lowery Sisters,* 1934 AMC 581 (2nd Cir. 1934), 70 F.2d 324, a canal operator of a chartered tug and barges contracted with the tug owner that the charterer would provide legal liability insurance for both owner and charterer. A barge was sunk in a collision and its cargo was lost. The charter became insolvent and took no action. The tug was held liable *In rem* for the cargo loss. The Court held that to be covered by a policy issued for *"the account of whom it may concern"*, it must appear that the person claiming the benefit of the insurance had an insurable interest in the subject matter that is insured. In this case, the tug owner had no *"insurable interest"* in the charter's legal liability as carrier". Since this was the subject matter of the insurance, the tug owner was not protected by the phrase *"on account of whom it may concern."* The court recognized that it was the intention of the charterer to cover the legal liability of the tug owner, but unfortunately its *declaration* to the insurance company did not have the effect of extending the coverage to a *new* subject matter not included within the terms of the open policy.

In *Calcasieu Chem Corp. v. Canal Barge Co.*, 1969 AMC 114, 404 F2d 1227 (7th Cir. 1969), the Court denied a cargo owner's suit for damages for cargo which was contaminated in the barge chartered from the towboat company because the cargo owner failed to procure insurance naming the towboat owner.

PERILS OF THE SEAS

"Perils of the Sea" means precisely what the phrase states; i.e., the peril must be *"of the seas"* and not merely *"on the seas."* See *Cary v. Home Insurance Co.*, 199 App. Div. 122, aff'd 235 N.Y. 296, 139 N.E. 274, 1923 AMC 438. Only extraordinary occurrences occasioned through fortuitous forces or actions, irresistible in nature, which cannot be guarded against by the ordinary exertions of human skill and prudence are considered as being covered. *Dwyer vs. Providence Washington Insurance Co.*, 1958 AMC 1488, 1958 F.Supp. 1488.

The greatest difficulty seems to arise in cases involving so-called *"unexplained sinkings"*; i.e., a vessel, sinks with little or no explanation. As previously stated there is general agreement that if a vessel sinks in calm water or ordinary weather and seas and a mere sinking is proven, a presumption arises that the vessel was unseaworthy and coverage will be denied. However, when the assured goes forward with evidence showing that the vessel was seaworthy for a reasonable time before the loss, the weight of authority is in favor of extending coverage. See *Mattson v. Connecticut Fire Insurance Co.*, 80 F.Supp. 101 (D.Minn., 1948).

INCHMAREE CLAUSE

It will be recalled that the decision in the case of *Thamses and Mersey Marine Insurance Co., v. Hamilton,* 12 App. Case. 484 (1887), so completely vindicated Marine Underwriters that a special clause which came to be known as the "Inchmaree Clause", was specially developed to give shipowners protection against losses or damage to hull or machinery *"through the negligence of masters, mariners, engineers or pilots, or through any latent defect in the machinery or hull"*, so long as the loss did not result from a want of due diligence on the part of the shipowner.

Through the years, the clause has greatly been expended and has come into play with respect to cases involving unexplained sinkings specifically that of *McAllister Lighterage Line vs. Ins. Co., of N.A.*, 1957 AMC 39, 143 F.Supp. 697, where a barge sank because the barge captain failed to stay aboard and tend the pumps. As this was a classic case of negligence on the part of the master, recovery was allowed under the Inchmaree clause.

Given the inherent dangers of tug and barge operations referred to previously, the protection offered by this clause is immeasurable. It provides coverage in a host of situations ordinarily ignore.

GENERAL AVERAGE

It is generally asserted that general average does not apply as between a tug and barge in tow; i.e., a sacrifice by the tug of a barge in tow, in order to save the venture, does not give rise to a *General Average Act.*

In the case of the *J.P. Donaldson,* 167 U.S. 599, 42 L.ed. 292 (1897) the Supreme Court of the United States in denying general average contributions, stated *"the master of the tug, having no authority to decide, as between barge and her cargo what part shall be sacrificed for the safety of the rest, and thereby to subject what is saved to contribute in general average for what is lost, can surely have no greater authority, by abandoning all the barges with their cargoes, to subject the tug to a general average contribution...if the questions arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that questions ultimately belongs to her own master, and not the master of the tug. And if the question presented is whether the barge should be run ashore for the purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo or the barge itself, the* *decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and, in either case, any right of contribution in general average cannot extend beyond that barge and her cargo".*

That case turned on the fact that the barge was manned and had a separate master plus the existence of a towage contract. But what if the barge is unmanned or the tug and the barge are furnished by the same owner?

In 1927, The Supreme Court had before it *Sacramento Navigation co. v. Salz, Supra Page*, in which it was held that where a tug and barge are furnished by the same owner to carry cargo belonging to a third party, the tug and barge are deemed a single or common venture. Consequently they are a single vessel for the purpose of claiming the benefit of the *Harter Act* and surrendering them in limitation of liability proceedings.

But what if the tug alone is in trouble, or the unmanned barge is in trouble, with no common owner? In those cases it appears that the practice is to treat the damage that the tug sustains or the barge sustains as a cost of salvage and that expense will be treated as a general expenditure to be contributed to by the tug and the barge and the cargo laden thereon. The better rule and the emerging rule is that a barge in tow is under the control of the master of the tug, therefore, the same principals of general average should apply as in the case of cargo carried on a single ship. See *Woodward & Dickerson v. Tug Venus*, 1955 AMC 1311, *Barge J. Whitney - Asphalt Incident*, 1968 AMC 995 (1968) (Arb), *Tampa Tugs & Towing, Inc. v. Sandanger,* 1965 AMC 1771, 242 F.Supp. 576.

However, as previously noted, there is no obligation on the part of cargo owners to contribute in general average where a vessel (tug and/or barge) is unseaworthy at the commencement of the voyage. The *Louise,* 1945 AMC 363, 58 F.Supp. 445 and the *Isis*, 290 U.S. 33 1933 AMC

SALVAGE

Salvage services rendered or expenditures may be recoverable as part of Sue and Labor charges, General Average expenditures, or as Strict Salvage charges. There is a distinction between the term "salvage charges" used in a Hull policy and the generic term "salvage charges" used to describe the expense of salvage. Example of the distinction would be as follows: a vessel in ballast goes aground. The owners hire a tug to pull it off (contract salvage). The expense falls under the Sue and Labor Clause of the Hull policy. But if the barge is loaded with cargo, the towage expense is that of general average and proportioned between vessel and cargo. But what if there is no contract entered into and the tug merely appears and engages in "pure" salvage efforts. In that particular case, the salvage charges would fall under the terms used in the Hull policy.

NO DEVIATION

No Deviation arises from the strict English rule of breach and warranty as regards vessels operating beyond certain designated geographical or "trading limits". American Courts have been quick to resolve any ambiguity in the favor of the assured as regards geographical descriptions.

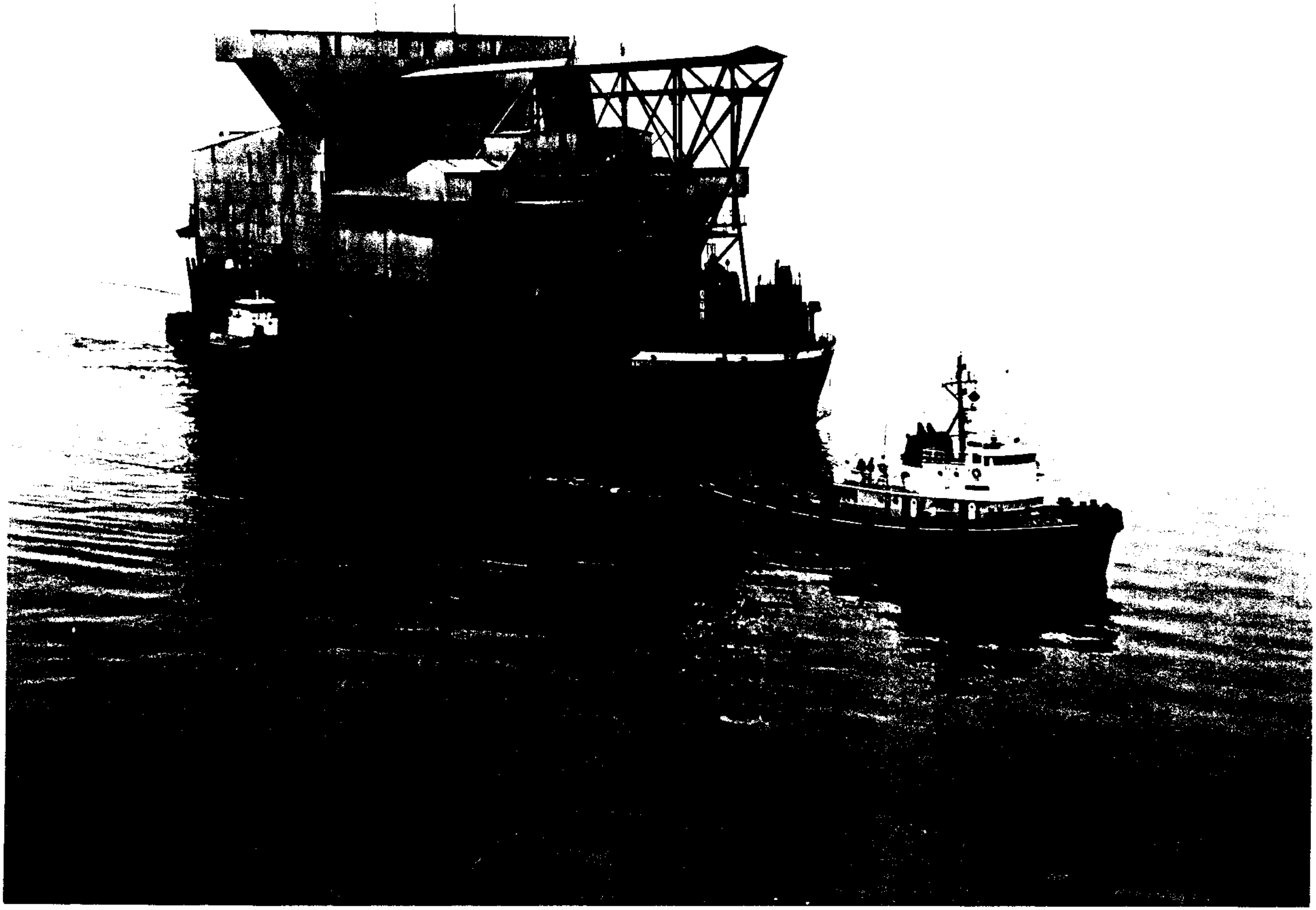
CONCLUSION

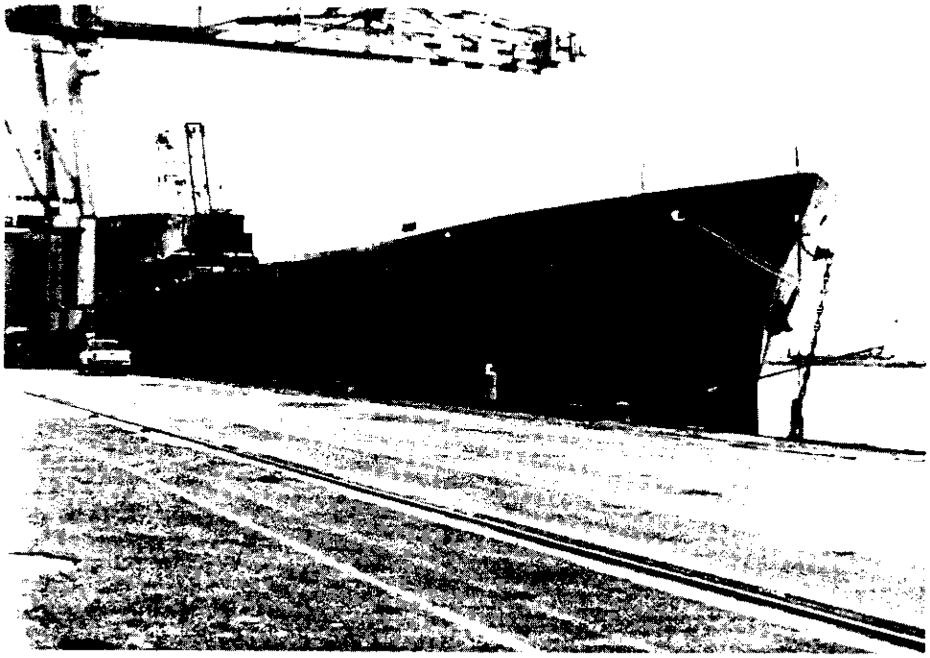
Like all areas of modern law, economics and frustration will affect the law of the tug and barge. As litigants seek to avoid litigation due to the cost and frustration associated with the legal system, practitioners will have to be more mindful of the potential risks involved as more and more goods are transported by barge.

SECTIONS OF CANADIAN NAVAL FRIGATE BEING BARGED FROM FACTORY TO SHIPYARD AND AT ST. JOHN's NEW FOUNDLAND

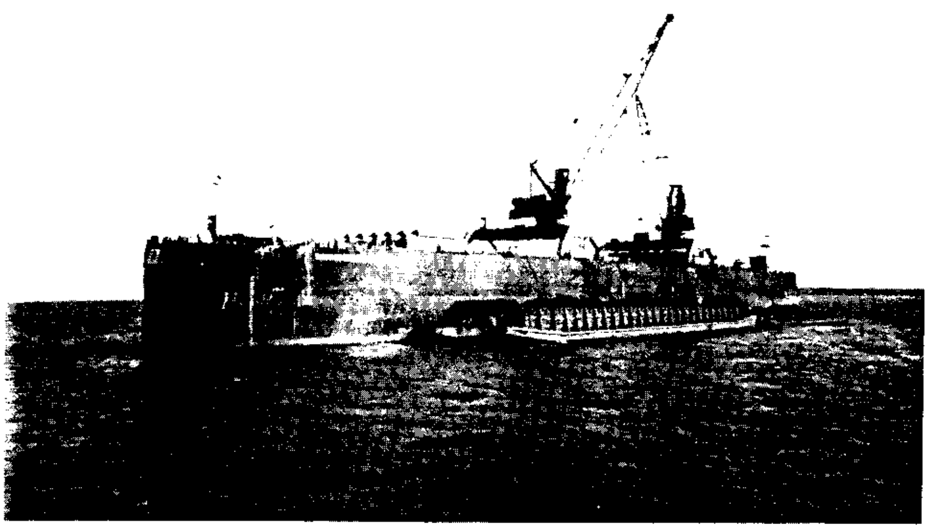
RAILROAD BOGIES BEING BARGED TO SOUTH AMERICA.

NATIONAL GAS EXTRACTION PLANT
BEING TOWED TO ALASKA'S NORTH SLOPE
FROM PUGET SOUND

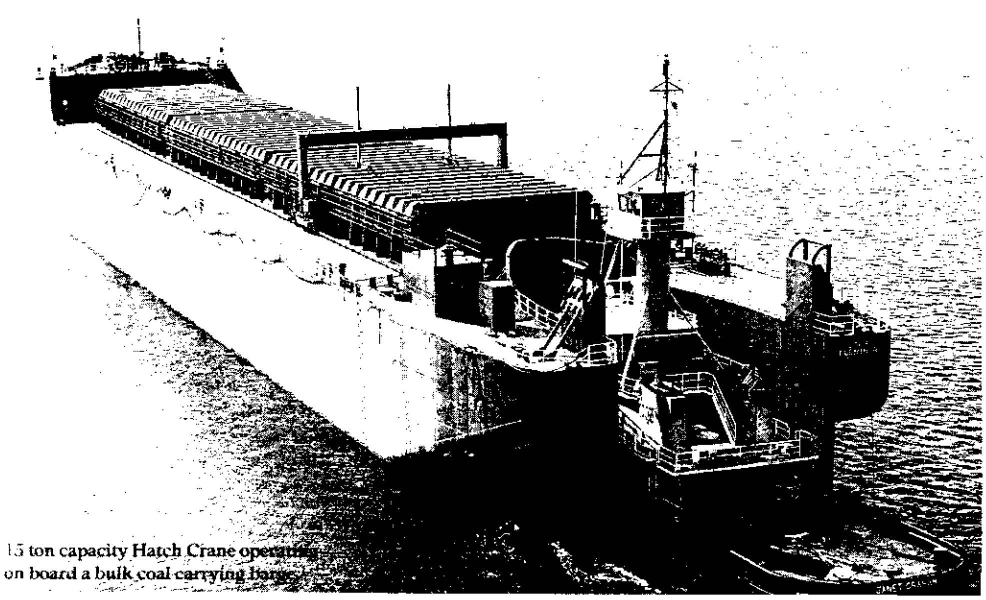




The *ISLANDER* of Matson Navigation. She was built for the Hawaiian inter-island service.

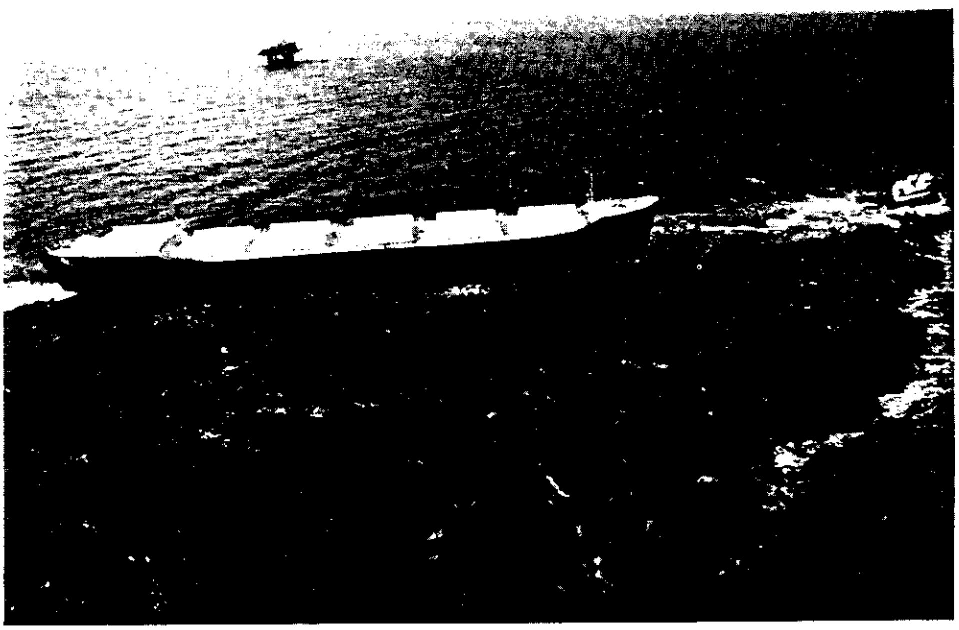


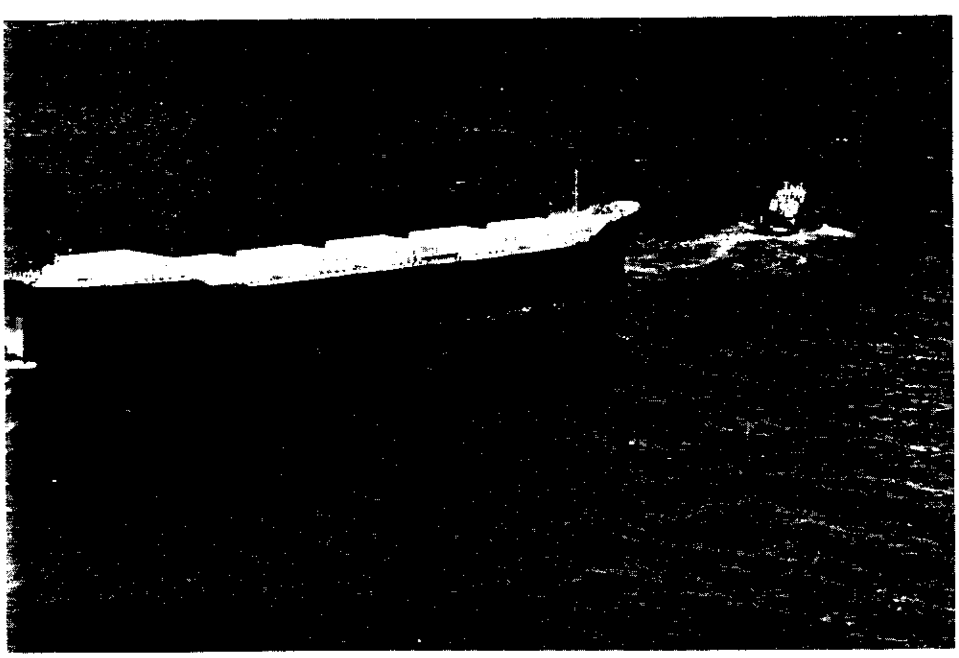
THOROUGHBRED TOPPER was built primarily for the domestic coal trades. She has a deadweight capacity of 33,600 metric tons and is equipped with two monitoring cranes mounted on tracts. She is frequently employed in grain trades.



15 ton capacity Hatch Crane operating on board a bulk coal carrying barge

The *DORIS GUENTHER* was built in 1985, for Gulfcoast Transit. This tug barge unit of 17,000 deadweight tons has frequently been in the grain trades and has travelled with cargoes to Alexandria, Egypt.





BEFORE & AFTER

The *S/S LOMPOC*, built in 1945, served the oil trades out of Los Angeles for 40 years, sailing under the banner of the West Coast Shipping Company

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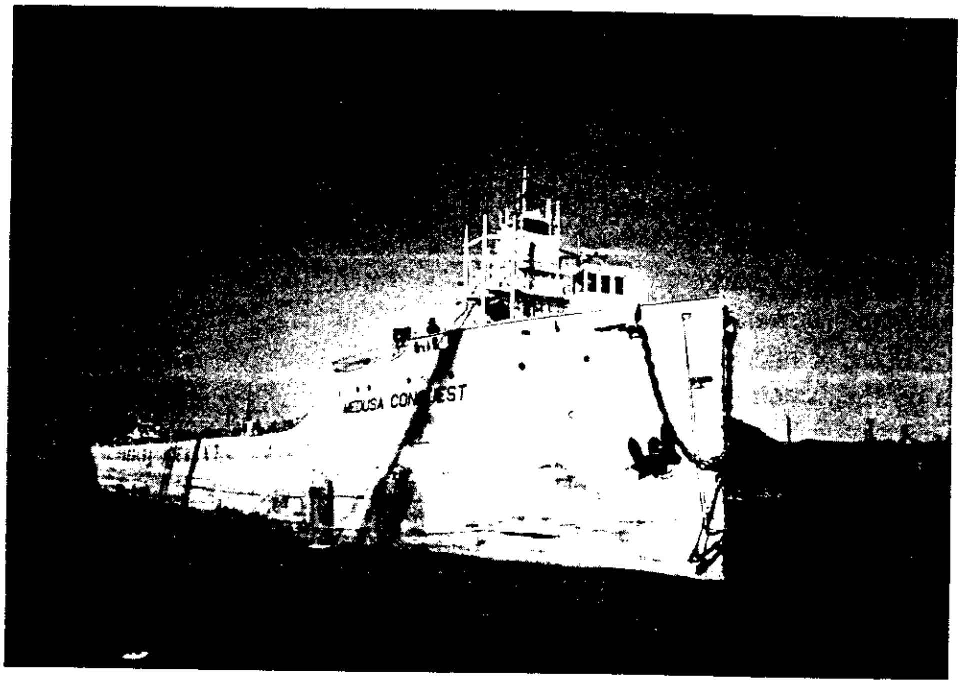
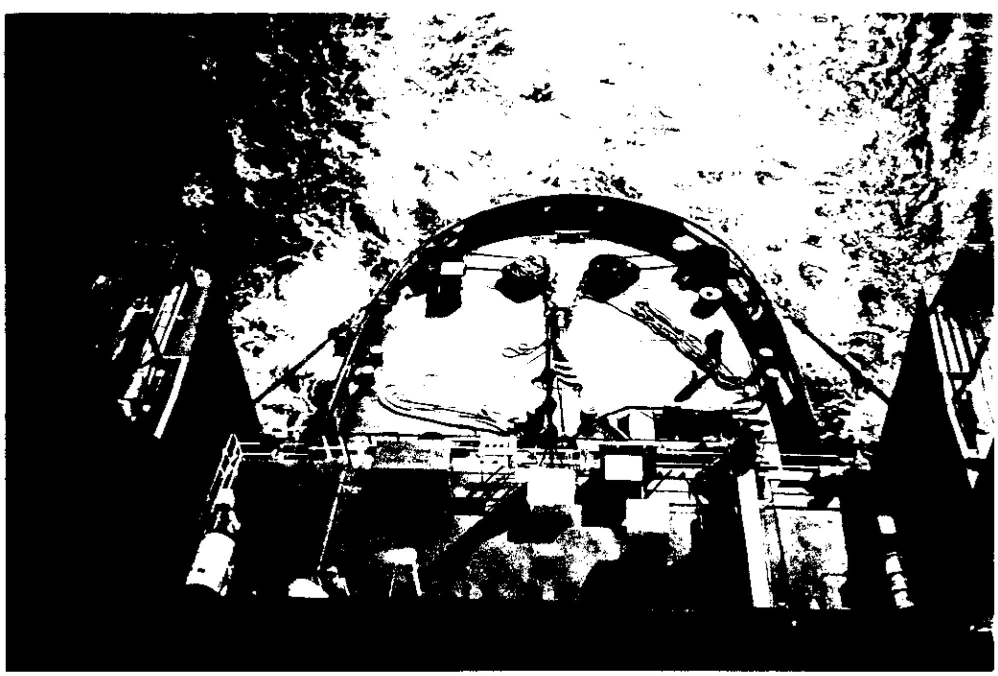
The lower 2 photos show her in her new configuration as the 19,154 deadweight ton barge CMD 1.

She was converted in 1991 at Mobile, Alabama and her owners are presently keeping her employed in the grain trades. Her cargo spaces are all epoxy-coated.



The barge *MEDUSA CONQUEST* is regularly employed in the cement trade on the Great Lakes. Her accompanying tugboat can be seen in the stern notch. *AMOCO INDIANA* was her name when she was a steam tanker, having been originally built in 1937.



TYPICAL TUG-BARGE PUSH GEAR OF

WIRE AND "SPECTROM" ROPE