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Collisions Involving Tugs and Tows

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Collisions Involving Tugs and Tows

Joseph C. Sweeney*

This Article examines the negligence principles that govern an action arising out of a collision involving a tug and its tow. First, it canvasses the navigational duties imposed on the tug. Specifically, tug unseaworthiness, towlines of improper length, and tugmaster ignorance may give rise to liability. The Article also briefly presents the duties imposed on towed vessels. Next, the Article explores negligence clauses in tug-tow contracts and concludes that contractual provisions that absolve tugboat owners of negligence liability are against public policy and therefore invalid. The Article explores the liability of the tug and tow when a third party is involved in the collision and concludes by examining practical steps to deal with human error disasters as a means of collision prevention.

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I. INTRODUCTION

It is not possible to generalize about the types of tugboats

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involved in collisions.¹ On the open ocean and in coastal transit, the tugboat probably will lead with its stern hawser pulling the tow. In harbor maneuvers, such as docking or undocking large vessels, tugs may be assigned to push or pull at different parts of the vessels as necessary. In river systems, the tugboat will probably be pushing barges made up into flotillas, some far larger in area than the largest vessels afloat. The modern tugboat with a diesel engine and available capacity of at least 10,000 horsepower usually provides direct control of the engine from the bridge. The tug has instant communication with the tow and other vessels in the vicinity. No special navigation privileges arise merely because tugs and tows are awkward and difficult to maneuver. However, the unmaneuverability of a flotilla of tugs and barges may be so extreme as to bring in the Special Circumstances Rule.²

II. NEGLIGENCE PRINCIPLES

The navigational rules provide specially for the lights and shapes as well as sound signals of tugs and towed vessels, but there is *no* special regime of law affecting collisions where tugs and tows are involved.³ Rather, general principles of negligence are applied.⁴ As between the tug and its towed vessel, there is a contractual relation that creates obligations in tort,⁵ but these contractual provisions cannot extend involuntarily to third parties to the relationship.⁶

1. Any discussion of towage problems must first refer to the work of the late Alex Parks, whose treatise is now in its third edition. See ALEX L. PARKS & EDWARD V. CATTELL, JR., *THE LAW OF TUG, TOW, & PILOTAGE* (3d ed. 1994).

2. 33 U.S.C. § 2002(b) (1988) (“[D]ue regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved . . .”); see *THE LUZERNE*, 204 F. 981, 982 (2d Cir. 1913).

3. *Stevens v. THE WHITE CITY*, 285 U.S. 195, 201-03, 1932 AMC 468, 472 (1932); *THE J.P. DONALDSON*, 167 U.S. 599, 603 (1897); *THE MARGARET*, 94 U.S. 494, 496-97 (1876); *THE STEAMER WEBB*, 81 U.S. (14 Wall.) 406, 414 (1871); *THE STEAMER SYRACUSE*, 79 U.S. (12 Wall.) 167, 171-73 (1870).

4. See, e.g., *THE J.P. DONALDSON*, 167 U.S. at 603; *THE STEAMER SYRACUSE*, 79 U.S. (12 Wall.) at 171.

5. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 85-86, 1955 AMC 899, 901 (1955); *Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co. (THE WASH GRAY)*, 277 U.S. 66, 81, 1928 AMC 923, 925-27 (1928); *THE STEAMER SYRACUSE*, 79 U.S. (12 Wall.) at 169-71.

6. See, e.g., *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 123, 1955 AMC 927, 928 (1955); *Pennsylvania R.R. v. THE BEATRICE*, 275 F.2d 209, 211-14, 1960 AMC 1408, 1408-14 (2d Cir. 1960).

Under negligence principles, the tug and its towed vessel is a *unit*, and the “dominant mind” of the unit is presumed to be the tug,⁷ unless there is proof of independent fault of the towed vessel contributing to the cause of the collision.⁸ The relation of the tug to its towed vessel is not bailor-bailee, shipper-carrier, or insured-insurer.⁹ Nevertheless, it should be noted that the shipper-carrier relation predominates in some circumstances because the parties have intended to contract for affreightment of cargo rather than towage.¹⁰

III. NAVIGATIONAL DUTIES OF THE TUG IN COLLISION

The tug has a duty to exercise reasonable care and to perform in a workmanlike manner.¹¹ At the very least, this duty of workmanlike performance resembles the *res ipsa loquitur* presumption applied in ordinary tort law—that is, the defendant has the burden of explaining

7. *THE CIVILTA*, 103 U.S. 699, 701-02 (1880); *THE MARGARET*, 94 U.S. at 496; *Sturgis v. Boyer*, 65 U.S. (24 How.) 110, 121-23 (1860).

8. *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 52-53 (1919). The question was whether the value of the entire flotilla (all belonging to the owner of the tug) or the tug alone was to be surrendered in the limitation proceeding. *Id.* Justice Holmes held that only the tug had to be surrendered “for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it.” *Id.* at 52.

9. *Stevens v. THE WHITE CITY*, 285 U.S. 195, 200-02, 1932 AMC 468, 470-72 (1932). See generally Robert B. Parrish, *Liabilities as Between Tug and Tow*, 39 FED’N INS. & CORP. COUNS. Q. 275 (1989) (reviewing the history of the law dealing with liabilities between tug and tow).

10. *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 328, 1927 AMC 397, 398-99 (1927). The owner of a tug and barge had issued a bill of lading for carriage of a cargo of barley on the barge in the name of the “dumb” barge only. The Supreme Court brought in the liability of the tug, describing the relation of both tug and barge to the barge cargo as a single contract of affreightment and not two separate contracts. *Id.* at 328, 1927 AMC at 398-99. See *In re D & H Corp. (TUG LIBRA)*, 1994 AMC 2285, 2291-92 (E.D. Va. 1993); cf. *Mississippi Valley Barge Line Co. v. T.L. James & Co.*, 244 F.2d 263, 267-68, 1957 AMC 1647, 1653-54 (5th Cir. 1957) (holding that Harter Act defenses are unavailable for towage of barge from New Orleans to Tennessee and return).

Incorporation of COGSA (46 U.S.C. app. §§ 1300-1315 (1993)) by reference into a towage contract has been held invalid under the *Bisso* doctrine. See *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726, 737, 1983 AMC 1786, 1803 (5th Cir. 1983); see also *Pure Oil Co. v. M/V CARIBBEAN*, 370 F.2d 121, 123, 1966 AMC 446, 446-47 (5th Cir. 1966). For a discussion of the *Bisso* doctrine, see *infra* notes 57-74 and accompanying text.

11. *THE WHITE CITY*, 285 U.S. at 202, 1932 AMC at 472; *THE MARGARET*, 94 U.S. at 497; *Winslow v. Thompson*, 134 F. 546, 549 (1st Cir. 1904); *National Transp. Corp. v. TUG ABQAIQ*, 294 F. Supp. 1080, 1086, 1970 AMC 203, 212 (S.D.N.Y. 1968), *aff’d*, 418 F.2d 1241, 1970 AMC 213 (2d Cir. 1969); *Offshore Co. v. G. & H. Offshore Towing Co.*, 262 F. Supp. 282, 286-87, 1966 AMC 2172, 2177-78 (S.D. Tex. 1966); see also R.T.C. No. 20 Corp. v. TUG BRONX, 1981 AMC 2465, 2467 (S.D.N.Y. 1981).

away the apparent negligence.¹² This is clearly a tort duty and not the warranty of workmanlike service arising out of contract.¹³

Three types of grievous faults may expose tugs to tort liability. The tug may be unseaworthy, the length of the towline may be improper, and the tugmaster may be unprepared or ignorant of the conditions of the waters.

A. *Tug Unseaworthiness*

A tug's unseaworthiness consists of general unseaworthiness due to age or improper maintenance,¹⁴ or it may be particular to the job, such as insufficient power to accomplish the task¹⁵ or improper

12. *THE ANACONDA*, 164 F.2d 224, 228, 1947 AMC 1658, 1664 (4th Cir. 1947); see *THE STEAMER WEBB*, 81 U.S. (14 Wall.) 406, 414 (1871); *Bisso v. Waterways Transp. Corp.*, 235 F.2d 741, 744, 1956 AMC 1760, 1763 (5th Cir. 1956); *THE HARDY*, 229 F. 985, 986 (9th Cir. 1916); *Lehigh Valley Transp. Co. v. Knickerbocker Steam Towing Co.*, 212 F. 708, 710 (2d Cir. 1914).

13. See *James McWilliams Blue Line, Inc. v. Esso Standard Oil Co.*, 245 F.2d 84, 86-87, 1957 AMC 1213, 1215-16 (2d Cir. 1957). For a discussion of the disapproval of the warranty concept, see *PARKS & CATTELL*, *supra* note 1, at 356-58. Thus, the contract of towage establishes the extent of the duty of care for the circumstances. In *THE WHITE CITY*, the Supreme Court held that in a suit against the tug for injury to the tow, the burden is on the tow's owner to show that the injury was caused by a breach of that duty. 285 U.S. at 202, 1932 AMC at 472.

14. *THE CLEVECO*, 154 F.2d 605, 614, 1946 AMC 933, 948 (6th Cir. 1946); *Cranberry Creek Coal Co. v. Red Star Towing & Transp. Co.*, 33 F.2d 272, 274, 1929 AMC 978, 980-81 (2d Cir.), *cert. denied*, 280 U.S. 596 (1929); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F. Supp. 1304, 1309-12, 1972 AMC 145, 150-57 (S.D. Tex. 1971), *aff'd*, 463 F.2d 120, 1972 AMC 2137 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); *THE MCALLISTER BROS.*, 18 F. Supp. 106, 107-08, 1937 AMC 293, 296-97 (E.D.N.Y. 1937). *But see Hendry Corp. v. Aircraft Rescue Vessels*, 113 F. Supp. 198, 201, 1953 AMC 2115, 2119-20 (E.D. La. 1953); see also *THE T.J. HOOPER*, 60 F.2d 737, 1932 AMC 1169 (2d Cir.), *cert. denied sub nom.* *Eastern Transp. Co. v. Northern Barge Corp.*, 287 U.S. 662 (1932).

15. See *THE STEAMER SYRACUSE*, 79 U.S. (12 Wall.) 167, 172-73 (1870); *Publicker Indus. v. Tugboat Neptune Co.*, 171 F.2d 48, 49-50, 1949 AMC 121, 123-24 (3d Cir. 1948); *THE SEVERANCE*, 152 F.2d 916, 920-21, 1946 AMC 128, 135-36 (4th Cir. 1945), *cert. denied*, 328 U.S. 853 (1946); *THE ROB*, 122 F.2d 312, 313, 1941 AMC 1201, 1203-04 (2d Cir. 1941); *Universal Tramp Ship Co. v. Irish Salt Mining Co.*, 1970 AMC 1783, 1785 (D. Mass. 1970); *Daniels v. THE M/V WIENERTOR*, 1966 AMC 817, 817 (M.D. Fla. 1964); cf. *Farrell Lines, Inc. v. STEAMSHIP BIRKENSTEIN*, 207 F. Supp. 500, 507-10, 1963 AMC 1846, 1855-60 (S.D.N.Y. 1962). *But see Eastern Tar Prods. Corp. v. Chesapeake Oil Transp. Co. (THE FRANCES)*, 101 F.2d 30, 32-33, 1939 AMC 58, 62-63 (4th Cir. 1939); *United States v. THE WESTERVELT*, 135 F. Supp. 596, 599-600, 1956 AMC 344, 348-49 (S.D.N.Y. 1956); *Great Lakes Dredge & Dock Co. v. Metropolitan Sand & Gravel Co.*, 82 F. Supp. 595, 600-01, 1949 AMC 449, 458-60 (E.D.N.Y. 1949).

composition of flotilla of tug and barges.¹⁶ Due care under the circumstances requires that the tug inspect its own towlines. It may require that the tug inspect the towlines belonging to the towed vessel if the tow's towlines appear to be frayed or defective.¹⁷

B. *Improper Length of Towlines*

The International Regulations for Preventing Collisions at Sea¹⁸ (COLREGS) do not have provisions governing the length of towlines. There are, however, provisions under the Inland Rules.¹⁹

The present rules on towing hawsers are no longer as precise as earlier versions in the Pilot Rules for Inland, Great Lakes, and Western Rivers. The penalty for an unlawful towline is cast against the tug master's license.²⁰ The pertinent federal regulations (33 C.F.R. §§ 160.1-168.60 (1994)) state:

Part 163 Towing of Barges
§ 163.01 Application.

(a) The regulations in this part apply to vessels navigating the harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, the Red River of the North, the Mississippi River and its tributaries above Huey P. Long Bridge, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.

(b) Seagoing barges and their towing vessels shall be subject to the requirements in this part under the provisions of section 14 of the Act of May 28, 1908, as amended (sec. 14, 35 Stat. 428, as amended; 33 U.S.C. 152). Under the provisions of section 15 of the Act of May 28, 1908, as amended (sec. 15, 35 Stat. 429; 33 U.S.C. 153), the

16. See *Tidewater Marine Activities, Inc. v. American Towing Co.*, 437 F.2d 124, 130, 1971 AMC 307, 315 (5th Cir. 1970); *THE MARGARET IRVING*, 47 F.2d 230, 230-31, 1931 AMC 147, 147 (2d Cir. 1931); *Barge NL-5—Chesapeake Bay Bridge-Tunnel*, 1968 AMC 1427, 1433 (E.D. Va. 1968); *Barge No. 90 Corp. v. TUG HELEN L. TRACY*, 1964 AMC 145, 147 (S.D.N.Y. 1963); *United States v. TUG PARRIS ISLAND*, 215 F. Supp. 144, 148, 1963 AMC 643, 647-48 (E.D.N.C. 1963); *THE WINONA*, 1935 AMC 867, 867 (S.D.N.Y. 1935); *U.P. No. 109*, 1931 AMC 1782, 1782 (E.D.N.Y. 1931).

17. *Slaten v. Hopemount Shipping Co.*, 345 F.2d 451, 453, 1965 AMC 2203, 2205-06 (5th Cir. 1965); *THE PORTCHESTER*, 18 F.2d 75, 76, 1927 AMC 489, 490-91 (2d Cir. 1927); cf. *Carlsen v. A. Paladini, Inc.*, 5 F.2d 387, 388, 1925 AMC 828, 830-31 (9th Cir. 1925).

18. 33 U.S.C. §§ 1601-1608 (1988).

19. 33 U.S.C. §§ 2071-2073 (1988).

20. 33 C.F.R. § 163.01(b) (1994).

penalty for use of an unlawful towline shall be an action against the master of the towing vessel seeking the suspension or revocation of his license.

§ 163.05 Tows of seagoing barges within inland waters.

(a) The tows of seagoing barges when navigating the inland waters of the United States shall be limited in length to five vessels, including the towing vessel or vessels.

§ 163.20 Bunching of Tows.

(a) In all cases where tows can be bunched, it should be done.

(b) Tows navigating in the North and East Rivers of New York must be bunched above a line drawn between Robbins Reef Light and Owls Head, Brooklyn, but the quarantine anchorage and the north entrance to Ambrose Channel shall be avoided in the process of bunching tows.

(c) Tows must be bunched above the mouth of the Schuylkill River, Pa.²¹

While the links between a pusher tug and its barge are not visible, the unity between vessels being towed astern and the tug is the visible towline or hawser. A disproportionately long towline can produce unmaneuverability leading to collision and loss of the tug or tow. Prudent seamanship requires that the length of the hawser be determined in light of the volume, weight, and size of the tow as well as the condition of wind, wave, tides, and current.

Tugs have been at fault where the length of the towline is improper, usually too long, but occasionally too short. In *THE FRED B. DALZELL, JR.*, the court found the towline to be excessively long.²² The court noted that towlines over seventy-five fathoms require a high degree of care.²³ *THE FRED B. DALZELL, JR.* involved a collision in Kill Van Kull, New York Harbor, during a starboard to starboard passing (made necessary by low water and deep draft). The barge was caught in a tidal rip and drifted into the oncoming steamship *Flagler*. The Second Circuit reasoned:

We hold the Bern [tug] liable, therefore, not because of the length of the hawser, but because, using a hawser the length she employed, she failed to control her tow and to keep it in line in tidewaters, and

21. *Id.* §§ 163.01, 163.05 & 163.20.

22. 1 F.2d 259, 263, 1924 AMC 1331, 1332 (2d Cir. 1924).

23. *Id.*, 1924 AMC at 1332.

permitted it to swing across the Flagler's bow. If the Bern had controlled her tow, this collision would never have happened.²⁴

Thus, loss of control rather than measurement of hawser length is the foreseeable peril: The power of the tug could not overcome the force of the wind and current.²⁵

An example from a canal passage is *THE JOHN E. ENRIGHT*.²⁶ On the New York Barge Canal at Lock No. 12 in the Mohawk River, the tug *Fox* was eastbound with a flotilla of four barges and a hawser estimated at 300 feet long. The tug *Fox* contributed to a collision with vessels to the stern of its flotilla that then allided with the lock. The court found the tug *Fox* at fault, reasoning that "if there had been a short hawser from the tug to the first two boats of the fleet, and the tug had continued into the lock keeping that hawser taut, the accident could not have occurred."²⁷

In *THE HYGRADE NO. 12*, the district court placed fault on the tug whose barges in tow lost headway when the towline was slackened to an excessively long length (from 1100 feet total to 2800 feet total) in Swash Channel, New York Harbor.²⁸ The barges drifted across the channel and collided with an inbound tank barge, which was also under tow. At the Southwest Pass of the Mississippi River in

24. *Id.*, 1924 AMC at 1332.

25. *See id.*, 1924 AMC at 1332; *see also* Boyer v. THE SENECA SUN, 143 F. Supp. 258, 266, 1956 AMC 1519, 1530 (E.D. Pa. 1956) (finding that the outbound tug's hawser was 1100 feet longer than allowed by the then-applicable rule, which contributed to the drift of the barge into a collision with the inbound tanker); Newton Creek Towing Co. v. THE CHRISTINE MORAN, 115 F. Supp. 244, 247, 1953 AMC 2046, 2050 (S.D.N.Y. 1953) (involving two tugs with towed barges in New London Harbor, where the hawsers from both tugs exceeded the then-applicable rule (seventy-five fathom limit), which contributed to the collision of the towed barges (mutual fault of both tugs was found)).

26. 36 F.2d 821, 822, 1929 AMC 1694, 1694 (W.D.N.Y. 1929), *aff'd*, 40 F.2d 588 (2d Cir. 1930). Rule 40 of the Barge Canal Rules provided, "[i]n passing into and out of locks, no towing line in excess of fifty feet in length shall be used by towing floats." *Id.*, 1929 AMC at 1694.

27. *Id.*, 1929 AMC at 1694.

28. 33 F. Supp. 149, 149-51, 1940 AMC 924, 924-28 (E.D.N.Y. 1940), *aff'd*, 130 F.2d 256, 1942 AMC 1047 (2d Cir. 1942). *See generally* White Stack Towing Corp. v. Bethlehem Steel Co., 279 F.2d 419, 1960 AMC 2294 (4th Cir. 1960) (finding tug's failure to shorten hawser "glaring" while the ship's maneuvers were excused as "in extremis"; sole fault was placed on the tug); *THE CHRISTINE MORAN*, 115 F. Supp. at 247, 1953 AMC at 2050 (finding excessively long hawsers to have contributed to collision); American Hawaiian S.S. Co. v. Steamtug Baldrock Eastern Transp. Co., 1934 AMC 1282 (E.D.N.Y. 1934) (finding mutual fault when, in heavy fog, the ocean tug *Baldrock* with three barges on hawsers of 1200 feet (4400 feet total) collided with a steamship; tug was at fault for failing to shorten the towing hawsers to the required 450 feet).

NORSWORTHY-TITAN, the tug *Titan* was held at fault for the stranding of its barge, *Norsworthy*, after shortening the towline from 1400 or 1500 feet to 150 feet in preparation for entering Southwest Pass.²⁹ The court found that the tow should have been lashed alongside or the hawser shortened further before risking the river currents.³⁰ Thus, where the towlines are inappropriately long, the tug is likely to be liable for damages that result from collision or allision.

Towlines can also be *too short* to accommodate the conditions of wind and wave. In *THE VAL NO. 2*, the tug was towing a barge loaded with 200,000 gallons of oil on a short hawser in the face of stiff winds and choppy seas.³¹ The bargee warned the tugmaster against the short hawser but the tugmaster ignored the warning. The towing hawser parted and the tug damaged the barge, resulting in a finding of tug negligence.³² *Geo. W. Rogers Construction Corp. v. TUG OCEAN KING* involved the capsizing of a pile driver being towed by a tug on Long Island Sound in calm weather.³³ In *Rogers*, the court found that a combination of a hawser that was too short (about 150 feet) and excessive tug speed caused the accident.³⁴

Limitation of liability was denied in *THE MICHELE*, in which one of the factors leading to the loss of life on the 900-horsepower tug was the short hawser.³⁵ The tug (68.9 feet long) was towing a barge (203.5 feet long) on the open ocean from Miami to Richmond in November when it encountered heavy seas, listed to port, and then rolled over to port and sank as the barge dragged the tug under water. The court explained:

We cannot say whether the sinking occurred solely because the MICHELE was not powerful enough or big enough, or because the tow line was too short for a tow in rough seas. We conclude, rather, that all of these contributed to a substantial degree, and it is not

29. See *Petroleum Navigation Co. v. Intracoastal Towing & Transp. Co.* (*NORSWORTHY-TITAN*), 1930 AMC 1506, 1506-10, *modified*, 1930 AMC 1709, 1709-12 (S.D. Tex. 1930).

30. *Id.* at 1510.

31. 66 F. Supp. 125, 125-26 (E.D.N.Y. 1946).

32. *Id.*

33. 252 F. Supp. 657, 657-66, 1965 AMC 2545, 2545-48 (S.D.N.Y. 1965).

34. *Id.* at 665, 1965 AMC at 2556.

35. *Puamier v. BARGE BT 1793 (TUG MICHELE)*, 395 F. Supp. 1019, 1040, 1974 AMC 2637, 2659 (E.D. Va. 1974). The entire hawser was only 600 to 1000 feet and the towline was from 300 to 500 feet. *Id.* at 1026-27, 1974 AMC at 2640.

necessary for the plaintiff to prove which cause contributed to the greatest degree or that one was indeed the sole cause.³⁶

The short hawser, furnished by the tug owner, played the *decisive* role in the court's determination to deny limitation.³⁷

The boundary line between inland and international waters has been a major consideration in several of the towing hawser problem cases. Shifting from international waters to United States inland waters or vice versa presents problems in the applicability of the Inland Rules. Thus, where the maximum length under the Inland Rules is 450 feet or seventy-five fathoms, but the towing hawser is 1500 feet, courts disregard the length of tow violation when the collision occurs *after* the tug and tow enter international waters and the length of tow was not the proximate cause of the collision or damage.³⁸ Further, in *TUG CARVILLE*, the vessel entered inland waters coming from a foreign port.³⁹ The court held that heavy seas and adverse weather made the failure to shorten the towline from 1200 feet to the required 450 feet an excusable error.⁴⁰

In *THE DIXIE SWORD*, the district court for the Eastern District of New York rejected a defense based on the different standards between inland and international rules.⁴¹ *The Moran* (with two sludge barges in tow and a 225 fathom hawser to the first barge and a 90 fathom hawser beyond to the second) and the incoming vessel, *Dixie Sword*, were operating in heavy fog at night in the vicinity of the Ambrose Light Ship at the entrance to New York Harbor. Both vessels proceeded on northerly courses. The tug argued that having proceeded from the sludge dumping grounds in international waters, there was no obligation to shorten the towline until entry into inland waters. However, the court stressed the fact that the tug was crossing a well-traveled ocean lane in a blanket of fog, and rejected the tug's defense of absence of rule in favor of the duty of prudent and cautious

36. *Id.* at 1034, 1974 AMC at 2651.

37. *Id.* at 1034-35, 1974 AMC at 2651-52.

38. *See, e.g.,* *Mystic S.S. Corp. v. M/V ANTONIO FERRAZ*, 498 F.2d 538, 541-42, 1974 AMC 545, 550-51 (2d Cir. 1974).

39. *Tiger Shipping Co., S. A. v. TUG CARVILLE*, 381 F. Supp. 1340, 1342-43, 1974 AMC 1957, 1960-61 (E.D. Va. 1974).

40. *Id.* at 1344, 1974 AMC at 1963; *see also* *Brodospas v. United States*, 1975 AMC 117 (S.D.N.Y. 1974).

41. 57 F. Supp. 183, 184-85, 1944 AMC 1375, 1378-79 (E.D.N.Y. 1944).

seamanship in the prevailing circumstance of adverse weather.⁴² Accordingly, the tug should have shortened the long hawsers, a conclusion which amounts to a mutual fault ruling.⁴³

The important question regarding improper toelines is whether the Pennsylvania Burden Rule⁴⁴ is applicable to the tug and tow situation. The Fifth Circuit has applied the Pennsylvania burden of proof rules in the towage context.⁴⁵ A Fourth Circuit case, *THE GEZINA*, held that the Pennsylvania Burden Rule was not applicable because the tug's excessive toeline was a condition, rather than a cause, of the collision.⁴⁶

C. *Tugmaster Unpreparedness or Ignorance*

Unfamiliarity with the waters or the special hazards of wind and tide is a frequent source of trouble (and collision) for tugmasters who are expected to know *everything on the charts*, plus many things *not* on the charts, but which should be known to persons habitually navigating the specified waters.⁴⁷ This obligation of familiarity in no

42. *Id.* at 185, 1944 AMC at 1379.

43. *Id.*, 1944 AMC at 1379-80. The court also considered it to be a fault that the barges did not give fog signals, even though not required. *Id.*

44. *THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125, 136 (1873) (stating that "when . . . a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions . . . the burden rests upon 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."), *questioned in*, *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1555, 1988 AMC 2278, 2302 (11th Cir. 1987) (stating that the Pennsylvania Rule reflects "a concern that maritime rules be strictly observed"); *In re Adventure Bound Sports, Inc.*, 837 F. Supp. 1244, 1253, 1994 AMC 1517, 1517 (S.D. Ga. 1993) (stating that the Pennsylvania Rule "imposes a rebuttable presumption that the violation of a statute intended to prevent collisions is a contributing cause of an accident . . . thereby placing the burden of proof as to negligence and causation on the party seeking limitation rather than on the claimant").

45. *See Candies Towing Co., Inc. v. M/V B & C ESERMAN*, 673 F.2d 91, 93-94, 1983 AMC 2033, 2036-37 (5th Cir. 1982); *see also Allied Chem. Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1052-53, 1982 AMC 1271, 1281-82 (5th Cir. Unit A Nov. 1981).

46. 89 F.2d 300, 304-05, 1937 AMC 660, 665-67 (4th Cir. 1937) (finding excessive hawser (2700 feet in length instead of the required 1400 feet for Inland Waters (Martha's Vineyard)) still being attached when preparing to anchor at Vineyard Haven *could not* have contributed to the collision); *see also Associated Dredging Co., Inc. v. Continental Marine Towing Co.*, 617 F. Supp. 961, 966 (E.D. La. 1985) (finding that towed dredge capsized and failure to lengthen the towing hawser was *excused* in view of the wave wash damage from two large vessels).

47. The tug master must know water levels, the depth of water, and the state of the tides, currents, ordinary obstructions, breadth and length of channels, and clearance of bridges. *See THE VULCAN*, 60 F. Supp. 158, 160-61, 1945 AMC 484, 488-89 (E.D. La.

way imposes strict liability on the tugboat. Substantial "leeway" is afforded to the tugs for "mere judgment errors."⁴⁸

IV. NAVIGATIONAL DUTIES OF THE TOWED VESSEL IN COLLISION

Most importantly, the owner of the towed vessel is responsible for the seaworthiness of the vessel to be towed.⁴⁹ Potential faults of the tow include insufficient ballast of the tow,⁵⁰ or overloading of the

1945); *THE JOSEPH MORAN*, 1932 AMC 1000, 1000 (E.D.N.Y. 1932). *But see* *THE MARY J. KENNEDY*, 1925 AMC 1250, 1252-53 (E.D.N.Y. 1925); *THE NONPAREIL*, 15 F.2d 200, 201-02, 1925 AMC 1160, 1160 (S.D.N.Y. 1925), *aff'd*, 15 F.2d 202, 1926 AMC 1668 (2d Cir. 1926).

48. *See* *THE MARGARET*, 94 U.S. 494, 497 (1876); *THE IMOAN*, 67 F.2d 603, 605, 1933 AMC 1626, 1629-30 (2d Cir. 1933); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1164, 1978 AMC 1786, 1804-05 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 649-52, 1961 AMC 2333, 2344-49 (9th Cir. 1961); *C.J. Dick Towing Co. v. THE LEO*, 202 F.2d 850, 856, 1953 AMC 498, 507-08 (5th Cir. 1953); *American Tel. & Tel. Co. v. Steuart Transp. Co.*, 1978 AMC 1680, 1688-89 (D. Md. 1977); *Barge NL-5—Chesapeake Bay Bridge-Tunnel*, 1968 AMC 1427, 1434-35 (E.D. Va. 1968).

49. *Curtis Bay Towing Co. v. Southern Lighterage Corp.*, 200 F.2d 33, 34, 1952 AMC 2034, 2036 (4th Cir. 1952); *THE ELI B. CONINE*, 233 F. 987, 988 (2d Cir. 1916); *THE GARDEN CITY*, 127 F. 298, 300 (6th Cir. 1904); *THE HERCULES*, 73 F. 255, 258 (2d Cir. 1896); *THE LAPWING*, 56 F. Supp. 859, 862, 1944 AMC 1289, 1295 (E.D. La. 1944), *aff'd*, 150 F.2d 214 (5th Cir. 1945); *THE RADNOR*, 21 F.2d 982, 983, 1927 AMC 1875, 1875 (D. Md. 1927).

50. *Nat G. Harrison Overseas Corp. v. AMERICAN TUG TITAN*, 516 F.2d 89, 93-94, 1975 AMC 2257, 2261-62 (5th Cir. 1975); *A.L. Mechling Barge Lines, Inc. v. Derby Co.*, 399 F.2d 304, 305, 1968 AMC 1436, 1436 (5th Cir. 1968); *South, Inc. v. Moran Towing & Transp. Co.*, 360 F.2d 1002, 1006, 1966 AMC 1987, 1991-92 (2d Cir. 1966); *Curtis Bay Towing Co.*, 200 F.2d at 35, 1952 AMC at 2036-37; *THE DIRECTOR*, 1927 AMC 1295, 1301 (4th Cir. 1927); *Moran Towing & Transp. Co. v. Bouchard Transp. Co.*, 373 F. Supp. 1, 3, 1974 AMC 1513, 1515-16 (S.D.N.Y. 1974); *Frederick Snare Corp. v. Moran Towing & Transp. Co.*, 195 F. Supp. 639, 645, 1961 AMC 2605, 2607 (S.D.N.Y. 1961).

Prior to the Federal Rules of Evidence, a presumption of unseaworthiness arose when a tow sank or foundered under normal weather and sea conditions. *THE RADNOR*, 21 F.2d at 983-84, 1927 AMC at 1875; *Central R.R. v. TUG MARIE J. TURECAMO*, 238 F. Supp. 145, 147, 1965 AMC 2570, 2572-73 (E.D.N.Y. 1965); *Frederick Snare*, 195 F. Supp. at 642, 1961 AMC at 2607. When the tug knows of the unseaworthy condition of the tow, the duty to use due care continues during the actual towage and until the towing service is ended. *THE HELDERBERG*, 94 F.2d 649, 651, 1938 AMC 240, 242-43 (2d Cir. 1938); *Henry Du Bois Sons Co. v. Pennsylvania R.R. (THE MERCER)*, 47 F.2d 172, 174, 1931 AMC 312, 314 (2d Cir. 1931). In *Hanover Ins. Co. v. Puerto Rico Lighterage Co.*, the court sustained a finding that the collision was 95% the fault of the tug and only 5% the fault of the unseaworthy tow. 553 F.2d 728, 730-31, 1977 AMC 850, 854-55 (1st Cir. 1977). In contrast, in *In re TUG BEVERLY, Inc.*, the sinking of the towed houseboat in an unseaworthy condition was assessed as 30% of the fault, while the excessive speed of the tug and failure to inspect the condition of the tow was assessed as 70% of the fault. 1994 AMC 2437, 2440 (E.D. Pa. 1994).

tow,⁵¹ or other failings of the tow making the tow unmaneuverable.⁵² In addition, the tow is liable for its interference in the normal operations of the tug.⁵³

V. NEGLIGENCE CLAUSES IN TOWAGE CONTRACTS

The essence of the towage contract is the agreement of the parties that the tug will skillfully and carefully move the towed object and deliver it in good condition to the agreed destination. Contracts between the tugboat owner and the owner of the towed vessel containing exculpatory clauses are common. The contract may explicitly state that the tug is not a common carrier, a bailee, or an insurer of the towed vessel. If such language is not explicit, it will be implied.⁵⁴ Steam tugs were first used in the United States around 1835, and exculpatory clauses in towage contracts became common by 1860.⁵⁵

In 1955, however, total exculpation of the tugboat owner from liability for damage to the towed vessel caused by the tugboat's negligence was held to be against public policy. Hence, exculpatory clauses in towage contracts, either of the type "sole risk of the towed vessel" or fictitious employment of the master and crew of the tug by

51. See *Shamrock Towing Co. v. Schiavone-Bonomo Corp.*, 275 F.2d 338, 341, 1960 AMC 817, 821-22 (2d Cir. 1960).

52. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 86, 1955 AMC 899, 901 (1955); *THE LEO*, 202 F.2d at 855, 1953 AMC at 506-07; *Lotz v. TUG ELSIE M.*, 98 F. Supp. 246, 247, 1951 AMC 1311, 1312-13 (S.D. Tex. 1950); *THE WALTER B. POLLOCK*, 1926 AMC 1019, 1019-20 (S.D.N.Y. 1926). However, the tow owner may be exonerated on proof of negligent loading by an independent stevedore. *Shamrock Towing*, 275 F.2d at 341, 1960 AMC at 821-22.

53. *Allied Chem. & Dye Co. v. THE CHRISTINE MORAN*, 303 F.2d 197, 200, 1962 AMC 1198, 1201-02 (2d Cir. 1962); *Neptune Transp. Co. v. Bartow*, 1957 AMC 2046, 2050 (S.D.N.Y. 1957); *In re Barrett*, 108 F. Supp. 710, 718, 1953 AMC 159, 171 (S.D.N.Y. 1952).

54. See *Stevens v. THE WHITE CITY*, 285 U.S. 195, 200-02, 1932 AMC 468, 468-72 (1932).

55. *Orge v. New Steam-Tug Co.*, 31 L.T.R.O.S. 85 (1858). Use of steam tugs began earlier in the United Kingdom. In the United Kingdom, for many years the "Standard Conditions for Towage and Other Services" protect the tugboat owner "whilst towing."

In the United States, the Second Circuit had previously approved various towage exculpatory clauses and continues to approve pilotage clauses to the same effect. *A/S Atlantica v. Moran Towing & Transp. Co.*, 498 F.2d 158, 160-61, 1974 AMC 555, 559-60 (2d Cir. 1974); see also *THE OCEANICA*, 170 F. 893, 895-96 (2d Cir.), cert. denied, 215 U.S. 599 (1909). Yet, the Ninth Circuit held towage exculpatory clauses to be invalid because they violate public policy. *Mylroie v. British Columbia Mills Tug & Barge Co.*, 268 F. 449, 452-53 (9th Cir. 1920), *aff'd*, 259 U.S. 1 (1922).

the towed vessel, were stricken.⁵⁶ The types may be used singly or in combination.

In *Bisso v. Inland Waterways Corp.*, an oil barge collided with a bridge pier while the barge was being negligently towed by the tug *Cairo* on the Mississippi River.⁵⁷ The barge had no propulsion, steering, officers, or crew. The towage contract provided that the towing was at the sole risk of the towed vessel. It also stated that the tugboat crew were servants of the towed vessel whether they were on the tug or not. The district court dismissed the towed vessel's claim and the Fifth Circuit affirmed.⁵⁸ The Supreme Court reversed the Fifth Circuit by a vote of five to three. The rationale of the majority was the public policy to discourage negligence and to protect those requiring towage services from being overreached by those (possibly monopolies) who can drive hard bargains.⁵⁹ The Court's opinion attempted to distinguish the approved pilotage clause of *Sun Oil Co. v. Dalzell Towing Co.* from the *Bisso* towage clause in a factually unconvincing manner describing state compulsory pilots rather than docking pilots.⁶⁰

On the same day that *Bisso* was decided, the Supreme Court relied on *Bisso* and struck down clauses making the towed vessel liable for all damage caused by the tug and tow through indemnification and fictitious employment clauses.⁶¹ In *THE WINDING GULF*, the obsolete United States Navy destroyer *U.S.S. Bancroft* (part of the destroyers-for-bases lend-lease agreement with the United Kingdom) was being towed to a shipbreaker for scrap by the tug *Peter Moran*.⁶² The destroyer had no propulsion, steering, or crew when it collided with the *Winding Gulf* because the navigational lights of the

56. *Bisso*, 349 U.S. at 94-95, 1955 AMC at 903; see Bruce L. Feingerts & Mark S. Stein, Comment, *Exculpatory Provisions in Towage Contracts*, 49 TUL. L. REV. 392, 392-95 (1975); cf. *Chile S.S. Co. v. McAllister*, 1956 AMC 1419, 1420-21 (S.D.N.Y. 1956) (finding that the special hazards of towage in ice were exculpated by a letter from the tugboat company).

57. *Bisso*, 349 U.S. at 85-86, 1955 AMC at 901.

58. *Bisso v. Inland Waterways Corp.*, 211 F.2d 401, 402-03, 1954 AMC 648, 649-51 (5th Cir. 1954), *rev'd*, 349 U.S. 85, 1955 AMC 899 (1955).

59. *Bisso*, 349 U.S. at 89-91, 1955 AMC at 903-04.

60. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 293-94, 1933 AMC 35, 36-37 (1932).

61. *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 123, 1955 AMC 927, 928 (1955).

62. *Id.* at 122, 1955 AMC at 927.

destroyer were not functioning. Following a collision in heavy fog, the towed destroyer sank, and the *Winding Gulf* was badly damaged. The district court held that the tug was negligent for failing to provide a crew to maintain the navigational lights and sound fog signals and divided the damages equally.⁶³ The court of appeals affirmed the finding of tow liability, without the necessity for a finding of tug liability because of the exculpatory clause.⁶⁴ But the Supreme Court, relying on *Bisso*, reversed by a vote of six to two.⁶⁵

Another case decided with *Bisso* and *THE WINDING GULF* was *United States v. Nielson*.⁶⁶ *Nielson* also dealt with the fictitious employment clause, but this time the tug owner used the clause as a sword rather than a shield. Two tugs were assisting the transfer of a vessel with her own power from Hoboken to Brooklyn. The captain of one tug had gone aboard the towed vessel as docking pilot. The negligence of the docking pilot caused one of the tugs to be crushed between the assisted vessel and a pier. The tug owner sued the towed vessel for the damage to its tug under the fictitious employment language of the pilotage clause, arguing that damage to its tug was caused while its employee was on board the assisted vessel, and thus, was temporarily the employee of the assisted vessel. The United States Supreme Court held that the release of the tug company from liability for damage *by* the tug does *not* authorize "it affirmatively to collect damages for injury to its own tug due to negligent pilotage by one of its tug captains."⁶⁷ The Court's conclusion was not based on public policy, but rather on the ambiguity of the contractual language.⁶⁸

Because of *Nielson's* reliance on ambiguity in the contract language, eight years later the Court revisited exculpatory towage

63. *THE ST. FRANCIS*, 72 F. Supp. 50, 56-57, 1947 AMC 819, 829-31 (D. Md. 1947), *aff'd sub nom.* Boston Metals Co. v. *THE WINDING GULF*, 209 F.2d 410, 1954 AMC 183 (4th Cir. 1954), *rev'd*, 349 U.S. 122, 1955 AMC 927 (1955).

64. *THE WINDING GULF*, 209 F.2d at 414, 1954 AMC at 189-90.

65. *THE WINDING GULF*, 349 U.S. at 123, 1955 AMC at 928.

66. 349 U.S. 129, 1955 AMC 935 (1955).

67. *Id.* at 131-32, 1955 AMC at 936-37.

68. In the Court's words:

A person supplying his own employees for use by another in a common undertaking cannot usually collect damages because of negligent work by the employee supplied. Clear contractual language might justify imposition of such liability. But the contractual language here does not meet such a test and we do not construe it as authorizing respondent to recover damages from petitioner.

Id., 1955 AMC at 937.

contracts in *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, in which the language of the contract specified that the towed vessel would indemnify the tugboat owner for "any damage claims urged by third parties."⁶⁹ Furthermore, the tugboat was to be a named assured on the towed vessel's insurance policy.⁷⁰ In *Dixilyn Drilling*, the towed barge collided with a bridge pier. Both tug and tow paid the pier owner. Later, in litigation between tug and tow, the district court denied the indemnification, holding the towing vessel solely liable.⁷¹ The Fifth Circuit reversed, distinguishing this contract from the one in *Bisso*.⁷² The Supreme Court in a terse per curiam opinion reversed, stating: "We adhere to the rule laid down in *Bisso* and *Winding Gulf* and hold that the Court of Appeals was in error in failing to follow it."⁷³ The Court did not even comment on the trial court's finding that the tugboat owner was not in a monopoly position to drive a hard bargain.⁷⁴ Thus, it is uncertain today what effect the monopoly component of *Bisso* continues to have. Accordingly, contractual exculpations of tugboat owners from liability to the towed vessel because of the tugboat's own negligence violate public policy and are invalid. Forty years after *Bisso*, it is difficult to imagine that the precedent would be abandoned directly, but that does not mean that it is impossible to circumvent it.

VI. SHIFT OF INSURANCE COVERAGE AND WAIVER OF SUBROGATION

Since *Bisso*, bargaining on the cost of liability insurance has replaced the effort to draft exculpatory clauses to expose the towed vessel to the consequences of tugboat negligence. Justice Frankfurter suggested in his *Bisso* dissent that inequality of bargaining power could not be assumed in the tug and tow situation, and there was no reason that the tugboat owner could not shift the financial

69. 372 U.S. 697, 697, 1963 AMC 829, 829 (1963).

70. *Id.* at 698, 1963 AMC at 830.

71. *Mississippi Highway Comm'n v. Dixilyn Drilling Corp.*, 198 F. Supp. 788, 794, 1961 AMC 943, 954 (D. Miss. 1961), *rev'd*, 303 F.2d 237, 1963 AMC 831 (5th Cir. 1962), *rev'd*, 372 U.S. 697, 1963 AMC 829 (1963).

72. *Crescent Towing & Salvage Co. v. Dixilyn Drilling Corp.*, 303 F.2d 237, 246-47, 1963 AMC 831, 844-45 (5th Cir. 1962), *rev'd*, 372 U.S. 697, 1963 AMC 829 (1963).

73. *Dixilyn*, 372 U.S. at 698, 1963 AMC at 830.

74. *Mississippi Highway Comm'n*, 198 F. Supp. at 789-91, 1961 AMC at 945-48.

consequences of tugboat faults onto liability insurers.⁷⁵ Thus, the user of tugboat services has the choice of relying on the tugboat's insurers at an additional cost for towage or relying on its own insurer at a reduced cost for towage.⁷⁶ Accordingly, the owner of the towed vessel choosing the latter alternative will name the tugboat company as an additional assured for which the vessel owner may (or may not) be required to pay an additional premium. In addition, the towed vessel owner should obtain a waiver of subrogation against the tugboat company and the tugs employed in the tow.

Bisso was used as a sword in *Fluor Western, Inc. v. G & H Offshore Towing Co.*, in which one party attempted to shift insurance coverage from the tugboat vessel.⁷⁷ The towed vessel argued that the required waiver of subrogation in the insurance policy was void because the clause was the equivalent of an exculpation of the tugboat from the consequences of its own negligence. The Fifth Circuit rejected the equivalency argument and enforced the waiver of subrogation.⁷⁸

The Fifth Circuit's approval of the shift of liability insurance with waiver of subrogation is now well established throughout the industry.⁷⁹ The leading case, *Twenty Grand Offshore*, involved clearly negligent action of the tugboat personnel whereby the towing hawser parted and the barge ran aground. The owner of the towed barge had *not* named the tugboat as an additional insured and had not obtained the waiver of subrogation, all in breach of its obligation under the towage contract. The Fifth Circuit reversed the district court

75. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 117-19, 1955 AMC 899, 924-26 (1955) (Frankfurter, J., dissenting).

76. *See Mississippi Highway Comm'n*, 198 F. Supp. at 789-91, 1961 AMC at 945-48.

77. 447 F.2d 35, 36-37, 1972 AMC 406, 407 (5th Cir. 1971), *cert. denied*, 405 U.S. 922, 1972 AMC 407 (1972); *see also* *Willamette-Western Corp. v. Columbia Pac. Towing Co.*, 466 F.2d 1390, 1391, 1972 AMC 2128, 2129 (9th Cir. 1972). *See generally* James A. Dixon, Jr. & David L. Canning, *The Continuing Erosion of Bisso—Waiver of Subrogation and Benefit of Insurance Clauses*, 44 INS. COUNSEL J. 97 (1977) (discussing the validity of exculpating clauses in towage contracts, including the enforceability of insurance clauses found in towage contracts).

78. *Fluor W.*, 447 F.2d at 40, 1972 AMC at 413.

79. *See Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679, 685, 1974 AMC 2254, 2262 (5th Cir.), *cert. denied*, 405 U.S. 922 (1974); *see also Willamette-Western*, 466 F.2d at 1392-93, 1972 AMC at 2130-32. *See generally* Dixon & Canning, *supra* note 77 (discussing the general acceptance of the validity of exculpatory insurance clauses in both the judicial and industrial realm).

judgment's in favor of the barge owner.⁸⁰ The question then became the amount of the towed vessel's damage covered by insurance. Accordingly, the Fifth Circuit concluded that the tugboat company would remain liable for any damages *not* covered by insurance because of tugboat negligence, but the towed vessel would be responsible for the portion of its damages that should have been covered by its own insurance.⁸¹ Subsequent cases have dealt with the effect of deductibles⁸² and the inconsistencies created by a maladroitly drafted instrument.⁸³

VII. COLLISIONS BETWEEN TOWS AND OTHER VESSELS

When a vessel other than the tug or its tow (the "third party") is damaged by the negligence of the tug, the tow, or both, the question arises whether the fault of the tug should be imputed to the tow, or whether the fault of the tow should be imputed to the tug. Tort law concepts of imputed liability are not used in this situation.⁸⁴ Thus, the

80. *Twenty Grand Offshore*, 492 F.2d at 685, 1974 AMC at 2262. The Fifth Circuit reasoned that the insurance clauses were not the same type of clauses held invalid in *Bisso* and *Dixilyn*, and thus not exculpatory. Further, if the insurers had refused to pay, the tug owner would still be liable to the towed vessel for the negligence. *Id.* at 683-85, 1974 AMC at 2259-62.

81. *Id.* at 685, 1974 AMC at 2262.

82. *See, e.g., Seley Barges, Inc. v. TUG EL LEON GRANDE*, 396 F. Supp. 1020, 1021-25 (E.D. La. 1974), *aff'd*, 513 F.2d 628 (5th Cir. 1975).

83. *See, e.g., BASF Wyandotte Corp. v. TUG LEANDER, JR.*, 590 F.2d 96, 97, 1979 AMC 1721, 1722 (5th Cir. 1979); *Dow Chem. Co. v. Ashland Oil, Inc.*, 579 F.2d 902, 903, 1979 AMC 1581, 1582 (5th Cir. 1979). The rate bargaining and waiver of subrogation clause in *Dow Chemical* reads as follows:

7. Owner shall cause its hull, P & I and cargo underwriters either to waive subrogation as to Contractor or make Contractor an additional assured under Owner's policies covering the said tow; any expense in connection therewith to be for account of Owner. Neither the procuring of said insurance arrangements by Owner nor its failure in that regard shall affect the other provisions of this contract, the provisions of this paragraph being primarily for the protection of Owner with respect to its insurance.

8. It is recognized and agreed by both parties hereto that the towage rate charged is based in part on the terms and conditions of this contract, without the benefits of which a higher towage rate would have been charged.

Dow Chemical Co. v. M/V CHARLES F. DETMAR, JR., 545 F.2d 1091, 1093 (7th Cir. 1976).

84. Imputed liability, often used in the common law, concerns the imputation of fault from agent to principal or from vehicle operator to vehicle owner. The doctrine of imputed liability is reviewed in *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* §§ 69-74, at 499-533 (5th ed. 1984).

negligence of a tug is not imputed to a tow or vice versa.⁸⁵ Whether the tug or tow is liable to the third party depends on the presence of the dominant mind.⁸⁶

The vessel whose master and crew are in control of the towage operation is the dominant mind. Accordingly, that vessel alone is liable for damage caused by the flotilla to third parties, unless there is independent negligence of the other flotilla vessels contributing to the damage.⁸⁷

When the tow strikes the third party vessel but the tow was not the dominant mind (no crew, no propulsion, no steering), the tow will not even be liable *in rem* for the damage.⁸⁸

A. *Tugboat as Dominant Mind*

The absence of propulsive power of the towed vessel is a prime consideration. Thus, in *THE FORT GEORGE*, where there was no propulsion capability in the tow and the tug provided the propulsion, the tug became the dominant mind and the tow had to follow the directions of the tug.⁸⁹ Contributory fault of the tow where the tug is

85. *Sturgis v. Boyer*, 65 U.S. (24 How.) 110, 121-23 (1860).

86. This is the only situation where liability as between tug and tow is considered. In the context of limitation of liability, the question is whether the tugboat must surrender barges owned by the tugboat owner. The Fifth Circuit has held that the entire flotilla of commonly owned and controlled tugs and barges had to be surrendered to make up the limitation fund. *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724, 727, 1967 AMC 2684, 2688-89 (5th Cir. 1967); *see also In re Drill Barge No. 2*, 454 F.2d 408, 411-12, 1972 AMC 1008, 1010-12 (5th Cir.), *cert. denied*, 406 U.S. 906 (1972); *cf. Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 54 (1919). For purposes of applying the Steering and Sailing Rules, a flotilla comprised of tug and tow is considered a single unit. *See THE GLADYS*, 144 F. 653, 655 (2d Cir. 1906).

87. *See THE MARGARET*, 94 U.S. 494, 497 (1876); *Sturgis*, 65 U.S. (24 How.) at 121-23; *see also Alter Co. v. M/V MISS SUE*, 536 F. Supp. 313, 316, 1983 AMC 302, 302 (E.D. La. 1982) (holding "helper" tugs exonerated and the dominant mind tug fully liable); *Naptha Barge Co. v. Continental Navigation Co.*, 1978 AMC 501, 511 (E.D. La. 1977).

88. *Sturgis*, 65 U.S. (24 How.) at 122-23; *see also Oil Transfer Corp. v. Westchester Ferry Corp.*, 173 F. Supp. 637, 640, 1959 AMC 485, 490 (S.D.N.Y. 1958) (stating that "where responsibility for the joint navigation of two vessels has been taken over by one of them, the other is not liable *in rem* if her owner is not responsible *in personam*. . . ." (emphasis added). *But see Amoco Oil v. M/V MONTCLAIR*, 766 F.2d 473, 475-76, 1986 AMC 1420, 1422-24 (11th Cir. 1985) (finding liable *in rem* a barge without propulsive power, manned by a "riding crew," for allision damage), *cert. denied*, 475 U.S. 1121 (1986).

89. 183 F. 731, 732-33 (2d Cir. 1910), *cert. denied*, 219 U.S. 589 (1911); *see also THE JOHN D. ROCKEFELLER*, 272 F. 67, 71 (4th Cir.), *cert. denied*, 256 U.S. 693 (1921).

the dominant mind can be found where the tow is unseaworthy,⁹⁰ has failed to follow the tug's directions,⁹¹ or has breached a duty owed to the tug.⁹²

The seaworthiness of a barge was brought into question in *Ryan Walsh Stevedoring*, in which the boom of the stern-mounted revolving crane (set in an elevated position) on the unmanned barge collided with the highest span of the Huey P. Long Bridge.⁹³ The tug argued that the positioning of the boom on the barge made it impossible for the barge to move safely from one site to another. Thus, the barge was unseaworthy because it was not reasonably fit for its intended purpose.⁹⁴ The district court, however, rejected the tugboat's assertion of nonliability, holding that the tug was solely responsible because the unseaworthiness was so obvious that the tug was negligent in proceeding on the job. The court stated, "once the master of the M/V HIAWATHA took over the D/B FRANK L without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the voyage shifted to him."⁹⁵

90. *In re Barrett*, 108 F. Supp. 710, 718, 1953 AMC 159, 171 (S.D.N.Y. 1952) (finding the tow unseaworthy), *modified on other grounds*, 209 F.2d 487 (2d Cir. 1954); *see also* S.C. Loveland, Inc. v. East W. Towing Co., 415 F. Supp. 596, 605-06, 1978 AMC 2293, 2297-2300 (S.D. Fla. 1976), *aff'd*, 608 F.2d 160, 1980 AMC 2947 (5th Cir. 1979), *cert. denied sub nom.* St. Paul Mercury Ins. Co. v. East W. Towing, 446 U.S. 918, 1980 AMC 2102 (1980); *cf.* P. Dougherty Co. v. United States, 104 F. Supp. 711, 715-16, 1952 AMC 537, 542-43 (S.D.N.Y. 1951) (concerning a tug that left dead ship insecurely anchored with an incompetent crew on board, which were held to remain employees of tug owner); *Ryan Walsh Stevedoring Co. v. James Marine Serv., Inc.*, 557 F. Supp. 457, 460-61, 1983 AMC 2516, 2520-21 (E.D. La. 1983) (holding that the tow was excused from contribution because the unseaworthiness of the tow was readily apparent), *aff'd*, 792 F.2d 1457, 1984 AMC 3000 (5th Cir.), *cert. denied*, 469 U.S. 981 (1984).

91. *Kinsman Marine Transp. Co. v. Great Lakes Towing Co.*, 1975 AMC 837, 841 (N.D. Ohio 1975); *Montauk Oil Transp. Corp. v. TUG LAURIE ANN REINAUER*, 1974 AMC 2382, 2386 (S.D.N.Y. 1974).

92. *Chevron U.S.A., Inc. v. Progress Marine, Inc.*, 1980 AMC 1637, 1639 (E.D. La. 1975) (holding tow liable for failure to show proper lights); *see also* THE SIF, 266 F. 166, 168 (2d Cir. 1920); THE GULFPENN-TUG DOVER-TUG SUSAN A. MORAN, 1933 AMC 1086, 1086-87 (E.D.N.Y. 1933) (presenting a summary of the opinion).

93. *Ryan Walsh Stevedoring*, 557 F. Supp. at 460, 1983 AMC at 2517-18.

94. *Id.*, 1983 AMC at 2519-20.

95. *Id.* at 462, 1983 AMC at 2522; *cf.* S.C. Loveland, 415 F. Supp. at 605, 1978 AMC at 2297 (holding that a barge that dragged anchor was not unseaworthy for failing to have a heavier anchor). The lower court held that the anchor was intended to be used only in emergencies for short periods of time, and that it was reasonably fit for its purpose. The crew of the tug should have known this and was thus negligent to leave the barge unattended at anchor in an exposed area. *Id.*, 1978 AMC at 2297.

In *Kinsman Marine*, the dominant mind tug was held at fault in a collision in which the tug imparted excessive sternway to the steamer it was towing.⁹⁶ However, the court also found that the steamer had contributed to the collision because it had failed to respond promptly and properly to the tug's orders. Accordingly, the damages were divided equally between tug and tow.⁹⁷ In *Montauk Oil*, the tow was likewise at fault for failing to follow the tug captain's instructions to lower the booms on the barge that later collided with a bridge.⁹⁸

Again, in a dominant mind tug situation, the tow might be held solely liable for the collision damage if the proximate cause of the collision was the negligence of the tow. In *In re Barrett*, for example, the court found the tug free of fault in the navigation of a tow that had broken loose and drifted uncontrollably into collision.⁹⁹ The court held that the tow was at fault for supplying a defective hawser to the tug, for a lack of authority and competence among the crew members aboard the tow, and for failing to maintain the anchors in a condition ready for immediate use.¹⁰⁰

B. *Towed Vessel as Dominant Mind*

THE FORT GEORGE set forth the principle that the tug providing the motive power will be the dominant mind. The parties may alter this arrangement by agreement.¹⁰¹ The agreement contradicting the dominant mind principle may be express or even implied from the circumstances.¹⁰² For example, the tow will be considered the dominant mind where the master and crew of the tow exclusively controlled both tug and tow from the tow and the tug merely furnished

96. *Kinsman Marine Transp. Co. v. Great Lakes Towing Co.*, 1975 AMC 837, 841 (N.D. Ohio 1975).

97. *Id.* at 841-42.

98. *Montauk Oil Co. v. TUG LAURIE ANN REINAUER*, 1974 AMC 2382, 2386-87 (S.D.N.Y. 1974).

99. 108 F. Supp. 710, 718-19, 1953 AMC 159, 171-72 (S.D.N.Y. 1952), *modified on other grounds*, 209 F.2d 487 (2d Cir. 1954).

100. *Id.* at 717, 1953 AMC at 169; *see also Chevron U.S.A., Inc. v. Progress Marine, Inc.*, 1980 AMC 1637, 1639 (E.D. La. 1975) (holding a tow solely at fault when the legs of an oil rig under tow struck underwater gas pipelines). The dominant mind tug had committed no negligence in the navigation. The sole proximate cause of the collision was the failure of the tow to measure accurately the lengths of the legs of the rig. *Id.* at 1640-41.

101. 183 F. 731, 732 (2d Cir. 1910), *cert. denied*, 219 U.S. 589 (1911).

102. *Dow Chem. Co. v. TUG THOMAS ALLEN*, 349 F. Supp. 1354, 1363, 1974 AMC 781, 792 (E.D. La. 1972).

the motive power for the exercise.¹⁰³ In that situation, the tug is liable only for failure to follow the tow's orders or for participating in an obviously dangerous maneuver.¹⁰⁴

In *TUG THOMAS ALLEN*, a tug and barge allided with an underwater gas pipeline while the tug and barge proceeded from one oil rig to another.¹⁰⁵ The towed barge had chosen the route and directed the tug in accordance with the normal custom in the area.¹⁰⁶ The court held the tow at fault for directing the tug to proceed into shallow water even though the towmaster knew that there were no charts of pipelines or guide boats available. However, the court also held the tug at fault for proceeding in the shallow area without a chart or guide boat on a course the tugmaster understood was dangerous.¹⁰⁷ Thus, tug and tow may both be liable for collision damages.

VIII. COLLISION PREVENTION IN THE TUGBOAT INDUSTRY

The United States Coast Guard blamed human error for 7,664 of the 12,971 tugboat casualties over the twelve-year period, 1980-1991 (about sixty percent of the casualties).¹⁰⁸ Human error is often the result of fatigue because sixteen-hour days are not unknown in the tugboat industry, where crews have been drastically reduced to cut costs in order to compete for business with rail and truck.¹⁰⁹

According to American Waterways Operators, the American tugboat industry consists of 600 towing and barge companies, employing about 175,000 people earning good wages. There are also about 7,000 tugboats and 30,000 barges in the United States. In 1990, the industry moved 775.3 million tons of cargo, fifteen percent of all

103. *Sturgis v. Boyer*, 65 U.S. (24 How.) 110, 122 (1860); *Old Time Molasses Co. v. United States*, 31 F.2d 963, 965, 1929 AMC 687, 690-91 (5th Cir. 1929).

104. *TUG THOMAS ALLEN*, 349 F. Supp. at 1363, 1974 AMC at 792 (concerning actions for personal injuries caused by fire aboard the barge after explosion resulting from the collision with the underwater gas pipeline).

105. *Id.* at 1358-59, 1974 AMC at 783-87.

106. *Id.*, 1974 AMC at 783-87.

107. *Id.* at 1363, 1974 AMC 792.

108. OFFICE OF MARINE SAFETY, SECURITY AND ENVIRONMENTAL PROTECTION and OFFICE OF NAVIGATION SAFETY AND WATERWAY SERVICES, U.S. COAST GUARD, REVIEW OF MARINE SAFETY ISSUES REGARDING UNINSPECTED TOWING VESSELS (Dec. 1, 1993).

109. TRANSPORTATION SAFETY CENTER, U.S. DEP'T OF TRANSP., DOT-MARAD 84090014, SHIPBOARD CREW FATIGUE, SAFETY AND REDUCED MANNING (Nov. 1990); *see also* OFFICE OF MARINE SAFETY, SECURITY AND ENVIRONMENTAL PROTECTION, U.S. COAST GUARD, AN ASSESSMENT OF TOWING VESSEL MANNING REQUIREMENTS (July 1994).

domestic traffic, including fifty-seven percent of all United States grain and thirty percent of petroleum, as well as increasing amounts of hazardous chemicals.¹¹⁰ The industry survives cutthroat competition by offering freight rates cheaper than rail and truck. In comparison with other modes of transport, it is largely unregulated, thus fatigue combines with inadequate training, licensing, and inspection to provide the ingredients of human error disasters. Cheap freight rates, achieved by cost cutting, result in collisions that are costly to insurers, shippers, governments, and other users of the waterways. In addition, cost cutting results in tragic consequences for maritime workers, who are killed or maimed.

This fierce intermodal competition proceeded inconspicuously for years until the early morning of September 22, 1993, when public attention was captured by the allision of a tug and barge flotilla with a fixed railroad bridge at Big Bayou Canot north of Mobile, Alabama. Eight minutes after the barge hit a support pier for the bridge, knocking it thirty-eight inches out of line, the Amtrak Sunset Limited, traveling at seventy-two miles per hour, derailed into the alligator-infested waters of the bayou. Three locomotives and four passenger cars (seven of the eleven units of the train) landed in the water, causing the deaths of forty-seven people and serious injuries to 103 others.¹¹¹

The tugboat *Mauvilla* was pushing barges of coal, steel, iron, and cement up the Mobile River in heavy fog. The operator had no formal training and had only recently passed his licensing exam after seven unsuccessful attempts. The tug had no charts or compass. It did have a radar, but the operator did not know how to use it. The operator became disoriented on that foggy night and proceeded up the impassable Big Bayou Canot apparently thinking it was the Mobile River, mistaking the outline of the bridge for a towed barge.¹¹² It has been estimated that the costs to the Protection and Indemnity club of the tug *Mauvilla* will probably exceed \$100 million.¹¹³

110. PARKS & CATTELL, *supra* note 1, at 5-6; John Boyd, *Barge Accidents a Way of Life on Rivers*, J. COM., Dec. 10, 1993, at 1A, 4A.

111. NATIONAL TRANSPORTATION SAFETY BOARD, NTSB/RAR-94-01, DERAILMENT OF AMTRAK TRAIN NO. 2 ON THE CSXT BAYOU CANOT BRIDGE NEAR MOBILE, ALABAMA, SEPTEMBER 22, 1993 (adopted Sept. 19, 1994).

112. Stephen Lebaton, *Barge Pilot Blamed in Fatal Amtrak Wreck*, N.Y. TIMES, June 22, 1994, at A12.

113. Jim Mulrenan, *Warrior & Gulf Drops Right to Limit Liability: P & I claim in Amtrak crash 'to top \$ 100 m'*, LLOYD'S LIST, July 15, 1994, at 1.

The Big Bayou disaster excited congressional interest and Coast Guard regulatory zeal. Two bills had been introduced in Congress by members of the former Merchant Marine and Fisheries Committee of the House of Representatives: Congressman Tauzin (Democrat of Louisiana) introduced a minimalist bill mandating charts, radars, and compasses on tugs and self-propelled barges,¹¹⁴ while Congressman Studds (Democrat of Massachusetts) introduced a maximalist bill requiring all of Congressman Tauzin's navigational aids plus extensive requirements respecting manning, licensing, and inspection.¹¹⁵ Congressman Studds's bill would have been costly to the industry, which fought it successfully. However, even the minimalist bill did not survive the rush to adjourn for the 1994 elections.¹¹⁶

In the meanwhile, the United States Coast Guard completed a Study of Marine Safety Issues related to Uninspected Towing Vessels,¹¹⁷ in which nineteen changes to existing rules were recommended. While the Coast Guard would have preferred additional legislative authority, a re-examination of the Ports and Waterways Safety Act¹¹⁸ revealed sufficient authority to impose the changes that might have prevented the Big Bayou Canot disaster.¹¹⁹

Three disaster-driven changes cannot be the end of the search. Equipment, training, licensing, and inspections must be improved until our rivers and harbors are the safest in the world.

114. H.R. 2150, 103d Cong., 1st Sess. (1993).

115. H.R. 1374, 103d Cong., 1st Sess. (1993).

116. William L. Roberts, *Coast Guard, Industry Set Barge Safety Regulations*, J. COM., Oct. 19, 1994, at 1A, 8A.

117. *See supra* note 108.

118. 33 U.S.C. §§ 1221-1225 (1988 & Supp. V 1993).

119. *See, e.g.*, Interim Rule for Immediate Reporting of Casualties, 59 Fed. Reg. 39,469 (1994) (amending 46 C.F.R. §§ 4.05-1 & 4.05-10) (requiring immediate notification of allisions with bridges); Interim Rule to Require Radar-Observer Endorsement for Operators of Uninspected Towing Vessels, 59 Fed. Reg. 53,754 (1994) (amending 46 C.F.R. §§ 10.305-.306 & 15.815) (requiring "radar-training for licensed masters, mates, and operators of radar-equipped uninspected towing vessels 8 meters . . . or more in length").

