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California Sues a Vessel In REM for Oil Discharge Damages to Its Water and Marine Life

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ADMIRALTY LAW: CALIFORNIA SUES A VESSEL IN REM FOR OIL DISCHARGE DAMAGES TO ITS WATER AND MARINE LIFE

In a country that each day becomes more and more concerned with the problems of pollution, few happenings are better publicized or arouse as much public outcry as do large oil spills.

In *California v. S.S. Bournemouth*,[1] a federal district court held that an in rem action in admiralty could be maintained against a vessel, by the State of California, for damages to water and marine life caused by the vessel's discharge of bunker oil into the navigable waters of that state. Bunker oil is essentially fuel oil used to operate vessels and should be distinguished from oil carried as cargo by tankers. Of course, due to the vast quantity of oil carried, tankers usually cause the largest amount of vessel pollution, either by design or by accident. The court, in denying defendant's motion to dismiss, ruled that the pollution of navigable waters by a vessel is a maritime tort which gives rise to a maritime lien against that vessel.[2]

One of the most publicized recent tanker-caused pollutions was the wreck of the Torrey Canyon off the southern coast of England, in March 1967. That wreck caused the loss to the sea of most of the entire cargo (119,000 tons of Kuwait crude oil). As a result, scores of birds, fish and other sea life were killed, many by the detergents used in a frantic effort to keep the large oil slicks from reaching the white sand resort beaches of England and France.[3] Today, the

[1] 307 F. Supp. 922 (C.D. Cal. 1969).

[2] 307 F. Supp. at 926; *accord*, The Anaces, 93 F. 240 (4th Cir. 1899).

[3] Cairns, *Oil Spill Report*, THE ORANGE DISC, Jan.-Feb., 1970, Vol. 19, No. 4 (Special Insert, not paginated) (The Magazine of the Gulf Cos., Published Bi-Monthly for Shareholders and Employees). Even more important than the deaths of

Torrey Canyon would not even make the "Top 38" list of prominent oil tankers, all of which are over 200,000 deadweight tons.[4] *The World Almanac* lists six tankers — the largest currently cruising the oceans—at 326,500 deadweight tons each, approximately three times the size of the Torrey Canyon.[5] But, as the *Bournemouth* case indicates, tankers are not the only culprits, even among vessels. Each year, thousands of gallons of oil and far deadlier pollutants are intentionally flushed, pumped or dumped into the navigable waters of the United States by ships, barges and boats of all sizes.[6] The results are obvious, and the problem acute.

In sustaining jurisdiction in admiralty, the court, in *Bournemouth,* rejected the argument, made by both parties, that the Extension of Admiralty and Maritime Jurisdiction Act[7] applied to this case. That act provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

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the birds, fish and minute sea life directly caused by the oil in one of these disasters, is the effect their demise has on the food chains in the surrounding waters. Countless additonal marine animals die because their food source is gone, or because some food source down the food chain has been decimated. The effect multiplies rapidly.

[4] THE WORLD ALMANAC 116 (1970 ed. L. Long).

[5] *Id.*

[6] One particular intentional cause of oil pollution is the practice of "ballasting" tanks, used by both tankers and dry cargo vessels. As the ships' bunker oil or fuel oil tanks are emptied on a voyage, the ships take on water in these tanks to maintain trim, stability and seaworthiness. But, as the ships near their ports of destination, they must get rid of this oil-water mixture so that they will be able to "top off" or fill their fuel tanks in port. Consequently, the tanks are pumped, and this oily mixture is spread upon the water. *See generally* Cairns, *supra* note 3.

[7] 46 U.S.C. § 740 (1964).

> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water. . . .[8]

Historically, from the time of *The Plymouth*,[9] the courts of the United States steadfastly held to the doctrine that ship-to-shore torts were not maritime in nature and, consequently, were without the admiralty jurisdiction granted to the federal courts by the United States Constitution.[10] The doctrine was explained in *The Mary Stewart*:[11]

> In cases of tort the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water.[12]

The inequities of this doctrine were apparent particularly in cases where a vessel collided with a pier or a bridge. In such a case, if the vessel was the tortfeasor, then the owner of the pier or bridge had to sue on the common law side of the federal court or in some law forum where the doctrine of contributory negligence might bar recovery entirely. On the other hand, if the pier or bridge owner was at fault, the vessel owners could sue in admiralty, where the comparative negligence doctrine would be applied.[13] It was this inequity that Congress sought to correct when it passed the Extension of Admiralty and Maritime Jurisdiction Act in 1948.[14]

However, the federal court judge noted that, in the

[8] *Id.*
[9] 70 U.S. (3 Wall.) 20 (1865).
[10] U.S. CONST. art. III, § 2.
[11] 10 F. 137 (E.D. Va. 1881).
[12] *Id.* at 138 (Citation omitted.).
[13] Fematt v. City of Los Angeles, 196 F. Supp. 89 (S.D. Cal. 1961).
[14] H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948).

Bournemouth case, the injury was to the water itself and to the marine life therein, not to the land. Therefore, the court decided that the injury here met the traditional "locality test" used to determine whether a tort is maritime in nature; that is, the tort took place on the navigable waters of the State of California and was the result of the operation of a vessel engaged in maritime commerce. Thus, the primary question was whether such a maritime tort gave rise to a maritime lien, independent of any statute; a maritime lien being a necessary foundation to the maintenance of an action in rem in admiralty against a vessel.

The defendant contended that, absent a specific statute, only two types of maritime torts create maritime liens — collision claims and personal injury claims. Rejecting that contention, the court said:

> A maritime tort involving no accident, and mere injury to property, is obviously out of the ordinary; collision and personal injury suits are common. But relative frequency of occurrence is not a reasonable standard by which an admiralty court will determine the range of appropriate remedies for various types of maritime torts.[15]

Support was found for the court's ruling in the cases of *The Atlanta,*[16] *The Escanaba,*[17] and *The Lydia,*[18] in which martime liens were recognized for the tort of conversion. The court reasoned that the alleged injury to property in the *Bournemouth* case was of the same general nature as a conversion of property and thus should likewise be protected by the creation of a maritime lien. The court noted the fact that the statutes of the United States provide all vessel owners with the privilege of limiting their liability to the value of

[15] 307 F. Supp. at 927.
[16] 82 F. Supp. 218 (S.D. Ga. 1948).
[17] 96 F. 252 (N.D. Ill. 1899).
[18] 1 F.2d 18 (2d Cir.), *cert. denied,* 266 U.S. 616 (1924).

their interest in the vessel.[19] Thus, in the absence of a finding of "privity of knowledge," the owners may limit their liability to the value of their interest in the vessel.[20] In cases like the Torrey Canyon, where the vessel is completely destroyed, this amounts to a complete exemption since the vessel's value is determined after, not before, the accident.[21] Furthermore, the court noted that the owners of vessels are often unknown and not amenable to service of process for an in personam action.[22] The federal district court concluded that this was insulation enough, and that there were strong reasons of justice and convenience in this case for allowing a maritime lien and an in rem action in admiralty for the discharge of oil.[23]

Merely because the Oil Pollution Act, 1924,[24] gives the federal government a cause of action in admiralty against a vessel, including a lien thereon, which has discharged oil, was held no reason to presume that other existing common law rights and remedies were intended to be extinguished by the 1924 Act.[25] This is made apparent by express language in the 1924 Act that its provisions are in addition to existing laws for the preservation and protection of navigable waters.[26]

Although the *Bournemouth* case has not yet gone to trial, the reasoning of the federal district court is sound in allowing the action to be brought on the admiralty side of the federal court. There was no question that the tort occurred on the navigable waters of the United States and of the State of California. The vessel was moored at a pier in

[19] Limitation of Vessel Owner's Liability, 46 U.S.C. §§ 181-96 (1964).
[20] *Id.* § 183(a).
[21] Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104 (1871).
[22] 307 F. Supp. at 928-29, *quoting,* The Anaces, 93 F. 240, 244 (1899).
[23] 307 F. Supp. at 929.
[24] 33 U.S.C. §§ 431-37 (1964), *as amended,* (Supp. IV 1968).
[25] 307 F. Supp. at 929.
[26] 33 U.S.C. § 437 (1964), *as amended,* (Supp. IV 1968).

Long Beach harbor when the oil was discharged. Also, without getting into the history of admiralty law, the tort was maritime in nature.[27] There is apparently no reason to deny to the states the same access to the admiralty courts, now enjoyed by the federal government, to sue for the pollution of their navigable waters. Indeed, in light of the safeguards allowed in admiralty actions to vessel owners, the in rem action and the maritime lien against the offending vessel appears to be a very effective method of combating the pollution problem.

With the opening of the Arkansas River waterway project, the State of Oklahoma is going to join the ranks of the maritime states. For all practical purposes, this will be Oklahoma's first experience with navigable waters, maritime commerce and the whole body of admiralty law. Most of Oklahoma's pollution problems of the future will not come from vessels on navigable waters, but, as barge and tug traffic increases on the Arkansas River waterway, there will undoubtedly be oil spills and accidents. Oklahoma now has a body of law which deals with the general problems of pollution of waters and watercourses.[28] However, the availability of an action in admiralty and the resulting lien on an offending barge, tug, or other vessel can be of immense importance to the State as an additional tool for controlling pollution on the waterway.

In the opinion of the author, the advantage of suing for damages to the water itself is that it eliminates the necessity of proving that the polluting material ever reached the shore or banks of the river, or of showing who owns the contiguous land and/or riparian rights. These problems are eliminated because the damage is done the minute the pollutant joins the water.

[27] The Plymouth, 70 U.S. (3 Wall.) 20, 35 (1865).
[28] *See generally* Comment, *Water & Watercourses: Water Pollution Laws and Their Enforcement in Oklahoma,* 22 OKLA. L. REV. 317 (1969).