New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 78
MONDAY, OCTOBER 21, 2019

ADMIRALTY LAW

Expert Analysis

Fire and Water: Fatal Mixture

By **James E. Mercante**

A mariner will say that "a fire at sea will ruin your whole day!" But, it's never thought to be your last day.

The last day for 33 passengers and one crew member aboard the 75-foot wooden and fiberglass dive boat CONCEPTION was Sept. 2, 2019. The vessel became engulfed in flames at 3 a.m. off the coast of Santa Barbara, Calif. with the full complement of passengers asleep and trapped below deck. The only survivors were four crewmembers. The tragedy ranks as one of the worst maritime disasters in U.S. history. It has been labeled a "major marine casualty" by the U.S. Coast Guard, and the National Transportation Safety Board is currently investigating to determine the probable cause of the fire.

As it involves a *"vessel"* upon *"navigable waters"* with the loss of a *"seaman"* and *"passengers,"* maritime law is naturally implicated. Indeed, the italicized words are all terms of art in the world of admiralty.

Fires at sea are not so rare, just rarely so fatal. There have been many noteworthy fire cases litigated in admiralty.

Smoke on the Water

Owners of ships carrying cargo enjoy the benefit of a 1936 "fire exception" defense under the U.S. Carriage of Goods by Sea Act (COGSA, 46 U.S.C. §30701). Pursuant to COGSA, the vessel owner is to be exonerated for fire losses to cargo unless the cargo interests (shipper) can prove the fire was caused by the *"fault"* or *"privity"* of the ship owner. A similar defense exists under the Limitation of Liability Act, wherein the "fire statute" provides that a vessel owner will be completely exonerated for "loss or damage to merchandise on the vessel caused by a fire … unless the fire resulted from the *design* or *neglect* of the owner." 46 U.S.C. §30504.

Issues abound in a marine fire case ranging from whether admiralty jurisdiction attaches, what law applies (state or federal), salvage, wreck removal, pollution, charter party disputes, cargo loss, compliance with nautical Rules of the Road, status of any injured or deceased (i.e., crew, fare paying passenger, guest), vessel owner limitation of liability, and marine insurance coverage. Also, vessel interests (including officers) need to be mindful of the 1909 "Seaman's Manslaughter Statute," which criminalizes simple neglect, inattention to duty, misconduct or a violation of law that results in death involving a vessel within the jurisdiction of the United States. 18 U.S.C. §1115.

Owners of ships carrying cargo enjoy the benefit of a 1936 "fire exception" defense under the U.S. Carriage of Goods by Sea Act.

Fire Cases

Presently pending before the Second Circuit Court of Appeals is a Southern District of New York

JAMES E. MERCANTE *is a partner at Rubin, Fiorella, Friedman & Mercante, president of the Board of Commissioners of Pilots of the State of New York, and Captain, U.S. Navy (ret.). He can be reached at JMercante@rubinfiorella.com.* KRISTIN E. POLING, *an associate with the firm, assisted in the preparation of this article.*

decision involving a fire aboard the cargo vessel MSC FLAMINIA. The fire burned for six weeks, resulted in the constructive total loss of the ship, three crew member fatalities, and $280 million in cargo loss or damage. A bench trial was held in admiralty before Judge Katherine Forrest (her last before retiring as a federal judge), with the 122-page ruling published at 339 F. Supp. 3d 185 (S.D.N.Y. 2018). The fire was caused by a chemical reaction in a cargo hold which ignited when one of the crewmembers opened the hatch.

In 1990, the U.S. Supreme Court ruled that a fire aboard a vessel docked at a marina involving only recreational (not commercial) vessels, nonetheless fell within admiralty jurisdiction. *Sisson v. Ruby,* 497 U.S. 358 (1990). In 2010, a massive oil spill in the Gulf of Mexico from the fixed drill platform DEEPWATER HORIZON resulting from an explosion and fire implicated admiralty law when the drill rig was deemed by a federal court to be a "vessel." *In re oil spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943 (E.D. La. 2011). This ruling allowed the rig owner to proceed in admiralty with its Limitation of Liability Petition. 46 U.S.C. §30501. Eleven people died and millions of gallons of oil flooded into the Gulf waters, causing catastrophic damage. Interestingly, the court's decision as to "vessel" status later sparked a movie actor portraying an oil rig worker to make an opening scene comment in the movie "Deepwater Horizon" (as the enormous oil rig came into view while the workers were being transported to work by helicopter) that *"I still can't believe that's a boat."* Any maritime lawyer worth his or her salt would know that this line was inserted based upon that 2011 court decision. On the flip side, in 2015, charges of Seaman's Manslaughter were dropped against the two highest ranking officials (petroleum engineers) that were working on the drill rig. The court explained that the Seaman's Manslaughter Statute only applies to persons in positions of authority with responsibilities relating to the transportation of a vessel over water. In DEEPWATER HORIZON, the fixed platform, although a vessel, was not used for transportation over water. *United States v. Kaluza*, 780 F.3d 647 (5th Cir. 2015).

> It is evident from the cases referenced herein that not only the admiralty law, but federal courts sitting in admiralty, are fit for the service and well-equipped to deal with the worst of maritime tragedies.

Tragedy Aboard The GENERAL SLOCUM

In 1900, one of the most fatal maritime fire disasters occurred right here in New York. A fire erupted aboard the 250-foot wooden side-wheel steamboat GENERAL SLOCUM while underway on the East River for a Sunday school excursion. Shockingly, over 1,000 passengers were trapped and died, or drowned. The captain and the crew survived. The ensuing admiralty litigation established deficiencies in ship operations including maintenance of fire hoses, life jackets and life boats. *Van Shaick v. United States,* 159 F. 847 (2d Cir. 1908). The forward storage hold of GENERAL SLOCUM was littered with flammable materials, including oil, paint and straw. The fire hoses that were connected were unable to withstand the water pressure of the pumps, and quickly burst under pressure. During the chaos, the lifeboats were not even launched.

GENERAL SLOCUM's captain was convicted by a jury of manslaughter under the predecessor to the Seaman's Manslaughter Statute for failing to prepare the crew and equipment for adequate firefighting and evacuation in the event of an onboard fire. The captain's poor judgment was highlighted by the fatal decision to beach the vessel bow first, in shallow water, so passengers could jump ashore. However, the fire was erupting from a forward hold. Thus, to avoid the flames forward, the passengers crowded together in the rear of the vessel and hundreds jumped overboard into the deep water and drowned. See *Van Shaick*, 159 F. 847 at 850 (2d Cir. 1908). Had the captain backed into the island stern first, many lives would have been saved. The statute provides that "every captain, engineer, pilot or other person employed on a vessel, by whose misconduct, negligence or inattention to his duties on such vessel, the life of any person is destroyed,

and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. §1115.

On appeal, the Second Circuit affirmed the judgment describing the grim scene as follows: "That by reason of the negligence and misconduct of the [Captain] there was an entire lack of discipline on said vessel after she caught fire, causing panic and confusion on board and, there being no adequate means for extinguishing the flames, no attempt to do so was made. That lifeboats were not launched or made ready for launching, that the life-preservers were useless and those who attempted to use them sank instantly and were drowned while others who remained on board sank into the flames and instantly died." *Van Schaick v. United States*, 159 F. 847, 849 (2d Cir. 1908). "That such an appalling calamity could not have occurred without fault somewhere is manifest. Human skill and care could have prevented or mitigated the disaster. In other words, it was not an inevitable accident." *Van Schaick*, 159 F. 847, 851 (2d Cir. 1908). The captain served three and a half years of a 10-year prison sentence. He was pardoned in 1912 by President William Howard Taft.

The worst maritime disaster in U.S. history occurred in 1865, when three boilers aboard the Civil War steamboat SULTANA exploded and burned the ship to its waterline. The SULTANA had a capacity of just 375, but was carrying over 2,500 people at the time of the fire. Eighteen hundred people died in the explosion and ensuing fire (more fatalities than the TITANIC), most of them Union soldiers who had just been released from Confederate prison camps following the end of the Civil War. The event was overshadowed by the assassination of President Abraham Lincoln, and nobody was ever held accountable.

Back to CONCEPTION

In the CONCEPTION matter, the vessel owner invoked its statutory admiralty rights under an 1851 statute just three days after the fire loss, by filing a Petition for Exoneration from or Limitation of Liability (LOLA) in federal court. 46 U.S.C. §30501; *In re Truth Aquatics et al,* No: 2-19-07693 (C.D. Cal. Sept. 3, 2019). At the time of the filing, the wreck of the vessel was still submerged. This legal strategy was not unexpected lest the timing of it be questioned. The benefit to the owner of the LOLA filing is that now all claims must be filed in the vessel owner's federal Limitation Action, and under maritime law only the federal judge can decide issues having to do with the vessel owner's attempt to limit its liability. Any suits filed in any other court (state or federal) will be stayed by a restraining order issued by the federal judge in the Limitation Action.

The vessel owner's Petition alleges that the CONCEPTION was "tight, staunch, and strong, fully and properly manned, equipped and supplied and in all respects seaworthy and fit for the service in which she was engaged." See *In re Truth Aquatics, et al.*, No.: 2-19-07693 (C.D. Cal. Sept. 3, 2019). Pursuant to the LOLA statute, the vessel owner is seeking exoneration from liability or, in the alternative, to limit its liability to the post casualty value of the vessel, which is zero. In admiralty, "limitation" is by no means automatic. It remains the vessel owner's burden to prove entitlement to limited liability in a federal admiralty (non-jury) hearing after discovery is complete.

Seaworthy Courts

From the Carriage of Goods by Sea Act, to the vessel owner's Limitation of Liability defense (and all the maritime laws in between), it is evident from the cases referenced herein that not only the admiralty law, but federal courts sitting in admiralty, are fit for the service and well-equipped to deal with the worst of maritime tragedies.