DISCUSSION OF A COMPLEX MARINE SUBROGATION CLAIM,

INCLUDING SELECTION AND USE OF EXPERTS

THE INCIDENT

On December 14, 1996, a vessel, named the BRIGHT FIELD, which was managed by a Chinese company based in Hong Kong and crewed by a number of individuals from mainland China, suddenly lost power while outbound in the Mississippi River adjacent to the port of New Orleans. The vessel which was proceeding at full sea speed in a flood current of 4-5 knots immediately veered sharply to port and headed toward a dock area known as the Riverwalk which had originally been constructed a number of years ago for the World's Fair in New Orleans. Aside from blowing its whistle, there was absolutely nothing done by the vessel or its crew to prevent what easily could have become a horrendous disaster with potentially hundreds of injuries and fatalities. Instead, luck and the presence of a shallow area adjacent to the dock caused the vessel to turn to starboard and eventually ground itself only a few feet from a floating casino filled with patrons.

As a result of the incident, a significant amount of physical damage was caused to the buildings and shops which were located on the Riverwalk, but no deaths were caused and few serious injuries were sustained. Although it is difficult to imagine, the state law of Louisiana does not govern this incident, which involved injuries to Louisiana residents and damage to the Louisiana shore pier structures. Maritime law actually governs the resolution of these claims pursuant to the Admiralty Jurisdiction Extension Act. 46 U.S.C. §740:

> 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 in navigable waters, notwithstanding that such damage or injury be done or consummated on land.

As a result of the incident, an array of lawyers appeared on the scene, and a number of state and federal suits were filed, some within 24 hours of the event. Some suits were filed as class actions, while others concerned individual claims of personal injury and property damage.

As a result of this "allision," as this is termed in maritime circles, Cozen and O'Connor was requested to represent a number of property underwriters involved with numerous insureds. At first glance, especially by someone not familiar with maritime law, it would appear as if this would be a simple case to recover damages. However, there was little that was simple in regard to this litigation.

As soon as we were requested to participate in this case, we retained local counsel in New Orleans. They informed us that a joint United States Coast Guard/National Transportation Safety Board hearing into the cause of this allision was implemented and hearings were starting immediately. We also were advised that the vessel was aground in the area where it came to rest after the allision and would not be leaving any time soon especially since there was a concern that the vessel actually was holding up portions of the Riverwalk. If the vessel moved, the mall could collapse. Also, the vessel had a severe gash in its hull which would prevent it from going to sea without first having emergency repairs.

Based on this information, we were confident that we did not have to worry about the ship leaving the jurisdiction anytime soon. We also presumed that the vessel would be filing a limitation of liability suit before leaving, since other parties had already arrested the ship at its location alongside the pier. The filing of the suit would allow a bond or letter of undertaking to be substituted for the res or ship. This would allow the vessel to depart the port and provide for what is termed a concursus. This concursus allows the Federal Court in Louisiana to deprive all

other courts of jurisdiction to hear the claims involved. Instead, all of the claims, counterclaims, third party claims and crossclaims would be decided before a Judge from the Louisiana District Court.

For most of my legal career, I have represented the P&I clubs which insure vessels of the type involved in this particular allision. I was corresponding counsel for the P&I club which insured this vessel for many years. I knew personally the attorneys who were assigned to represent the ship in New Orleans, as well as the law firm in New York which was the North American representative for this particular club. As a result of additional telephone discussions with these individuals, I was able to determine that a limitation of liability suit was being filed and a valuation of the vessel in the area of $14,000,000 to $17,000,000 would be alleged.

THE LITIGATION

Limitation of liability actions are governed by 46 U.S.C. §183 et seq. This act, which was initially passed in 1851, generally provides that if certain conditions are shown, the liability of the owner of any vessel cannot exceed the amount or value of the interest of such owner in the vessel and her freight then pending. The procedural underpinnings with regard to limitation actions are found in the Federal Rules of Civil Procedure, Supplemental Rules for Maritime and Admiralty cases, with Rule F governing the general procedures necessary in a limitation of liability suit. Rule F(5) contains the provisions which govern when claims and answers must be filed.

In the BRIGHT FIELD case, the court initially entered an order indicating that any claims would have to be submitted by April 30, 1997. The Court then extended this date to May 30, 1997. Although counsel for the vessel interests defaulted on all non-filing claimants on

August 25, 1997, there have been a few instances where late claims have been permitted by the Court even though the claims were filed after the Court imposed deadline. In general, the Court has required affidavits supporting any motions to extend the time limit which clearly show a good reason for not filing timely.

In order to ensure that we would be notified of any Court Orders, we filed a claim within six days of the incident on behalf of one of the underwriters which we were representing, despite the fact that no claims yet had been paid on the policy. The judge initially assigned to handle this case elected to recuse himself, because he had a sibling practicing law with one of the firms involved in filing claims. For this reason, the case was reassigned to the Chief Judge of the District Court of Louisiana.

The first two hearings, which involved the presence of many lawyers, members of the press and claimants, turned out to be considerably less than a model of decorum. Actually, the term "three ring circus" probably would be a better way to describe what happened. The judge declared that this was a complex litigation matter. He specifically invoked Federal Rule of Civil Procedure 16(c)(12) which allowed the Court to adopt special procedures for managing potentially difficult or protracted actions. Without any consultation with counsel for the claimants, he arbitrarily appointed two lead counsel. Although these were counsel who generally represented plaintiffs in personal injury claims, the Court subsequently rejected our attempts to have additional lead counsel appointed for the property damage claimants. Proceeding with two lead counsel created problems in trying to schedule depositions, coordinate other discovery, and in attempting to reach a consensus on what experts would be used by the various groups.

However, we were able to reach certain agreements with the six primary property damage interests insofar as funding three experts retained to act on our behalf. We also tried to

reach agreements with many personal injury claimants on the funding of a document depository and the cost of interpreters and court reporters. At the time, this seemed quite reasonable since the court had ordered many restrictions concerning how discovery was to be obtained, including limiting how many lawyers would be permitted to ask questions and how much time would be allowed in deposing these foreign nationals in a foreign language. This eventually led to many more problems since a number of the individual claimants' counsel failed to fund the depository and thus invoices of court reporters, interpreters and several experts were not paid in full.

Pursuant to the Limitation of Liability Act, a vessel owner can limit its liability provided the accident or allision was not the result of negligence that occurred with the knowledge and privity of the owner. As a practical matter, counsel for the vessel owner must show that the incident resulted from activities which were the result of operational negligence on the part of the crew and not something about which the vessel owners either knew or should have known.

At the commencement of this litigation, very little was known concerning the cause of the incident. We also were dealing with a crew that lived in mainland China and we would have no way of compelling their testimony once the ship left the United States. The People's Republic of China is not a signatore to any treaties or conventions which would allow us to take discovery in its jurisdiction. Therefore, it was necessary to take the deposition testimony of all of the deck and engineering personnel who were intimately involved with the vessel's operation at the time of this incident. This resulted in 15 depositions which covered almost a three month period. We were also required to schedule these depositions so as not to interfere with the United States Coast Guard and National Transportation and Safety Board Hearings which were occurring at the same time.

Although we tried to learn as much as we could about the incident by having representatives attend the Coast Guard hearings and obtain copies of the transcripts, it became quite clear early on that the testimony being presented at these proceedings gave us little assistance especially in regard to the testimony of the Chinese nationals, who spoke in Mandarin which was not well translated by the interpreters hired by the Coast Guard. The testimony of the pilot of the vessel, which was in English, indicated that the vessel had lost power while proceeding at sea speed and this loss of power caused the vessel to veer to port. Although an order had been given to drop anchor, it was not executed until just prior to the allision of the vessel with the dock. The pilot also did not believe that any power was restored prior to colliding with the pier. Unfortunately, the pilot knew nothing about why the ship lost power.

I was appointed as lead counsel for the deposition testimony of eight of the fifteen crew members deposed. The litigation is ongoing, weaving its way through the discovery process.

USE AND SELECTION OF EXPERTS.

The use of experts also proved incredibly difficult. The Federal Rules of Civil Procedure which govern the information which must be disclosed before experts can be used in a civil trial are the same rules that govern the use of an expert in a maritime case. Maritime experts also are similar to many experts used in civil cases in that many of them have become professional witnesses who spend much time testifying in various proceedings, and very little of their time actually maintaining any type of expertise in a particular subject.

Due to the nature of this type of litigation, many of the experts used have backgrounds either as vessel masters or chief engineers, tug boat captains, river pilots and the

jack-of-all trade marine surveyors. Because many were seamen, they sometimes suffer from the nautical “three sheets to the wind” syndrome.

Many cargo claims, wharf damage claims and other small marine matters have marine surveyors testifying as experts in one area or another. Most of these surveyors have no background in the marine field except for “on-the-job training” and many have degrees in english, music, and many other liberal art subjects. Their expertise in testing for salt water damage is generally limited to putting drops of silver nitrate solution on steel coils and testifying that they show signs of salt water wetting when the color changes. They can sometimes be used just for counting bags or coils but the results may be disastrous if they are used to actually quantify damage.

One of the biggest problems in dealing with maritime experts in large disaster cases is that they tend to have self-perpetuating cadres of similar experts. Usually one has a friend who produces another who then produces a third, fourth, or more. Many of these experts become expert at insisting that they need all of their companion experts in order to testify in a particular area. Sometimes, they are experts at working the crowd if you have cases with many different plaintiffs involved or a number of different defendants involved.

Some lawyers are extremely interested in having experts attend every deposition and meeting. Some experts believe that it is their job to tell lawyers how to handle their cases and how to try them. This can create problems, and needless to say, the bigger the case the bigger the problems.

Due to advances in ship construction and vessel safety considerations, major accidents do not happen that often. This can create a problem in trying to locate experts used in previous cases. Many times, you discover that your expert witness is now dead, retired, or even

senile. Perhaps the greatest advantage I have had is in having attended the U.S. Merchant Marine Academy and having maintained friendships with many people active in the maritime industry. This has helped me to identify new experts when a disaster occurs.

The use of experts and the information that is imparted to them must be monitored closely by counsel in order to avoid having privileged information and work product documents revealed to opposing counsel. In some jurisdictions the entire file of experts is subject to review by opposing counsel, if requested. Obviously, this could include copies of various opinion letters which may have been forwarded to clients and given to experts to review, as well as copies of preliminary - and sometimes unsatisfactory test results.

In many maritime cases, however, it is essential that experts be used. In limitation of liability cases such as the BRIGHT FIELD, claimants generally have the initial burden of proving that the allision was caused by a defect in the vessel or its engineering plant. It then becomes the burden of the vessel owner or manager to show that such a cause was occasioned without the privity or knowledge of the vessel owner. What is found to be a defect in a vessel or its engineering plant normally entails a complicated engineering investigation which requires experts to present this evidence to the court. In the cargo damage area, expert testimony is often essential in order to show that a vessel's hatch covers were either in good or bad condition depending upon which side of the case you are presenting. Experts also are required to show whether or not steel oxidation actually was caused by salt water or by condensation. The testimony of a meteorologist and other ocean routing experts may be required to show that the vessel actually experienced weather conditions which were far beyond the normal for the time of year and the waters involved.

In the ship collision area, many times hydrodynamicists and other experts are required in order to prepare plots of the vessel's track based on a review of course recorders and other vessel documents. Today's modern ships are equipped with many types of sophisticated mapping technology that incorporates Differential GPS, ARPA's, radar, gyrocompasses, and other types of navigational equipment which require expert testimony to present. Damage experts are essential in either presenting or defending claims especially in areas where depreciation or new for old allowances are discussed.

In the course of my career of defending or prosecuting claims against vessel owners, I have had occasion to use experts in just about every category imaginable. Some of these areas have included whether or not a single point mooring facility was required in certain ports instead of a spread mooring facility; whether tug assistance was essential in docking or undocking vessels at certain berths; the cause of various explosions and fires on different types of ships and small boats; whether cargo damage was caused by seawater infiltration into a vessel's hatches; whether a vessel was a burden or a privileged vessel at the time of a collision; whether damage to cargo was caused by error in its care and custody; whether pilots or masters were negligent in failing to properly plot the vessel's courses and positions on a chart prior to an accident; whether the collision was caused by a defect in a vessel; whether the damages alleged were caused by the accident in question; whether the plaintiff had done everything possible to mitigate its loss; the market value of a vessel at the time of an accident and what was the proper measure of business interruption loss. Specialized experts are required to address all of these subjects.

I have found that sometimes the best experts are the ones that are not used the most. They are people who have other means of making a living and are not relying upon expert testimony as their sole means of earning a livelihood.

CONCLUSION

Since the Bright Field case is ongoing, I cannot discuss our case handling strategy. I thought you would be interested in the general types of problems that have been experienced in handling a case of this complexity. I also hope that you will benefit from the comments concerning the use of experts in the marine field.

Although accidents involving vessels and shore structures have not been that common in years past, the development of many waterfront properties into commercial ventures such as hotels, condominiums, casino vessels, and shopping malls continues to increase. As more of this happens, it is only a matter of time before more allisions such as the Riverwalk occur.

As noted above, these cases are complex with many diverse experts being needed to prove a case that will defeat an owner's attempt to limit its liability. The vessel which caused the damage may well be foreign owned with a real threat that it will not be returning to the jurisdiction anytime soon. The Coast Guard or National Transportation Safety Board may start an immediate investigation and may also dictate tests which could cause the destruction or at least change in the equipment involved in the accident.

For the above reasons, it is absolutely essential that legal advice be sought as early as possible. Considering the admiralty nature of the law governing rights of recovery, you should insure that the attorneys selected are experts in the many nuances of maritime law. The arresting of vessels involved in the commission of torts is unique to this area of the law.

Although a ship at sea can be a beautiful sight to behold, it can be an altogether different view when it suddenly decides to park in your condominium's garage.

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