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A Wharfinger's Duties

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Every vessel, whether a tug, barge, tanker, cargo ship, or yacht uses a dock or wharf at one time or another. Some use a dock or wharf more than once per day; others use a dock or wharf on a less frequent basis. This article addresses the duties owed by a wharfinger, defined as the owner and occupier of a wharf, to the vessels using its dock.

A wharfinger's primary duty

In *Smith v. Burnett*, 173 U.S. 430 (1899), decided 110 years ago, the US Supreme Court set forth the primary duties a wharfinger owes to vessels using its dock. While a wharfinger does not guarantee the safety of the vessels using its dock, it must exercise reasonable diligence to determine the condition of the berth and, if possible, remove any dangerous obstructions. If an obstruction cannot be removed, for example, a sunken vessel located in the approach to the berth, the wharfinger must give notice of it.

Reasonable diligence may require dredging to maintain adequate water depth at the berth. It may also require a wharfinger to maintain the dock itself in a state of repair sufficient to withstand expected weather or marine activities nearby. Some courts have required a reasonably diligent wharfinger to provide dock fittings that will not fail but others have considered the circumstances of the failure of the fittings before allocating fault to the wharfinger.

Reasonable diligence also includes warning of hidden hazards or deficiencies, which the wharfinger knows about or should know about but which are unknown to the vessel owner. There is no duty to warn when the dangerous condition is open and obvious to those in charge of navigating the vessel or when the dangerous condition is actually known to the vessel owner. However, the vessel owner's knowledge of a prior dangerous condition at the berth does not establish actual awareness of that condition at a later date. The courts reason the vessel owner may have forgotten about the condition or believed it to have been eliminated.

There is no duty imposed on a wharfinger to provide a berth with safe surroundings (beyond the entrance and exit) or to warn of hazards in the vicinity of but away from the berth itself, i.e. shallow water. The courts recognize it is common knowledge that when a ship breaks away from its berth and is not under command, it runs a substantial risk of grounding or other damage. The wharfinger's duty is satisfied if the berth itself is free of hazards or if the wharfinger has given an appropriate warning of hazards in the berth.

Weather conditions, tide, and currents are considered open and obvious conditions or discoverable with reasonable diligence by the vessel owner. Therefore, a wharfinger does not have a duty to warn of them. To the contrary, the vessel owner has a duty to monitor weather conditions and the state of the tide and currents. Similarly, ice and ice floes are open and obvious conditions of which the wharfinger has no duty to warn.

In *West v. City of St. Paul*, 1997 AMC 2103 (S. Ct. Alaska 2003), a crabber intended to deliver crab to a dock in St. Paul, Alaska. The vessel encountered an ice floe approximately 1 1/2 miles from the harbor entrance. The vessel's captain contacted the harbormaster to advise him the vessel would be late in arriving. The harbormaster did not tell the captain about hazardous ice conditions in the harbor or that any vessels were stuck in the ice. Before reaching the dock, the crabber became stuck in ice and eventually went aground. A crewman was injured during evacuation from the vessel. He sued, among others, the city of St. Paul alleging the harbormaster was negligent in not warning of the ice. The court held the wharfinger had not



breached any duty because the ice was not a latent or hidden hazard and the vessel's captain had sufficient information to put him on notice of the conditions.

Warranty of Workmanlike Performance

The warranty of workmanlike performance applicable to service contracts in general, applies also to a contract between a wharfinger and a vessel owner. The warranty is a promise by the wharfinger to perform its services with reasonable care, skill and safety. The extent of the warranty is primarily determined by the type of services undertaken by the wharfinger in connection with each vessel.

The warranty of workmanlike performance requires the wharfinger to furnish a safe means of egress and ingress to vessels berthed at its dock. In *Vierling v. Celebrity Cruises, Inc.*, 2003 AMC 1966 (11th Cir. 2003), the Port Everglades Port Authority owned and operated a terminal for cruise ships and contracted to furnish a loading bridge and gangway for Celebrity's passengers to use. A terminal worker did not properly position the bridge and gangway. Heavy winds caused the cruise ship to move away from the dock and the gangway to pull out of the end of the bridge, injuring a passenger. The court held the port authority could be liable if, by improperly positioning the bridge and gangway, it breached the warranty of workmanlike performance and the breach caused the passenger's injury.

Duty to Monitor

The master of the vessel, not the wharfinger, has the ultimate responsibility for docking the vessel if there is no contract providing otherwise. Although the vessel's crew has a duty to monitor and adjust the mooring lines as needed, the wharfinger may also have an ongoing duty to monitor operations including a periodic check of the mooring lines.

In *Androutsakos v. M/V Psara*, 2004 AMC 2113 (D. Or. 2004), one of a tanker's forward spring lines was fouled when the ship was first being docked. The wharfinger's employees gave notice of the fouled line to the tanker's crew, which failed to take corrective action. Later in the day, after discharging the oil cargo, the ship's crew used a hydraulic winch to try to free the fouled line. The line came free and injured a crewmember walking on deck. The court held the wharfinger 25 percent at fault in initially mooring the vessel with a fouled line, in failing to follow up with the vessel's crew after giving notice of the fouled line, in failing to monitor the lines while the vessel was discharging, and in signing off on the safe mooring of the ship before the discharge began.

Exculpatory Clauses

The courts are not in agreement as to whether a wharfinger can validly avoid liability for its negligence by means of an exculpatory clause in its contract with a vessel owner. While historically exculpatory clauses were disfavored by admiralty courts, now many courts routinely enforce them in maritime contracts (except towage contracts) if the disclaimer is clear and unequivocal. The courts reason the parties can negotiate or bargain over the risk of loss and set the contract price accordingly. For example, in *Sander v. Alexander Richardson Investments*, 334 F.3d 712 (8th Cir. 2003), the court upheld an exculpatory clause in a berth rental agreement on the ground the parties' intent to absolve the dock owner from liability was clear and not the result of overreaching.

On the other hand, in *Pelletier v. Alameda Yacht Harbor*, 188 Cal. App. 3d 1551 (1986), a California state court held a contractual provision purporting to exculpate a yacht harbor from liability to a vessel owner for its negligence to be unenforceable because such provision was against public policy. Given the growing trend in the federal courts of upholding exculpatory



provisions in maritime contracts, and the general rule that state courts should follow established federal maritime law, the holding in *Pelletier* is not of significant precedential value.

Wharfingers owe duties to vessels using their docks. While not guarantors of the safety of those vessels, wharfingers must exercise reasonable diligence to make the berths safe and to warn of hazards or obstructions that are not known to the vessel owner. Wharfingers do not have a duty to warn of conditions that are open and obvious or conditions that are known to the vessel owner. Wharfingers are bound by a warranty of workmanlike performance although the extent of the warranty depends on the services undertaken by the wharfinger.