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Towing Liability, Part One: Towing Company Not Necessarily Liable for Loss of Tow

By Marilyn Raia

A common misperception in the maritime industry is that a towing company is liable whenever its tow is lost or damaged. In fact, there is no such rule under US law, and diverse parties can share responsibility for towing casualties.

Towage arises when one vessel is employed "to expedite the movement of another." It is a broad term encompassing the pushing of a vessel as well as the pulling of a vessel. Simply stated, a towage contract arises when a vessel owner contracts to have his vessel moved by another vessel. Towage contracts can be oral or written.

The Basis of Liability

Each party to a towage contract owes obligations to the other. Under US law, the towing company is not liable as an insurer or bailee or common carrier of the tow. Although the parties' relationship is created by contract, i.e. the towage contract, the towing company's liability is, in the first instance, based on the principle of negligence but can be changed with certain limitations. A common example is a reciprocal benefit of insurance clause in the towage contract by which each party agrees to have insurance for its own benefit and the other party named as an additional insured with a waiver of subrogation.

As a general rule and absent contractual provisions to the contrary, the towing company will be held liable for loss of or damage to the tow only if it failed to use reasonable and ordinary care and skill. This article, the first of a two-part series, focuses on the obligations of the towed vessel and its owner to the towing company. The second part will focus on the obligations of the towing company to the towed vessel and its owner.

Warranty of Seaworthiness

A vessel owner tendering a vessel for towage warrants the seaworthiness of that vessel. To be considered seaworthy, the vessel to be towed must be structurally sound and in good repair to withstand the ordinarily expected perils of the tow. The warranty of seaworthiness is imposed on the tow owner because he is in the best position to know the vessel's condition and what is required to prepare it for towing. The tow owner cannot avoid liability for breach of the warranty of seaworthiness by having the towing company inspect the tow. Indeed, a towing company has no duty to give the tow more than a cursory inspection before undertaking the voyage. Even a Coast Guard certification of seaworthiness is not conclusive evidence of the tow's seaworthiness.

If the towed vessel is lost due to an unseaworthy condition unknown to the towing company, the tow's owner cannot recover from the towing company. Moreover, if the tow sinks under normal towing conditions and there is no evidence of negligence by the towing company, the towed vessel is presumed to have been unseaworthy. For example, in *Shebby Dredging Co. v. Smith Bros., Inc.*, 469 F. Supp. 1279 (D. Md. 1979), a dredge was deemed unseaworthy after sinking in 3 to 4-foot seas with winds of 10 to 15 knots, not unusual conditions for the area.

Tendering a seaworthy vessel for towing requires consideration of many different aspects of the

vessel. With those aspects comes the potential for non-recovery if the tow is lost or damaged, or the imposition of a significant percentage of comparative fault on the tow owner. Courts have considered a wide variety of omissions by the tow owner as the basis for diminished or no recovery from the towing company.

In *Cargill, Inc. v. C & P Towing Co, Inc.*, 1991 AMC 101 (E.D. Va. 1990) the plaintiff barge owner failed to implement procedures for inspecting its own barges to ensure their seaworthiness and the loading supervisor conducted only a cursory inspection of the barge's condition and readiness for towing. Further, manhole covers were not watertight and the hull plating was holed and rusty. The towing company had no notice of these conditions. The barge owner was denied a recovery from the towing company after the barge sank.

In *Dow Chemical Co. v.* **M/V Gulf Seas**, 428 F. Supp. 667, 672 (W.D. La. 1977), the tow owner was found negligent for failing to provide the towing company with a diagram or detailed instructions for a tank barge's complicated ballast pumping equipment.

Components of Seaworthiness
The obligation to tender a seaworthy vessel for towing extends beyond providing a structurally sound hull. The tow owner must also prepare the vessel's equipment and appurtenances to withstand the conditions the tow will face during the voyage. A tow seaworthy for one voyage may not be seaworthy for another. *Arkansas State Highway Commission v. Arkansas River Company,* 271 F.3d 753 (8th Cir. 2001) illustrates the point.

In *Arkansas State Highway Commission*, the US Army Corps of Engineers contracted with Arkansas River Company to move a dragline barge on the Mississippi River. The Corps's supervisor determined the boom on the barge did not have to be lowered from 30 degrees to 15 degrees for the voyage, which involved passing under a certain bridge. The tug captain inspected the barge before departing and assumed the boom would clear the bridge, but the boom struck the underside of the bridge. The district court, affirmed on appeal, held the Corps to be 100 percent liable and rejected the argument that the tug operator should have noticed the boom had not been lowered.

The tow must have proper and functional equipment to meet the seaworthiness obligation imposed on the tow's owner. The mere absence of an operable anchor on a towed vessel resulted in allocation of 40 percent comparative fault to its owner in *Nissho-Iwai American Corp. v.* **M/T Grand Day**, 1980 AMC 2882 (S.D.N.Y. 1980). In that case, shortly before the tow departed, the tow owner discovered the one anchor aboard the vessel could not be raised because of an equipment malfunction. Rather than delay departure of the tow, that anchor was cut free. The vessel had no other anchor because the owner had not wanted to incur the expense of putting a spare aboard. During the voyage, an anchor was needed to prevent the tow from grounding. When imposing fault on the tow's owner, the district court held the original malfunction of the vessel's equipment which culminated in the cutting free of the vessel's only anchor, demonstrated the vessel was ill-equipped to undertake the voyage and thus, unseaworthy.

When the tow is manned, additional criteria must be met to assure its seaworthiness. The tow

must be adequately manned with the proper number of crewmembers who are competent for their positions. In *Eastern Transportation Co. v.* **S/T Nancy Moran**, 1948 AMC 1301 (E.D.N.Y. 1948), the court held the towed coal barge unseaworthy because its certificate required a crew of three, two of whom were to be ablebodied seaman, and there were only two crew members aboard. In *The Great Lakes Towing Company v. American Steamship Company*, 1948 AMC 249 (6th Cir. 1948) the court held the tow at fault because it had a lookout on the stern who was not competent to inform the master of the tow's position relative to a buoy, which the tow struck.

Unseaworthiness

The towing company is not charged with unseaworthy conditions that an inspection would not reveal. It is entitled to rely on the seaworthiness warranty. Of course, if the towing company notes unseaworthiness and nonetheless undertakes the tow, it may not be able to rely on the seaworthiness warranty if the towed vessel is lost or damaged. The towing company does, however, have to right to decline to undertake the tow if it determines the tendered vessel is unseaworthy. Under such circumstances, the towing company is