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

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Standard of Care Owed by the Towing Company

A towing company is not strictly liable for the loss of its tow. Rather, its conduct is judged on a negligence standard. The owner of the towing vessel has a duty to exercise "such care and maritime skill as prudent navigators usually employ in similar undertakings and with such consideration as special circumstances may require." This standard is often referred to as the duty of reasonable care under the circumstances.

Failure to fulfill the duty of reasonable care can lead to a finding of negligence and liability for the loss of the towed vessel. But the towing master will be held liable for lack of seamanship only if his conduct is outside the range of possible discretion. Moreover, the master's conduct will be judged with foresight, not hindsight. That is, the courts will not second-guess the master's decisions made *in extremis* even if they turn out to have been wrong. The towing company will not be held responsible because the tug master, in an emergency, did not do precisely what others later may think would have been the best thing to do.

Duties Before the Voyage

The duty to exercise reasonable care has many aspects. When undertaking a tow, the towing vessel first represents itself as fit and staunch to accomplish the voyage in light of the anticipated perils, without damage to the towed vessel. To be fit and staunch to undertake the tow, the towing vessel must have sufficient power to meet the anticipated conditions. It must also have an appropriate number of competent crewmembers who know how to operate the vessel's equipment. Indeed, it has been held that the crew must be competent not only for the ordinary duties of an uneventful voyage but also "for an exigency that is likely to happen."

The towing vessel must be equipped with functioning equipment. Towing companies have been held liable in a wide variety of circumstances involving inoperable equipment critical to the voyage. Examples of equipment deficiencies that have formed the basis for liability include an inoperable towing capstan, a defective or non-calibrated compass, an improperly calibrated barometer, a negligently maintained generator, an inoperable fathometer, an inoperable gyrocompass and an ineffective radio receiver.

The lack of necessary equipment as well as the presence of defective or inoperable equipment can lead to liability. Courts have imposed liability when the towing vessel has lacked, among other things, a spare towing hawser, charts, a compass deviation card, or hoses for pumps. The lack of a lookout can also serve as a basis of liability. Negligence may be found if the towing vessel and the tow are not properly lit.

Once appropriately equipped and manned, the towing vessel has a duty to properly make up the tow and position the towed vessels. Of course, the towing gear must be in good condition and appropriate for the type of tow. The towing wires should be able to withstand the size of the load as well as the additional forces placed upon them by heavy seas. While the mere parting of the towing wire during the voyage does not raise a presumption of negligence, the failure of the towing company to properly inspect and lubricate its towing wires may be the basis for a finding of negligence.

Negligence can be found if the towed vessel is positioned so it is not completely visible from the towing vessel. Negligence may also be found if, under certain conditions, the towed vessel is positioned alongside the towing vessel instead of on a hawser.

Although the towing company does not have a duty to conduct a comprehensive and detailed inspection of the tow, it does have a duty to assess the basic characteristics of the tow in order to determine whether it is suitable for the intended voyage. In doing so it must give due consideration to the anticipated weather as well as the time estimated for completion of the voyage.

The towing master is charged with knowledge of the weather predictions whether or not he has actual knowledge of them. In *Aiple Towing v. Lynn E. Quinn*, 1982 AMC 1869 (E.D. La. 1982), the towing company was held liable for the failure to insure the manhole covers on the barge to be towed were secured when the voyage contemplated transit in open waters with expected high seas. On the other hand, in *Dow Chemical Company v. MIV Gulf Seas*, 428 F. Supp. 667 (W.D. La 1977), the court held the crew of the towing vessel did not have a duty to inspect the openings in the towed barge's ballast system and sea chest given the circumstances and representations of seaworthiness made by the barge owner. Whether a duty to do more than a cursory inspection of the tow will be required depends on the circumstances and reasonably anticipated weather and towing conditions.

Duties During the Voyage

In addition to the duties owed before the voyage gets underway, the towing company owes duties during the voyage. An appropriate towing speed must be maintained. The towing vessel does not have to maintain constant surveillance of the tow, but it must maintain reasonably close watch over the tow. The degree to which the towing vessel must watch the tow is dependent on the conditions encountered during the voyage.

For example, in *Consolidated Grain and Barge Company v. Flowers Transportation, Inc.*, 538 F. Supp. 65 (E.D. Mo. 1982) the court held the towing company did not exercise reasonable care during the voyage in light of the prevailing snow and ice conditions. While it would have been onerous for the tug crew to have checked each void tank on every barge in the flotilla every day, the "walk the deck" inspection actually performed was held insufficient to determine if the barges were taking on water. The court suggested an inspection of the void tanks every three days would have been reasonable. Similarly; in *McDonough Marine Service, Inc. v. MIV Royal Street*, 465 F. Supp. 928 (E.D. La 1979) the court held the towing company negligent for failing to ascertain why the towed barge's bow was constantly awash and the barge had lost six to eight inches of freeboard during the voyage.

Before and during the voyage, the towing vessel must monitor the weather forecasts to assess the likely interaction between the tow and the weather and sea conditions. It can be negligent to undertake the tow at all under certain conditions. Once the voyage begins, the towing vessel must take appropriate action when conditions worsen. Appropriate action includes returning to the port of departure, heading to a port of refuge, dropping anchor, or beaching the tow.

Duties After the Voyage

After arrival at destination, the towing vessel has a duty to properly moor and make fast the towed vessel. If the towed vessel drifts away within a short time after being moored by the towing vessel, a presumption of negligence by the towing vessel can be raised. The towing vessel's duty to the towed vessel ends when the towed vessel is safely delivered to the agreed destination and is moored there properly in an apparently safe berth or location under the prevailing conditions.

Warranty of Workmanlike Performance

Some courts, and in particular, the Ninth Circuit (which includes the West Coast) have held a warranty of workmanlike service is implied in every towage contract. Further, they have held the warranty can be breached by negligent as well as non-negligent conduct. Other courts have declined to recognize such warranty, holding it inconsistent with the rule that liability must be based on negligence.

Comparative Fault

Even if the towing company is found to have been negligent, it is not necessarily liable for all of the damages sustained by the owner of the towed vessel. Any award of damages to the owner of the lost or damaged tow is subject to reduction by the percentage of fault attributable to the towed vessel.

Although the towing vessel is not the insurer of her tow, it has a duty to exercise reasonable care given the characteristics of the tow and the reasonably anticipated conditions. Reasonable care includes making sure the towing vessel is properly manned and equipped for the intended voyage with sufficient power. In the Ninth Circuit, a warranty of workmanlike performance is implied in the towage contract.

The towing vessel does not have a duty to conduct a thorough inspection of the tow before the voyage but is charged with obvious unseaworthy conditions. During the voyage, the towing vessel must reasonably monitor the towed vessel, the frequency of observation being dictated by the conditions encountered during the voyage. Greater observation is warranted under more severe conditions. The towing vessel must monitor the weather forecasts and take appropriate steps to avoid loss of or damage to the tow if the weather worsens. Lastly, the towing vessel must properly moor the tow upon delivery.