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Submerged Obstructions to Navigation

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When a moving vessel strikes a stationary object, a rebuttable presumption of fault by the moving vessel arises. That presumption, "the *Oregon* rule", derived from an 1895 US. Supreme Court case, *The Oregon*, 158US.186 (1895). Behind the presumption is the common sense notion that a moving vessel does not usually hit stationary objects unless it has been mishandled. Although the presumption is a strong one, it does not always lead to liability and a judgment against the moving vessel. The presumption can be rebutted if the moving vessel's owner or operator can show the accident was the fault of the stationary object, the moving vessel was handled reasonably, or the accident was unavoidable.

Countless cases address liability when a moving vessel strikes a visible stationary object such as a bridge or dock. This article focuses on the liability analysis when a moving vessel strikes a hidden stationary obstruction to navigation such as a submerged pipeline.

Paramount Right to Navigate

The right of a vessel to have the navigable waters free of obstructions is paramount. The right of navigation extends to the entire width of the navigable waterway and to the mud along the shore through which vessels are capable of running. It is not limited to a dredged channel or the middle of the waterway.

Federal statutory law prohibits the creation of any obstruction of the navigable waterways except as authorized by Congress. Congress has plenary power to exclude structures from the navigable waterways and has delegated power to the Army Corps of Engineers to decide what structures will be allowed. Before any structure is built on, under, or about a navigable waterway, its owner must obtain a permit for it from the Army Corps of Engineers. Obstructions to the navigable waterways are tolerated only because of commercial necessity and public convenience.

If a permit for a submerged structure is issued by the Army Corps of Engineers, its terms and conditions must be strictly and continuously complied with. That is, the submerged structure must be installed and maintained exactly as provided by the terms and conditions of the permit.

Texas Eastern Transmission Corp. v. Tug Captain Dann 898 E Supp. 198 (S.D.N. Y. 1995) involved an underwater gas pipeline installed in 1950 pursuant to a permit issued by the Army Corps of Engineers. The terms of the permit required the pipeline to be buried and have a minimum depth of 42 feet below mean low tide. In 1974, an underwater survey revealed erosion of the rip rap cover over the pipeline, which left part of the pipeline exposed above the riverbed and flattened. The pipeline owner received permission from the Army Corps of Engineers to repair the pipeline and recover it. In 1984, the pipeline was surveyed and once again found to be exposed. The riprap was replaced following the survey. In 1990, the pipeline was damaged by a barge under tow. The pipeline owner was held solely at fault because it breached its statutory duty to avoid creating unauthorized obstructions to navigation. The pipeline had become exposed due to erosion of its cover, which was known to have occurred in the past. Although not initially an unauthorized obstruction to navigation, the pipeline became one due to improper maintenance.

Presumption of Fault

Failure to install and maintain a submerged obstruction to navigation in strict accordance with the terms and conditions of the permit can raise a presumption of fault by the owner of the submerged obstruction under the *Pennsylvania* rule, named after an 1874 US. Supreme Court

case, **The Pennsylvania**, 86 US. (19 Wall.) 125 (1874). Under the *Pennsylvania* rule, failure to comply with a navigational statute, regulation, or rule triggers a rebuttable presumption of fault. The presumption of fault is extremely difficult to overcome. The violator must show not only the violation of the statute, regulation, or rule was not a contributing cause of the casualty, but also could not have been a cause of the casualty.

In *Evergreen International S.A. v. Marinex Construction Company, Inc.*, 477 ESupp.2d 681 (D.S.C. 2007), Marinex contracted with the Army Corps of Engineers to dredge a channel. Its subcontractor laid a submerged dredge pipeline across a marked federal channel. A container vessel struck the pipeline and suffered damage. The subcontractor argued it should not be held liable for the damage suffered by the vessel because the dredging project act was approved by the Army Corps of Engineers. The court disagreed. It held the government did not contemplate or intend any obstruction to the navigable waterway when entering into the dredging contract and noted the work did not necessitate an obstruction to the navigable waterway. The court also held the subcontractor's failure to comply with the terms of the dredging contract by not marking the pipeline, by failing to confirm the pipeline was on the bottom, and by failing to confirm the pipeline was below the project depth in the channel, triggered the *Pennsylvania* rule. The court equated violation of the government dredging contract to violation of a statute, rule, or regulation.

Duty to Give Adequate Notice of the Obstruction

In addition to installing a submerged structure in accordance with the permit issued by the Army Corps of Engineers, the owner of the submerged structure must properly mark it. A party owning and maintaining a submerged structure above the mud line has a duty to warn of the potential obstruction to navigation. Notice of the submerged structure must be adequate to apprise mariners of its location and characteristics. The signage must be visible from passing vessels and located close to the obstruction.

In *Texas Eastern Transmission Corp., supra*, a sign on shore warning of the pipeline area read "Do Not Anchor or Dredge". The court held the sign inadequate notice of the submerged pipeline because the pipeline was exposed above the riverbed and the barge that hit it was neither dropping anchor nor dredging.

When transiting an area where there is a submerged obstruction to navigation, a mariner is entitled to rely on the accuracy of soundings indicated on a navigation chart and signage on the shore unless he has notice they may be inaccurate. In a navigable cable or pipeline area, a mariner also can reasonably expect the cable or pipeline to be buried below the seabed, bank to bank, unless otherwise charted or marked.

Duty to Inspect the Obstruction

Once a submerged obstruction is installed, the party owning it has a duty to adequately inspect it. The inspection must be more than walking along the bank or shoreline and observing it from a distance. Further, due consideration must be given to changes in the area's topography. In *Ranger Insurance Company v. Exxon Pipeline Company*, 760 E Supp. 97 CWo. La. 1990), Exxon laid a gas pipeline in a Louisiana bayou in accordance with a permit requiring the pipeline to be a minimum of two feet below the bottom of the waterway. Over the years, the bayou had widened 40 feet resulting in the pipeline becoming unburied and suspended in the waterway. When the spuds on a spud barge passing over the pipeline were lowered by five feet to avoid hitting overhead power lines, they struck the submerged pipeline, causing an explosion and fire. The court held Exxon liable because its inspection, consisting of personnel passing the

pipeline on the adjacent highway looking for bubbles or pollution was inadequate to determine the exact position of the pipeline and did not take into consideration changes in the topography of the waterway.

Mutual Fault

When a moving vessel strikes a submerged obstruction to navigation, both the owner of the moving vessel and the owner of the submerged obstruction can be held at fault. The court will apply the principle of comparative fault to determine the extent of their liability.

In *Pacific Gas and Electric Company v. The Steamship Lompoc*, 291 ESupp. 767 (N.o.Ca. 1968), a utility company obtained an Army Corps of Engineers permit to install a 10.75-inch-diameter submarine gas transmission pipeline which crossed a channel. The permit required the pipeline to be laid at least 44 feet below the mean lower low water and covered to a minimum depth of five feet. Approximately one year after the pipeline was installed, the mate on a tanker walked the anchor out while maneuvering in the channel toward a dock. The anchor struck and damaged the pipeline. The utility company sued the vessel owner for the damage to the pipeline. The court held both equally at fault. The vessel was at fault because the anchor was lowered prematurely, i.e. before the vessel had passed over the pipeline en route to the dock. The utility was at fault because it had not continuously inspected the pipeline during the year since its installation and had not maintained it in accordance with the terms of the permit, i.e. a substantial portion had lost its required cover.

When the Army Corps of Engineers permits a submerged obstruction in the navigable waterways, the terms and conditions of the permit must be strictly and continuously followed. The obstruction must be adequately marked and inspected. Fault may be imposed on the owner of a submerged obstruction if it fails to comply with its permitting, marking and inspection obligations.