



**Marilyn Raia**  
San Francisco,  
Shareholder

Direct Dial: 415.352.2721  
Fax: 415.352.2701  
Email Attorney

## **Have You Left Anything Behind?**

By Marilyn Raia

It is not unusual for a moving vessel to create a wake, swell, or suction effect that causes damage to moored vessels it passes. And it is commonly thought a vessel is always liable for the effects of its wake. In fact, that is not true. This article addresses the presumptions and liabilities, if any, when a moored vessel suffers wake, swell, or suction damage.

### **The Duties of the Moored Vessel**

Maritime law generally recognizes a rebuttable presumption of fault when a vessel's wake, swell, or surge causes damage to a moored vessel. To raise the presumption of the passing vessel's fault, the damaged vessel must first prove it was properly moored. That means the moored vessel's mooring lines must have been sufficient in number, strength, and placement to minimize the effect of the passing vessel operating under expected speed and conditions. They must also have been appropriately tended.

*Martin Marine Transp. Co. v United States*, 66 F.Supp. 673 (E.D. Penn. 1946) illustrates the point. In that case, two tugs were towing a barge and found it necessary to tie up at mooring dolphins in a canal because of fog. The mooring dolphins were not the most convenient place to tie up but less risky than proceeding in the fog. No effort was made by the tug crews to slacken the mooring lines as the tide fell and the barge slid down the side shelf of the canal. A Coast Guard picket boat passed the tugs and barge within 100 feet and its bow wave caused the barge to move, and the barge's stern lines to part. One of the tugs suffered damage when the barge's lines parted. The tug owner sued the United States to recover for that damage alleging the picket boat's speed and swells were excessive. Judgment was entered in favor of the United States. The judge held the picket boat was not negligently operated but the barge was moored in an unseaworthy manner, reasoning the lines would not have parted if they had been appropriately monitored by the tug crews and slackened as the tide fell.

On the other hand, the court in *Shell Pipeline Corporation v. M/T CYS Alliance*, 1982 AMC 389 (E.D. La 1981), found the damaged moored vessel's mooring lines to have been too slack, and denied a recovery for damage caused by the wake of a passing vessel. In that case, a moored crude oil tanker surged when another tanker passed at a distance closer than normal because of a third vessel in the vicinity. The surging caused damage to the moored vessel's unloading arm and manifold, which led to spillage of crude oil into the waterway. Because the mooring lines did not break, the court concluded they were too slack. Because they were too slack and not properly adjusted, they could not compensate for the effects of normal vessel traffic, precluding a recovery for the vessel damage because proper mooring could not be shown in the first instance.

### **The Duties of the Passing Vessel**

Once proper mooring is established, a rebuttable presumption of fault by the passing vessel arises when wake damage occurs to a moored vessel. The moving vessel has a duty to consider the anticipated effects of its speed and motion through the water on vessels moored nearby. It must proceed carefully to avoid creating swells or suction that might cause damage. It must also take reasonable precautions to minimize the effects of its wake, including perhaps a reduction in speed and/or a course change. A vessel may even be required to proceed at a speed below steerageway, using tugs for steering.

In *Gaines Towing and Transportation Incorporated v. Atlantia Tanker Corporation*, 191 F.3d 633 (5th Cir. 1999) the court held the defendant solely at fault for damage suffered by a tug that was moored at a dock for unloading. Upon the request of the tug's captain, the Coast Guard

issued a slow bell broadcast to passing vessels. The defendant's tanker slowed in response to the slow bell. However, when passing the moored tug, it still created a wall of water that caused the moored tug to surge and strike a portion of its berth. The district court held the tanker solely liable concluding it should have taken additional precautions given it was forewarned of the situation and chose to proceed under its own power, without tug assistance.

If the damaged vessel is properly moored, the passing vessel usually has a difficult time avoiding liability for wake damage if the **Pennsylvania** rule is triggered. Readers may recall the **Pennsylvania** rule from a prior article. It is derived from an 1873 U.S. Supreme court case, *The Steamship Pennsylvania*, 86 U.S. (Wall) 125 (1873). Under the **Pennsylvania** rule, if a vessel in a collision is found to have violated a statute intended to prevent collisions, the violator must then prove the violation was not and could not have been the cause of the collision. It is a very difficult burden to sustain. The courts consider contact between a vessel's wake and another vessel to be a collision to which the **Pennsylvania** rule may apply.

A violation of the safe speed rule, International- Inland rule 6, is commonly alleged in a wake damage case. That rule requires every vessel to proceed "at a safe speed so she can take proper and effective action to avoid collision...." In determining the safe speed, the vessel must consider various factors including visibility, traffic density, maneuverability, weather and sea conditions, and the vessel's draft in relation to the depth of the available water. In the absence of any facts demonstrating an emergency situation requiring the vessel to travel at what might be deemed an excessive speed, it will be nearly impossible to show a violation of the safe speed rule did not contribute to the wake damage.

The presumption of fault by a passing vessel whose wake affects a moored vessel does not necessarily apply to a personal injury suffered by someone on the moored vessel. In *Maxwell v. Hapag-Lloyd Aktiengesellschaft, Hamburg*, 862 F.2d 767 (9th Cir. 1988), Maxwell was unloading fish from a fishing boat at a private dock when the wake of the defendant's ship caused him to fall and break his leg. He alleged the ship was travelling at an excessive speed, failed to maintain proper control, and failed to give a warning. The Ninth Circuit held the presumption of fault does not extend to personal injuries resulting from an accidental fall on a properly moored vessel when the moored vessel itself does not suffer damage.

### **Comparative Fault**

The principles of comparative fault apply in wake damage cases. The passing vessel and the damaged moored vessel can both be at fault, resulting in a reduction of the recoverable damages. In *Creole Shipping Ltd. v. Diamandis Pateras, Ltd.*, 410 F.Supp. 313 (S.D. Ala 1976), the freighter **Pyramid Veteran** was moored at a pier waiting for an unloading berth. The freighter **Pateras** passed the **Pyramid Veteran** and when doing so, created a suction effect that caused the **Pyramid Veteran** to surge fore and aft and away from the dock. As a result, some of the **Pyramid Veteran's** mooring lines parted and the port gangway was damaged. When passing the **Pyramid Veteran**, the **Pateras** was being operated at slow and dead slow speeds, but from time to time the engines had to be "kicked ahead" to maintain steerageway. The court held the **Pateras** was not being operated at an excessive speed but was otherwise negligently operated because the vessel owner did not show "it was not in her power to prevent the injury by any practical precautions she could have adopted" under the circumstances. The court also held the **Pyramid Veteran** was not properly moored due to slackness in the mooring lines, which allowed the vessel to surge when the **Pateras** passed by. The court ultimately held both parties at fault, apportioning two-thirds of the fault to the **Pateras** and one-third of the fault to the **Pyramid Veteran**.

Wakes, swells and surges occur in the ordinary course of vessel operation. A moored vessel's crew must take steps to properly moor the vessel to avoid damage resulting from the ordinary wakes, swells, and surges from passing vessels. A moving vessel has an obligation to pass a moored vessel carefully and avoid producing unusual wakes, swells and surges, taking into consideration many factors. If a properly moored vessel is damaged by the wake from a passing vessel, a presumption of fault by the passing vessel is raised. If the damaged vessel was not properly moored, no presumption is raised and the moored vessel may be held partially or totally at fault for the damage it suffered.