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Legal Aspects of Recreational Marina Operations in Florida

by Richard G. Hamann and Bram D. E. Canter

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INTRODUCTION

This publication is the second of a pair intended to assist the operators of recreational marinas in Florida. The first report entitled "Legal Aspects of Recreational Marina Siting in Florida" described the major environmental regulatory controls applicable to the construction of a recreational marina in Florida. This second report addresses legal considerations affecting the operation of a recreational marina.

A recreational marina, like any other business, is subject to a broad range of legal obligations. Emphasis is placed in this report on areas of law that are of particular relevance to marina operators, as opposed to more general businesses. The topics covered are tort liability, bailments, admiralty law, charter service, marine insurance, maritime liens, wrecked and derelict vessels, and oil spill and pollution control. An effort is made throughout the text to give guidance to marina operators in recognizing and avoiding potential legal difficulties.

A word of caution is in order. No document of this nature can substitute for the professional advice of an attorney and this report is not intended as a replacement for such personal service. The intention, rather, is to provide a helpful supplement.

I - TORT LIABILITY

A. INTRODUCTION

Tort liability should be of major concern to recreational marina operators.[1] Tort liability results when people or their property are wrongfully injured or damaged. It can be very costly for a responsible party to compensate an injured person. Furthermore, determining issues of liability and compensation can be complex, time-consuming and expensive. For these reasons, as well as the desire to prevent injury no matter who is at fault, considerable attention should be devoted to ensuring safety in marina operations. Also, sufficient liability insurance should be maintained.

Broadly speaking, a tort is a civil wrong, other than breach of contract, for which courts provide remedies in the form of an action for damages.[2] The right to compensation for tortious injuries does not depend on deliberate infliction or the existence of culpable intention. Nor is tort liability necessarily predicated on the defendant's fault. The common thread woven into all torts is the concept of unreasonable interference with the interests of others.[3]

The essential elements of a cause of action for tort are the existence of a legal right in the plaintiff, a corresponding legal duty in the defendant, and a violation of that duty which results in injury or damage to the plaintiff.[4] The plaintiff's right and the defendant's duty are correlative - two sides of the same coin. For example, if the defendant carelessly operates a boat without looking ahead and runs over a swimmer, he has breached his legal duty to proceed with care for the safety of others. From the other perspective, the plaintiff's legal right not to be injured by the careless acts of another has been infringed.

Wrongful injury resulting in tort liability can occur in a wide variety of factual settings. Intentional acts such as trespassing on another's property, seizing personal property, detaining, or making damaging statements about a person can result in tort liability. Carelessly operating machinery, making substandard repairs, selling defective products or failing to repair rotten docks or clean up spilled oil are examples of unintentional acts or omissions for which marina operators may be liable. A marina owner is usually responsible for the tortious acts of employees. Much of the discussion that follows is intended to assist marina owners in recognizing and avoiding "wrongful" conduct that might result in tort liability.

B. NEGLIGENCE

Liability for damage arising from the negligent acts of marina owners or their employees is a common tort claim. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances.

Intent to commit a wrongful act is not necessary. "Wrongful" is defined in terms of reasonable conduct as prescribed by law and society. Something is "wrongful" if in the context of a particular situation it is unreasonable or less than a prudent exercise of care. Liability arises when the negligent and wrongful act causes injury or damage.

The following elements are required for a cause of action in tort: (1) existence of a duty on the part of the defendant to protect the plaintiff from the injury or damage of which he complains; (2) failure of the defendant to perform that duty; (3) a reasonably close causal connection between the conduct and the resulting injury, called "legal cause" or "proximate cause"; and (4) actual injury or damage to the plaintiff.[5]

The duty of care that one person owes to another varies depending upon the circumstances. It may depend upon the status, capacity, or condition of the person to whom the duty is owed. For example, whether a potential victim is an infant or physically disabled bears upon the degree of care that must be exercised with respect to that person.

Even assuming a duty and a breach thereof, a defendant cannot be liable for negligence unless the plaintiff shows that the defendant's conduct was the proximate cause of the injury complained of. The proximate cause of an injury may be defined as that cause which, in natural and continuous sequence, unbroken by a sufficient intervening cause, produces the injury, and without which the result would not have occurred.[6] That is, it is the cause that leads to, produces, or contributes directly to, the injury.

Proximate cause is inextricably related to the concept of foreseeability. The fundamental question related to the proximate cause of a negligently caused injury is whether it was foreseeable. "Foreseeable" is not "what might possibly occur."[7] A person's negligent conduct may in fact be the cause of injury, yet he will avoid liability if the chain of causation is so tenuous as to be unforeseeable. Conversely, the fact that a defendant did not foresee a certain event does not mean that the event was unforeseeable. For example, a marina operator may not foresee that his failure to replace buoy markers may lead to a vessel going off course and causing damage to another vessel. Yet, under the circumstances, a jury could find that such a result was forseeable. The relevant determination is whether the defendant should have foreseen the potential for injury and taken steps to avoid it.

An example of how negligence may operate to impose liability is negligent entrustment. A boat owner may be liable for negligently allowing someone to operate the boat if the owner knew or should have known that the entrusted person was incompetant to handle the vessel safely. The following cases illustrate this type of negligence.

Pritchett v. Kimberling Cove, Inc.[8]

A 15-year-old employee had been entrusted with a key to a dockhouse where the keys to approximately 175 boats were kept. The minor employee injured the plaintiff while using one of the boats that he had access to. The marina owner was held liable

for the injuries inflicted by the minor employee on the theory of negligent entrustment. The marina owner had entrusted the boat to an incompetent operator and was liable for the harm resulting from such negligence.

Cashell v. Hart[9]

A boat owner's minor daughter permitted her friend, an inexperienced and incompetent navigator, to operate the boat. The friend negligently injured the plaintiff by turning the boat in such a way as to throw the plaintiff out of it. The court held that the boat owner knew or should have known that his daughter would permit the friend to operate the boat and, therefore the complaint alleging negligent entrustment stated a cause of action.

C. PRODUCTS LIABILITY

An important area of tort liability for both sellers and pleasure boat users is that of products liability.[10] "Products liability," in a broad sense, is a descriptive term which is applied to a type of action brought to recover compensation for injuries sustained as a result of product use. The term is applied to the liability of a manufacturer, processor, or non-manufacturing seller for injury to the person or property of a buyer or third party caused by a product they sold.

There are various theories upon which a products liability action may be brought. Traditionally, most cases were brought alleging negligence, breach of warranty, or both. However, in recent years a new basis of liability has developed: the principle of strict liability in tort. All three theories are discussed below.

Where recovery for injuries is sought on a negligence theory, it is necessary to show the elements of negligence, previously discussed, including duty, breach of duty, and proximate cause. For instance, if a manufacturer carelessly failed to tighten a fuel line on a boat and it consequently exploded, the manufacturer would have breached his duty and would be liable. Negligence can also arise from careless design of a product.

Liability under a warranty theory is similar to contractual liability. By law there are three different warranties that may accompany a sales transaction. A seller implicitly warrants to the buyer that the goods are merchantible and fit for their intended purpose. A seller may also make an express warranty either orally or in writing. And if the seller has reason to know that the buyer is relying on the seller's judgment, an implied warranty may exist that the goods are fit for the buyer's particular purpose which differs from the ordinary use of the goods. Failure to meet these obligations constitutes a breach of warranty, and this theory of liability may be used instead of, or in addition to negligence. These warranties are codified by the Uniform Commercial Code in the Florida Statutes.[11]

Under a warranty theory a different set of elements is needed to prove liability than those needed under negligence theory. The plaintiff must prove: (1) injury and damages; (2) the pro-

duct was defective, and; (3) the defect was the proximate cause of the injury.

While a seller's warranties normally run in favor of buyers, the Uniform Commercial Code, as adopted in Florida, extends seller warranties in favor of any person who is in the family or household of the buyer, or who is a guest in his home, or his employee, servant or agent, if it is reasonable to expect that such person may use, consume or be affected by the goods.[12]

The same warranties applicable to a manufacturer apply to a retail seller of a defective product, even though he may only be a conduit through which the product passes. This is because specific negligence has no relevance to a claim for breach of warranty.

The third and most important product liability theory is that of strict liability, which is currently recognized in many American jurisdictions, including Florida. This doctrine is expressed in §402A of the Restatement of Torts 2d.[13] This form of liability is "strict" in the sense that it is unnecessary to prove the defendant's negligence and, since the liability is in tort, defendants cannot avail themselves of the usual contract or warranty defenses which might be used in an action for breach of warranty.[14]

A plaintiff seeking to hold a defendant liable on the theory of strict liability in tort must establish the defendant's relationship to the product in question, the defective and unreasonably dangerous condition of the product, and the existence of a proximate cause connection between that condition and the plaintiff's injuries or damages.[15] The doctrine of strict liability may be applied against persons engaged in the busines of selling products, including manufacturers, wholesale and retail dealers or distributors, and operators of restaurants.[16] The Restatement declares, however, that strict liability does not apply to the occasional seller who is not engaged in selling as a regular part of his business.[17]

Although Florida was slow to allow strict liability in tort for products liability cases, Section 402A was adopted by the Supreme Court of Florida in 1976 in West v. Caterpillar Tractor Co. Inc.[18] The West court also held that liability for defective products extends to injured bystanders, in addition to purchasers and users of the product. The Restatement of Torts also recognizes this extension of liability. Some cases have held manufacturers or sellers of boats liable for harm caused by their products. An earlier Michigan case held that the manufacturer could be found guilty for the death of one who drowned when his boat broke apart at the hull.[19]

The case sketches that follow illustrate Florida's position on products liability for boating injuries.

Duncan v. Monarch Boat Company, Inc.[20]

In this case decedent was drowned when thrown out of a boat. The manufacturer of the boat had failed to attach a plate stating the recommended safe number of persons or maximum weight load as required by Section 371.60, Florida Statutes (now codified at §327.52). Decedent's estate sued the manufacturer alleging wrongful death based on the failure to attach the plate. The

court held this sufficient to state a cause of action. This case is illustrative of what kind of "defect" may render a manufacturer liable in tort for injuries to users of its products. Here the defect was, in effect, statutorily created, in that the defendant failed to provide certain warning requirements on the product.

Outboard Marine Corp. v. Apeco Corp.[21]

The plaintiff in this case was injured in a boating accident and claimed the proximate cause of the accident was the failure of the steering mechanism which was part of the engine. The supplier of the inboard-outboard engine was held liable upon the showing of a defect and the demonstration of a causal link between defect and the injury. No proof of negligence was necessary for plaintiff's recovery.

Young v. Wellcraft Marine Corp., et al.[22]

This case also involved a defective steering mechanism. A $1,150,000 settlement was sustained by the Circuit Court for injuries resulting from loss of control of the plaintiff's powerboat. In a suit based upon negligence and breach of warranties brought against the boat manufacturer, the manufacturer of the engine, and the retailer of the boat, plaintiff alleged the accident was the result of a steering failure caused by the lack of a proper grease fitting on the power control valve which caused the valve to jam in an open position. All three defendants contributed to the settlement.

D. DUTY TO PERSONS ON THE PREMISES

A marina has particular legal duties with respect to persons entering upon the marina property. Accidents involving customers and other business patrons are a common source of liability and a marina owner should be keenly aware of his legal duties toward persons on marina property.

One who enters the premises of another does so either as a trespasser, licensee, or invitee. The degree of care owed to the entrant by the owner or occupant depends in large part on the status of the entrant.

A trespasser is one who enters or remains on another's land without permission or privilege. The general rule is that the landowner owes no duty to a trespasser to make his land safe, to warn of dangers, or to protect the trespasser in any other way.[23] However, once the landowner knows a trespasser is on his property, the landowner is under a duty to exercise reasonable care for the trespasser's safety.[24] Intentionally harming a trespasser is also prohibited.

A licensee is one who has the landowner's permission to be on the property but who does not have a business purpose for being there. The landowner's duty is to warn the licensee of any known dangers. However, the landowner is under no duty to inspect the premises to find hidden dangers and is not liable if the premises are unsafe.[25] Social guests were most frequently put within this

category until recent years. This category is now somewhat obsolete.

Most persons on the premises of a marina will be there as invitees. An invitee was traditionally considered to be one who enters on the premises for a purpose connected with the business of the owner or occupant of the premises, but the class of invitees has been expanded to include any member of the public invited on the premises by the purpose for which the land is open to the public.[26] Invitee status has also been given to social guests or "licensees by invitation" of the land owner.[27]

An owner or occupant of property owes to an invitee a duty to use ordinary care to maintain the premises in a reasonably safe condition. The owner also has a duty to give the invitee timely notice and warning of latent or concealed perils that are known or should be known by the exercise of reasonable care.[28] Thus the owner has a duty to inspect his premises to discover possible dangers. For example, an owner would be liable for injuries sustained by a patron who fell as a result of a worn or rotted dock plank or rail collapsing which should have been detected by the owner. Owners may also be liable for faulty construction, such as uneven floors, causing patron injuries.[29]

There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant. If the injured patron had or reasonably should have had knowledge of a spill on the floor, the owner will not be charged with liability for the patron's fall.[30]

In Florida, however, an injured plaintiff may recover damages for injuries negligently inflicted even though he was also at fault. That is, one may negligently act or fail to discover a peril and still recover partial compensation if the defendant's negligence proximately causes of the injury. Instead of completely barring an injured plaintiff from recovery because of his own contributory negligence, Florida has adopted the rule of comparative negligence, which decreases a plaintiff's monetary damages by the percentage his own negligence contributed to the injury.[31]

Although injuries can never be entirely prevented, the liklihood of their occurrence and the potential liability arising therefrom, can be diminished. This is particularly true with respect to injuries caused by the condition of the marina premises. Periodic inspection of potentially hazardous conditions may serve to preclude one of the elements of a plaintiff's case--that is, that the defendant knew or reasonably should have known of the danger and breached his duty of care by not correcting the danger. These principles are illustrated by the following two reported decisions involving damage to boats at a marina.

John's Pass Seafood Company v. Weber[32]

Plaintiff rented a slip at defendant's dock. One night a fire that started aboard another vessel moored to the dock spread to plaintiff's boat. The plaintiff sued the defendant alleging negligence in that the defendant had failed to provide fire extinguishers and firefighting equipment as required by a city fire code. Although plaintiff had signed a slip lease containing

an exculpatory clause stating defendant would not be liable in such a situation, the court held that violation of the fire code was negligent per se. The defendant should have known of the potentially dangerous condition and he breached his duty by not providing firefighting equipment.

Bertram Yacht Yard v. Florida Wire & Rigging Works[33]

The owner of a yacht yard was found liable for damages to a vessel which fell when a steel cable broke on a boat lift owned and operated by the defendant. The yard owner was charged with negligence with respect to the condition of the wires and cables. The notion of superior landowner knowledge on the part of the landowner that creates a duty toward invitees was used in this case. The defendant knew or should have known of the dangerous condition and was liable to the plaintiff for any damages arising out of that condition.

Similarly, just as a marina owner owes a duty of care to invitees, a boat owner owes a duty to those on board his boat. The owner of a vessel owes to every person lawfully on board by express or implied invitation the duty to provide reasonable security and to exercise ordinary care to protect him from injury.

Judy V. Belk[34]

Plaintiff was injured when she fell into the water while attempting to step from a houseboat to the dock. The court held that the plaintiff's status as a houseboat guest was that of an invitee. As an invitee, the houseboat owner owed a duty to provide reasonable security and exercise ordinary care to protect the plaintiff from injury. The evidence conflicted over the adequacy of lighting and the houseboat had no guard rail or gangplank, so the court remanded the case for jury determination on the issue of whether the houseboat owner had fulfilled the duty owed to plaintiff invitee.

E. RESPONSIBILITY FOR EMPLOYEES

An employer may be liable to third persons for injuries inflicted by his employees. Where the injury is caused by an act of the employee, the employer may be vicariously liable on the principle of respondent superior. Under this rule, for example, the business proprietor may be found liable for falls on a floor made slippery by waxing or oiling by an employee, for injury due to the presence of an obstacle, or for an employee's negligent inspection of cables supporting a yacht.[35]

Under the theory of respondent superior, the test for employer liability for the tortious act of employees is whether the acts causing the injury to the third person were committed in the scope or course of employment. Much litigation results from interpretation of these terms, since they are often determinative of liability. Generally, an employee acts within the scope of his employment when he is engaged in doing what the employer directs him to do, or what he could be expected to do, from the

nature of his employment.[36] Conduct of an employee is within the scope of his employment only if it is of the kind he is employed to perform, it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the employer.[37] For example, injuries resulting from the negligent operation of machinery by an employee will impose liability on the employer. The purpose of the employee's act, rather than the method of performance, is the important consideration. The question of whether a tort committed by an employee is within the scope of his employment is ordinarily one for the jury.

F. LIABILITY FOR DEFECTIVE REPAIR WORK

Repairmen are subject to liability for harm caused by a negligently repaired item. The law is applied to boat repairmen in the same manner it is applied to aircraft and auto mechanics, carpenters, plumbers and all other types of repairmen.[38] The repairman's duty is to exercise that degree of skill which enables him to do a workmanlike job free of negligence and the duty is the same whether the repairman is a bailee[39] or an independent contractor.[40] Failure to meet this duty makes repairmen liable for property damage and personal injuries to those who may reasonably expect to be endangered by use of the repaired item.[41]

Contracts for pleasure boat repair are also governed by legal principles which generally apply to contracts. Thus, reasonable charges will be imposed for repairs if specific charges were not set out in the contract,[42] and the reasonable value of beneficial repairs must be paid for by the boatowner even when some of the repair work was defective.[43] Also, it should be noted that the scope of a repairman's liability can be expanded by what he contracts to do. A repairman can expressly warrant certain results and thus become liable if those results are not attained.[44] A repairman is liable under contract theory in damages either for breach of contract or warranty.[45]

Some legal commentators have suggested that the standard of liability for people who provide services should be the same as the standard imposed upon manufacturers of products.[46] The so-called "products liability" standard, based on implied warranties under contract theory and strict liability in tort, is discussed above. Manufacturers are generally liable for harm caused by defective products even if the manufacturer exercised the utmost care to prevent the harm from occurring. However, courts have so far been unwilling to hold repairmen to this higher standard of care.

Many courts have declared there exists an implied warranty of "workmanlike performance" in a contract for repair.[47] A close review of these decisions, however, indicates that this implied warranty is treated as merely a duty not to be negligent. It is not applied as a guarantee that the repairman will undertake responsibility for any harm that may result, in the absence of

negligence.[48] Therefore, the test of liability under an implied warranty of workmanlike performance is simple due care.[49]

While the doctrine of strict liability in tort has been applied in a few instances to highly trained professionals, it has not been held applicable to general repairmen.[50] The most commonly used rationale for not applying this standard to defective repair services is that strict liability was developed to apply to the sale of goods and not to services.[51] As the law stands today, liability for defective repair requires proof of negligence.[52]

G. INDEPENDENT CONTRACTORS

The types of repair facilities and expertise necessary to meet the needs of modern pleasure boats have changed dramatically in the last few decades. Many 50-foot yachts today contain more sophisticated electronic and mechanical equipment than large ships did thirty years ago. Few marinas can afford to maintain staff competent at servicing all of the air conditioning, refrigeration, stabilizers, radar, loran, automatic steering, radios, automatic direction finders, depth recorders and other equipment found on today's pleasure boats. Services may instead be offered to marina customers by employing a trained mechanic or technician as an independent contractor. The legal significance of such an arrangement is that, generally, a marina is not liable for the tortious acts or omissions of an independent contractor, but is liable for those of an ordinary employee.[53]

An independent contractor is one who contracts to do certain work according to his own methods, without being subject to the control of his employer except for results.[54] The essential factor that distinguishes an independent contractor from an ordinary employer is the extent of control the employer exercises over the work. The work of an employee is usually almost entirely controlled by his employer. An independent contractor, on the other hand, decides on his own the manner of performing the contracted task.

The courts have considered a number of factors when analyzing the extent of control exercised by the employer.[55] The existence of a performance contract at a fixed price and time period is an indication that a person has been employed as an independent contractor. Ordinary employees normally are not employed under such a contract. An independent contractor is likely to employ his own assistants and independently supervise their activity. He usually furnishes the tools and most of the materials and supplies he and his assistants use. Independent contractors are commonly paid by assignment, while ordinary employees are usually paid an hourly wage. Whether the skill or calling of a person is of an independent nature, and whether the work he does is part of the regular business of the employer are important considerations. The following is a list of other factors:

a) existence of a contract to perform a certain piece of work at a fixed price;

b) employment of assistants and the right to supervise their activities;

c) obligation to furnish tools, materials and other supplies;

d) right to control the progress of work except as to the final results;

e) time period for employment.

These factors only tend to indicate the status of an individual as an ordinary employer or independent contractor. None are determinative. The unique factual circumstances of each case will ultimately determine what weight is assigned to each factor.

Complicating matters somewhat is the fact that a person may be an independent contractor for one phase of work and an employee for another,[56] though this would be unusual. An independent contractor may also act as the agent of the employer under some circumstances. Because an independent contractor is not an ordinary employee, statutes that affect the rights of employees are not applicable to independent contractors. Thus, independent contractors are generally not covered by workmen's compensation or unemployment compensation laws.[57]

The policy behind the legal principle that an employer is not liable for the tortious acts of an independent contractor is the notion that employers should not be liable for the wrongs of someone over whom they exercise no control. However, a number of exceptions have been carved out of the general rule. If an independent contractor's work is defective or otherwise negligently performed and causes harm to someone, an employer may also be held liable where it is shown that he knew or should have known that the independent contractor was inexperienced or incompetent.[58] A marina owner, therefore, should make reasonable efforts to insure, before he hires an independent contractor, that the individual is adequately skilled for the work to be done. The marina owner should also be sure he provides the independent contractor with a safe workplace.[59]

An employer may also be liable for allowing an independent contractor to create and maintain dangerous conditions on marina premises known to the employer.[60] For example, if the employer knew the independent contractor was creating a fire hazard at his marina workplace which later caused a fire, the employer could be liable to anyone injured or whose property was damaged by the fire.

Another important exception to the general rule that an employer is not liable for the acts of an independent contractor arises when the employer retains control of the premises, in which case the employer is responsible for the safe condition of the premises.[61] Thus, if the workshop roof falls in on the independent contractor or his assistants, the employer will be liable for any resulting injuries. In a like fashion, the employer will be liable for defective materials or tools he furnishes to the independent contractor. The employer must notify the independent contractor and his assistants of any dangerous conditions on the premises the employer knows or should know exist which are not known to the independent contractor.[62] Warning the independent

contractor will usually take care of the employer's responsibility to warn persons employed by the independent contractor since it is usually assumed that the independent contractor will pass the warning on to his employees.[63] The employer owes no duty to warn of obviously dangerous conditions.[64]

An employer may also be liable for meddling or otherwise interfering with the independent contractor's work in such a way that property damage or personal injury results.[65] This and the other exceptions to employer non-liability may be viewed as merely special applications of the fundamental legal principle that employers are liable for his own wrongful conduct.

Once the independent contractor's work is complete and accepted by the employer, thereafter the employer is generally held responsible for any defects causing harm.[66] Thus, if a boat is delivered to the marina for repair and an independent contractor does the actual work, the marina can be sued by the boat owner if the boat later sinks due to the defective repair work. Of course, the marina can sue the independent contractor to recover any money paid to the boat owner, but that is often an unsatisfactory process.

A better approach may be to have the boat owner deal directly with the independent contractor for repair services. The marina can merely rent space to an independent contractor who deals directly with boat owners as to details of the work and costs. It would be unlikely in that situation for the marina to be held liable for the defective repair work. However, if a marina affirmatively advertises that it can provide certain repair services in order to encourage business, the marina may be prohibited from claiming that it is not responsible for defective repair work.[67] Since the customer is induced by the marina to make use of the services, a court may allow him to sue the marina as if the independent contractor were an ordinary employee.

H. BOAT REGISTRATION AND SAFETY LAW

The operator of a pleasure craft owes to his passengers a duty to exercise reasonable care, and he may be liable for negligent operation.[68] The operation of pleasure boats is also regulated in the Florida Boat Registration and Safety Law, Chapter 327, Florida Statutes, which proscribes and punishes reckless operation of vessels.[69]

Under the Boat Registration and Safety Law, all boats are considered to be dangerous instrumentalities, and operators are held to the exercise of the highest degree of care to prevent injuries to others.[70] This is a duty of care beyond that which is generally imposed by the common law of negligence. In addition, it is unlawful for any person under the influence of an alcoholic beverage or a controlled substance to operate a vessel.[71]

Any marine operation qualifying as a boat livery is also regulated by the Florida Boat Registration and Safety Law with respect to loads, motors, equipment and seaworthiness. Full compliance with these requirements releases the livery from

vicarious liability for accident or injury resulting from rental boat operation. Although not defined by statute, a boat livery is defined generally as one who keeps boats for rent. Boat liveries may not knowingly lease, hire or rent a boat to any person when the number of persons intending to use the boat exceeds the maximum safety load for the boat.[72] A livery is also prohibited from renting a boat if certain equipment requirements are not met. These include horsepower of the motor, life-saving equipment, an anchor, appropriate paddles or oars, and a general requirement of seaworthiness.[73]

A boat livery may not close until the last boat has returned, and if a boat is unnecessarily overdue, the livery must notify the proper authorities. When a livery has complied with the above requirement, its liability is limited, and the person leasing the boat, not the livery, is liable for Chapter 327 violations, and for accidents or injuries occurring while in control of the boat.[74]

I - NOTES

1 See generally W. Prosser, Handbook of the Law of Torts (1970); 32 Fla. Jur. Torts.

2 W. Prosser, note 1 supra, at 2.

3 Id. at 6.

4 32 Fla. Jur. Torts, §3.

5 W. Prosser, note 1 supra, at 143.

6 23 Fla. Jur. Negligence, §26.

7 See Bryant V. Jax Liquors, 352 So.2d 542, 544 (Fla. 1st D.C.A. 1977).

8 568 F.2d 570 (8th Cir. 1979).

9 143 So.2d 559 (Fla.2d D.C.A. 1962).

10 See generally, 63 Am. Jur. 2d, Products Liability §2.

11 Fla. Stat. §§672.312-.318 (1981).

12 Id. §672.318.

13 Restatement (Second) of Torts §402A (1965).

14 63 Am. Jur. 2d, Products Liability §4.

15 Id. §128.

16 Restatement (Second) of Torts §402A (1965).

17 Id., comment f.

18 336 So.2d 80 (Fla. 1976).

19 State v. Garzell Plastics Industries Inc., 152 F.Supp. 483 (E.D. Mich. 1957).

20 281 So.2d 382 (Fla. 1st D.C.A. 1973).

21 348 So.2d 5 (Fla. 3rd D.C.A. 1977).

22 Dade County Circuit Court No. 75-34263, 1977.

23 W. Prosser note 1 supra at 357.

24 Restatement (Second) of Torts §§335,336 (1965).

25 Id., §342.

26 Post v. Lunney, 261 So.2d 146 (Fla. 1972).

27 Wood v. Camp, 284 So.2d 691 (Fla. 1973).

28 23 Fla. Jur. Negligence §45.

29 Heath v. First Baptist Church, 341 So.2d 265 (Fla. 2d D.C.A. 1977).

30 See Rice v. Florida Power & Light Co., 363 So.2d 834 (Fla. 3d D.C.A. 1978) (uninsulated power lines in open field). cf. Metropolitan Dade County v. Yelvington, 392 So.2d 911 (Fla. 3d D.C.A. 1980) (algae condition on boat launching ramp was not so open and obvious as to relieve defendant of liability as a matter of law).

31 Hoffman v. Jones, 280 So.2d 431 (Fla. 1978).

32 369 So.2d 616 (Fla. 2d D.C.A. 1979).

33 177 So.2d 365 (Fla. 3d D.C.A. 1965). See also, Doca v. Marina Mercante Nicaraguense S.A., 474 F.Supp. 751 (S.D.N.Y. 1979).

34 181 So.2d 694 (Fla. 3d D.C.A. 1966).

35 Bertram Yacht Yard v. Florida Wire & Rigging Works, 177 So. 2d 365 (Fla. 2d D.C.A. 1978).

36 Fla. Jur. 2d, Agency and Employment, §213.

37 Whetzel v. Metropolitan Life Ins. Co., 266 So.2d 89 (Fla. 4th D.C.A. 1972).

38 Restatement (Second) of Torts, §323, and comments (1965). See e.g., Pan American Petroleum Transp. Co. v. Robins Dry Dock & Repair Co., 281 F.97 (2d Cir. 1922) (wires were crossed during repair of a ship's telegraph apparatus and caused a fire); Lancashire Shipping Co. v. Morse Dry Dock & Repair Co., 43 F.2d 750 (E.D.N.Y. 1930) (acetylene torch ignited fuel fumes and boat exploded); Bell v. Mutual Machine Co., 63 S.E. 680 (N.C. 1909) (defective caulking of a hull caused leakage and damage).

39 Am. Jur. 2d., Bailments, §§325, 280.

40 Restatement (Second) of Torts §§403, 404 (1965).

41 See generally Annot., 44 A.L.R. 824 (1926).

42 Sturgeon Bay Shipbuilding & Dry Dock Co. v. The Nautilus, 166 F.Supp. 187 (E.D. Wis. 1958).

43 See Dog River Boat Service, Inc. v. The Francis D., 192 F.Supp. 759, 761 (S.D. Ala. 1961).

44 Dierickx v. Vulcan Industries, 10 Mich. App. 67, 158 N.W. 2d 778 (1968).

45 Miller v. American Insurance Company, 439 S.W. 2d 238 (Mo. App. 1969).

46 See e.g., Greenfield, Consumer Protection in Service Transactions - Implied Waranties and Strict Liability in Tort, 1974 Utah L. Rev. 661.

47 Id. at 663-65, nn. 10-19.

48 See, e.g. Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc. 168 So.2d 333 (Fla. 2d D.C.A. 1964) cert. denied, 173 So.2d 146 (Fla. 1965).

49 Courts have refused to apply the stricter doctrine of implied warranty of fitness for a particular purpose, which is imposed upon manufacturers. See, e.g. Raritan Trucking Corp. v. Aero Commander, Inc. 458 F.2d 1106, 1113-115 (3d Cir. 1972) (strict liability not applicable to airplane services); Pepsi Cola Bottling Co. v. Superior Burner Service Co., 427 P.2d 833, 839-42 (Alaska 1967) (no strict liability on those agreeing to furnish labor or services).

50 R. Hursh & H. Bailey, American Law of Products Liability 2d §6:17 (1974). The Restatement of Torts §404, provides that "[O]ne who as an independent contractor negligently makes, rebuilds, or repairs chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." The Restatement does not suggest that a strict liability standard would be appropriate for repairman.

51 See, e.g., White v. Sarasota Country Pub. Hosp. Bd., 206 So. 2d 19, 21-22 (Fla. 2d D.C.A. 1968) cert. denied, 211 So.2d 215 (Fla. 1968); Greenfield, supra, note 46 at 683.

52 Myers v. Ranenna Motors, Inc. 468 P.2d 1012 (Wash. App. 1970); Poston Steel Erection Corp. v. Saumenig, 132 So. 2d 310 (Fla. 2d D.C.A. 1961) (duty of ordinary care in repair work).

53 Musselman Steel Fabricators, Inc. v. Channel, 208 So. 2d 639 (Fla. 2d D.C.A. 1968); Mount Dora v. Voorhees, 115 So.2d 586 (Fla. 2d D.C.A. 1959).

54 See Mumbry v. Bowden, 25 Fla. Rep. 454 6 So. 453 (1889); King v. Young, 107 So. 2d 751 (Fla. 2d D.C.A. 1958). It is not the act of control, but the authority to control that is determinative in this context. National Surety Corp. v. Windham, 74 So.2d 549, 550 (Fla. 1954).

55 See Margarian v. Southern Fruit Distributors, 1 So.2d 858, 860 (Fla. 1941) (relationship may exist whether or not the parties think it does); Peterson v. Highland Crate Co-op, 23 So.2d 716, 717 (Fla. 1945) (lack of control important factor). See also 41 Am. Jur. 2d, Independent Contractors, §§5-23.

56 McKenzie v. Neale Constr. Co., 294 P.2d 355 (Wyo. 1956); Morrison v. National Life & Accident Ins. Co., 162 S.W. 2d 497 (Tenn. 1940).

57 Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972) (party held to be employee despite contract).

58 Annot., 78 A.L.R. 3d 910 (1977).

59 Annot., 31 A.L.R. 2d 1375 (1965).

60 Modlin v. Washington Ave. Food Center, Inc., 178 So.2d 596 (Fla. 3d D.C.A. 1965), quashed, 205 So.2d 295 (Fla. 1968), conformed 208 So.2d 862 (Fla. 3d D.C.A. 1968); Maldonado v. Jack M. Berry Grove corp., 351 So.2d 967 (Fla. 1977).

61 Crane v. I.T.E. Circuit Breaker Co., 278 A.2d 362 (Pa. 1971).

62 McCarty v. Dade Div. of American Hospital Supply, 360 So. 2d 436 (Fla. 3d D.C.A. 1978).

63 Lake Parker Mall, Inc. v. Carson, 327 So.2d 121 (Fla. 2d D.C.A. 1976); Delhi-Taylor Oil Corp. v. Henry, 416 S.W. 2d 390 (Tex. 1967).

64 See Pence Construction Corp. v. Watson, 470 S.W. 2d 637, 638 (Tex. 1971); see also Brletich v. U.S. Steel Corp., 285 A.2d 133 (Pa. 1971) (no duty toward independent contractor's employees when independent contractor has skill or knowledge such that the danger should be obvious to him.

65 Mount Dora v. Voorhees, 115 So.2d 586 (Fla. 2d D.C.A. 1959).

66 Baader v. Looby, 126 SO.2d 745 (Fla. 3d D.C.A. 1961).

67 Am. Jur. 2d, Independent Contractors §4.

68 See Gibboney v. Wright, 517 F.2d 1054, 1059 (5th Cir. 1975).

69 Fla. Stat. §327.33 (1981)

70 Id. §327.32.

71 Id. §327.35.

72 Id. §327.54(1)(a).

73 Id. §327.54.

74 Id. §327.54(4)

II - BAILMENTS:
LIABILITY FOR THE MOORING OR STORAGE OF BOATS

A. INTRODUCTION

The law of bailments is relevant to four general categories of services recreational marinas normally provide: mooring, storage, boat repair and charter service. This report will begin with an explanation of bailments and applicable legal principles. Three sections follow, treating mooring, storage and repair separately and examining the legal responsibilities of marina operators in regard to each. The law applied to chartered boats is discussed in the chapter on charter.

1. What is a bailment?

A bailment is a legal relationship between persons arising when one delivers personal property to another in trust for a specific purpose with the understanding the property is to be returned or otherwise properly accounted for.[1] The owner delivering the property is called the "bailor" and the person receiving temporary possession the "bailee." Any kind of personal property, including pleasure boats, can be the subject of a bailment. Since the primary function of a recreational marina is to provide a facility where pleasure boat owners can deliver boats for mooring, storage or repair for temporary periods when the boat is not being used, the law of bailments is crucial to understanding the legal obligations and potential liability of recreational marina operators.

2. Theories of liability

A bailee may be subject to liability under two basic legal theories -- negligence and breach of the bailment contract. Either or both theories may apply at the same time. Under negligence theory, a bailee is generally liable for any loss or damage to bailed property in his possession if he fails to exercise ordinary care in handling or protecting the property. The duty of ordinary care is not dependent upon the existence of an express contract, but arises by operation of law. However, formal written contracts are often used.

If a contract is entered into by the bailor and bailee, its terms govern the rights and responsibilities of the parties in accord with contract law. A failure by the bailee to carry out his contractual obligations gives the bailor a right to sue for both breach of contract and negligence. Of course, when the bailor fails to comply with its terms, the bailee may sue under the contract also.

The ordinary care (sometimes referred to as "reasonable care") of a bailee is the standard of care a prudent person handling his own property under similar circumstances would ordinarily exercise.[2] If the bailment agreement includes special matters, such as the repair of bailed property, the bailee must use ordinary care in rendering whatever skills are necessary to accomplish the special task. The bailee is also liable for any negligence on the part of employees causing harm to the bailed

property if the harm occurs within the scope of their employment. Nevertheless, the bailee is not an insurer of the bailed property. If he and his employees are not at fault, he will not be liable for damage or loss resulting from other causes.[3]

A plaintiff can usually establish negligence by proving that he delivered his property to a bailee in a certain condition and the bailee returned it in a worse condition. If the bailee offers no excuse in rebuttal, a court could hold the bailee negligent and liable for the difference in value.[4] On the other hand, if the bailee shows that he exercised ordinary care, the bailor must prove additional facts establishing actual negligence on the part of the bailee.[5]

If no bailment exists, a person has no duty of ordinary or reasonable care toward another's property. However, even a non-bailee will be liable for the consequences of gross negligence. Gross negligence has never been precisely defined by the courts but the concept can be described generally as conduct that is reckless and without consideration of possible harm.

What has been stated concerning negligence theory must be qualified if there is a contractual relationship between the bailor and bailee. A bailee can assume responsibilities going beyond the requirement to exercise ordinary care and refrain from doing negligent acts. He can, for example, agree to take special protective measures that would not usually be contemplated in a bailment relationship.[6] Such additional obligations would have to be carried out by the bailee to avoid liability for breach of the contract. In a more positive sense, a written bailment contract can be used to clarify responsibilities of the parties and reduce the potential for controversy and litigation.

B. MOORING

Slip rental with nothing more, will rarely create a bailment.[7] A bailment relationship is characterized by the exclusive temporary relinquishment of possession to the bailee. When the yacht or motorboat owner pays a monthly slip rental fee to moor his boat at a marina, he usually does not relinquish exclusive control and possession to the marina operator. He merely pays for the privilege to moor. It might appear the operator has possession when the boat is at the marina and the owner is miles away, but the law of bailment focuses on the notion of exclusive possession and not physical proximity. Since the owner can return at any time, untie the lines to the boat and cast off, the marina operator is not considered a bailee with exclusive possession and is under no obligation to exercise ordinary care for the boat.[8] The brief case sketches that follow will illustrate the legal principles applied to simple moorings.

Blank v. Marine Basin Co.[9]

A boat owner entered a marina, tied up his boat, and padlocked the lines. He arranged to pay for mooring and for hauling the boat in and out of the water on request. The marina owner, however, was never given a key to the padlocks. The owner

and his friends used the boat from time to time without giving notice to the marina owner. The boat was later found missing and presumed stolen. The court dismissed the boat owner's claim of negligence because the boat had not been delivered to the marina operator's exclusive possession and thus, no bailment was created.

Richardson v. Port Vincent Boat Works, Inc.[10]

A boatowner paid monthly rentals to tie his 44-foot Chris Craft in the defendant's floating boathouse. The boat sank and the owner claimed the sinking was caused by the boathouse owner's negligent maintenance of the boathouse and failure to protect the boat. The court held that the rental arrangement created only a lessor-lessee relationship between the parties and not a bailment. The boathouse owner had no obligation to use reasonable care toward the boat and the fact that he never checked the premises or the boat did not make him negligent.

Florida Small Business Corp. v. Miami Shipyards Corp.[11]

The plaintiff sued a boatyard owner because his boat sank while moored to the dock. The boat was in the possession of the plaintiff's employee while being prepared to be sold. In addition, the crew of a prospective purchaser had had control of the boat. Under these circumstances, the court determined that there had not been a "complete delivery" to the boatyard owner. Therefore, the boatyard owner did not breach any duty owed to the plaintiff because no bailment existed.

Blair v. Saguaro Lake Development Co.[12]

The owner of a cabin cruiser had just completed refinishing the hull. She asked the marina owner to check the boat for seepage while she went into town for several hours. The marina owner inspected the boat but did not see enough water to justify pumping it out. The boat was later discovered to be on fire and the marina owner and his employees were unable to put it out. The boat was dragged away from the dock, where it exploded. The cabin cruiser owner sued the marina, claiming negligence for not preventing the fire. The court found that the marina owner's agreement to check for seepage created a bailment. He had been placed in exclusive possession and control of the boat while the owner was absent. Nevertheless, the court found no basis for holding that the marina owner had breached his duty of ordinary care. There was no evidence of how the fire was caused. The marina owner's periodic inspection of the boat for seepage had overcome any presumption of negligence. Therefore, without proof that the fire was caused by the marina owner's negligence, he could not be held liable.

A situation faced by many marina operators is where a boat is left at the marina against the wishes of the marina operator or without his knowledge. Since a bailment is usually understood to be an agreement for the mutual benefit of the bailor and bailee,[13] a court is unlikely to find a bailment when the marina operator refuses the relationship or is without knowledge of it. A California case[14] involved a boat owner who refused to remove his boat from the marina on request. When the boat was sub-

sequently damaged, the owner claimed it was due to the marina owner's negligence. The court, however, described the marina owner as an "involuntary depository" of the boat and not a bailee owing a higher duty of ordinary care.

In a more recent case from New York,[15] the plaintiff had towed his disabled cabin cruiser to a marina and tied it to the dock. No one at the marina was informed of the boat's presence or its condition. Water filled the boat through an unstoppered opening in the hull exposed when the exhaust pipes and transmission were removed, and the boat sank. In a suit by the boat owner against the marina, the court declared that no bailment had been created. The court went on to state that, even if a "constructive bailment" were held to exist, the marina owner fulfilled his obligation to exercise care and diligence in protecting the unknown boat when he secured its mooring lines.

Whenever a boat is left for mooring or any other marina service, it cannot be handled in a manner not reasonably related to the service.[16] For example, if a boat owner has left his boat in a rental slip, the marina operator or his employees cannot use the boat for business or pleasure without permission.[17] Should damage occur to the boat that would not have occurred if the boat had been handled as agreed by the parties, the marina operator could be held liable even in the absence of negligence.[18]

Since the law imposes greater responsibility upon a bailee than a non-bailee, a marina operator may reduce his liability exposure for damage to boats moored at the marina by not accepting complete control and possession. This can be accomplished most effectively by the terms of a written mooring contract, executed by the boat owner and marina operator. The contract should state in unambiguous language the boat owner is only paying for the privilege of mooring his boat at the marina, and nothing more. The following provision is offered as an example:

> The boatowner acknowledges that he has inspected the berthing space leased under this contract and is satisfied that the space is adequate for the safe mooring of his vessel. This contract is not a bailment of the boat owner's vessel but only the lease of a berthing space. The marina's responsibility is limited to supervision and maintenance of the waterfront area. The marina's employees will make reasonable efforts to notify the boat owner of any dangerous conditions they are aware of but the marina assumes no responsibility for tending mooring lines, moving the boat from its assigned berth or otherwise tending to the boat. The boat owner retains full control and possession of the boat during the period of this lease.[19]

In order to attract customers, the marina owner or manager might prefer to offer special services to boat owners who rent mooring spaces. The marina may, for example, provide a night watchman, periodic inspection of boats, pump-outs, or other services to persons renting a slip. The intent of this report is not to

discourage such business practices. Marina owners and operators should be aware, though, of the consequences of creating a bailment relationship.

The distinction between renting a mooring space and agreeing to undertake additional responsibilities is often difficult to determine, but critical to the question of potential liability. Also, the difference between "wet" and "dry" storage can be an important factor as to whether a bailment exists.[20] Furthermore, a request for minor repair services can change simple rental into a bailment even when the boat is not moved.

The next two sections explore the kinds of situations which create bailments and the responsibility imposed on the marina.

C. STORAGE

1. Generally

In the preceding section it was concluded that renting a boat slip will rarely create a bailment. Because the boat owner has not delivered exclusive possession and control of the boat to the marina operator, the law does not require the operator to protect the boat as if it were his own. Often, however, the marina is asked to provide greater protection for the boat and a bailment relationship results. The key determinant is always the concept of exclusive possession.

Exclusive possession in the context of marina operations usually involves an understanding that the boat owner will not be available to look after the boat for the bailment period and protection of the boat is left entirely to the marina operator. In addition, it usually means the owner does not have easy access to his boat and must make arrangements with the marina operator for its use. These circumstances are typical of many boat storage situations and, therefore, boat storage normally creates a bailment between the boat owner and marina operator.

There are a number of factual settings that can be generally described as storage and which bring into play the legal principles of bailment law. Many owners of yachts and other large pleasure craft have their vessels winterized and stored at a marina. Storage, however, can be accomplished at any time of the year and for any number of days. Storage bailments can also occur in conjunction with boat repairs and when a boat has been left with the marina operator to sell.[21] Storage is not dependent upon any particular placement of the boat. Storage can occur in the water, boathouse, or in the boatyard with the boat on blocks, on a trailer, or stacked in a building.

A bailment, whether for boat storage or another purpose, creates a duty on the part of the bailee to exercise ordinary care to protect the bailed property. The particular facts and circumstances of each case determine whether or not the bailee failed to exercise the required standard or care. However, the cases that have been decided by the courts indicate a few general patterns.

First, if a written contract is used for the storage agreement, its terms will govern the rights and responsibilities

of the parties unless it is ambiguous.[22] Second, the marina operator must take precautions to avoid forseeable mishaps such as fire, theft and storms. For example, fires are foreseeable and the operator would be negligent not to have fire fighting equipment near stored boats.[23] In addition, the marina should be in compliance with fire codes and employees should be briefed on the measures to be taken in the event of a fire. Whether extraordinary storms are foreseeable depends on surrounding circumstances, but, clearly, stored boats must be kept safe from the normal weather conditions of the particular location and season.[24] Third, when an accident occurs, the marina operator must take reasonable steps to reduce the resulting damage. While he may be free of negligence in regard to the outbreak of a fire, for example, he would be liable for failure to take action to put the fire out if it was within his power to do so. These general principles are illustrated in the following case sketches.

Chanler v. Wayfarer Marine Corp.[25]

The owner of a 40-foot cutter-rigged yacht stored it for the winter. In the spring, the yacht was launched again and placed at its regular mooring offshore. When a violent storm came up one evening and wrecked the vessel, the owner sued the marina. The boat owner alleged that the marina operator was negligent for placing the yacht at a mooring that was insufficient to ride out the storm. The court disagreed. It found that the mooring was adequate for normal conditions and that there had been no indication in the latest United States Weather Bureau forecast that 70 knot winds were coming. The court found that the marina operator had exercised reasonable care under the circumstances.

Pennington v. Styron[26]

The plaintiff in this case left his 34-foot yacht for winter storage as he had done the previous year. The vessel was kept in the plaintiff's regular boat slip until a larger yacht asked for berthing at the marina. The marina operator put the larger yacht in the plaintiff's regular slip and moved the plaintiff's yacht to a smaller sheltered boat slip. Some time later, a heavy rainfall caused the shelter to collapse onto the plaintiff's yacht and damage it. The court held the marina operator liable for the damage, focusing primarily on the removal of the boat from its regular slip. This created a breach of the bailment contract. The court stated:

> It is generally held that if the bailee, without authority, deviates from the contract as to the place of storage or keeping of the property, and a loss occurs which would not have occurred had the property been stored or kept in the place agreed upon, he is liable, even though he is not negligent.[27]

The marina operator attempted to avoid the effect of this legal principle by claiming that he often moved boats around in the marina and that it was a customary practice to do so. The court, however, was not persuaded. It declared that a custom

must be such that the plaintiff is presumed to know of it even without evidence of his actual knowledge. The court was not convinced that the practice of moving the boats from one slip to another was commonly known to boat owners. Thus, the marina operator had a duty to obtain consent before moving the plaintiff's boat from its regular slip.

Wentz v. Hartge[28]

This case involved the extent of a marina operator's obligation to inspect a boat that had been left for winter storage. The owner of a 44-foot cabin cruiser had winterized the vessel himself before turning over control to the marina operator. The marina operator inspected the boat on a regular basis each day and never noticed any problem. The boat was last inspected at midnight one evening and was found almost sunk the following morning.

The owner sued to recover damages to the boat, claiming that the marina operator should have noticed the unblocked exhaust pipes and realized that the condition might cause water to enter the bilges if not corrected. However, the court found the absence of wooden plugs in the exhaust pipes to be of no particular significance since there was no general custom to have such plugs. The evidence was not conclusive that the unplugged pipes were the only cause of the sinking, if any cause at all. The court did not think the marina operator's duty to inspect the boat included an obligation to open hatches and look for water in the bilges if there was no outward indication that water was accumulating. The fault for the sinking was improper winterizing by the plaintiff and not negligence by the marina operator.

Gelb v. Minneford Yacht Yard[29]

A yacht owner informed a marina operator that he was trying to sell his yacht but if he was unsuccessful in getting a buyer he wanted the boat placed in the marina yard for winter storage. The marina operator urged the owner to request storage soon because otherwise he would be far down the list of persons whose boats were to be stored and would have a long delay before the yacht could be hauled out of the water.

The yacht owner subsequently requested that the boat be stored. While awaiting its turn for storage preparations, the boat was regularly inspected by marina employees, additional mooring lines were added and on one occasion it was pumped out. The marina operator often made evening inspections of the boats in the marina as well. The yacht was found one morning to have sunk for unknown reasons.

The owner sued the marina operator for the loss of his yacht, but the case was dismissed. The court held that the length of time that the yacht remained in the water was reasonable and that the plaintiff had notice of the delay. It also held that the evidence showed diligent care by the marina operator in checking the boat, adding lines and pumping it out. These facts overcame any presumption that the sinking of the yacht was caused by the marina operator's negligence.

Fireman's Fund American, Inc. v. Capt. Fowler's Marina, Inc.[30]

Plaintiff's yacht was stored outside in the defendant's boatyard. One evening, a fire broke out on a boat that was stored beside the plaintiff's yacht and the fire soon engulfed both vessels. The evidence showed the marina did not have a night watchman, there was no water on the premises, and there were apparently few, if any, fire extinguishers available. It should be rather obvious that the marina owner did not exercise ordinary care toward the plaintiff's yacht under these circumstances. The case is worth noting, nonetheless, for two propositions utilized by the court.

First, the court found a bailment to exist despite the fact that the plaintiff was permitted to come onto the boatyard premises at any time to work on his boat. The contract that was used by the parties provided that the plaintiff could not bring others onto the premmises without special permission, that all materials needed by the plaintiff would be purchased from the boatyard, and the boat could not be removed without the defendant's permission. Under these circumstances, the court did not consider free access to the yacht to affect its finding that the boatyard owner had sufficiently exclusive possession and control to create a bailment.

The second proposition of importance was the court's use of the "Fire Protection Standards for Marinas and Boatyards" published by the National Fire Protection Association as a general guideline for judging the reasonableness of the defendant's conduct. The court cited section 101(a) of the publication which states that marina owners are expected to provide "necessary equipment to control the spread of fire"; section 102 which recommends "adequate water supply for fire fighting"; and section 103 which instructs marina owners to locate "portable fire extinguishers of approved types and suitable to the hazards and circumstances . . . so . . . that an extinguisher is within 50 feet of any point."[31]

Empire Tool Co. v. Wells[32]

A boat owner had a marina take his boat out of the water and place it on a cradle for storage. The boat owner did some work on the boat for a while and made monthly visits to the marina to check on it. All the while, he paid storage fees to the marina. The marina was sold to another company but no notice of the change in ownership was given to the boat owner and his storage payment receipts continued to refer to the marina by the same name. When the boat owner finally took back possession of his boat he discovered missing items and damage. The boat owner sued both the first and the second marina owners and a judgment was awarded in his favor against both. The new owner of the marina brought an appeal.

On appeal, the new marina owner claimed that he could not be held liable for the boat's damaged condition because the boat owner had not proven that the boat was delivered to the new owner in a better condition. The boat owner had only proven that he had delivered the boat to the first owner in better condition. The appellate court was not persuaded and affirmed the lower court's judgment. The appellate court said that when the marina

was purchased, the new owner should have known about the boats that were on its property. When the new owner billed the boat owner for storage, that constituted a constructive or implied acceptance of the bailment of the boat. Because he was thus a bailee, the new owner had a duty to protect and account for the boat. He had the same obligations as the original bailee unless he terminated the bailment by notifying the boat owner and giving back possession of the boat. Since he did not notify the boat owner, he could not avoid liability for the harm done.

2. Applicability of the Uniform Commercial Code

In most states, the general standard of care, burden of proof and opportunity to limit liability in warehousing situations is governed by the Uniform Commercial Code (UCC). Florida has adopted the UCC with only minor changes. Article 7, which deals with warehousing, is codified in Chapter 677 of the Florida Statutes. A marina operator who stores boats may not think of himself as a warehouse operator, but for UCC purposes he is.

A "warehouseman" is defined broadly in the UCC as "a person engaged in the business of storing goods for hire."[33] In turn, "goods" are defined in such a way that yachts and other pleasure boats would be included.[34] Storage does not have to be inside a building to make a warehouseman out of a marina operator. Even outdoor storage of boats is sufficient since the definition of warehouseman does not mention warehouses.[35]

It is well settled in the law that when goods are stored in a warehouse a bailment is created.[36] If there is any doubt about the relationship, the test of exclusive possession and control is applied. Florida's UCC defines a warehouseman's duty in regard to stored property in the same general way as a bailee's duty:

> A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed upon he is not liable for damges which could not have been avoided by the exercise of such care.[37]

Thus, the degree of care required of a marina operator is not enlarged by the UCC provisions as to warehousemen. His duty is still one of ordinary care under the circumstances.

The applicability of Florida's UCC, however, would allow the court to draw upon prior decisions rendered in cases involving more traditional warehousing situations and apply their principles to boat storage cases. The following factors have been important in UCC decisions examining the sufficiency of warehousemens' protection of bailed goods against fire damage:[38]

a) construction materials used in the warehouse,
b) type of construction,
c) whether fireproof storage was promised,
d) maintenance of the warehouse,
e) methods of disposal of debris,
f) proximity of stored goods to fire hazards,

g) availability of water supply,
h) availability of fire extinguishers,
i) maintenance of fire fighting equipment,
j) security precautions taken, such as use of night watchmen,
k) whether smoking was allowed nearby,
l) what actions were taken to put out the fire.

Similar factors relating to construction and maintenance of storage facilities and security precautions would be applicable to cases involving storm damage[39] and theft.[40]

Of perhaps greater significance to a marina's boat storage operations would be the UCC provisions concerning limitation of liability for damage or loss of stored goods. It is common for a bailment agreement to include a clause limiting the potential liability of the bailee to an amount less than the true value of the bailed property. The Florida UCC allows the practice but requires that the limited liability be specified by a particular sum for each article stored or per unit of weight.[41] A bailee cannot divest himself of all liability for damage or loss of property in his possession. The courts usually find such agreements to be against public policy and will hold the bailee liable despite the no-liability clause.[42] In addition, the right to limit liablity does not apply when goods are stolen by the bailee.[43]

It should be noted that the courts will resolve any ambiguity in the bailment agreement against the party who drafted the agreement.[44] In most situations, that will be the bailee. The following case sketches describe limitation of liability clauses which courts refused to enforce.

Harbor One, Inc. v. Preston[45]

The plaintiff had left his boat with a marina to sell. The consignment contract that was signed by both parties had a provision that stated: "Due to limited physical facilities, the consignee hereby waives all responsibility for theft or any other casualty." When the boat was stolen, the marina relied upon this exculpatory clause to refuse payment to the plaintiff. When the plaintiff sued the marina, the court found the contract language ambiguous and ineffective to relieve the marina from liability.

The provision was ambiguous because it specified that the "consignee" was making the waiver. The court declared that any exculpatory clause should be strictly construed to make its effect as narrow as possible. The ambiguity was resolved in the plaintiff's favor by ignoring the provision altogether.

Fireman's Fund American Insurance Co. v. Boston Harbor Marina, Inc.[46]

A marina fire damaged many of the boats stored in one of the buildings, including the plaintiff's yacht. The storage contract had specified that the boat owner must carry his own insurance and the marina "will not be liable for loss or for damage . . . under any circumstances . . . including fire, theft, vandalism, water damage and any negligent acts or omissions and notwithstanding any asserted or actual breach of this contract."

The marina refused to pay for the yacht's repair and the plaintiff sued.

The court observed that the United States Supreme Court disapproves of exculpatory clauses as generally contrary to public policy in relationships between bailors and bailees.[47] Though the case had to be remanded to the lower court, this court used strong language in its own disapproval of the contract in question and instructed the lower court to presume it to be against public policy unless further evidence proved otherwise.

Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc.[48]

The owner of a yacht signed a contract with a marina to have his boat stored for the winter. The contract provided that "the boat and all the property of the boat is at the sole risk of the boat owner while on the marina premises and [the marina] . . . will not be liable for damage to or loss of said boat and all other property of any kind, no matter how occasioned." A fire that was clearly due to the lack of reasonable safeguards on the part of the marina damaged the yacht. In the litigation that followed, the court held the exculpatory clause violative of the UCC and against public policy.

3. Nonjudicial sale of stored boats

Because it is not uncommon for a boatowner to default on his boat storage payments, many marina operators provide in their written storage contracts that the boat will be sold if payments go unpaid for a specified length of time. This practice is authorized by Florida statute if several conditions are met.[49] First, the nonpayment period must be at least six months. Second, the contract must indicate where notice of the sale should be mailed to the boatowner. Third, the boatowner must be notified by certified mail at least 30 days before the sale is to occur. Fourth, written notice of the sale and a copy of the contract must be sent to the Florida Department of Natural Resources in Tallahassee at least 30 days before the sale. Fifth, the marina must have a notice published in a newspaper in the same county where the marina is located at least ten days before the sale. The notice must indicate the time and place of the sale, a description of the boat and that the sale will be a sale by public auction to the highest bidder.

The Florida Statutes also provide that the boat's sale price must be at least 50% of its fair market value as determined by two independent licensed property appraisers.[50] The marina must hire the appraisers and have their appraisals sent to the Department of Natural Resources at least 30 days before the sale. Any proceeds of the sale which exceed the unpaid storage charges, newspaper publication costs and appraisers' fees must be turned over to the court clerk. These provisions are designed to protect the boat owner. With some inconvenience, they also provide a legal process for the marina to obtain unpaid storage fees. Hopefully, the notice of public sale that must be sent to the boatowner will be all that is necessary in most cases to elicit the desired response.

D. REPAIR

When a boat is left with a marina for repairs, a bailment almost always results. A possible exception applies only when the marina does not have exclusive possession of the boat. That might be that case, for example, when a boat owner works on his boat with the assistance of a mechanic employed by the marina but does not relinquish control. In this situation, the line between bailments and non-bailments can be difficult to draw.

If the repair work agreement does not specify a date upon which the work is to begin or end, reasonable time limits will be assumed by a court if the issue is later raised in litigation.[51] What constitutes reasonableness for time limits or other matters will vary from one situation to another and may depend in part on the customary practices of marinas in the region.[52]

Whether specified by contract or not, it would be unusual for the repairs to begin immediately after the boat is delivered or be completed the same day. The boat will more likely spend a few days awaiting repair and awaiting redelivery to the owner. The law treats this time in the same manner as storage agreements generally -- as a bailment. Therefore, the duty of the marina operator to protect a boat left for repairs is greater than his duty toward a boat for which only slip rental is paid.

The legal principles discussed in the previous section in the context of agreements for boat storage are equally applicable to the standard of care required of a marina operator asked to repair a boat. The following case sketches illustrate storage responsibilities arising in conjunction with repair bailments. It should be noted that marina owners may not only be subject to liability under bailment theory, as illustrated by the following cases, but also for negligently performed work on boats brought in for repair. Only bailment liability is discussed in this section. Liability for defective work is covered in the section on torts.

Erlbacher v. Republic Homes Corp.[53]

The plaintiff's yacht ran aground in the Mississippi River and was towed to defendant's boatyard where the damage was repaired. Two days before plaintiff was to pick up the yacht, the defendant inspected it to determine what final cleaning would be necessary. He had two employees begin scrubbing down the decks. He did not check the engine compartment even though he knew that an open-face heater had been placed between the engines to prevent them from freezing up and that the compartment had been closed for a long time.

Later, one of the laborers washing the decks heard the engine running, smelled strong fumes, and saw some liquid spewing in the vicinity of a small motor. The laborer left the yacht to tell the foreman what he had seen. The foreman instructed the laborer to turn off the yacht's electrical power, but he did not accompany the laborer even though he knew the man was inexperienced

with boats. While the laborer was searching for the shut-off switch in the wheelhouse, the yacht exploded and burned.

In the litigation that followed, the court dismissed the boatyard's contention that the bailment created when the yacht was delivered for repairs ended at the completion of the repair work. The bailment continued and required the boatyard and its employees to exercise ordinary care in protecting the yacht. The court found the boatyard negligent for its failure to adequately inspect the yacht under the circumstances, and for allowing an inexperienced employee to be responsible for an emergency situation.

Aetna Life & Casualty Co. v. Stan-Craft Corp.[54]

Plaintiff's twenty-seven foot sailboat was delivered to a marina for repairs. The sailboat was placed in the repair shop to await repairs and was destroyed by a fire of unknown origin. The plaintiff sued the marina for negligence. The fire was discovered a half hour after the last employee had gone home. The shop was left unattended and unlocked. In addition, there was flammable gasoline and paint thinner in open cans in the work area and a pile of swept-up wood chips, sawdust and greasy rags on the floor. Cigarette smoking was permitted in the repair shop as well. The court determined that these conditions created a fire hazard and were sufficient to make the marina liable for the destruction of the plaintiff's sailboat.

E. CONCLUSION

Marina operators may be subject to liability for damages arising to property left on the marina premises. Whether or not the operator or owner will be liable may depend on the standard of care imposed by the reviewing court. If a bailment arises between the parties then the marina operator must exercise the ordinary level of care a reasonable, prudent operator would exercise under the circumstances. In the absence of a bailment, the operator owes the boat owner no duty to exercise ordinary care but only a duty to refrain from doing any affirmative act which causes damage to the boat. Whether or not a bailment relationship arises is significantly determined by whether the marina operator is given exclusive possession of the boat. While a bailment relationship may be necessary or desirable for business reasons in many situations, marina operators should be aware of the additional responsibilities that are imposed by law.

II - NOTES

1 Maulding v. United States, 257 F.2d 56 (9th Cir. 1958); Dunham v. State, 192 So. 324 (Fla. 1939).

2 Hollander v. Nolan Brown Motors, Inc., 272 So. 2d 9 (Fla. 3rd D.C.A. 1973).

3 See Freuhauf Corp v. Aetna Ins. Co., 336 So. 2d 457, 459 (Fla. 1st D.C.A. 1976).

4 Stegemann v. Miami Beach Boat Slips, Inc., 213 F.2d 561 (5th Cir. 1954); Marine Office-Appleton & Cox Corp. v. Aqua Dynamics, Inc., 295 So. 2d 370 (Fla. 3rd D.C.A. 1974).

5 Gelb v. Minneford Yacht Yard, Inc., 108 F.Supp. 21 (S.D.N.Y. 1952).

6 See Noonan Constr. Co. v. Federal Barge Lines, Inc., 453 F.2d 637, 640-41 (5th Cir. 1972).

7 Moseley, Marina and Vessel Repair Facilities: Liability and Insurance, 6 J. Mar. L. & Com. 621, 625 (1975).

8 Foremost Ins. Co. v. Blue Streak Enterprises, Inc., 353 So. 2d 430 (La. App. 1978).

9 178 A.D. 666, 165 N.Y.S. 883 (N.Y. App. 1917). Similar facts and holdings may be found in Marino v. Gagliano, 50 Misc. 2d 499, 270 N.Y.S. 2d 934 (Sup. Ct. 1966).

10 284 F. Supp. 353 (E.D. La. 1968).

11 175 So. 2d 46 (Fla. 3rd D.C.A. 1965).

12 495 P.2d 512 (Ariz App. 1972).

13 Bailments may also be undertaken for the benefit of one of the parties. See 5 Fla. Jur. 2d, Bailments §3 (1978).

14 Sellick v. Clipper Yacht Co., 386 F.2d 114 (9th Cir. 1967).

15 Mack v. Davidson, 55 A.D.2d 1027, 391 N.Y.S. 497 (N.Y. App. 1977).

16 8 Am. Jur. 2d, Bailments §171 (1980).

17 See Sellick v. Clipper Yacht Co., 386 F.2d 114, 116 (9th Cir. 1967).

18 See Pennington v. Styron, 153 S.E.2d 776, 779-80 (N.C. 1967).

19 3 Am. Jur. Legal Forms 2d, Boats and Boating, 677 (1973).

20 Moseley, supra note 7, at 628.

21 See e.g., Marine Office-Appleton & Cox Corp. V. Agua Dynamics, Inc., 295 So. 2d 370, 370-71 (Fla. 3d D.C.A. 1974); Harbor One, Inc. v. Preston, 172 So. 2d 478, 478 (Fla. 3d D.C.A. 1965). Storage bailments as an aspect of a bailment for repairs is treated in Section D, infra.

22 See Harbor One, Inc. v. Preston, 172 So. 2d 478, 479 (Fla. 3d D.C.A. 1965).

23 See Employers Fire Ins. Co. v. Laney & Duke Storage Warehouse Co., 392 F.2d 138, 139-40 (5th Cir. 1968); Fireman's Fund American Ins. Co. v. Captain Fowler's Marina, Inc. 343 F.Supp. 347,350-51 (D. Mass 1971).

24 See Iron City Sand & Gravel Div. of McDonough Co. v. West Fork Towing Corp., 440 F.2d 958 (4th Cir. 1971); Buntin v. Fletchas, 257 F.2d 512 (5th CIr. 1958).

25 302 F.Supp. 282 (D. Maine 1969).

26 153 S.E. 2d 776 (N.C. 1967).

27 Id., at 779, citing 8 Am. Jur. 2d, Bailments §191.

28 132 F.Supp. 527 (D.Md. 1955).

29 108 F.Supp. 211 (S.D.N.Y. 1952).

30 343 F.Supp. 347 (D. Mass. 1971).

31 Id., at 350. See also Employers Fire Ins. Co. v. Laney & Duke Storage Warehouse Co., 392 F.2d 138, 139-40 (5th Cir. 1968) (where the court took judicial notice of the FLorida Fire Prevention Code and the City of Jacksonville Ordinance Code to provide a standard for the defendant's conduct in a warehouse fire).

32 227 So. 2d 76 (Fla. 4th D.C.A. 1969).

33 Fla. Stat. §677.102(1)(h) (1981).

34 Id., §677.102(1)(f).

35 "The fact that storage in the instant case was out-of-doors rather than in a warehouse or similar structure does not mean that the bailee was not a 'warehouseman' since, regardless of where he keeps them, he is a person engaged in the business of storing goods for hire." Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F.Supp. 347, 350 (D.Mass. 1971).

36 78 Am. Jur. 2d, Warehouses, §25 (1975).

37 Fla. Stat. §677.204(1) (1981).

38 Annot., 2 A.L.R. 3d 908 (1972).

39 See Annot., 43 A.L.R. 3d 607 (1972).

40 See Marine Office-Appleton & Cox Corp. v. Aqua Dynamics, Inc., 295 So. 2d 370 (Fla. 3d D.C.A. 1974).

41 Fla. Stat. §677.204(2) (1981).

42 See Bisso v. Inland Waterways Corp., 349 U.S. 85,90 (1955); Fireman's Fund American Ins. Co. v. Boston Harbor Marina, Inc., 406 F.2d 917, 920-22 (1st Cir. 1969); Fireman's Fund American Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F.Supp. 347, 349-50 (D. Mass. 1971).

43 Fla. Stat. §677.204(2) (1981).

44 See Harbor One, Inc. v. Preston, 172 So. 2d 478, 479 (Fla. 3d D.C.A. 1965).

45 172 So. 2d 478 (Fla. 3d D.C.A. 1965).

46 406 F.2d 917 (1st Cir. 1969).

47 Id. at 920 (citing Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); S.W. Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Dixilyn Drilling Corp., 372 U.S. 697 (1963)).

48 343 F.Supp. 347 (D. Mass. 1971).

49 Fla. Stat. §328.17 (1) (1981).

50 Id. §328.17(2).

51 See Stovall Tire & Marine Inc., v. Fowler, 217 S.E. 2d 367 (Ga. App. 1975)

52 See e.g., Niagra Fire Ins. Co. v. Dog River Boat Service, Inc., 187 F.Supp. 528 (S.D. Ala. 1960) (fire precautions taken by the defendant were compared to other boathouse operations in the region); Grabbert v. Marina Parks, Inc., 221 A.2d 455 (R.I. 1966) (continuation of a bailment after the repair of a boat was treated as a customary practice).

53 263 F.2d 217 (8th Cir. 1959).

54 499 P.2d 776 (Mont. 1972).

III - THE APPLICABILITY OF ADMIRALTY LAW TO RECREATIONAL MARINA OPERATIONS

A. INTRODUCTION

Admiralty or maritime law has ancient roots. It began and has developed with European shipping. Most simply defined, admiralty law is the body of statutes, regulations and judicial doctrines that govern matters concerning ships and shipping. It is a specialized system of law superimposed upon the common law and superceding state law wherever there is a conflict.[1]

The United States Constitution provides that the "judicial power of the United States" extends to all cases of admiralty and maritime jurisdiction.[2] Since this clause is not self-executing, a more specific grant of admiralty jurisdiction was made in the Judiciary Act of 1789.[3] The Judiciary Act, in ambiguous language, gave to the federal district courts exclusive jurisdiction over admiralty claims but "saved to suitors, in all cases, the right of a common law remedy."[4] This so-called saving to suitors clause has been judicially interpreted to mean that admiralty claims can be brought in federal or state courts,[5] with the exception of claims involving maritime liens[6] based on particular federal statutes that require federal admiralty jurisdiction.[7]

A number of significant federal statutes have been passed to supplement or supplant judicial admiralty law doctrines. These include the familiar Jones Act[8] and the Longshoreman's and Harbor Workers' Compensation Act.[9] Each legislative enactment has contributed to the complexity and uniqueness of admiralty law.

B. WHEN ADMIRALTY LAW APPLIES

The reach of admiralty jurisdiction has been the subject of much comment and controversy for at least one hundred years. Generally, the issue has revolved around the sorts of activities that are maritime in nature and the places where they occur. In the great majority of cases, the question of whether admiralty law will govern the rights and liabilities of the parties is an easy one. Legal actions involving commercial vessels and seamen on the high seas are nearly always subject to admiralty law; actions involving dry land and landlubbers -- almost never. Recreational marinas, catering to non-commercial vessels and located at the water's edge, fall somewhere in between.

The "locality test," as articulated in the mid-nineteenth century declared that only offenses occurring upon navigable waters were within admiralty jurisdiction.[10] The definition of navigable waters most often cited by the courts emphasized that they were waters actually used or susceptible of being used for commercial trade and travel.[11] A modern treatise on admiralty law offers a more specific definition:

> [T]he admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.[12]

Even navigable privately owned waterways may be within admiralty jurisdiction if connected to a commercial waterway.[13] Under these guidelines many incidents occurring on the waters of a marina would meet the test and could be the subject of admiralty law.

Strict application of the locality test, however, has brought under admiralty jurisdiction many incidents whose only relationship to traditional maritime concerns has been the fact that they occurred on the water. Admiralty law has been applied in a case involving the injury of a swimmer by a surfboard[14] and in many waterskiing accidents.[15] Application of admiralty law in these types of cases has been severely criticized by many jurists and legal commentators.[16]

A doctrine sometimes referred to as the "locality-plus" or "maritime nexus" test has been developing as an attempt to circumscribe the limits of admiralty jurisdiction.[17] Under this test, an incident must not only occur on navigable waters, but it must also bear a significant relationship to traditional maritime activity.[18] The majority of cases applying the new test in the pleasure boat context have held that admiralty law applies.[19] Although there is some reluctance to apply admiralty law to water skiing accidents,[20] admiralty jurisdiction has been found where a skiier struck a partially submerged barge.[21] The Fifth Circuit, which had jurisdiction over appeals from Florida, has gone so far as to extend admiralty jurisdiction to a case in which the driver of a fifteen foot boat was shot from the shore of an island hunting preserve from which he was fleeing and on which he had been poaching deer.[22] An incident occurring literally on navigable waters, such as a slip and fall on a floating dock, but without significant maritime connection, would probably be subject to state law rather than admiralty.

Although the law is clearly unsettled, there is no question that many aspects of pleasure boat ownership and recreational marina operations come within the purview of traditional maritime activities.[23] Admiralty law can thus govern such issues as the chartering of boats,[24] marine insurance,[25] wrongful death,[26] product liability claims,[27] maritime liens,[28] and oil spills and their ensuing damages.[29]

C. THE SIGNIFICANCE OF APPLYING ADMIRALTY LAW

Once it has been determined that a legal claim is within admiralty jurisdiction, federal admiralty law will govern the rights and liabilities of the parties involved. Even when the

suit is brought in a state court, federal admiralty law is controlling and cannot be contradicted by state statute or judicial ruling.[30] The difference is frequently unimportant. In many admiralty law cases, the substantive principles that determine the rights and liabilities of the parties are governed largely by the same legal principles used in a non-admiralty civil suit. However, when clear precedents are lacking in admiralty law, a court will look to other sources, including state law, for a appropriate rule to apply.[31] One commentator discerns a "trend toward permitting a broader application of state law in admiralty matters, at least where small, non-commercial vessels are involved. . . ."[32] State law has been allowed to supplement federal admiralty law in only a few areas.

Nevertheless, in many cases "the judicial determination of whether a case is at law or in admiralty may largely determine the outcome of the suit and the relative liabilities of the parties."[33] Many legal principles and federal liability and compensation statutes are peculiar to admiralty law. The concepts of limitation of liability, maritime liens, salvage, maintenance and cure, and unseaworthiness, for example, are not found outside the admiralty practice. In addition, there are procedural aspects of a suit in admiralty that differ markedly from other types of civil actions. The legal principles derived from admiralty law and the effect upon the rights and responsibilities of marina operators will be discussed in the sections covering specific areas of potential liability.

[1]Sovel, Determining the Applicable Law in Cases Arising in State Territorial Waters, 37 Temple L.Q. 479, 482 (1964). "There is nothing forbiddingly esoteric about admiralty law. It is just law, in a special factual setting." G. Gilmore & C. Black, The Law of Admiralty 46 (2d ed. 1975).

[2]U.S. Const. art. III, §2.

[3]1 Stat. 76, ch. 20 (1789); 28 U.S.C. §1331 (1976).

[4]Id. This language was revised in 1949 to read "saving to suitors, in all cases, all other remedies to which they are otherwise entitled." 28 U.S.C. §1333 (1976). The Supreme Court has treated the revision as constituting no substantive change in the law. Madruga v. Superior Ct. of Calif., 346 U.S. 556, 560 n. 12, (1954).

[5]Caldarola v. Eckert, 332 U.S. 155 (1947); Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303 (1915).

[6]See, The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1866).

[7]E.G., Death on the High Seas Act, 46 U.S.C. §§761-768 (1976); Ship Mortgage Act, 46 U.S.C. §§911-984 (1976).

[8]38 Stat.1164, §33 (1915); 46 U.S.C. §688 (1976).

[9]44 Stat. 1424 (1927); 33 U.S.C. §§ 901-950 (1976).

[10]The Plymouth, 70 U.S. (3 Wall.) 20, 33-34 (1865).

[11]The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). More recently stated in Davis v. United States, 185 F.2d 938, 943 (9th Cir. 1950).

[12]G. Gilmore & C. Black, supra note 1, at 31-32.

[13]Dagger v. U.S.N.S. Sands, 287 F. Supp. 939 (D.W.Va. 1968); c.f., Chapman v. United States, 575 F.2d 147 (7th Cir. 1978)(non-navigable waters).

[14]Davis v. City of Jacksonville, 251 F. Supp. 327 (M.D.Fla. 1965).

[15]See, e.g., King v. Testerman, 214 F. Supp. 335 (E.D.Tenn. 1963).

[16]"Ideally, the jurisdiction ought to include those and only those things principally connected with maritime transporation." G. Gilmore & C. Black, supra note 1, at 31. "Most circuit courts, upon looking for a maritime relationship in pleasure boating, have interpreted traditional maritime activity to include all occurrences involving the navigation of

vessels. This definition, however, does not adequately consider the history and function of admiralty courts in exercising jurisdiction over maritime shipping and commercial trade." Note, Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard, 34 Wash. & Lee L. Rev. 121, 139 (1977). "To invoke federal admiralty jurisdiction and the substantive maritime law for a claim arising from recreational boating is to confuse form with substance." Note, Admiralty Jurisdiction: Pleasure Craft and Maritime Nexus, 12 Cal. W.L. Rev. 535, 543 (1976). See also, Note, Admiralty Jurisdiction Over Pleasure Craft Torts, 36 Md. L. Rev. 212 (1976).

[17]The locality-plus test is derived principally from Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972). "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." Id., at 268.

[18]See generally Note, Admiralty Jurisdiction Requires Both a Maritime Locality and a Substantial Maritime Connection, 52 Tex. L. Rev. 114 (1973).

[19]Courts applying admiralty law to cases involving pleasure boats include: Levinson v. Deupree, 345 U.S. 648 (1953); Coryell v. Phipps, 317 U.S. 406 (1943); St. Helaire v. Henderson, 496 F.2d 973 (8th Cir. 1974); Kelley v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974); Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971); Rowe v. Brooks, 329 F.2d 35 (4th Cir. 1964); Armour v. Gradler, 448 F. Supp. 741 (W.D.Pa. 1978); Gilmore v. Witschovek, 411 F. Supp. 491 (E.D.Ill. 1976); Kayfetz v. Walker, 404 F. Supp. 75 (D.Conn. 1975); Brown v. United States, 403 F. Supp. 472 (C.D.Cal. 1975); Banchi v. Miller, 388 F. Supp. 645 (E.D.Pa. 1974). Courts refusing to apply admiralty law to cases involving pleasure boats include: Adams v. Montana, 528 F.2d 437 (9th Cir. 1975); Richardson v. Foremost Ins. Co., 470 F. Supp. 699 (M.D.La. 1979); Dailey v. United States, 1981 A.M.C. 1418; Vann v. Willie, 1978 A.M.C. 936; Roberts v. Grammer, 432 F. Supp. 16 (E.D.Tenn. 1977).

[20]See Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 255-56 (1972); Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973); Jorsch v. LeBeau, 449 F. Supp. 485 (N.D.Ill. 1978); Webster v. Roberts, 417 F. Supp. 346 (E.D.Tenn. 1976). But c.f., Complaint of Rowley, 425 F. Supp. 116 (D. Idaho 1977) (pleasure boat towing skiier that struck swimmer was subject to admiralty jurisdiction).

[21]Kaiser v. Travelers Ins. Co., 359 F. Supp. 90 (E.D.La. 1973).

[22]Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973). The court analyzed four factors in addition to locality: (1) the function

and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) the traditional concepts of the role of admiralty. Id at 525.

[23]"The marina [is] a commercial enterprise with an obvious and important connection with navigation." Re Colquitt, 1975 A.M.C. 981, 986. But see, Dailey v. United States 1981 A.M.C. 1418, 1424 (marina negligence must relate to proper navigation of vessels and tend to endanger other craft using navigable waterway).

[24]Morewood v. Enequist, 64 U.S. (23 Haw.) 491 (1860); O'Donnell v. Latham 525 F.2d 650 (5th Cir. 1976).

[25]Ins. Co. v. Sunham, 78 U.S. (11 Wall.) 1, 30-35 (1871).

[26]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

[27]Schaeffer v. Mich.-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969).

[28]The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866).

[29]Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973).

[30]See, e.g., Madruga v. Superior Ct., 346 U.S. 556 (1954). Northern Coal & Dry Dock Co. v. Strand, 278 U.S. 142 (1928). Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[31]See Madruga, note 30, supra; Wilburn Boat Co. v. Fireman's Mutual Fund Ins. Co., 348 U.S. 310 (1954); Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963).

[32]Sovel, note 1, supra, at 484.

[33]Whipple, Recreational Boating Law in Wisconsin, 61 Marq. L. Rev. 425, 446 (1978).

IV - CHARTER SERVICE

A. INTRODUCTION

In addition to boat docking, storage and repair services, small pleasure craft rentals or "boat liveries" are a common part of Florida's recreational marinas. Many marinas also own sport fishing and excursion boats operated on a regularly scheduled basis or by special arrangement. Both services are a type of charter but are treated differently under the law.[1]

When boats are rented in the same manner as one normally rents cars, the rental agreement is known as a "bareboat" or "demise" charter. To create a bareboat charter, the vessel owner must completely and exclusively relinquish possession, command, and navigation to the charterer.[2] The charterer is responsible for all operating expenses. The charterer receives nothing but the boat; thus the name "bareboat".

The operation of sport fishing, excursion, sightseeing or diving boats, where a passenger fee is paid, is a "time" charter. In the case of a time charter, the boat owner selects the crew and pays all operating expenses. The charterer has little to no control over the boat's operation.[3]

The various charter agreements are maritime contracts and thus are governed by admiralty, rather than state, law.[4] In most respects, admiralty law contract rules are identical to rules applied to any contract.[5] A valid charter agreement, termed a "party",[6] does not have to be in any particular form. In fact, it does not even have to be in writing. An oral charter agreement may be valid and enforceable.[7] Nevertheless, it is always advisable to use a written charter party to ensure that the terms of the agreement are clear.

B. BAREBOAT CHARTERS

Because a bareboat charterer takes complete possession and control of the rented boat, he is treated legally, in several aspects, as if he were the boat owner. The legal term for his status is "owner pro hoc vice" which means the owner for one particular occasion.[8]

1. The Doctrine of Seaworthiness

The primary legal obligation of boat owners under bareboat charters is furnishing a seaworthy vessel to the charterer or renter. This obligation is implied by law. There does not have to be a contract clause or agreement placing this responsibility on the boat owner.[9] A vessel is seaworthy when it is reasonably fit for its intended use.[10] That means it is structurally sound and adequately equipped for proper use of the boat by the charterer.

The doctrine of seaworthiness creates a liberal basis for finding boat owners liable for personal injuries and property losses caused by a defective vessel. The owner will be liable even though he was unaware of the defect, whether or not he made a careful inspection of the boat before renting it. In other words, the boat owner does not

have to be negligent to be liable. As long as the injury or damage is caused by the vessel's unseaworthiness, the owner is responsible.[11]

There is authority for the proposition that a boat owner will not be liable for the boat's unseaworthiness if the unseaworthy condition should have been noticed by the charterer.[12] Thus, charterers cannot place all of the blame on boat owners for damages occurring when the boat sinks, if a reasonable inspection of the hull would have revealed it was leaking badly. The best approach for the owner, of course, is to routinely make his own careful inspection before the boats are rented.

Only charterers and crew members are entitled to claim unseaworthiness as a basis for liability. The duty does not extend to passengers and the charterers' guests.[13] Even a single paid hand on a pleasure boat, however, is regarded as a seaman and entitled to all the benefits afforded seamen by admiralty law, including the right to a seaworthy vessel.[14]

A vessel is also unseaworthy when it is operated without a sufficiently large crew or is operated by an incompetent crew.[15] These grounds for liability are inapplicable when boats are rented on a bareboat charter basis, however, since the bareboat charterer is responsible for his own crew. The situation is different in the case of time charterers, as will be discussed below.

2. The Boat Owner's Duty to Other Members of the Boating Party

Although the charterer's guests cannot sue the boat owner under the doctrine of unseaworthiness for defective vessel conditions causing injury, they can sue on negligence grounds.[16] A negligence claim is more difficult to prove than an action based on unseaworthiness. For example, a defect in a boat engine making it likely to fly apart would clearly make the boat unseaworthy. Yet, if the defect were impossible to detect, the boat owner would not be negligent for failing to discover and correct it. Often, however, the unseaworthy condition of a boat may be traced to the boat owner's negligence.

In a Washington case,[17] an eighteen-foot plywood boat was rented to a man and his three companions. Soon after they set out in the boat, water began to collect in the cockpit. While attempting to change positions so as to raise the stern slightly, three persons were pitched into the water. One person drowned. The boatyard was held liable for negligent failure to inspect the boat before renting it. The court found that a reasonable inspection would have revealed that a previously patched area of dry rot in the hull would probably leak. The fact that the passengers caused the boat to pitch them out did not alter the owner's liability because it was the leak that made them react as they did.

A Florida case[18] involved a boat rental operator who rented an eighteen-foot inboard motorboat to a man and his freinds which later exploded and burned to the waterline. Apparently, the explosion was caused by sparks from the engine that ignited fumes in the engine compartment. The charterer brought a claim for unseaworthiness that was successful because the engine compartment was found to be improperly ventilated, which allowed gasoline fumes to accumulate. The injured passengers also brought successful negligence claims for the boat owner's failure to properly inspect the boat and correct the ventilation problem.

The owner of the boat rented on a bareboat or demise charter basis is not responsible for the charterer's negligence.[19] Because he is not the an employer or partner, the charterer's negligence cannot be imputed to the boat owner. The boat charterer is solely liable if, for example, he became intoxicated and caused the boat to collide with a buoy at high speed, injuring his passengers.[20]

3. The Charterer's Duty to His Passengers

This report is directed to informing marina owners and operators of the legal aspects of recreational marina operations. The bareboat charterer's duty toward passengers will not be examined in detail. Generally, operators owe passengers a duty to exercise ordinary care under the circumstances.[21]

4. The Bareboat Charter as a Bailment

In the section of this report examining the law of bailments, a bailment is described as temporary relinquishment of exclusive possession and control of property by its owner to another, with the understanding that the property will be returned or otherwise accounted for. When one rents a boat under a bareboat agreement, a bailment is created.[22] As a general rule, the boat charterer or renter must return the boat in the same condition as he received it, and is liable for repair costs and damaged equipment.[23]

The requirement that boats be returned in the same condition is subject to an exception for normal wear and tear. In a case from Louisiana, the cracked cylinder head of a boat engine was held to be the result of normal wear and tear.[24] The difficulty of proving that engine mishaps are due to negligent operation of a boat should be obvious. Unless the evidence is clear and the cost of repair high, suits to recover monetary damages from renters would probably not be worthwhile.

5. Limitation of Liability

a. The Limitation of Liability Act

Title 46, section 183(a) of the United States Code permits a vessel owner to limit liability for damage claims arising from vessel operation to the remaining value of the vessel if the damage occurred without the vessel owner's privity or knowledge.[25] This provision applies to small pleasure crafts as well as large commercial ships.[26] In the case of "seagoing vessels", the owner's liability for death and personal injury may only be limited to $60 per ton, to be distributed among the claimants.[27] The statute, however, specifically excludes pleasure yachts from this category.[28]

Operation of the limitation rule can be illustrated using a hypothetical boating accident. Suppose a fire breaks out aboard a yacht and destroys the belongings of two passengers. One suffers damages of $2,500, the other $7,500. The hull is ruined but the engine can be salvaged and has a value of $1,000. If the owner qualifies for limitation of liability, he will only have to pay $1,000 to the claimants instead of $10,000 in claims.[29] This federal statute, therefore, has a tremendous impact on the potential liability of boat charter operators.

The focus of most litigation involving a boat owner's limitation of liability claim is whether the owner had privity or knowledge of the condition causing the accident. The burden is on the boat owner

to prove a lack of privity or knowledge.[30] In the context of a bareboat charter arrangement, the issue almost always concerns whether the owner knew of an unseaworthy condition. If the owner rented a boat that he knew or should have known was unseaworthy, he will not be able to invoke the Limitation of Liability Act.[31]

A recent case involved the limitation claim of a recreational marina owner that did not relate to seaworthiness.[32] The marina rented motorboats on an hourly basis to the public. Dockhands employed by the marina were permitted to use rental boats from time to time without charge, but only with the marina manager's permission. A fifteen-year-old dockhand took one of the rental motorboats without permission and collided with another boat. The court ruled the marina was negligent for entrusting the keys to the marina and boats to an inexperienced fifteen-year-old. Because the owner was aware of the situation, he could not assert that he was without privity or knowledge for purposes of the Limitation of Liability Act.

If the marina owner, in the case just discussed, had not known that his manager had hired the young dockhand or that the manager had entrusted the keys to the boy, the owner would probably still have been liable. That is because the requisite privity or knowledge may sometimes be imputed to the boat owner when his employees knew or should have known of the condition causing the accident.[33]

Courts have imputed employee knowledge to boat owners only when the employee holds a high position, such as marina manager or corporate officer.[34] The acts or knowledge of a dockhand or similar employee would, therefore, not invalidate an owner's limitation of liability claim.[35] Some courts have been willing to impute the knowledge of lesser employees to the owner and treat the issue as a question of fact under the circumstances.[36] The reasonable course of action for a marina owner to minimize liability is to hire competent supervisory people and keep informed about marina operations.

The Limitation of Liability Act is not only available to the boat owner, but also to bareboat charterers. Because a bareboat charterer becomes the "owner pro hoc vice" during the period of the charter, he may limit liability when he is without privity or knowledge of a condition causing personal injury or property damage.[37] If a person rents a motorboat and destroys it and injures passengers, he can possibly limit his liability to the boat value after the accident -- perhaps zero. Not only will the passengers not be able to collect for injuries, but the boat owner will not be compensated for the loss of the boat.

b. Exculpatory Clauses in the Charter Agreement

As was previously stated, a warranty of seaworthiness is contained in every charter, whether expressly provided or implied under maritime law. Can boat owners contract away this warranty or potential liability for negligence? A federal case from Florida indicates that it may be possible, but a clear and fair agreement between boat owner and charterer is required. In Rothman v. U-Steer-It, Inc.,[38] a boat was rented which later exploded because of unseaworthiness. The boat owner had utilized a bareboat charter that was probably copied from a commonly used standard form. The charter provided that the renter agreed to protect the owner from any and all liability arising from any present, future or latent defects of the boat. It stated that the renter had inspected the boat and found it in excellent condition. It

also waived the right of the renter or anyone in his boating party to sue the boat owner.[39]

The court's opinion began by declaring the rule that contract provisions that seek to limit liability are to be strictly construed against limitation. Despite the wording and the fact that the charterer signed the agreement, the court refused to enforce it. First, as to the waiver of liability for unseaworthiness, the Rothman court found that even "if it can be done at all" the release must be clearly spelled out in such a way as to get the charterer's attention.[40] It must also be in specific, rather than general, terms. Because the charterer could not have found the unseaworthy condition without removing the boat flooring, the fact that he was supposed to have made an inspection of the boat did not relieve the owner of liability for the concealed condition.

The court also ruled that the injured guests were not prohibited from suing the boat owner for negligence because of a provision in an agreement signed by the charterer. The contract between the owner and charterer cannot limit the legal rights of others.[41]

c. Florida Statute §327.54

Section 327.54 of the Florida Statutes sets out a number of requirements imposed on persons renting boats to the public. These requirements are basic and are what good common sense would require without such a law. Importantly, however, Section 327.54(4) provides that if a boat owner is in compliance with the statute, he will be exonerated from liability for any accident or injury occurring while the boat is rented.

Section 327.54 provides that a boat livery operator may not knowingly rent a boat if too many persons intend to use it; if the horsepower of the motor exceeds the capacity of the boat; if the boat does not contain Coast Guard approved life-saving devices for each passenger; if it has no suitable anchor; if it does not have appropriate paddles or oars; or, if it is otherwise unseaworthy.[42] The last factor, of course, is the most difficult to ascertain. The statute also requires that boat rental service operators wait until the last boat has returned before closing operations. Missing boating parties must be promptly reported to the authorities.[43]

6. Bareboat Charter Provisions

It was previously mentioned that a valid bareboat charter does not have to be in any particular form. Nevertheless, it would be wise to use written contracts expressly outlining the responsibilities of the boat owner and charterer as to a number of elements that can easily become sources of controversy later.

It is a good idea to declare at the beginning of the written agreement that the arrangement between the parties is a bareboat charter. This should be accomplished not merely by use of the words "bareboat charter" but also by a clear statement that possession and command of the boat is placed exclusively in the charterer. For example:

> This agreement is a demise charter and the owner maintains no control over the charterer's use except as set forth herein. Therefore, the charterer shall indemnify the owner for all liabilities that arise or

> are connected with the charterer's operation of the vessel.

The sample provision states that the owner asserts no control over the boat "except as set forth herein." Several minor limitations can be placed on the charterer's boat use without changing the agreement's bareboat status. The most commonly used restrictions relate to the type and place of boat use. The owner can restrict the use of the boat to pleasure use. He could also prohibit racing or use by more than a specified number of persons. In addition, the boat owner may restrict the boat's use to certain waters such as, for example, Biscayne Bay, the Caribbean or within ten miles of the coast.[45]

Since the owner bears the responsibility for renting a seaworthy boat, it is important to cover this issue in the contract. Something like the following is useful:

> The charterer acknowledges that the vessel is of a size, design and capacity for his intended use. Acceptance and use of the vessel by the charterer is deemed to be an acknowledgement that the vessel is staunch and seaworthy and fit for his purposes.[46]

As discussed earlier, however, no contract provision like this is an adequate substitute for routine, thorough inspection of the boat by the owner. There can be no claim if there is no loss.

For yacht leases, charter agreements commonly require that the charterer obtain vessel insurance for the charter period. The charterer's choice of insurer and amount of coverage are often made subject to the owner's approval.[47] If the charterer is responsible for insuring the vessel, the owner should get proof that this responsibility has been met. In the case of small boat rentals, the owner will probably want to maintain his own insurance on the rental operation and make the rental fees cover this cost of operation.

Because unpaid vessel services, whether crew wages or repairs or supplies, create a lien on the vessel, boat owners should expressly provide that charterers are not permitted to incur any liens. This is important in a bareboat charter because the charterer is responsible for providing all necessities. For large yachts, this can be important enough to require the charterer to fasten a notice to the boat to alert anyone seeing it that the charterer is without authority to create vessel liens.[48]

As to limitation of liability provisions, the reader is referred to the discussion above. While exculpatory clauses may be drafted to waive all owner liability, the effect of such provisions is often less protective than intended when reviewed by a court in light of the surrounding circumstances. However, one thing seems clear -- hiding the waiver in the middle of the contract in small print will not help to effectuate it. The charterer must be able to see it, read it, and understand it, if his signature on the document is to effectively limit owner liability.

C. TIME CHARTERS

Unlike bareboat charters, time charters do not place exclusive control of boats in the charterer. Instead, the boat owner or his employees serve as master and crew. The charterer is essentially a passenger. The captain making a few navigational changes at the charterer's request usually has no effect on the charterer's status. The captain is not the charterer's employee for legal purposes. Since the owner and his employees retain more control than with a vessel that is chartered bareboat, the owner is exposed to a great deal more liability.

On a chartered fishing vessel, excursion boat or the like, each person paying a fee may be considered a charterer. On the other hand, a person may single-handedly arrange the charter for himself and his guests. For the boat owner, it makes little difference. In the discussion that follows, charterers and passengers are treated alike. The master and crew of the vessel make up another class of persons with distinct legal rights.

1. The Boat Owner's Duty to Charter Passengers

a. The Standard of Care

The boat owner taking passengers for hire is required to exercise the same degree of care as other so-called "common carriers", such as taxis and bus lines.[49] It is a higher duty than the usual "ordinary care". The standard is not merely that of a reasonable or prudent man. It has been described as the "greatest possible care", "highest degree of care", "utmost care" and by other similar terms.[50]

Under some circumstances, a boat owner who time charters his boat may not be a common carrier. If he does not hold himself out to the public as engaged in the business of taking passengers for hire, but only time charters his vessel on one or two occasions by special arrangement, he is probably a private carrier. Private carriers are held to a standard of ordinary care.[51] The determination of whether a charter operation makes one a common carrier or private carrier may sometimes be difficult to make. Under most circumstances, however, a marina operating one or more time charter vessels on a regular basis for fishing trips, sightseeing excursions, and the like will probably be treated as a common carrier.[52]

The boat owner's duty to non-paying persons aboard a vessel is the lower standard of ordinary or reasonable care under the circumstances.[53] This probably remains true despite the fact that the Florida Statutes designate motor vessels as dangerous instrumentalities and appear to require any operator to exercise the "highest care in order to prevent injuries to others."[54] A relatively recent case held that this statute could not expand the maritime standard of care established under federal admiralty law.[55]

While "highest care" is greater than "ordinary care", it is impossible to describe the difference between the two legal standards in a meaningful way. Even if a difference could be articulated, the way in which the standards are applied varies from one court to another. Whether a person has been negligent for failing to meet his duty of ordinary care or of highest care, will always turn on the court's analysis of the particular circumstances of an individual case. It is ultimately a judgment call by the judge or jury.

Since the term "highest care" has no meaning outside the facts of a case and the way they are viewed by the court, the only approach that a boat owner can take to protect himself from liability is to take every reasonable precaution to avoid mishaps during the charter voyage. The vessel master and crew should always be on the lookout for situations that may cause personal injury to a passenger.

b. The Elements of Safe Transportation

i. To Provide a Seaworthy Vessel

A boat owner does not have a duty to provide passengers with a boat free of defects that could not have been found by making a reasonable inspection.[56] However, any passenger injured because of an unseaworthy vessel condition that the owner should have been aware of, or knew about but failed to correct, can bring suit based on the owner's negligence.[57] In McCormick Shipping Corp. v. Stratt,[58] a passenger sued the ship owner for negligence when a defective closet door lock allowed the door to swing open and strike her head. The court held the ship owner negligent, emphasizing that he is bound by defects he should have know about as well as the ones he actually did know about.

ii. Skillful Navigation

The time chartered vessel must be navigated skillfully. If the crew is incompetent or negligent in their handling of the boat so that it runs aground, collides with another vessel, or is involved in some other type of accident, the owner will generally be liable for the resulting personal injuries and property damage. In Lock-Wood Boat & Motors, Inc. v. Rockwell,[59] a sightseeing boat owner was held liable for unskilled navigation by the pilot. A storm had come up and the winds and seas had increased. Instead of keeping the bow of the boat headed into the wind and waves, the pilot turned the boat broadside to them and the boat capsized. Six persons drowned.

An aspect of the responsibility of skillful navigation is proper response to weather conditions. It would be negligent to attempt to operate a boat in severe weather conditions when avoidable.[60] Of course, the forecast given by official weather stations will be an important factor when a court is called upon to decide whether or not the owner or his employees knew bad weather was likely to occur, but a forecast for sunny, clear skies will not protect a boat owner who takes passengers out into conditions which are obviously much different.

iii.Safe Embarking and Disembarking

Accidents commonly occur when passengers are boarding or leaving a vessel and the cause frequently arises from failure to take a few simple precautions. It is risky to make any passengers jump onto or off the vessel.[61] A safe and easy means of entering and exiting should be provided that is not steep, slippery, unstable, or in disrepair. Adequate lighting, hand rails, or ropes are also important.[62] Whether or not easy boarding is available, it would always be worthwhile to have a crew member stand by to assist passengers.

In a recent Florida case, Tittle v. Aldacosta,[63] a passenger on a sport fishing boat was seriously injured when she fell while stepping from the transom to the dock, which was only a foot or so away. Usually, a damp towel was placed on the transom. On this particular occasion, however, the crew was busy elsewhere. The court found that

all the charter boats in the area used something on the transom for this purpose, whether rubber mats, teak strips, tarpaulins, or towels. Since everyone recognized the danger of a slippery transom, the court held the boat owner liable for failure to use a towel on this occasion.

iv. Duty to Warn of Possible Dangers

The master and crew of a vessel must warn their passengers of reasonably anticipated dangers which are not obvious to the passengers. The duty relates to any physical condition of the boat or its operation. For example, a boat was chartered for a deep-sea fishing voyage out of Panama City, Florida.[64] While the passengers fished, crew members tagged the fish that were caught. A passenger cut his hand badly when he tried to tag a fish on his own. He sued the boat owner for the injury. The owner was held liable for not having enough crew members to assist passengers and for failing to warn passengers that sharp metal tags were hazardous to handle.

Many cases have involved personal injuries caused when passengers have slipped, fallen, or been thrown down by rough seas. In most of these cases, the pitching and churning of the boat by wave action was considered a natural hazard of boating.[65] No special warning is usually required to avoid liability for injuries occurring from rough seas. This is especially true if an injured passenger is experienced with boat travel.[66] Nevertheless, when a boat enters a storm or has inexperienced passengers aboard, it would be wise to give passengers some simple instructions for their safety and to see that they are carried out.[67]

v. First Aid

Basic first aid supplies and assistance should be available in the event a passenger is injured while aboard the vessel. If medical care is given by the crew, it is not necessary that they possess the skill of a doctor. What is required is reasonable aid under the circumstances.[68] For serious injuries, the master should radio ahead for shoreside medical help and make for port immediately.

vi. Protection from Misconduct of Crew Members

The criminal or negligent acts of the crew can cause the boat owner to be liable for passenger injuries. Such misconduct could include anything from horseplay to murder.[69] It is essential, of course, to hire a responsible crew. Although most owners try to do so, misconduct still occurs occasionally. While it may be impossible to detect the homicidal tendencies of the ship's cook before it's too late, a lot of less extreme misconduct can be stopped before it gets out of hand. Intoxicated crew members, for example, should be left at the dock or kept away from passengers.

vii.Protection from Other Passengers

It may be difficult, but to avoid liability the crew has a duty to prevent harm to passengers from other passengers, at least to the extent that some danger is known and can be prevented. An old federal case involves a steamship whose crew allowed passengers to shoot pistols and rifles during the voyage, presumably at anything they saw in the water.[70] One passenger was shot through the ankle while reading on an upper deck. The owner of the vessel was held liable for the injury.

A passenger may even require protection from himself. In Palmer v. Ribax, Inc.,[71] a young man fell overboard from a sixty-foot sightseeing and party boat operating on Lake Tohopekaliga in Central

Florida. The vessel's captain knew he was intoxicated but failed to point him out to the crew or to place a few crew members on deck to keep passengers away from the rails. The ship owner was thus partially liable for his drowning.

c. Comparative Negligence

The boat owner or his crew is not always the cause of a passenger's injury. They may be completely free of fault in regard to an accident that occurs aboard chartered vessels. The burden of proving negligence in a law suit is on the injured plaintiff.[72] Though a boat owner's duty to protect his passengers is high, he is not the insurer of passenger's safety.[73] Some fault of the owner or crew must be demonstrated to the satisfaction of a judge or jury.

In a Florida case where a passenger claimed she was injured from a fall caused by an unstable bunk ladder the ship owner had negligently failed to inspect, there was not sufficient evidence to prove that the ladder actually was unsafe.[74] Injuries caused by "sneaker" waves are an example of accidents which are not the boat owner's fault and for which he is not liable.[75]

If the boat owner is found to be at fault for an injury, the admiralty law doctrine of comparative negligence will make him liable only for a proportion of damages equal to his proportion of fault.[76] In the Lake Tohopekaliga case that was discussed above, the young man who fell overboard was partly to blame because he became intoxicated. The court assigned seventy percent of the fault to the drowned man and thirty percent to the ship owner.[77] In the case that involved the deep-sea fishing trip and the passenger who cut his hand on the fishtag, twenty-five percent of the fault was placed on the passenger for attempting to tag the fish.[78]

d. The Passenger's Personal Property

It is one of the peculiar aspects of admiralty law that a suitcase may receive greater legal protection than the passenger to whom it belongs. While a passenger must prove his personal injury was caused by negligence before he can recover compensation, a boat owner is generally liable, without fault, for the loss or destruction of baggage and cargo.[79] For items other than simple baggage, the boat owner's liability normally turns on the question of whether he knew the item was brought aboard or how "ordinary" it was.[80] An ordinary item would be a camera. The boat owner, however, would not be liable for the loss of a bag of precious gems that he had no idea were in a passenger's possession.

2. The Boat Owner's Duty to the Crew

This area of admiralty law is quite complex and large volumes have been written on each aspect of the rights of seamen. No attempt will be made here to present even a significant fraction of the countless possible applications of pertinent federal laws. Instead, the same attempt will be made in this section, as elsewhere, to outline basic legal considerations and suggest reasonable approaches to be taken by boat owners to reduce potential liability. The outcome of an actual case, though, will always depend upon its particular facts.

a. To Provide a Seaworthy Vessel

The basic elements of the doctrine of seaworthiness were pre-

viously discussed in the context of bareboat charters. The doctrine in its most simple terms creates an absolute duty on the part of the boat owner to provide a vessel fit for its intended use.[81] Seaworthiness is a relative term. A boat can be fit for some purposes and not for others. It can be capable of sailing across the ocean but unseaworthy because one loose bolt causes a piece of equipment to fall and injure a crew member. A seaman must only show that some defect in the vessel, the equipment, or its operation, was the legal cause of his injury. He does not have to prove that it was the vessel owner's fault.[82]

i. Who is a Seaman?

The unseaworthiness doctrine covers virtually anyone injured while performing services on or about the ship as long as the work is for the vessel's benefit and done with the owner's permission.[83] In addition to the typical crew members, a seaman can be anyone else employed to work in the service of a vessel. Musicians, bartenders, cooks and stevedores have all been treated as seamen and allowed to sue for a vessel's unseaworthiness.[84]

To be a seaman, a worker must have been more or less permanently assigned or connected with the vessel. A passenger or guest is not a seaman nor is a stowaway.[85] If a passenger volunteers to lend a hand without being asked and without receiving instructions, he does not become a seaman merely because he performs some minor task.[86]

ii. A Proper Crew

It was mentioned previously that an incompetent crew makes a boat unseaworthy.[87] Too few crew members to effectively operate a vessel or perform its functions can also cause unseaworthiness.[88] Even when the crew is large enough, a boat may be unseaworthy if not enough men are assigned to a particular task.[89] If, for example, only one man were instructed to handle a piece of equipment that properly required two men, he could sue the boat owner if he were injured because of it. His claim would be that the ship was not fit for the particular task because too few men were available to do the job.

In Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.,[90] a ship was declared unseaworthy because the crew had not been adequately trained to respond to a fire aboard ship. When a fire broke out, some of the crew panicked. They did not know where the fire-fighting equipment was stored and they waited ten minutes before informing the captain a fire had been discovered.

iii.Transitory Unseaworthiness

Some conditions making a vessel unsafe, like a defective engine block or rotted floorboards, are not permanent. The best example of so-called transitory unseaworthiness is a spill of some slippery substance on the deck.[91] If a seaman slips on an oily spot and breaks his leg, he has a claim against the boat owner for unseaworthiness. It does not matter that the boat owner did not know about the oily condition.[92] Liability for transitory unseaworthiness is exactly the same as for more permanent defective vessel conditions.

b. Maintenance and Cure

"Maintenance and cure" is a legal right unique to admiralty law. It is the right of every sick or injured seaman in the service of a ship to receive medical attention and other assistance at the obligation of the vessel owner. It arises from the employment relationship and does not depend on the owner's fault or the cause of the

injury.[93] Maintenance and cure covers medical care, subsistance, and unearned wages.[94]

The boat owner's obligation to provide maintenance and cure arises even if the injury occurs on land, as long as the injured seaman was acting as an employee at the time the injury happened.[95] Thus, even a seaman injured in a traffic accident on the way to the ship and a sailor slipping in the shower at home while cleaning up between shifts might be eligible for maintenance and cure.[96]

The boat owner's duty to provide maintenance and cure continues as long as the seaman needs medical treatment and ends when the seaman's condition is stabilized.[97] If the condition is permanent or incurable, the obligation ends when that fact is determined by a physician.[98] It should be noted that seamen are as broadly defined for entitlement to maintenance and cure as they are under the doctrine of unseaworthiness.[99]

An injured seaman has no right to maintenance and cure if the injury was brought about by misconduct.[100] An example would be an attempted suicide. Injury caused by a sailor's drunkeness, however, has usually not barred the right to recovery.[101]

c. The Jones Act

This federal law[102] simply provides seamen with the right to recover money damages from the vessel owner for negligence causing injury. In case of the seaman's death, his personal representative has this right. The Jones Act's type of negligence is more liberally applied by the courts than non-maritime negligence law. If the employer's negligence played even the slightest part in producing the seaman's injury or death, the employer will be liable.[103]

d. Summary

When the doctrine of seaworthiness, the obligation of maintenance and cure, and the Jones Act negligence principles are considered together, a formidable amount of protection is given to seamen and a great deal of potential liability falls on the shoulders of the boat owner. A defective boat condition or operation gives rise to a claim of unseaworthiness. If there is no defect, but some negligent act causes a seaman to be injured, he can sue under the Jones Act. If there is no negligence, a seaman can still collect for medical bills, lost wages and subsistance if he becomes sick or accidentally injured.

In a typical suit by a seaman against his employer, all of these claims are pleaded at the same time. Because comparative negligence is applied under admiralty law, a claim will be reduced by the percentage of fault that is attributable to the seaman's negligence.[104]

The protective measures a boat owner would take to provide safe transportation to passengers are generally applicable to the crew as well. A crew member falling off an unstable gangway actually has a better chance in court to recover for his injury than a passenger would because of the liberal admiralty law treatment of seamen.[105] Furthermore, courts are unlikely to permit the boat owner to limit the amount he will pay a crew member for injuries through an employment contract provision. Such a provision would be against public policy.[106]

The boat owner must provide the crew with a safe place to work. Safety equipment should be provided for certain jobs aboard the vessel

and, to minimize his potential liability, a boat owner should require their use.[107] A court found a boat owner liable for the drowning of an inexperienced hand for not requiring him to wear one of the available life vests.[108]

If a crew member is injured or sick, the boat owner must have adequate first aid supplies on hand and must render reasonable assistance.[109] A seaman should not be required to work if rest is called for or if the work could complicate the injury, as by causing infection.[110] In the case of serious injuries or illnesses, it may be necessary to head to the nearest medical facility[111] and radio ahead for assistance. The particular circumstances always determine the appropriate response.

IV - NOTES

1 See generally, G. Gilmore and C. Black, The Law of Admiralty, Chapter IV (2d ed. 1975); N. Norris, Your Boat and the Law, Chapter 10 (1975); T. E. Scrutton, Charter Parties and Bills of Lading 1 (17th Ed. 1964).

2 See Potashnick - Badgett Dredging, Inc. v. Whitield, 269 So. 2d 36, 43 (4th D.C.A. Fla. 1972).

3 See G. Gilmore and C. Black, note 1 supra at 229-39. There is a third type of charter called a "voyage" charter. In most respects, it resembles the time charter and, because its only distinctions relate to cargo carrying in the shipping industry, it will not be discussed separately here.

4 Atlantic Lines, Ltd. v. NARWHAL, Ltd., 514 F.2d 726 (5th Cir. 1975); Potashnick - Badgett Dredging, Inc. v. Whitfield, 269 So. 2d 36 (4th D.C.A. Fla. 1972).

5 For example, the charter agreement must be supported by sufficient consideration, entered into by competent parties, definite in its terms and free of fraud. Battery S.S. Corp. v. Refineria Panama, S.A. 513 F.2d 735 (2d Cir. 1975). The intentions of the parties to the charter will govern if any matter is not explicitly set out. Eskine v. United Barge Co., 484 F.2d 1194 (5th Cri. 1973).

6 "Charter party" is an English corruption of the latin term carta partita which meant "divided document". It refers to the long ago practice of preparing charter agreements in two parts and giving one to the ship owner and one to the charterer. The Florida Bar, Maritime Law and Practice §4.16 (1980).

7 Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Gardner v. The Calvert, 253 F. 2d 395 (3d Cir. 1958), cert. denied, 356 U.S. 960 (1958).

8 Reed v. The Yaka, 373 U.S. 410 (1963); Black's Law Dictionary 1091 (5th ed. 1979).

9 G. Gilmore and C. Black, note 1 supra, §4-22.

10 See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

11 Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), reh. denied, 347 U.S. 974 (1954); Moragne v. State Marine Lins, Inc. 211 So. 2d 161 (Fla. 1968).

12 Seminole Lumber and Export Co. v. Bronx Barge Corp., 11 F.2d 982 (S.D. Fla. 1926); 7 Fla. Jur. 2d, Boats, Ships, and Shipping, §48 (1979).

13 See Isham v. Pacific Far East Line, Inc., 476 F.2d 835, 836 (9th Cir. 1973); Luna v. Star of India, 356 F.Supp. 59, 67 (S.D. Cal. 1973); Norris, The Landlubber Takes to the Water, 37 Temp. L.Q. 548 (1964). See generally Comment, Admiralty - Warranty of Seaworthiness - Not Extended to Passenger on Pleasure Boat, 37 Temp. L.Q. 548 (1964).

14 Maritime Law and Practice, note 6 supra, §2.19.

15 Boudoin v. Lykes Brothers S.S. Co., 348 U.S. 336 (1955); Cashell v. Hart, 143 So. 2d 559 (2d D.C.A. Fla. 1962).

16 Dresner v. Riviera Ass'n., 161 N.Y.S. 2d 701 (N.Y. Sup. Ct. 1957).

17 Adler v. University Boat Mart, Inc., 387 P.2d 509 (Wash. 1963).

18 Rothman v. U-Steer-It, Inc., 247 F.2d 803 (5th Cir. 1957).

19 Grillea v. United States, 232 F.2d 919 (2d Cir. 1956).

20 The charterer is responsible for fault in collision, The Barnstable, 181 U.S. 464 (1901), and for injury to shoreworkers, Cannella v. United States, 179 F.2d 491 (2d Cir. 1950).

21 See Gibboney v. Wright, 517 F.2d 1054, 1059 (5th Cir. 1975); Judy v. Belk, 181 So. 2d 694, 695 (3d D.C.A. Fla. 1966).

22 Marine Equipment, Inc. v. Martin, 184 F.Supp. 111 (E.D. La. 1960).

23 See G. Gillmore and C. Black, note 1 supra, at 241.

24 Dufrene v. Ledoux, 285 So. 2d 302 (4th D.C.A. La. 1973).

25 Norwich Co. v. Wright, 80 U.S. 104 (Wallace, 1871); see generally, 2 M. Norris, The Law of Maritime Personal Injuries, Chapter VII (3d ed. 1975).

26 Application of Theisen, 349 F.Supp. 737 (E.D.N.Y. 1972).

27 46 U.S.C.A. §183(b) (1958).

28 Id., §183(f).

29 The claimants would receive $250 and $750, respectively, in proportion to their individual losses. Id., §184.

30 Coryell v. Phipps, 317 U.S. 406 (1943).

31 In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972) (inferred unseaworthiness).

32 Pritchett v. Kimberly Cove, Inc., 568 F.2d 570 (8th Cir. 1977) (negligent entrustment).

33 46 U.S.C.A. §183(e) (1958).

34 China Union Lines, Ltd., v. A. O. Anderson & Co., 364 F.2d 769 (5th Cir. 1966); Avera v. Florida Towing Corp., 322 F.2d 155 (6th Cir. 1963); The Marguerite, 140 F.2d 491 (7th Cir. 1944); Complaint of B.F.T. No. Two Corp., 433 F.Supp. 854 (E.D. Pa. 1977).

35 United States v. Standard Oil Co. of California, 495 F.2d 911 (9th Cir. 1974); Holloway Concrete Products Co. v. Beltz-Beatty, Inc. 293 F.2d 474 (5th Cir. 1961).

36 Coryell v. Phipps, 317 U.S. 406 (1943); McDonald v. The 204, 194 F.Supp. 383 (S.D. Ala. 1961).

37 The Elfrida, 14 F.2d 237 (E.D.N.Y. 1926); The Atlas No. 7, 42 F.2d 480 (S.D.N.Y. 1930); Complaint of Cook Transp. System, Inc., 431 F.Supp. 437 (W.D. Tenn. 1976).

38 247 F.2d 803 (5th Cir. 1957).

39 Id., at 804, n. 1.

40 Id., at 804.

41 Id., at 808. See also Brady v. Roosevelt S.S. Co., 317 U.S. 575, 579-85 (1941).

42 Fla. Stat. §327.54(1)(a)-(f) (1981).

43 Id. §371.54(2).

44 3 Am. Jur. Legal Forms 2d §42.43 (1971).

45 Maritime Law and Practice, note 6 supra, at 181.

46 3 Am. Jur. Legal Forms 2d, §42.43 (1971).

47 Id.

48 Maritime Law and Practice, note 6 supra, at 181.

49 Loc-Wood Boat and Motors, Inc. v. Rockwell, 245 F.2d 306 (8th Cir. 1957); Moore v. American Scantic Line, Inc., 121 F.2d 767 (2d Cir. 1941); 7 Fla. Jur. 2d, Boats, Ships and Shipping §47 (1978).

50 M. Norris, note 25 supra, §36.

51 This is the same as the standard of care owed to non-paying persons. See note 53-55 and accompanying text infra.

52 Loc-Wood Boat and Motors, Inc. v. Rockwell, 245 F.2d 306 (8th Cir. 1957) (sightseeing boat); Kulack v. The Pearl Jack, 79 F.Supp. 802 (W.D. Mich. 1948) (speedboat); Cozine v. Hawaiian Catamaran, Ltd., 412 P.2d 669 (Haw. 1966) (sailboat).

53 Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

54 Fla. Stat. §327.32 (1981).

55 Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971) (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)).

56 Isham v. Pacific Far East Lines, Inc., 476 F.2d 835 (9th Cir. 1973) (doctrine of unseaworthiness not applicable to passengers).

57 Complaint of Compagnie Generale Transatlantique, 392 F.Supp. 973 (D. Puerto Rico 1975).

58 322 F.2d 648 (5th Cir. 1963).

59 245 F.2d 306 (8th Cir. 1957).

60 Armour v. Gradler, 448 F.Supp. 741 (W.D. Pa. 1978).

61 See The Ocracoke, 159 F. 552 (E.D. Va. 1908).

62 Jullis v. Fidelity and Casualty Co. of New York, 397 F.2d 22 (5th Cir. 1968).

63 544 F.2d 752 (5th Cir. 1977).

64 Stewart v. George W. Davis and Sons, Inc., 340 F.Supp. 643 (N.D. Fla. 1972).

65 Aronowitz v. Molero, 273 F.Supp. 226 (E.D. La. 1967); The Winnipeg, 5 F.Supp. 469 (N.D. Cal. 1933).

66 S.S. Serpa Pinto, 45 F.Supp. 255 (E.D.N.Y. 1942).

67 The Arabic, 50 F.2d 96 (2d Cir. 1931).

68 See 1 M. Norris, The Law of Maritime Personal Injuries §39 (3d ed. 1975).

69 Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952).

70 Northern Commercial Co. v. Nestor, 138 F. 383 (9th Cir. 1905).

71 407 F.Supp. 974 (M.D. Fla. 1976).

72 Pickett v. Nelseco Navigation Co., 270 F.Supp. 682 (D. Conn. 1967) (no recovery due to failure to sustain burden of proof); Summers v. Motor Ship Big Ron Tom, 262 F.Supp. 400 (D.S.C. 1967) (failure to sustain burden of proof bars recovery).

73 See Moore v. American Scantic Line, Inc., 121 F.2d 767, 768 (2d Cir. 1967).

74 See McCormick Shipping Corp. v. Warrner, 129 So. 2d 448, 449 (3d D.C.A. Fla. 1961). See also Ludena v. The Santa Luisa, 112 F.Supp. 401, 406-07 (S.D.N.Y. 1953).

75 Cobb v. United States, 471 F.Supp. 102 (M.D. Fla. 1979); Weddle v. West, 275 F.Supp. 165 (W.D. Wash. 1967).

76 Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

77 Palmer v. Ribox, 407 F.Supp. 974 (M.D. Fla. 1976).

78 Stewart v. George W. Davis & Sons, Inc., 340 F.Supp. 643 (N.D. Fla. 1972).

79 The Thesaloniki, 267 F. 67 (2d Cir. 1920) (recovery barred for other reasons).

80 Brock v. Gale, 14 Fla. 523 (1874).

81 The Osceola, 189 U.S. 158 (1903); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

82 Moragne v. State Marine Lines, Inc. 211 So. 2d 161 (Fla. 1968).

83 Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); See Maritime Law and Practice, note 6 supra, §2.19.

84 84 A.L.R. 2d 620 (1962).

85 United States v. Sandrey, 48 F. 550 (5th Cir. 1891).

86 Buffalo & C.I. Ferry Co. v. Williams, 25 F.2d 612 (2d Cir. 1928).

87 See note 15 and accompanying text, supra.

88 Waldron v. Moore-McCormick Lines, Inc., 386 U.S. 724 (1967); June T., Inc. v. King, 290 F.2d 404 (5th Cir. 1961); Fribley v. Bebe, Inc., 121 So. 2d 446 (1st D.C.A. Fla. 1960).

89 Waldron v. Moore-McCormick Lines, Inc., 386 U.S. 724 (1967).

90 403 F.Supp. 562 (S.D.N.Y. 1975).

91 Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) (slime and fish query film); Corrao v. M/V Act III, 359 F.Supp. 1160 (S.D. Fla. 1973) (oil and grease on deck).

92 See Davis v. Hill Engineering, Inc., 549 F.2d 314, 330 (5th Cir. 1977).

93 See Corella v. McCormick Shipping Corp., 101 So. 2d 903, 905-06 (3d D.C.A. Fla. 1958).

94 Maritime Law and Practice, note 6 supra, §2.2.

95 Warren v. United States, 340 U.S. 523 (1951).

96 See Palmer v. Boat Edith L. Boudreau, Inc., 223 N.E. 2d 919, 920-21 (Mass. 1967).

97 Farrell v. United States, 336 U.S. 511 (1949); Murphy v. Light, 257 F.2d 323 (5th Cir. 1958).

98 Vella v. Ford Motor Co., 421 U.S. 1 (1975).

99 Mahramas v. American Export Isbrandsten Lines, Inc., 475 F.2d 165 (2d Cir. 1973).

100 Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724 (1943).

101 Bentley v. Albatross S.S. Co., 203 F.2d 270 (3d Cir. 1953) (intoxication only goes to mitigation of damages).

102 46 U.S.C. §688 et. seq. (1976).

103 Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521 (1957); Reyes v. Vantage S.S. Co., 609 F.2d 140 (5th Cir. 1980); Edmundson v. Hamilton, 148 So. 2d 262 (Fla. 1962), per curiam. See G. Gilmore and C. Black, note 1 supra, at 374-83.

104 See Maritime Law and Practice, note 6 supra, §2.30.

105 See generally, Norris, The Seaman as Ward of the Admiralty, 52 Mich. L.Rev. 479 (1954).

106 Blanco v. Phoenix Compania de Navegacion, S.A., 304 F.2d 13 (4th Cir. 1962) (lack of consideration); W. J. McCahan Sugar Refining and Molasses Co. v. Stoffel, 41 F.2d 651 (3d Ci. 1930); Schellenger v. Zubik, 170 F.Supp. 92 (W.D. Pa. 1959) (workman compensation agreement no bar to recovery).

107 See generally, 91 A.L.R. 2d 1019 (1963 and Supp. 1979).

108 See Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 494 (5th Cir. 1962). See also Rogers v. Gracey-Hellums Corp. 331 F.Supp. 1287, 1290 (E.D. La. 1970) (failure to provide goggles to roughneck). But see Deftes v. Federal Barge Lines, In., 229 F.Supp. 719, 721-22 (D.C. La. 1964).

109 See generally,16 A.L.R. Fed. 87 (1973). Stevens v. Sea Coast Co., 414 F.2d 1032 (5th Cir. 1969).

110 See Robinson v. Isbrandsten Co., 203 F.2d 514, 515 (2d Cir. 1953); The Point Fermin, 70 F.2d 602, 605 (5th Cir. 1934).

111 Unica v. United States, 287 F.177 (D. Ala. 1923).

V - MARINE INSURANCE

A. INTRODUCTION

Recreational marinas are normally insured against the liability to which they are exposed. The particular type of insurance policy or policies that provide the best protection for a marina can only be selected through consultation with experienced insurance company agents or brokers. This section is not intended to be a substitute for professional insurance advice. It is designed to inform marina owners of some key legal factors relating to the selection of adequate insurance coverage.

Before discussing the manner in which courts have interpreted and applied various marine insurance policy provisions, a few basic concepts should be noted. First, an insurance policy is merely a special type of contract. Like all contracts, it can contain any lawful agreement that the parties wish to make. In other words, it can be tailored to fit the needs and desires of the marina owner. In actual practice, most insurance companies have standard policies for commonly requested coverage. Nevertheless, standardized policies can be adapted to respond to the unique needs of individual policy holders. Any pre-printed provision should be carefully examined to make sure it is adequate when applied to one's own marina operations. when applied to one's own marina operations.

One should realize that a number of policies have been developed to cover different aspects of typical marina operations. For example, policies have been issued to cover only boat repairs or only boat manufacturing and sales. Other policies have been used that only covered boat storage operations. In addition, hull policies covering a particular vessel or a fleet of vessels are distinct from other types of available coverage.

Fragmentation of insurance coverage may be impossible to avoid, as in the case of a marina needing to insure both a restaurant and a boat repair yard. However, several of the policies mentioned above can be consolidated into a single, comprehensive, operator's liability policy. Where possible, this is the preferable approach to coverage. Finally, a general note about the language of insurance policies.

Courts are often asked to interpret policy provisions because their meaning is hotly disputed by the participating parties. A court can consider any evidence that helps to demonstrate the actual intent of the parties at the time of agreement. However, since the parties usually contradict one another as to their intentions, the courts usually let the policy speak for itself. If the language is so ambiguous that it could have two or more different meanings, the law requires that the meaning most favorable to the insured party be applied.[1] Therefore, if ambiguous language makes it unclear whether something is covered or not, the presumption is for coverage.[2] Similarly, if a policy exclusion provision is unclear on whether a particular matter is excluded from coverage, the presumption is against exclusion.

In this section, the term "insured" means the policy holder, and "insurer" refers to the insurance company. If there is only one point that is remembered after a reading of the following discussion, it should be this: Know what is covered by your policy.

B. COMMON COVERAGE OF BOATS

1. The Hull Policy: Named Perils

Most commercial vessels and many non-commercial vessels are insured under a "named perils" policy. The policy sets forth traditional perils against which risk of loss or damage will be insured.[3] Traditional perils include fire, theft, piracy, war damage, and common "perils of the sea."[4] Perils of the sea are accidents which occur due to severe weather conditions and navigaton mishaps. For example, extraordinary wind and wave damage, vessel collisions, and stranding and striking rocks are considered perils of the sea.[5] If a policy holder's loss was caused by one of the named perils in the hull policy, he is entitled to a recovery.[6]

The chief issue arising in litigation involving hull policies is whether the boat owner's loss was caused by one of the covered perils. All courts agree that ordinary wear and tear on a boat is not a peril of the sea.[7] When a houseboat sank at a Miami boatyard because the bottom was worm-holed throughout, the court disallowed any recovery based on the boat owner's policy.[8] Worm and rot damage to wood are foreseeable problems that can be avoided throught the use of preventative measures. As such, they are not covered perils.[9]

If the exact cause of a boat's sinking is unknown, recovery is unlikely under named perils protection. As a prerequisite to recovery under a policy, the vessel owner must demonstrate that one of the named perils in the policy was the proximate cause of the loss.[10] Additional insurance coverage is necessary to protect against losses not caused by named perils.

The named perils provision usually includes the term "assailing thieves" in its list of covered losses. As the term implies, coverage is against risk of theft by violent acts against persons and property. It does not protect a boat owner from total loss of a vessel, but just its contents or equipment. If thieves forcefully break into a locked vessel, losses are probably covered under this provision,[11] but other types of theft would have to be covered by more specific policy provisions.

2. "Inchmaree" Clause

The "Inchmaree" clause is another traditional marine insurance provision found in hull policies. The clause gets its peculiar name from a ship that was the subject of an old English court decision. The decision prompted marine insurance companies to begin using the clause.[12] The clause significantly expands the scope of hull policy coverage. It extends coverage to accidents occuring when loading or unloading a vessel, explosions,

breakdown of electrical machinery, latent defects in machinery or the hull, and negligence of charterers and repairers other than policy holders. The Inchmaree clause also covers losses caused by negligence of crew members, as long as the losses did not result from the owner's lack of diligence.[13]

Much litigation concerning Inchmaree clauses focuses on whether or not a loss resulted from a covered latent defect, or by ordinary wear and tear, which is normally expressly excluded from coverage. Latent defects are defined to be undiscoverable conditions. Those which are merely difficult to locate are not covered.[14] Conditions resulting from ordinary wear and tear are not latent defects.[15]

3. Protection and Indemnity Insurance

Protection and Indemnity insurance, sometimes referred to as "P and I" insurance, protects boat owners from claims brought against them by persons who were injured or lost property because of the boat's operation.[16] P and I insurance offers a broad range of coverage but, as an indemnity policy, reimburses the policy holder only for claims actually paid. Unlike a hull policy, which insures only against named perils, the P and I policy will insure anything not specifically excluded.

P and I insurance can cover claims for death, personal injury, illness, the crew's maintenance and care, loss of personal property of the crew and passengers, government fines, damage to cargo and baggage, and damage to docks and buoys.[17] There are a number of important areas which are not usually covered in a typical P and I policy. These may include physical damage to the vesel itself, loss of other property owned by the policy holder, and breach of contract claims.

A relatively new type of policy used to insure pleasure craft is the "All Risks Policy."[18] It operates like P and I policies in that all losses are covered unless expressly excluded. It does not, however, cover accidents arising from ordinary wear and tear of a vessel[19] or boat title defects.[20]

C. COVERAGE OF MARINA OPERATIONS

In addition to insurance coverage for its own vessels, a marina owner needs to insure each element of its operations. That will require either a comprehensive policy or several separate policies to cover sales, storage and repair. Individual policies will always contain certain coverage exclusions. Therefore, marina owners must be careful to fill all policy "gaps" when combining policies.

Boats that are only moored at the marina so that no bailment has been created (See Chapter II for an explanation of bailments) represent a smaller risk of liability to marina owners than stored boats. Nevertheless, even this lesser risk could result in a substantial claim. Therefore, it is advisable to insure against the loss or damage of moored, as well as stored, boats.

For stored boats, liability policies may cover boats that have been entrusted to the marina owner's care. Storage poli-

cies, however, often apply only to moored boats paying slip rental. In a New York case, a boatyard owner tried to collect under his storage insurance policy after he was found negligent for the sinking of a moored boat.[21] He was unsuccessful because the policy only applied to boats in his custody. If the marina owner wants insurance against claims for the loss of moored vessels custody limitations should be carefully examined.

The task of choosing an adequate amount of coverage is especially important in the case of boat storage liability insurance because of the large number of boats normally involved. It is advisable to maintain a level of insurance sufficient to cover total loss of all the boats and their equipment when the marina is filled to capacity.[22]

Boat repair liability insurance can protect against claims for property damage to boats repaired by a marina and against property damage caused by the negligently repaired boat. The standard repair policy does not cover loss of a boat's use due to improper repair. For commercial vessels, loss of use can be of considerable value and should be insured against if the marina frequently repairs commercial vessels.[23] The coverage of boats in custody of the marina which is provided by repair and storage policies is usually unavailable under the other types of insurance discussed in this section.

Marina owners can also insure certain aspects of their operation using a typical owner, landlord and tenant's policy. These policies can protect against liability for accidents caused by defective conditions, such as a broken stair or faulty wiring, on the marina premises. Insurance of the premises does not generally cover accidents resulting from the use of movable equipment or property in the marina's custody.[24] In Monari v. Surfside Boat Club, a boatyard owner was not permitted to recover under his owner, landlord and tenant's policy for damages caused when an employee dropped a boat from a self-propelled crane.[25] The court ruled that, regardless of the fact the boat was being removed from the water so the owner could work on the propeller, the boat was in the marina's custody while being moved by the crane not covered by the policy.

Marina premises insurance usually covers personal injuries caused by defective property conditions in addition to damages to the property. Boat storage, repair and dealership policies, on the other hand, normally do not cover personal injury cliams. These policies must be strengthened by adding protection and indemnity endorsements for personal injury and wrongful death claims arising from storage, repair and sales operations at the marina.[26]

D. OTHER LEGAL LIMITS TO COVERAGE

1. Misrepresentations

An insurance underwriter may avoid payment under a policy if the insured party wilfully misrepresented any fact, or innocently misrepresented a material fact that was one of the inducements for the underwriter to issue the policy[27] A material fact is one

affecting the risk of liability being insured against. For example, in Gulfstream Cargo, Ltd. v. Reliance Insurance Co., an insurance company requested a new survey of the insured's boat before renewing the policy.[28] The insured commissioned a survey and it recommended extensive repairs for rot in the stern. Without making the repairs, the boat owner sent the insurance company a copy of an old survey which described the boat as seaworthy. When the boat later sank, the owner was not permitted to collect on the policy because of his willfull misrepresentation of the boat's condition.

A hull policy was voided in a Washington case because the owner had not disclosed that a vessel's gasoline capacity had more than doubled since the original policy was issued.[29] Although in these cases, the cause of the subsequent loss or damage was directly related to the misrepresented facts, misrepresentation of any material fact could void a policy. In the context of marina operations, the kind of misrepresentation that might void the insurance coverage would be, for example, stating that a watchman is always on the premises when no watchman is actually employed, or claiming that no gas facilities are operated when in fact they are.

2. Misconduct of the insured party

Marine insurance policies almost always include provisions excluding coverage for losses caused by misconduct of the insured or his employees. The misconduct referred to is usually not mere negligence, but criminal conduct. Two recent Florida cases involved the theft of boats, in one case by a charterer[30] and in the other case by a marina employee.[31] In both instances, the courts did not allow the marina owners to collect from their insurers for the losses.

3. Sue and Labor Clause

Typical hull policies usually include a sue and labor clause requiring the policy holder to do his best to limit losses. The insurer will reimburse boat owners for some or all of the expenses incurred in the process of preventing or mitigating losses. To qualify for reimbursement, the loss must be one of the named perils and it must have been reasonably certain to occur.[32] If, for example, a boat capsizes in rough seas, the sue and labor clause requires the owner or his crew to make every effort to right the boat and pump it out before it sinks. If money is paid for towing or other assistance, the policy reimburses the owner for the cost.

4. Use restrictions

Marine insurance policies often exclude certain vessel usage or require that a use be approved by the insurer in order to keep the insurance in force. A common restriction is one that disallows use of the vessel for commercial purposes, such as for charter.[33] The violation of a use restriction will normally only suspend policy coverage while the uninsured use is in progress. When the prohibited use is discontinued, the policy would once again be in force.[34]

It is also common for boat insurance to geographically restrict coverage. Beyond a described geographic area the policy would be suspended. A policy that restricts coverage to the boat's use on inland waters or within five miles of shore in coastal waters, for example, would not cover a boat taken to Bimini.

E. SUMMARY

While every recreational marina owner in Florida is sure to have insurance coverage for his operation, it is likely that many marinas are underinsured. To prevent this, marina owners should itemize each of the many services provided to boat owners and all buildings and eqipment . Many insurance agents or brokers may want to inspect the property or its plans to determine the marina's insurance needs. If the agent does not do so on his own initiative, marina owners should request an insurance inspection.

Exclusions from coverage should be clearly understood, especially when combining specialized policies. By so doing, additional insurance can be obtained or the marina owner can modify operations accordingly. For example, if one cannot insure against boat loss due to ordinary wear and tear, an estalished inspection schedule becomes more important. After initial coverage, the insurer should be consulted every time a change in operations is planned, whether is is to be the addition of a new bulding on the premises, the beginning of a new boat rental service, or even less significant changes that might increase the marina's liability risk.

Almost all of the litigation regarding marina insurance policies has concerned interpretaion of policy coverage. It cannot be overemphasized that obtaining a clear understanding between the marina owner and his insurer before claims arise is preferable to seeking an understanding after a claim is brought against the marina. In reaching an understanding with one's insurer about what risks are protected against and which are not, it is worth the effort many times over to insist that the policy express the understanding in clear, unambiguous language.

V - NOTES

1 See e.g. Stuyvesant Ins. Co. v Butler, 314 So.2d 567, 570 (Fla. 1975); Winegarden v. Penninsular Life Ins. Co., 363 So.2d 1172, 1173 (Fla.3d DCA 1978).

2 See e.g. DaCosta v. General Guaranty Ins. Co. of Fla., 226 So.2d 104,105 (Fla. 1969); Blue Shield of Florida, Inc. v. Woodlief, 359 So.2d 883,884-85 (Fla. 1st DCA 1978).

3 See Generally Admiralty Law Institute: A Symposium on the Hull Policy, 41 Tul.L.Rev. 231 (1967).

4 See G. Gilmore and C. Black, The Law of Admiralty 71 (2d ed. 1975).

5 See Spooner & Sons v. Connecticut Fire Ins. Co., 314 F.2d 753, 755-57 (2d Cir. 1963); The Florida Bar, Maritime Law and Practice §8.18 (1980). See generally Vogel, The Hull Policy: The Perils and Held Covered Clauses, 41 Tl.L.Rev. 259 (1967).

6 Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co., 302 U.S. 556 (1958); Northwestern Mutual Life Ins. Co. v. Linard, 498 F.2d 556 (2d Cor. 1974).

7 Tropical Marine Products Co. v. Birmingham Fire Ins. Co., 247 F.2d 116 (5th Cir. 1957).

8 Reisman v. New Hampshire Ins. Co., 312 F.2d 17 (5th Cir. 1963).

9 See Irwin v. Eagle Star Ins. Co., 455 F.2d 827, 830 (5th Cir. 1972).

10 See G. Gillmore and C. Black, note 4 supra, at 76-79.

11 Swift v. American Universal Ins. Co., 212 N.E. 2d 448 (Mass. 1965); A.L.R. 3d 1150 (1968).

12 See Tetreault, The Hull Policy: The "Inchmaree" Clause, 41 Tul.L.Rev. 325, 325-28 (1967).

13 See Maritime Law and Practice, note 5 supra, §8.27.

14 Tropical Marine Products Co. v. Birmingham Fire Ins. Co., 247 F.2d 116 (5th Cir. 1957); Continental Ins. Co. v. Levinson, 224 So.2d 445 (3d D.C.A. Fla. 1969). 91 A.L.R. 2d 1295 (1963).

15 Irwin v. Eagle Star Ins. Co., 455 F.2d 827 (5th Cir. 1972) (improper bolt installation not a latent defect); Reliance Ins. Co. v. Brickenkamp, 147 So.2d 200 (Fla. 1962) (misadjustment of drive belt on new cabin cruiser not a latent defect).

16 See Maritime Law and Practice, note 5 supra, §8.3.

19 Chase v. Newark Ins. Co., 109 R.I.130, 282 A.2d 194 (1971); but see Egan v. Washington General Ins. Corp., 240 So.2d 875 (4th D.C.A. Fla. 1970) (suggesting that a repairman's failure to correct a condition caused by ordinary wear and tear may amount to negligence that is covered by the all risks policy.)

20 Nevers v. Aetna Ins. Co., Inc., 14 Wash. App. 907, 546 P.2d 1240 (1976).

21 Marine Basin Co., Inc. v. Northwestern Fire and Marine Ins. Co., 256 N.Y. 306, 176 N.E. 404 (1931).

22 See Maritime Law and Practice, note 5 supra, §8.30.

23 Id., §8.31.

24 Id., §8.32.

25 469 F.2d (9 Cir. 1972).

26 See Maritime Law and Practice, note 5 supra, §8.29.

27 Wathen v. Public Fire Ins. Co., 61 F.2d 962 (2d Cir. 1932), G. Gilmore and C. Black, §2.6.

28 1966 A.M.C. 385 (S.D. Fla.).

29 Pacific Queen Fisheries v. Atlas Insurance Co., 307 F.2d 700 (W.D. Wash. 1961); see also Hauser v. American central Ins. Co., 216 F. Supp. 318 (E.D. La. 1963) (insured had not removed a butane stove that he said he had removed).

30 Mariner Charters, Inc. v. Foremost Ins. Co., 316 So.2d 602 (3d D.C.A. Fla. 1975).

31 Sills v. Boston Old Colony Ins. Co., 356 So.2d 1335 (3d D.C.A. Fla. 1978).

32 O'Donnell v. Lathan, 525 F.2d 650 (5th Cir. 1976).

33 Reliance Ins. Co. v. The Escapade, 280 F.2d 482 (5th Cir. 1960).

34 Id.

VI - MARITIME LIENS

A. INTRODUCTION

In nearly every instance where there is potential liability in connection with the operation of a vessel, whether for personal injury, personal damage, or breach of repair or storage contracts, there exists the possibility for the imposition of a maritime lien, enforceable against the vessel, to recover the amount of loss or debt.

A lien is a right which the law gives to a person to have a debt satisfied out of a particular thing.[1] No formal document or record is necessary to create a maritime lien. It arises automatically at the time services are rendered to a vessel or when its operation causes a personal injury or damage to property.[2]

Admiralty law treats the vessel as if it were a person. If the lien is not satisfied, the vessel can be arrested, taken into custody and sold to pay off the claims against it even if it has been sold to someone who was unaware that the lien existed when he purchased the vessel.[3]

Because a marina provides services to a large number of boats, opportunities for creating maritime liens in the marina owner's favor may arise. Liens can also be created against vessels owned and operated by the marina. Thus, the nature and enforcement of maritime liens are important legal considerations for recreational marinas.

B. TYPES OF MARITIME LIENS

1. Traditional Liens

There are several maritime liens that have been historically recognized and enforced by the admirality law. These traditional liens cover unpaid crew wages, the cost of salvage, maritime torts and breach of charter contracts.[4]

Persons whose pay constitutes "crew wages" are broadly defined in the law as "seamen." In addition to persons performing normal duties related to navigation, anyone else employed to render vessel services, such as a cook, doctor, musician, bartender, etc., will have a maritime lien against the vessel for unpaid wages.[5]

Maritime torts include claims arising from collisions and other mishaps causing property damage, personal injury or death. If, for example, a passenger on a chartered fishing boat is injured when a negligently placed piece of equipment falls on her, she can sue the vessel as well as its owner to recover medical expenses, pain and suffering, and lost wages.[6] Crew members sustaining injuries caused by unseaworthy conditions of a vessel will also have a maritime tort lien.[7] Maritime torts create liens even when the vessel is under a charterer's control.[8]

Oil pollution or other damage to waters and marine life may create maritime tort liens enforceable by the United States or the State of Florida.[9] The failure to return rented equipment or

other supplies used on a vessel may also create tort liens against the vessel for conversion.[10]

2. The Federal Maritime Lien Act

The possibilities for the application of maritime liens expanded tremendously with the passage of the Federal Maritime Lien Act in 1920.[11] The Act provides that "any person furnishing repairs, supplies, towage, use of a dry dock or marine railway, or other necessaries, to any vessel . . . shall have a maritime lien on the vessel."[12]

The maritime liens made possible by the Federal Maritime Lien Act are important to marina owners or operators because they apply to services typically provided by marinas to boat owners. The coverage of the Act is especially broad because of the liberal interpretation that has been given the phrase "other necessaries."[13] In addition to repair, supplies, towage and dry-dock services, maritime liens now extend to charges for dockage, storage, haulouts, pumpouts, battery charging, cleaning, fumigation, marine surveys and similar boat services commonly provided by recreational marinas.[14]

Some uncommon services furnished to a vessel have been held to create maritime liens against the vessel. Printing supplies,[15] cruise ship advertising[16] and the delivery of cigarettes[17] have created maritime liens. There is virtually no limit to the items that qualify as supplies in this context.

3. Florida Statutes

Section 713.60 of the Florida Statutes provides for the creation of liens "in favor of any person performing for himself or others, any labor, or furnishing any materials or supplies for use in the construction of . . . or for the use of benefit of a vessel or watercraft, including masters . . . ." The statute creates three distinct liens: 1) for masters, crew and others performing labor for a vessel; 2) for anyone furnishing supplies or materials for a vessel's use, and; 3) for anyone furnishing supplies or materials for a vessel's construction.[18] Nevertheless, Section 713.60 is only valid and enforceable to the extent that it supplements the federal law.[19] Because maritime liens for the furnishing of repairs, supplies and other services are covered by the Federal Maritime Lien Act, the Florida Statute has no effect in that area. Crew wages are also already covered by the general admiralty law. What effect, then, can Section 713.60 have?

While states cannot create maritime liens per se,[20] a state-created lien that is "maritime in nature" can be enforced under the admiralty law.[21] The admiralty law does not generally recognize the right of masters, as opposed to other crew members, to have a lien for unpaid wages.[22] However, because a master's claim for wages is maritime in nature, the admiralty courts will enforce liens created by Section 713.60.[23]

Construction liens, even for the construction of water craft, are not maritime in nature. Therefore, a federal admiralty court would not order a vessel's arrest to enforce a construction lien. The construction lien created by Section 713.60 could, of course, be enforced in a state court proceeding.

4. When Maritime Liens are not Created

Some debts or liabilities that arise in connection with vessel operations do not create maritime liens. Anyone having an ownership interest in a boat cannot hold a lien against it since lien holders must be "strangers to the vessel."[24] This principle applies to owners, part-owners and stockholders of a corporation that own a boat.[25] If a part-owner of a yacht paid for certain repairs but could not get the other part-owners to reimburse him for their share of the repair costs, he would not have a lien enforceable against the yacht.

A breach of an executory contract cannot create a maritime lien.[26] An executory contract is one that requires some future performance. For example, a boat-yard may contract with a boat owner to have a boat hull scraped and repainted. If the boat owner changes his mind at the last minute and refuses to deliver his boat to be worked on, the contract is still only executory because no work was actually done. No lien is created, though the boat owner himself could be sued for breaching the contract. On the other hand, if the hull were scraped and painted, the contract is no longer executory and a lien will arise which can be enforced against the boat if the debt is not paid.[27]

Contracts to build a vessel[28] or for the sale of a vessel[29] are non-maritime liens when they are breached. Finally, unpaid insurance premiums for a policy covering a vessel will not create a maritime lien.[30]

C. CREATION, DISCHARGE AND WAIVER

The greatest number of maritime liens are created by contracts for repairs, supplies and other necessaries furnished to a vessel. Sometimes a court is asked to decide whether services or supplies were actually furnished with expectation that they were to be used for the benefit of the vessel's operation. There is no question when a boat is repaired or outfitted with new equipment that a service to the vessel has been rendered. In the case of supplies, however, the situation may be uncertain.

The legal focus is on whether there is a delivery to the boat or its owner or master with the expectation that the security for any unpaid amounts is to be the vessel itself.[31] A hardware store owner who sells paint or other supplies to a customer on account could not claim a maritime lien if he did not know at the time of sale that the supplies were for vessel use.[32] Most supplies purchased at a marina, however, are assumed to be for boat use. If a bank loan is obtained without the bank's knowledge that the money is to be used for the benefit of the vessel, no maritime lien will arise that can be enforced against the vessel if the owner defaults on his loan.[33] If the loan is made expressly for the benefit of a vessel, the opposite is true.

Another area of conflict concerns the question of who has authority to create a maritime lien. The Federal Maritime Lien Act provides that liens for services may be created by the owner, master, or any person to whom the management of the vessel is entrusted.[34] Because a recreational marina provides services primarily to small pleasure craft, the person requesting services

will almost always be the owner or one entrusted with the boat and clearly able to bind the vessel for unpaid debts. Not all crew members on a large yacht, however, have the authority to create a maritime lien.[35] A marina operator should be careful to deal directly with the owner or captain of a large vessel before committing services or supplies to it on account.

Persons who charter a vessel are able to create liens against it.[36] Most charter parties, however, specifically provide that the charterer is not to do so. Nevertheless, even with a no-lien clause, a charterer may still create a lien against the boat when one provides services to the charterer without knowledge of the prohibition.[37]

A maritime lien is not created if the repairman, supplier, etc., expressly waives the right to hold the vessel liable.[38] The parties can agree to some other security.[39] A sales agreement for fuel, for example, could expressly state that a lien for the fuel is waived and the boat owner alone is responsible for the debt. The right to hold a lien against the vessel as well as its owner, however, is a valuable right that should not be lightly bargained away. When the issue is in dispute, the courts will presume that a maritime lien was contemplated unless evidence to the contrary is very strong.[40]

D. LIEN PRIORITIES

Holding a maritime lien against a vessel with the right to force sale of the boat will not always guarantee that a debt or liability will ultimately be satisfied. The fair market value of the vessel may be less than the total amount of lien claims against it. In fact, the vessel may have sunk or been completely destroyed so that the liens against it are not meaningful.

Over the years the admiralty courts have assigned priorities to maritime liens which will determine in what order they will be paid when the proceeds of sale are not sufficient to satisfy all. The ranking of liens in cases where many liens and lien holders are involved will frequently depend on the judge's assessment of what is fair under the circumstances.[41] Thus, the following discussion is only accurate as a general rule. Equitable exceptions abound.

1. Lien Classification

Lien priorities are classified in a two-step process; first by type and then by date. The generally recognized class ranking of maritime liens and other claims is set out below.[42]

#1 Crew Wages and Maintenance and Cure
#2 Salvage and General Average
#3 Maritime Tort Claims
#4 Contract Claims and Federal Maritime Lien Act Claims for Repairs, Supplies and Other Necessaries
#5 State Statutory Liens that are Maritime in Nature
#6 Non-Maritime Liens

The cost of storing and protecting a vessel taken into custody and awaiting judicial sale is paid before the balance of the sale proceeds are distributed according to the priority system.[43]

All maritime liens are superior to non-maritime liens against the vessel such as tax liens, construction liens and regular mortgages.[44] When a boat is sold to enforce liens against it, nonmaritime liens and low priority maritime lien holders commonly receive nothing.

2. Classification by Date of Lien

The date a lien was created will determine how liens of the same type will be ranked, with the last-in-time having a higher priority than earlier liens.[45] Therefore, if a yacht was repaired on two separate occasions, the most recent repair lien will be paid off first in the event of a forced sale.

Ranking liens by date is relatively simple in the case of the "preferred maritime liens" -- crew wages, salvage and maritime torts. Ranking the most numerous contract liens involving unpaid repairs, supplies and other services can be much more difficult. Courts customarily group such liens by voyage, commercial season or on a yearly basis.[46] The voyage rule allows each lien of the same type to share equally in the proceeds of sale even when they arose on dates that differ only by a few days or weeks. The season and year rules apply the same way to longer time periods. All liens within the most recent time period outrank liens of an earlier period.[47] These rules developed in the context of commercial shipping cases, but might be applied to liens against pleasure craft in appropriate circumstances.[48]

E. ASSIGNMENT AND ADVANCES

Maritime liens can be assigned to new lien holders without changing lien priority.[49] The assignment simply transfers the identical right to another. In the event a lien holder dies before the lien is satisfied, the lien is inherited by his heirs like any other personal asset.[50]

Advancing money to boat owners to pay off liens has related effects. The advance, by bank loan or other source, creates a lien with the same priority as the lien that was paid off.[51] Thus, if a boat owner borrows money from a friend to pay an overdue repair bill, the lien is transferred from the repairman to the friend who will receive the same amount from the vessel's forced sale as the repairman would have received.

F. RIGHT OF POSSESSION

Recreational marinas do not always allow charges for dockage, storage, repair or other services to be placed on account. Marina owners and operators may want to extend that privilege only to old and reliable customers. Other boat owners may be required to pay in advance or at the time services are rendered. The fewer the number of boat owners allowed to receive services on credit, the fewer the number of unpaid debts that will arise which require enforcement of a maritime lien.

Even when the marina makes a practice of requiring early payment for services to boat owners, occasions will arise when

boat owners refuse or are unable to pay for services rendered. This is likely to occur most frequently when repairs are made which the boat owner must pay for after completion. Under these circumstances, can the marina keep the boat until the repairs are paid for or until the vessel is sold to enforce the lien? The answer is a qualified "yes."

In the absence of a maritime lien, common law permits repairmen to retain possession of property until the debt is satisfied.[52] Maritime liens give the same right.[53] Unlike common law liens, however, vessel possession is not an enforcement prerequisite of the maritime lien. Whether or not the marina keeps a boat, liens can be enforced by arrest and sale.

Anyone retaining possession of a boat for unpaid debts must be aware, however, that, as a bailee, he is responsible for the boat's protection while it is in his custody. This principle is illustrated by Gulf City Fisheries, Inc. v. Slay.[54] Gulf City involved repairs to a shrimp boat for which the owner failed to pay. The boatyard retained possession of the shrimp boat but was negligent in guarding it, and some of its gear was lost or stolen. The court held the boat-yard owner liable for lost items and their value exceeded the unpaid repair bill.

Reasonable expenses incurred by marinas to protect boats held for non-payment may be added to the original debt. In Gulf City, for example, permissible expenses might include a night watchman, haulouts, pumpouts and related services necessary for boat protection.

G. ENFORCEMENT

1. Laches

The legal term "laches" means an unreasonable delay in bringing a legal action which causes undue prejudice to the other party.[55] A lien holder may lose a maritime lien if he sits by for a long while and does not take steps to have the lien satisfied. Whether a delay amounts to laches is a question of fact depending on particular circumstances of each case.[56]

When a boat having a lien against it is purchased by someone without knowledge of the lien, the chances are greater that the lien holder's failure to enforce the lien constitutes laches since the new owner is placed in an unfair position.[57] If the boat has not been sold, the penalty for laches may only be loss of priority status rather than total loss of the lien.[58]

2. Procedure

The first step to enforce a maritime lien is filing suit with the federal district court in the district where the boat is located.[59] When all filing and notice requirements are fulfilled, a United States marshall then arrests the vessel and has it placed in safekeeping until legal proceedings are concluded. Frequently, however, the lien holder will ask the court to substitute another custodian recommended by him. A substitution is beneficial to the lien holder and boat owner because expenses of custody under a U.S. marshall are usually

greater. As mentioned earlier, storage costs have priority over all liens.

The boat owner can get the boat back by posting a bond equal to the claims against it up to its full stipulated value. If the value of the boat is in dispute, the court will determine its value with assistance of appraisers. Sometimes the boat owner may propose that the lien holder accept a "letter of undertaking" from the owner, his bank or underwriter, which guarantees payment of any judgment to a specified amount.[60] If either of these alternatives is used, the maritime lien no longer exists against the vessel but shifts to the bond or letter of undertaking.[61] Thereafter, the vessel is not subject to arrest for the shifted liens.

If a vessel remains in custody, it is usually sold by public auction at the pier or courthouse.[62] Once the legal proceedings are completed, any lien holder failing to participate loses his lien.[63] A lien holder who loses his lien in this manner still retains the right to hold the boat owner personally liable for the debt or liability for which the lien had been created.

VI - NOTES

1 Sanford v. McClelland, 163 So. 513, 514 (Fla. 1935).

2 Riffe Petroleum Co. v. Cibro Sales Corp., 601 F.2d 1385, 1389 (10th Cir. 1979).

3 Osaka Shosen Kaisha v. Lumber Co., 260 U.S. 490 (1923). For this reason, it is sometimes referred to as a "secret" lien. Id. at 497.

4 The Florida Bar, Maritime Law and Practice §§9.5-9.8 (1980). See generally Toy, Introduction to the Law of Maritime Liens, 47 Tul. L. Rev. 559 (1973); Richards, Maritime Liens in Tort, General Average and Salvage, 47 Tul. L. Rev. 569 (1973).

5 See Cisenfield v. S.S. Steel Pier, 1934 A.M.C. 939 (S.D. Fla. 1934) (musicians); Norris, The Law of Seaman §9 (3d ed. 1970 & Supp. 1981).

6 See The Admiral Peoples, 295 U.S. 649, 652-54 (1935).

7 See The Osceola, 189 U.S. 158, 175 (1903). A Jones Act claim based on negligence, however, will not create a lien. Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928).

8 The Barnstable, 181 U.S. 464 (1901); Reed v. The Yaka, 373 U.S. 410 (1963).

9 See United States v. Beatty, Inc. 401 F.Supp. 1040 (W.D. KY 1975) 33 U.S.C. §132 (f) (i) (1976). State of California Dept. of Fish & Game v. S.S. Bournemouth, 307 F.Supp. 922, 926 (C.D. Cal. 1967). See generally Maritime Law and Practice, supra note 4, 311.

10 See Goodpasture Inc. v. M/V Pollux, 602 F.2d 84,87 (5th Cir. 1979); Port Welcome Cruises, Inc. v. S.S. Bay Belle, 215 F.Supp. 72, 85-6 (D. Md. 1963); The Lydia, 1 F.2d 18, 23 (2d Cir. 1924).

11 46 U.S.C. §971 et. seq. (1976).

12 Id. §1971.

13 See, e.g., Payne v. S.S. Tropic Breeze, 423 F.2d 236, 240 (1st Cir. 1970); J. Ray McDermott & Co., 262 F.2d 523, 525 (5th Cir. 1959); Layton Industries, Inc. v. Sport Fishing Cruiser Gladiator, 263 F.Supp. 356, 360 (D. Mass. 1967).

14 See Maritime Law and Pracatice, supra note 4, §9.9; 46 U.S.C.A. §971, n. 3 (1975), The Denelfred, 59 F.2d 213, 215-16 (E.D. Mich. 1932).

15 Colonial Press of Miami, Inc. v. The Allen's Cay, 277 F.2d 540 (5th Cir. 1960).

16 Stern, Hays & Lang, Inc. v. M/V Nile, 407 F.2d 549 (5th Cir. 1969).

17 Allen v. M/V Contessa, 196 F.Supp. 649 (S.D. Tex. 1961).

18 Fla. Stat. §713.60 (1981).

19 46 U.S.C. §975 (1976); 2 Benedict on Admiralty §39 (7th ed. 1979).

20 Still v. Dixon, 337 So.2d 1033 (Fla. 2d D.C.A. 1976)

21 The Diane, 45 F.Supp. 510 (S.D. Fla. 1942).

22 See The Steamboat Orleans v. Phoebus, 36 U.S. 175, 184 (Peters 1837). But see Swift v. Knowles, 100 F.2d 977, 978-79 (5th Cir. 1939) (a person employed as both master and crew on a yacht entitled to maritime lien for unpaid wages).

23 Burdine V. Walden, 91 F.2d 321 (5th Cir. 1937).

24 Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204 (5th Cir. 1978).

25 The Morning Star, 1 F.2d 410 (W.D. Wash. 1924) (part owners); Freedom Line, Inc. v. Vessel Glenrock, 268 F.Supp. 7 (S.D. Fla. 1967) (stockholder in corporate owner of vessel); Fathom Expeditions, Inc. v. M/T Gaviron, 402 F.Supp. 390 (M.D. Fla. 1975) (joint ventures).

26 Continental Grain Co. v. Toko Lines, 333 F.Supp. 1349, 1350 (E.D. La. 1971); Ray, Maritime Contract Liens, 47 Tul. L. Rev. 587, 587-88 (1973).

27 Likewise, prepaid tickets of cruise ship passengers represent only executory contracts for future passage. Acker v. The City of Athens, 177 F.2d 961, (4th Cir. 1949).

28 Thames Towboat Co. v. The Francis McDonald, 254 U.S. 242 (1920).

29 Atlantic Lines, Ltd. v. Narwhal, Ltd., 514 F.2d 726 (5th Cir. 1975); Hirsch v. The San Pablo, 81 F.Supp. 292 (S.D. Fla. 1948).

30 The Prilla, 21 F.Supp. 383 (D. Mass. 1937). But see Grow v. Steel Gas Screw Loraine K, 310 F.2d 547 (6th Cir. 1962) (Admiralty Court enforcing state created lien).

31 Brock v. S.S. Southhampton, 231 F.Supp. 283 (D. Ore. 1964).

[32] See The Denelfred, 59 F.2d 213, 215 (E.D. Mich. 1932).

[33] See Florida Yacht Brokers, Inc. v. Yacht Huckster, 249 F.Supp. 371, 373 (S.D. Fla. 1965).

[34] 46 U.S.C. §972 (1976)

[35] See Barber v. The M/V Blue Cat, 372 F.2d 626, 628-29 (5th Cir. 1967).

[36] The Barstable, 181 U.S. 464 (1901) (vessel collision).

[37] See Ramsay Scarlett & Co., Inc. v. S.S. Koh Eun, 462 F.Supp. 277, 284-85 (E.D. La. 1978); Lake Union Drydock Co. v. M/V Polar Viking, 446 F.Supp. 1286, 1291 (W.D. Wash. 1978). See also Roberts v. Echternack, 302 F.2d 370, 373 (5th Cir. 1962); Maritime Law and Practice, supra note 4 §9.17 803-05.

[38] See Harmon, Discharge and Waiver of Maritime Liens, 47 Tul. L. Rev. 786, 803-05 (1973).

[39] Nacirema Operating Co., Inc. v. S.S. Al Kulsum, 407 F.Supp. 1222 (S.D.N.Y. 1975).

[40] W. A. Marshall & Co. v. S. S. "President Arthur", 279 U.S. 564 (1929); Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861 (5th Cir. 1958).

[41] G. Gilmore & C. Black, The Law of Admiralty 736 (2d ed. 1975).

[42] See Todd Shipyards v. The City of Athens, 83 F.Supp. 67, 78-9 (D. Md. 1949); The Law of Admiralty supra note 41, §9-58; Maritime Law and Practice, supra note 4, §9.14; Varian, Rank and Priority of Maritime Liens, 47 Tul. L. Rev. 751, 753 (1973).

[43] New York Dock Co. v. S.S. Poznan, 274 U.S. 117 (1927).

[44] National Bank of North America v. S. S. Oceanic Ondine, 335 F.Supp. 71, 73 (S.D. Tex. 1971) (federal taxes). See also Varian, supra note 42, at 764.

[45] Rubin Iron Works v. Johnson, 100 F.2d 871 (5th Cir. 1939).

[46] See The Brimstone, 69 F.2d 106, 106 (2d Cir. 1934). The Odysseus III, 77 F.Supp. 297, 298 (S.D. Fla. 1948).

[47] See Varian, supra note 42, at 760-63.

[48] On the Gulf and Atlantic Coasts, the voyage and calendar rules have both been applied on occasion. Rubin Iron Works, supra note 46;The Commack, 8 F.2d 151 (S.D. Fla. 1925). See also Varian, supra note 42, at 762.

[49] Veverica v. Drill Barge Buccaneer No. 7, 488 F.2d 880 (5th Cir. 1974).

[50] 2 Benedict on Admiralty §26 (7th ed. 1979).

[51] Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204 (5th Cir. 1978); Crustacean Transp. Co. v. Atlantic Trading Corp., 369 F.2d 656 (5th Cir. 1966). See Harmon, Discharge and Waiver of Maritime Liens, 47 Tul. L. Rev. 786, 793 (1973).

[52] Barbre-Askew Finance, Inc. v. Thompson, 100 S.E. 2d 381 (N.C. 1957); 21 Fla. Jur. Liens §§5-6 (1958); 76 A.L.R.2d 1332 (1961).

[53] See Gulf City Fisheries, Inc. v. Slay, 245 F.Supp. 526, 529 (S.D. Sla. 1965). See also Eastern Airlines Employees Federal Credit Union v. Lauderdale Yacht Basin, Inc., 334 So. 2d 175, 177 (4th D.C.A. Fla. 1976).

[54] 245 F.Supp. 526 (S.D. Ala. 1965).

[55] Esso International, Inc. v. S.S. Captain John, 443 F.2d 1144 (5th Cir. 1971).

[56] Molnar v. Gulfcoast Transit Co., 371 F.2d 639 (5th Cir. 1967).

[57] Tagaropulos, S.A. v. S.S. Santa Paula, 502 F.2d 1171 (9th Cir. 1974).

[58] See Harmon, supra note 51, at 801-03.

[59] See Rogers, Enforcement of Maritime Liens and Mortgages, 47 Tul. L. Rev. 767, 771-72 (1973); Maritime Law and Practice, supra note 4, §§9.21-30 (1980)

[60] See Continental Grain Co. v. Federal Barge Lines, Inc., 268 F.2d 240, 243-44 (5th Cir. 1959).

[61] J.K. Welding Co., Inc. v. Gotham Marine Corp., 47 F.2d 332 (S.D.N.Y. 1931).

[62] See Rogers, note 59, supra, at 782.

[63] Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861 (5th Cir. 1968).

VII - WRECKED AND DERELICT VESSELS

Two, nearly identical, Florida statutes are applicable to wrecked or derelict vessels, Sections 376.15 and 823.11. Both make it unlawful for any person to leave a vessel in a wrecked condition or otherwise abandoned without the state's consent or, if docked on private property, without the owner's consent. The state agency with enforcement responsibility is the Department of Natural Resources (DNR), through Marine Patrol officers.

Section 376.15 empowers DNR to remove a derelict vessel when it obstructs navigation, contributes to pollution or in some other manner poses a danger to persons or the enviroment.[1] DNR can assess fines up to $50,000 per day in extreme cases.[2] Section 823.11, part of the Pollutant Spill Prevention and Control Act, makes abandonment of a vessel a first degree misdemeanor. It also gives DNR the authority to remove vessels and charge owners for the costs.

These statutes were enacted with the intention of giving public officials authority to remedy problems caused by the wreckage or abandonment of large vessels that are capable of spilling significant quantities of oil, or other hazardous substances, or blocking a navigation channel. Nevertheless, the statutes do not exempt small commercial or pleasure crafts. The Florida Marine Patrol would like to remove all derelict vessels from Florida waters, no matter what size. Their primary attention, though, is on the removal of vessels constituting a hazard of some kind.[3]

The two statutes have only rarely been the subject of litigation. In a case from the Circuit Court for Dade County, the judge declared an old cargo vessel in the Miami River a nuisance.[4] He authorized the County to tow the ship out to a specified point in the Atlantic Ocean and to sink it, under the Coast Guard's supervision. Another case, which did not go to court, involved an 80-foot ship which had wrecked off the coast of Jacksonville. Although a salvage company had been given title to the vessel, DNR informed the original owner that he, not the salvage company, would be fined unless the vessel was removed within 30 days.[5]

A marina operator may wish to utilize one of the statutes if a vessel sinks in or near the marina basin and obstructs navigation, pollutes the water, or becomes an eyesore. Both the Marine Patrol and the County Attorney should be informed if the owner of the vessel is making no efforts to remove it.

In the case of boats that are abandoned in one of the marina's slips or dry storage facilities reasonable efforts should be made to contact the owner. Any boat in the marina's custody, however, must be protected from damage and theft while attemps are being made to contact the owner. The boat will probably accumulate dockage or storage expenses which create a maritime lien, and the marina has the right to enforce the lien by petitioning the federal district court to have the boat sold if the lien is not satisfied.6

A boat which is not in the marina's custody because the owner only paid for slip rental need not be given special protection by the marina.[7] When the rental period expires and the owner fails to return for his boat or to pay for an extension of the rental period, the reasonable cost of dockage can be charged against the vessel to create a lien against it. If the boat has been abandoned, the marina can have the lien satisfied by judicial sale.

NOTES

1 Fla. Stat. §376.15(2)(a)(1981). See also §376.031(1).

2 Id. §376.16(1).

3 Interview with Sgt. Patrick of the Florida Marine patrol, District 8, in Jacksonville (Sept. 30, 1980).

4 Dade County v. M/V Almirante, 42 Fla. Supp. 1 (1975).

5 Id.

6 See the chapter on Maritime Liens for more details of this process.

7 See the chapter on Bailments for an explanation of the marina's duty to protect boats.

VIII - OIL SPILL AND POLLUTION CONTROL

Large quantities of petroleum fuels and lubricants are stored, transferred and used in modern recreational marinas. Sometimes this oil is deliberately or accidently discharged into state waters. To prevent such damaging events and to provide effective remedies when they do occur, both state and federal governments have enacted laws regulating petroleum storage, management of spills, and assessment of clean up costs. Sections A and B of this chapter discuss applicable state and federal regulations. Local regulations also apply and are discussed in section C. In addition, liability for oil spills may be based on common law theories of trespass and nuisance. Section D discusses potential liability of marina operators and recreational boaters under common law.

A. STATE REGULATIONS

Florida has specific legislation governing pollution of state waters. Those laws most relevant to the operation of a recreational marina are Section 370.09 and Chapter 376, Florida Statutes.

1. Section 370.09, Florida Statutes

It is a misdemeanor, according to this provision, for a person to discharge oil from vessels or other floating craft, or wharves upon any salt waters of the state.[1] Application depends on whether the water in question is "salty,"[2] a somewhat ambiguous term. Since all oil discharges are prohibited, irrespective of size, this law is generally applicable to situations in which recreational boaters might be involved.[3] For example, a person pumping out the oily bilges of a small boat could be in violation. The Marine Patrol cites or tickets violators, much like the Highway Patrol tickets speeding motorists. Courts usually impose relatively small fines though, depending on the particular circumstances of the case.

2. Chapter 376, Florida Statutes - The Pollutant Spill Prevention and Control Act.

The Pollutant Spill Prevention and Control Act[4] focuses on prevention, containment, removal, and payment of costs with respect to pollution of state waters caused by the discharge of certain pollutants occurring as a result of procedures involved in the transfer, storage, and transportation of the pollutants.[5] It prohibits all discharges of designated pollutants into or upon coastal waters, estuaries, tidal flats, beaches and lands adjoining the state coast.[6] Applicability depends on whether the discharge is in "coastal" water. While that language is different from Section 370.09, which prohibits discharges into "salt" water, a distinction would be difficult to make.

Several definitions are of importance. "Pollutants" include oil of any kind and in any form, gasoline, pesticides, ammonia,

chlorine and derivatives thereof.[7] "Vessel" includes every kind of watercraft used or capable of being used, as a means of transportation upon water, whether self-propelled or otherwise.[8] "Discharge" includes, but is not limited to, any spilling, leaking, seeping, pouring, emitting, emptying, or dumping which occurs within the territorial limits of the state.[9] "Terminal Facility" is any waterfront or off-shore facility on or under the water capable of being used for drilling, pumping, storing, handling, transferring, processing or refining pollutants.[10]

The Department of Natural Resources (DNR) is responsible for administering the Act,[11] although the Department of Environmental Regulation may provide technical assistance in the event of a spill and would be a joint party to any suit against a discharger.[12] DNR has adopted implementing regulations, compiled in Ch.16N-16 of the Florida Administrative Code, governing terminal facility operations, discharge reporting, the cleanup of pollutant spills and inspection of any registrant causing a pollution discharge.

Any terminal facility operator must have a registration certificate.[13] The comprehensive definition of a terminal facility (described supra) would clearly seem to encompass a marina fueling facility. Gas docks, would therefore, have to be licensed.[14]

Registration certificate applicants must show adequate means and equipment necessary to prevent, control and abate the discharge of pollutants.[15] If the storage capacity of the registrant exceeds 250 barrels, the facility must be in compliance with detailed regulations promulgated by the Coast Guard.[16] Most marina fueling facilities, however, will not be subject to these requirements because they will not exceed a storage capacity of 250 barrels.

If the storage capacity of the facility is less than or equal to 250 barrels, DNR requires the facility to show evidence of membership in an approved discharge cleanup organization or capabilitites by contract or ownership reasonably sufficient to contain and remove facility discharges.[17] Any group of facility owners or operators can apply to DNR for approval as a discharge cleanup organization.[18] Approval by DNR of a discharge organization is based on consideration of: (a) the quality of cleanup organizations already approved for the area; (b) the nature of the membership in the present and proposed cleanup organizations and; (c) the ability of the area to properly support the proposed cleanup organization.[19]

Marinas, as terminal facilities, are subject to annual inspections by the Marine Patrol. An annual registration fee is assessed based on application processing costs and facility inspection costs. Inspection fees are directly related to facility storage capacity.[20] Each registrant must provide and maintain evidence of financial responsibility.[21] In addition, the Act imposes an excise tax on the transfer of each barrel of pollutant, for deposit in the Florida Coastal Protection Fund.[22] Excise taxes are only collected once -- on the first transfer of the pollutants. Thus, marinas are not subject to the

excise tax unless thay are the first point of transfer within Florida waters.[23]

The pilot and master of any vessel, or the person in charge of a terminal facility causing a discharge of pollutants, is required to immediately report the discharge to DNR or the Coast Guard. Failure to do so constitutes a felony of the third degree.[24] Since time is crucial to the success of spill containment and removal, prompt reporting is of primary concern to the Marine Patrol. There is no minimum amount of oil specified in the statute or rules that can be discharged and not reported. The statute requires that any spill be reported, so a violator is always subject to the prescribed penalty.

In addition to reporting the incident, any person discharging pollutants is required to contain and remove the discharge immediately.[25] When a spill is detected, the Marine Patrol attempts to determine the source and give the responsibile party an opportunity to take corrective action. If the person responsible for the discharge fails to remove the pollutants, the Marine Patrol will clean up the spill or contract with a third party to do so. Costs are payable from the Florida Coastal Protection Trust Fund, although the person responsible is then obliged to reimburse the costs.[26] Cleanup costs may be recovered by an action in civil court brought by DNR on behalf of the State of Florida. If the discharge source is unknown, removal costs are borne by the Trust Fund.[27]

The Marine patrol exercises concurrent jurisdiction with the Coast Guard over discharges.[28] During a cleanup, the Marine Patrol acts as the representative of the State. If the Marine Patrol cleans up beyond what is removed by the Coast Guard, an action can be brought for the additional removal costs. Of course, most small scale marina spills do not involve extensive clean up operations.

The owner or operator of a terminal facility which discharges pollutants may be liable for costs of abatement and cleanup up to eight million dollars, except that where willful or gross negligence or willful misconduct is shown, the owner or operator is liable for the full amount expended.[29]

Violators of Chapter 376 and regulations adopted pursuant thereto are also subject to civil penalties up to $50,000 per violation per day. This penalty is in lieu of any penalty for the same discharge under Chapter 403 of the Florida Statutes.[30] The penalty provision does not apply, however, to discharges that are promptly reported and removed in accordance with the rules and regulations of DNR.[31] In addition to the criminal penalty for failing to report a discharge, (discussed supra) there is a criminal penalty for fraudulently making false statements in response to Act requirements.[32]

Parties suffering damages from pollutant discharges may apply directly to the Fund for relief. Fund reimbursement may then be sought by DER against the polluter.[33] However the act specifically preserves private causes of action for damages from pollutant discharges.[34] The only defenses in an action for damages, costs, and removal expenses are an act of war, an act of government, an act of God, or an act or omission of a third party.

Although the provisions of Chapter 376 apparently contemplate large scale oil spills, small scale petroleum dealers--such as marina operator--are not exempt. Compliance with Chapter 376 is thus necessary for marina operations.

An additional statute, outside the scope of petrochemical pollution, is also relevant to marina operators. The Florida Litter Law makes it a misdemeanor to throw, discard, place, or deposit any litter in or on any state tidal or coastal waters.[35] The law may be enforced by any officer of the Florida Highway Patrol, the county sheriff's department, DER, or the Game and Fresh Water Fish Commission. Violators are cited in the same manner as speeding motorists, the penalty being at the discretion of the court.

B. FEDERAL REGULATIONS

The federal government exercises extensive regulatory powers to protect the quality of waters affected by recreational marinas.[36] This authority is primarily exercised through the Federal Water Pollution Control Act.[37] The most pertinent sections of the Federal Water Pollution Control Act , those dealing with oil spills, and to a lesser extent, those regulating marine sanitation devices, will be discussed.[38]

1. Oil and Hazardous Substance Liability

Section 311 of the Federal Water Pollution Control Act prohibits harmful discharges of oil and hazardous substances.[39] A discharge is considered "harmful" if it causes a "film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.[40] Thus, a relatively small discharge could violate Section 311.

Administration of Section 311 is primarily the responsibility of the Coast Guard. It has been given authority to inspect and establish equipment requirements for vessels and facilities, prevent harmful discharges, assess civil penalties in the event of a prohibited discharge, conduct clean up operations and recover clean up costs from responsible parties.[41]

Coast Guard Regulations establishing required methods and equipment designed to prevent prohibited discharges have been

published.[42] Briefly, they require: (a) the submission of an operations manual describing how the facility meets the requirements of the regulations; (b) requirements for each hose assembly used for transferring oil; (c) specifications for any mechanical loading arm used in transferring oil; (d) closure devices; (e) monitoring devices; (f) a means to safely and quickly remove discharge oil; (g) discharge containment equipment; (h) emergency shutdown capability; (i) adequate communications; and (j) adequate lighting.

Failure to comply with these regulations may subject the facility operator to a civil penalty of up to $5,000 for each violation.[43] The Coast Guard normally does not inspect small operations such as marina fueling facilities. Those inspections are left to the Florida Marine Patrol until there is an actual spill.[44]

In the event of a harmful spill, the person in charge of the vessel or onshore facility must immediately notify the Coast Guard.[45] Information obtained from a notification pursuant to this section cannot be used against that person in a criminal prosecution.[46] The failure to make proper notification, though, is a criminal act.[47]

The Coast Guard is authorized to remove any harmful discharge, unless it is determined that such removal can be done properly by the facility operator.[48] The Coast Guard "on scene coordinator" is in charge of discharge removal, in conjunction with the Florida Marine Patrol, if they are involved.[49] The costs of hiring a contractor to perform the clean up are payable from the Federal Contingency Fund. The violator is then liable to reimburse the Fund for those expenses. Four exceptions to liability are: (a) an act of God; (b) an act of war; (c) negligence on the part of the United States Government; (d) an act or omission of a third party.[50]

Although §1321 does not cover damages caused by harmful discharges, it specifically recognizes the authority of any state or other political subdivision to impose additional requiremnts or liability with respect to oil pollution.[51] In addition, assessment of a civil penalty against the violator is required by statute, regardless of whether the discharger was at fault.[52] Although the statute authorizes penalties of up to $5,000 for each violation, the circumstances of the spill, such as whether it was a first violation, are taken into account in setting the amount.[53]

Like its counterpart in Florida law, the Federal oil pollution statute primarily contemplates spills larger than those normally of interest to marina operators and users. However, it does not exclude smaller spills from its coverage. Given proper jurisdiction under the Federal Water Pollution Control Act, the Coast Guard has authority to act under the various provisions of Section 311. The liberality of the "sheen" test indicates that discharges of a relatively small size are sufficient to violate the Act. Therefore, the safest course of action in the event of a spill would be to immediately report it to the Coast Guard.

2. §1322. Vessel Sewage - Marine Sanitation Devices

Those sections of the Federal Water Pollution Control Act

relating to sewage disposal from vessels are of particular concern to recreational marina operations.[54] The Environmental Protection Agency is required to promulgate standards for the performance of marine sanitation devices and the Coast Guard is empowered to enforce them.[55] The standards apply to all vessels equipped with installed toilet facilities. After the effective date, it is unlawful for a manufacturer to make or sell any vessel not in compliance with the standard.[56] Civil penalties for non-compliance are up to $5,000 per violation. Since the effect of this statute will be to increase the use of sewage holding tanks or treatment facilities, an increasing demand for pump-out, treatment and marina service facilities can be expected.

C. LOCAL REGULATIONS

County and municipal regulation of marina-related pollution is based primarily on the police power. To be valid, local ordinances must rest upon a reasonable relation between the remedy adopted and the public purpose to be served. Local ordinances cannot be inconsistent with either state or federal law. Within this context, there is great latitude for local governmental units to regulate pollution. Ordinances imposing additional requirements not in conflict with state law are valid.[57] Operators should be aware of local ordinances pertinent to marina operations. A number of local governments have passed applicable laws. Dade County, for example, has enacted regulations with respect to pollutants ranging from oil and grease to mercury.[58] Belleair Beach has a general ordinance which prohibits the pollution of marina and basin waters.[59] Daytona Beach has an ordinance prohibiting sewage discharge from vessels.[60]

D. COMMON LAW

The extensive statutory coverage of water pollution has virtually preempted traditional common law actions. Trespass and nuisance theories, however, retain some supplemental value and may be used to sue a polluter.[61]

A unique federal common law has recently been applied in a few cases in which pollution was interstate in nature.[62] The federal common law is most likely to be relevant where large interstate polluters are concerned, and thus, is not of great importance to an analysis of potential pollution liability of Florida marina operators.

Common law is sometimes used to fill in gaps left by regulatory programs. Common law actions are expressly preserved by statute in Florida.[63] The statutory standards with respect to pollution, however, may play an evidentiary role in a common law trial suit for pollution damage. Remedies include injunction, damages, or both, depending on the circumstances of the case.

A blend of property and tort law governs common law pollution remedies. The common law tort theory of nuisance is of most relevance. The nuisance ground is actually two related doctrines. One is private nuisance and protects the use the enjoyment of one's land from unreasonable interferences. A plaintiff may recover not only for harm arising from acts affecting the land itself and the comfortable enjoyment thereof, but also for harm to family or possessions. Private nuisance actions to abate water pollution have been rare.

A public nuisance is an unreasonable interference with a right held by the public. It can arise when some activity interferes with public health and safety or is prohibited by statute, ordinance or administrative rule. A private person may bring an action for public nuisance only when he can show that he has been injured in a way different in kind, rather than degree, from the general public.

In theory at least, the action for trespass to real property should provide the best environmental protection, since neither proof of intent nor negligence is required for liability. Trespass is an invasion of the plaintiff's interest in the exclusive possession of his property. An action is based on an actual invasion of the plaintiff's property by the defendant or his instrumentalities. In order to find that an invasion was direct, it must have involved objects seen with the naked eye. In the case of oil spill pollution, this requirement would be met if oil particles come onto plaintiff's property. Like nuisance however, this theory has taken a back seat to actions based on pollution control statutes.

The doctrine of strict liability affords another possible remedy for pollution damage. This theory would allow the plaintiff to recover for damage to property without a showing of negligence, based on the inherently dangerous nature of defendant's activity. The application of this remedy only to abnormally dangerous or ultra-hazardous activities, though, has severely limited its applicaiton. A plaintiff would have to characterize a fueling operation as an abnormally dangerous activity in order to use this theory successfully.

VIII - NOTES

1 Fla. Stat. §§370.021, .09 (1981).

2 Id., §370.01(5).

3 Telephone interview with Officer J. H. Schmidt, Florida Marine Patrol, District 8, Jacksonville, Florida (Aug. 8, 1980).

4 Fla. Stat. §§376.011-.21(1981). The act was soon challenged as an interference with federal maritime law. The United States Supreme Court upheld the constitutionality of Chapter 376 and found no conflict with federal law. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). The Supreme Court held that the act did not conflict with the Water Quality Improvement Act of 1970, which expressly called for coordination between state and federal regulation. (superseded by the Federal Water Pollution Control Act. 33 USC §1251 et. seq.). The Court held that absent a clear conflict between state and federal law, state regulation is permissible in the admiralty area. For a discussion of the relationship between state and maritime law, especially as it relates to Chapter 376, see McCoy, Oil Spill and Pollution Control: The Conflict Between State and Maritime Law, 40 Geo. Wash. L. Rev. 97-122 (1971-72).

5 Fla. Stat. §376.021(3)(b)(1981).

6 Id., §376.041.

7 Id., §376.031(7). "Pollution" is defined in §376.031(8).

8 Id., §376.031(12).

9 Id., §376.031(5).

10 Id., §376.031(9).

11 Id., §376.021(4). The powers and duties of the Department of Natural Resources are enumerated in §376.051.

12 Telephone interview with Dennis Statts, South Florida Regional Office, Florida Department of Environmental Regulation, West Palm Beach (Aug. 29, 1980). DER has jurisdiction over a broad class of polluting activities under Chapter 403, Florida Statutes.

13 Fla. Stat. §376.06(1) (1981).

14 Telephone interview with Richard Healy, Florida Department of Natural Resources, Tallahassee, Florida (Aug. 29, 1980).

15 Fla. Stat. §376.06(3),(8) (1981); 6 F.A.C. 16N-16.11.

16 45 Fed.Reg. 7169, 7169-174 (January 31, 1980). See notes 41-44 and accompanying text infra.

17 6 F.A.C. 16N-16.11(1).

18 Id., 16N-16.12(1)

19 Id., 16N-16.12(2).

20 Id., 16N-16.105(5). 1) 0--60 barrels liquid storage capacity--annual fee of $10.00. 2) 61-100 barrels--$40.00. 3) 101-200 barrels--$70.00. 4) 201-500 barrels--$150.00. 5) over 500 barrels--$250.00. Id.

21 Fla. Stat. §376.14(1) (1981).

22 Id., §376.11(4); F.A.C. 16N-16.15.

23 Healy, supra note 14.

24 Fla. Stat. §376.12(7) (1981).

25 Id., §376.09(1).

26 Id., §376.11(7).

27 Id., §376.09(3).

28 See note 49 and accompanying text, infra.

29 Fla. Stat. §376.12(1) (1981).

30 Id., §376.16.

31 Id., §376.16(3).

32 Id., §376.07(2)(g).

33 Id., §376.12(2).

34 Id., §376.205.

35 Id., §403.413.

36 Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.C.D.C. 1975); U.S. v. Holland, 373 F.Supp. 665 (M.D. Fla. 1974).

37 33 U.S.C.A. §§1251-1376 (1978).

38 An excellent discussion of federal oil spill controls is Oil Pollution Control Mechanisms: Statutes and Regulations,

University of Mississippi Law Center (1977).
Mississippi-Alabama Sea-Grant Consortium, MASGP 78-014.

39 33 U.S.C.A. §1321(b)(3) (Supp. 1981).

40 40 C.F.R. §110.3 (1980).

41 33 U.S.C.A. §1321(g) (1978); 33 C.F.R. §155 (1980).

42 See 45 Fed.Reg. 7170 (Jan. 31, 1980); 33 C.F.R. §154 (1980).

43 33 U.S.C.A. §1321(j)(2) (1978).

44 Telephone interview with Petty Officer Lux, Coast Guard Station, Jacksonville, Florida (Aug. 29, 1980).

45 33 U.S.C.A. §1321(b)(5) (Supp. 1981).

46 Id.

47 Id.

48 Id., §1321(c)(1) (1978).

49 33 C.F.R.153.105 (1980).

50 33 U.S.C.A. §1321(f)(2) (1978).

51 Id., §1321(o).

52 Id., §1321(b)(6).

53 Id., §1321(b)(6)(B) and Lux interview, note 44 supra.

54 Id., §1322.

55 Id., §1322(b); 40 C.F.R. §140 (1980); 33 C.F.R. §159 (1980).

56 33 U.S.C.A. §1322(h) (1978).

57 Fla. Stat. §376.19 (1981).

58 Dade County Code §24.11 (1975).

59 Belleaire Beach Resolution 208 (1972).

60 Daytona Beach Code Ch. 10 (1976).

61 See generally, F. Maloney, S. Plager, R. Ausness and B. Canter, Flordia Water Law-1980 1-762, 330-351, University of Florida Water Resources Research Center publication No. 50.

62 Illinios v. City of Milwaukee, 406 U.S. 91 (1972); Illinois v. Outboard Marine Corp., 619 F.2d 623 (1980).

63 Fla. Stat. §376.205 (1981).

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