

Marquette Law Review

Volume 42
Issue 1 *Summer 1958*

Article 6

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Harney B. Stover Jr., *Special Provisions of Towage Contracts*, 42 Marq. L. Rev. 36 (1958).
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SPECIAL PROVISIONS OF TOWAGE CONTRACTS

HARNEY B. STOVER, JR.*

I. INTRODUCTION

In the United States today there is a growing interest and emphasis on the shipping industry and the benefits that may be derived from shipments by water. Perhaps the greatest contributing factor to this increased interest in recent years has been the joint undertaking and development of the St. Lawrence Seaway by the United States and Canada. Within the shipping industry itself, towing services play a vital and necessary role. Almost all of the ports of the United States are situated in such a manner that, of necessity, at one time or another ships desiring to use their facilities require towing services. Though there are many cases dealing with the subject of towage and towage contracts, writers in the field of Admiralty have felt it unnecessary to devote much attention to those subjects. The most recent textbook in the field of Admiralty does not devote much more than six pages to this subject.¹ It is with this in mind that the writer now undertakes to develop in some detail a discussion of certain special provisions in towage contracts which have caused some degree of controversy over the years.

II. IN GENERAL

Before actually considering special provisions in towage contracts, it would be well to have in mind some of the basic premises underlying the field of towage. The usual definition of towage service is that service rendered by one vessel to expedite the voyage or movement of another vessel without reference to any circumstances of danger.² More realistically and specifically it has been stated that towage is the supplying of power by a vessel, usually one propelled by steam, or today by diesel engine, to tow or draw another vessel.³

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¹ GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, 426-432 (1957).

² *Sacramento Nav. Co. v. Salz*, 273 U.S. 326 (1927); *Mississippi Valley Barge Line Co. v. Indian Towing Co.*, 232 F. 2d 750, 753 (5th Cir. 1956); *The Kennebec*, 231 Fed. 423, 425 (5th Cir. 1916); *The S. C. Schenk*, 158 Fed. 54, 59 (6th Cir. 1907); *The Nettie Quill*, 124 Fed. 667, 670 (S.D. Ala. 1903).

³ *Stevens v. The White City*, 285 U.S. 195, 200 (1932).

In order to intelligently consider any subject within the field of towage and towage contracts, one must be able to distinguish between towage service and salvage service. This can be done by considering that towage service is the aid rendered in the movement of a vessel not in distress while salvage service is the aid rendered to a vessel in distress and in imminent danger of disaster.⁴ Towage service is a contractual service,⁵ whereas true salvage service is a voluntary service rendered to a vessel in peril to relieve her from present or reasonably apprehendable danger or distress.⁶ The necessary elements for true salvage service are the presence of actual peril or distress, a voluntary service rendered and either partial or complete success.⁷ The salvage itself is compensation in the nature of a reward received for the meritorious services successfully rendered, given so as to encourage others to do likewise in situations of distress or peril.⁸ Of course, salvage services may also be contractual in which case the amount of the compensation and the conditions upon which it is dependent would be determined by the terms of the contract itself. A change in conditions may convert a towing operation into a salvage service or vice versa.⁹

"Towing" a vessel is distinguished from "navigating" a vessel in that the latter means steering, directing or managing a vessel, implying that such is done by those aboard the vessel itself, while the former means to drag a vessel through the water by means of a cable or line attached to another vessel, implying that such is done by those aboard the other vessel.¹⁰ Today this would include pushing, as well as pulling movements, and sternward, as well as forward, movements because as a practical matter a tug may push or pull her tow in numerous ways both forward and sternward in accomplishing the purpose of the tow. Vessels being towed may include barges, canal boats and other vessels having no motive power of their own such as dredges, rafts, etc., as well as vessels having motive power of their own such as steamers which frequently employ auxiliary power in the form of tugs to assist them in moving about harbors, docks and channels.¹¹

Despite some miscellaneous statements to the contrary, it is gen-

⁴ The Mercer, 297 Fed. 981, 984 (2d Cir. 1924).

⁵ P. Dougherty Co. v. U.S., 97 F. Supp. 287, 291 (D.C. Del. 1951), *rev'd.* on grounds of negligence, 207 F. 2d 626, *cert. denied*, 347 U.S. 912.

⁶ La Rue v. United Fruit Co., 181 F. 2d 895, 898 (4th Cir. 1950); The Kennebec, 231 Fed. 423 (5th Cir. 1916); Kittelsa v. U.S., 75 F. Supp. 845, 846 (E.D. N.Y. 1948); The Emanuel Stavroudis, 23 F. 2d 214, 216 (Md. 1927).

⁷ Squires v. The Ionian Leader, 100 F. Supp. 829, 834 (N.J. 1951).

⁸ La Rue v. United Fruit Co., 181 F. 2d 895, 898 (4th Cir. 1950); U.S. v. The James L. Richards, 179 F. 2d 530, 532 (5th Cir. 1950); Steamer Avalon Co. v. Hubbard S.S. Co., 255 Fed. 854, 856 (9th Cir. 1919); J. M. Guffey Petroleum Co. v. Borison, 211 Fed. 594, 601 (5th Cir. 1914).

⁹ Geertson v. U.S., 223 F. 2d 68 (3d Cir. 1955).

¹⁰ Ryan v. Hook, 34 Hun. (N.Y.) 185 (1884).

¹¹ Stevens v. The White City, 285 U.S. 195 (1932); also see 1 BENEDICT, ADMIRALTY, §100 (6th ed.), p. 306.

erally conceded by American Courts that the towing vessel or tug is not a common carrier or insurer or bailee of the tow,¹² and owes to the tow that degree of care and skill in the management of the towing vessel and in the conduct of the towing operation as is ordinarily employed by prudent navigators under the same or similar circumstances.¹³ In the many opinions covering the subject there appears to be conflict as to whether the care required is reasonable care, ordinary care or a high degree of care. It seems safe to say that there actually is no conflict but that the terms reasonable and ordinary are synonymous under the circumstances. Mention of a high degree of care as that being required can usually be reconciled with other statements in that the ordinary or reasonable care required is actually the exercise of a high degree of skill as compared to the skill required in other fields, but within the field of navigation it is the ordinary or reasonable care employed by prudent navigators under the same or similar circumstances.

Just as it is implied that the towing vessel will conform to a standard of care in performing its functions in connection with the towage operation, so also is it implied that the tow will conform to the same standard of care in its conduct of the operation,¹⁴ dependent upon the nature of the vessel being towed. For example, in open waters with a single towing vessel pulling, it is the duty of the tow to follow the guidance of the towing vessel, keep within her wake as much as possible and conform to her directions.¹⁵ So also, a steamer in tow is not relieved of the duty to maintain a proper and competent lookout and to warn of any impending danger.¹⁶

The extent of the assistance required of the towing vessel varies under the circumstances of the tow. Assistance rendered to a dead, unmanned tow would differ considerably from that rendered to a live, loaded steamer fully manned and with power and helm available. The condition of the tow and the circumstances surrounding the towing operation might very well include a light, partially loaded or loaded tow, an unmanned, partially manned or fully manned tow from a barge without any rudder or power up to a steamer with full power and rudder available, the use of one, two or more towing vessels or an

¹² *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291 (1932); *Stevens v. The White City*, 285 U.S. 195 (1932); *The Margaret*, 94 U.S. 494 (1877); *The Webb*, 14 Wall. 406 (1871); *The Syracuse*, 12 Wall. 171 (1871); *The W. H. Baldwin*, 271 F. 411 (2d Cir. 1921).

¹³ See Annot: 54 A.L.R. 104-108; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 153 F. Supp. 923 (E.D. La. 1957); *Foss Launch & Tug Company v. The Kukui*, 130 F. Supp. 180 (N.D. Cal. 1955).

¹⁴ *The W. J. Keyser*, 56 Fed. 731, 734 (5th Cir. 1893).

¹⁵ *The Margaret*, 94 U.S. 494 (1877).

¹⁶ *Stevens v. The White City*, 285 U.S. 195 (1932); *Reiss S.S. Co. v. Great Lakes Towing Co.*, 177 F. 2d 681 (8th Cir. 1949); *Great Lakes Towing Co. v. American S.S. Co.*, 165 F. 2d 368 (6th Cir. 1948); *The Vale Royal*, 51 F. Supp. 412 (Md. 1943); *The Coleraine*, 179 Fed. 977 (E.D.N.Y. 1910).

operation taking place in open waters as opposed to towage in narrow channels. Suffice it to say that any one or a combination of these factors will vary the amount of assistance required to complete the towing operation successfully and will vary the extent of the responsibility of the towing vessel and the tow.

In strange waters the master of the towing vessel is held to that degree of skill and knowledge required of prudent navigators operating in such waters, as indicated before. In its home port a towing vessel is bound to know and chargeable with knowledge of channels, depth of water, currents and tide, condition of the bottom and existing and well known obstructions, whether charted or uncharted,¹⁷ and even recently changed conditions in channels and harbors if means of knowledge exist and are available to it.¹⁸ However, the master of a towing vessel, even in its home port, is not presumed or bound to know uncharted, unmarked, hidden and dangerous obstructions to navigation of which he has no notice or knowledge.¹⁹

A towage contract is no different than any other contract²⁰ in that it must contain the essential elements of offer, acceptance and consideration. As a practical matter, the contract may be made in many different ways. There may be a specific written contract covering the tow of one vessel by another from one point to another or covering towing operations for an entire season or year in hauling certain cargoes. But the contract need not be in writing.²¹ Frequently, a towage contract is made when a vessel entering a harbor and requiring assistance to a dock, signals for a tug and the tug comes alongside and takes the vessel's line. The towing operation actually commences when the towing vessel takes the tow line.²² Large towing companies may publish tariffs covering the operations of their towing vessels in various ports and send copies of such tariffs to shipping companies operating vessels in those ports. Availing themselves of the services of such towing vessels binds both tug and tow to the terms, conditions and rates set forth in the tariff unless there is a specific agreement otherwise.²³

The relation ordinarily existing between tug and tow may be changed by agreement between the parties.²⁴ It is such specific pro-

¹⁷ *The W. H. Baldwin*, 271 Fed. 411 (2d Cir. 1921); *Vessel Owners' Towing Co. v. Wilson*, 63 Fed. 626 (7th Cir. 1894).

¹⁸ *Great Lakes Towing Co. v. Alva S.S. Co.*, 261 Fed. 261, 262 (7th Cir. 1919).

¹⁹ *The Arlington*, 10 F. 2d 285 (2d Cir. 1927); *The W. H. Baldwin*, 271 Fed. 411 (2d Cir. 1921); *The Westerly*, 249 Fed. 938 (1st Cir. 1918); *The Louisa*, 215 Fed. 92 (2d Cir. 1914); *Maxon v. Chicago & N.W. Ry. Co.*, 122 Fed. 555 (E.D. Wis. 1903).

²⁰ *Clark v Gifford*, 7 La. 524, 26 Am. Dec. 511 (1835).

²¹ *The Marmor*, 56 F. Supp. 435, 437 (S.D.N.Y. 1944).

²² *Midland Steamship Line v. The Arkansas*, 232 F. 2d 81 (6th Cir. 1956).

²³ *Hand & Johnson Tug Line v. Canada S.S. Lines*, 281 Fed. 779 (6th Cir. 1922).

²⁴ *Wells & Tucker v. The Steam Navigation Co.*, 2 N.Y. 204, 1 Seld. 132 (1849).

visions or agreements changing the ordinary relationship existing between tug and tow which are now to be considered.

III. COMPENSATION

Most towing operations are conducted in accordance with a towage contract or tariff which prescribes the rates to be charged and paid for the services performed. In the absence of an agreement as to rates or price for the towage services performed, the towboat is entitled to receive a "reasonable compensation" for its services.²⁵ In the case of a towboat ordinarily engaged in rendering towing services, the standard followed would involve consideration of the running expenses of the towboat and the general custom as to rates and charges for similar services.²⁶ In determining what is reasonable compensation for extraordinary towage services performed, but short of salvage, there may be taken into consideration the type of vessel rendering the towing service, the time spent, the danger involved and the value of the towing vessel and her cargo.²⁷ Money expended to acquire additional assistance to complete the towing operation, where such is required through no fault on the part of the towing vessel, is chargeable to the tow.²⁸

Since a towing vessel engaged in rendering towing services is not a common carrier, rates for towage services may be set by contract without regard to rates established by a state for common carriers.²⁹ However, in at least one instance, a towing company has grown so large in its operations within a certain area as to become virtually monopolistic within that area, and, as an alternative to dissolution by virtue of an anti-trust action, has been required to annually publish and post a tariff in order to continue the operation of its business.³⁰ An agreement in a towage contract or in the tariff under which the services are performed as to the amount chargeable fixes that as the amount recoverable and to be paid.³¹ Compensation for towage services is recoverable even despite delay due to a reasonable deviation or injury to the tow where such results without any fault on the part of

²⁵ *Curtis Bay Towing Co. v. Luckenbach S.S. Co.*, 54 F. Supp. 988 (E.D. Penn. 1943), *affd.* 142 F. 2d 257 (3d Cir. 1944); *The Oswego No. 2*, 23 F. Supp. 311 (W.D.N.Y. 1938); *The J. C. Pfluger*, 109 Fed. 93 (N.D. Cal. 1901).

²⁶ *Curtis Bay Towing Co. v. Luckenbach S.S. Co.*, 54 F. Supp. 988 (E.D. Penn. 1943), *affd.* 142 F. 2d 257 (3d Cir. 1944); *Syson v. Hieronymus*, 127 Ala. 482, 28 So. 967 (1900).

²⁷ *The Viola*, 52 Fed. 172 (C.C.E.D. Penn. 1892); *The J. C. Pfluger*, 109 Fed. 93 (N.D. Cal. 1901).

²⁸ *Foss Launch & Tug Company v. The Kukui*, 130 F. Supp. 180 (N.D. Cal. 1955).

²⁹ *State of Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 (1927).

³⁰ *U.S. v. Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio 1913), supplementary decision 217 Fed. 656 (N.D. Ohio 1914).

³¹ *Pennsylvania R. Co. v. M. McGirr's Sons Co.*, 287 Fed. 334 (2d Cir. 1922), *cert. denied*, 262 U.S. 743; *Foss Launch & Tug Company v. The Kukui*, 130 F. Supp. 180 (N.D. Cal. 1955); *The Enterprise*, 181 Fed. 746 (W.D. Penn. 1910).

the towing vessel.³² When agreed upon and not due to any fault of the towing vessel, loss of the tow does not affect the compensation due.³³ Of course, damages resulting from delay of, injury to or loss of the tow due to the negligence of the towing vessel would be the proper subject of a claim against the tower.

The parties to a towage contract may make any agreement as to the time and method of payment. In the absence of such an agreement, payment for towage services is not due until the services have been rendered, unless there is a custom of the port otherwise and such custom is binding upon the parties.³⁴

IV. PILOTAGE

Pilots can generally be classified into two categories; those entrusted with the navigation of a vessel throughout the course of a voyage, and those employed to guide a vessel in and out of harbors, rivers and specified channels. The degree of skill required by the two classes differs. The former requires a knowledge and application of the applicable rules of navigation, the use of particular charts to avoid dangers, and the use of navigational observations and aids to complete a successful voyage from departure to destination. The latter requires a personal, thorough, up-to-date knowledge of the channels, currents, obstructions and dangers, charted or uncharted, of the locale.³⁵ It is the latter use of a pilot which is generally the subject of a pilotage provision in a towage contract. As a practical matter the pilot in such instances may take the helm of the vessel and actually steer her course or may stand by the wheelsman and direct the navigation of the vessel. In either case, he is generally conceded by American authorities to supersede the master as far as the navigation of the vessel is concerned.³⁶

The usual pilotage provision in a towing contract provides that the master of a towing vessel who goes aboard a tow, using her own propelling power, to pilot her becomes the servant of the tow or her owners and that the towing vessel and her owners are not liable for his negligent pilotage. The leading case in this field is *Sun Oil Co v. Daltzell Towing Co.*³⁷ In that case the United States Supreme Court considered a situation wherein the owner of a tank steamer brought an action against the owner of three tugs and the tugs themselves for damages to the steamer when she was grounded while the tugs were assisting her through the waters leading to Newark Bay and to a dock at Bergen Point, New Jersey. At the time of the grounding, the

³² *Atlantic & Gulf Shipping Co. v. Marine Contracting & Towing Co.*, 26 F. 2d 70 (5th Cir. 1928).

³³ *Foss Launch & Tug Company v. The Kukui*, 130 F. Supp. 180 (N.D. Cal. 1955).

³⁴ *The Queen of the East*, 12 Fed. 165 (C.C.E.D. La. 1882).

³⁵ *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U.S.) 389 (1875); *Pacific Mail S.S. Co. v. Joliffe*, 2 Wall. (U.S.) 450 (1865).

³⁶ *The Oregon*, 158 U.S. 186 (1895).

³⁷ 287 U.S. 291 (1932).

master of one of the tugs was aboard the tank steamer acting as pilot. Though there was no written or formal towage contract and the agreement was formed by an oral order and acceptance via telephone in accordance with prior like transactions between the parties, it was agreed that the contract contained as one of its terms a clause providing that when the captain of one of the tugs towing a vessel using her own propelling power was aboard the vessel, he was to become the servant of the vessel's owners in regard to giving orders to any of the tugs or handling the vessel. The Court, in considering whether the tugs and their owners were liable for the negligent pilotage of the tug captain aboard the tank steamer, stated as follows:

"When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towing service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damages resulting therefrom."

The Court held that the pilotage clause was valid and that the owner of the tugs was exempt from liability for negligent pilotage by the tug captain while aboard the steamer as pilot. The basis for this decision was given as the fact that the tugs were not common carriers or bailees, since towage does not involve the liability of common carriers or bailees. Since pilotage is something even less than towage and there was no monopoly present in respect of services desired by the steamer, the Court held that the parties were on an equal footing and dealt at arms length and that public policy required enforcement of the contract actually made.

That this rule is still in full force and effect today is clearly established by two recent decisions of the United States Supreme Court, *Bisso v. Inland Waterways Corp.*³⁸ and *Boston Metals Co. v. The Winding Gulf*,³⁹ which specifically referred to *The Sun Oil Case* as valid and binding law. However, it is apparent from the latter case that such provisions are to be strictly construed and apply only to cases of pilotage in the true sense of the word and cannot be used in an attempt to establish an exemption from all liability for negligent towage. That such provisions will be strictly construed is even more apparent from the decision of the Court in *United States v. Nielson*,⁴⁰ wherein the Court held that a pilotage clause releasing from liability for damages resulting from the negligence of the tugman acting as pilot by making him an employee of the tow owner, could not be construed to

³⁸ 349 U.S. 85 (1955).

³⁹ 349 U.S. 122 (1955).

⁴⁰ 349 U.S. 129 (1955).

entitle the tug owner to collect for damages to the tug resulting from the negligence of the tugman-pilot aboard the tow. The Court did state, however, that "clear contractual language might justify imposition of such liability."

There can be little doubt but that a pilotage provision of the type discussed herein is valid, binding and enforceable as between the parties to a towage contract. Disregarding all arguments concerning whether or not towing vessels are common carriers, insurers or bailees, whether or not one should be able to contract against liability for his own negligence or that of his employees and whether or not the towing operations involved are in the nature of a monopoly, the real reason and basis for upholding the validity of a pilotage provision probably lies in the fact that furnishing pilotage is not a part of towage. The vessel in tow could just as easily obtain the services of a pilot other than the master of the towing vessel and in any case the pilot would, for all intents and purposes, become the servant of the owner of the tow if he was piloting her with the use of her own propelling power, probably even in the absence of any special provision in the contract as to pilotage. Accordingly, the parties are unquestionably dealing on an equal basis and there is no reason of public policy or otherwise preventing the owner of a towing vessel from exempting himself and his vessel from liability for damage incurred as a result of the negligence of his tug captain while actually serving as pilot for and servant of the owner of the vessel in tow.

V. DEMMURAGE

Towing contracts and the tariffs of towing companies frequently contain a provision to the effect that the amount chargeable for demurrage to a towing vessel and her owners in case of liability on the part of the towing vessel shall be limited to a certain amount per day. Such restrictive limitations usually contain the provision that the limit may be increased upon notice and payment of increased rates.

That such a limitation is valid and binding as between the parties to a towage contract was firmly established in *Hand & Johnson Tug Boat Line v. Canada S.S. Lines*⁴¹ wherein the Court considered a situation involving a tug pushing a steamer toward a dock. The steamer was moving sternward and the tug and the steamer were lashed port bow to port bow. The steamer's stern hit the dock. The tug owner was a subsidiary of The Great Lakes Towing Company. By Court order in an anti-trust action brought by the United States against The Great Lakes Towing Company, the towing company was required to publish and post a tariff annually in order to continue the operation of its business. The towing company did this and Canada S.S. Lines had received previous tariffs. The latest one prior to the accident in

⁴¹ 281 Fed. 779 (6th Cir. 1922).

question was mailed from the towing company's general office in Cleveland to the steamship company's general office in Montreal marked for the "Accounting Office." Copies were also sent to the steamship company's office in Toronto. The latter were admittedly received but the former could not be found and the steamship company claimed that they were never received. The tariff contained a restrictive provision limiting the amount chargeable for demurrage in case of the tug's liability to One Hundred Dollars per day with a provision for increase in limitation upon notice and payment of increased rates of 5% for each One Hundred Dollars per day increase. The lower Court held the tug at fault and the provision limiting demurrage invalid and ineffective and allowed demurrage of Three Hundred Dollars per day. The Circuit Court of Appeals affirmed that the tug was at fault but upheld the demurrage provision on the ground that if a demurrage liability limitation is valid for common carriers, which are closer to the position of insurers than tugs which are not common carriers, then the demurrage liability limitation was valid. The Court further held that if the tariff was received, the towing company had the right to assume that any request for towing was made pursuant to the offer and conditions contained in the tariff and the steamship company could not deny the conditions therein.

Subsequent cases have uniformly upheld the validity and enforceability of such demurrage limitations.⁴² As was stated in *The Hand & Johnson Tug Line Case*, the underlying reason for enforcing such provisions is probably that they are upheld in the case of common carriers,⁴³ and vessels engaged in towing operations are something less than common carriers. It follows that they should be valid and enforceable as applied to towage operations.

It should be pointed out that all such provisions which have been upheld have not sought to exempt or release the towing vessel from all liability but rather have sought only to limit the towing vessel's liability. Further, it should be pointed out that all such clauses uniformly provide for an increase in the limitation upon payment of higher rates. It is doubtful that any such provision which limits liability to a certain sum per day for demurrage, without any provision for increase in that amount upon payment of higher rates, would be held to be valid and enforceable.

VI. RELEASE FROM LIABILITY

Release-from-liability provisions in towage contracts have been the subject of considerable judicial discussion over a period of many

⁴² Great Lakes Towing Co. v. Bethlehem Transp. Corp., 65 F. 2d 543 (6th Cir. 1933); *The Texas*, 27 F. 2d 162 (W.D.N.Y. 1928).

⁴³ *Union Pacific R. Co. v. Burke*, 255 U.S. 317 (1921); *Reid v. American Express Co.*, 241 U.S. 554 (1916).

years. Such clauses may provide that the towing operation is undertaken at the sole risk of the tow, or that the vessel in tow is to assume all risk, or that the towing vessel and her owners are to be exempt from liability for negligence on the part of the towing vessel, her officers and crew, or that the officers and crew of the towing vessel are to be deemed employees of the owner and operator of the tow. In 1871, in *The Steamboat Syracuse v. Thomas Langley*,⁴⁴ the United States Supreme Court considered a situation wherein a canal boat, being towed by a steamer, was crushed and lost. The contract of towage provided that the tow would bear the risks of navigation provided the steamer, which furnished the propulsive power, was navigated with ordinary care and skill. The Court found in favor of the canal boat and the following appeared in the syllabus of the case:

“Although by special agreement, a canal-boat was being towed at her own risk, nevertheless, the steamer towing the canal-boat is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss.”

That such language appeared in the syllabus was unfortunate, because the actual decision of the Court stated as follows:

“It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss.”

The decision shows that the Court actually never decided whether or not the steamer could exempt herself from liability by contract because, if negligent, in either case, she was liable and she had been found negligent. The decision itself would appear to be merely an interpretation of the contract but the statement in the syllabus went further.

In 1909, the Circuit Court of Appeals for the Second Circuit in *The Oceanica*⁴⁵ considered an agreement made between a tug and tow, absolving the tug from liability in case of damage to the tow, i.e., the tow to assume all risk. The court stated that “a tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care” and that “it follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier.” The Court then went on to firmly establish a rule that a towing vessel may by contract exempt itself and its owners from liability for negligence on the part of the towing vessel, its officers and crew.

The apparent discrepancy between the decisions in *The Syracuse* and *The Oceanica* caused a complete divergence of opinion on the

⁴⁴ 79 U.S. (12 Wall.) 167 (1871).

⁴⁵ 170 Fed. 893 (2d Cir. 1909), *cert. denied*, 215 U.S. 599 (1909).

subject. A number of jurisdictions followed what was considered to be the lead of the decision in *The Syracuse* and held release-from-liability provisions in towage contracts to be void and unenforceable.⁴⁶ The courts in the Second Circuit and a few other courts uniformly held that such provisions in towage contracts were valid and enforceable.⁴⁷ Even leading writers in the field of admiralty differed as to validity of such provisions.⁴⁸

In 1928 the question again indirectly came before the United States Supreme Court in *The Walsh Gray*.⁴⁹ In that instance the towage contract provided that, other than furnishing a hawser, "all other risk and expense to be borne by the tug" (tow) and that the towing vessel would not be responsible in any way for loss or damage to the tow. The tow was damaged and sunk due to the negligence of the master and crew of the towing vessel. The owner of the tow had insurance and attempted to recover for his damage under the insurance contracts. The insurance companies claimed that the clause in the towage contract exempted the tower from liability and so the insurance companies would have no right of subrogation against the tower. Since the clause in the towage contract was not disclosed at the time that the insurance contracts were written, the insurance companies claimed that the policies were void because they never would have written policies for such liability. The Court held that the clause was ineffective so that the insurance companies would have a right of subrogation against the tower and therefor should pay under the policies. The courts of the Second Circuit again considered that this was merely an interpretation of the contract and continued to follow the rule established in *The Oceanica*.

The entire situation came to a head in 1955 when the United States Supreme Court rendered its decision in *Bisso v. Inland Waterways Corporation*.⁵⁰ The situation considered therein involved an oil barge which was being towed up the Mississippi River by a steam tug. The

⁴⁶ *The American Eagle*, 54 Fed. 1010 (N.D. Ohio 1893); *The Somers N. Smith*, 120 Fed. 569 (D.C. Maine 1903); *Alaska Commercial Co. v. Williams*, 128 Fed. 362 (9th Cir. 1904); *Mylorie v. British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (9th Cir. 1920); *The Sea Lion*, 12 F. 2d 124 (N.D. Cal. 1926); *Great Lakes Towing Co. v. American S.S. Co.*, 165 F. 2d 368 (6th Cir. 1948); *The Walter G. Hougland*, 184 F. 2d 530 (6th Cir. 1950).

⁴⁷ *Ten Eyck v. Director General of Railroads*, 267 Fed. 974 (2d Cir. 1920); *The Cutchogue*, 10 F. 2d 671 (2d Cir. 1926); *The Mercer*, 14 F. 2d 488 (E.D.N.Y. 1926); *The Melvin and Mary*, 23 F. Supp. 398 (E.D.N.Y. 1938); *Peterson Lighterage & Towing Corp. v. The J. Raymond Russell*, 87 F. Supp. 467 (S.D.N.Y. 1949); *North River Barge Line v. Chile S.S. Co.*, 213 F. 2d 882 (2d Cir. 1954); *The Pacific Maru*, 8 F. 2d 166 (S.D. Ga. 1925).

⁴⁸ ROBINSON, ADMIRALTY §91, p. 672 (1939), stating that such a provision is not valid; 1 BENEDICT, ADMIRALTY, §100, pp. 307-308 (6th ed.), stating that a towage contractor may by contract limit or disclaim liability for negligence.

⁴⁹ Reported as *Compania de Navegacion, Interior, S.A. v. Firemen's Fund Ins. Co.*, 277 U.S. 66 (1928).

⁵⁰ See note 38 *supra*.

barge had no motive power, steering apparatus, officers or crew and was under the complete control of the tug. Negligent towage by the tug caused the barge to collide with a bridge pier and sink. The contract between the tug and the barge provided that the towing operation was to be done "at the sole risk" of the tow and that the master, crew and employees of the tug should "in the performance of said service, become and be the servants" of the barge owners. The District Court upheld the validity of the contractual provision exempting the tug owner from liability for the negligence of the tug and entered a judgment for the tug owner.⁵¹ The Court of Appeals held both clauses valid and affirmed the judgment of the District Court.⁵²

The Supreme Court held that *The Syracuse* and *The Walsh Gray* determined that towboat owners could not be permitted "by contract wholly to escape liability for their own negligent towing." On this basis both clauses of the contract were held invalid as attempting to shift all liability for negligent towage from the tower to the tow. The rule of the Second Circuit established in *The Oceanica* was impliedly overruled. The rule of *The Sun Oil Case* upholding the validity of pilotage provisions was specifically considered and left untouched, being distinguished as merely upholding a pilotage clause while *The Bisso Case* concerned a towage exemption-from-liability clause. The reasons given as a basis for the decision in *The Bisso Case* were, as a matter of public policy, "to discourage negligence by making wrongdoers pay damages" and "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains," the implication being that many of the aspects of the towing business were somewhat monopolistic.

The decision of the Supreme Court in *The Bisso Case* is, at best, a weak decision in the sense that the majority opinion, written by Justice Black, was a four-man opinion. Justice Harlan took no part in the consideration or decision of the case. Justice Douglas concurred with the opinion of the four-man majority but indicated that if conditions are now such that vessels in tow are in a better position to assume the risks than the towing industry, then the public policy might be different and the rule should be changed. He stated that this would require an economic brief which was not submitted in *The Bisso Case*. Justice Frankfurter, with Justices Reed and Burton joining him, dissented and stated that the rule of the Second Circuit in *The Oceanica* should be the prevailing rule. Following the decision in *The Bisso Case*, the Supreme Court rendered a decision in *Boston Metals Company v. The S.S. Winding Gulf*⁵³ holding a pilotage clause invalid as actually

⁵¹ 114 F. Supp. 713 (E.D. La. 1953).

⁵² 211 F. 2d 401 (5th Cir. 1954).

⁵³ See note 39 *supra*.

an exemption-from-liability clause in that the vessel in tow in the situation considered therein was a dead, unmanned, obsolete destroyer. This case in no way overruled *The Sun Oil Case* but rather distinguished pilotage from towage and ruled against doing indirectly what could not be done directly in seeking to release from negligent towage by means of a pilotage clause. Towage is not pilotage and the Court recognized that fact.

It is interesting to note that any mention of a release-from-liability provision in *The Bisso Case* refers to a release from *all* liability.

"The question presented is whether a tow boat may validly contract against all liability for its own negligent towage."⁵⁴

"*The Steamer Syracuse, The Walsh Gray* and intervening lower court cases together strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing towage from all liability for their negligence."⁵⁵

"Thus, holding the pilotage contract valid in *The Sun Oil Case* in no way conflicts with the rule against permitting towage by contracts wholly to escape liability for their own negligent towing."⁵⁶

Strict construction of the majority decision in *The Bisso Case* would indicate that the rule against release-from-liability provisions in towage contracts is a rule against provisions providing for exemption from *all* liability for negligent towage. There is no mention of any rule to prohibit the *limitation* of liability for negligent towage in a towage contract and, in fact, the decisions as to demurrage provisions indicate that a proper limitation of liability provision would be upheld.

From this it is quite apparent that there is nothing presently in the law to prohibit the owners of towing vessels from limiting their liability and the liability of their vessels for negligent towage to specified amounts. Of course, to insure the validity and enforceability of such provisions, it would probably be both wise and necessary to include a provision that the amount to which the liability is limited may be increased in accordance with proper written notice and payment of increased rates. It is quite probable that the increases in limitation would have to be graduated to corresponding increases in rates with a top limit of no less than the actual damage incurred by the vessel in tow or the towage company's legal liability under the United States Statutes⁵⁷ or otherwise, whichever is less, and without rate increases so substantial as to be prohibitive in order to obviate any argument that the clause in effect provides for exemption from all liability.

VII. FAILURE TO GIVE NOTICE

Many towage contracts and towing company tariffs include a pro-

⁵⁴ 349 U.S. 85.

⁵⁵ 349 U.S. 85, 95.

⁵⁶ 349 U.S. 85, 94.

⁵⁷ Limitation of Liability Statutes, 46 U.S.C.A. §183-189.

vision to the effect that notice of intention to make claim for damage or injury sustained by a vessel being assisted or towed in accordance with the contract or tariff must be presented to the owners of the towing vessel in writing within a reasonable time, not to exceed a specified number of days, from the date of the occurrence on which the claim is based, failing which presentation of written notice the claim will be barred. That such provisions are valid and enforceable is clear from the decision of the United States Court of Appeals for the Sixth Circuit in *Midland Steamship Line, Inc. v. The Tug Arkansas*.⁵⁸ There the Court considered a clause in the tariff of The Great Lakes Towing Company similar to that mentioned above and upheld its validity. The Court stated as follows:

“Also appellant claims that paragraph 16 of the tariff violates public policy, but we agree with the District Court that the provision is valid and enforceable. While a towboat owner may not validly contract against all liability for his negligence, *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, common carriers may impose just and reasonable limitation upon common-law liability not amounting to an exemption from the consequences of their own negligence,***.”

While it is unfortunate that the language of “common carriers” crept into the decision of the Court, it is clear that a failure to give notice provision of the type suggested herein should be and is valid and enforceable. The underlying reason for upholding the validity of such provisions is probably one of public policy. If the owner of a towing vessel is not given proper and timely notice of claim for damages sustained during towing operations, it is conceivable that the owner of a vessel in tow could attribute to a single accident damages resulting from numerous unrelated causes in an effort to collect for all repairs. Without timely notice and an opportunity to conduct a thorough and up-to-date investigation of the claim and the accident in question, the owner of the towing vessel and the vessel itself are literally at the mercy of the owner of the tow. From this, it stands to reason that the owner of the towing vessel is entitled to receive timely notice of any claim for damage or injury to the vessel in tow and that failure to give such timely notice in accordance with a reasonable contractual provision therefor not only should but will bar any claim therefor.

VIII. OPPORTUNITY TO EXAMINE DAMAGE

In addition to the failure to give notice provision, towage contracts and tariffs frequently include a provision to the effect that the owner, operator, charterer or person in control of the vessel in tow which has met with disaster shall, within a reasonable time after the occurrence which is the basis of the claim and before repairs are made, give rea-

⁵⁸ See note 22 *supra*.

sonable opportunity to the tower to examine the damaged property in order to ascertain the nature and extent of the damage and that failure to give such opportunity for internal and external inspection shall bar any claim or suit in regard thereto. The writer knows of no decisions having been rendered concerning the validity or interpretation of such a provision in a towage contract. However, it is reasonable to assume that such a provision is analogous to a provision in regard to failure to give notice. The reasoning of *The Midland Steamship Line Case* should apply as well to an opportunity to examine damage provision as to a failure to give notice provision. Without a reasonable opportunity to examine the damage prior to repairs, the owner of the towing vessel and the towing vessel itself are at the mercy of the owner of the vessel in tow since the latter could attribute to one accident damages resulting from other unrelated disasters.

As a practical matter, such a provision could cause considerable trouble and should be interpreted by the Courts at some future time. Does such a provision mean that the towing vessel and her owner should have a reasonable opportunity to have the damage examined and surveyed by a competent marine surveyor, or should such a provision be reduced in meaning to include little more than observation of the damage by the master of the towing vessel? These questions are unanswered. In order to forestall any argument on this point, it would probably be well for towers to include in their towage contracts and tariffs a provision that a reasonable opportunity to examine damage is to be interpreted as meaning a reasonable opportunity for the tower to have a competent marine surveyor examine the damage on his behalf. It is customary for a vessel owner to notify a tower ahead of time that the vessel is to be taken into dry dock at a certain time for repairs, some of which may be attributable to accidents in which the tower may have an interest, so as to enable the tower to have a marine surveyor present, prior to the repairs, to survey the damage. It is in instances where this custom is not followed or where immediate repairs are made that trouble arises and such a provision becomes applicable. There is little doubt but that a provision of this type, properly worded to include a reasonable opportunity for examination of damages by a competent marine surveyor on behalf of the tower, would be considered binding, valid and enforceable as between the parties to a towage contract.

IX. ICE DAMAGE

In the face of ice conditions, the towing vessel owes its tow the duty to perform the towing operation "in a seamanlike manner,"⁵⁹ or, as indicated earlier, to exercise that degree of care in the conduct of

⁵⁹ *Rice v. The Marion A. C. Meseck*, 148 F. 2d 522 (2d Cir. 1945), *cert. denied*, 326 U.S. 740.

the towing operation as is ordinarily employed by prudent navigators under the same or similar circumstances. In a normal towing operation, there is no justification for towing in such ice and under such conditions and in such a manner as to make the operation dangerous.⁶⁰

Towing contracts usually contain a provision whereby the towing vessel and her owner are released from liability for damage caused by ice to the vessel in tow. The primary difficulty with such a provision is that it is capable of being used, like the pilotage provision, as a subterfuge to attempt to circumvent the rule against exemption from all liability for negligent towage established in *The Bisso Case*, discussed before. That such a provision is valid and enforceable is clearly set forth by the United States Court of Appeals for the Second Circuit in *North River Barge Line v. Chile S.S. Co.*⁶¹ Unfortunately however, that case was decided prior to *The Bisso Case* and the Court went off on a discussion of the rules of *The Oceanica* and *The Syracuse* and affirmed its earlier decision in *The Oceanica* and upheld the ice damage provision. This was unnecessary because the operation was undertaken at the specific request of the charterer of the tow with full knowledge of the ice conditions present. There really should have been no question as to negligent towage because the letter containing the contractual provision declining liability for ice damage specifically stated that the tower was not freed "from other liabilities customarily assumed by the tower." The Court, however, held that the tug was freed from all liability for ice damage, whether or not on account of its negligence.

In their practical application, as in *The North River Barge Line Case*, ice damage provisions frequently can be misinterpreted and misapplied. Since most ice conditions in connection with towage operations arise in shallow waters, along with the ice damage question there usually is presented a question concerning negligent navigation. Was the master of the towing vessel performing the towing operation "in a seamanlike manner" in navigating those waters in the first place?

Since *The Bisso Case* only prohibits an exemption by the tower from all liability for negligent towage, it seems safe to say that an ice damage provision will be upheld as valid and enforceable in the absence of negligence. It also should be upheld as valid and enforceable even in the presence of negligence where the towing operation is undertaken at the instance of the vessel in tow with full knowledge of the dangers present on the part of the owners and operators of the vessel in tow and the negligence consists solely of undertaking a towing operation under the conditions then present. In any event, an ice

⁶⁰ *Monk v. Cornell Steamboat Co.*, 198 F. 472 (2d Cir. 1912); *Conners-Standard Marine Corp. v. Oil Transfer Corp.*, 120 F. Supp. 180 (E.D.N.Y. 1953); *The Rambler*, 66 Fed. 355 (S.D.N.Y. 1895).

⁶¹ 213 F. 2d 822 (2d Cir. 1954).

damage provision, worded in a manner similar to that suggested in connection with a release-from-liability provision, should be valid and enforceable.

X. SUMMARY

From the foregoing, it is clear that contractual provisions between the parties to a towage contract as to compensation are to be construed literally and in the absence of such provisions the custom of the locale will prevail. Reasonable demurrage limitations and pilotage provisions are valid and enforceable, though the latter will be construed strictly and applied only to instances of true pilotage. Contractual exemptions from all liability for negligent towage are void. There is some likelihood that, upon proper presentation and reconsideration at some time in the future, the present rule against the validity of such release-from-liability provisions will be changed. Carefully and properly worded provisions limiting liability on a reasonable basis, barring claims upon failure to give reasonable notice in regard thereto and a reasonable opportunity to examine the damage which is the subject of the claim prior to repairs, and limiting claims for ice damage or barring such claims, except where the ice damage is caused by negligent towage other than undertaking the operation under the conditions then present, are valid and enforceable.