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THE LIMITATION OF LIABILITY STATUTE AND ITS APPLICABILITY TO OIL POLLUTION DAMAGE RESULTING FROM OFFSHORE DRILLING

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Introduction

The probability of oil pollution disasters resulting from offshore operations has substantially increased in recent years.[1] The $1.3 billion damage suit filed against the operators of the faulty Santa Barbara well[2] and the current claims of $350 million against Sedco, the Texas firm that owned the Ixtoc I drilling platform,[3] give a vivid picture of the enormity of the damage caused by spills from well blowouts. In this context, a crucial issue is whether drilling rigs may be regarded as "vessels" and thereby benefit from the Limitation of

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1. Offshore oil production after World War II has increased from virtually 0% in 1953 to approximately 20% of the world's oil production in 1975. C. Drake, J. Imbrie, J. Knauss & K. Turekian, Oceanography 387 (1978).

2. 10 Harv. Int'l L.J. 316, 320 n.26 (1969); for factual background regarding the Santa Barbara incident, *see generally* A. W. Holmes, *The Santa Barbara Oil Spill*, in Oil on the Sea (1969).

3. N.Y. Times, Oct. 24, 1979, at A12; for factual background regarding the Mexican Oil Spill that was a result of the Ixtoc I blowout in the Bay of Campeche, see generally *Voyage Into Uncertainty: Assigning Liability for the Bay of Campeche Oil Spill*, 9 Envt'l L. Rep. 10218 (1979) (hereinafter cited as *Voyage Into Uncertainty*).

Liability Act of 1851[4] (Liability Act).

This issue is now being considered in the consolidated claims that have emanated from the "Mexican Oil Spill,"[5] the most recent example of the risks that accompany the generally beneficial undertaking of offshore oil exploration and exploitation. Society must learn how to cope with these incidents and how to settle the disputes arising from them. The scope of damages and expenses is broad. They include costly clean-up operations, latent and unassessed damage to the ocean's ecological system, evident damage to natural resources, depression of the fishing industry resulting in loss of tax revenues and a loss of the recreational value of the ocean's environment leading to a decrease of tourist trade.[6] Claims, therefore, may also include a loss of future profits and revenues.[7]

The issue of whether drilling rigs may be regarded as vessels for the purpose of limiting liability under the Liability Act was first introduced by Sedco, the Texas-based owner of the faulty drilling rig, Sedco 135. Sedco, faced with a substantial amount of claims for damages and clean-up costs, filed a complaint pursuant to section 185, in connection with section 183 of the Liability Act, arguing that the rig was a vessel for purposes of the Act.[8]

The legal status of drilling rigs for purposes of liability remains to be decided because most drilling platforms are located on the outer continental shelf (OCS) bringing them under the regime of the Outer Continental Shelf Lands Act (OCSLA).[9] But since the Ixtoc I blowout occurred 50 miles off the Yucatan Peninsula, an area within Mexico's claimed jurisdiction for purposes of exploration and exploitation,[10] the incident does not fall within the purview of the OCSLA.

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4. 46 U.S.C. §§ 181-189 (1976).

5. In re Complaint of Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Sept. 11, 1979).

6. *Cf.* Revelle, Wenk, Ketchum & Corino, *Ocean Pollution by Petroleum Hydrocarbons*, in Man's Impact on Terrestrial and Oceanic Ecosystem 298 (1976).

7. *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), where the plaintiffs, commercial fishermen, sought damages partly consisting of profits lost as a result of the 1969 Santa Barbara oil spill.

8. *See* Memorandum of Petitioner Sedco, In re Complaint of Sedco, Inc., No. H-79-1880 (S.D. Tex., filed Dec. 11, 1979).

9. 43 U.S.C. § 1333(a)(1) (1976).

10. *See* Mexico's Law on the Exclusive Economic Zone of 1976, Art. 4, *reprinted in* 15 Int'l Leg. Mat. 380 (1976).

This article will attempt to resolve the question whether drilling rigs may be regarded as "vessels" for purposes of liability by (1) examining the statutory framework, history and current interpretations of the Liability Act; (2) by analyzing the jurisprudence of domestic courts regarding "vessel" status within the meaning of the Liability Act and (3) discussing the status of "vessels" in other statutory contexts, particularly focusing on recent Federal legislation concerning oil pollution and offshore activities.

The Limitation of Liability Act of 1851[11]

A. The Statutory Framework

Pursuant to section 185 of the Liability Act, a vessel owner may petition for limitation of liability. Section 183(a) of the Liability Act allows the owner of any vessel to limit his liability "for any loss, damage, or injury by collision . . . done, occasioned, or incurred, without the privity or knowledge of such owner or owners . . . [to] the interest of such owner in such vessel, and her freight then pending."[12] Section 183, except as otherwise provided, applies to all seagoing vessels[13] and to all vessels used on lakes, rivers or in inland navigation, including canal boats, barges and lighters.[14]

In 1871, the U.S. Supreme Court held that "value" as used in section 183(a) means the vessel's value *after*, not before, the accident.[15] It thereby severely restricted potential recovery if the vessel for which limitation was sought lay unsalvageable on the ocean's bottom.[16] Moreover, a series of Supreme Court decisions in 1885 held that even if owners were fully compensated by insurance after the accident, those funds were not part of the vessel's value, and, therefore, were sheltered from claims.[17]

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11. 46 U.S.C. §§ 181-189 (1976).
12. 46 U.S.C. § 183(a) (1976).
13. *Id.* at § 183(f), which defines seagoing vessels.
14. 46 U.S.C. § 188 (1976).
15. Mendelsohn & Fidell, *Liability for Oil Pollution—United States Law*, 10 J. Mar. L. & Com. 475, 476 (1979) [hereinafter referred to as Mendelsohn & Fidell] (citing Norwich Co. v. Wright, 80 U.S. 104 (1871)).
16. *Id.*
17. Place v. Norwich & N.Y. Transp. Co. 118 U.S. 468 (1885); Dyer

For instance, Sedco is currently attempting to limit its liability to $300,000, which is the lease value of its drilling rig to PEMARGO (Perforaciones Marinas Del Golfo).[18] If the rig is considered to be a vessel for the purpose of liability limitation under the Liability Act, Sedco's interest in the "vessel" itself would be negligible, if not zero, since the rig was a total loss after the blowout.[19] In addition, under the Supreme Court's decisions, the $21 million Sedco reportedly received in insurance payments for the rig's loss would not be part of the limitation fund.

The inequitable results reached by applying the Liability Act are obvious and are further evidenced in the *Torrey Canyon* disaster.[20] A U.S. court had applied section 183(a) to that case and was able to award no more than $50, the value of the single lifeboat remaining after bombers of the British Royal Air Force sank the ship.[21] Preventive measures and clean-up costs were estimated to have been about $18 million.[22] The amount of claims for damage, etc., in the Sedco proceeding so far total $350 million.[23] This background reveals the practical problems that courts are faced with when they try to apply a 130-year-old statute to modern environmental disasters.

B. Historical Background

A reasonable interpretation of the Liability Act in modern times can be arrived at only through an appropriate understanding of its history. The traditional principle by which a shipowner might limit his liability had its origin in

> [c]onsiderations regarding the economic conditions of shipping enterprises. The shipping industry is very risky because it involves the

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v. Nat'l Steam Navigation Co., 118 U.S. 507 (1885); Thommessen v. Whitwill, 118 U.S. 520 (1885).

18. *Voyage Into Uncertainty, supra* note 3, at 10219.

19. *Id.*

20. *See generally* E. Cowan, The Torrey Canyon Disaster (1968).

21. In re Barracuda Tanker Corp., 281 F. Supp. 228, 230 (S.D.N.Y. 1968); *modified on other grounds,* 409 F.2d 1013 (2d Cir. 1969) *see also* Mendelsohn & Fidell, *supra* note 15 at 475-76.

22. F. M'Gonigle & M. Zacher, Pollution, Politics and International Law 144 (1979).

23. *See Voyage Into Uncertainty, supra* note 3.

> employment of considerable capital which is often entirely destroyed by a single accident. It is, therefore, in accordance with the principles of political economy to guard against this danger and thus protect the shipping industry.[24]

Moreover, people might be deterred from employing ships if "they lay under the perpetual fear to be answerable for the acts of their masters to a limited extent."[25] Yet the reasonableness of this statement, the truth of which might have been undeniable in the early years of the Act, becomes somewhat doubtful when applied to those modern multinational oil companies that own both the ships and the cargoes of supertanker fleets.[26]

A more important rationale for the adoption of the Liability Act was to encourage the development of the American shipping industry by assuring that the amount invested would not be exceeded by the shipowner's risk.[27] The United States shipping industry was to be afforded a protection equal to that of other maritime nations[28] and thereby remain competitive. Thus, the Act mimicked the essentials of its British equivalent.[29]

Today, the international scope of maritime interests makes uniformity of applicable laws inevitable.[30] Yet Congress has neither attempted to bring the original Act into conformity with the laws of other nations nor adjusted the liability limit in the Liability Act to modern environmental problems, the recent development of supertankers,[31] or continually increasing inflation. Despite ample opportunity for correction,[32] the Liability Act remains hopelessly outdated. Even early applications of the Act gave U.S. shipowners more protection than the Act's British counter-

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24. F. Manca, International Maritime Law 124 (1970).

25. *Id.*, quoting the famous Dutch jurist, Hugo Grotius.

26. *See* Fleischer, *Liability for Oil Pollution Damage Resulting from Offshore Operations*, 20 Scand. Stud. L. 107, 116-117 (1976).

27. In re Barracuda Tanker Corp., 281 F. Supp. 228, 230 (S.D.N.Y. 1968), *modified on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

28. Volk & Cobbs, *Limitation of Liability*, 51 Tul. L. Rev. 953 (1977) [hereinafter referred to as Volk & Cobbs]; Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21-22 (1926).

29. Volk & Cobbs, *supra* note 28, at 953.

30. Differing ceilings of liability constitute a major incentive for forum shopping which such uniformity would help to prevent.

31. Volk & Cobbs, *supra* note 28, at 953.

32. Mendelsohn & Fidell, *supra* note 15, at 477.

part. Court opinions, which almost uniformly granted limitation, contain oft-quoted passages remarking that the Act was too liberally construed to effectuate its beneficent purposes.[33]

C. Criticisms of the Liability Act

Today, judges are leaning toward a more restrictive view of the liability limitations provisions.[34] The passage most frequently quoted is from Justice Black's opinion in *Maryland Casualty Co. v. Cushing*,[35] where he spoke for four members of a 4-4-1 divided Court:

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions of the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, while they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.[36]

Present judicial attitude clearly reflects an awareness that circumstances have been substantially altered by the advent of the corporation as the standard form of business organization and that a much larger amount of insurance protection is now available.[37] In the light of these developments, recent limitation cases have been, with few exceptions, adverse to the petitioning shipowner.[38] Calls for repeal have become commonplace.[39] But even if the Liability Act is not repealed, it will become farcical because of judicial hostility.[40]

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33. G. Gilmore & C. Black, Jr., The Law of Admiralty 821 (2d ed. 1975) [hereinafter cited as Gilmore & Black].

34. In re Barracuda Tanker, *supra* note 27, at 230.

35. 347 U.S. 409 (1954).

36. *Id.* at 437.

37. Gilmore & Black, *supra* note 33, at 822.

38. *Id.*

39. *Id.*

40. *See* George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968). This decision, like many others in recent times, contains expressions of judicial distaste for limitation of liability, *id.* at 987 n.1. *See, e.g.*, Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230, 235 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); Rowe v. United States Fidelity & Guaranty Co., 375 F.2d 215, 219 (4th Cir. 1967).

For example, the Fifth Circuit in a recent limitation case expresses its disapproval of the Act, calling it "hopelessly anachronistic."[41]

Regardless of the Act, courts seem willing to find ways to bring about the fair result in a particular case. One way around the Act, of course, is to find that the craft involved is not a "vessel." Another way is to expand the interpretations of the "privity or knowledge" requirement of the owner. Alternatively, the limitation can be avoided by holding, as a Florida district court did in the litigation following the *Yarmouth Castle* disaster,[42] that the law of limitation is governed by the *lex loci delicti commissi* rather than by the *lex fori*.[43]

Yet, courts cannot entirely ignore the Act as long as it remains in force and Federal law precludes any changes through legislation by the States.[44] Nevertheless, this background reveals how the Act is viewed today, and gives a fair estimate of how courts are likely to view any forthcoming limitation proceedings, especially where the vessel status is the crucial issue.

D. Description of Drilling Rigs in Use

It will be helpful to give a brief description of the various types of drilling rigs in use. Some rigs are classified as vessels because of their particular structure and mobility. Depending on the type of support being used, one usually distinguishes among fixed platforms, semi-fixed platforms and floating platforms.[45]

1. Fixed Platforms

Fixed platforms are firmly fixed to piles which are driven into

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41. University of Texas Medical Branch at Galveston v. United States, 557 F.2d 438, 441, 455, (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). The opinion stated: "Statutes can be read complementarily or contradictorily, but always with a gloss of contemporary time and clime . . . the shifting sands of time demand innovative interpretative analysis lest we come to rest on a shoal that did not threaten our grandfathers but is only newly formed."

42. Mendelsohn & Fidell, *supra* note 15, at 145.

43. *Id.* Here, the amount to be paid by defendants under United States law was $240,000, whereas under Panamanian law it would have been $6.5 million.

44. *See* P. Swan, Ocean Oil and Gas Drilling and the Law 254 (1979).

45. For a more thorough description, see M. Summerskill, Oil Rigs: Law and Insurance 1-12 (1979) [hereinafter cited as Summerskill].

the sea bottom. Hence, they are classified as artificial islands rather than vessels.[46]

2. Semi-fixed Platforms

Semi-fixed platforms are divided into two main types: the self-elevating platform rigs, known as jack-ups; and submersible drilling barges. These installations rest on the sea bottom during drilling operations. Once the operations are completed, they are floated and shifted to new sites.[47]

3. Floating Platforms

Floating platforms can be classified as ship-type floating rigs, such as drilling ships and barges, or semi-submersible rigs.

Ship-type units[48] may be shaped like a ship, but the rig itself is incorporated into the structure as a whole. Major mooring systems afford the unit some degree of stability and keep them in place.

Semi-submersible drilling units[49] consist of hulls and caissons which are filled with water, then emptied when the operation is completed. Complex anchoring and mooring devices keep them in position.

Semi-submersibles and jack-ups are the most difficult rigs to classify because of their mobility. While being moved, they are arguably closer to a vessel. When they drill, they are firmly, though temporarily, fixed to the seabed and more closely resemble a fixed platform. The Sedco 135, for instance, was a semi-submersible mobile offshore drilling unit which was, at the time of the well blowout, firmly fixed to the ocean's floor.

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46. *See* Rodrigues v. Aetna Casualty & Surety Co., 395 U.S. 352, 365-66 (1969), where the court indicated that Congress chose to treat fixed platforms as artificial islands.

47. *See* Summerskill, *supra* note 45, at 1-12.

48. *See generally* Summerskill, *supra* note 45, at 1.

49. *Id.* at 5.

Judicial Construction of "Vessel" Status Under the Liability Act[50]

So far, there has been no reported decision that has afforded a drilling rig the benefits of limitation of liability under the Liability Act.[50a] Thus, it will be necessary to analyze the requirements to be met in order to afford a particular contrivance the "vessel" status for the purposes of the Act.

Although the Act does not contain a clear-cut definition of what crafts may be regarded as "vessels," reference is made in Section 188 of the Act, which provides in pertinent part that "this title shall apply to all seagoing vessels and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."[51] This wording, in essence, conforms to the general definition of a vessel that is articulated in 1 U.S.C. §3, which describes a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."[52] Hence, read together, these "definitions" suggest a functional approach to what might be considered a "vessel."[53] Thus, conventional navigational craft such as ships, boats and tankers easily qualify as vessels under the Act. In the past, however, courts have been willing to include non-shipping craft[54] within the scope of Section 183 of the Act, on the grounds that to do so would clearly advance the purpose and policy of the Act, namely to promote the vitality of United States shipping interests.[55]

In the leading case, *Evansville & Bowling Packet Co. v. Chero Cola Bottling Co.*,[56] the Supreme Court laid down specifically the factors to be considered for the denial of vessel status under the Act. The structure in question was a wharfboat which was towed

50. The jurisdictional issue will be omitted as it goes beyond the scope of this article.

50a. In Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), the court avoided the issue and focused instead on the question whether the activity of the *injured* party bore a significant relationship to maritime law. (Emphasis added.)

51. 46 U.S.C. § 188 (1976).

52. 1 U.S.C. § 3 (1976).

53. *See, e.g.*, Trinidad Corp. v. American S.S. Owners Mutual Protection and Indemnity Assoc., 229 F.2d 57 (2d Cir. 1956), *cert. den.* 351 U.S. 966 (1956).

54. Deep Sea Tankers, Ltd. v. The Long Branch, 258 F.2d 757 (2d Cir. 1958) (tugs); Grays Landing Ferry Co. v. Stone, 46 F.2d 394 (3d Cir. 1931) (ferryboats); Pettus v. Jones & Laughlin Steel Corp., 322 F. Supp. 1078 (W.D. Pa. 1971) (barges); Petition of Kansas City Bridge Co., 19 F. Supp. 419 (W.D. Mo. 1937) (mobile houseboat).

55. Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21-22 (1926).

56. *Id.*

each winter to a harbor to protect it from ice. During that time, although the wharfboat was in use for the rest of the year, it was physically anchored and permanently attached to the land. The court pointed out that "[t]he rule (of limited liability) should be applied having regard to the purpose it is intended to subserve and the reasons on which it rests."[57] The court emphasized that the determination of vessel status for the purpose of limiting liability depended on the question of whether the wharfboat was a "vessel" at the time it sank. The factors leading the court to deny vessel status were:

(1) it was not used to carry freight from one place to another;
(2) it was not practically capable of being used as a means of transportation;
(3) it performed no function that might not have been performed as well . . . by a floating stage or platform permanently attached to the land; and
(4) it did not encounter perils of navigation to which craft used for transportation are exposed.[58]

Similar reasoning was applied in *In re United States Air Force Texas Tower No. 4*,[59] in which an offshore radar facility was denied vessel status under the Act. The tower had been towed to and anchored at an offshore operation where it collapsed as the result of a storm, causing death and personal injury. Although the tower met the first three requirements implied in *Evansville*, the court noted that even though the tower was subject to the perils of the sea, it "was not so subject in a navigational sense."[60] Additionally, the opinion reiterated the Supreme Court's view in *Evansville*[60a] that the use *at the occasion* is decisive and therefore determinative of the legal status of the structure in question.[60b]

Thus, the courts did not take the statutory definition literally, but rather looked beyond the wording in order to reach reasonable results justified by the purpose and intent of the Act. One court pointed out that a literal interpretation would be inapposite "since any contrivance that will float on water is capable of being used as a means of transportation (of things or persons) on water"[61] and the word "capable" in the statutory definition was to be read

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57. *Id.*
58. *Id.* at 22.
59. 203 F. Supp. 215 (S.D.N.Y. 1962).
60. *Id.* at 219 (citation omitted).
60a. *Supra* note 56, at 22.
60b. In re United States Air Force Texas Tower No. 4, *supra* note 59, at 219.
61. Petition of Kansas City Bridge Co., 19 F. Supp. 419 (W.D. Mo. 1937).

as "practically capable."[62]

Applicability of the Act to Offshore Drilling Operations

A superficial look at the floating semi-submersible drilling rig Sedco 135 would suggest that all of the four requirements stated by the Supreme Court in *Evansville* are applicable. Regarding the first factor, one might argue that Sedco 135 always carried highly sophisticated drilling equipment and thereby met the "carriage of freight" requirement.[63] On the other hand, one might argue that this was a literal interpretation of the definition of a "vessel" under the Act since such carriage was incidental to the real purpose of Sedco 135, namely to perform drilling operations. The latter argument is more persuasive in that a practical understanding of "carriage of freight" can mean only such carriage as is consistent with the overriding purpose of the contrivance used. This conforms to the holding of the court in *Texas Tower*,[64] *i.e.*, that on the facts, radar equipment did not meet the "carriage of freight" requirement.

Regarding the second factor, since the rig crossed the Atlantic twice, one might argue that it clearly had the capacity to be used as a means of transportation. Moreover, the lack of self-propelling capability does not prevent it from being regarded as a vessel, since available authority affords vessel status to non-self-propelling contrivances.[65] Again, the primary purpose in moving the rig was to perform drilling operations on other sites. It was, in essence, not used as a means of transportation.[66] *Evansville*[67] supports such a narrow interpretation.

For the third requirement, permanence of location, one might point out that no such permanence was ever intended; for the rig had made many moves. It must be conceded that a certain mobility was inherent in the structure of the rig. But the moment the drilling

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62. *Id.*, referring to *Evansville*, *supra* note 55, at 22.

63. *See* Petitioner's Memorandum, *supra* note 8.

64. 203 F. Supp. at 219.

65. *Cf.* Pettus v. Jones & Laughlin Steel Corp., 322 F.Supp. 1078 1078 (W.D. Pa. 1971).

66. To be a vessel, the craft's purpose must be reasonably related to "the transportation of passengers, cargo, or equipment from place to place across navigable waters." Bennett v. Perini Corp., 510 F.2d 114, 116 (1st Cir. 1975); Powers v. Bethlehem Steel Corp., 477 F.2d 643, 647 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973).

67. *Supra* note 55, at 22.

rig arrived upon the drilling site, the rig became fixed to the sea bottom on a quasi-permanent basis. The fixed nature of the structure during these operations is contrary to the concept of mobility.[68] Nonetheless, as was emphasized in *Texas Tower,* the ability to float is not solely determinative of vessel status under the Act.[69]

Fourth, in performing its primary function, the rig can hardly be said to have been exposed to the perils of navigation normally encountered by crafts engaged in sea travel. Although the rig was certainly exposed to the perils of the sea while drilling, it cannot be said to have been exposed to these perils in a navigational sense.

Even if such hurdles were to be surmounted, it would seem that the *at the occasion* approach as introduced by the court in *Evansville* and embraced in *Texas Tower* cannot be circumvented. For no argument can be made that the rig, at the moment the well blowout occurred or just for the time drilling operations were carried out, was a vessel for the purposes of the Act.

In addition to contemporary judicial construction of the Act, its purpose and intent cannot be disregarded. It is submitted that Congress, at the time the Act was adopted, could not have foreseen the enormity of environmental oil pollution disasters caused by tanker accidents, much less by well blowouts such as the blowout in the Bay of Campeche. Affording the Sedco 135 vessel status would extend the scope of the Act in an unprecedented manner; for it would not conform to the purpose or intent of the Act nor with the Act's contemporary construction.[70] Further, one can hardly argue that offshore drilling operations may be compared with merchant shipping, which the Act was intended to support,[71] since offshore drilling for oil and gas is not a traditional maritime activity.

Finally, repeated reference has been made to the requirement of a voyage. This requirement has emerged from former Admiralty Rule 51.[71a] An early application of this rule was enunciated in *Wong v. Utah Home Fire Insurance Co.*[72] where a tidal wave tore

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68. The same issue was addressed in the *Texas Tower* case, where the court held that even though the Tower was designed to float so that it could be towed to its destination, "[w]hen erected and assembled the Tower had the attribute of permanence. The fixed nature of the Tower is incongruous to the concept of mobility." 203 F. Supp. at 219.

69. *Id.*

70. *See* notes 34-44 and accompanying text *supra.*

71. *See, e.g.,* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 845 (D.V.I. 1977).

71a. Admiralty Rule 51, 28 U.S.C. (current version in Fed. R. Civ. P. Supplemental Rule F(2) (1976)).

72. 167 F. Supp. 230, 235 (D. Hawaii 1958).

a vessel from its moorings and deposited it in the plaintiff's fish pond. The defendant was not permitted limitation of liability because the voyage had come to an end before the treaspass occurred. In *Texas Tower*, the court held, in reference to the *Wong* decision, that "certainly from the time the tower was affixed to the bottom of the ocean floor, no voyage had occurred."[73]

This seems to be a sensible interpretation, since it is in accord with the purpose and intent of the Act. A strict application of the voyage requirement would deny the benefits of the Act to any drilling structure, whether ship or semi-submersible floating platform, from the moment it is fixed, however temporarily, to the seabed. Taking the underlying purpose of the Act into account, namely to encourage the United States shipping industry, it makes no difference that a ship is anchored in a port or on repair in a drydock.[74] Accordingly, the new Supplemental Rules of Admiralty now specify that the complaint must state the voyage "if any."[75]

Thus, the *Wong* approach has been substantially weakened. But even a weak voyage requirement suggests that the primary purpose of a vessel is to go on a "voyage," while the primary purpose of a drilling rig, though floatable and capable of being towed, is drilling. Hence, an argument pointing to the various voyages undertaken by a drilling rig from one site to another would have to be rejected as immaterial, even under a liberal construction of "voyage."

The Treatment of Drilling Rigs in Other Statutory Contexts and Recent Pollution Legislation

A particular structure may be classified as a vessel for one purpose, but denied that status for another.[76] "The word vessel has been given a number of different definitions, depending upon the context in which it is used. . . . No single definition is pervasive in admiralty and maritime law."[77] For example, the United States

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73. 203 F. Supp. at 222.

74. Gilmore & Black, *supra* note 33, at 947-48.

75. Fed. R. Civ. P. Supplemental Rule F(2).

76. G. H. Robinson, Handbook of Admiralty Law in the United States 42-48 (1939).

77. Dresser Industries, Inc. v. The Fidelity & Casualty Co. of New York, 580 F.2d 806, 807 (5th Cir. 1978) (citations omitted).

Code defines "vessel" differently in a number of provisions.[78] It will be helpful, then, to discuss the different ways in which drilling rigs are classified.

A. The Jones Act

In its complaint, Sedco relied heavily on case law developed under the Jones Act.[79] This Act[80] allows recovery for injury or

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78. Compare, for example, the differing definitions of "vessel" in these provisions: 1 U.S.C. § 3 (1976) ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"); 46 U.S.C. § 170(1) (1976) ("The word 'vessel' as used in this section shall include every vessel, domestic or foreign, regardless of character, tonnage, size, service, and whether self-propelled or not, on the navigable waters of the United States, including its Territories and possessions, but not including the Panama Canal Zone, whether arriving or departing, or under way, moored, anchored, aground, or while in drydock; it shall not include any public vessel which is not engaged in commercial service . . ."); 46 U.S.C. § 713 (1976) (". . . and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this Title may be applicable . . ."); and 46 U.S.C. § 1271(b) (1976) ("The term 'vessel' includes all types, whether in existence or under construction, of passenger cargo and combination passenger-cargo carrying vessels, tankers, tugs, towboats, barges and dredges which are or will be documented under the laws of the United States, fishing vessels whose ownership will meet the citizenship requirements for documenting vessels in the coastwise trade within the meaning of section 802 of this Title, floating drydocks which have a capacity of thirty-five thousand or more lifting tons and a beam of one hundred and twenty-five feet or more between the wing walls and oceanographic research or instruction or pollution treatment, abatement or control vessels owned by citizens of the United States. . . .").

79. *See* note 8 *supra*.

80. 46 U.S.C. § 688 (1976), which provides as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in

death of seamen and confers vessel status most liberally. In *Offshore Co. v. Robison*,[81] the court stated that "[t]he Act has always been construed liberally, but recent decisions have expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable waters."[82]

In *Dresser Industries* the court pointed out that "the courts have accorded an extremely liberal interpretation to the provisions of the Jones Act in order to provide remedies to a broad class of seamen."[83] For this reason, the scope of the Jones Act has been extended to cover submersible drilling rigs. In *Marine Drilling Co. v. Autin*[83a] the court said that

> under the Jones Act, a vessel means something more than a means of transportation on water. It can be a special purpose structure such as a submersible drilling rig. The fact that navigation or water transportation is not the principal use for which the structure is put does not mean that it cannot be a vessel for the purposes of the Jones Act.[83b]

The common denominator of the two acts is the general definition of "vessel" contained in 1 U.S.C. § 3 (1976). This provision, however, has never been crucial for the determination of vessel status in either act. Instead, courts have focused on the purpose and intent of the statute in question to determine the status of a particular contrivance.[84] Also, it is obvious that we deal here with

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> such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

81. 266 F.2d 769 (5th Cir. 1959).

82. *Id.* at 771 (footnote omitted).

83. Dresser Industries, Inc. v. The Fidelity & Casualty Co. of New York, *supra* note 77, at 807.

83a. 363 F.2d 579, 580 n.1 (5th Cir. 1966).

83b. *Id.* at 580.

84. This approach is clearly shown by the decisions concerning the Jones Act, *supra* notes 81-84. For the approach under the Liability Act, *see, e.g.*, Evansville, *supra* note 55 at 21-22; University of Texas Medical Branch at Galveston v. United States, 557 F.2d 438, 454 (5th Cir. 1977).

two entirely different situations. The Liability Act is intended to promote United States shipping industry while the Jones Act is aimed at the protection of injured seamen. Thus, the *Dresser* court emphasized that vessel status, for purposes of the Jones Act, does not carry over to other statutory contexts.[84a] Accordingly, in *Texas Tower* the court held that the liberal approach to recovery under the Jones Act, if applied to the Liability Act, would lead to misconstruction of the limitation statute.[85] Hence, no persuasive argument can be made that the vessel status under the Jones Act is determinative of the vessel status under the Liability Act.

B. Section 1311 of the Clean Water Act (CWA)

Section 1311 of the Clean Water Act[86] provides for liability for the discharge of oil and hazardous substances. The CWA mimics the Water Quality Improvement Act of 1970 (WQIA).[87] It redefines, however, some of the terms in the WQIA, extends the limits of liability and adds new provisions regarding recovery for damage. The WQIA was a response to the developments of supertankers and offshore operations and the increased dangers of major environmental disasters. It replaced the outdated Oil Pollution Act of 1924.[88] The interesting aspect of section 1311 WQIA was that it clearly distinguished the sources of oil pollution as "vessel" or "facility." In the latter, further distinction was drawn between "onshore facility" and "offshore facility."

The purpose of the following discussion is to analyze the legislative history of the WQIA and its Amendments and then the CWA. This will reveal how Congress would be likely to react if today it were faced with a situation such as the Mexican Oil Spill.

84a. Dresser Industries, Inc. v. The Fidelity & Casualty Co. of New York, *supra* note 77, at 807.

85. 203 F. Supp. at 222.

86. 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978).

87. Pub. L. No. 91-224, 84 Stat. 91.

88. 33 U.S.C. §§ 431-437 (1976).

1. The Original WQIA of 1970: The House Version[89]

In its introductory paragraph, the House Committee took notice of recent oil pollution disasters. The Torrey Canyon accident and the Santa Barbara Oil Spill had just occurred, so the Committee was aware that oil pollution had various sources.[90]

Despite a failure to define all of these pollution sources in the House Bill,[91] the clear-cut distinction drawn between vessel-source pollution and offshore facility-source pollution suggested that a drilling rig such as Sedco 135 would not be construed as a vessel.

2. The Original WQIA of 1970: The Senate Version

The Senate report[92] reflected the perception of the House that two primary and different types of oil discharge sources exist.[93] It not only clearly distinguished between "vessels" and "offshore facilities," but referred to discharges from offshore operations. The Committee, then, perceived the possibility of temporary drilling contrivances that could be easily regarded as vessels. This suggested a reinforcement of the *at the occasion* doctrine implemented by the *Evansville* court.[94]

Unlike the House, the Senate bill also provided definitions

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89. H.R. Rep. No. 127, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. Code Cong. & Ad. News 2691.

90. With reference to these incidents it stated that:

> The Oil Pollution Act of 1924 is simply not sufficient to cope with such problems . . . [L]imited to vessels, it does not apply at all to spills from fixed installations such as pipelines, oil deposits, refineries, or manufacturing plants or other types of industrial activity using and storing large quantities of oil.

Id.

91. It only defined the category "vessel"; the definition essentially paralleling the one contained in 1 U.S.C. § 3.

92. S. Rep. No. 351, 91st Cong., 1st Sess. (1969).

93. Thus, the Committee noted that: "The committee recognizes that fortunately there has been no discharge from a vessel affecting the coastal waters of the United States, which approaches the liabilities imposed by this bill. The committee, however, believes that the risk of such spills must be considered together with the possibility of major catastrophic discharges from onshore or *offshore facilities* or from *offshore operations.*" *Id.*, at 6 (emphases added).

94. *See supra* note 55, at 22.

for on- and offshore facilities.[95] From these, it clearly follows that a semi-submersible drilling rig would be regarded as a drilling-production facility.[96]

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95. "Onshore or offshore drilling-production facility" means any facility of any kind and related appurtenances thereto, located in, on, or under, the surface of any land, or permanently or temporarily affixed to any land, including lands beneath the navigable waters of the United States, which is used or capable of being used for the purpose of exploring, drilling, or producing oil;

"onshore or offshore facility" means any facility, other than an onshore or offshore drilling-production facility, of any kind and related appurtenances thereto located in, on, or under, the surface of any land, or permanently or temporarily affixed to any land, including lands beneath the navigable waters of the United States, which is used or capable of being used for the purpose of processing, transporting, or transferring oil, or for the purpose of storing oil for any commercial purpose . . .

Supra note 92, at 103. The committee explained these definitions as follows:

The definition of a "vessel" is identical to that in section 3, Title 1, United States Code, and would include all vessels, both foreign and domestic . . .

The definition of "onshore and offshore facilities" distinguishes between drilling and production facilities and other facilities. Drilling and production facilities and related appurtenances, such as pipelines, platforms, barges used for drilling purposes, etc., are those that are used or capable of being used solely for the purpose of exploring for, drilling, or producing oil. The other facilities are those that are used or capable of being used to process, transport, or transfer oil, or to store oil commercially . . .

Id. at 65-66.

96. The Senate proposals with respect to limitation of clean-up cost liability reveal the awareness of and concern of the Senate with the varying degree of risk:

—vessel: $125 per ton of vessel
—drilling-production facility: $8 million ceiling
—other facility: $125 per ton oil maximum 24-hour capacity.

The explanation given for these differentiations reiterated the important distinctions between the different sources of pollution with reference to the unknown risks of drilling-production facilities.

3. The Original WQIA of 1980: The Conference Version

This conference version,[97] which established a compromise between the House and the Senate proposals, was ultimately adopted by Congress. The conference bill dropped the technical distinctions provided by the Senate between drilling-production facility and non-drilling/non-production facility. Nevertheless, clear-cut distinctions among vessels, on- and offshore facilities were retained.[98]

The definition of an offshore facility did not require that the structure be permanently fixed to the seabed, since the operative word was "located." The use of "located" covered all drilling operations even if they were carried out by non-permanently fixed drilling rigs, for these too are "located" the moment they commence drilling.[99]

The committee distinguished on- or offshore facilities that drill and produce oil from those that process, transport or store oil. This distinction was made because the latter facilities would, in an accident, discharged a fixed, known amount of oil, while the former would discharge an unknown quantity. The liability standard of $8 million for the former type of facilities was not related to any known accident, but was a sum that testimony indicated could be insured. *Supra* note 92, at 18.

97. Conference Comm. Report, H.R. Rep. No. 940, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. Code Cong. & Ad. News 2712.

98. "[V]essel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel . . .

Federal Water Pollution Control Act, 33 U.S.C. § 1321(a) (3)(1976).

"[O]nshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than a submerged land . . .

Id. at § 1321(a)(10).

"[O]ffshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States . . . other than a vessel or a public vessel . . .

Id. at § 1321(a)(11).

99. Such interpretation is approved by the statement of the House managers:

The Federal Water Pollution Control Act Amendments (FWPCA) of 1972[100] and 1973[101] did not change any substantive law with respect to oil pollution. The Clean Water Act of 1977,[102] which replaced the FWPCA, and its 1978 Amendments[103] left the substance of the definitions as set forth in the WQIA unaltered. It essentially raised the limits of liability and added new recovery and penalty provisions. Thus, the distinctions drawn by the WQIA were reinforced and their validity confirmed. The legislative history of the Federal Clean Water Act of 1977 leaves no doubt that drilling rigs, whether permanently or temporarily fixed, would be classified as "offshore facilities" as opposed to "vessels" for purposes of the Federal Clean Water Act.

C. The Outer Continental Shelf Acts

Language similar to the CWA is in the Outer Continental Shelf Lands Act Amendments of 1978.[104] The original version provided for the extension of U.S. jurisdiction "to the subsoil and seabed of the Outer Continental Shelf and to all *artificial islands*

> **The definition of "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States other than a vessel or public vessel. *This would include offshore drilling rigs as well as all other offshore facilities* within the navigable waters of the United States which, in the case of the coastal waters would extend to the seaward boundaries of the States within the meaning of the Submerged Lands Act . . .**

Conference Comm. Reports, *supra* note 97 at 2722 (emphasis added).

100. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1265, 1281-1292, 1311-1328, 1341-1345, 1361-1376 (1976)).

101. Pub. L. No. 93-207, 87 Stat. 906 (codified at 33 U.S.C. §§ 1254, 1286, 1287, 1321, 1325, 1369 (1976)).

102. Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251, 1252, 1254, 1255, 1256, 1259, 1262, 1263, 1281-1285, 1291, 1292, 1294-1297, 1311, 1314, 1315, 1317-1319, 1321, 1322, 1323, 1324, 1388, 1341, 1342, 1344, 1345, 1362, 1364, 1375, 1376 (1976 & Supp. II 1978)).

103. Pub. L. No. 95-576, 92 Stat. 2467 (codified at 33 U.S.C. §§ 1254, 1321 (1976 & Supp. II 1978)).

104. 43 U.S.C. § 1333(a)(1) (Supp. II 1978).

and *fixed structures* which may be erected thereon for developing, removing and transporting resources therefrom."[105] The 1978 Amendments changed the language after "artificial islands" to read:

> and all installations and other devices permanently or *temporarily attached* to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any installation or other device (other than a ship or vessel) for the purpose of transporting such resources . . .[106]

Any doubts that may once have been held concerning the classification of drilling ships, semi-submersible rigs and other contrivances temporarily attached to or connected with the seabed are thus removed by the 1978 amendments. A drilling rig such as Sedco 135 would not fall under the category of a vessel under the 1978 Amendments. Moreover, the last sentence of the House Reports reflects the *at the occasion* approach of the *Evansville* court and the understanding that a drilling contrivance must be classified differently depending upon whether it drills or is being used for transportation.

The Outer Continental Shelf Resource Management Act of 1978 (OCSRMA), which establishes an offshore oil spill pollution fund, contains equally sharp and differentiating language.[107] It

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105. Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(1) (1976).

106. Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1333(a)(1) (Supp. II 1978) (emphasis added). The House Report on this section is even more explicit:

> It is thus made clear that Federal law is to be applicable to all activities on all devices *in contact with the seabed* for exploration, development, and production . . . Federal law is, therefore, to be *applicable to activities on drilling ships, semi-submersible drilling rigs, and other water-craft, when they are connected to the seabed by drillstring, pipes, or other appurtenances on the OCS* for exploration, development, or production purposes. Ships and vessels are specifically not covered when they are being used for the purpose of transporting OCS mineral resources.

H.R. Rep. No. 590, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1450, 1534 (emphases added).

107. 43 U.S.C. §§ 1801-1866 (Supp. II 1978).

defines "vessel" to mean:

> every description of watercraft or other contrivance, whether or not self-propelled, which is operating in the waters above the Outer Continental Shelf . . . or which is operating in the water above submerged lands seaward from the coastline of a State . . . and which is transporting oil directly from an offshore facility.[108]

The OCSRMA reveals Congress' attitude in recent pollution legislation toward a clear-cut view and understanding of the various sources of ocean pollution. Congress seems to have perceived the need for differentiation and made this new legislation conform to the realities and dangers of modern offshore operations and technology. The provisions also help overcome the perennial difficulties of defining the legal status of temporarily fixed drilling structures, whether a floating platform or a drilling ship. Once drilling has begun, all such structures are afforded the status of offshore facilities. Such would be the Sedco 135 for purposes of the aforementioned acts.

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108. *Id.* at § 1811(5).

This Act distinguishes between oil-transporting craft and offshore facility and defines the latter to include:

> any oil refinery, drilling structure, oil storage or transfer terminal, or pipeline, or any appurtenance related to any of the foregoing, which is used to drill for, produce, store, handle, transfer, process, or transport oil produced from the Outer Continental Shelf . . . and is located on the Outer Continental Shelf, except such term does not include (A) a vessel, or (B) a deepwater port.

Id. at § 1811(8).

The House Report on this bill explains that section as follows:

> Vessels are separately defined and are separately treated by this title. However, *once a drilling ship or other watercraft is attached to the seabed* for exploration, development or production *it is to be considered an "offshore facility" rather than a vessel, for purposes of applying the differing requirements for a facility as compared to a vessel.*

H.R. Rep. No. 590, *supra* note 106, at 1585 (emphases added).

Conclusion

In light of the above, it is highly unlikely that a judicial body would afford a drilling rig the legal status of a vessel for purposes of the Liability Act. Since courts are becoming increasingly reluctant to allow shipowners to claim limitation of liability under the Act, it can almost be taken for granted that they are not prepared to do so in the case of a drilling rig owner. The original purpose of the 1851 statute, *i.e.*, to protect the American shipping industry, simply cannot be construed to cover modern offshore drilling technology and possible discharges therefrom. Moreover, the availability of insurance renders the Act hopelessly obsolete and obviates its original purpose.

It is recognized that a particular contrivance might be regarded as a vessel for some purposes, while it might be denied this status for others.[109] For example, a mobile drilling rig may be considered as a vessel while being towed from one site to another. Yet, it must be denied that status for purposes of limiting liability under the Act while it is attached to the seabed and carries out drilling operations, for it lacks all the attributes of a vessel during that time. This "purpose" approach explains why drilling rigs have been regarded as vessels under the Jones Act. But "vessel" status under the Jones Act does not carry over to other statutory contexts.[110]

The possibility of driling rig owners limiting their liability under the Liability Act by having their rigs treated as vessels becomes even less likely when recent pollution legislation is taken into account. For it is argued that those provisions of the WQIA regarding limitation of liability partially supersede the corresponding provisions of the Liability Act.[111] The House Report addressing the WQIA stated that "this limitation of liability is intended to be the only limitation of liability for discharge of oil or matter under this section, notwithstanding any other provision of law."[112] This

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109. *See* notes 81-85 and accompanying text *supra*. *See also* Summerskill, note 45 *supra*, at 16.

110. *See* text accompanying note 85 *supra*.

111. Volk & Cobb, *supra* note 28, at 966.

112. H.R. Rep. No. 127, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. Code Cong. & Ad. News 2691, 2702.

view has found judicial,[113] as well as scholarly,[114] support and furthers the argument that the legal status of a drilling rig should be consistent with current pollution legislation.

An analysis of that legislation reveals a clear and sharp differentiation between vessels on the one hand, and offshore facilities and mobile drilling rigs on the other. The different limitation ceilings reflect an understanding that the degree of danger and risk that attends offshore operations is greater than that of oil transportation in vessels. Hence, the classification of a mobile drilling rig as a vessel for purposes of the Liability Act must be rejected on all grounds.

113. Complaint of Steuart Transportation Co., 435 F. Supp. 798, 806 n.8 (E.D. Va. 1977).

114. Volk & Cobb, *supra* note 28 at 966.