

VESSEL SEAWORTHINESS

**THE RIGHTS OF PASSENGERS AND THE RESPONSIBILITIES OF CAPTAINS
AND MANAGEMENT**

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Someone who thought he'd never have an accident at sea

When anyone asks me how I can best describe my experience in nearly forty years at sea, I merely say, uneventful. Of course there have been winter gales, and storms and fog and the like. But in all my experience, I have never been in any accident . . . of any sort worth speaking about. I have seen but one vessel in distress in all my years at sea. I never saw a wreck and never have been wrecked nor was I ever in any predicament that threatened to end in disaster of any sort.

Edward J. Smith, 1907
Captain, RMS Titanic

ABOUT THE FIRM

Garan Lucow Miller, P.C. was founded in 1948 by Daniel Garan, Milton Lucow, and Albert Miller upon their graduation from law school. Since its inception the firm has specialized in the field of civil litigation defense. As tort law has expanded, so too has the Firm's practice and clientele.

We now represent a broad spectrum of insurers and self-insureds, with an extremely diverse base of defense experience. In addition to the traditional areas of no-fault and auto negligence, premises liability, and insurance coverage issues, we are extensively involved in admiralty, product liability, medical malpractice, toxic tort, environmental, real estate, and professional malpractice litigation.

The Firm offers representation to its clients throughout the State of Michigan, with offices and resident partners in Detroit, Grand Blanc, Port Huron, Ann Arbor, Troy, Mt. Clemens, Grand Rapids, Lansing, Marquette, and Traverse City. Its attorneys frequently appear at federal and local courts throughout the Great Lakes region, including Duluth, Chicago, Detroit, Cleveland, and Buffalo.

ABOUT THE AUTHOR

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I. INTRODUCTION

In the wake of the publicity surrounding the accident involving the *Ethan Allen* in upstate New York, those that own and operate vessels which carry passengers for a fee are often asking themselves not only how best to prevent such a disaster from happening again, but also what legal liabilities they may face should a similar disaster befall them. For the owners and operators of relatively small vessels such as local ferries and tour boats, many of whom may never have experienced a passenger claim, examining the potential thicket of legal issues that can arise can seem bewildering and daunting.

Complicating matters is the combination of two factors which can make North American a relatively perilous legal environment in which to operate a passenger vessel. First, the United States has a long-standing tradition of maintaining a healthy marine industry through progressive laws designed to protect the health and welfare of those at sea, including to some degree passengers. The concept is that people will be more likely to go to sea – whether as a seaman or as a paying passenger – if they can expect reasonable compensation for injuries they may suffer. Second, as one can often read in the papers, the United States is one of the most litigious societies on the face of the earth. It does not take much to start a lawsuit, and a great amount of time and money can be spent litigating one.

The issues which confront vessel masters and shipowners in this area are not, in any event, anything new. Whether one looks to the *Titanic* in 1912, or the *Eastland* in Chicago a few years later, or numerous other maritime disasters large and small, it is to be expected that any serious maritime accident which occurs such as that which occurred on the *Ethan Allen* will lead to serious questions which will likely have to be litigated in the court system.

The purpose of this guide is to provide the shipowner and the ship master with an introduction to the legal issues that can arise in the wake of passenger claims following a maritime accident attributable to a vessel's "seaworthiness." "Seaworthiness," we will see, is a concept that is much broader than just a vessel's stability or the soundness of her hull. So it should be understood that while these issues will come up in any case involving issues of vessel stability, they also will come up in *any* kind of passenger claim.

II. ADMIRALTY OR MARITIME JURISDICTION

Once a situation occurs in which the shipowner or a vessel's master is faced with the prospect of actual or potential passenger claims, the shipowner or master may be faced with a variety of Federal, state and local laws and regulations which might be pertinent. This can be especially confusing for the owners and operators of small passenger-carrying craft like ferries on the Great Lakes. At this point, the shipowner or master might ask: *where* might we be sued; and what law applies if and when we are sued? And determining what law might apply is important; there can be crucial differences between a state's law on the one hand and maritime law on the other.

In general, the questions faced may be broken down as follows:

1. Does the federal admiralty and maritime law apply?
2. Where will the case be filed; i.e., in state court or in federal court?
3. Which law applies — state, admiralty, or both?

In order to answer these questions, one must look to the origins of the admiralty and maritime law.

A. Source of Admiralty Jurisdiction

While the concept of a separate body of law devoted to maritime matters goes back to ancient times, admiralty law as we know it today was first developed by England. In the 18th and 19th centuries that country was a great seafaring nation; so important was maritime commerce to it that it developed admiralty courts and a body of law relating to admiralty law. It was this system which ultimately was adopted in the New World; the colonies established their own tribunals devoted to admiralty law, and applied that law as it had been developed in England. This practice continued even after the Declaration of Independence and the Revolutionary War.

Maritime commerce was important to the young United States, and its founders believed in continuing the tradition of a system of admiralty jurisdiction, all under national as opposed to state control. Accordingly, they included within the Constitution, at Article III, § 2, the statement that the judicial powers of the federal courts “. . . shall extend . . . to all cases of admiralty and maritime jurisdiction.”

In 1789, Congress enacted the Judiciary Act to carry out its constitutional directive to establish a system of federal courts. The Act in its present form states, at 28 USC § 1333:

The district court shall have original jurisdiction, exclusive of the courts of the states, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Taken together, these mean that admiralty law is primarily a creature of federal law. Congress can pass statutes revising and supplementing admiralty law; the federal courts can apply and interpret admiralty law. State law, however, cannot conflict with or overrule maritime law; a federal court ruling on a principle of admiralty law, for example, cannot be overridden by state statute or a ruling of a state court.

B. What is the Admiralty Law?

The admiralty law is, therefore, a federal creature. The federal maritime law consists of two

elements. The first would be statutes of a maritime nature which have been promulgated by Congress. The second would be a body of law which has been developed by the courts, themselves, through their decisions in published cases. This second body of law is known as the “General Maritime Law.”

The General Maritime Law functions as a sort of federal common law in the maritime setting, addressing or supplementing issues not directly addressed by federal statutes. (The term “common law” means law that is created by the courts through their published court decisions). For example, much of the law in the area of maritime liens is judge-made, as is the law as it pertains to injuries to seamen aboard commercial vessels.

C. Determining Whether the Admiralty Law Applies

The test for determining whether admiralty law applies to a given claim is the same as the test for determining whether the case would fall within a federal district court’s admiralty jurisdiction. In other words, if it can be filed in federal court under admiralty jurisdiction, admiralty law applies.

The traditional reach of admiralty jurisdiction is the sea, including waters within the ebb and flow of the tide. In the 19th Century, jurisdiction was extended over all public navigable waters as well, so as to include rivers, streams, lakes, and other bodies of water so long as they were “navigable.” Historically, the federal courts applied a locality test -- the place of the wrong -- to determine if a tort action fell within the scope of admiralty jurisdiction. Today, that approach has been replaced with a two part test. The elements for admiralty jurisdiction are now as follows:

1. The wrong must occur in *navigable waters*, and
2. The wrong must bear a significant relationship to traditional maritime activity (the “nexus” requirement).

Both requirements must be met separately.

A finding of *navigable waters* involves two requirements. First, an interstate nexus must be present; the body of water in question must be available as a continuous highway for commerce between ports and places in different states. Second, the water must be used or capable of being used for the customary modes of trade and travel on water. To meet this test, proof of present or potential commercial shipping is required. For that reason, inland lakes (located wholly within a state) are not navigable waters because they are not capable of interstate commerce and often cannot sustain commercial shipping.

The first prong of the test can be met, however, if the accident occurs on a waterway which is a “lake” but which nonetheless meets the elements of a navigable waterway. Certainly any of the Great Lakes and Lake St. Claire and their tributaries meet this, but think also of Round Lake or Lake

Charlevoix in northern Michigan. If the waterway can support commercial traffic, it meets the first prong of the test.

The second part of the test is more difficult to apply. In 1990 the U. S. Supreme Court held in *Sisson v. Ruby* that, in order for a wrong to bear a significant relationship to traditional maritime activity, the incident must have the potential to disrupt maritime commerce and must be substantially related to traditional maritime activity. The particular facts do not control the result; rather, the general nature of the incident is to be considered in determining its potential impact and the general character of the activity is considered in evaluating the relationship to traditional maritime activity. *Sisson* specifically held that “traditional maritime activity” is not limited to actual navigation or operation of a vessel.

Sisson involved a fire which destroyed a marina on Lake Michigan. The fire had originated in a washer/dryer unit on the pleasure boat *Ultorian*, which was docked at the marina. There was no real possibility of disruption to commerce. However, the Supreme Court held that the *general nature of the incident* — a fire aboard a vessel at a marina on navigable waters — satisfied the requirement of “potentially disruptive impact on maritime commerce.” As for whether any “traditional maritime activity” was involved, the Court stated:

Our cases have made it clear that the relevant “activity” is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose . . . Thus, in this case, we need not ascertain the precise cause of the fire to determine what “activity” *Sisson* was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters.

In short, even accidents which at first glance have nothing to do with “traditional maritime activity” might meet the test.

In the circumstance of a passenger-carrying vessel, the courts have long held that the transportation and care of passengers is a quintessential activity affecting maritime commerce, and as such virtually any claim involving a passenger injury will meet the second prong of the test. This is certainly true of any claim arising from an incident involving the vessel’s stability at sea. (There are interesting questions which can arise when a passenger has disembarked; for example, a cruise line passenger who is injured while off the ship and taking a tour on shore may not find that his claim is governed by maritime law).

If the admiralty jurisdiction test is met, admiralty law applies to the claim. If not, then state and local laws will govern.

D. Concurrent Jurisdiction of Federal and State Courts

Assuming that the admiralty jurisdiction test is met and admiralty law applies to a claim, the

question remains: is the case going to be filed in federal court, or in state court?

As seen above, the admiralty law is a federal creature. The Judiciary Act states that the federal district courts “shall have original jurisdiction [of] any civil case of admiralty or maritime jurisdiction.” However, this does not mean that admiralty law is *exclusive* to the federal courts. The Judiciary also states “saving to suitors in all cases all other remedies to which they are otherwise entitled.”

The “savings to suitors” clause of the Judiciary Act gives the state courts concurrent jurisdiction where the common law can provide a remedy. Therefore, in many -- *but not all* -- admiralty cases, suit can be filed in state court; however, the state court must then apply the admiralty law as developed by the federal courts. However, to the extent the maritime law is silent on a given subject, state and local laws can supplement it; but they cannot contradict it.

The vast majority of admiralty claims can be filed in state court pursuant to the savings to suitors clause. However, there are exceptions. For example, a claim asserted directly against the vessel in order to enforce a maritime lien may only be pursued in a federal district court. Similarly, a proceeding filed by the owner of a vessel under the Shipowner’s Limitation of Liability Act (see below), is actionable only in a federal district court pursuant to its admiralty jurisdiction. Otherwise, all admiralty passenger claims likely to be faced by the shipowner and master are subject to concurrent jurisdiction of the federal courts and the state courts.

It should further be noted that, if the admiralty jurisdiction test is *not* met, then the case most likely would be filed in state court, unless some other basis for federal district court jurisdiction — such as diversity of citizenship — exists.

E. Relationship of State and Federal Law

Based on the foregoing, we know that if admiralty law applies, in most cases the action can be filed in state or federal court. The next question is whether state law, federal admiralty law, or both apply.

While many admiralty claims can be filed in both state and federal courts the law to be applied is the admiralty law as established by Congress and the federal courts. State law can supplement, *but not contradict*, federal law in the maritime setting.

In cases where the test for admiralty jurisdiction is met, the laws may be ranked as follows:

1. Federal statutes passed by Congress, and federal regulations promulgated pursuant to those statutes;
2. Decisions of the federal courts, both interpreting and applying the above and also those developing a judge-made body of law known as the “General

Maritime Law;” and

3. State and local laws and regulations, to the extent that they do not contradict the first two.

A state or local law may take precedence, however, if it is deemed *procedural* as opposed to *substantive* in nature. A state court applying the federal admiralty law as the substantive law in a case would remain free to apply its own procedural laws.

The differences between *substantive* and *procedural* state laws and their relation to the substantive admiralty or maritime law can be demonstrated by examining two aspects of Michigan law that are frequently at issue in personal injury litigation. In 1995 the Michigan legislature enacted a comprehensive tort reform measure. In part, that measure:

1. Bars recovery by plaintiffs for noneconomic damages where comparative negligence is more than 50% (with the economic damages recovery being reduced by the amount of comparative negligence);
2. Bars ANY recovery by plaintiffs where comparative negligence is 50% or more and they are impaired by alcohol or drugs;
3. Abolishes joint and several liability in most cases (see below);
4. Allows a defendant to seek allocation of fault against a non-party and a settling party (see below).

Admiralty law, however, provides for no such defenses. While no opinions have yet been issued on the subject, in our opinion Michigan’s tort reform would be deemed substantive rather than procedural, such that if admiralty law applies, these defenses would not be available.

On the other hand, Michigan has laws regarding the proper venue in personal injury cases. Even where a state court is applying the substantive admiralty or maritime law to a case, it has been uniformly held that the state venue provisions are procedural in nature and therefore apply.

III. PASSENGER PERSONAL INJURY CLAIMS

Passenger personal injury claims arising from an incident involving a vessel’s stability tend to be catastrophic. Such incidents can occur rapidly, seemingly without warning and in good weather, with the result the passengers and crew might not be prepared for a sudden crisis. Almost invariably the passengers will not be wearing life vests when the crisis begins. For tour operators, often the passengers are elderly, and for dinner cruises and the like the passengers may be under the influence of alcohol to some degree. A number of deaths and serious injuries can result, leading in turn to almost inevitable claims and lawsuits.

While certainly it is important for a shipowner or master to understand these issues in case they ever find themselves embroiled in such claims or lawsuits, the most important thing to remember is this: neither the master nor the shipowner should *ever* attempt to handle the claim or lawsuit themselves (setting aside, of course, those shipowners that have dedicated, trained claims people on staff). Most if not all incidents arising out of a vessel's stability will be covered by insurance. A prudent shipowner should be sure to have appropriate insurance with adequate coverages, and should immediately notify the carrier of the incident when it occurs. Masters are typically covered by the same policy of insurance.

Either the insurance company or the shipowner or the master or all three should arrange to have qualified counsel on site as soon as possible. In any serious maritime accident, there will initially be extensive interest from local law enforcement and conceivably the United States Coast Guard and the NTSB. Statements made by these investigators at the scene can be used later on against the shipowner or master at a future passenger lawsuit. Make sure anyone speaking to these investigators is accompanied by counsel.

Similarly, counsel can immediately conduct an investigation of what occurred, identify potential witnesses early on, and take other steps to ensure that crucial evidence is not lost.

In the aftermath of the actual incident, your attorney and (if applicable) carrier will be determining whether the admiralty jurisdiction test is met, such that admiralty law applies. If the answer to this is "no," then state law applies. If the answer is "yes," then regardless of whether it is filed in state or federal court the substantive admiralty law applies and the claims/lawsuits will have to be evaluated accordingly.

A. State Law

If state law applies, the owner or master of a vessel that carries passengers for hire has a common-law (i.e., judge-made) duty to exercise ordinary or reasonable care for the care and protection of their passengers. "Ordinary" or "reasonable" care means that the shipowner or the master would do or not do what a hypothetical "reasonably prudent" would or would not do under the circumstances. If the shipowner or master acts in a way which breaches this duty of care, and in turn that breach proximately causes an injury, then there is an actionable claim for negligence.

Some Michigan cases have indicated that common carriers, such as vessels carrying passengers for hire, owe their passengers a "high degree of care," which means care proportionate to the danger and risk of undertaking in light of means of conveyance employed.

However, shipowners and masters are also held not to be "insurers" of their passenger's safety. This means that the mere fact that an accident has occurred does not mean the shipowner or master is liable. One of the specific *duties* described above must be breached in order to give rise to liability.

It is important to note that this duty applies both to shipowner's and management as well as the master; indeed, it applies to each and every member of the crew. Essentially, everyone involved has a duty to exercise reasonable care. However, the precise actions required to be taken or avoided in order to meet this duty will vary with the circumstances and it logically follows that in most circumstances the shipowner and, to a lesser degree, the master will be held to a higher standard than the crew.

The shipowner likely is also the employer of the master and crew, and as such is liable for their negligent acts and omissions under Michigan law.

A shipowner also has a duty, under Michigan law, to discover all detectable defects in a vessel. This duty contemplates that a shipowner will have the vessel inspected in reasonable ways and at reasonable intervals in order to uncover potential "defects." (Although this duty is discussed in the context of being the shipowner's duty, as a practical matter this duty is frequently discharged through the efforts of master and crew; so it applies in this sense to them as well). In the context of vessel stability, this obviously means that shipowner and master must be cognizant of any changes in their vessel that might affect stability. It is not enough that they hide behind their ignorance; they must affirmatively *look* for vessel stability problems as circumstances warrant.

(And a crucial feature is, "as circumstances warrant." This guide is not suggesting that a stability check be performed every hour. However, periodic stability tests as might be recommended and performed by qualified naval architects or engineers or surveyors might be a good idea. If the master and crew notice some change in the vessel's handling characteristics, that might be a good time to check the vessel's stability. And certainly, after any change in vessel's structure that may potentially affect its stability would warrant an examination).

In terms of damages that can be awarded under state law, obviously in a personal injury action the issue is one of money. An injured passenger can recover economic damages, such as lost wages and medical bills. (There may or may not be an offset for collateral sources such as health insurance; most common, there is not, and the health carrier is asserting a lien on the recovery). An injured passenger may also recover money damages for noneconomic losses, such as pain and suffering and loss of society and companionship of a spouse. In the event of a death claim, the passenger's estate can claim money damages for any pre-death conscious pain and suffering, loss of financial support, and loss of society on the part of family members.

There is no set measure on the amount of damages that can be awarded. It is generally left to the trier of fact's discretion, although in jury trials the trial judge has some discretion to adjust the number upward or downward.

Michigan is a comparative negligence state. That means that if a passenger bringing a lawsuit is found to be comparatively negligent, liability is apportioned between the defendant(s) and the passenger and any percentage assigned to the passenger is not imposed on the defendant(s). Michigan also penalizes plaintiffs whose own negligence exceeds a certain percentage; again, the

following provisions under 1995 Tort Reform might apply:

1. A passenger cannot recover noneconomic damages (i.e., pain and suffering) where comparative negligence is more than 50% (with the economic damages recovery – such as lost wages – being reduced by the amount of comparative negligence); and
2. A passenger recovers nothing where his where comparative negligence is 50% or more and he was found to be impaired by alcohol or drugs.

It is, of course, a bit difficult to imagine any significant degree of comparative negligence would be assigned to passengers in the case of an accident arising from a vessel stability issue, but still, as circumstances warrant it is an issue to examine.

Michigan law also has other crucial liability apportionment provisions which can come into play in a passenger claim, again assuming state law applies. For example, there may be a number of individuals and entities that might be potentially liable in the wake of a serious accident involving vessel stability: the vessel's designer, her builder, the shipyard that altered her, etc. Until 1995, all of these were said to be "jointly and severally" liable; meaning that all defendants found to be liable were each 100% responsible for the amount of damages. That meant if a liable co-defendant went belly-up and did not pay, the other liable defendants had to make it up. To determine how any liability would be apportioned between liable defendants, they had to essentially sue one another (and this did not change the fact that if one couldn't meet his share, the others had to make it up to the plaintiff). And if a potentially responsible party was not named in the lawsuit by plaintiff, a defendant would have to sue that party to secure any contribution from them.

This all changed considerably in 1995. Now, as to all named defendants, a jury apportions liability between them and no defendant pays more than his or her allocated share. Moreover, if a potentially responsible party was not named as a party, one or more of the named defendants can actually name that entity as a "non-party at fault." The defendant then has the burden of proving that the non-party is wholly or partially at fault, and if successful, the trier of fact will apportion a percentage of liability to that non-party; any percentage so allocated does not have to be paid by the remaining defendants. (Plaintiff does have the option of bringing in non-parties who have been named, though).

These provisions, which we believe would NOT apply if admiralty law was in effect on a claim, can be very valuable for the defense in a passenger personal injury claim. They are a crucial reason as to why one needs to examine whether state or admiralty law will apply in any given situation.

There are also any number of legislative and regulatory measures specific to Michigan which might impact the claim if Michigan law applied. If a defendant has violated a statute which was designed to prevent the sort of occurrence which did in fact occur, he or she may be presumed to be

negligent. On the other hand, if a defendant violates a local measure or a regulation, negligence is not presumed, but the violation is considered as evidence of negligence.

There are any number of local laws and regulations which might pertain to a specific body of water and thereby apply to a specific claim, both generally and as may arise out of a vessel stability issue. For example, many local municipalities enact speed control measures for water craft within their jurisdiction. Various townships might enact rules on operating boats on inland lakes. These measures are too numerous to list here. One should be careful to note the location of the accident and determine whether there are any geographic-specific measures which might apply.

One statutory provision which would be applied throughout Michigan, however, is the Watercraft and Marine Safety Act contained at MCL § 324.80101, *et seq.* This version of the Marine Safety Act was updated in 1995. Highlights as they might apply to a passenger personal injury claim arising from a vessel stability issue might include:

Duty to Render Assistance After An Accident. The operator of any vessel “involved in a collision, accident, or other casualty” MUST provide “reasonable assistance” to injured persons, including transport to a hospital, unless: doing so would put his or her own vessel in danger; or it is not apparent that treatment is necessary or the individual does not request it. For example, if there is a collision, the vessel operator is obligated to assist the other vessel. The section goes on to say that one would not be liable for any acts or omissions in providing such care, unless he or she fails to act as “an ordinary, reasonably prudent person” in carrying out the task.

The statute also impacts bystanders who might attempt to assist. If a bystander “gratuitously and in good faith” renders assistance following a marine casualty, without objection from the person assisted, he or she is held to the same “reasonably prudent person” standard or face civil liability for breach thereof. Sec. 80133.

Obligation to Report Accident. In the event of an accident, the operator is obligated to report it as soon as possible, generally to the local sheriff’s office. Sec. 80135.

Speed Limits. The statute sets certain speed limits: unless otherwise set by regulation, 55 miles per hour. An exception exists for the Great Lakes and Lake St. Clair; there is no speed limit there, although within 1 mile of the shoreline the 55 mph limit applies. Local governments have the authority to set the limit at 40 mph. Generally, a vessel within 100 feet of the shoreline where the water depth is less than 3 feet must maintain a slow — no wake speed. Sec. 80146.

A vessel must also be operated at slow — no wake speed if someone is riding on the bow and it is not designed for such occupancy, or where someone’s physical person extends beyond the sides of the vessel. This does not apply, however, to vessels where such measures are necessary, such as sailboats or vessels that are docking. Sec. 80148.

Reckless Operation of A Vessel. A person operating a motor vessel:

. . . in disregard of the rights or safety of others, without due caution and circumspection, or at a rate of speed or in a manner that endangers or is likely to endanger a person or property, . . .

that person is guilty of reckless operation and can face criminal penalties. Sec. 80147.

Positions of Occupants. No one on a vessel underway can sit, stand, walk, or otherwise position themselves on a part of the vessel not designed for that purpose, unless immediately necessary to the safe and reasonable navigation of the vessel. Sec. 80153.

Owner's Liability. The Act contains a provision rendering a vessel owner liable for its negligent operation. Sec. 80157.

Potential Criminal Penalties. The Act includes provisions which could result in criminal penalties, including jail time, being imposed on shipowners and masters:

Sec. 80172. A person who, by the operation of any vessel at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not willfully or wantonly, injures so as to cripple or cause the death of another is guilty of a misdemeanor, and shall be imprisoned for not more than 2 years, or fined not more than \$2,000.00, or both.

Sec. 80173. A person who operates any vessel carelessly and heedlessly in a willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or is likely to endanger any person or property and thereby injures so as to cripple any person, but not causing death, is guilty of the offense of felonious operation, and shall be imprisoned for not more than 2 years, or fined not more than \$2,000.00, or both.

Sec. 80174. The crime of negligent homicide is included within every crime of manslaughter charged to have been committed in the operation of any vessel, and where a defendant is charged with manslaughter committed in the operation of any vessel, if the jury finds the defendant not guilty of the crime of manslaughter, the jury may render a verdict of negligent homicide.

(These are not exhaustive. There are other criminal penalties that may well be brought into play as circumstances and a prosecutor's zeal may dictate)

Operating Vessel While Under the Influence. The legal limit when operating a boat is .10. As in the case of automobiles, severe criminal penalties may apply. Sec. 80176.

Passengers filing their lawsuits in state court have a right to a jury trial. Personal injury cases are tried most often before juries.

A passenger can file a lawsuit under state law generally within 3 years of the accident; after that, the suit is barred. The most notable exception is that pertaining to minors: a minor can wait until 3 years after his or her 18th birthday.

It is common for the owners of passenger vessels to attempt to limit if not avoid their liability altogether with contractual language. This language might secure the passenger's agreement to waive all claims of liability, or establish a shorter time limit for filing suit, or commit them to pursuing claims in arbitration or only in a specific forum.

Michigan law does not forbid such agreements, but certainly frowns on them, and will void them if they are not achieved as a result of a knowing, arms-length, bargained-for transaction. Fine print on the back of the ticket of passage typically won't cut it. On the other hand, a formal document signed in advance of the trip may pass muster; however, there is always a legitimate question of to what degree can most passengers truly appreciate the specific "risks" of vessel operation. Of course, few vessel operators find it practical to have their passengers sign formal waivers or modifications of their legal rights

B. Admiralty Law

If, on the other hand, the admiralty jurisdiction test is met, then the effect of admiralty law must be examined.

At the outset, it should be pointed out that the application of admiralty law does NOT call for an absolute non-application of state law. Again, state law may still apply to supplement admiralty law, provided it does not contradict it.

Under the general maritime law, a shipowner owes to its passengers the duty of exercising reasonable care under the circumstances. The application of "reasonable" changes with the circumstances of each particular case; in some cases it may be a very high degree of care, and in others, it may be something less. The shipowner's duty of care includes the duty to warn passengers of dangers which are not apparent and obvious; this includes a duty to reasonably inspect for such defects. In general, a shipowner is liable for all defective conditions on board of which it knew or should have known in the exercise of due diligence.

A special concept that can arise under maritime law is the doctrine of seaworthiness. This is a specific doctrine which some shipowners may be familiar with as a result of dealing with crew claims. It has some application in passenger claims as well.

The doctrine of seaworthiness provides that a shipowner implicitly warrants that a vessel is fit to be at sea. To satisfy the obligation of seaworthiness, a shipowner must do all in its power to keep the vessel and its appurtenances, appliances, equipment and crew reasonably fit for its intended use. This obligation is actually owned not only by the vessel owner, but also its operator (if different) and the vessel itself (the vessel itself can actually be held liable in admiralty court for an

unseaworthy condition).

The doctrine does not just apply to the hull, but ALL of the vessel's appurtenances and equipment.

The doctrine of seaworthiness is a relative concept; a vessel that is seaworthy for one trip may not be seaworthy for another, depending on circumstances. While the shipowner's duty is absolute, his only duty is to provide a vessel and equipment reasonably fit for their intended use. Absolute perfection or pristine condition is not required; it is not necessary that a vessel be capable of weathering every conceivable storm, or withstand every imaginable peril. The equipment need not be the best, the most modern, or the most convenient.

A vessel can be unseaworthy because of a temporary condition, such as a momentary or temporary break-down of a piece of equipment.

In crew cases, the doctrine of seaworthiness is known as a "strict liability" standard. If a seaman is injured because of an unseaworthy condition aboard ship, he recovers money damages regardless of whether the shipowner knew or should have known of the hazard, and regardless of whether the shipowner was otherwise negligent. (This doctrine, together with the Jones Act, is what makes seaman claims a challenge to defend).

This is not the case with passenger claims. The strict liability provisions of the doctrine of seaworthiness do not apply to passenger cases. For a passenger to recover under maritime law, the passenger must establish negligence. However, a failure to provide a seaworthy vessel can be considered in determining whether the shipowner has breached its standard of care. Also, unlike in seaman cases, the passenger must establish that the shipowner knew or should have known of the unseaworthy condition.

As under state law, a shipowner is vicariously liable for the negligent conduct of the master and crew in its employ. In instances where the owner is not also the operator, admiralty law would often find the owner responsible, even if the Michigan owner's liability statute did not apply. The owner would remain liable for the condition, or *seaworthiness*, of the craft. He or she would also be liable under admiralty law for allowing a person to operate the vessel if that person was known to be unqualified to do so or impaired from alcohol, drug use, or some physical infirmity. Any act or omission on the owner's part, even if entirely distinct from the actual operation of the vessel, which in any way contributes to the accident will render the owner liable.

Maritime law treats the duties of a master a bit differently. The general maritime law provides that it is the master's duty to keep his vessel constantly in the highest state of readiness and trim. (Indeed, the shipowner has an obligation to provide a competent and skillful master of sound judgment). The master is actually liable to the shipowner for damages caused by his willful or negligent misconduct.

If the carrier issuing the ticket is different from the shipowner, the carrier may also face liability. The contract of carriage imposes a duty on a carrier to transport passengers safely and to exercise reasonable care under the circumstances of each case.

Thus, and as with state law, the general maritime law would generally require shipowners and masters to be aware of the handling characteristics of their vessels, to perform reasonable inspections as needed, and to protect their passengers against hazards and defects they know or should know of. Again, the specifics of how these obligations are carried out will vary with the circumstances. But from the standpoint of vessel stability, the crucial point is again that shipowners and masters cannot hide behind their ignorance; they must affirmatively look for vessel stability problems as circumstances warrant.

There are certain presumptions as to liability that are unique to maritime law and which may, under some circumstances, apply to a case involving vessel stability issues. For example, if an allision with a stationary object caused or contributed to vessel instability, the maritime law presumes the moving vessel was at fault. Specifically, where a vessel strikes a nonmoving object, such as a dock, the courts have recognized that logically the dock is probably not the party to blame. Accordingly, there is a presumption at law that the moving vessel was at fault in causing the accident, and this presumption supports a *prima facie* case for negligence against the vessel owner and operator. However, the presumption is a rebuttable one; evidence can be introduced to prove the nonmoving vessel was wholly or partially at fault. Fault will then be allocated between the parties. Common examples of a nonmoving structure's fault are: improper lighting, inadequate mooring, and improper placement.

Further, violations of the Rules of the Road (discussed below), as well as violations of the Michigan statute and other local laws and regulations as may apply, can carry serious consequences under admiralty law. Under the well-established United States Supreme Court holding known as *The Pennsylvania Rule*, where a vessel is found to be in violation of a rule or regulation relating to navigation, the vessel owner/operator must prove that the violation did not and could not have caused the casualty. This is an extremely difficult burden for any defendant in a lawsuit to meet.

On the other hand, a defense which can be invoked very rarely is "Act of God" or Force Majeure. Admiralty law recognizes that at sea certain damages caused by nature are unavoidable. An obvious example is an unexpected tidal wave. However, in the age of satellite transmissions, GPS navigation systems, weather forecasts, and the like, it will be highly unlikely for a defendant to successfully avail himself of this defense.

The damages that can be awarded under the general maritime law are identical to those that can be awarded under Michigan law. One exception is the possible application of the federal Death on the High Seas Act, which applies only to accidents occurring more than 1 marine league off shore (not a factor in the Great Lakes). This Act was passed to fill a void left by the general maritime law, which did not allow wrongful death actions in accidents on the high seas. The Act allows such actions, but limits damages to economic losses only. It obviously has no application to the Great

Lakes.

As with state law, there is no set measure on the amount of damages that can be awarded. Again, it is left to the trier of fact, though a judge can make limited adjustments to a jury's award.

The general maritime law permits a trier of fact to assign fault to a plaintiff passenger by way of comparative negligence. As with state law, any percentage assigned to a plaintiff is not paid by defendant(s). However, unlike state law, the provisions of 1995 Tort Reform which punish plaintiffs whose comparative negligence exceeds 50% or who was using illegal drugs or alcohol do *not* apply. Therefore, a plaintiff who was high on cocaine and 99% responsible for his own injuries can still collect 1% of his damages from a liable defendant.

Michigan's provisions regarding apportionment of fault between defendants and potentially responsible non-parties likewise do not apply. Defendants are jointly and severally liable, meaning if one of them can't pay, the others owe the entire obligation. Any "apportionment" of liability between responsible parties can only be achieved by suing each other, and even then, if one cannot meet its obligation, the remaining parties have to absorb its share when making payment to plaintiff.

The general maritime law will recognize and observe local laws and regulations, and state statutes, which are pertinent and which do not conflict with the maritime law. As a practical matter, this means the same local and state measures, such as the Watercraft and Marine Safety Act, discussed above will still be an issue under the general maritime law. In addition, negligence may also be established by a violation of one or more Rules of the Road (both state and federal), discussed below.

Passengers filing claims under the general maritime law have a right to jury trial. Again, they may not necessarily file in federal court; under the savings to suitors clause, they can file their lawsuit in state court, and the state court is obligated to apply federal maritime law.

IV. RULES OF THE ROAD

Rarely does a vessel stability problem arise simply because of the inherent characteristics of the vessel itself. If that were always the case, a vessel would flip over as soon as it was placed in the water. Instead, what we see is a vessel operate for years in a given configuration without any apparent problem, and then demonstrate its instability only when certain specific circumstances and conditions occur. One of the variables is the operation and navigation of the vessel itself. Vessel operation and navigation is often regulated by the so-called "Rules of the Road" promulgated by both state and federal authorities.

The following excerpts from the Rules of the Road are particular to vessel operation which may impact stability, but are of course equally applicable to a number of circumstances, such as collisions. Again, distinctions should be drawn between state and admiralty law principles on the subject.

A. State Law

Local laws, regulations, and other geographic-specific measures may have an impact on the proper navigation and operation of a vessel. They will have to be consulted on a case-by-case basis prior to making any determination as to liability under state law. As with personal injuries in general, if a defendant has violated a statute which was designed to prevent the occurrence, he or she is presumed to be negligent. On the other hand, if a defendant violates a local measure or a regulation, negligence is not presumed, but the violation is considered as evidence of negligence.

Provisions of the Michigan Watercraft and Marine Safety Act which governs vessel navigation and operation and which may have particular relevance in a vessel stability case is the following provision, possibly the most frequently cited in personal injury cases arising out of maritime accidents:

Section 80145. A person operating or propelling a vessel upon the waters of this state shall operate it in a careful and prudent manner and at such a rate of speed so as not to endanger unreasonably the life or property of any person. A person shall not operate any vessel at a rate of speed greater than will permit him or her, in the exercise of reasonable care, to bring the vessel to a stop within the assured clear distance ahead. A person shall not operate a vessel in a manner so as to interfere unreasonably with the lawful use by others of any waters.

In the context of a stability issue, this provision is often cited in cases where the plaintiff accuses a vessel operator of traveling at an unsafe speed, which in turn causes or contributes to an episode of instability. For example, the plaintiff might accuse the pilot of taking a wave at too high a rate of speed.

B. Admiralty Law

Should admiralty law apply, again, the above Michigan statutory provisions will still apply in that they supplement, rather than contradict, the substantive admiralty law. Admiralty law does, however, present some unique Rules which will arise in a vessel stability case.

The federal Rules of the Road are promulgated by the United States Coast Guard and are codified at 33 USC § 1601 (International Regulations for Preventing Collisions at Sea) and 33 USC § 2001 (Inland Navigation Rules). The International Rules (COLREGS) apply to vessels on the high seas, whereas the Inland Rules apply to vessels operating on the inland waters of the United States. It is the Inland Rules which apply to the Great Lakes region.

The most pertinent provisions that might apply to vessel navigation and operation which in turn causes or contributes to vessel instability are as follows:

Rule 2 — Responsibility. The general catch-all rule; establishes the standard

of good seamanship, and precludes the exoneration of any vessel or its operator for any neglect of any precaution which might be required by the ordinary practice of seamen. In other words, even if the Rules of the Road are scrupulously followed, the owner or operator is still held to further measures if so “required by the ordinary practice of seamen.”

Rule 5 — Lookout. Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision. Frequently, the facts of the accident might make it clear that adequate lookout was not maintained, such as where a vessel is thrown from the water by a wave or wake which should have been clearly visible.

Rule 6 — Safe Speed. Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. The factors to take into account include visibility, other vessel traffic, weather, maneuverability, and draft.

(This is the equivalent of Michigan’s “assured clear distance” rule).

Rule 7 — Risk of Collision. Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision exists. *If there is any doubt, such risk shall be deemed to exist.*

Rule 8 — Action to Avoid Collision. Any action taken to avoid collision shall be positive, made in ample time and with due regard to the observance of seamanship.

Rule 13 — Overtaking. A vessel overtaking another shall keep out of the way of the vessel being overtaken. “Overtaking” occurs where the vessel is approached 22.5 degrees abaft her beam; otherwise, it is a crossing situation or a head on situation.

Rule 14 — Head-On Situation. In a head-on situation, each vessel is to pass on the left side of the other.

Rule 15 — Crossing Situation. In a crossing situation, the vessel with the other on its right side must give way and the vessel with the other on its left side shall have the right of way.

Rule 16 — Give-Way Vessel. The vessel obligated to give way must do so and take early and substantial action to keep well clear.

Rule 17 — Vessel with Right of Way. The vessel with the right of way must keep her course and speed, except where it appears that the collision cannot be avoided by the actions of the other vessel alone, in which case she should take reasonable action to avoid the collision.

There are also numerous other provisions regarding lights to be displayed on vessels, which may be of relevance in instances of night collisions. And in instances of collisions generally, given the broad and overlapping nature of the Rules of the Road it is the rare case where all parties involved are not at least arguably responsible for one or more violations of these provisions.

V. LIMITATION OF LIABILITY

The concept of limitation of liability is unique to admiralty law. While it can only rarely be successfully invoked, its potential benefits are such that a shipowner must examine the possibility of seeking this relief following any major accident. Such an examination must also be made promptly, as there are very significant time limitations on seeking this relief.

46 USC § 183 provides that the owner of any vessel involved in an accident, where the act or omission was “. . . done, occasioned or incurred, without the privity and knowledge . . .” of the owner, *shall not be liable for an amount in excess of the post-casualty value of the vessel and her cargo (if any)*.

45 USC § 185 lays out the procedure for seeking this relief. Essentially, the vessel owner must file a petition with the proper federal district court, and post security for the value of the vessel and cargo (if any). **THE PETITION MUST BE FILED WITHIN SIX MONTHS OF FIRST RECEIVING WRITTEN NOTICE OF THE CLAIM OR IT IS WAIVED.** Such a petition for limitation may also be joined with a request that the court exonerate the owner; i.e., find that there is no liability in the matter. Of particular importance is that upon filing of such a petition:

. . . all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

Subsection (3) of Supplementary Admiralty Rule F. See also 45 USC § 185.

In other words, filing a petition for exoneration or for limitation of liability does three things:

1. It puts the defendant in federal court, where the judge and jury may be less liberal than state courts in some areas (the judge is typically the trier of fact on liability issues and the issue of exoneration and limitation of liability; a jury is generally called to determine personal injury damages);

2. It ceases any state court proceedings and prevents any future state court filings; and
3. It presents the defendant with an opportunity to, if exoneration is not forthcoming, limit his or her liability to the post-casualty value of the vessel.

The value of a recreational craft after an accident is generally not large. In the cases the Firm has been involved with in the past, values ranged from \$7,500 to \$15,000.

It is not surprising that limitation of liability is unpopular amongst the plaintiff bar and members of the federal judiciary. Nevertheless, an owner is entitled to limit his liability as to claims arising out of negligent operation of his vessel as long as they were incurred “without his privity and knowledge.” 46 USC § 183. It is precisely this requirement, however, that makes this relief so rare.

A noted treatise, *Gilmore and Black*, observes that the words “privity and knowledge” are “empty containers into which the courts are free to pour whatever content they will.” Essentially, the concept of privity or knowledge means the owner’s personal participation in the negligence or fault which caused the damage.

In some cases, the owner is also the operator and the negligence being asserted is negligent operation of the boat, so privity and knowledge exists. However, the defense should not be discounted even where the owner was present or was operating the boat. Under some circumstances, even with the exercise of reasonable care, the operator might not be aware of the circumstances which ultimately cause the accident. In one recent case handled by this Firm, the owner/operator had been unaware of substantial (and illegal) modifications to his boat by a prior owner; the first time he went out to test it, there was an accident.

The concept that the owner’s presence and participation in the navigation of the vessel is not in and of itself fatal to a limitation of liability claim was recently discussed by the United States Court of Appeals for the 6th Circuit in *In re Muer*, 146 F.3d 410, 416 (1997), cert. den. 142 L.Ed.2d 769 (Supreme Court 1/19/99). In *Muer*, the vessel owner and his wife were sailing from the Bahamas to Florida with another couple. The owner was acting as captain. The vessel was lost with all hands due to a storm. The relatives of the decedent passengers sued the owner’s estate for wrongful death, arguing that the owner should not have proceeded in the face of a poor weather forecast.

The owner’s estate filed an exoneration/limitation of liability proceeding in federal district court in Detroit. The plaintiff moved for summary disposition, arguing that because the claimed negligence was that of the owner himself, lack of privity and knowledge could not be established and limitation would have to be denied. The district court denied the motion.

The Sixth Circuit Court of Appeals upheld the district court’s decision. It held that in any limitation of liability case, there would be a two-part inquiry: first, the claimant would have to

demonstrate negligence; second, if negligence existed, then the petitioner (the defendant) would carry the burden of demonstrating lack of privity or knowledge. *Muer* at 416. If neither were shown, the shipowner would be entitled to limitation of liability. The Court went on to state:

Thus, it is not the case, as the claimant-appellant urges, that simply alleging facts that support a finding of knowledge or privity, the second step in the district court's inquiry, leads to a dismissal as a matter of law of a LOLA [Limitation Of Liability Action] action (sic). . . . the claimant carries the burden of demonstrating negligence and thus the mere showing of privity or knowledge, the second step, does not preclude a LOLA action.

Id. at 416. The Court then discussed the commonly accepted, but erroneous, logic that an owner present on the vessel would not be able to demonstrate a lack of privity or knowledge:

“The owner’s presence is not necessarily fatal to his right to limit if the evidence suggests that his conduct was in all respects prudent. (Citations omitted). In short, in most circumstances negligence in operation will be sufficiently connected to the owner on board his own small vessel and operating it that he will be found to have privity or knowledge, but this common sense recognition of how the facts will usually work out is not an ineluctable doctrine. . . The ‘owner at the helm’ doctrine is a useful tool directed toward proper decision and not a talisman.”

Id. at 416, citing *In re M/V Sunshine II*, 808 F.2d 762, 764 (CA11 1987), in turn citing Gilmore and Black, *The Law of Admiralty*, § 10-23 at 883, and at n. 93).

Therefore, the presence of the owner on board, even if he or she is participating in the vessel’s navigation, is not necessarily fatal to a limitation of liability proceeding. Generally, the basic inquiry is whether he or she was aboard ship at the time of the incident and, if so, whether he or she was personally participating in the operation of the vessel, such as standing watch, manning the helm, etc. Generally, if he or she has selected competent individuals to operate the vessel, has given them adequate instructions, and is either not personally involved in the operation of the vessel or conducts his or her role with reasonable prudence, he will not be charged with “privity or knowledge.”

To be entitled to limitation of liability, the tort must occur on “navigable waters” and the test for admiralty jurisdiction must otherwise be met.

The reader is reminded that the time limit for filing such a petition is six months from the first written notice of the claim. It is strongly recommended that in order to avoid any limitation problems that the petition be filed, if at all, within six months of the date of loss.