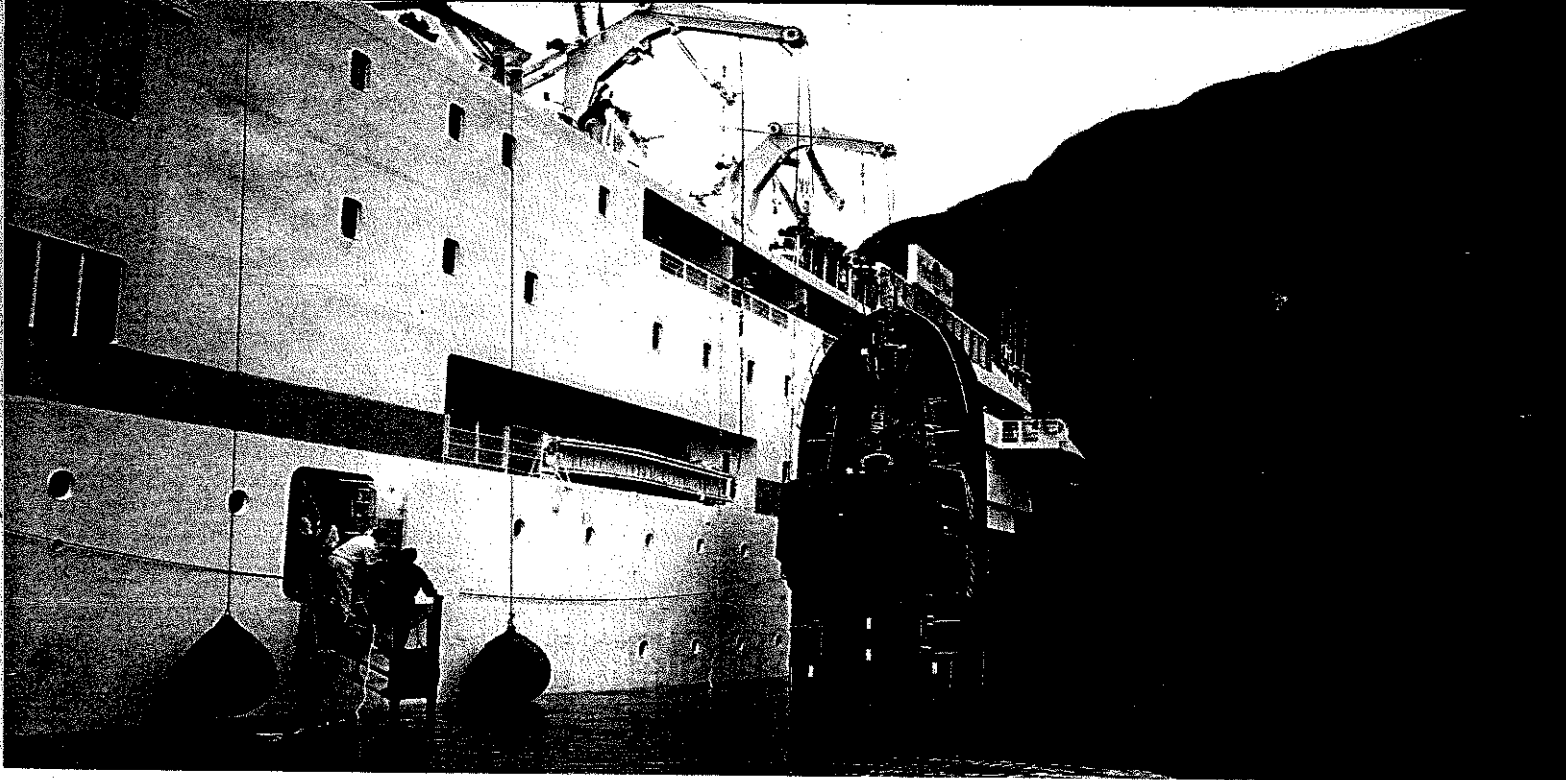




GARDNEWS



GARD NEWS ISSUE 183 August/October 2006

**A 20-year anniversary – The loss
of lives in lifeboats with
on-load release hooks PAGE 4**

**Bumps and scrapes
can be costly! PAGE 12**

Legal implications of coral reef damage in the United States

By Nenad Krek, Carlsmith Ball LLP, Honolulu, Hawaii and Eugene J. O'Connor, Fowler Rodriguez & Chalos, Port Washington, New York.

Following the feature on damage to coral reefs which appeared in the last issue of Gard News,¹ in the following article Nenad Krek and Eugene J. O'Connor discuss legal implications of grounding damage caused by ships to reefs in the US.

16

Cases governed by the Oil Pollution Act of 1990 (OPA)²

There are many coral reefs in the United States, including reefs in the states of Hawaii and Florida, territories of Puerto Rico, Virgin Islands and Guam, and reefs surrounding individual islands in the Pacific Ocean that belong to the United States. A grounding of a ship on a coral reef in the United States will result in liabilities for the shipowner (called the Responsible Party, or "RP") under OPA even if no oil is spilled or likely to be spilled. The RP is liable under OPA for all damage, including injuries to natural resources, caused by an incident involving an actual discharge or a *substantial threat of discharge* of oil.³ Courts interpreting OPA and related statutes have held that a substantial threat exists whenever there is a reasonable cause

for concern that a discharge of oil may occur. In practice, the RP will be liable under OPA for all damage caused by salvage efforts if there was any oil, including bunkers, on board the grounded ship.

An RP's liability under OPA is imposed without regard to fault. Exoneration from

"A grounding of a ship on a coral reef in the United States will result in liabilities for the shipowner under Oil Pollution Act even if no oil is spilled or likely to be spilled."

liability is granted only if the incident was caused *solely* by an act of God, an act of war, or act or omission of a third party with whom the RP has no contractual relationship (so the negligence of assisting pilots or tugs will not qualify) – but only if the RP exercised due care and took precautions against foreseeable acts or omissions of such third party and the foreseeable consequences of

¹ "Claims for damage to coral reef in the US" in Gard News issue No. 182.

² 33 U.S.C. § 2701 *et seq.* There may be other statutes also imposing liability, depending on location, such as the National Marine Sanctuaries Act (16 U.S.C. § 1431 *et seq.*) or the Park System Resource Protection Act (16 U.S.C. § 19jj), not discussed here.

³ 33 U.S.C. § 2702(a); 15 C.F.R. § 990.10.

those acts or omissions.⁴ As a practical matter, such defences will seldom, if ever, be available in a case where a ship grounds on or strikes a charted reef, let alone spills oil on a reef. However, the RP will have the right to pursue contribution from any third party (tugs, salvors) who may also be liable for all or part of the damage arising from the incident.⁵

"The methodology for assessing such damage, known as natural resources damage assessment (NRDA) is defined in the federal regulations implementing OPA."

Damage caused by the salvage efforts are recoverable from the RP under OPA and will include injuries to the reef caused by anchors, tow wires and the impact and movement of the vessel's hull on the reef during efforts to extricate her. A good rule of thumb used by technical experts in such cases is that about one-third of the damage to a coral reef is caused by the grounding itself, another third is caused by the efforts of the Captain to get his vessel off the reef (by going full astern, etc.) and the last third is caused by the efforts of the salvors (particularly by submerged tow wires which will shred coral heads). Damage caused by the latter two thirds may be recoverable from the RP under OPA.

The measure of damage to natural resources, including coral reefs, under OPA is:

- (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- (B) the diminution in value of those natural resources pending restoration; plus
- (C) the reasonable cost of assessing those damages.⁶

The methodology for assessing such damage, known as natural resources damage assessment (NRDA) is defined in the federal regulations implementing OPA.⁷ The injured natural resources will be represented in a NRDA related to coral reef damage typically by the US Department of the Interior, the National Oceanic and Atmospheric Administration (NOAA) and its agency, the Fish and Wildlife Service (FWS), the

concerned agency or agencies and possibly the Native American tribes or indigenous people of the coastal state or territory where the incident occurred. The NRDA regulations provide for emergency restoration, determination and quantification of injury, and development and implementation of a restoration plan which would result in "making the environment and public whole".

In some coral reef cases, emergency restoration may include uprighting overturned corals or literally "gluing" broken corals back together. Although the fact that such emergency work must be done at an early stage may seem counter-intuitive, experience has shown that this is often a very cost-effective way to mitigate the overall long-term injury to the coral, and so it should always be given serious consideration. If the RP pays for emergency restoration, such payment is "without prejudice" and if it is later determined that the RP is entitled to either exoneration or limitation under OPA, the RP can recover the amount paid from the National Pollution Fund.

The determination and quantification of injury is in theory often done "co-operatively" by technical representatives of the RP and federal and state natural resource Trustees. It is commonly done by extrapolation from supposedly comparable reference sites. There will often be differences of opinion as to whether the quality and density of coral at the chosen reference sites fairly represents the coral population destroyed or damaged by the incident (grounding, salvage, and/or oil spill). There will also be differences of opinion as to the length of time necessary for full recovery of the injured reef. The restoration plan may include years of study and monitoring of the injured population, and provision of substitute services or resources. Under OPA, the cost of all these activities is ultimately borne by the RP.

In practice, in some coral reef cases the "damages" owed by the RP on account of NRDA are eventually agreed, i.e., settled, between the RP and the Trustees on the basis of a dollar amount per square metre of the lost coral cover, using settlements in prior cases as precedent. Settlements can also be based on the cost of conducting restoration on unrelated coral sites, invasive algae control, implementing limits or

safeguards on recreational use or funding coral monitoring and studies. The RP will usually receive substantial credit in the final settlement for having funded emergency restoration projects and studies related to the extent of damage and feasibility of restoration.

Other types of damages that can be incurred under OPA in connection with reef injury include, but are not limited to, the Trustees' costs of conducting the NRDA, the costs and salaries of the US Coast Guard and other federal and state employees involved in the response to the grounding, property and profit losses by third parties and damages for loss of the subsistence use of the reef.⁸ OPA also expressly preserves the right of the coastal states to impose liabilities and requirements in addition to those imposed by OPA in relation to the discharge or substantial threat of discharge of oil.⁹ For example, Florida law provides for civil penalties for damage to coral reef in the state waters in the amount of up to USD 1,000 per square metre of reef area damaged.¹⁰

"It is a rare grounding that does not involve some violation of one of the applicable federal safety or navigation regulations, so in many ways the OPA limitation is illusory."

OPA gives the RP the right to limit its overall liability to a pre-defined amount unless the RP, its employees, agents and contractors acted with gross negligence or engaged in wilful misconduct, violated a federal safety, construction or operating regulation, failed or refused to report the incident, co-operate or comply with the authorities.¹¹ The amount of limitation for tank ships is the greater of

⁴ 33 U.S.C. § 2703(a).

⁵ 33 U.S.C. § 2709. Recourse against a salvor may be limited, as discussed further in this article.

⁶ 33 U.S.C. § 2706(d)(1).

⁷ 15 C.F.R. Part 990.

⁸ 33 U.S.C. § 2702(b). A discussion of all types of damages recoverable under OPA is beyond the scope of this article.

⁹ 33 U.S.C. § 2718(c).

¹⁰ Florida Statutes §253/04(3).

¹¹ 33 U.S.C. § 2704(c).

USD 1,200 per gross ton or USD 10 million for tankers greater than 3,000 gross tons, USD 2 million for tankers smaller than 3,000 gross tons.¹² The amount of limitation for other vessels is the greater of USD 600 per gross ton or USD 500,000.¹³ It is a rare grounding that does not involve some violation of one of the multitude of applicable federal (CFR) safety or navigation regulations, so in many ways the OPA limitation is illusory.

The assessment of damages under OPA proceeds initially through studies and negotiation, and without resort to the judicial system. As a condition of its participation in the NRDA, the RP is usually asked to advance some or all of the Trustees' costs of conducting the NRDA. All claims are presented first to the RP. Only if the RP and the government agencies and/or other claimants eventually reach an impasse as to the final amount payable by the RP, the unpaid claimants will seek recovery from the Oil Pollution Liability Trust Fund funded by a tax imposed by the United States on imported oil.¹⁴ The US Attorney on behalf of the Fund will then sue the RP for the amounts paid from the trust.¹⁵

The RP's recourse against the salvor for damage caused to the reef by inept or

inappropriate salvage methods (such as, e.g., shredding of coral outside the grounding zone by submerged tow lines) is limited. The salvor will be considered as having "responded" to the threatened oil spill and thus enjoys "responder immunity" which insulates him from damages except for those caused by gross negligence or willful misconduct.¹⁶ Moreover, while the Coast Guard nominally directs response operations under OPA, the Coast Guard enjoys "sovereign immunity" and will not incur civil liability by failing to restrain the salvor from damaging the reef. The RP should not count on the Coast Guard intervening to prevent such damage. However, it is strongly recommended that the RP require the salvor, before commencing salvage or wreck removal of a vessel on a coral reef, to submit to the RP and the Incident Command its plan to avoid or minimise further damage

"The RP's recourse against the salvor for damage caused to the reef by inept or inappropriate salvage methods is limited."

to the coral, e.g., the use of floating tow lines. If the salvor then deviates from such plan and causes more coral damage, it may not have a responder immunity defence to an RP claim for indemnity.

Cases not governed by OPA

OPA will not come into play if the ship, after having contacted the reef, remains afloat and there is no reasonable cause for concern about an oil spill. By the same logic, OPA should not be applicable in the case of grounding of a barge carrying only dry cargo, if the tug remains safely afloat. The shipowner will be liable for the impact damage to the reef under the general maritime law on the basis of fault or under other possibly applicable statutes such as the National Marine Sanctuaries Act or the Park System Resource Protection Act.¹⁷ The procedural setting will be a civil action against the shipowner brought by government entities that own the reef on behalf of the public. ■

¹² 33 U.S.C. § 2704(a)(1).

¹³ 33 U.S.C. § 2704(a)(2).¹⁴ 33 U.S.C. § 2713.

¹⁵ 33 U.S.C. § 2715.

¹⁶ 33 U.S.C. § 1321(c)(4)(B)(iv).

¹⁷ See footnote 2.



the RP will be liable under OPA for all damage caused by salvage efforts if there was any oil, including bunkers, on board the grounded ship.