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INTERACTION OF THE LIMITATION OF LIABILITY ACT AND THE WRECK ACT: WHO CAN LIMIT LIABILITY FOR THE GOVERNMENT'S WRECK REMOVAL EXPENSES?

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INTRODUCTION

Whether the owner of a vessel may limit his liability under the Limitation of Liability Act of 1851[1] for expenses incurred by the government or another party in removing a sunken vessel which obstructs a waterway in violation of the Wreck Act,[2] enacted in 1899,[3] is a question which has received extensive attention from the courts only in the last decade. This question had long lain dormant because prior to the Supreme Court's 1967 decision in *Wyandotte Transportation Company v. United States*,[4] lower courts had consistently held that owners of sunken vessels had an absolute right of abandonment, and that following abandonment, the government had no in personam rights against the owners of the vessel to recover expenses incurred in raising a sunken vessel which posed a threat to navigation.[5]

The Supreme Court's decision in *Wyandotte* significantly changed prior law. The Court there denied an absolute right of abandonment and held that where the right to abandon did not exist and the government did not accept the abandonment, the government had an in personam right to recover wreck removal costs from the vessel's owner.[6] Because an action to recover removal costs is no longer limited to an in rem proceeding, whether the right to limit liability is available is now a very real question.

This article will examine the post-*Wyandotte* development of the Wreck Act exception to the Limitation Act. The discussion will begin with broad outlines of the Limitation Act and of the Rivers and Harbors Act of 1899 with an emphasis on the Wreck Act. Discussion of the development of case law through the *Wyandotte* decision will follow. The article will then treat post-*Wyandotte* developments, with an analysis of the main line of cases in which the courts have denied limitation and of the recent case of *University of Texas*

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1. 46 U.S.C. §§181-189 (1970).
2. 33 U.S.C. §§409, 411, 414, and 415 (1970).
3. Ch. 425, §§15, 16, 19 & 20, 30 Stat. 1121 (1899).
4. 389 U.S. 191 (1967).
5. *See, e.g.*, United States v. Bethlehem Steel Corp., 319 F.2d 512 (9th Cir. 1963); United States v. Zubik, 295 F.2d 53 (3d Cir. 1961). Another possible reason is that courts avoided interpretation of the Wreck Act because of its poor draftsmanship. *See* Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438, 442 (5th Cir. 1977); United States v. Moran Towing & Trans. Co., 374 F.2d 656, 670 (4th Cir. 1967) (Sobeloff, J., dissenting), *vacated*, 389 U.S. 575 (1967).
6. See text accompanying notes 35-53 *infra*.

Medical Branch at Galveston v. United States,[7] which has developed a new and better-reasoned theory to deny limitation. The article will conclude with a critical discussion of the two lines of cases.

THE LIMITATION ACT

Any discussion of the interaction between the Limitation Act and the Wreck Act must begin with the former, for the Wreck Act has developed as an exception to the generally broad application of the Limitation Act. The Limitation of Liability Act of 1851[8] was enacted as a response to *New Jersey Steam Navigation Co. v. Merchants' Bank*.[9] There the owners of the vessel had been held liable for the loss of valuable negotiable paper the existence of which they were completely unaware. At the time of the decision, owners of vessels in the English merchant marine were insulated from such liability by statute.[10] Without similar legislation, the American merchant marine would have been at a competitive disadvantage, being subject to liability to which English shipowners were not.[11] Congress acted in 1851, providing American shipowners the right to limit their liability to their interest in the vessel and voyage when the loss occurred without the owner's privity or knowledge.[12]

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7. 557 F.2d 438 (5th Cir. 1977).

8. 46 U.S.C. §§181-189 (1970).

9. 47 U.S. (6 How.) 344 (1848). See The Main v. Williams, 152 U.S. 122 (1894).

10. 53 Geo. III, c. 159 (1813): "Be it therefore enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That no Person or Persons who is, are or shall be Owner and Owners, or Part Owners or Owners of any Ship or Vessel, shall be subject or liable to answer for or make good any loss or Damage arising or taking Place by reason of any Act, Neglect, Matter or Thing done, omitted or occasioned without the Fact or Privity of such Owner or Owners, which may happen to any Goods, Wares, Merchandize or other Things laden or put on board the same ship or Vessel, after the First Day of September, One thousand eight hundred and thirteen, or which after the said First Day of September One thousand eight hundred and thirteen may happen to any other ship or Vessel or to any Goods, Wares, Merchandize or other Things, being in or on board of any other Ship or Vessel, further than the Value of his or their Ship or Vessel, and the Freight due or to grow due for and during the Voyage which may be in Prosecution or contracted for at the time of the happening of such Loss or Damage." This statute was in force in 1851. For discussions of the history of limitation statutes, see The Main v. Williams, 152 U.S. 122 (1894); Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104 (1871); The Rebecca, 20 F.Cas. 373 (C.C.D. Me. 1831) (opinion of J. Ware); 3 E. BENEDICT ON ADMIRALTY §4 (7th rev. ed. E. Jhirad & A. Sann 1974); Note, *Shipowners' Limitation of Liability —New Directions for an Old Doctrine*, 16 STAN. L. REV. 370 (1964) (collecting citations to earlier law review articles).

11. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §§10-2 & 10-3 (2d ed. 1975).

12. Limitation of Liability Act, ch. 43, §3, 9 Stat. 635 (1851) (current version at 46 U.S.C. §183(a) (1970)). The most significant portion is the Limitation Act at 46 U.S.C. §183(a) (1970): "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

If there were any constraints on shipowners' right to limit their liability as a result of modeling this legislation on English statutes,[13] they were rapidly cast off by the American courts, and the Limitation of Liability Act was interpreted in a manner favorable to shipowners.[14] Despite restrictive amendments in 1935 and 1936[15] and significant and growing criticism,[16] the Limitation Act has managed to survive.

THE WRECK ACT

The Wreck Act, part of the Rivers and Harbors Act of 1899, has its origins

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13. Even if the purpose of the Limitation Act was to give shipowners protection from claims similar to that possessed by British shipowners, the American courts interpreted the Act very broadly without looking to British law. G. GILMORE & C. BLACK, *supra* note 11, §10-3. If they had looked to British law, it is unclear what they would have found with respect to removal of wrecks. Prior to 1851 the controlling statute was 10 & 11 Vict. c. 27, §LVI: "The Harbour Master may remove any Wreck or other Obstruction to the Harbour, Dock, or Pier, or the Approaches to the same, and also any floating Timber which impedes the Navigation thereof, and the Expense of removing any such Wreck, Obstruction, or floating Timber shall be repaid by the Owner of the same, and the Harbour Master may detain such Wreck or floating Timber for securing the Expenses, and on Nonpayment of such Expenses, on Demand, may sell such Wreck or floating Timber, and out of the Proceeds of such Sale pay such Expenses, rendering the Overplus, if any, to the Owner on Demand." No case construing this statute in light of the English limitation statute exists. Even if in England that statute had been construed as an exception to the limitation act, *cf.* The Stonedale No. 1, [1954]2 All E.R. 170 (C.A.), *aff'd*, [1955]2 All E.R. 689 (H.L.) (construing similar provision in the Manchester Ship Canal Act of 1936), and even if adoption in substance of the English limitation act by the United States implied adoption of English constructions of that statute, generally accepted tenets of statutory construction cannot imply the adoption of unrelated statutes such as 10 & 11 Vict. c. 27, §LVI, in derogation of the common law. The Main v. Williams, 152 U.S. 122 (1894). *See also* Williamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

English precedents, had they existed, would have been useless after the enactment of the Wreck Act, because the relevant portions of the Wreck Act were derived not from English statutory models, but as a response to the Supreme Court's holding in *Williamette* that there was no common law of the United States which prohibited obstructions and nuisances in navigable rivers. *Id.* at 8. *See* Rivers and Harbors Act, ch. 907, §10, 26 Stat. 426, 454-455 (1890).

14. G. GILMORE & C. BLACK, *supra* note 11, §10-3. *See, e.g.*, The City of Norwich, 118 U.S. 468, 493-506 (1886) (insurance proceeds are not part of the owners' interest in the ship or freight pending); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883) (limitation proceedings supersede all other proceedings seeking damages arising out of the voyage).

15. Ch. 804, §1, 49 Stat. 960 (1935); ch. 521, §1, 49 Stat. 1479 (1936) (codified at 46 U.S.C. §183(b) (1970)).

16. *See, e.g.*, Maryland Cas. Co. v. Cushing, 347 U.S. 409, 427 (1954) (Black, J., dissenting); Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438 (5th Cir. 1977); G. GILMORE & C. BLACK, *supra* note 11, §10-3.

It is interesting to note that while the area of wreck removal expenses is just now developing as a major exception to the right to limit liability here in the United States, the converse is taking place in Great Britain. After several cases held that statutory wreck removal expenses were not limitable pursuant to some of England's Wreck removal statutes (The Millie, [1940] P.1, 55 T.L.R. 963; The Stonedale No. 1, [1954]2 All E.R. 170 (C.A.), *aff'd*, [1955]2 All E.R. 689 (H.L.)), the limitation act was expressly amended to allow limitation of these expenses. Merchant Shipping (Liability of Shipowners and Others) Act, 1958, §2(2); 6 & 7 Eliz. 2, c. 62, §2(2) (1958). That these expenses are now limitable was made clear in The Arabert, [1961]2 All E.R. 385 (P.D.A.) and The Putbus, [1969]2 All E.R. 676 (C.A.).

in the Rivers and Harbors Act of 1890.[17] That act was the congressional response to the Supreme Court's decision in *Willamette Iron Bridge Co. v. Hatch*[18] that there was no federal common law which prohibited creation of obstructions and nuisances in navigable waters.

In relevant part, the Rivers and Harbors Act of 1890 provided that:

> The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist, and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States.[19]

Section 10 of the 1890 Act was interpreted in *United States v. Rio Grande Dam & Irrigation Co.*[20] There, the respondent planned to dam the Rio Grande above its navigable portion, with allegedly serious consequences to the navigability of the river's lower reaches. The Supreme Court held that the statute's provisions must be given a broad reading, emphasizing that the statute was "not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity . . . .,"[21] and issued an injunction against the project. Even though section 10 of the 1890 Act was superseded by the provisions of the

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To the extent ascertainable, these expenses are also limitable in other maritime nations. *See, e.g.*, International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships, October 10, 1957 (reprinted in 6A E. BENEDICT ON ADMIRALTY 634 (7th rev. ed. E. Jhirad & A. Sann 1974)), superseded by Convention on Limitation of Liability for Maritime Claims, 1976, of the Inter-Governmental Maritime Consultative Organization (reprinted in 8 J. MAR. L. & COM. 533 (1977)). *But see* Marwell Equip. Ltd. v. Vancouver Tug Boat Co., Ltd., 26 D.L.R.2d 80 (Can. 1960) (following statutory debt analysis of the Stonedale No. 1, [1954]2 All E.R. 170 (C.A.), *aff'd*, [1955]2 All E.R. 689 (H.L.) but holding wreck removal expenses not limitable against government or against private party who removed wreck upon order of government); Trustees of Clyde Navigation v. Kelvin Shipping Co., Ltd., [1927] Sess. Cas. 622 (Scotland) (now overruled by statute).

17. Ch. 907, §10, 26 Stat. 426 (1890).
18. 125 U.S. 1 (1888).
19. Ch. 907, §10, 26 Stat. 426, 454 (1890).
20. 174 U.S. 690 (1899).
21. *Id.* at 708.

1899 Act, a broad reading of the 1899 Act to effectuate the policy goals of its framers has continued to characterize the Act's interpretation.[22]

The 1899 Act significantly expanded the provisions of the Rivers and Harbors Act of 1890. Section 10 of the 1899 Act essentially reenacted section 10 of the prior Act:

> The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.[23]

Section 12[24] makes violation of section 10 a criminal offense and provides for the enforcement of some of section 10's requirements by injunction.

Section 15,[25] the most important for the purposes of this article, prohibits, among other things, the sinking of vessels in navigable channels:

> [I]t shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; *or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels;* or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the

22. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960); Sanitary Dist. v. United States, 266 U.S. 405 (1925).

23. Rivers and Harbors Act, ch. 425, §10, 30 Stat. 1121, 1151 (1899) (codified at 33 U.S.C. §403 (1970)).

24. 33 U.S.C. §406 (1970) "[E]very person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars or by imprisonment (in the case of a natural person), not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

25. 33 U.S.C. §409 (1970).

owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and *it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for.*[26]

Section 16[27] provides penalties for violation of section 15. Section 19[28] provides for abandonment of such sunken vessels and for removal of abandoned

26. *Id.* (emphasis added).

27. 33 U.S.C. §§411-412 (1970): "[E]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen and fifteen of this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occured, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

28. 33 U.S.C. §414 (1970): "[W]henever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft or other similar obstruction, and such obstruction has existed for a longer period than thirty days or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: PROVIDED, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: AND PROVIDED ALSO, That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other

vessels at the direction of the government. Section 20[29] is an emergency provision which can be applied to remove vessels which endanger navigation even before abandonment.

The Supreme Court interpreted section 10 of the 1899 Act in *Sanitary District of Chicago v. United States*.[30] There, the Sanitary District of Chicago sought to expand its use of water from the Great Lakes to flush its sewage into the Mississippi River watershed. This practice would have led to a drop in the level of the Great Lakes. The Supreme Court held that the lowering of the lakes without the required permission was within the prohibitions of the Act because it "modif[ied] the . . . capacity, of [a] lake . . ."[31] and affected the navigable capacity of waters of the United States; therefore, the Court enjoined the district from expanded use of lake water.

The next significant interpretation of the Rivers and Harbors Act did not occur until 1960, when the Supreme Court decided *United States v. Republic Steel Corp.*[32] Republic Steel had deposited industrial wastes in the Calumet River, reducing the depth of the navigable channel. The Army Corps of Engineers had, over the course of time, removed the deposits. The instant suit sought injunctive relief requiring the defendants to maintain the channel depth.

The Court held that the wastes deposited by Republic Steel were included in section 10's prohibition of "the creation of any obstruction . . . to the navigable capacity of any of the waters of the United States."[33] The Court

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obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States; PROVIDED, That such bidder shall give satisfactory security to execute the work; PROVIDED FURTHER, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States."

29. 33 U.S.C. §415 (1970): "[In an] emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: PROVIDED, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: AND PROVIDED FURTHER, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States."

30. 266 U.S. 405 (1925), *enforced sub nom.* Wisconsin v. Illinois, 278 U.S. 367 (1929).

31. 33 U.S.C. §409 (1970).

32. 362 U.S. 482 (1960), *rev'g*, 264 F.2d 289 (7th Cir. 1959).

33. 33 U.S.C. §403 (1970).

ignored the technical cause of the obstruction and focused on the phrase "navigable capacity." The Court also held that injunctive relief was available on the theory that section 10, in prohibiting the creation of obstructions to navigable capacity, defined the scope of the government's interests, and that even absent specific statutory authority allowing recovery by the government in those circumstances, the Rivers and Harbors Act provided an adequate framework to allow the construction of appropriate remedies where the government had an interest to protect.[34] In dictum, the Court said that any other holding would render the Act a futile gesture.

The holding that there were implied civil remedies under the Rivers and Harbors Act had a small impact on limitation litigation, as the government began to argue that the Act provided for unlimited recoveries in personam for wreck removal expenses. This argument was not particularly well received until after the *Wyandotte* case.

WYANDOTTE TRANSPORTATION CO. V. UNITED STATES

Wyandotte Transportation Co. v. United States[35] involved two separate but similar incidents. In one incident two barges were sunk in a collision with a tanker. Their owners refused to remove them, and the government sought a decree declaring the owners, among others, responsible for the removal of the barges, alleging that the sinkings had been caused by the owners' negligence.[36] The second case was more dramatic. A barge carrying liquid chlorine had sunk in the Mississippi. The government determined that the presence of the sunken chlorine presented a major danger and removed the barge at great expense. The government then sued in rem and in personam for the costs of raising the barge, alleging negligence on the parts of the owners of the barge and the tug which had been pushing it.[37]

Although the Court of Appeals had decided the question under section 10 of the 1899 Act,[38] the Supreme Court held that section 15[39] controlled.[40] With respect to section 15, the Court held that the remedies and procedures specified by the 1899 Act for the enforcement of that section were not intended to be exclusive and, on the authority of *Republic Steel,* that other remedies were

34. Section 12 provides for injunctive relief to require removal of structures built in violation of section 10, but does not provide specific statutory authority for injunctive relief to require removal of the broader category of "obstructions to navigable capacity."

35. 389 U.S. 191 (1967), *aff'g,* United States v. Cargill, 367 F.2d 971 (5th Cir. 1966). Two cases, United States v. Cargill and United States v. Wyandotte, were consolidated at the district court level. 367 F.2d at 972.

36. 367 F.2d at 972.

37. *Id.* at 972-73.

38. United States v. Cargill, 367 F.2d 971 (5th Cir. 1966).

39. See text accompanying note 26 *supra.*

40. 389 U.S. at 196-97. The Supreme Court did not pass judgment either way on the validity of the grounds on which the Court of Appeals relied. *Id.* at 196 n.4. However, with substantially the same result available under section 15, little reliance has been placed on section 10 since the *Wyandotte* decision. *See, e.g.,* Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438 (5th Cir. 1977); United States v. Raven, 500 F.2d 728 (5th Cir. 1974). *But see* United States v. Ohio Barge Lines, 432 F. Supp. 1023 (W.D. Pa. 1977).

impliedly available, including declaratory relief and recovery of removal expenses.[41]

The Court reasoned that because (1) the purpose of the Rivers and Harbors Act was to prevent obstructions in the nation's waterways;[42] (2) the Act had received broad interpretation in the past;[43] (3) one of the Act's principal beneficiaries was the government;[44] (4) the criminal penalties for violation of section 15 of the Act were an inadequate remedy to satisfy the pecuniary injury which a negligent shipowner could inflict upon the sovereign;[45] (5) the denial of a remedy to the government would permit a negligent party to shift the responsibility for the consequences of its acts of negligence onto the victim (the government);[46] and (6) if implied remedies were unavailable, a negligent wrongdoer might be allowed to benefit from the commission of a criminal act,[47] it could not have been the intent of Congress to deny the government appropriate civil remedies, including declaratory relief, to remedy section 15 violations.[48]

With respect to the availability of a civil action to recover costs incurred in removing a negligently sunken vessel, the Court stated:

> Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel . . . Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal.[49]

Finally, the Court held that negligent parties could not abandon their sunken vessels as an alternative to removal, on the theory that it was unlikely that Congress would have made the negligent or intentional sinking of a vessel a crime and then have granted the negligent owner civil immunity from the consequences.[50]

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41. 389 U.S. at 200-01.
42. *Id.* at 201.
43. *Id.*
44. *Id.*
45. *Id.* at 202.
46. *Id.* at 204.
47. *Id.*
48. *Id.*
49. *Id.* at 204-05.
50. *Id.* at 206-07. *See also* Humble Oil & Ref. Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970).

The Supreme Court reserved comment on the questions of liability and the right of abandonment for the owner of an accidentally sunken vessel. 389 U.S. at 197 n.6. However, the language of section 15 indicates that the right to abandon is still available. If abandonment were no longer available to any class of owners of sunken vessels, the language of section 15 providing for abandonment and the language in section 19 relating to removal of abandoned vessels would be rendered mere surplusage.

Cases holding that the owner of an accidentally sunken vessel can still abandon are: Lane v. United States, 529 F.2d 175 (4th Cir. 1975); United States v. Federal Barge Lines, Inc., 433 F. Supp. 53 (E.D. Mo. 1977); United States v. Osage Co., Inc., 414 F. Supp. 1097 (W.D. Pa.

The Court left several questions unanswered,[51] including what relief would be available against negligent persons other than owners,[52] and (now that in personam liability for removal expenses had been created in the case of negligent sinkings) whether liability could be limited pursuant to the Limitation of Liability Act of 1851.[53] On this last question, which is the focus of this article, the owners argued that the Act provided for an absolute right of abandonment. In response, the Court observed that such a holding would have the effect of limiting the owners' liability in the case of a sinking even where the owners had been negligent.

The Court said:

> Congress gave no indication, in passing the Rivers and Harbors Act, that it intended to alter or qualify the 1851 Act. In the congressional failure to connect these two statutes, we find at least some evidence that petitioners' discovery of a limitation of liability in the Rivers and Harbors Act is unwarranted.[54]

In a footnote, the Court further stated:

> We do not, of course, pass on the applicability of the Limitation Act, before or after the passage of the Rivers and Harbors Act, to the facts of the case now before us. We only note that the principle for which petitioners are contending is very much like the principle of limitation of liability, known to the statutory maritime law of the United States almost 50 years prior to the passage of the Rivers and Harbors Act.[55]

Thus, the relationship between the Limitation Act and the Wreck Act remained undefined.

PRE-WYANDOTTE LIMITATION-WRECK ACT CASE LAW

Prior to *Wyandotte*, particularly after the broad statements in *Republic Steel*, there had been a few decisions regarding a shipowner's right to limit liability for wreck removal expenses, but rarely had an owner been held liable in personam for such expenses. The question was usually academic because the contemporary view was that the Wreck Act provided only for in rem recoveries

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1976); Jones Towing, Inc. v. United States, 277 F. Supp. 839 (E.D. La. 1967). *See also In re* Marine Leasing Servs., Inc., 328 F. Supp. 589 (E.D. La. 1971), *aff'd per curiam*, 471 F.2d 255 (5th Cir. 1973). *But see* National Metal & Steel Corp. v. Tug Mariner, 341 F. Supp. 249 (N.D. Cal. 1971) (without authority or discussion; criticized in Lanier, *Abandon Ship?*, 9 J. MAR. L. & COM. 131, 134 (1977)).

51. See note 40 *supra*.

52. 389 U.S. at 199 n.11.

53. *Id.* at 205 n.17.

54. *Id.* at 205. "There is no indication anywhere . . . in the legislative history of the Act, in the predecessor statutes, or in non-statutory law, that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility." *Id.* at 200.

55. *Id.* at 205 n.17.

and that, except in the case of the intentional sinkings, abandonment was available.[56]

In *Petition of Highlands Navigation Corp.*,[57] two vessels owned by the petitioner burned and sank while at a pier. The cost of raising the vessels was imposed on the petitioner by a New York City ordinance. The city sought to deny the petitioner the right to limit its liability for those costs. The Court of Appeals held that the Rivers and Harbors Act provides a right of abandonment, and that having once abandoned his vessel, the petitioner could not be held liable for statutorily-imposed removal costs.

In contrast, three years later the same court affirmed a district court decision that the government could not limit its liability in a case involving a violation of section 15. In *The Snug Harbor*,[58] the United States owned a vessel which sank in Block Island Sound. The government made little effort to discover the location of the wreck, which was a hazard to navigation. About one month later, two barges struck the unmarked wreck and sank.[59] The barge owners sued and the trial court found the government liable.[60] The government then sought to limit its liability and the district court held that the section 15 duty to mark was a nondelegable duty of the owner, at least if the owner could have found the wreck by due diligence.[61] Because the duty to so mark was personal, the owner could not limit his liability. The Court of Appeals affirmed without consideration of the district court's section 15 analysis.[62]

Although this case did not involve removal costs, the language in section 15 relating to removal is the same as the language relating to marking,[63] so at least by analogy this case stands for the proposition that the government could recover from an owner for consequential damages, including removal costs, caused by a negligent violation of a statutory duty such as removal.

The first case to be decided after the government's victory in *Republic Steel* was *United States v. Zubik*.[64] There, the defendant negligently sank two tow boats in the Allegheny River, and the government removed them and sued for its removal expenses. The Court of Appeals held that despite the Supreme Court's expansive reading of section 10 of the Rivers and Harbors Act, section

56. See United States v. Hall, 63 F. 472 (1st Cir. 1894) (under section 10 of Rivers and Harbors Act of 1890, the government could compel the owners to remove a vessel which had been intentionally scuttled in the navigable waters of Rockland Harbor, Maine); *In re* Eastern Transp. Co., 102 F. Supp. 913 (D. Md. 1952), *aff'd sub nom.* Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952) (trustee in bankruptcy not allowed to abandon several barges in navigable waters rather than pay to tow them to sea and sink them there even though the cost of the latter exceeded their value).

57. 29 F.2d 37 (2d Cir. 1928).

58. 53 F.2d 407 (E.D.N.Y. 1931), *aff'd on other grounds sub nom.* United States v. Eastern Transp. Co., 59 F.2d 984 (2d Cir. 1932).

59. Two other vessels had already collided with an unknown obstacle, later thought to be the Snug Harbor, within the month following the sinking. 53 F.2d at 408.

60. That decree was affirmed. 40 F.2d 27 (4th Cir. 1930).

61. 53 F.2d at 410.

62. 59 F.2d at 986.

63. See text accompanying note 26 *supra*.

64. 295 F.2d 53 (3d Cir. 1961).

15 did not expressly provide the remedy sought, and affirmed a district court order denying recovery.[65]

A similar result occurred in *United States v. Bethlehem Steel Corp.*,[66] in which the government sued for expenses incurred in removing defendant's sunken vessel. The Court of Appeals held that no implied remedies were available to enforce section 15 of the Wreck Act and that the government's only remedy to recover its expenses was an in rem action against the vessel, here worthless.[67] No civil liability against the owner followed from violation of the criminal portion of the statute since the court found that the interest asserted by the government was regulatory rather than proprietary.[68] A dissent argued from the assumption that because the government could by mandatory injunction compel the owner to remove the vessel, it should by analogy be able to recover its costs if it removed the vessel itself.[69]

In *United States v. Perma Paving Co.*,[70] the logic of the dissent in *Bethlehem Steel* was followed in the case of a section 10 obstruction. The defendant had overloaded some swampy land adjacent to the Bronx River, causing shoaling in the river. The government removed the shoaling and sued for its expenses. The Court held that because *Republic Steel* gave the government an injunctive remedy in this same situation, it made sense to provide a damage remedy when the government ultimately had to do the work itself.[71] The Court was not faced with the issue of whether the government could recover its expenses for removing a sunken vessel, but, in dictum, stated that the government's position probably would be weaker in that situation because of the total lack of statutory support for such an implied remedy.[72]

The next case to be decided in a court of appeals was *United States v. Cargill*.[73] Although affirmed by the Supreme Court in *Wyandotte*, the case requires discussion because the grounds of the decision by the Court of Appeals differed from those of the Supreme Court.[74] The Fifth Circuit held that the sunken vessels were obstructions prohibited under section 10 and required the defendants to reimburse the government for its removal costs pursuant to section 12 and *Perma Paving*.[75]

One case was decided between the Court of Appeals decision in *Cargill* and the Supreme Court's affirmance thereof. In *United States v. Moran Towing &*

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65. *Id.* at 58.

66. 319 F.2d 512 (9th Cir. 1963).

67. *Id.* at 519-20.

68. *Id.* at 520.

69. 319 F.2d at 522, 523 (Browning, J., dissenting). These views, of course, were not accepted until the *Wyandotte* decision by the Supreme Court.

70. 332 F.2d 754 (2d Cir. 1964).

71. *Id.* at 757-58.

72. *Id.* at 758.

73. 367 F.2d 971 (5th Cir. 1966), *aff'd sub nom.* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

74. See text accompanying notes 35-53 *supra.*

75. 367 F.2d at 977. The court also relied on Army Corps of Engineers Regulation interpreting sections 10 and 12, 33 C.F.R. §209.410 (recodified at 33 C.F.R. §209.170(a) (2) (1976)).

Transportation Co.,[76] the defendants owned a tug and tow (a floating wooden drydock). The drydock foundered and was grounded. The government removed the drydock and sued for its expenses on the theory that the drydock was either not a vessel or a craft and hence was a section 10 obstruction with expenses recoverable under *Perma Paving*, or alternatively, that the grounding was intentional or negligent and therefore the defendants could not abandon the vessel. The Fourth Circuit Court of Appeals held that sections 10 and 15 of the Wreck Act were mutually exclusive,[77] that the drydock was a vessel,[78] and that the owner could abandon the vessel even if his negligence had caused the sinking.[79] It refused to analogize from the *Republic Steel – Perma Paving* line of cases which provided the government broad relief under section 10.[80]

A dissent[81] would have affirmed the district court on the theory that the drydock was not a vessel but rather a section 10 obstruction. This dissent provided two alternate theories for its holding: first, that vessels could be section 10 obstructions; and second (and more importantly), that the distinction on abandonment questions should be drawn between owners of intentionally or negligently sunk vessels, on the one hand, and innocent owners, on the other, rather than allowing both a negligent owner and an innocent owner to abandon as the majority had done.

The dissent's reasoning was soon followed in *Wyandotte*. On appeal to the Supreme Court, *Moran Towing* was vacated and remanded to be reconsidered in light of *Wyandotte* and was ultimately decided favorably to the government.[82]

To summarize the law after *Wyandotte*: For negligent violations of section 10, the government had implied civil remedies, both to enjoin the violation[83] and to recover removal costs.[84] Whether a vessel was a section 10 obstruction was an open question.[85] It was also clear that the government had corresponding implied civil remedies in the case of vessels voluntarily or negligently sunk in violation of section 15.[86] Two significant questions remained open: Did the government have a right of recovery against negligent parties (other than

76. 374 F.2d 656 (4th Cir. 1967), *rev'g* United States v. Bethlehem Steel Corp., 235 F. Supp. 569 (D. Md. 1964), *vacated*, 389 U.S. 575 (1968), *on remand*, 409 F.2d 961 (4th Cir. 1969), *on remand*, 302 F. Supp. 600 (D. Md. 1969) (finding negligence and liability).

77. 374 F.2d at 662.

78. *Id.* at 664.

79. *Id.* at 666-69.

80. *Id.* at 668.

81. 374 F.2d at 669 (Sobeloff, J., dissenting).

82. United States v. Bethlehem Steel Co., 302 F. Supp. 600 (D. Md. 1969).

83. United States v. Republic Steel Corp., 362 U.S. 482 (1960).

84. United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964).

85. Wyandotte Transp. Co. v. United States, 389 U.S. at 196 n.5 (1967). Some cases have held that vessels can be section 10 obstructions. *See, e.g.*, United States v. Raven, 500 F.2d 728 (5th Cir. 1974); United States v. Cargill, 367 F.2d 971 (5th Cir. 1966). Some cases have held that vessels are not section 10 obstructions. *See, e.g.*, United States v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967); United States v. Bethlehem Steel Corp., 319 F.2d 512 (9th Cir. 1963); The Manhattan, 10 F. Supp. 45 (E.D. Pa. 1935), *aff'd*, 85 F.2d 427 (3rd Cir. 1935); Loud v. United States, 286 F. 56 (6th Cir. 1923).

86. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

owners) who caused sinkings? Did the negligent party causing the sinking of a vessel in violation of section 15 have the right to limit its in personam liability?

THE RIGHT TO ABANDON — THE INNOCENT OWNER'S LIMITATION

With respect to abandonment, *Wyandotte* only held that a negligent owner could not abandon a sunken vessel. That decision has been consistently followed.[87] The question of whether an owner of an accidentally sunken vessel could abandon was not clearly answered,[88] but the cases now show that such an owner will be allowed to abandon.

In *Jones Towing, Inc. v. United States*,[89] decided shortly before the *Wyandotte* decision, a barge was sunk in the Gulf of Mexico Intracoastal Waterway. The plaintiff struck the sunken barge, which had not been removed, marked, or reported in any marine notices. The court found that the original sinking had not been negligent and that the barge had been abandoned to the government,[90] and held the government solely liable for the plaintiff's damages.[91] The court stated that if the first sinking had been negligent, the barge owner could not have abandoned and would have been held jointly liable with the United States.[92]

In *In re Marine Leasing Services, Inc.*,[93] the petitioner's chlorine barge was sunk in the Mississippi by the force of a hurricane. The court found that the petitioner had not been negligent and allowed limitation of wreck removal costs.[94] Although the court's analysis was very superficial and did not reach the abandonment question, its result demonstrates that it must have held, sub silentio, that a non-negligent owner may abandon.

More recently, in *Lane v. United States*,[95] the Court of Appeals apparently assumed that abandonment was still available to an innocent owner.[96] *Lane* has been followed in *United States v. Osage Co.*[97] and *United States v. Federal*

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87. *See, e.g.*, Humble Oil & Ref. Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970); United States v. Osage Co., Inc., 414 F. Supp. 1097 (W.D. Pa. 1976).

88. *See* 389 U.S. at 197 n.6. Also, see note 50 *supra*.

89. 277 F. Supp. 839 (E.D. La. 1967).

90. *Id.* at 844-45.

91. *Id.* at 850.

92. *Id.* at 848-50. Buffalo Bayou Transp. Co. v. United States, 375 F.2d 675 (5th Cir. 1967), and Lane v. United States, 529 F.2d 175 (4th Cir. 1975), involved similar facts. In *Buffalo Bayou*, the court assumed the sunken vessel had been abandoned to the United States. Since the government had marked the wreck before the plaintiff struck it, the court found it not liable under the theory that the government had a choice of marking or removing sunken vessels, and had satisfied its duty by marking the wreck. In *Lane*, the court again assumed that the sunken vessel had been abandoned to the United States. But here, the government had not marked the vessel. The court remanded the case for a determination of whether the government's failure to mark was negligent.

93. 328 F. Supp. 589 (E.D. La. 1971), *aff'd per curiam*, 471 F.2d 255 (5th Cir. 1973).

94. *Id.* at 598-99.

95. 529 F.2d 175 (4th Cir. 1975). This was a suit by the owner of a pleasure cruiser for damages incurred when his vessel sank after striking a sunken barge. See note 92 *supra*.

96. 529 F.2d at 177 n.2.

97. 414 F. Supp. 1097 (W.D. Pa. 1976).

Barge Lines, Inc.[98] In *Osage*, the defendant's barge had been secured to the bank of the Monongahela River. It "mysteriously left its mooring site"[99] and sank downstream. The district court held, under a res ipsa loquitor theory, that the sinking was negligent, and therefore that abandonment was not available.[100] In contrast, in *Federal Barge Lines*, the defendant's barge sank in the Mississippi River and the defendant, after making unsuccessful attempts to remove the barge, tendered abandonment to the government. In the government's suit for wreck removal costs the court found the defendant not liable because the sinking had been non-negligent, and therefore abandonment was available.[101]

These cases clearly show that the innocent owner's right to abandon frees him not only from liability for wreck removal expenses but also from liability for damage to vessels which strike his sunken vessel.[102] Because the innocent owner of a sunken vessel can abandon and, hence, have no further liability (a remedy not available to a negligent owner or an owner who has voluntarily sunk his vessel), in personam recovery is impossible, and the limitation question thus becomes moot. It is only with respect to negligent owners of sunken vessels that the question remains open.

Limitation by Negligent Owners

In *In re Midland Enterprises, Inc.*,[103] the first post-*Wyandotte* case to discuss an owner's right to limit liability for wreck removal, a tug with fourteen barges

98. 433 F. Supp 53 (E.D. Mo. 1977).

99. 414 F. Supp. at 1100.

100. *Id.* at 1101.

101. 433 F. Supp. at 57.

102. *Wyandotte* clearly holds that one of the consequences of denial of the right to abandon is liability for wreck removal expenses. Post-*Wyandotte* decisions have also been relatively uniform in finding the owners of sunken barges liable for other damages caused by sunken vessels.

In Humble Oil & Ref. Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970), the plaintiff struck a barge which sank in the Mississippi some three years previously. Coincidentally, the barge was one of those involved in the *Cargill-Wyandotte* litigation which still remained in the river. (For other cases involving this same sunken barge, see 422 F.2d at 607 n.9). The court held, relying on *Wyandotte*, that: "When a vessel is wrecked in a navigable stream due to the negligence of its owner, it cannot be abandoned to the United States and its owner remains liable for all damages resulting from its continued interference with navigation." *Id.* at 608. The same conclusion was reached in United States v. Osage Co., Inc., 414 F. Supp. 1097 (W.D. Pa. 1976). *See also* Jones Towing Inc. v. United States, 277 F. Supp. 839 (E.D. La. 1967).

An interesting corollary to the rule that a negligent owner is liable to third parties indefinitely for damage caused by his unremoved vessel is found in Three Rivers Rock Co. v. The M/V Martin, 401 F. Supp. 15 (E.D. Mo. 1975). The plaintiff owned a tug which sank in 1973 and was neither marked nor raised. In 1975, when its value was less than salvage cost, it disappeared, allegedly after being struck by a tow owned by the defendant. The defendant could not show that failure to mark could not have been a cause of the alleged loss. Although the decision denied recovery because of failure to prove causation (applying the rule of The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873) to the failure to mark), the court stated that an owner, in addition to having indefinite continuation of liability for damage caused by a negligently sunken vessel, would also have to meet a very high burden of proof in order to recover damages for injury to that vessel.

103. 296 F. Supp. 1356 (S.D. Ohio 1968).

in tow on the Ohio River had moored those barges to the bank in order to assist another tug in distress. The flotilla somehow broke loose and collided with a dam owned by the United States. Eight barges sank, jamming open the dam gates and causing the level of the river to fall precipitously. Because of the emergency, the government chose to remove the sunken barges itself.[104] The court denied the government's motion to allow it to proceed outside the limitation proceedings in its claim for removal costs and dam damages. Judge Hogan deferred to the trial on the merits[105] consideration of whether the owner could limit its liability for wreck removal costs, remarking that the questions involved remained unclear.[106]

Most of the cases which have denied owners the right to limit their liability for wreck removal expenses have reasoned that if a sinking was negligent, the owner could not abandon, and in the absence of abandonment, the statutory duty to remove the wreck arose within the privity and knowledge of the owner as a matter of law as soon as the owner knew of the vessel's sinking. For instance, in *In re Pacific Far East Line, Inc.*,[107] the petitioner's cargo vessel was grounded in Apra Harbor in Guam as the result of a collision at the mouth of the harbor caused by the negligence of both vessels involved. Ultimately, petitioner's vessel was towed to sea by the navy and destroyed.[108] With little discussion, the court held that both parties were personally liable for the cost of removal; that the statutory duty of diligence in removing the wreck was a mandatory obligation personal to the owner; that failure to remove then fell within the privity and knowledge of the owner; and that, therefore, the petitioner was not entitled to limit the government's claim for wreck removal expenses.[109]

In re Chinese Maritime Trust Ltd. (The S/S Sian Yung)[110] involved the question of whether an owner could limit its liability for wreck removal costs imposed pursuant to regulations of the Panama Canal[111] similar to the

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104. *Id.* at 1358-59.

105. The case was settled before trial. Ray, *After Wyandotte — Rights and Liabilities of the Innocent Owner of a Sunken Vessel*, 44 INS. COUNSEL J. 64, 67 (1977). Ray was counsel for petitioners in the case, as well as for the petitioners in *Wyandotte*.

106. 296 F. Supp. at 1365.

107. 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd per curiam*, 472 F.2d 1382 (9th Cir. 1973).

108. *Id.* at 1341-44.

109. *Id.* at 1346-50. The court found the other vessel also negligent. Whether the owner of the other vessel could limit its liability for wreck removal costs was not addressed. This was probably so for two reasons: first, the other vessel was not before the court; and second, the costs of its share of removal probably were less than the value of the vessel, so limitation would have been irrelevant.

110. 361 F. Supp. 1175 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 1357 (2d Cir. 1973), *cert. denied*, 414 U.S. 1143 (1974).

111. 35 C.F.R. §117.5 (1977): "Control of wrecked, injured, or burning vessels: When a vessel in Canal Zone waters goes aground, or is wrecked, or is so injured that it is liable to become an obstruction in such waters, or is on fire, the Canal authorities shall have the right to supervise and direct, or to take complete charge of and conduct, all operations which may be necessary to float the vessel, to clear the wreckage, to remove the injured vessel to a safe location or to extinguish the fire, as the case may be. The Canal authorities may, when necessary, take such action without awaiting the permission of the owner or agent of the

provisions of the Wreck Act. The Sian Yung sank in the Panama Canal and the Panama Canal Company removed the vessel. The owner of the vessel began limitation proceedings. On the Canal Company's motion for allowance to proceed outside the limitation proceeding, the court held that liability for removal costs under the Canal Zone regulations could not be limited because the regulations created an obligation personal to the owner to remove the wreck and that the costs were incurred within the owner's privity or knowledge once it became aware of the sinking.[112] The court noted that its decision was supported by the fact that there was no indication in the Limitation Act that such costs could be limited,[113] and, though the history of the Wreck Act was not helpful, that its holding was in accord with modern trends expanding the scope of the Wreck Act and narrowing the scope of the Limitation Act.[114]

Although in *In re Marine Leasing Services, Inc.*,[115] wreck removal expenses were not imposed on the owner,[116] the decision is not inconsistent with this theory. There, a barge carrying liquid chlorine was sunk on the Mississippi River by the force of a hurricane. The barge was under a bareboat charter[117] to the owner and shipper of the chlorine cargo. The court found that the hurricane was of such force that the sinking of the barge was an act of God and that no reasonable precautions or preparations would have prevented the sinking.[118] Two questions regarding limitation were presented: first, whether

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vessel, and may require the master of the vessel and all persons under his supervision and control to place the vessel, and all equipment on board, at the disposal of the Canal authorities without cost to the Canal. Unless the Panama Canal Company is subsequently found and determined to be responsible for the accident or the condition necessitating action by the Canal authorities, the necessary expenses incurred by the Canal in carrying out the provisions of this section shall be a proper charge against such vessel, her owners and/or her operators." This regulation was issued pursuant to authority of C. Z. CODE tit. 2, §1331:

"The President may prescribe, and from time to time amend, regulations governing:
(1) the navigation of the harbors and other waters of the Canal Zone;
(2) the passage and control of vessels through the Panama Canal, or any part thereof, including the locks and approaches thereto;
(3) pilotage in the Canal or the approaches thereto through the adjacent waters; and
(4) the licensing of officers or other operators of vessels navigating the waters of the Canal Zone.

Whoever violates a regulation issued pursuant to this section shall be fined not more than $100 or imprisoned in jail not more than 30 days, or both."

112. 361 F. Supp. at 1177-78.

113. *Id.* at 1178. *But see* note 13 *supra.*

114. The court reserved comment on whether lack of negligence was required before limitation would be allowed under the Canal Zone Regulations. *Id.* at 1178-79. However, in another case decided the same day under section 15 of the Wreck Act, the court mentioned negligence as an additional necessary factor before the government could recover. *In re* Scranton Indus., Inc., 358 F. Supp. 7 (S.D.N.Y. 1972). *See also In re* Pentzien, Inc., 1974 AM. MAR. CASES 1201 (D. Neb. 1974) (no facts, government's motion to proceed outside the limitation proceeding to recover its removal costs allowed on the basis of this line of cases, without discussion).

115. 328 F. Supp. 589 (E.D. La. 1971), *aff'd per curiam*, 471 F.2d 255 (5th Cir. 1973).

116. *Id.* at 598-99.

117. A bare-boat charter results in the charterer taking over the ship completely and supplying his own crew. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §421 (2d ed. 1975).

118. 328 F. Supp. at 597.

the costs of locating and marking the barge could be limited; second, whether the costs of removing the barge could be limited. The court held that because the duty to locate and mark a wreck applied to all sunken vessels, the duty was mandatory,[119] at least before abandonment,[120] so that even if negligence could not be proven, the cost involved was not limitable.[121] In contrast, with only the barest of analysis, the court held that liability for removal costs was dependent on the existence of negligence, and without negligence, there was no liability for such costs.[122]

The court also held that the duty to locate and mark the vessel could be placed on the bare-boat charterer as owner *pro hac vice*.[123] Because the lack of negligence meant that the government bore the cost of removing the barge, the court reserved the question of whether a bare-boat charterer, held to be the owner *pro hac vice* and personally liable for marking costs, could also be held personally liable for removal expenses in the case of a sinking involving negligence. The court ignored the question of whether the owner of a vessel under a bare-boat charter could be held liable either for costs of marking or for costs of removal. Because the statutory duty is on the owner, liability for costs of both marking and removal probably can be placed on him or at least on the owner and charterer jointly. However, in light of the great probability that a bare-boat charter agreement would include an indemnity clause, the question is of little more than academic importance.[124]

It has become quite clear that existence of negligence is the determinative factor in deciding whether an owner will be liable for wreck removal costs

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119. *Id.* at 599-600. See, Ingram Corp. v. Ohio River Co., 505 F.2d 1364 (6th Cir. 1974) (nondelegable duty to mark).

120. The Court never actually addressed the question of abandonment, but from the result which the court reached, it appears that the barge must have been abandoned.

121. *Id.* It is probably fair to say that even absent a statutory duty to mark, a modern court would find that failure to mark was negligent. The burden on the owner is usually minimal, since the cost of marking is not high. Items used to mark wrecks include fifty-five gallon barrels (United States v. Osage Co., Inc., 414 F. Supp. 1097, 1100 (W.D. Pa. 1976)), smaller barrels and empty Clorox bottles (Ingram Corp. v. Ohio River Co., 382 F. Supp. 481, 485-86 (S.D. Ohio 1973)), and the owner is usually in the best position to know the location of the sunken vessel. In contrast, the danger to other mariners inherent in unmarked wrecks is high and other vessels will have no way of knowing even the approximate position of such an unmarked wreck.

122. 328 F. Supp. at 598-99.

123. *Id.* at 599. *Cf.*, 46 U.S.C. §186 (1970) (bare-boat charterer may be deemed owner for purposes of limitation of liability).

124. *See* Harper, *Demise Charters: Responsibilities of Owner or Charterer for Loss or Damage*, 49 TUL. L. REV. 785, 786-87 (1975). With respect to criminal penalties, such an indemnity clause might be against public policy. In light of the fact that in a wreck removal case, even one in which criminal penalties are involved, the principal expenses are the civil damages because of the low maximum criminal penalties, the owner probably would not be particularly upset about this minor expense. The same relationship between criminal penalties and civil liability would appear to exist under the Panama Canal Zone Code; *compare*, 35 C.F.R. §117.5 (1977) (Civil Liability) *with* C.Z. CODE tit. 2, §1331 (1963) (criminal penalties for violation of regulations). *But see* C.Z. CODE tit. 6, §1591 (1963) (further criminal penalties).

without limitation.[125] In another typical case, *United States v. Osage Co.*,[126] the defendant's barge sank, abandonment was tendered and refused, and the government raised the barge and sued for its removal expenses. The court held that abandonment was not available in the case of a negligent sinking, and that once negligence was established, the defendant clearly was liable for removal costs.[127]

Some courts have also held that where negligence exists, the government may not only recover its full removal costs but also other costs less directly associated with the marking and removal of the wreck.[128] For example, in *In re Sincere Navigation Corp.*,[129] a collision sank a vessel owned by the United States. The court held that the government could recover from the negligent party any reasonable expenses incurred in determining whether the wreck constituted a sufficient navigational hazard to warrant removal, even if no actual removal ever took place.[130]

In *United States v. Ohio Barge Lines, Inc.*,[131] the United States brought an action against a vessel and its owner to recover the government's costs in hiring a helper boat while it removed three barges which sank as the result of the defendant's negligence. The court held that the broad purposes of the Rivers and Harbors Act, as developed in *Wyandotte* and *Republic Steel*, provided an adequate foundation to allow the government to recoup not only expenses of removal,[132] but also costs associated with ensuring the safety of other travelers during the removal process.[133] Thus, it appeared well-settled that negligent

125. Some shipowners were ready to concede that once negligence was proven, the owner could not limit as to wreck removal costs. *See*, United States v. Chesapeake & Delaware Shipyard, Inc., 369 F. Supp. 714 (D. Md. 1974).

126. 414 F. Supp. 1097 (W.D. Pa. 1976).

127. *Id.* at 1101.

128. The government could probably also recover damages in its proprietary capacity, if a vessel owned by it struck a vessel sunk in violation of section 15. See note 102 *supra*.

129. 327 F. Supp. 1024 (E.D. La. 1971).

130. *Id.* at 1026. In this case, if the vessel had been removed, the same factual situation would have been presented as in Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438 (5th Cir. 1977). However, here no limitation question was presented, probably because the costs of the survey were not large enough to raise a limitation issue. After *Univ. of Tex. Medical Branch*, which held that negligent non-owners could not limit their liability for wreck removal costs, it is an open question whether limitation for expenses incurred in determining whether removal was warranted would be available to a negligent non-owner causing a wreck. Because the essence of that case is that negligent owners cannot shift the burden of removal to the government through limitation, it is quite possible that survey expenses also could not be limited. On the other hand, survey expenses are not clearly referred to in the Wreck Act, and to deny limitation merely because they are expenses incurred by the government is to open up a favored position for the government, exempting it from the dictates of the Limitation Act.

131. 432 F. Supp. 1023 (W.D. Pa. 1977).

132. The court held that a sunken barge could be an obstruction, and decided the case under section 10. *Id.* at 1027.

133. *Id.* at 1028. This case involved no limitation question. Since it was decided under section 10, it is unclear what the results would have been if such a question had been presented. Since *Wyandotte*, all cases involving vessels, wreck removal costs, and limitation, have been decided under section 15. The Fifth Circuit, exponent of the leading case holding that a vessel can be a section 10 obstruction (*See* United States v. Cargill, 367 F.2d 971 (5th Cir.

owners would not be permitted to limit the costs of wreck removal and might even be held fully liable for related expenses. The remaining question to be answered was whether those not treated as owners would be allowed to limit their liability.

LIMITATION BY NEGLIGENT NON-OWNERS

The rationale of recovery which had developed up to this point, that only owners of faultless vessels could abandon and that in the absence of abandonment the statutory duty to remove was within the privity or knowledge of the owner, left the government without a remedy in the situation in which it removed a vessel which sank as the result of negligence on the part of a third party but without fault of its owner. The paradoxical result was that the owner would be held liable though not negligent, and the negligent third party would be held not liable because it was not the owner, and hence, not in privity with or having knowledge of the owner's statutory duty to remove.

Surprisingly, the question whether or not a negligent third party could be held liable in personam for wreck removal expenses never arose during this period. The reason may have been that removal expenses for vessels which negligently caused sinkings but remained afloat themselves were rarely greater than the value of the negligent vessel; therefore limitation of in personam liability was never an issue.

This problem came up indirectly in *In re Marine Leasing Services, Inc.*[134] There, a district court held that a bare-boat charterer of a sunken barge, the owner *pro hac vice,* could be held liable for the cost of marking the wreck.[135] The case plainly suggests that some types of non-owners can be held liable under section 15 of the Rivers and Harbors Act. The court's reasoning that a bare-boat charterer has so many characteristics of the owner that for present purposes he *is* an owner (a common attitude toward demise charterers) avoids confronting directly the issue of whether non-owner third parties whose negligence causes a sinking can be held liable for removal costs.

University of Texas Medical Branch at Galveston v. United States[136] finally presented the question directly. The limitation plaintiff's oceanographic research ship collided with a Norwegian tanker, which in turn struck and sank a dredge belonging to the Army Corps of Engineers. The United States removed the wreck immediately because it posed a threat to navigation. The plaintiff timely filed its limitation complaint, claiming a value for its vessel far less than the removal costs. The government, alleging the plaintiff's negligence, moved for an order declaring that its right to recover the expense of removing the wreck was not subject to limitation and allowing it to proceed outside the limitation proceeding. The district court granted the government's motion, and the plaintiff took an interlocutory appeal.[137] In affirming, the Court of

1966)), has had recent opportunity to address this question and did not. *See* Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438 (5th Cir. 1977).

134. 328 F. Supp. 589 (E.D. La. 1971), *aff'd per curiam,* 471 F.2d 255 (5th Cir. 1973).

135. See text accompanying note 123 *supra.*

136. 557 F.2d 438 (5th Cir. 1977).

137. *Id.* at 438.

Appeals assumed that the plaintiff's vessel had been negligent and that her owners lacked privity with or knowledge of the causal negligence. Nonetheless, the Fifth Circuit held the Limitation Act inapplicable to a section 15 civil suit against parties responsible for the wreck.[138]

The court found, on the one hand, that it was impossible to simultaneously effectuate the Limitation Act and the Wreck Act and, on the other hand, that the previously accepted reading of the privity or knowledge requirement, though adequate in suits against owners, led to paradoxical results in suits against non-owners. The court then held that the Limitation Act did not apply to the government's[139] civil suits under section 15 for wreck removal costs against *any* parties negligently responsible for the wrecks.[140] The court resolved the paradox expressed at the beginning of this section by developing a new rationale regarding the right to limit wreck removal costs. Its theory grew from the policies suggested by *Wyandotte*. The court read *Wyandotte* as having drawn no distinction between negligent owners and negligent non-owners for the purposes of providing the government implied civil remedies for wreck removal costs. Even though *Wyandotte* had not answered the limitation question, two themes had emerged from that decision which had led post-*Wyandotte* courts to uniformly deny limitation to owners of negligently sunk vessels. In *Wyandotte*, the Supreme Court's first theme was that because the critical distinction in section 15 is between negligent and innocent parties, not between owners and non-owners, a negligent party may not shift the burden of removal costs to an innocent party.[141] The second theme was that, where an in rem recovery plus criminal penalties are inadequate to reimburse the government for its removal costs, the government should not be penalized for correctly performing its duty to remove impediments in inland waterways.[142] The Court of Appeals held that these policies, which supported the government's recovery against a negligent owner without limitation, were equally applicable to the government's recovery against a negligent non-owner.[143] Although *Wyandotte* and *Cargill* allowed the government to seek an injunction requiring the negligent party to remove the wreck, a course of action resulting in no direct cost to the government, such a course would require an equally innocent public to bear the indirect costs caused by an obstruction in the channel throughout the course of the proceeding. Because the government could have obtained an

138. *Id.* at 452.

139. *Id.* at 445, 450.

140. *Id.* at 445-46, 450.

141. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204-05 (1967).

142. *Id.* The opinion made no allusions to application of the Limitation Act to the right of recovery of wreck removal expenses by a private party whose vessel was sunk by the negligence of another. Recovery has been allowed in this situation, although no limitation question has been presented. *See* Western Transp. Co. v. Pac-Mar Serv., Inc., 547 F.2d 97 (9th Cir. 1976) (owner of barge risked forfeiture of its barge when it sank in navigable waters unless it removed it; owner may not have been liable for removal costs under section 15 due to lack of negligence; owner's right to recover those costs from the negligent party who caused them should not be obscured).

143. Univ. of Tex. Medical Branch at Galveston v. United States, 557 F.2d 438, 448-52 (1977).

injunction against the negligent non-owner, there was no reason to penalize the government for choosing the more efficient course of action.

Previous courts had attempted to harmonize the Limitation Act and the Wreck Act by holding that owners of sunken vessels were in privity with or had knowledge of the statutory duty to remove. This analysis obviated the need to choose one or the other of the Acts in the situation where a sinking was caused by negligence of the owner's vessel. The Fifth Circuit in *University of Texas Medical Branch* criticized this analysis, characterizing it as narrow and leading to anamolous results where sinkings were caused by the negligence of non-owners.[144]

CONCLUSION: THE IMPACT OF UNIVERSITY OF TEXAS MEDICAL BRANCH

Prior to *University of Texas Medical Branch* courts denied owners of sunken vessels the right to limit their liability for wreck removal costs incurred by the government by finding satisfaction of the privity or knowledge requirement of the Limitation Act in the statutory duty to remove imposed by section 15 of the Wreck Act. Owners of accidentally sunken vessels were protected from liability by the right to abandon. Where the sinking of the vessel was caused by the owner's negligence, the analysis essentially utilized a traditional negligence standard to decide the question of liability for wreck removal expenses. This analysis resulted in a harmonization of the two otherwise inconsistent Acts. This theory has been criticized for several reasons. First, it is inadequate to satisfy the policy requirements of *Wyandotte* when the vessel is sunk solely through the negligence of a third party.[145] Second, the theory that an owner satisfies the "privity or knowledge" requirement of the Limitation Act merely through the statutory imposition of the duty to remove results in a potentially serious erosion of the traditional meaning of the phrase.[146] If the privity or knowledge requirement can be satisfied by the imposition of a statutory duty, the right to limit liability would be unavailable in any case where a statute imposed strict liability for injury or damage caused by a vessel.

This theory has arguably been followed in two cases involving interaction of section 14 of the Rivers and Harbors Act[147] and the Limitation Act. Section

144. *Id.* at 450.

145. *Id.* at 448-52.

146. *See* Matter of Oswego Barge Corp., 439 F. Supp. 312 (N.D.N.Y. 1977); Note, *Expenses Incurred in Removal of Wrecked Vessel in Panama Canal Not Subject to Shipowner's Limitation of Liability Act*, 5 J. MAR. L. & COM. 671 (1974).

147. 33 U.S.C. §408 (1970): "[I]t shall not be lawful for any person or pesrons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: Provided, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the

14 prohibits any person from damaging facilities built by the United States for the improvement of navigation. In *United States v. Ohio Valley Co.*,[148] the defendant's tug had damaged a lock owned by the United States. The United States sought to recover the costs of the necessary repairs. The court refused to allow the defendant to limit its liability on three grounds: first, that canons of statutory interpretation and policy considerations enunciated in *Wyandotte* required that in the case of a conflict between the Limitation Act and the Rivers and Harbors Act, the latter must control;[149] second, that the Limitation Act did not apply to strict liability statutes:

> Since the triggering mechanism for . . . limitation of liability is tied to an awareness of negligence, and because negligence is not significant in actions under section 14 . . . [of the Rivers and Harbors Act], it follows that the limitation of liability provisions are inapplicable to those sections;[150]

and third, that in any event, the defendant's insurer had provided a stipulation for value in an amount sufficient to cover the government's claim.[151]

In *Hines, Inc. v. United States*[152] the limitation plaintiff's tug and tow struck the government's dam and locks, caught fire, and sank, damaging the facility. The government claimed that the plaintiff could not limit its liability for injury to the dam and locks done in violation of section 14 of the Rivers and Harbors Act. The court agreed, holding as a matter of statutory interpretation and for policy reasons that the Rivers and Harbors Act overrode the Limitation of Liability Act. The *Hines* court quoted the Seventh Circuit panel's discussion of strict liability in *Ohio Valley* but did not extend its analysis.[153]

The reasoning in *Ohio Valley* and *Hines* has recently been criticized in *In re Oswego Barge Corp.*[154] Here the petitioner's barge grounded, causing an oil spill in the St. Lawrence River. New York statutes[155] prohibited such spills and provided for civil penalties, and New York sought to recover without limitation. The district court held, on the basis of the supremacy clause,[156] that the state statutes could not impair the application of the Limitation Act,[157] and

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temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest." This statute is enforced by section 16 of the Rivers and Harbors Act, quoted at note 27 *supra*.

148. 510 F.2d 1184 (7th Cir. 1975).

149. *Id.* at 1186-88.

150. *Id.* at 1188.

151. *Id.* at 1189-90.

152. 551 F.2d 717 (6th Cir. 1977).

153. *Id.* at 727.

154. 439 F. Supp. 312 (N.D.N.Y. 1977).

155. N.Y. ENVIR. CONSERV. LAW §§11-0505(1), 17-0501, 71-0925(5) (McKinney 1973) and 71-1941 (McKinney Supp. 1977).

156. U.S. CONST. art. VI, cl. 2.

157. 439 F. Supp. at 316. See also Complaint of Harbor Towing Corp. (The Barge Shamrock), 335 F. Supp. 1150 (D. Md. 1971). Here, the petitioner had spilled oil in Baltimore Harbor. MD. ANN. CODE art. 96A, §29(a)-(b) provided for criminal penalties for such spills and

further, that there was no general exception to the applicability of the Limitation of Liability Act for strict liability satutes.[158]

The court in *Oswego Barge* extensively criticized the *Hines* and *Ohio Valley* decisions, stating that the correct reason for denying limitation of government claims under section 14 was the principal of statutory interpretation which requires that two congressional provisions, neither of which refers to the other, be construed, if possible, so as to avoid any conflict.[159] The existence of a strict liability exception to the Limitation of Liability Act was denied on the ground that Congress never intended such an exception because strict liability statutes were virtually unknown in 1851 when the Limitation Act was enacted.

These grounds for criticism of prior law are cured by the Fifth Circuit's decision in *University of Texas Medical Branch* that the Limitation Act does not apply in actions by the government to recover its wreck removal expenses against negligent parties. The traditional meaning of the privity or knowledge requirement is not altered; rather, it is dispensed with in order to satisfy the policy requirements of *Wyandotte*. Because the analysis of *University of Texas Medical Branch* reaches the same result as the prior line of cases with respect to liability of owners of negligently sunk vessels, there is no necessity to continue to use that line of reasoning.

The result of the Fifth Circuit's decision is consistent with the modern trend to limit the applicability of the Limitation of Liability Act wherever possible.[160] The Limitation Act itself contains express exceptions. The 1884 amendments to the act[161] provide, among other things, that liability for seamen's wages may not be limited. The traditional solicitude of courts of admiralty for seamen has also manifested itself in decisions holding that liability for maintenance and cure is excluded for limitation.[162] Furthermore,

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MD. ANN. CODE art. 96A, §§29E-29G provided that the Department of Natural Resources should have authority to charge and collect fees for cleaning up such oil spills. The court held that costs imposed under this scheme could be limited under the 1851 Act, because the Supremacy Clause clearly required the court to apply the Limitation Act where the state and federal statutes conflicted, and also because the statutory scheme imposed no personal duty on the owners to clean up the spill. The early wreck cases were distinguished on the grounds that the Wreck Act provided for such a personal duty. The inference that can be drawn from this case is that the Limitation Act can be avoided merely by artful drafting of statutes so as to clearly impose statutory duties on the owners of vessels. However, the same result could be reached in the case of a federal statute by explicitly stating that the Limitation Act does not apply.

Other cases preferring federal maritime law over conflicting state law include Union Fish Co. v. Erickson, 248 U.S. 308 (1919) (not a limitation case; relies on exclusivity of maritime jurisdiction in federal courts under U.S. CONST. art. III, §2, cl. 1, rather than supremacy clause); City of Newark v. Mills, 35 F.2d 110 (3d Cir. 1929) (limitation case; relies on art. III); The Central States, 9 F. Supp. 934 (E.D.N.Y. 1935) (limitation act preferred over state statute; relies on art. III); In re Highlands Navigation Corp., 24 F.2d 582 (S.D.N.Y. 1927), *aff'd*, 29 F.2d 37 (2d Cir. 1928) (same).

158. 439 F. Supp. at 316-19.

159. *Id.* at 316-17.

160. See Md. Cas. Co. v. Cushing, 347 U.S. 409 (1954) (Black, J., dissenting); G. GILMORE & C. BLACK, *supra* note 11, §§10-4, -4(a), -13.

161. Ch. 121, §18, 23 Stat. 57 (codified at 46 U.S.C. §189 (1970)).

162. Hugney v. Consolidation Coal Co., 345 F. Supp. 1079 (W.D. Pa. 1971); Petition of

sympathy for claims involving death or injury to other individuals is evident in the 1935 and 1936 amendments to the Limitation Act,[163] which required a minimum fund of sixty dollars per ton to satisfy such claims. In addition the Financial Responsibility Act of 1966[164] required American and foreign vessels having accommodations for more than fifty passengers and embarking passengers at American ports to provide proof of the owner's or charterer's financial responsibility up to $20,000 per accommodation for the first five hundred passengers, and in lesser amount for accommodations over five hundred. Even where the limitation concept has been retained in new legislation, as in the Water Quality Improvement Act of 1970[165] which limits potential liability to the lesser of $100 per gross ton or $14,000,000, the amount of potential liability has been increased. Finally, the right to limit is clearly reserved for owners.[166] In states which allow direct actions against insurers, the modern trend is to deny to the insurer the right to limit liability as long as certain procedural steps are followed.[167]

In any event, after *University of Texas Medical Branch*, the availability of limitation in a Wreck Act case depends upon the nonexistence of negligence. This requirement has been criticized[168] because the use of the negligence test can result in great uncertainty as to the obligations of the parties where the existence of negligence is controverted or unclear. A determination of whether a party has been negligent before all the facts are developed in a trial can never be more than hypothetical, and this places a shipowner in a difficult position. If the owner fails to remove the sunken vessel, the government then removes it, and negligence is later found, the negligent party will be liable for whatever the government has reasonably expended, a cost potentially higher than the owner would have incurred by removing the vessel himself. On the other hand, if the owner of the vessel removes it, he avoids the possibility of paying inflated government removal charges but loses forever the advantages of abandonment, which would have been available if the court had found no negligence.

The creation of this dilemma, although perhaps unfair in one sense, may nevertheless serve to effectuate the goals of the Wreck Act. The harsh results

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Tiedemann, 236 F. Supp. 895 (D. Del. 1964), *rev'd*, 367 F.2d 498 (3d Cir. 1966); Murray v. N.Y. Central R.R. Co., 171 F. Supp. 80 (S.D.N.Y. 1959), *aff'd*, 287 F.2d 152 (2d Cir. 1961) (maintenance and cure award of $2,800 not appealed). *See* G. GILMORE & C. BLACK, *supra* note 11, §10-26.

163. Ch. 804, §1, 49 Stat. 960 (1935), ch. 521, §1, 49 Stat. 1479 (1936) (codified in relevant part at 46 U.S.C. §183(b) (1970)).

164. 46 U.S.C. §§817d, 817e (1970).

165. 33 U.S.C. §1321 (Supp. V 1975).

166. 46 U.S.C. §186 (1970).

167. See, Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) (explaining Md. Cas. Co. v. Cushing, 347 U.S. 409 (1954)). *Cf.* Pettus v. Jones & Laughlin Steel Corp., 322 F. Supp. 1078 (W.D. Pa. 1971) (limitation fund does not include value of liability policy where defendant is the insured rather than the insurer).

168. United States v. Moran Towing & Transp. Co., 374 F.2d 656, 669 (4th Cir. 1967); Ray, *The Wyandotte Decision — Its Significance to Maritime Interests*, 38 INS. COUNSEL J. 230, 232-33 (1971).

postulated above may arise only infrequently because in almost any sinking, some negligence can be found, even if only on principles of res ipsa loquitur.[169] Under most circumstances, therefore, the practical question is reduced to merely estimating whether removal by the government or removal by the owner will result in the greater or lesser cost. Moreover, the mere existence of this dilemma contributes to the accomplishment of the purposes of the Rivers and Harbors and the Wreck Acts, which were designed to maintain the nation's waterways. Because the owner of a vessel risks having to pay higher costs incurred by the government, and because the owner loses the rights to any excess recovery if the cost of removal is less than the salvage value of the raised vessel but remains liable if salvage value is less than removal costs, it is more likely to be to his advantage to remove the vessel himself.[170] Thus, in *University of Texas Medical Branch*, the Fifth Circuit, by basing the availability of limitation on the nonexistence of negligence, has potentially benefitted all the users of our nation's waterways.

169. *See, e.g.*, United States v. Moran Towing & Transp. Co., 374 F.2d 656, 669 (4th Cir. 1967); United States v. Osage Co., 414 F. Supp. 1097 (W.D. Pa. 1976); United States v. Chesapeake & Del. Shipyard, Inc., 369 F. Supp. 714 (D. Md. 1974); *See also* Ray, *supra* note 168, at 235.

170. *See* Wyandotte Transp. Corp. v. United States, 389 U.S. at 207.