

LIABILITY ISSUES RAISED BY THE DEEPWATER HORIZON BLOWOUT

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1 Introduction

The mobile offshore drilling unit (MODU) *Deepwater Horizon* sank off the coast of Louisiana on 20 April 2010 after a massive explosion and fire. At the time, there were 126 crew members on board. Eleven were killed in the explosion and many were injured. The drill pipe and riser connecting the MODU to the undersea oil and gas reservoir fractured and oil and gas began to pour from the subsea well into the ocean. The blowout continued for three months until the well was finally capped on 15 July 2010. The oil caused extensive damage to marine and wildlife habitats, closed down the rich fishing grounds off the coast of Louisiana and had a significant impact on tourism along the Gulf of Mexico coast. The liability issues raised by the blowout are very complex. Hundreds of lawsuits have been commenced in both federal and state courts against B.P., the lessee of the well site, Transocean, the owner of the *Deepwater Horizon*, Halliburton, the contractor in charge of cementing the riser pipe that failed, Cameron International, the manufacturer of the blowout preventer that failed, and others. The federal cases have been consolidated in the U.S. District Court for the Eastern District of Louisiana in New Orleans.¹ They will all be heard by one judge, Judge Carl Barbier. Many cases continue in state court.

The principal cause of the complexity attending the liability issues is the fact that, unlike Australia and New Zealand, the United States does not have a single common law. Each state has its own common law. Louisiana, the state most badly affected by the blowout, is a mixed jurisdiction, as it also has a civil code. Although the law varies considerably from state to state, maritime cases are governed by federal law: either Acts of the federal U.S. Congress or uniform general maritime law. There is no federal common law *except* for general maritime law. The constitutional and federalism issues raised by a case like the *Deepwater Horizon* are almost bizarrely complex. This article will give an overview of the main liability issues.

2 The Outer Continental Shelf Lands Act (OCSLA)

The *Deepwater Horizon* was positioned about 41 nautical miles off the coast of Louisiana, outside the territorial waters of the United States, which end at 12 nautical miles. The vessel was registered in the Marshall Islands. There would be no basis for applying U.S. law to a foreign-flagged vessel on international waters were it not for the *Outer Continental Shelf Lands Act* (OCSLA).

OCSLA, 43 U.S.C. § 1333(a)(1) makes ‘the Constitution and laws and civil and political jurisdiction of the United States’ apply to the subsoil and seabed of the Outer Continental Shelf (OCS) and to ‘all installations and other devices permanently or temporarily attached to the seabed’. The *Deepwater Horizon* was ‘temporarily attached to’ the OCS by the drilling apparatus. As a result, 43 U.S.C. § 1333(1) makes the laws of the United States – i.e. federal law – apply to it.

OCSLA, 43 U.S.C. § 1333(a)(2)(A) applies ‘the civil and criminal laws of [the] adjacent State’ as surrogate federal law to the extent that they are not inconsistent with federal law. This provision applies only to ‘artificial islands and fixed structures’ – i.e. only to fixed rigs. That was the phrase used throughout § 1333 when the statute was first passed in 1953. The reference to ‘installations and other devices permanently or temporarily attached to the seabed’ was added by amendment to § 1333(a)(1) in 1978 to make provision for new technology such as drill ships, semisubmersible drilling rigs, jack-up rigs, etc. Section § 1333(a)(2)(A) was not amended in 1978. It still uses the

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¹ On 10 August 2010, the Judicial Panel on Multidistrict Litigation transferred 45 of the federal cases to the U.S. District Court for the Eastern District of Louisiana for consolidation as *In re Deepwater Horizon Incident Litigation*. Later that month, the Panel transferred an additional 71 cases. In September 2010, the panel transferred an additional 70 cases to the multidistrict litigation (MDL). Thus, all federal cases will be heard in New Orleans.

original 1953 formula referring to ‘fixed structures’. The apparent intention of Congress in amending one subsection in 1978 but not the other is clear: only § 1333(a)(1) should apply to mobile units temporarily attached to the seabed, like the *Deepwater Horizon*. That should mean that incidents on such units should be governed only by federal law, meaning Acts of Congress and general maritime law.

Notwithstanding the plain words of § 1333(a)(2)(A), the U.S. Court of Appeals for the Fifth Circuit has repeatedly held that the paragraph applies to mobile units temporarily attached to the seabed. Courts in the Fifth Circuit routinely quote the following passage from *Union Texas Petroleum Corp. v PLT Engineering Inc*:

[F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.²

To put it bluntly, this is just wrong, no matter how many times it is repeated by the Fifth Circuit. Adjacent state law does not (or should not) apply as surrogate federal law to ‘artificial structures...temporarily attached thereto’ because § 1333(a)(2)(A) only applies to ‘artificial islands and fixed structures’.

Given the weight of Fifth Circuit authority, however, it must be accepted that Louisiana state law will be applied as surrogate federal law to a mobile offshore drilling unit (MODU) like the *Deepwater Horizon* unless and until the (long) line of Fifth Circuit cases is overturned by the Supreme Court or by the Fifth Circuit *en banc*. Nothing turns on that so far as the liability of B.P. is concerned. B.P.’s liability is governed by the federal *Oil Pollution Act 1990* (OPA 90). If Louisiana state law were to be inconsistent with OPA 90 it would not be applied, even under the *Union Texas* test quoted above. In any event, Louisiana’s *Oil Spill Prevention and Response Act*³ imposes the same limit on liability as OPA 90, as is explained in more detail in below.

So far as the liability of B.P.’s contractors (Transocean, Halliburton and Cameron) is concerned, however, the Fifth Circuit’s determined misreading of 43 U.S.C. § 1333(a)(2)(A) may have some significance. For example, if a plaintiff were to bring a product liability claim against Cameron International, alleging that the blowout protector was defective, that claim should properly be governed by general maritime law, as there is no federal products liability statute. Strict products liability is part of (federal) general maritime law.⁴ Because the Supreme Court held in *Exxon Shipping Co. v Baker*⁵ that punitive damages are available under general maritime law (albeit not to exceed the amount of compensatory damages), punitive damages would theoretically be available in such an action. However, the U.S. Court of Appeals for the Fifth Circuit has held that Louisiana state law applies as surrogate federal law to a products liability claim in relation to a fixed rig on the OCS.⁶ If one combines that decision with the *Union Texas* test for application of adjacent state law, one arrives at the result that a products liability action against Cameron International would be governed by Louisiana state law. Because of Louisiana’s civil law heritage, punitive damages are not available under Louisiana law unless expressly authorised by statute.⁷ The Louisiana *Products Liability Act* does not authorise the award of punitive damages.

OCSLA contains extensive provisions dealing with the administration of oil and gas leases, geological and geophysical exploration, etc.⁸ So far as civil liability is concerned, it creates no private rights of action *except* for a workers’ compensation remedy, which is considered below. The significance of OCSLA in the present context is principally as the source of application of federal or state law.

² 895 F 2d 1043, 1047 (5th Cir, 1990) (emphasis added).

³ *West’s Louisiana Revised Statutes Annotated* § 30-2541ff.

⁴ *East River S.S. Corp v Transamerica Delaval Inc*, 476 U.S. 858, 106 S Ct 2295 (1986).

⁵ 128 S Ct 2605 (2008).

⁶ *Texaco Exploration and Production Inc. v AmClyde Engineered Products Co. Inc*, 448 F 3d 760 (5th Cir, 2006).

⁷ *Breaux v Simon*, 104 So 2d 168 (La, 1958); *Holcombe v Superior Oil Co*, 35 So 2d 457 (La, 1948).

⁸ 43 U.S.C. § 1334-56a.

3 The Oil Pollution Act 1990 (OPA 90)

3.1 'Responsible party' liability

The *Oil Pollution Act 1990* (OPA 90), 33 U.S.C. § 2702(a), imposes strict liability for 'removal costs and damages' on the 'responsible party'. The U.S. Coast Guard has designated B.P. as the 'responsible party' for the oil and gas flowing from the subsea well. The U.S. Coast Guard has designated Transocean as the 'responsible party' for any pollution caused by the *Deepwater Horizon* itself on or above the surface of the water. Those designations are not judicial determinations and they may later be challenged in court. They do seem, however, to be consistent with the OPA 90 provisions dealing with who is the 'responsible party' for a MODU. Those provisions are rather complex.

OPA 90, 33 U.S.C. § 2701(32), defines 'responsible party' differently for 'vessels' and 'offshore facilities'. For a 'vessel', the responsible party is 'any person owning, operating or demise chartering the vessel'.⁹ That would include Transocean as well as B.P. For an 'offshore facility', the responsible party is 'the lessee or permittee of the area in which the facility is located'.¹⁰ That would be only B.P.

A 'mobile offshore drilling unit' is defined to mean 'a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility'.¹¹ For the purpose of determining the 'responsible party', a MODU that is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge of oil on or above the surface of the water.¹² That explains why Transocean has been designated as the 'responsible party' for any pollution caused by the *Deepwater Horizon* itself on or above the surface of the water – it is the owner of the thing deemed to be a tank vessel.

'Offshore facility' is defined to mean 'any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel'.¹³ The remains of the drilling apparatus at the subsea well satisfied that definition while the oil and gas were still flowing from the well. That explains why B.P. has been designated the 'responsible party' for the oil and gas flowing from the subsea well, as it is the lessee of the area where the facility is located.

The responsible party is liable for all removal costs, which include all costs incurred by the United States, a State, an Indian tribe or any person acting consistently with the National Contingency Plan.¹⁴

The damages recoverable from the responsible party are listed in 33 U.S.C. § 2702(b)(2). They are: natural resource damages;¹⁵ real or personal property damage;¹⁶ subsistence use of natural resources;¹⁷ revenue losses of taxes, royalties, rents, fees or net profit shares;¹⁸ loss of profits or earning capacity;¹⁹ costs of additional public services during removal activities.²⁰ In the sections that follow, I shall focus on the categories of greatest practical significance in relation to the *Deepwater Horizon*.

3.2 Purely economic losses

Purely economic loss claims make up the lion's share of the litigation that has arisen as a result of *Deepwater Horizon* blowout. Economic loss claims have been made by commercial fishermen who have lost income because

⁹ 33 U.S.C. § 2701(32)(A).

¹⁰ 33 U.S.C. § 2701(32)(C).

¹¹ 33 U.S.C. § 2701(18).

¹² 33 U.S.C. § 2704(b)(1).

¹³ 33 U.S.C. § 2701(22).

¹⁴ 33 U.S.C. § 2702(a),(b).

¹⁵ 33 U.S.C. § 2702(b)(2)(A).

¹⁶ 33 U.S.C. § 2702(b)(2)(B).

¹⁷ 33 U.S.C. § 2702(b)(2)(C).

¹⁸ 33 U.S.C. § 2702(b)(2)(D).

¹⁹ 33 U.S.C. § 2702(b)(2)(E).

²⁰ 33 U.S.C. § 2702(b)(2)(F).

the spill and the clean-up operations have closed the areas in which they catch fish and shellfish and because the oil has killed or contaminated the fish and shellfish. Claims have also been brought by boat charterers, seafood wholesalers, seafood processors, and various businesses that supply equipment and goods to commercial fishermen. Claims have been made by seafood and other restaurants along the Gulf Coast and beyond, seeking to recover their lost profits. Hotels and beachfront resorts have likewise sought to recover their lost income because the spill has damaged their beaches or otherwise driven tourists away from their communities. The owners of condominiums and other property in areas affected by the spill have made claims for the diminution in the value of their property resulting from both physical damage to the property as well as the threat of the oil pollution.

Purely economic losses are not recoverable under general maritime law because of the ‘bright line’ rule stated by the Supreme Court of the United States in *Robins Dry Dock & Repair Co. v Flint*,²¹ by which only those suffering personal injury or property damage may recover economic losses consequential on that injury or damage. Although the decision is only binding in relation to general maritime law, the *Robins Dry Dock* rule has been followed under the common law of many states, including Louisiana.²²

Nevertheless, purely economic losses *are* recoverable in an action against the ‘responsible party’ under OPA 90, because of 33 U.S.C. § 2702(b)(2)(E). The paragraph provides for loss of profits ‘due to injury, destruction or loss of real property, personal property *or natural resources*’ (emphasis added). Thus, claimants need not show that they themselves have suffered damage to real or personal property, but merely that they have suffered loss of profits as a result of damage to ‘natural resources’, which are defined very broadly to mean ‘land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government’.²³

There is very little case law about the proper scope of § 2702(b)(2)(E). Obviously, some kind of a line must be drawn to cut off claims that should be allowed from claims that are too remote. Oyster and shrimp fishermen deprived of their livelihood seem clearly to fall within that line, as do beachfront hotels. Seafood restaurants who buy oyster and shrimp, and travel agents who make bookings for travellers to visit the beachfront hotels on the Gulf Coast seem intuitively to lie beyond that line, even though they undoubtedly may suffer loss as a result of the spill. The difficulty lies in knowing where to draw the line on a principled basis.

Purely as a matter of statutory interpretation, the key question under § 2702(b)(2)(E) will be whether claims were ‘due to’ the natural resource damage caused by the oil spill. In another context, it has been said of the phrase ‘due to’ that:

The words do not speak clearly and unambiguously for themselves. The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.²⁴

There is one unreported decision of the U.S. District Court for the Eastern District of Louisiana, which employed (without explanation) a simple ‘proximate cause’ analysis to determine what claims are compensable under § 2702(b)(2)(E).²⁵ A proximate cause analysis would suffice to include fishermen and beachfront hotels, whose losses flow directly from the damage to natural resources, but would exclude seafood restaurants and travel agents, whose losses are derivative from the losses suffered by the fishermen and the beachfront hotels.

Following the *Deepwater Horizon* blowout, the Gulf Coast Claims Facility (the GCCF) was established to administer claims by individuals and businesses for damages arising from the accident.²⁶ B.P. agreed to create a \$20 billion escrow account to pay claims submitted to, and approved by, the GCCF. The GCCF purports to be an ‘independent claims facility’, which does not report to, or take direction from, B.P. although B.P. provides its

²¹ 275 U.S. 303, 48 S Ct. 134 (1927).

²² *PPG Industries Inc v Bead Dredging*, 447 So 2d 1058 (La, 1984).

²³ 33 U.S.C. § 2701(20).

²⁴ *Adams v Director OWCP*, 886 F 2d 818, 821 (6th Cir, 1989).

²⁵ *Sekco Energy Inc v Chouest*, 1993 WL 322942 (E.D.La, 1993).

²⁶ Gulf Coast Claims Facility, *Frequently Asked Questions* (3 December 2010) Gulf Coast Claims Facility § 1.1, <<http://gulfcostclaimsfacility.com/faq#Q1>>.

funding.²⁷ The GCCF has taken varying positions on the scope of economic loss claims that it will pay since its creation.

On 23 August 2010, the GCCF issued its Protocol for Emergency Advance Payments, setting out the procedures for emergency advance payments by individuals and businesses for costs and damages incurred due to the *Deepwater Horizon* incident. The GCCF stated initially that it would use a proximate cause test for determining whether to pay claims, and also that claimants would have to show ‘among other things, geographic proximity, nature of industry, and dependence upon injured natural resources’.²⁸ The GCCF indicated subsequently, however, that geographic proximity (or, presumably, a lack of it) would not prevent ‘legitimate’ business loss claims from being processed.²⁹

Later, on 22 November 2010, the GCCF issued its Protocol for Interim and Final Claims.³⁰ The Protocol for Interim and Final Claims explains the causation analysis to be applied by the GCCF in different terms than the earlier protocol. Unlike the Protocol for Emergency Advance Payments, the Protocol for Interim and Final Claims does not state that the GCCF will be guided by the ‘proximate cause doctrine’ or considerations of geographic proximity, the nature of the claimant’s industry, or its dependence upon injured natural resources.

Adding to the confusion over what standards the GCCF intends to apply to interim and final economic loss claims is the fact that, on the same day the GCCF issued its Protocol for Interim and Final Claims, a report prepared by Professor John Goldberg of Harvard Law School on liability for economic loss associated with the *Deepwater Horizon* accident was also made available. The GCCF’s Protocol for Interim and Final Claims does not refer to Professor Goldberg’s report. Likewise, in his report, Professor Goldberg states that his analysis ‘is *not* provided to establish the terms on which GCCF funds ought to be distributed ... This report is instead intended to provide an assessment of the legal liability B.P. and/or its subsidiaries can be expected to face if certain claims against it are pursued in courts of law – specifically, claims seeking compensation for economic loss not predicated on personal injury or physical damage to the claimant’s property.’³¹ Nevertheless, in transmitting a copy of his report to the GCCF’s administrator, Kenneth R Feinberg, Professor Goldberg indicated that he was providing the report to Mr Feinberg at his request.

The Goldberg Report focuses primarily on two aspects of a responsible party’s potential liability for economic losses suffered as a result of an oil spill under OPA. First, the report concludes that ‘a person may obtain compensation for economic loss from a party responsible for a spill if she can prove that her loss is “due to” harm to property or resources that “result[s] from” the spill, irrespective of whether she owns that property or those resources’.³² Second, the report defines the scope of liability for such claims as limited only to ‘those economic loss claimants who can prove that they have suffered economic loss because a spill has damaged, destroyed or otherwise rendered physically unavailable to them property or resources that they have a right to put to commercial use’.³³ I have argued elsewhere, with two co-authors, that such a test is unduly narrow and not supported by the language of OPA 90.³⁴

Any claimant who accepts a final payment from the GCCF is required to sign a settlement agreement releasing B.P. and all other possible defendants from liability. Thus, despite its claim to be an “independent claims facility”, the GCCF is, in effect, settling claims on behalf of B.P. Many claimants have decided not to accept payments from GCCF in the hope of recovering more in court. It remains to be seen whether the court will adopt a simple proximate cause test or one of the more elaborate ones propounded by the GCCF.

²⁷ Ibid §§ 1.1-1.2.

²⁸ Gulf Coast Claims Facility, *Gulf Coast Claims Facility Protocol for Emergency Advance Payments* (23 August 2010) § II(F) <http://www.gulfcoastclaimsfacility.com/proto_1.php>.

²⁹ Gulf Coast Claims Facility, *Feinberg Announces Clarification Regarding Geographic Proximity* (5 November 2010) <<http://www.gulfcoastclaimsfacility.com/press7.php>>.

³⁰ Gulf Coast Claims Facility, *Gulf Coast Claims Facility Protocol for Interim and Final Claims* (22 November 2010) <http://gulfcoastclaimsfacility.com/proto_4>. The GCCF intends its claims process and protocols to comply with OPA and OPA’s standards, § I(A), (B).

³¹ John C. P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* 22 November 2010) 6 (“Goldberg Report”).

³² Ibid 3.

³³ Ibid 3, 25-38.

³⁴ Robert Force, Martin Davies and Joshua Force, ‘Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties and State Remedies in Oil Spill Cases’, (2011) 85 *Tulane Law Review* 889.

3.3 Punitive damages

One item that is conspicuously missing from the list of recoverable damages in 33 U.S.C. § 2702(b)(2) is punitive damages. In *South Port Marine L.L.C. v Gulf Oil Limited Partnership*,³⁵ the U.S. Court of Appeals for the First Circuit held that this means exactly what it appears to say, namely that punitive damages are not recoverable in an OPA 90 action. That decision has been followed once by a district court in the Ninth Circuit.³⁶ There are no reported cases that have suggested that punitive damages are available under OPA 90, but this is a proposition that seems likely to be tested again in the *Deepwater Horizon* litigation. Federal district courts are not obliged by the rules of precedent to follow circuit court decisions from other circuits, so the *South Port Marine* decision is not binding on the U.S. District Court for the Eastern District of Louisiana, which is where all the federal court claims have been consolidated, and which is in the Fifth Circuit.

3.4 Natural resource damages

Under 33 U.S.C. § 2702(b)(2)(A) damages are recoverable for ‘injury to, loss of, or loss of use of, natural resources’. As noted above, ‘natural resources’ is defined very broadly.³⁷ Natural resource damage claims are made by federal, state and (where relevant) Indian tribe trustees appointed by the President, the Governor of the relevant state and the governing body of any Indian tribe respectively.³⁸ Damages are payable to the U.S. Government for natural resources ‘belonging to, managed by, controlled by, or appertaining to’ the United States; to a state for natural resources ‘belonging to, managed by, controlled by, or appertaining to’ that state; and to an Indian tribe for natural resources ‘belonging to, managed by, controlled by, or appertaining to’ that tribe.³⁹ The measure of natural resource damages under OPA 90 is the cost of restoration or rehabilitation of the damaged natural resources; the diminution in value of those natural resources pending restoration; and the reasonable cost of assessing those damages.⁴⁰

The National Oceanic and Atmospheric Administration (NOAA) published a final rule to guide trustees in assessing natural resource damages.⁴¹ The Natural Resource Damages Assessment (NRDA) process has three phases: the pre assessment phase,⁴² the restoration planning phase⁴³ and the restoration implementation phase.⁴⁴ It is very difficult to predict what the NRDA process will produce in relation to the oil spill from the *Deepwater Horizon* blowout, where restoration of some of the natural resources, including Louisiana’s wetlands, may be impossible.

3.5 Tax revenues

Revenue losses are specifically covered by OPA 90, 33 U.S.C. § 2702(b)(2)(D). The U.S. Government may be able to recover damages for lost federal taxes, such as income taxes from people like fishermen affected by the spill. State and local governments may be able to recover lost sales taxes. Here, too, the relevant words of causal connection are ‘due to’.

3.6 Limitation of liability

The liability of the responsible party under OPA 90 is limited, although it is relatively easy to break the limit. For an offshore facility, liability is presently limited to \$75 million plus removal costs.⁴⁵ In other words, there is no limit on liability for removal costs, but liability for all other kinds of damage, including natural resource damages, could be limited to \$75 million. From the first days of the blowout, B.P. publicly declared that it did not intend to take advantage of that limit.

³⁵ 234 F 3d 58 (1st Cir, 2000).

³⁶ *Clausen v M/V New Carissa*, 171 F Supp 2d 1127 (D.Or, 2001).

³⁷ 33 U.S.C. § 2701(20).

³⁸ 33 U.S.C. § 2706(b).

³⁹ 33 U.S.C. § 2706(a).

⁴⁰ 33 U.S.C. § 2706(d)(1)(A)-(C).

⁴¹ 15 C.F.R. § 990.10 ff.

⁴² 15 C.F.R. § 990.40-990.45.

⁴³ 15 C.F.R. § 990.50-990.56.

⁴⁴ 15 C.F.R. § 990.60-990.66.

⁴⁵ 33 U.S.C. § 2704(a)(3).

Transocean's liability as responsible party for discharges of oil on or above the surface of the water would be \$59 million. The limitation provisions in relation to MODUs are convoluted. Recall that for purposes of determining the responsible party of the MODU itself, the MODU is treated first as a tank vessel.⁴⁶ The limit of liability for a tank vessel greater than 3000 gross tons (the *Deepwater Horizon* was 32588 metric tons) that is not a single-hull vessel is \$16 million.⁴⁷ However, the Act provides that if that sum were to be insufficient to cover removal costs and damages, the MODU is deemed to be an offshore facility, which would raise the limit to \$75 million, but then the amount in § 2704(b)(1) (\$16 million) is subtracted, leaving \$59 million.⁴⁸ Saying that the limit is \$16 million but if that is not enough, \$59 million, is saying, in effect, that the limit is \$59 million. All of that is immaterial in relation to the *Deepwater Horizon* blowout itself because it will surely be impossible to determine what, if any, damage was caused by the oil spilled from the MODU on or above the surface of the water, as opposed to the oil that has been spilling from the subsea well. Whatever quantity there was will have been minuscule compared with the quantity gushing from the subsea well.

The responsible party is not entitled to limit its liability under OPA 90 if the incident was proximately caused by gross negligence or wilful misconduct, or the violation of an applicable federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party or any person acting pursuant to a contractual relationship with the responsible party.⁴⁹ In other words, if the incident was proximately caused by a violation of some federal safety regulation by B.P. or any of its employees, *or* Transocean *or* Halliburton *or* Cameron International, the result would be that B.P. would not be able to limit its liability.

A bill has been introduced into Congress to increase the limits of liability under OPA 90 with retroactive effect. It passed the House of Representatives but not (yet) the Senate.

3.7 Presentment requirements

OPA 90 establishes a mandatory claims procedure. All claims for removal costs or damages must first be presented to the responsible party.⁵⁰ Under 33 U.S.C. § 2713(c), a claimant may only commence an action in court against the responsible party if the claimant first presents a claim under § 2713(a) and either: (1) all responsible parties deny all liability (33 U.S.C. § 2713(c)(1)); or (2) the claim is not settled by payment within 90 days after (A) the claim was presented, or (B) the responsible party began advertising a claims procedure, as it is required to do by 33 U.S.C. § 2714(b), whichever is the later (33 U.S.C. § 2713(c)(2)).

The presentment procedure is a mandatory condition precedent.⁵¹ Any claim that is not made in accordance with the procedure must be dismissed.

4 Defences and the Oil Spill Liability Trust Fund

The Oil Spill Liability Trust Fund (the Fund) predates OPA 90 by four years, but it was not until OPA 90 was passed that use of the money in the Fund was authorised. The Fund is administered by the National Pollution Funds Center (NPFC), an administrative agency of the U.S. Coast Guard. It is designed to fund the U.S. Government's response to oil pollution. It can be used to fund: removal costs incurred by federal or state governments; costs of assessing natural resource damages; claims for uncompensated removal costs or uncompensated damages; the costs of administering OPA 90.⁵²

Any claimant must claim first from the responsible party.⁵³ Claims can only be made to the Fund first if the responsible party denies the designation and the President advertises to the public.⁵⁴ A State may, however, claim

⁴⁶ 33 U.S.C. § 2704(b)(1).

⁴⁷ 33 U.S.C. § 2704(a)(1)(C)(i)(II).

⁴⁸ 33 U.S.C. § 2704(b)(2).

⁴⁹ 33 U.S.C. § 2704(c)(1).

⁵⁰ 33 U.S.C. § 2713(a).

⁵¹ *Boca Ciega Hotel Inc. v Bouchard Transportation Co. Inc.*, 51 F 3d 236 (11th Cir, 1995); *Marathon Pipe Line Co. v LaRoche Industries Inc.*, 944 F Supp 476, 477 (E.D.La, 1996); *Johnson v Colonial Pipeline Co.*, 830 F Supp. 309, 311 (E.D.Va, 1993); *Abundiz v Explorer Pipeline Co.*, 2003 WL 23096018 (N.D.Tex, 2003) 5; *Russo v M/T Dubai Star* 2010 WL 1753187 (N.D. Cal, 2010) 2-3.

⁵² 33 U.S.C. § 2712(a).

⁵³ 33 U.S.C. § 2713(a).

first against the Fund.⁵⁵ Because B.P. and Transocean have accepted their designation as responsible parties, private party claims must be made against them first.

If the responsible party has a complete defence to liability, it may claim reimbursement of removal costs or damages from the Fund.⁵⁶ To establish a complete defence, the responsible party must show, by a preponderance of the evidence, that the discharge was caused *solely* by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurred in connection with any contractual relationship with the responsible party.⁵⁷ It is extremely unlikely that any of these defences will be available to B.P. Even if the explosion was solely caused by Transocean, Halliburton or Cameron International, B.P. would not be relieved of liability because of 33 U.S.C. § 2703(a)(3).

If the responsible party is entitled to limitation of liability, it may claim reimbursement of removal costs or damages from the Fund to the extent that those removal costs or damages exceed its limited liability.⁵⁸ Unlike 33 U.S.C. § 2703, which deals with complete defences, the limitation provision, 33 U.S.C. § 2704, does not state where the burden of proof lies. Not surprisingly, the NPFC takes the position that the burden of proof lies on the responsible party to show that it, its employees, agents and contractors did *not* proximately cause the incident by gross negligence or wilful misconduct, or the violation of an applicable federal safety, construction, or operating regulation, which would deprive the responsible party of the right to limit.⁵⁹ Obviously, such an onus would be difficult to discharge.

Conversely, the Fund is entitled to claim reimbursement from the responsible party. If the Fund pays a claim it is subrogated to any rights that that claimant had ‘under any other law’.⁶⁰ The phrase ‘any other law’ clearly refers to claims other than under OPA 90 itself. Thus, the Fund can bring recourse claims against the responsible party (or, indeed, anyone else) but only if it can establish liability on some other basis.

Because it is highly unlikely that B.P. will be able to rely on any defences in relation to the *Deepwater Horizon* and because B.P. set up the GCCF to settle claims voluntarily, the Fund has had little part to play.

5 State oil pollution compensation laws

OPA 90 explicitly and emphatically states that neither it nor the Shipowners’ Limitation of Liability Act⁶¹ is intended to pre-empt state law. OPA 90 provides that states are not precluded from imposing ‘additional liability or requirements’ with respect to pollution by oil within their territory;⁶² nothing in either federal act shall be construed as affecting or modifying the obligations or liabilities of any person under state law, ‘including common law’;⁶³ and nothing in either federal act affects the authority of a state to impose additional liability, fines or penalties relating to the discharge of oil.⁶⁴ The intention of Congress seems clear: the remedies provided by OPA 90, state law and general maritime law should be cumulative. Nevertheless, and perhaps surprisingly to Antipodean eyes, the first question that must be addressed is whether Congress and the states are constitutionally permitted to act in this way.

In *Knickerbocker Ice Co. v Stewart*,⁶⁵ the Supreme Court of the United States held that the Admiralty Clause of the Constitution⁶⁶ affirmatively prevents Congress from delegating to the states the authority to pass laws interfering with the national uniformity of maritime law.⁶⁷ Although *Knickerbocker Ice* has long been the subject of caustic

⁵⁴ 33 U.S.C. §§ 2713(b)(1)(A), 2714(c).

⁵⁵ 33 U.S.C. §§ 2713(b)(1)(C).

⁵⁶ 33 U.S.C. § 2708(a)(1).

⁵⁷ 33 U.S.C. § 2703(a).

⁵⁸ 33 U.S.C. § 2708(a)(2)(b).

⁵⁹ 33 U.S.C. § 2704(c)(1).

⁶⁰ 33 U.S.C. § 2715(a).

⁶¹ 46 U.S.C. § 30501 *et seq.*

⁶² 33 U.S.C. § 2718(a)(1)(A).

⁶³ 33 U.S.C. § 2718(a)(2).

⁶⁴ 33 U.S.C. § 2718(c).

⁶⁵ 253 U.S. 149, 40 S. Ct. 438 (1920).

⁶⁶ U.S. Constitution art III, § 2.

⁶⁷ *In re Exxon Valdez*, 767 F Supp. 1509, 1515 (D. Alaska, 1991) (‘Congress’ power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement arises from the Constitution and is nondelegable’), citing *Knickerbocker Ice*.

criticism, both by academics⁶⁸ and judges,⁶⁹ it has never been overruled.⁷⁰ Some writers have argued that OPA 90's authorisation of recovery under state liability laws is unconstitutional because of *Knickerbocker Ice*.⁷¹ To evaluate that proposition, it is necessary to examine the decision of the Supreme Court in *Askew v American Waterways Operators Inc.*⁷²

In *Askew*, a coalition of shipowners and industry groups brought suit to enjoin application of a Florida state statute imposing liability on responsible parties for clean-up costs associated with oil pollution and for damage incurred by the state and private individuals. The plaintiffs argued that the Florida statute intruded unconstitutionally into the federal maritime domain, which was then occupied by the Water Quality Improvement Act, which imposed strict liability for clean-up costs incurred by the federal government. The plaintiffs relied on *Knickerbocker Ice* and also the *Admiralty Extension Act*,⁷³ which provides that federal admiralty jurisdiction extends to cases of injury or damage on land caused by a vessel on navigable waters. The *Askew* court unanimously rejected the plaintiffs' arguments, holding that neither *Knickerbocker Ice* nor the *Admiralty Extension Act* precluded the state from legislating. In relation to the *Admiralty Extension Act*, the court said 'sea-to-shore pollution – historically within the reach of the police power of the States – is not silently taken away from the States by the *Admiralty Extension Act*, which does not purport to supply the exclusive remedy'.⁷⁴

The *Water Quality Improvement Act* dealt only with clean-up costs incurred by the federal government; it did not, as OPA 90 does, impose civil liability for damage caused by oil pollution. There was thus no potential conflict between federal law, which dealt only with federal clean-up costs, and state law, which dealt with state clean-up costs and civil liability. Strictly speaking, then, *Askew* does not speak directly to the situation that now prevails, where both Congress and the states have legislated to impose civil liability and penalties.⁷⁵ Nevertheless, the *Askew* doctrine is quite clear: unless Congress intended to provide an exclusive maritime remedy (which it has not, in the case of OPA 90), states can exercise their traditional police power to impose liability for ship-to-shore pollution. That would seem to be enough to validate OPA 90's waiver of pre-emption provision, which is in very similar terms to the one considered in *Askew*.

Also, it can be argued that a waiver of pre-emption provision such as those found in OPA 90 does not violate *Knickerbocker Ice*'s prohibition against delegation of federal statutory authority to the states. Standing aside to let the states exercise their traditional police powers does not constitute delegating authority to them to do so. In *Pacific Merchant Shipping Association v Aubry*,⁷⁶ the U.S. Court of Appeals for the Ninth Circuit held that the waiver of pre-emption provision in the federal *Fair Labor Standards Act*⁷⁷ did not constitute a *delegation* of authority to the states but simply made clear Congressional intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours and, therefore, *Knickerbocker Ice* did not control the case. Precisely the same argument could be made in the context of OPA, particularly in the light of what *Askew* said about the states' historical police powers to regulate ship-to-shore pollution.

As a result, it seems clear that the concurrent operation of federal and state legislation is constitutionally permissible notwithstanding *Knickerbocker Ice*. Concurrent operation of OPA 90 and state common law is another matter.

⁶⁸ Brainerd Currie called *Knickerbocker Ice* and its companion case, *Washington v W.C. Dawson & Co*, 246 U.S. 219 (1924), 'aberrations'. Brainerd Currie, 'Federalism and Admiralty: The Devil's Own Mess', (1960) *Supreme Court Review* 158, 191. See also William Cohen, 'Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma', (1983) 35 *Stanford Law Review* 387, 402-3 ('constitutional law derelicts'); Michael F. Sturley, 'Maritime Cases About Train Wrecks: Applying Maritime Law to Inland Damage of Ocean Cargo', (2009) 40 *Journal of Maritime Law & Commerce* 1, 23-24 ('the now-discredited principles of *Knickerbocker Ice*'; 'the *Knickerbocker-Dawson* era has passed').

⁶⁹ See e.g., *Ceres Terminals Inc v Industrial Commission of Illinois*, 53 F 3d 183, 184 (7th Cir, 1995) (describing *Knickerbocker* and *Dawson* as 'opinions that exist more as spectral apparitions than as living forces of the law'); *American Dredging Co. v Miller*, 510 U.S. 443, 459, 114 S. Ct. 981, 991 (1994) (Stevens J)(dissenting)(describing the *Knickerbocker Ice* doctrine as a 'truly remarkable conclusion').

⁷⁰ David J Bederman, 'Uniformity, Delegation and the Dormant Admiralty Clause' (1997), 28 *Journal of Maritime Law & Commerce* 1, 25

⁷¹ Stephen R Eubank, 'Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990' (1994) 18 *Maryland Journal of International Law & Trade* 149; Matthew P Harrington, 'Necessary and Proper, But Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States', (1997) 48 *Case Western Reserve Law Review* 1.

⁷² 411 U.S. 325, 93 S. Ct. 1590, 1973 AMC 811 (1973).

⁷³ Then 46 U.S.C. § 740, now 46 U.S.C. § 30101.

⁷⁴ *Askew*, 411 U.S. 343, 93 S. Ct. 1601, 1973 AMC 825.

⁷⁵ For that reason, Stephen Eubank has argued that *Askew* is 'inapplicable' and that 'OPA 90 must meet *Knickerbocker Ice* head on'. Eubank, above n 71, 164-65.

⁷⁶ 918 F 2d 1409, 1421, 1991 AMC 2797, 2813 (9th Cir, 1990).

⁷⁷ 29 U.S.C. § 218.

Under the doctrine stated in another famous (or infamous) Supreme Court decision, *Southern Pacific Co. v Jensen*,⁷⁸ state courts can only apply state common law when exercising admiralty jurisdiction if the state law does not contravene the essential purpose expressed by an act of Congress, or work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international and interstate relations.⁷⁹ The *Admiralty Extension Act* provides that cases of ship-to-shore damage fall within the admiralty jurisdiction, and the general rule is that ‘with admiralty jurisdiction comes the application of substantive admiralty law’,⁸⁰ unless the exception to the *Jensen* uniformity principle can be satisfied. The *Askew* court itself said that ‘*Jensen*...has vitality left’.⁸¹

In other words, it may be that because of the *Admiralty Extension Act*, all claims that are not governed by OPA 90 or state legislation must be governed by the (federal) general maritime law and not by state common law. That is significant because two of the three states most affected by the *Deepwater Horizon* have not passed legislation dealing with liability for ship-to-shore pollution. Claimants in state court are undoubtedly relying on state common law claims in negligence and nuisance, hoping to collect punitive damages. As noted above, although punitive damages are recoverable under general maritime law, they cannot exceed the value of compensatory damages, a restriction that does not apply to punitive damages under state common law. For these reasons, the rather obscure-sounding issue about the operation of the *Admiralty Extension Act* may play an important role in the *Deepwater Horizon* litigation.

5.1 Louisiana

Rather oddly, Louisiana’s *Oil Spill Prevention and Response Act* contains an extensive definition of the word ‘damages’, a definition of ‘responsible party’ and a provision limiting the liability of a responsible party for ‘damages and removal costs’ to sums identical to those in OPA 90, but yet the Act contains no provision that actually imposes liability for damages on the responsible party.⁸² It can be inferred that the legislative intention was to impose civil liability for damages, or else there would have been no point in defining the relevant terms or limiting liability. Nevertheless, the omission of an operative provision is an oversight, to put it mildly. Given that Louisiana was the state most affected by the *Deepwater Horizon* blowout, it can confidently be expected that before long there will be an answer to the question whether statutory liability can be implied, rather than expressed. Even if the statute does impose liability, it no longer imposes liability for purely economic losses. The statute used to contain a provision equivalent to that in OPA 90 referring to loss of profits or impairment of earning capacity due to damage to property or natural resources, but that provision was removed by amendment in 1995.⁸³

In short, it seems unlikely that the Louisiana statute will play any significant role in relation to civil liability in relation to the *Deepwater Horizon*.

5.2 Alabama and Mississippi

Neither Alabama nor Mississippi has passed legislation imposing civil liability for oil pollution. Both states have passed Acts creating immunity from liability for those responding to oil spills, but that is all.⁸⁴ Thus, state law can only be applied if it survives the *Jensen* test described above.

5.3 Florida

Florida’s *Pollutant Discharge Prevention and Control Act* creates a statutory cause of action for damages against a responsible party for property damage and natural resource damages but not purely economic loss.⁸⁵ It also imposes

⁷⁸ 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917).

⁷⁹ *Jensen*, 244 U.S. 216, 37 S. Ct. 529.

⁸⁰ *East River S.S. Corp. v Transamerica Delaval Inc.*, 476 U.S. 858, 864, 106 S. Ct. 2295, 2298-99 (1986); *Jerome B. Grubart Inc. v Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545, 115 S. Ct. 1043, 1054 (1995).

⁸¹ *Askew*, 411 U.S. 344, 93 S. Ct. 1601, 1973 AMC 825.

⁸² *West’s Louisiana Revised Statutes Annotated* §§ 30:2454(5), (22), 30:2479(A).

⁸³ 1995 La. Acts No. 740, § 2.

⁸⁴ Ala. Code 1975 § 6-5-332 (Alabama Act Regarding Liability for Persons Responding to Oil Spills); Miss. Code Ann. §§ 49-18-3, 49-18-5 (Mississippi Liability of Persons Responding to Oil Spills Act).

liability on the responsible party for clean-up costs but, unlike OPA 90, it limits that liability to \$600 per gross ton for vessels (like *Deepwater Horizon*) other than oil tankers.⁸⁶ For the *Deepwater Horizon*, that would produce a limit of \$19 552 800 for clean-up costs. However, that limit could be broken on grounds very similar to those in OPA 90, including violation of a federal or state safety regulation.⁸⁷ Civil liability for property damage and natural resource damages is unlimited. ‘Discharge’ is defined to include discharges outside the territorial limits of the state that affect lands and waters within the territorial limits of the state, so the statute could apply to the *Deepwater Horizon* spill for any oil that reached Florida.⁸⁸

6 Personal injury and death

6.1 The Jones Act

The *Jones Act* provides a statutory fault-based remedy for seamen killed or injured in the course of their employment.⁸⁹ The Supreme Court has stated an eight-factor test to determine when the *Jones Act* applies to deaths or injuries occurring outside the territory of the United States: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; (8) the shipowner’s base of operations.⁹⁰ Although some of those factors would point to the Marshall Islands in the case of the *Deepwater Horizon*, it seems highly likely that a court would apply the *Jones Act* to the death or injury of American seamen on the *Deepwater Horizon*, given the extent of connection with the United States.

In order to constitute a ‘vessel’ for purposes of the *Jones Act*, a watercraft need only be *capable* of maritime transportation.⁹¹ It does not matter that it has been stationary for extended periods of time, nor that it is not actually being used for maritime transportation at the time of the incident, nor that its primary purpose is something other than maritime transportation. It seems very likely that the *Deepwater Horizon* qualifies as a ‘vessel’ under these criteria.

The term ‘seaman’ is not defined in the *Jones Act*. A series of cases in the Supreme Court has established a two-part test for seaman status. First, the employee’s duties must contribute to the function of the vessel or to the accomplishment of its mission.⁹² It is not necessary that the employee contribute to the transportation function of the vessel by aiding in its navigation. Secondly, the employee must have a connection to a vessel in navigation (or to an identifiable group of such vessels in common ownership or control) that is substantial in terms of both its duration and its nature.⁹³ The U.S. Court of Appeals for the Fifth Circuit has established a test for ‘substantial connection’, which is usually referred to as a ‘rule of thumb’ but which in practice is more like a hard-edged qualifying rule, that an employee who spends less than 30 percent of his time in the service of a vessel in navigation does not qualify as a seaman under the *Jones Act*.⁹⁴

Whether those killed or injured on the *Deepwater Horizon* qualify as *Jones Act* seamen will depend very much on what they were employed to do. The Supreme Court has said that not all those ‘who breathe salt air’ are engaged in maritime employment.⁹⁵ However, if the *Deepwater Horizon* qualifies as a vessel, which seems likely, any worker contributing to its mission will qualify as a seaman if he had a substantial connection to the vessel in terms of duration and nature (at least 30 percent of his working time). Thus, for example, an inspector or surveyor temporarily on the vessel would not qualify.

⁸⁵ Fla. Stat. § 376.12(4),(5).

⁸⁶ Fla. Stat. § 376.12(2).

⁸⁷ Fla. Stat. § 376.12(3).

⁸⁸ Fla. Stat. § 376.031(7).

⁸⁹ 46 U.S.C. § 30104.

⁹⁰ *Lauritzen v Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953); *Hellenic Lines Ltd v Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

⁹¹ *Stewart v Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005).

⁹² *McDermott International Inc. v Wilander*, 498 U.S. 337, 355, 111 S.Ct. 807, 817 (1991).

⁹³ *Chandris Inc. v Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995); *Harbor Tug and Barge Co. v Papai*, 520 U.S. 548, 117 S.Ct. 1535 (1997).

⁹⁴ See e.g., *Roberts v Cardinal Services Inc.*, 266 F.3d 368, 375 (5th Cir, 2001); *Nunez v B & B Dredging Inc.*, 288 F. 3d 271, 277 (5th Cir, 2002).

⁹⁵ *Herb’s Welding Inc. v Gray*, 470 U.S. 414, 423, 105 S.Ct. 1421, 1427 (1985).

Although the *Jones Act* provides a wrongful death remedy to the dependants of a seaman who is killed in the course of his employment, recovery is limited to pecuniary losses such as loss of dependency and funeral expenses.⁹⁶ Similarly, punitive damages are not recoverable. Thus, for example, the parents of the deceased may recover nothing unless they were in some way dependent on the deceased. A child was born to the wife of a Transocean employee after he was killed; that child is not entitled to *Jones Act* compensation because it was never dependent on the deceased father.

The *Jones Act* also provides a survival action for ‘the surviving widow or husband and children’ of a deceased seaman and, if none, for the seaman’s parents.⁹⁷ The seaman’s own cause of action survives for the benefit of his estate. In effect, this means that damages are recoverable for any pain and suffering the seaman endured before death.

A bill has been introduced into Congress to make non pecuniary damages recoverable under the *Jones Act* when the seaman dies as a result of his injuries. It has passed the House of Representatives but not (yet) the Senate.

6.2 Outer Continental Shelf Lands Act/Longshore and Harbor Workers’ Compensation Act

OCSLA provides workers’ compensation remedies to those injured or killed while working on the OCS, which would otherwise be beyond the scope of operation of federal or state workers’ compensation regimes. OCSLA, 43 U.S.C. § 1333(b) provides that any person injured or killed ‘as a result of operations on the [OCS] for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources’ is entitled to compensation under the *Longshore and Harbor Workers’ Compensation Act* (LHWCA), 33 U.S.C. § 901ff. *unless* the person injured or killed is a member of a crew of any vessel. If the workers killed or injured on the *Deepwater Horizon* count as crew members of a vessel, they will be entitled to a remedy under the *Jones Act*. If not, they will be entitled to LHWCA compensation ‘picked up’ by OCSLA.

LHWCA itself confines compensation to those engaged in ‘maritime employment’.⁹⁸ There is no equivalent status requirement when LHWCA applies on the OCS by virtue of OCSLA. The only status requirement is that the worker be engaged in ‘exploring for, developing, removing, or transporting by pipeline’ natural resources.⁹⁹

Under the LHWCA, 33 U.S.C. § 905(a), the employer’s liability is exclusive, which means that the employer cannot be liable in damages under any other theory. However, LHWCA, 33 U.S.C. § 905(c) provides that an employee entitled to LHWCA benefits by virtue of OCSLA, 43 U.S.C. § 1333(b), may bring an action for damages if his injuries were caused by ‘the negligence of a vessel’. For these purposes, ‘a vessel’ is defined to include both the vessel itself and its owner or charterer.¹⁰⁰ Thus, any non-seaman (other than a Transocean employee) injured on the *Deepwater Horizon* may bring an action for damages alleging negligence by Transocean. Any such action would, however, fall within Transocean’s limitation suit, which is described below.

If such a case is brought against Transocean and Transocean is entitled to a contractual indemnity from the plaintiff’s employer, it would be entitled to enforce that indemnity. Unlike its non-OCS counterpart (33 U.S.C. § 905(b)), 33 U.S.C. § 905(c) does not prohibit enforcement of indemnities given by the injured worker’s employer.¹⁰¹ The end result would thus be that the worker’s employer would be responsible for the damages paid to the worker, notwithstanding the immunity conferred by the LHWCA, 33 U.S.C. § 905(a).

The Fifth Circuit has also held that an LHWCA employee may sue non-vessel third parties under general maritime law tort principles.¹⁰² The same is presumably true of OCS workers entitled to LHWCA benefits by operation of

⁹⁶ *Miles v Apex Marine Corp.*, 498 U.S. 19 (1990).

⁹⁷ See *Federal Employers’ Liability Act*, 45 U.S.C. § 59, ‘picked up’ for seamen by the *Jones Act*, 46 U.S.C. § 30104(a).

⁹⁸ 33 U.S.C. § 902(3).

⁹⁹ *Mills v Director OWCP*, 877 F. 2d 356, 362 (5th Cir, 1989); *Becker v Tidewater Inc.*, 586 F. 3d 358, 366 (5th Cir, 2009).

¹⁰⁰ *Longshore and Harbour Workers’ Compensation Act*, 33 U.S.C. § 902(21).

¹⁰¹ See *Becker v Tidewater Inc.*, 586 F. 3d 358, 366 (5th Cir, 2009).

¹⁰² *Melerine v Avondale Shipyards*, 659 F. 2d 706, 708 (5th Cir, 1981); *Harrison v Flota Mercante Grancolombiana*, 577 F. 2d 968, 977 (5th Cir, 1978); *Becker v Tidewater Inc.*, 335 F. 3d 376, 387 (5th Cir, 2003).

OCSLA. Thus, any non-seaman workers on the *Deepwater Horizon* could bring actions for damages against Halliburton or Cameron International, provided that they were not employed by those companies.

6.3 The Death on the High Seas Act (DOHSA)

The *Death on the High Seas Act* (DOHSA) provides a cause of action for the dependants of any 'individual' killed on the high seas 'by a wrongful act, neglect or default'.¹⁰³ For these purposes, the 'high seas' begin at three nautical miles. Because the remedies available under DOHSA are very limited, it seems unlikely that any of the dependants of those killed on the *Deepwater Horizon* will try to rely on them. Dependants of those who qualify as seamen will have a *Jones Act* remedy; dependants of other workers will have an OCSLA/LHWCA workers' compensation remedy. Only if one of the deceased was neither a *Jones Act* seaman nor a worker engaged in 'exploring for, developing, removing, or transporting by pipeline' natural resources will it be necessary for the dependants to rely on DOHSA.

Damages under DOHSA are confined to pecuniary losses.¹⁰⁴ Although 46 U.S.C. § 30308(a) seems by its plain words to preserve the application of State law, the Supreme Court has held that the DOHSA remedy is exclusive, pre-empting any state statute that purports to apply on the high seas.¹⁰⁵ The Supreme Court has also held that DOHSA cannot be supplemented by any general maritime law remedy.¹⁰⁶

DOHSA, 46 U.S.C. § 30305, provides for survival of a deceased person's cause of action only if he/she brought suit before his/her death. For those killed instantly or soon after they were injured, like the 11 who died on the *Deepwater Horizon*, there can obviously be no survival action and thus no recovery for the deceased's pain and suffering. In *Dooley v Korean Air Lines*,¹⁰⁷ the Supreme Court held that the restrictive nature of the survival remedy under 46 U.S.C. § 30305 makes it clear the Congress intended that there should be no general maritime law survival remedy for deaths on the high seas.

The Supreme Court has not (yet) held that DOHSA pre-empts state survival statutes for deaths on the high seas, but a combination of *Dooley* and *Tallentire* makes it fairly clear that that would be the Court's holding. The US Court of Appeals for the Fifth Circuit so held in *Jacobs v Northern King Shipping Co. Ltd.*¹⁰⁸

A bill has been introduced into Congress that would make damages for non pecuniary losses recoverable under DOHSA. The bill would also provide that the Act only begins to apply at 12 nautical miles. It has passed the House of Representatives but not (yet) the Senate.

7 Limitation of Shipowners' Liability Act

The *Limitation of Shipowners' Liability Act* provides that the owner (or demise charterer) of a vessel is entitled to limit its liability to the value of the vessel and pending freight.¹⁰⁹ Although this legislation is popularly known as the *Limitation of Shipowners' Liability Act*, the rights it confers are not confined to the owners of ships. The Act uses the word 'vessel', and it has been applied to all kinds of watercraft. The U.S. Court of Appeals for the Eleventh Circuit has even held that a jet ski is a 'vessel' for the purposes of the Act.¹¹⁰ There can be little doubt that the Act applies to the *Deepwater Horizon*.

For commercial vessels, the limit of the vessel owner's liability to pay claims for personal injury or death is \$420 times the tonnage of the vessel, if that figure is greater than the value of the vessel plus pending freight.¹¹¹ For the *Deepwater Horizon*, that would produce a limitation fund of \$13 686 960. That sum is smaller than the sum of \$26 764 083 that was outstanding in lease payments from B.P. to Transocean at the time of the explosion, which

¹⁰³ 46 USC §§ 30302.

¹⁰⁴ 46 U.S.C. § 30303.

¹⁰⁵ *Offshore Logistics Inc v Tallentire*, 477 U.S. 207 (1986). (DOHSA pre-empts Louisiana state wrongful death statute).

¹⁰⁶ *Mobil Oil Corp. v Higginbotham*, 436 U.S. 618 (1978).

¹⁰⁷ 524 U.S. 116 (1998).

¹⁰⁸ 180 F. 3d 713 (5th Cir, 1999).

¹⁰⁹ 46 U.S.C. § 30505.

¹¹⁰ *Keys Jet Ski Inc. v Kays*, 893 F. 2d 1225 (11th Cir, 1990).

¹¹¹ 46 U.S.C. § 30506(b).

Transocean is treating as 'pending freight' for these purposes. Transocean has petitioned for limitation of liability to the sum of \$26 764 083. This limit of liability applies only to claims for personal injury, death and property damage.

A vessel owner seeking limitation of liability under the Act must bring a civil action in federal district court within six months after receiving written notice of a claim (any claim) against it.¹¹² A limitation petition of this kind can only be brought in federal court.¹¹³ State courts do not have jurisdiction to hear petitions under the Act.

When a vessel owner makes a limitation petition in federal district court, it is required to constitute a limitation fund by paying into court an amount equal to its interest in the vessel or by providing some approved security equivalent in value.¹¹⁴ Once the vessel owner has constituted the limitation fund in this way, the federal court issues an order, known as a monition, that brings to an end any other claims and proceedings against the vessel owner or its property in relation to the same incident.¹¹⁵ Transocean initially filed its petition in the U.S. District Court for the Southern District of Texas in Houston, but the case was transferred to the U.S. District Court for the Eastern District of Louisiana in New Orleans, where all the other federal cases against other defendants have been consolidated. The monition in these proceedings will have brought to an end any state court proceedings against Transocean, but not the other defendants.

In order to establish its right to limit, the vessel owner must prove that the incident occurred without its 'privity or knowledge'.¹¹⁶ For a corporate shipowner such as Transocean, that means that there must be no fault at a corporate managerial level.

A bill has been introduced into Congress that would completely abolish limitation of liability. It has passed the House of Representatives but not (yet) the Senate.

8 Conclusion

The *Deepwater Horizon* blowout was the worst oil spill in U.S. history. At the time of writing (February 2011), the GCCF reports having received 488 354 claims and having paid 168 632 claimants a total of \$3.3 billion, almost all of which was for lost earnings or profits – i.e. purely economic losses.¹¹⁷ Of that \$3.3 billion, \$2.5 billion has been in what the GCCF calls Emergency Advance Payment. The claimant does not have to release B.P. from liability in order to receive an Emergency Advance Payment. In contrast, in order to receive a final payment, the claimant has to release B.P. and all other defendants from liability. So far, only \$800 million has been paid by the GCCF way of final payment. These figures are widely interpreted to mean that claimants have used the GCCF fund to tide them over the immediate aftermath of the blowout but intend to litigate their final claims. In many cases, it is too early to tell the magnitude of a claimant's eventual loss. For example, the catch of Louisiana shrimp and oysters may be affected for years to come. The litigation before Judge Barbier and in state courts will also continue for years to come, not least because of the Byzantine complexity of the relevant laws, which have been sketched out here.

¹¹² 46 U.S.C. § 30511(a).

¹¹³ *Lewis v Lewis & Clark Marine Inc.*, 531 U.S. 438, 452, 121 S.Ct. 993, 1003 (2001).

¹¹⁴ 46 U.S.C. § 30511(b).

¹¹⁵ 46 U.S.C. § 30511(c); Fed. R. Civ. P. Supp. Adm. Rule F(3).

¹¹⁶ 46 U.S.C. § 30505(a).

¹¹⁷ All figures in this paragraph from Gulf Coast Claims Facility, *Gulf Coast Claims Facility Overall Program Statistics (Status Report as of 9 February 2011)* <http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf>.