

(New DUKW Regulations, con't from p. 1)

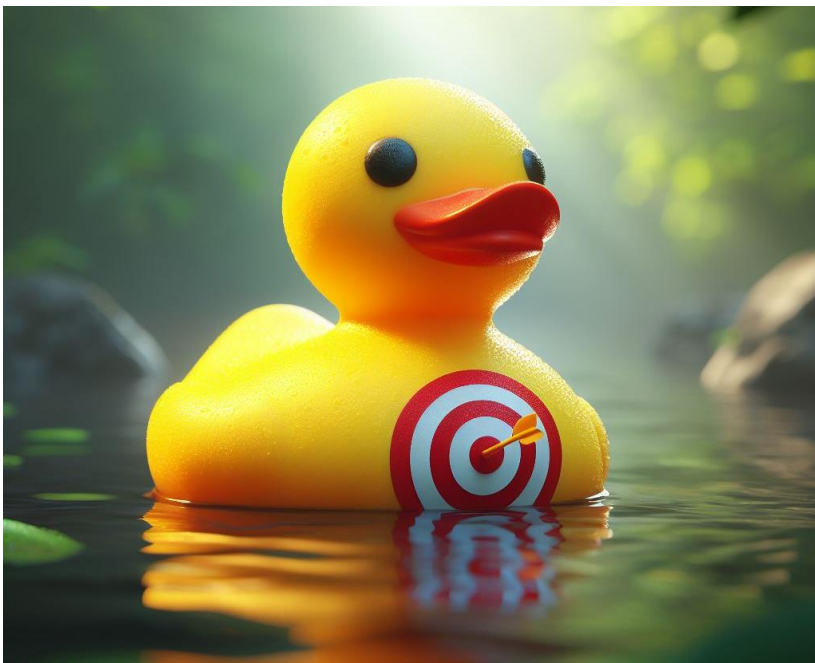
Subsequent to an investigation of the STRETCH DUCK 7 accident, Congress included in Section 11502(f) of the James M. Inhofe National Defense Authorization Act for Fiscal 2023 (“NDAA 2023”) a mandate for additional safety measures for DUKWs. The NDAA 2023 required the Coast Guard to issue interim safety features while the Coast Guard determined the appropriate nature and scope of broader permanent regulations. Subsequently, on September 11, 2023, the Coast Guard promulgated the interim regulations. Because the NDAA 2023 required that the interim rules be implemented without notice and comment, the interim rule promulgated on September 11, 2023, was effective on September 11, 2023.

The NDAA 2023 defines DUKW vessels as vessels that use, modify, or derived from the General Motors DUKW-353 design and operates as a small passenger vessel in waters subject to the jurisdiction of the United States.

The interim regulations target two DUKW weaknesses: egress and flooding.

Requirements 1 and 2 require removal of canopies and window coverings for the vessels for waterborne operations or that canopies be installed such that horizontal or vertical escape is possible in the event of flooding or sinking.

Requirements 3 through 8 are designed to address flooding and sinking of the DUKWs. These requirements include that all unnecessary access plugs through hull penetrations be permanently eliminated, that independently powered bilge pumps capable of dewatering at the volume of the largest remaining penetration in order to supplement an equal or greater operable Higgins pump, installation of at least four independently powered bilge alarms, inspection of the vessel after any change to the through hull penetration array, and the installation of an LED light that activates automatically in an emergency.



Operators must comply with this rule within 120 days of the date of interim rule publication on September 11, 2023. Therefore, the compliance deadline is January 9, 2024. Compliance with the rule will be determined through the ordinary vessel inspection process.

Contemporaneously with issuing this regulation, the USCG has requested information from the public regarding DUKWs. Any comments will be due to the United States Coast Guard on December 11, 2023.

Companies operating or insuring these vessels may wish to stay tuned to the developing body of regulations to ensure compliance and avoid similar tragedies in the future.



Insufficient Evidence: When Wake Was Not Negligent

By *Melanie Huffines*

The shipping company Maersk Line, Ltd. and its vessel M/V MAERSK IDAHO were recently held not liable for the death of Police Chief Christopher Reed (City of Kemah), after a six-day bench trial in the Southern District of Texas. Mr. Reed’s wife and children brought suit against Maersk and the container ship after Reed was knocked overboard when crossing the Houston Ship Channel behind the ship. The suit alleged, *inter alia*, negligence and that the vessel violated 33 C.F.R. § 164.11 (requiring vessels over 1600 GRT to set their speed with consideration of the damage that the wake might cause), and the Inland Navigation Rules, including Rule 5 (requiring a proper lookout), and Rule 6 (safe speed). Plaintiffs alleged these violations triggered The Pennsylvania Rule and made actions of the vessel negligence *per se*. The court found that plaintiffs failed to prove by a preponderance of the evidence that the MAERSK IDAHO violated 33 C.F.R. § 164.11, Rule 5, Rule 6, or that the defendants were otherwise negligent or that the defendants’ actions were the legal cause of Mr. Reed’s death.

The facts surrounding the incident as found by the court were as follows: on June 7, 2019, Mr. and Mrs. Reed were the occupants of a 22’ center-console fishing boat in Galveston Bay. Mr. Reed was the sole operator, and was fishing while Mrs. Reed read magazines. The Reeds decided to change locations, to an area Mr. Reed not visited before, which involved crossing the Houston Ship Channel from east to west. The MAERSK IDAHO was moving through the channel at the same time, and Mr. Reed directed his vessel about a half-mile behind the ship. Mr. Reed cleared the starboard wake field, but while encountering the port-side wake field, he fell overboard. The Reeds were not wearing lifejackets and there was no throwable personal-flotation device; Mrs. Reed was only able to throw a dock line in an attempt to assist, but Mr. Reed ultimately did not resurface.

During trial, the court heard testimony from many witnesses, including experts for both sides, but relied heavily on the testimony of the Captain of the vessel

“Accordingly, due to plaintiffs’ failure to provide evidence of unreasonable actions taken by Maersk or the MAERSK IDAHO under the circumstances, the plaintiffs were awarded nothing from defendants.”

Reed v. Maersk Line, Ltd., No.3:19-cv-238, 2023 U.S. Dist. LEXIS 1599 (S.D. Tex. Jan. 5, 2023)

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and expert opinion of defense naval-architecture expert Dr. Dick Yue, to conclude that there was no negligence, or legal causation, on the part of Maersk or the MAERSK IDAHO, as related to Mr. Reed's untimely death. The Captain testified the wake was 1'-2' in the area where Mr. Reed fell overboard, which comported with the testimony of Dr. Yue, whose calculations showed the wake could not have been more than 2.2' high. There was no other credible testimony provided to counter Dr. Yue's calculations or the Captain's testimony. Accordingly, the court concluded the wake was not excessive, unusual, or in violation of 33 C.F.R. § 164.11.

Nor did any of the testimony or evidence show violations of the Inland Navigation Rules. The court found that a lookout was posted on the MAERSK IDAHO on the date in question, and when the Reeds' boat came close, the ship blew her danger signal as a warning. The Captain testified the speed of 15 knots at the time of the incident was reasonable, and plaintiffs presented no evidence to refute this testimony, nor any evidence of what speed would have been safe under the conditions. Plaintiffs evidence showed the vessel transited that same channel on prior occasions at less than 15 knots, but nothing was provided to substantiate the position that 15 knots was unreasonable. Therefore, the court found no violation of Rule 5 or 6.

Accordingly, due to plaintiffs' failure to provide evidence of unreasonable actions taken by Maersk or the MAERSK IDAHO under the circumstances, the plaintiffs were awarded nothing from defendants.

However, this case also contains a cautionary tale regarding representations to the court during trial. Despite receiving a defense verdict, defendants were sanctioned for delay of the trial due to defendants' misrepresentations of the Captain's availability to testify immediately after the close of plaintiffs' evidence. The trial was postponed in the afternoon of one day, to the morning of the next. Additionally, it was revealed that the Captain, on a subsequent voyage, took video of the MAERSK IDAHO's wake in the Houston Ship Channel, which was not provided to opposing counsel before his trial testimony. The court was not impressed with these revelations, and sanctioned defendants. No court costs were awarded to defendants and they were ordered to pay for the full cost of the trial transcript, as opposed to splitting costs with plaintiffs.

Practice Reminder: Reporting Sexual Misconduct on U.S. Vessels

The Coast Guard has released [Marine Safety Information Bulletin 01-23 "Reporting sexual Misconduct on U.S. vessels"](#) to emphasize the Coast Guard's commitment to investigating and pursuing appropriate enforcement actions for all reports of sexual misconduct on U.S. flagged vessels. Recent changes to the law now require the responsible entity of a vessel, defined as the owner, master, or managing operator, to report any complaint or incident of harassment, sexual harassment, or sexual assault to the Coast Guard that violates company policy. The reporting options include a CGIS Tips App, and/or the email address CGISTIPS@uscg.mil which can be used by all reporting sources, including bystanders and survivors, who have access to a smart phone or the internet. The Coast Guard also maintains a 24/7 watch, which can field reports of sexual misconduct via the National Command Center (NCC) phone number at 202-372-2100.



It's Murky: Seasonal Swampland and Admiralty Jurisdiction

By Gregory Burts

Angelle and his grandson Thibodeaux (“Plaintiffs”) were harvesting crawfish in Lost Lake, a “perched lake situated in a crook of undeveloped swampland between the Atchafalaya River and the Butte LaRose Cutoff Channel,” when Bernhard (“Defendant”) came alongside on his johnboat and asserted that they were trespassing and illegally trapping on his property. A verbal altercation ensued, but Angelle and Thibodeaux were undeterred, and continued checking and rebaiting their crawfish traps until they were ordered to leave by the local sheriff, forcing them to abandon some of their traps.

Plaintiff’s sued, seeking “monetary damages for lost profits and conversion of their crawfish traps” under 28 U.S.C. 1333. Defendant filed a motion to dismiss arguing that admiralty jurisdiction was lacking over Lost Lake because it “does not form an interconnected highway of commerce” due to its seasonal communication with the Atchafalaya River. The Court was unpersuaded by this argument.

First, the Court correctly noted, seasonal navigability has never been part of the Fifth Circuit’s analysis, indeed, water “need not be present” all year round for admiralty jurisdiction to exist. Moreover, the Court pointed out that Lake Rycade - “a nearby body of water in Basin with virtually identical relevant characteristics to Lost Lake” - was found navigable. Second, the Court found that Lost Lake was “accessible through a short canal into the Atchafalaya River for roughly one-third of the year,” which (importantly) coincided with crawfish season. Finally, because Lost Lake connects to the Atchafalaya River which connects to the Gulf of Mexico, the Court found the waterbody to be navigable-in-fact, and therefore navigable-in-law, and denied Defendant’s motion to dismiss. *Thibodeaux v. Bernhard*, 2023 U.S. Dist. LEXIS 100394 (W.D. La. June 8, 2023)



OSHA Finds that Maersk Retaliated Against Seaman, Awards More than \$700,000 in Damages

By Adam Deitz

July 20, 2023 – The U.S. Department of Labor’s Occupational Safety and Health Administration determined Maersk Line’s termination of a seaman violated the federal Seaman’s Protection Act (46 U.S.C. § 2114) (“SPA”).

The Seaman’s Protection Act prohibits persons from retaliating against seamen for engaging in certain protected activities pertaining to compliance with maritime safety laws and regulations, including reporting maritime safety issues to the U.S. Coast Guard or any other federal agency. Under the SPA, no person may discharge or otherwise retaliate against a seaman because the seaman engaged in any protected activity. Complaints for violation of the SPA are filed with OSHA, which assigns an administrative investigator. If the OSHA investigator finds reasonable cause to believe that unlawful retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include an order requiring respondent

(Maersk Retaliation, con't from p.5)

to provide reinstatement, back pay, compensatory damages, punitive damages not exceeding \$250,000, other remedies for the unlawful retaliation (such as a neutral reference), and reasonable attorney fees and costs.

Among the various activities protected by the SPA is:

“Reported (or is about to report) information relating to a violation of maritime safety laws or regulations to the USCG or other appropriate federal agency or department.”

In Maersk’s case, investigators learned the seaman reported a variety of safety concerns about the ship, SAFMARINE MAFADI, to the Coast Guard in December 2020. Maersk responded by suspending the seaman in December 2020 and then terminating the seaman in March 2021. Maersk asserted that the seaman violated Maersk’s internal policy against making the complaint to the Coast Guard without notifying the company first.

OSHA found that, under the SPA, seamen are permitted to report concerns directly to the USCG and are not required to follow any company policy that requires employees to report first to the company.

For this violation, OSHA ordered Maersk to reinstate the seaman and pay \$457,759 in back wages, interest, compensatory damages and \$250,000 in punitive damages. The company must also revise its policy to not prohibit seamen from contacting the USCG or other federal, state or local regulatory agencies before first notifying the company.



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