

Dock Damages & Maritime Lien Arrest and Foreclosure Procedures:

A unique maritime
law tool for collecting
tort damages
(and unpaid bills).

PRESENTED BY

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June 26, 2025

CAVEATS AND LAWYER TALK:

- This information does not constitute or create an attorney-client relationship.
- These slides are not legal advice, are not intended to cover all laws or circumstances, and should not be relied upon as legal advice.
- Applicable laws vary among different jurisdictions, and most legal situations are “fact driven” anyway.
- You should seek the advice of a licensed attorney for particular legal issues.
- Keep hypotheticals hypothetical.

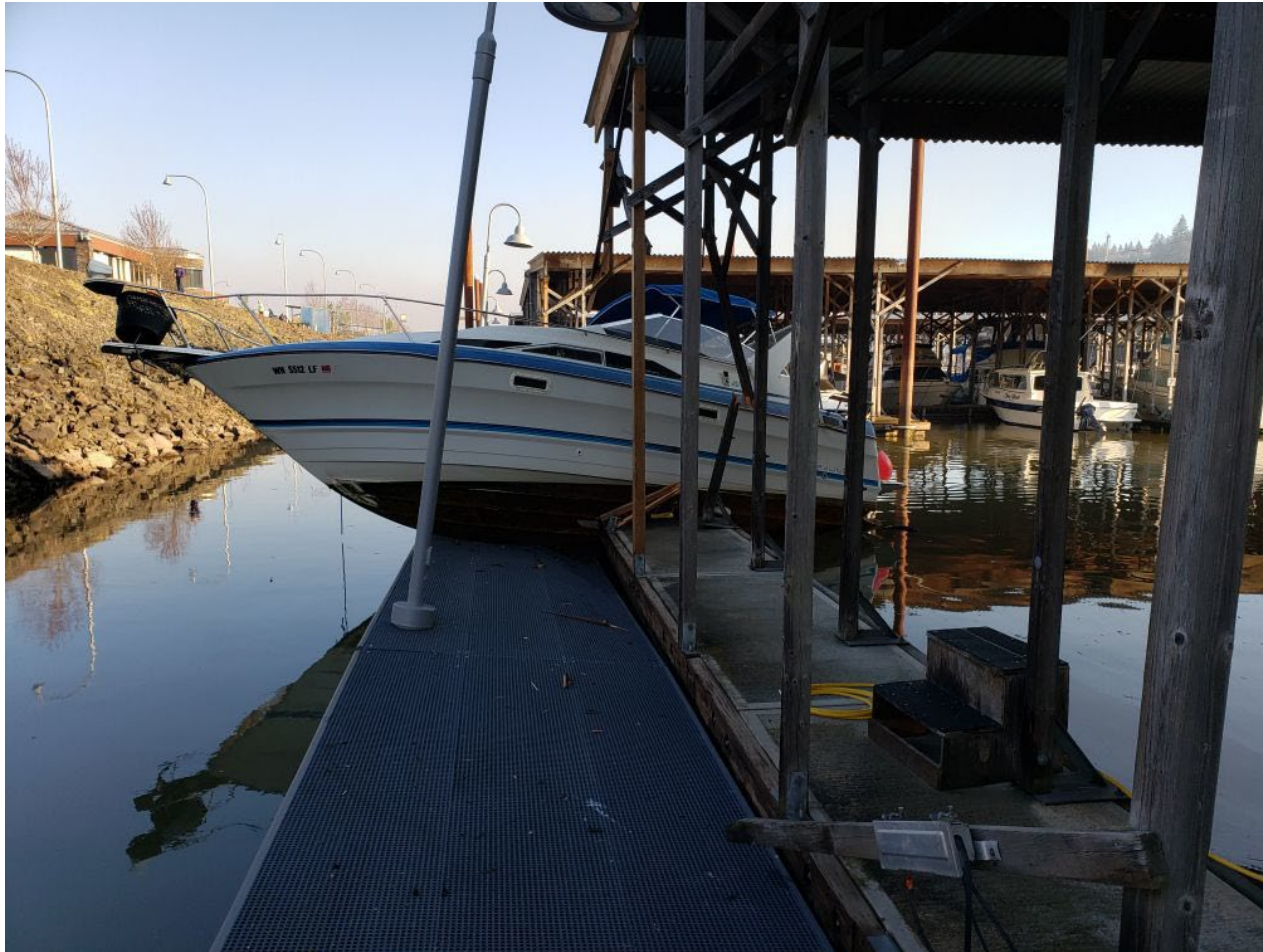
PORT OF KALAMA MARINA APRIL 13, 2020 SHIP WAKE INCIDENT







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THE COLOMBIAN 4/13/2020 - SHIP WAKE CAUSES \$1 MILLION DAMAGE AT PORT OF KALAMA MARINA.



LEGAL DUTIES OF DOCK AND WHARF OWNERS

- Exercise due diligence to:
 - maintain berths in a safe condition
 - maintain wharves and piers in a state of repair to resist effects of normal maritime activity near them
 - remove obstructions dangerous to vessels



- Exercise due diligence to:
 - provide mooring cleats, bollards or other fittings that will not fail, even in a severe storm
 - warn vessels against hidden hazards not reasonably apparent



MARITIME COLLISION LAW HAS SPECIAL RULES FOR ALLISION AND WAKE DAMAGE CASES

- Presumptions in collision law directed at the issue of fault.
- Presumptions particularly apply to allisions
 - moving vessels collide with an anchored vessel, navigational structure or dock.
- Presumptions change the burden of proof and burden of persuasion.

THE OREGON RULE

- When a vessel under its own power collides with a stationary object, the moving vessel is presumed to have been negligent and at fault.
- Burden shifts to vessel to produce evidence proving:
 - absence of fault, or
 - inevitable accident.

THE LOUISIANA RULE

- Vessel that drifts from its anchorage or breaks its moorings causing damage to other vessels or structures is presumed at fault.
- Vessel must prove inevitable accident, or *vis major* which human skill and precaution could not have prevented.
 - Hurricane cases - could breakaway have been prevented?
 - *Port of Portland v. Gulf Oil* - shipowner proved tanker was properly moored and sole cause of breaking loose in windstorm was defective mooring bollard.

PRESUMPTIONS IN MARITIME COLLISION LAW

- Presumptions derive from common-sense observation that moving vessels do not usually collide with stationary objects unless the vessel is mishandled in some way.
- Also, "any evidence of actual negligence, or lack of it, is likely to be known only to the persons on board, who are in the best position to either keep damaging evidence hidden, or bring favorable evidence forward."

Evidence presumptions

- Alteration or erasure in vessel logbooks creates strong presumption the erased matter was adverse to the vessel.
- Unexplained failure to produce a log book, bell book or other material shipboard records creates adverse inference against the vessel.
- Shipowner failure to call a material witness within its control creates inference witness's testimony would have been adverse.

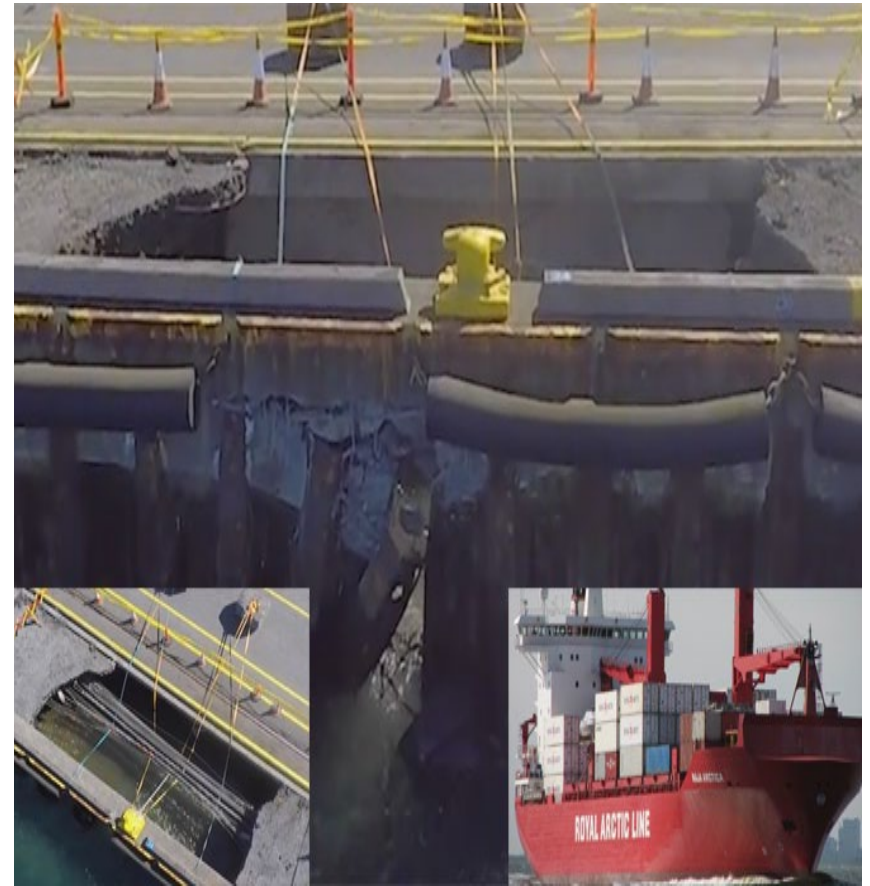
CREW OF THE THREE MASTED SAILING
VESSEL *PYTHOMENE* AT SEATTLE, 1904



OREGON AND LOUISIANA PRESUMPTIONS DO NOT APPLY WHEN:

1. Stationary object is not visible.
2. Object struck has obligation to keep waterway open - draw bridges, overhanging cranes.
3. Stationary vessel or object also guilty of statutory or other fault.
4. Contact between a vessel and a pier, dolphin or other stationary object occurred during "**normal**" mooring procedures, and the object should have been able to withstand the handling of the vessel during normal procedures, without damage.

MOORING RELATED DOCK DAMAGE – “NORMAL” MOORING VS. DETERIORATED OR INADEQUATE STRUCTURES



125 FT YACHT RAMS DOCKS AND VESSELS AT PORT ANGELES, 2019



THE PENNSYLVANIA RULE

- Where a vessel violates a statute or regulatory rule, the violation is presumed to have contributed to the collision or allision.
- To escape liability, the vessel must prove not only that the violation did not cause the collision, but *could not have contributed to the collision*.
 - Violation could not have been a cause "within the bounds of reasonable probability."

THE PENNSYLVANIA RULE ALSO APPLIES TO DOCK OWNERS

- Vessel allided with pier.
- Wharf-owner's failed to place red lights on seaward corners of piers, as required by local port regulations, found 10% at fault.
- Could not establish that this a statutory violation that did not contribute in some way to the allision.



COMPARATIVE FAULT ALSO APPLIES IN ALLISION CASES

- Vessel allided with bridge, damaging electrical cables.
- Court apportioned damages 50%, finding bridge owner failed to maintain fendering that would have avoided damage from foreseeable allisions.



WAKE DAMAGE

- Cases commonly involve ship wakes and suction damaging moored vessels and shore structures.
- Maritime collision law applies, *Pennsylvania* Rule applies, but *Oregon* Rule presumption does not.
- Vessels obligated to proceed carefully to avoid creating unusual swells or suction, consider effects of speed through water and take precautions to avoid causing damage.

WAKE DAMAGE

- Piers and docks must be kept in proper condition, and vessels properly moored, to resist ordinary and normal swells. Wash from passing vessels must be anticipated and guarded against.
- Only unusual swell or suction which cannot be reasonably anticipated furnish the basis for a claim.
- Once dock is proven "seaworthy", offending vessel must prove injury could not have been prevented by adopting practical precautions.

- No strict liability for wake damage: reasonableness under the circumstances to avoid damaging wakes.
- Ability to safely steer the ship and reasonableness of hiring tugs to assist are factors.
- Ships not liable for damage to improperly moored vessels, or to weak or defective structures.



COMPARATIVE FAULT ALLOCATION

- Vessel creates excessive wake:
 - Excessive wake/suction caused slamming damage by moored vessel to a terminal's wharf
 - The vessel passing a moored ship at excessive speed has the burden to prove that its fault was not the sole cause of the damage.
 - Court apportioned fault 50% to moving vessel, 10% to moored vessel for improper mooring lines, and 40% to terminal for construction weakness.



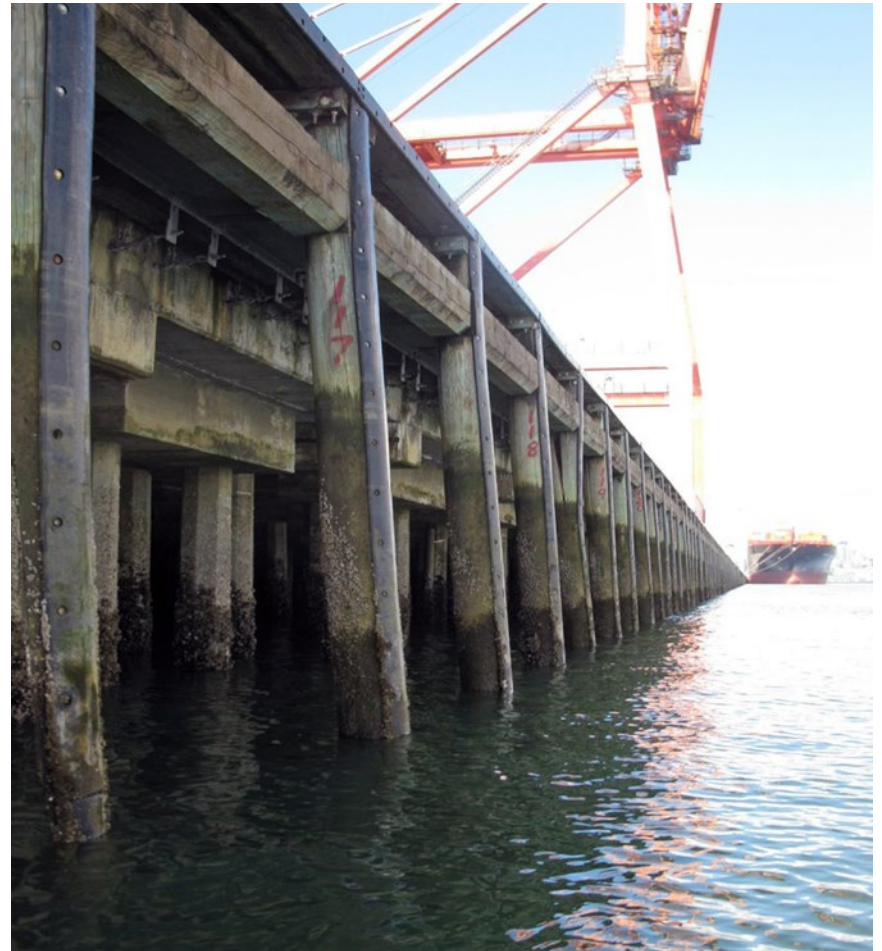
THE DREADED “NEW FOR OLD” DEPRECIATION RULE

- Dock owner's damages are reasonable cost to repair or replace, plus loss of use costs.
- But credit allowed against cost of repairs for depreciation of "non--integral" structures with defined life expectancies, after which they must normally be replaced irrespective of any accidental injury.
- Repairs may improve the original property in terms of strength or longevity, or for depreciating property, having a new item in place of an old one.



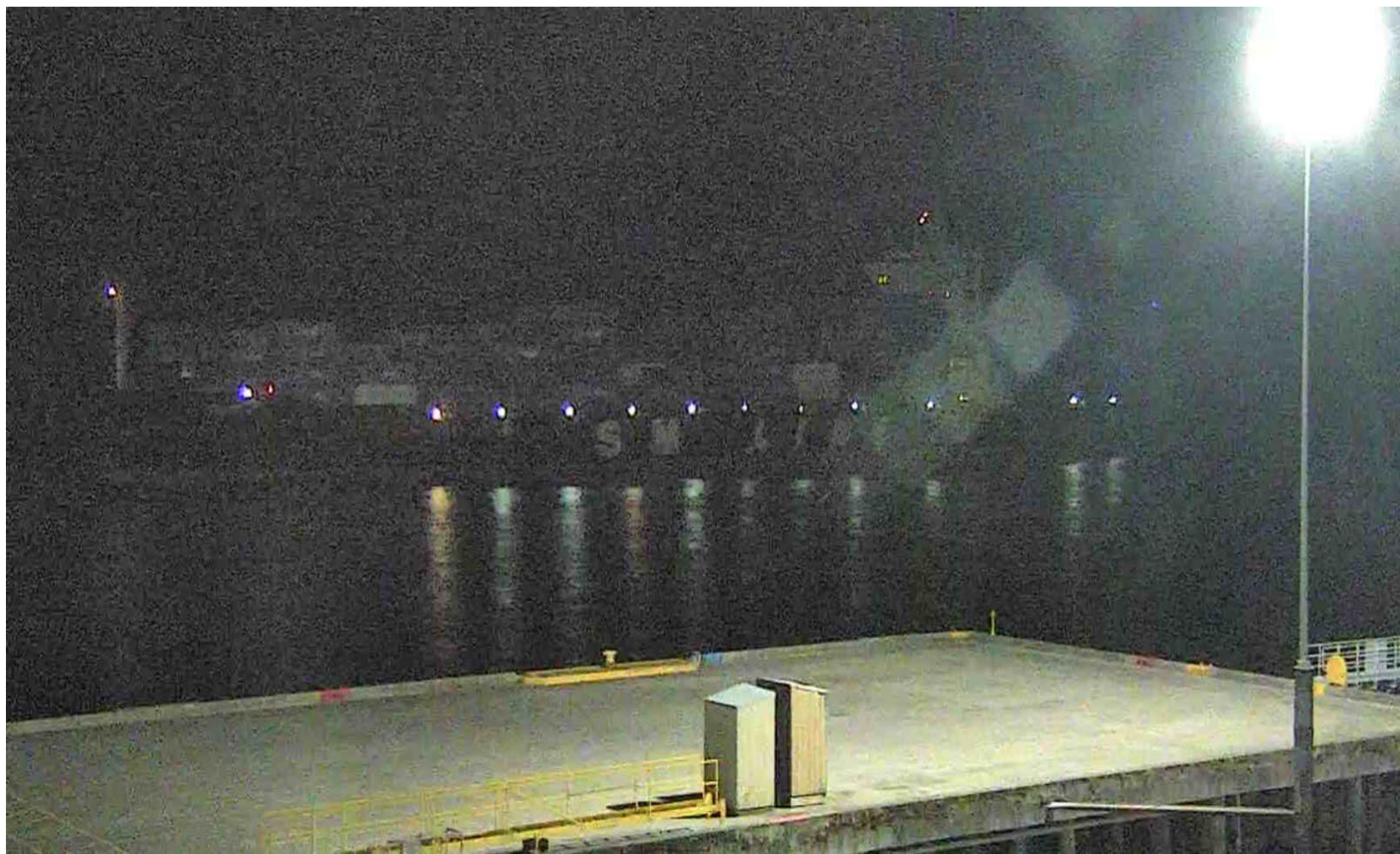
THE DREADED “NEW FOR OLD” DEPRECIATION RULE

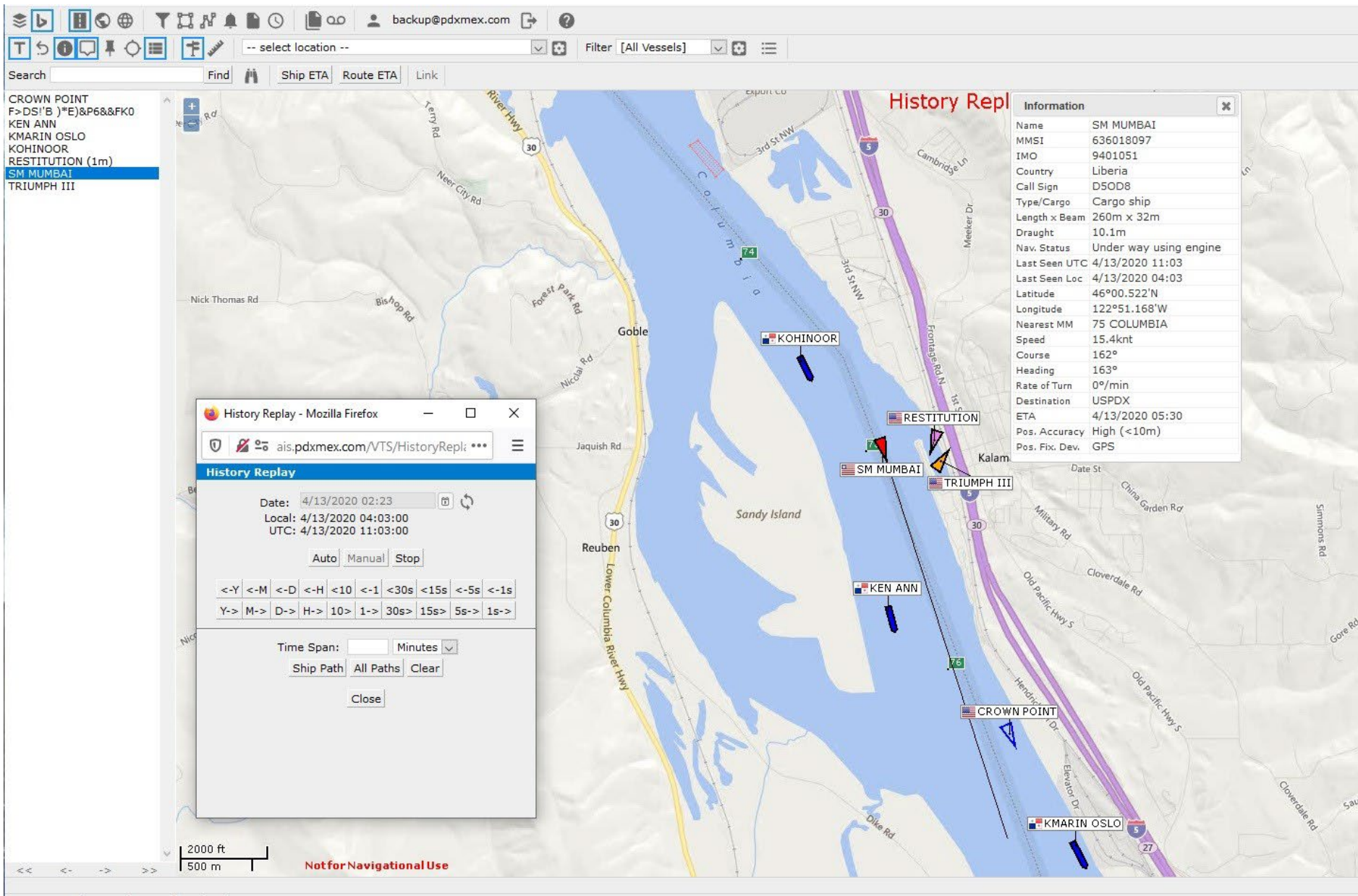
- Fender pilings and dolphins expected to deteriorate and require replacement after a given number of years.
- electrical and telephone cables with expected useful life.
- Repair methods resulting in improvements to longevity or value (e.g., steel or concrete pilings in place of wood pilings).



“NEW FOR OLD” DEPRECIATION







M/V SM MUMBAI
260 M X 32 M, 40,030 GT (50,849 DWT)



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Of Attorneys for Plaintiff Port of Kalama

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**Port of Kalama, a Washington public port,
and John Does 1 through 100,**

Plaintiffs,

vs.

**M/V SM MUMBAI, her engines, tackle,
apparel, furniture, equipment and all other
necessaries appertaining and belonging
thereto, *in rem*; KLC SM CO LTD, Korea
Tonnage No. 19 Shipping Co., dba SM Line
Corporation and SM Line Corporation, *in*
personam,**

Defendant.

No.

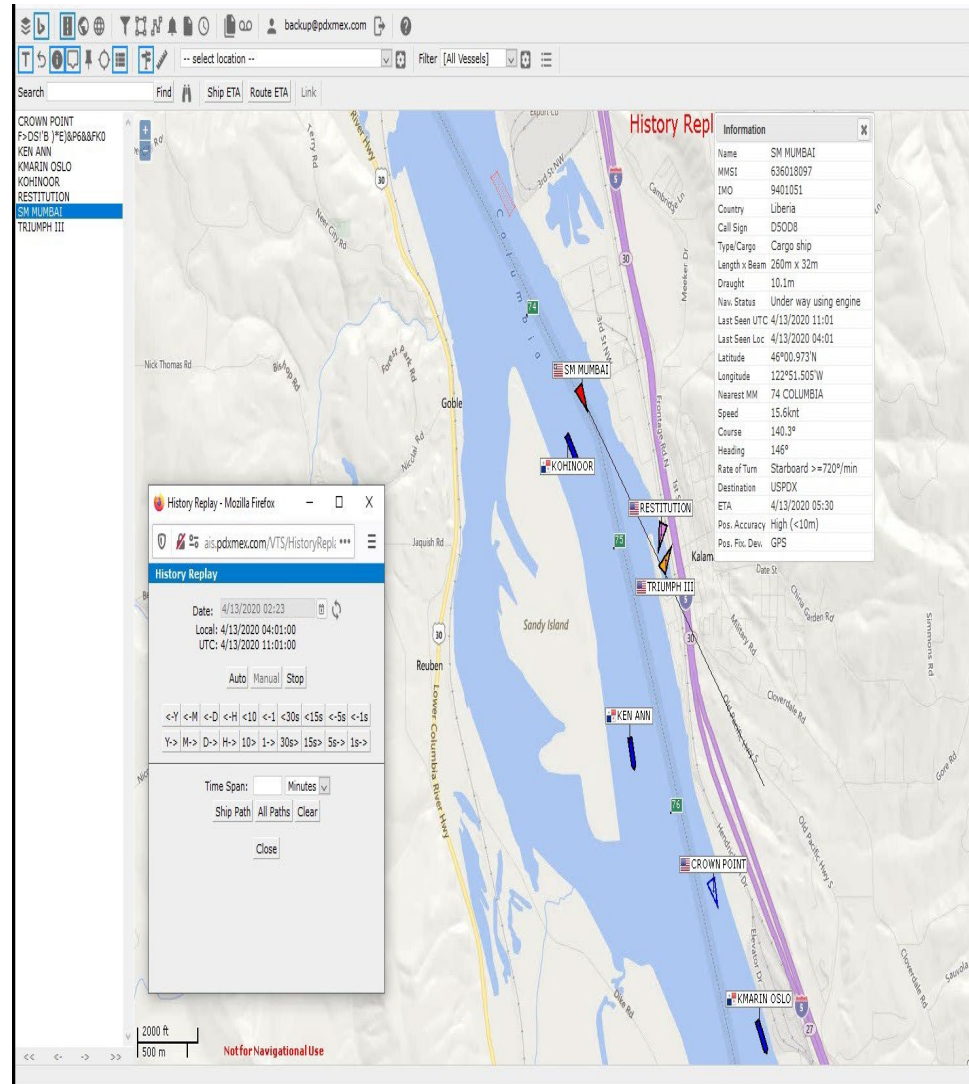
IN ADMIRALTY

COMPLAINT IN REM AND
IN PERSONAM
(Maritime tort)

Plaintiff, Port of Kalama, by its attorneys, Schwabe, Williamson & Wyatt, for its
complaint against Defendants M/V SM MUMBAI, *in rem*; and Korea Tonnage #19 Shipping
Co., dba SM Line Corporation and SM Line Corporation, *in personam*, in a cause of action for a
maritime lien arising from maritime tort, on information and belief, alleges as follows:

///

- No ship at Kalama Export grain dock
- So Col. River Pilot orders full speed ahead
- Passes Kalama area at almost 16 kts (rather than 10 kts)
- OBMP – pilot negligent, orders 60 day license suspension
- Ship responsible for pilot actions



OTHER PROBLEMS MARITIME LIENS CAN ADDRESS

- Unpaid moorage or dockage
- Other unpaid bills
- Tort damages
- Lack of jurisdiction



SUPPLEMENTAL ADMIRALTY RULES

- Rule A: Scope and application
- Rule B: *In personam* attachments
- Rule C: *In rem* arrests
- Rule D: Possessory title actions
- Rule E: Procedures
- Rule F: Limitation of Liability
- Rule G: Forfeiture *in rem*



WHY ARREST AND/OR ATTACH PROPERTY?

- a) To enforce or foreclose a maritime lien
- b) To acquire jurisdiction;
- c) To obtain security for a claim; and
- d) To seize property in connection with the enforcement of a judgment.

RULE B

A Rule B attachment permits pre-judgment seizure of a defendant's property.



REQUIREMENTS FOR RULE B

- 1) *In personam* prima facie maritime claim against defendant;
- 2) Defendant cannot be “found” in the district;
- 3) Defendant’s property is or will soon be present in the district;
- 4) There is no statutory or maritime law bar to attachment.

RULE B PROCEDURES

- Verified Complaint alleging Rule B elements
- Affidavit describing efforts to locate Defendant in district and that to affiant's knowledge, cannot be found
- *Ex parte* motion for writ
- If *prima facie* burden met, court will issue writ

ALTER EGO LIABILITY

When can the assets of Company A be attached for claims against Company B?



ALTER EGO FACTORS

- Disregard of corporate formalities
- Inadequate capitalization
- Intermingling of funds
- Overlap in ownership and directors
- Shared office space
- Degree of discretion exercised by allegedly dominant corporation
- Existence of arm's length dealings
- Treatment of companies as independent profit centers
- Payment or guarantees of dominated corporation's debts
- Intermingling of property

ADMIRALTY RULE C

A Rule C arrest is an *in rem* action brought in federal court against the vessel to obtain payment on the facility's lien.



REQUIREMENTS FOR RULE C ARREST

- Plaintiff must possess a maritime lien against a vessel or other property.
- Claim may only be asserted against the property that is the subject of a maritime lien, not the owner *in personam*.
- The vessel must be present in the district when the suit is filed or during the pendency of the litigation.

ARREST PROCEDURES

- Verified complaint describing the basis for the maritime lien and the vessel, and asking the court to arrest and sell it to satisfy lien
- Motion asking court to issue warrant
- Sheriff arrests by placing notice of arrest on wheel
- Consider substitute custodian

POST ARREST PROCEDURES



POST ATTACHMENT HEARING

Rule E(4)(f): any party with a cognizable interest in the property that has been arrested or attached is entitled to a “prompt hearing” at which the “plaintiff shall be required to show cause why the arrest shall not be vacated.”

RULE E(4)(F) HEARING

- Majority rule: Plaintiff must come forward with evidence showing “probable cause” or “reasonable basis”
- Minority rule: *Prima facie* standard—parallels pleading standard
- Defendant or specially appearing claimant may attack any element of Plaintiff’s claim (i.e. found in district, lack of maritime claim, no lien, etc.)

SECURITY AND BONDS

- Substitute security for *res.* E(5)
 - General bond for all claims that may be thereafter brought
 - Special bond for claims presented
- Security on counterclaim arising out of same facts. E(7)
- Security for costs. E(2)(b)

WRONGFUL ARREST/ATTACHMENT

If the attachment/arrest is vacated, Plaintiff may be liable for damages if they sought the attachment/arrest in bad faith or with gross negligence. Equatorial Marine Management Services Pte Ltd v. MISC Berhad, 464 Fed. Appx. 647 (9th Cir. 2011)

FINAL AND INTERLOCUTORY SALE

- Ask court for judgment on lien and order directing sale of vessel to satisfy lien.
- For an interlocutory sale (i.e. sale before judgment on lien) to be granted, a moving party must demonstrate that:
 - (a) the property perishable or liable to deterioration;
 - (b) the expense of keeping the property is excessive or disproportionate to its value; or
 - (c) there has been an unreasonable delay in securing the release of the property by the owner.

QUESTIONS?
HYPOTHETICALS?
CRAZY SCENARIOS?
GOOD OF THE ORDER?

