ADMIRALTY AND MARITIME LAW
Mr. Martin
May 20, ~~1999~~ 2000

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted in accordance with the amount of time suggested for each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), be sure that your social security number is on each one, and insert all others into the first one.

QUESTION ONE

(Suggested time: thirty minutes)

Cargo sued vessel owner for damage by sea water to a cargo of bagged coffee beans loaded at Santos, Brazil, bound for New Orleans by way of Rio de Janeiro. Sea water entered no. 2 hold through a twelve-inch fracture in the bow shell plate just below the lip of an overboard discharge soil line which was located about two feet above the water line and which protruded about two inches outboard of the surface of the hull plates. This fracture was caused by the pressure of the ship's weight bearing on this small protuberance in momentary contact against the concrete face of the dock while undocking at Santos.

The vessel followed her customary maneuver away from the dock at Santos. The stern lines were cast off and, with the aid of tugs, the vessel's stern was swung away from the dock and out into the channel. The bow lines were held fast in order to hold the port bow at the dock while the stern was maneuvered. In the course of this maneuver the port bow rolled in contact with the concrete facing of the dock. The fracture resulted because the drip pad lip, from the peculiar combination of water level, draft and trim, happened momentarily to take the full force of the vessel as she was rolling against the concrete dock. Thus the vessel left Santos bearing an open wound in a cargo space.

No inspection was made which would have revealed this condition. At Rio de Janeiro ten inches of water were noted to be in the bilge of no. 2 hold. The hold had previously been dry. The

master attributed this condition to rain encountered on the voyage and, again, did not inspect the hull for possible leaks.

After the vessel departed Rio de Janeiro, Owner radioed directing the master to put in at Caracas, Venezuela, for the purpose of filling all fuel tanks in order to take advantage of spot prices at that port for bunker fuel. Vessel complied, encountering some rough sea conditions that wouldn't have been encountered on the normal route.

What will be the major issues in Cargo v. Owner?

QUESTION TWO

(Suggested time: forty-five minutes)

Two occupants of a pleasure boat ("Boaters") were injured, requiring hospitalization, when a tow of barges pushed by the defendant's ship collided with the pleasure boat on the Ohio River. In the course of the ship's emergency maneuvers subsequent to the collision a seaman employed by the ship's owner ("Seaman") lost his footing on a ladder, fell, and also was injured requiring hospitalization. Seaman fell because a rung was missing from the ladder; Seaman knew this, but forgot about it in the excitement following the collision.

Compare the remedies of Boaters to the remedies of Seaman. Your comparison should include (but need not be limited to) similarities and differences in jurisdiction, matters to be proven, burdens of proof, damages recoverable, right to jury trial, and role of contributory or comparative negligence.

QUESTION THREE

(Suggested time: forty-five minutes)

Throughout this course we have discussed the unique character of maritime law, from time to time illustrating its uniqueness by comparing principles of maritime law to principles of law that apply to analogous situations ashore ("comparing the law of the surf to the law of the turf," as one student put it in a previous year's class).

Identify and compare three areas of law where the "law of the surf" is significantly different from the "law of the turf." Explain, as best you can, the reasons for the differences.

QUESTION FOUR

(Suggested time: one hour)

In 1920 Congress passed legislation popularly known as the Death on the High Seas Act or DOHSA. This statute is now codified at 46 App. U.S.C. s. 761-767.

As background, the common law provided no recovery for wrongful death. Also, the general maritime law did not provide recovery for wrongful death (and the Supreme Court so held in _The Harrisburg_, 119 U.S. 199 [1886]). A remedy for wrongful death, therefore, exists by virtue of statutes passed to create such a remedy. All American states now have enacted Wrongful Death Acts, which differ widely in their specific terms. Congress, in enacting the Death on the High Seas Act, was acting to fill a gap in the

general maritime law and for the same reasons that motivated state legislatures to pass the state Wrongful Death Acts.

Your instructor is aware that you have not studied the Death on the High Seas Act and are not familiar with it. This question is a test of your ability to read, understand, and interpret an unfamiliar statute in the light of your knowledge of its general subject matter. That is a job which lawyers often have to do.

EACH OF THE FOUR (4) PARTS OF THIS QUESTION
WILL BE WEIGHTED EQUALLY.

PART A.

Read the Death on the High Seas Act (hereinafter called "DOHSA") in your statutory supplement. Then answer the following questions. In each case, answer "yes" or "no," followed by a brief explanation.

1. Does DOSHA apply in the case of the death of a maritime passenger (as opposed to that of a maritime worker)?

2. Could an adult child of the decedent be a plaintiff under DOSHA, if the widow of the decedent who is the decedent's personal representative refuses to bring suit?

3. Could an unmarried sister-in-law of the decedent be the beneficiary of an award under DOSHA?

4. Can damages be recovered under DOSHA for the decedent's conscious pain and suffering before death?

5. Can damages be recovered under DOSHA for a minor child's loss of the decedent's consortium or society?

PART B.

Prior to passage of DOHSA, in The Hamilton, 207 U.S 398 (1907), the Supreme Court decided that state Wrongful Death Acts could extend to high seas fatalities and that an appropriate plaintiff could sue under state law pursuant to the "saving to suitors" clause, where personal jurisdiction over the defendant could be obtained. Are there reasons of policy why this holding should have been re-examined in the aftermath of the passage of DOSHA?

PART C.

Read section 7 of DOSHA, 46 App. U.S.C. s. 767. As originally introduced in Congress, section 7 provided:

> [t]hat the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes accruing within the territorial limits of any State. Nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state or to any navigable waters in the Panama Canal Zone.

The underlined language was deleted by an amendment on the floor of the House of Representatives. What was the effect of this amendment on the statute as a whole and in particular on the holding of The Hamilton?

PART D.

The Hamilton has never been overruled. Identify, therefore, three (3) bases of subject matter jurisdiction on which an appropriate plaintiff may now bring suit for wrongful death on the high seas, also identifying in each case the courts where the suit may be brought.

ADMIRALTY
Mr. Martin
May 19, 2001

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QUESTION ONE

This questions asks you to compare Admiralty Rule B to Admiralty Rule C.

Your instructor is aware that in this course only cursory attention was paid to the Supplemental Admiralty Rules of Procedure (Rules A through F). This questions tests your ability to read and understand unfamiliar texts and to relate them to subject matters with which you are familiar. That is a job which lawyers often have to do.

Before you answer the questions below, ask yourself the following questions:

(a) To what claims is each rule applicable?

(b) What are the procedural differences between Rule B and Rule C?

(c) What are the reasons for these differences?

Questions.

In each of the following cases, answer the question by writing "A," "B," or "C," according to the possibilities identified below. Then explain your answer. In each possibility below, the words "Plaintiff can proceed" mean that plaintiff can initiate litigation by filing a complaint which will survive motions to dismiss based on lack of jurisdiction, and can seek and secure prejudgment relief pursuant to Rule B or Rule C, or both rules, as the case may be.

Possibility A. Plaintiff can proceed in federal court under Rule B but not under Rule C;

Possibility B. Plaintiff can proceed in federal court under Rule C but not under Rule B;

Possibility C. Plaintiff can proceed in federal court under either Rule B or Rule C, or both.

Case 1: The Cannibal Island case. Fox Television, filming its TV hit series Survivor III about castaways on a tropical island who must periodically elect one among their number to be eaten by the others, time-chartered the vessel Long Pig. Long Pig is owned by a corporation organized in the Cayman Islands with a principal place of business in Nassau in the Bahamas. For convenience in making payments on U. S. accounts, owner maintains a checking account in a Miami bank, but owner has no other business activities in the United States. Long Pig's engines would not reverse, the master was intoxicated, the food was spoiled, the crew was mutinous, and the bunker fuel on board ran out. Fox sues for breach of the contract of charter, seeking to recover its cost of tug hire and other expenses, in the Middle District of Florida (which includes Miami).

Case 2. The Paper Chase case. Scrap Books, Inc., shipper, entered into a contract of affreightment with Learned Foot Corp., carrier, whereby 100 tons of returned copies of the Yale Law Journal were to be shipped from New Haven via carrier's vessel William Howard Taft to Vladivostok, Russia. There the cargo was to be sold on the spot market for toilet paper. On its way to New Haven, William Howard Taft went aground off Nantucket and had to be towed to Boston for repairs. Scrap Books missed the peak of the

spot market in Vladivostok and had to find another ship at greater expense. While William Howard Taft is in drydock in Boston, Scrap Books sues for breach of the contract of affreightment in the United States District Court for the District of Massachusetts.

3. Case 3. The Aruba SCUBA case. Benthic Vandal is a high seas dive boat owned by Henry Cabbage Cod, a resident of Boston. Cod chartered Benthic Vandal, bareboat, to Coney Island Marine Adventures, a New York corporation with a principal place of business in Brooklyn, New York, and having no business contacts in any other state, for a SCUBA diving expedition to Aruba, Venezuela. While jostling with other dive boats for the best diving position over the wreck of a seventeenth-century galleon, Benthic Vandal was in collision with a vessel owned by Baywatch Enterprises. The collision was the fault of Benthic Vandal's master who is also the president and sole shareholder of Coney Island Marine Adventures, Inc. Benthic Vandal is in New Orleans for repairs. Baywatch Enterprises sues for damage to its vessel in the United States District Court for the Eastern District of Louisiana (which includes New Orleans).

QUESTION TWO

Are state laws forbidding discrimination applicable to maritime employment? Fuzzy and Buzzy were longtime shipmates aboard the M/V (motor vessel) Stygian Eyrie homeported in Boston, Massachusetts. Stygian Eyrie is a vessel of the Black Bucket Line running general cargo from Boston to Hamburg, Germany, and other European ports.

Fuzzy and Buzzy were also gay lovers and, ashore at their apartment in Chelsea, Massachusetts, domestic partners. They hid their sexual orientation when aboard Stygian Eyrie because Black Bucket had for many years an announced policy not only forbidding the employment of homosexuals but also requiring the discharge of seamen with known homosexual orientation. In 1992, as a gesture to the modern world, Black Bucket formally amended its policy to conform to the U. S. military's "don't ask, don't tell" policy. Pursuant to "don't ask, don't tell," homosexual activity is still considered an occasion for discharge (from the armed services and from the Black Bucket Line as well), but homosexual orientation unmanifested by sexual activity is not to be the subject of inquiry or of adverse personnel action.

Last year Fuzzy and Buzzy moved temporarily to Vermont in response to that state's legislation authorizing "civil unions" (equivalent to marriage) between individuals of the same sex. After residing in Vermont for the durational period required by that state's law, Fuzzy and Buzzy entered into a civil union.

The Black Bucket Line deemed entry into a civil union to be a violation of its "don't ask, don't tell" policy because the civil union in effect told all the world that the partners were homosexuals. Black Bucket fired Fuzzy and Buzzy.

Massachusetts anti-discrimination law is protective of sexual orientation, unlike the anti-discrimination laws of most states and of the federal government. Massachusetts law prohibits discrimination in employment on the basis of sexual orientation.

Mass. G. L. c. 151B, s, 4(1). The Massachusetts law is enforced by an administrative complaint system directed by the Massachusetts Commission against Discrimination ("MCAD"). Fuzzy and Buzzy, once again domiciled in Massachusetts, filed a complaint with the MCAD seeking reinstatement and back pay. They claimed that Black Bucket's "don't ask, don't tell" policy contravened Massachusetts law.

In response, Black Bucket filed an action against Fuzzy, Buzzy and the MCAD in the United States District Court for the District of Massachusetts seeking to enjoin Fuzzy and Buzzy from pursuing their MCAD complaint, seeking to enjoin the MCAD from entertaining their complaint, and seeking a declaratory judgment that Massachusetts cannot impose its own anti-discrimination law on maritime employment.

What will be the principal issues in Black Bucket Line v. Fuzzy, Buzzy and the Massachusetts Commission against Discrimination?

QUESTION THREE

Seeking to create a new prison at minimal fiscal and political cost, the Commonwealth of Massachusetts bought USS Botany Bay from the United States Navy for $1.00. Botany Bay is the last surviving World War II escort carrier, mothballed for many years.[1] Botany

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[1]. Escort carriers were aviation decks mounted on merchant hulls. They were first improvised to meet the need for convoy escorts in the North Atlantic during World War II. They also served during that war as floating airstrips in support of operations ashore. Escort carriers were not expected to fight with the fleet nor to survive major battle damage.

Bay was towed from Norfolk, VA, to Boston and moored to a pier at otherwise-uninhabited Outer Brewster Island in Boston Harbor.

Botany Bay's berthing spaces now house 1,000 inmates. The hangar deck is used as an indoor recreation and assembly space. In good weather the flight deck affords inmates all of the outdoor delights of a medium security prison except that the volleyballs often get lost over the side. At the opening of the prison, Governor Cellucci broke a bottle of champagne over the bow and stated, "I christen thee 'MCI Pleasure Island.'"

Botany Bay's boilers and engines remain on board but are unneeded and inoperative. Millions of dollars would have to be spent to restore them to use. For obvious security reasons, all lifeboats and other small boats have been removed. Otherwise, Botany Bay is substantially unmodified. Her turbo-generators supply her own electric power; her distillers furnish her own fresh water. The likelihood that Botany Bay will be recalled to active naval service is remote, to say the least, but the purchase arrangements nevertheless provide that the Navy may reclaim the vessel in the event of war or national emergency. As a safety measure, there is a contingency plan to tow Botany Bay to a sheltered location in Boston Harbor in the event of a hurricane.

Dick Turpin was serving three to five years at MCI Pleasure Island, having been convicted of burglary. He was assigned to work in the ship's kitchens or galleys where he washed pots and pans, being paid $10.00 per day which was credited to his prison account. One day he slipped and fell on a wet spot on the galley floor. He

tumbled into a floor-mounted 100-gallon soup kettle which, contrary to OSHA regulations, was unprotected by a cover or a guardrail. Turpin sustained burns and other serious injuries. The deck was wet because an overhead pipe was leaking. (Many pipes on Botany Bay leaked). Turpin brought Jones Act and unseaworthiness claims against the Commonwealth of Massachusetts, complying with the procedural provisions of the Massachusetts Tort Claims Act respecting tort claims against state and local government agencies.

Discuss the merits of Turpin's suit.

QUESTION FOUR

The ocean carriage of bananas is a surprisingly tricky business. More than one case of bad bananas can be found in Federal Reporter and Federal Supplement. The mournful song, "Yes, we have no bananas," indirectly refers to a boatload of bananas that went bad in transit. The problem is that bananas like to ripen in a certain way. They continue to ripen after harvesting.

If bananas are cut too late or refrigerated more than 24 to 48 hours after harvesting, they may reach a ripening stage called the "climacteric" before refrigeration is accomplished. During the climacteric phase the bananas emit substantial amounts of ethylene gas. If this gas is released in an enclosed space it will accelerate the ripening of other bananas. This is so even if the other bananas were properly cut, loaded, ventilated and refrigerated in a timely manner. In other words, as has been written, "Unus putridus fructus contamnabit omnes." [One rotten (or overripe) apple (or banana) will spoil the whole barrel].

Once the bananas are loaded aboard ship, the handling procedures are equally intricate and vital to prevent the bananas from reaching the climacteric phase prematurely. Within 24 to 36 hours of loading, the pulp temperature must be reduced to within four degrees fahrenheit of the constant temperature at which the bananas are to be kept until unloaded. There are also strict requirements regarding continued refrigeration.

Manana's Bananas, a banana shipper in Colombia, uses computer-controlled refrigerated ocean containers to ship bananas to ports in the United States. The refrigeration units on each container employ devices that electronically monitor the temperature of the air entering and leaving the refrigeration unit. Additionally, the refrigeration units are equipped with recorders called "Ryan recorders" which make graphical records of temperatures within the container.

Manana's Bananas delivered ten of these containers filled with bananas to the dock at Cartagena, Colombia, where they were promptly loaded aboard carrier's vessel M/V <u>American Gastronome</u> for shipment to Boston. Upon <u>American Gastronome</u>'s arrival at Boston after an uneventful voyage, inspectors employed by the buyers of the bananas opened the containers to inspect the contents. The inspectors smelled ethylene gas and found ten containers of over-ripe bananas suitable only for baking banana bread.

Manana's Bananas sued carrier for damage to cargo.

As the Court which decided this case observed, the burden of proof in a case of cargo damage shifts more often than the wind on

a stormy sea. Trace the burden of proof through the following litigation steps:

1. What evidence will Manana's Bananas have to offer in order to establish a prima facie case?

2. What evidence will carrier have to offer in order to rebut the prima facie case?

3. If carrier rebuts the prima facie case, what must Manana's Bananas then prove in order to carry its burden of proof at trial?

4. What affirmative defenses can carrier prove in response to Manana's Bananas's case in chief?

Be specific with reference to the facts in connection with your answers to (1), (2), (3) and (4).

END OF EXAMINATION

ADMIRALTY
Mr. Martin
May 18, 2002

SSN ______________________

FINAL EXAMINATION

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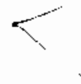
Not all students are taking this examination at the same time. Therefore, as an examination security measure, you must enter your social security number in the space above on this white examination paper and turn in this white examination paper along with your blue book or books.



QUESTION ONE

The American law school curriculum does not treat actions against governments in much detail. Therefore students acquire the vague impression-- correct so far as it goes-- that governments were once immune to actions but today have largely waived their immunities. In practice, however, admiralty litigation frequently calls on plaintiffs to sue governments. The details of immunities and waivers, and of the methods of making claims and bringing action, demand careful attention.

Admiralty actions against the United States are governed by the Suits in Admiralty Act, 46 U.S.C. App. ss. 741-752, and by the Public Vessels Act, 46 U.S.C. App. ss. 781-789. These statutes operate to waive the defense of sovereign immunity, but only in accordance with their terms.

Read the Public Vessels Act in your statutory supplement. Notice that it incorporates by reference the Suits in Admiralty Act. You should also, therefore, read 46 U.S.C. App. ss. 741-745, which are the relevant sections of the Suits in Admiralty Act. Then answer the following questions based on your reading of the statutes. Your instructor is aware that you have not previously studied the Public Vessels Act or the Suits in Admiralty Act. However, this question is not a test of your retained knowledge. Rather, it is a test of your ability to read, understand and interpret unfamiliar statutes in the light of your knowledge of its general subject matter. That is a job which lawyers often must do.

Please answer each of these sub-questions "Yes," or "No,"

followed by a brief explanation and a citation to the relevant section of the Public Vessels Act or the Suits in Admiralty Act. Your correct "Yes," or "No" answer counts as one-third of each sub-question. Your brief explanation counts as one third. Your correct citation to the relevant section of the statute counts as the last one third.

1. USS Chandler, DDG-996, was operating at an unsafe speed in a 300-foot-wide channel in the Columbia River. The destroyer threw up a bow wave that damaged plaintiff's barge causing the loss of barge and cargo. Does the Public Vessels Act permit a claim against the United States arising out of damage by a U. S. Navy destroyer to a barge?

2. Does the Public Vessels Act permit the barge-owner in sub-question 1 to commence an action in rem against the destroyer by causing its arrest pursuant to Admiralty Rule C?

3. If the barge owner waits two and one half years before commencing suit, will the claim be time-barred?

4. Marine Coatings, Inc., as subcontractor to Shipyard, performed repairs on USS Neosho, AO-59. Shipyard became bankrupt. Marine Coatings has not been paid by Shipyard. Does the Public Vessels Act permit a claim against the United States for money alleged to be unpaid for repairs to a public vessel, where the repairer would have a maritime lien on the vessel if she were privately owned?

5. Independently of the Public Vessels Act, does the Suits in Admiralty Act permit the claim described in sub-question 4?

QUESTION TWO

The M/V Mimi sailed from Miami, Florida, bound for ports of call in Venezuela and Guyana. Her cargo consisted of bagged fertilizer and other general cargo stowed below and containers of general cargo stowed on deck, all carried under the usual bills of lading. A small vessel, just under 500 tons, the Mimi was owned by Darkstar Tramp Logistics (hereinafter "Darkstar"). She carried a complement of four German officers, four Indonesian seamen, and a Filipino cook. Among the seamen was one Gun Gun Supardi who had signed aboard five months before in Hamburg, Germany, and had since served continuously as a member of the crew.

During loading operations just before departure from Miami, Gun Gun Supardi was cut above one eye when a cable snapped and lashed him. He was taken to a hospital, given four stitches, and returned to the vessel. The captain then sent him to his cabin to rest. Supardi stayed there for the first twenty-four hours of the voyage. Thereafter, shortly before midnight, he left his quarters. He encountered the Chief Engineer in another part of the vessel. Words were exchanged. Supardi struck the officer with what he later described as an "iron." Supardi then knifed the stunned Chief Engineer. When another officer came to the rescue, Supardi knifed the latter as well. Supardi then proceeded to seek out and knife in turn each of the two other officers. Those who survived the knife wounds were bludgeoned into unconsciousness.

Supardi then awakened the sleeping crew members and forced them at knife-point to provision and lower a lifeboat. At some point in this process he shut down the engines and opened the sea-valves in the engine room. At about 4:00 A.M., while Supardi stood by in the lifeboat with his captive fellow crew members, the Mimi sank carrying with it all of its cargo and its four dead or dying officers. Later that morning the lifeboat occupants were picked up by a passing ship.[1]

[Stage direction: Exit, Gun Gun. Enter, attorneys].

Darkstar filed a petition for exoneration or for limitation of liability under the Limitation of Liability Act, 46 U.S.C. App. ss. 181-188, in a federal district court having competent jurisdiction of the matter. Multiple cargo claimants, hereinafter called "Cargo," intervened to assert claims for their losses under the Carriage of Goods by Sea Act. As a preliminary matter the district judge ruled that Cargo's COGSA claims should be tried first, in advance of Darkstar's petition for exoneration or limitation.

Discuss Cargo's COGSA claims. Discuss Darkstar's COGSA defenses.

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[1]. This is a true story.

QUESTION THREE

McBirdie was permanently disabled on June 10, 1999, while working aboard the M/V Paul Revere, a Boston harbor tour boat owned by Harbor Cruise Co., Inc. McBirdie was employed as a porter by Savory Sage Corp., which operated a restaurant aboard the Paul Revere. His duties included transporting supplies from his employer's shoreside restaurant and loading them aboard the ship. He suffered a back injury when he fell while carrying a 150-lb. container of ice up a flight of stairs on the Paul Revere in preparation for the nightly "Harbor Islands Sunset Cruise," formerly known as the "booze cruise." Ordinarily two men were assigned to the task of loading the 150-lb. container of ice but, on the day in question, McBirdie's usual partner was absent from work and he was thus obligated to carry the container by himself. McBirdie's fall was most likely occasioned by a slight movement of the Paul Revere as she lay at the pier. Also, the nonskid coating originally applied to the stair treads had worn away and had not been renewed.

McBirdie applied for workers' compensation benefits shortly after his accident. His claim was not contested, and McBirdie received approximately $100 per week in benefits starting in September of 1999.

Just yesterday, while eating a sandwich on a park bench on Boston Common, McBirdie struck up a conversation with an attractive

woman who shared the bench with him, Gladys Corkle. Gladys was a graduate of the Massachusetts School of Law who had recently been admitted to the bar. As she had yet to find employment in the law, time was not pressing her. She willingly engaged in conversation with McBirdie. When Gladys mentioned that she was a lawyer, McBirdie's interest turned from the potentially romantic to the immediately practical. He told her about his accident and asked if Gladys could help him to get his workers' compensation award increased.

When Gladys realized that the accident occurred on a boat she remembered studying Admiralty and Maritime Law in law school under a renowned professor who had taught her that maritime personal injury awards were more generous by far than workers' compensation awards. She asked McBirdie if anybody had ever told him about the possibility of suing his employer or the owner of the Paul Revere on account of the maritime nature of his injury. McBirdie said that nobody had ever mentioned this, not even his workers' compensation attorney. By the time the conversation was over, Gladys had her first client.

What can Gladys do for McBirdie? Analyze McBirdie's possible maritime law claims. Discuss the possible defenses and other obstacles that he will have to confront. Decide if, as a matter of business judgment, Gladys should decide to initiate litigation on behalf of McBirdie (on, necessarily, a contingent fee basis). Finally, assume that Gladys's answer to the preceding question was "yes," and formulate a litigation plan.

QUESTION FOUR

Throughout this course we have discussed the unique character of maritime law, from time to time comparing principles of maritime law to principles of law that apply to analogous situations ashore ("comparing the law of the surf to the law of the turf," as one student in a previous class put it).

Identify and compare three areas of law where the "law of the surf" is significantly different from the "law of the turf." Explain, as best you can, the reasons for the differences.

ADMIRALTY AND MARITIME LAW
Mr. Martin
May 17, 2003

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QUESTION ONE

Sally Forth was a waitress on a riverboat gambling ship called the M/V Big Jule, owned by Get Rich Quick Gambling Enterprises, Inc. ("GRQ"). Sally was a recent high school graduate who wanted a sailor's job on a boat. The only job for which she immediately qualified was waitress at $4.25 per hour plus tips. Thinking this to be better than nothing she took the waitress position on the Big Jule but she still wanted a real sailor's job.

On January 11, 2001, Sally and three other employees of GRQ drove to Toledo, Ohio, in a car owned and driven by a fellow-employee named Dusty Rhodes so that they could attend a training program for firefighting at the Great Lakes Region Training Center which is operated by the United States Department of Transportation. Since 1996, GRQ had allowed its employees to sign up for this week-long training program and would pay its employees their regular rates of pay (although, in Sally's case, not tips) for the duration of the program. Additionally, GRQ paid its employees' tuition costs for the program. GRQ did not require Sally or any other waitress to attend this training program. However, successful completion of this program or its equivalent was required of marine operating personnel. Sally wanted to become one of the marine operating personnel, starting as a deckhand, and she believed that if she passed the firefighting course she would be looked on favorably when a deckhand position opened up.

While driving to Toledo, Sally was seriously injured in an automobile accident which was possibly the fault of Dusty Rhodes, the driver, her fellow-employee of GRQ. Sally was hospitalized and required surgery.

She required rehabilitative care for a period of six months, during which she was unable to work. Sally lived ashore during this period, in an apartment that she shared with three other young women. She paid $400 per month as her share of the rent and utilities plus an average of $200 per month towards the combined food bill.

Big Jule cruised the Runaway River from the beginning of April to the end of November. During the four winter months, and at the time of Sally's accident, the boat was tied up alongside the river bulkhead, receiving all utilities from the shore. Sally had an assigned bunk in the female crew quarters. However, during the four-month tie-up period she was living ashore in the apartment.

Sally's medical expenses were mostly covered by the health insurance policy for which her employer paid 80% of the cost. However, she incurred out-of-pocket medical expenses in the form of co-pays, transportation costs, and the like in the amount of $2000.

In July 2001, after six months in rehabilitation, Sally was ready to go back to work. July was, however, the height of the cruising season and there were no job vacancies aboard Big Jule.

Disappointed, Sally sued GRQ in federal district court. Suit was brought (1) under the Jones Act for negligence and (2) under the general maritime law for maintenance, cure, and lost wages.

The foregoing facts were before the District Court when GRQ filed a motion for summary judgment in its favor. The District Court allowed the motion as to both causes of action.

Sally appealed. The Court of Appeals reversed the grant of summary judgment on the Jones Act claim and reversed the grant of summary judgment on the claim for maintenance and cure. The Court of Appeals, however, affirmed the district court's grant of summary judgment on the claim for lost wages under the general maritime law. Why did the Court of Appeals act as it did?

QUESTION TWO

The Carriage of Goods by Sea Act ("COGSA") and other statutes relating to shipping have not been updated to accommodate the modern era of containerized shipping moving from port to port and thence overland.

Plaintiff American Fittings, Inc. ("AFI") purchased a shipment of six "house to house" containers each holding forty-eight pallet loads of plumbing fittings.[1] Each pallet in turn bore twenty corrugated cardboard boxes in which the fittings were packed. The shipment originated in China. AFI is located in Boston, MA.

The containers were shipped aboard defendant Black Bucket Lines's general cargo vessel <u>Elvis Presley</u>. The bills of lading

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[1]. A "house to house" container shipment is one where the goods are loaded into the container, and the container sealed, on the premises of the shipper. It is anticipated that the container will not be unsealed, nor the goods unloaded, until the container reaches the premises of the consignee.

indicated that the containers' destination was Boston, MA. The port of discharge was listed as New York. Each bill of lading recited that the shipment consisted of "1 container STC 480 packages plumbing fittings. Shipper's load, weight & count." The bills of lading did not declare the value of the shipment.

The containers were off-loaded at Port Newark, NJ (considered to be part of the port of New York) on November 23, 2002. Black Bucket Lines arranged overland transportation to Boston by means of a contract with Henry's Haulers, Inc.

On November 24, 2002, Ed McRedd, a driver employed by Henry's Haulers, drove his tractor and flat-bed trailer to the terminal at Newark. One container was loaded onto the trailer and McRedd drove away. McRedd drove from Newark to Queens, NY. There he left the container overnight on the trailer, with the tractor attached, on a local street in Queens. At 11:25 the next morning, McRedd called police to report the theft of the tractor, trailer and container. More than an hour earlier, however, the police had been called to investigate an accident in the Bronx. The police discovered the container resting on its side in the median of the Bruckner Expressway. The container had been torn apart and separated from the tractor and trailer, which were no longer at the site. The cargo was found strewn along the Bruckner Expressway and in its median for a distance of two hundred feet. Only seven of the pallets were still intact.

So much of the cargo as was salvageable was sent on to AFI in Boston. AFI presented a claim to Black Bucket Lines for

nondelivery of the remainder of the shipment. Black Bucket Lines tendered $500 in full settlement of AFI's claim. AFI refused this tender and sued Black Bucket Lines in federal district court. Black Bucket Lines impleaded Henry's Haulers as a third-party defendant.

What will be the issues at the trial? How should the trial judge, sitting as finder of fact, resolve them?

QUESTION THREE

M/V Ginny Slocum is a small general cargo tramp of United States registry. She was on a voyage from Providence, Rhode Island, to Halifax, Nova Scotia, Canada, with a cargo of bagged fishmeal when she collided with the Nantucket ferry in Nantucket Sound on a foggy evening in November, 2002. As a result of the collision, water was taken aboard Ginny Slocum. Pumps kept the ship afloat, but there was considerable damage to cargo. Ginny Slocum's master radioed for a tug and arranged a salvage contract, later reduced to writing, for $25,000. The salvage tug arrived on the scene a few hours later and towed Ginny Slocum into port in New Bedford where stevedores hired by the master unloaded the cargo.

The owner of Ginny Slocum petitioned in federal district court to limit its liability to the post-collision value of the vessel. Notice was duly given. The following claimants put in appearances and claims in the limitation proceedings:

1. Commercial Bank, holder of a preferred ship mortgage duly recorded and dated prior to any other claim, on which $5,000,000

was unpaid;

2. Bob's Ocean Towing Service, $25,000 for the contract salvage tow;

3. Chapman's Marine Fuels, $40,000 for diesel fuel supplied to Ginny Slocum in Providence but not paid for at the time;

4. Unpaid wages of the master and crew, $35,000;

5. Claims for maintenance and cure of crew members injured in the collision, $50,000;

6. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, owner of the Nantucket ferry, $600,000 for collision damage;

7. Cargo interests for damage to cargo, $250,000;

8. Services of stevedores, $20,000;

9. Wharfage fees in New Bedford; $15,000;

10. Legal services rendered to owner by Mason & Martin, LLP, $50,000.

Each of these creditors proved its claim in the amount indicated. The trial judge found the collision to be 100% the fault of Ginny Slocum. The trial judge also found Ginny Slocum's owner to be not at fault or in privity with the errors that caused the collision. Ginny Slocum was sold in her damaged but repairable condition for $1,000,000. Finally, the owner of Ginny Slocum collected a settlement of $2,500,000 from the ship's insurer. How should the Court order funds to be disbursed?

(Hint: the answer is found, in part, in your Statute and Rule Supplement).

QUESTION FOUR

The framers of the United States constitution and the first Congress which passed the Judiciary Act of 1789 had no experience of maritime activity which was non-commercial or recreational in nature. Today, however, there are over ten million registered recreational boats in this country.

Americans buy, sell, mortgage, register, repair, collide, damage, salvage and operate these boats under a regime of law which originated in the context of ocean-going commerce. An argument can be made that the recreational boat is more nearly analogous to the family car than it is to the ocean-going commercial vessel. Accordingly, so goes this argument, recreational boating should be governed by principles of law relating to land-based activity such as owning and driving cars rather than by principles of admiralty and maritime law.

Offer your comments on the proposition that recreational boating should not be governed by principles of admiralty and maritime law. You may agree or disagree, in whole or in part, but be sure to make a coherent argument that is supported by material which you have studied in this course.

ADMIRALTY AND MARITIME LAW
Mr. Martin
May 15, 2004 SSN: ______________________

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted in accordance with the amount of time suggested for each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, please be sure that your social security number is on each and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

Because at least one student must take this examination on a deferred basis, you must fill in your social security number in the space above and turn in this white examination paper along with your blue book or blue books. This is a temporary measure for examination security only, and this examination paper will be returned to you upon request after all students have taken the examination.

QUESTION ONE
(suggested time: one hour)
(this question consists of two parts, Part A and Part B)

Captain Watertoast of the S/Y Nancy is an old salt horse from the fishing fleet. Until his accident he was not only the captain, but also the cook, the mate and the bos'un of Nancy.[1] Which is to say, that Captain Watertoast was the whole crew.

Nancy is a 32-foot ketch owned by Nancy Reagan College for Women in Scituate, Massachusetts.[2] Years ago a now-forgotten elderly yachtsman donated Nancy to the college in exchange for a nice tax deduction. Nancy sometimes cruises around Cape Cod Bay with students from the class in Marine Ecology. Mostly, however, the President of Nancy Reagan College, Boffin Bleatmore, relaxes aboard Nancy after his long and laborious workday. Not infrequently Mr. Bleatmore entertains donors, and those from whom donations are to be entreated, on these cruises.

Because the college owns no waterfront property, Nancy customarily docks at Mickey Mastbreaker's boatyard in Scituate Harbor where Mickey waives the docking charges in exchange for his daughter's free tuition. Access to the vessel is somewhat difficult. From the dock, you have to go down a ramp to a float that rises and falls with the tide.

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[1]. See the note at the end of this examination.

[2]. Inevitably, the college's seal depicts crossed arms above its motto, "Just say no."

The ramp is about thirty feet in length. It is of timber construction. Planks run lengthwise from the top to the bottom. About every fifteen inches, a cleat runs crosswise to the planks; otherwise, there is no anti-slip protection. Because bulky loads must be trucked up and down, the ramp is wide-- so wide that a person cannot hold the handrails on both sides as he or she ascends or descends. President Bleatmore himself often boards Nancy at Mickey's; however, the guests are usually picked up at the town dock.

Last week, President Bleatmore noticed that one of the cleats was missing. He meant to mention this to Mickey, but forgot.

Yesterday, Captain Watertoast was about to board Nancy at 8:00 in the morning. Although the sky was clear, it had rained the previous night and the ramp was wet. The tide was at extreme low and, in consequence, the ramp tilted downwards at an angle of 30 degrees. (Ashore, any ramp angled at greater than 20 degrees is considered unsafe). Captain Watertoast slipped where the missing cleat should have been, tripped, lost his footing and slid all the way to the foot of the ramp. He sustained multiple fractures of his right ankle. Surgery was necessary in order to set the bones, and two plates and a large number of pins had to be inserted in the ankle. Follow-up surgery will be required to remove some of this hardware. Captain Watertoast will not be sailing Nancy for a long time. In fact, it is possible that Captain Watertoast will never sail again.

Part A.
(suggested time: thirty minutes)

Captain Watertoast and Mickey are old town buddies. Captain Watertoast is not going to sue Mickey under any circumstances. Therefore, discuss Captain Watertoast's remedies against Nancy Reagan College.

Part B.
(suggested time: thirty minutes)

Assume that Captain Watertoast has sought his remedies against Nancy Reagan College in the United States District Court for the District of Massachusetts. After the pleadings are complete, Nancy Reagan College files a motion for partial summary judgment seeking to limit its liability to $20,000 in accordance with the Massachusetts charitable immunity statute, G. L. c. 231, s. 85K.

Section 85K limits the tort liability of a "charity" to $20,000. This statute was enacted by the Massachusetts Legislature in 1971 in response to a warning from the Supreme Judicial Court that the latter was going to abolish the doctrine of charitable immunity in tort. Since 1971 the Legislature has steadfastly declined to repeal or amend this statute, and the Supreme Judicial Court has found it to be constitutional.

There is no doubt that Nancy Reagan College for Women is a "charity" as that word is used in the Massachusetts statute.

In support of its motion, Nancy Reagan College points to Morris v. Massachusetts Maritime Academy, 409 Mass. 179 (1991), in which the Supreme Judicial Court held that the Massachusetts [Governmental] Tort Claims Act's limitation on tort liability at

$100,000 applied to personal injury actions brought against the Commonwealth under the Jones Act. Captain Watertoast points out that Morris, being a suit against the Commonwealth, was controlled by the Eleventh Amendment which is irrelevant in an action against a private defendant.

How should the judge decide Nancy Reagan College's motion for partial summary judgment? Why?

QUESTION TWO
(suggested time: thirty minutes)
(this question consists of two parts, Part A and Part B)

The M/Y Champerty is a 55-foot vessel documented under United States law and certified by the United States Coast Guard to carry up to 24 passengers. The vessel engages primarily in dinner cruise operations in Boston harbor.

On June 20, 2003, the vessel was so engaged, having been time chartered by the law firm Mason & Martin LLP to take some lawyers and clients out for an evening cruise. At approximately 2030 hours (8:30 p.m.), Champerty was lying to, or standing still, in the water just beyond Point Allerton light, in order for the passengers to watch the sun set over the city of Boston. Although evening twilight had begun, the master had not yet illuminated the vessel's running lights as required by COLREGS.

At the same time a U.S. Navy frigate, USS Murdstone, was heading for Boston harbor destined for a berth at a shipyard. The frigate had a full complement of officers and seamen on the bridge and, in addition, was being conned by a pilot.

As Murdstone approached Champerty, Champerty was in a direct line between Murdstone and the brilliant sunset. Accordingly, the people on the bridge of Murdstone had a blind spot in their vision and could not see Champerty. Also, the bow lookout on Murdstone had momentarily turned away to talk to a shipmate about the girl he was to meet on liberty that night after the ship tied up. As Murdstone approached, people aboard Champerty began to shout and wave their hands; however, nobody on Murdstone noticed this until too late. Murdstone came into collision with Champerty, hitting a glancing blow. Champerty banged down the side of Murdstone, suffering several cracks in her hull.

Murdstone's captain immediately realized that a collision had taken place, ordered general quarters, and began to lower boats to assist the people on Champerty. The captain of Champerty realized that his vessel was in danger of sinking. He ordered everybody to put on life jackets in preparation for abandoning ship. He also sent a MAYDAY by radio, which was picked up both by the local Coast Guard command and by Seatow, a commercial salvor.

As the passengers and crew were being removed from Champerty into Murdstone's boats, the Coast Guard and Seatow both arrived on the scene. Coast Guard personnel went aboard Champerty and found the vessel to be rapidly taking on water. The Coast Guard immediately hooked up portable pumps and began dewatering operations. Seatow's personnel stood by aboard Champerty while the Coast Guard and Harry Snipe, Champerty's engineer, who had returned to Champerty from one of Murdstone's boats, wedged mattresses

against the hull cracks. Eventually the vessel was stabilized, the Coast Guard departed, and Seatow towed her to a boatyard in Boston harbor where she was repaired.

Murdstone suffered no damage; however, her captain was relieved of duty and advised to retire from the Navy.[3]

Part A.
(Part A counts as twenty per cent of this question)

Assign percentages of fault to Murdstone and Champerty respectively in accordance with an allocation which you consider fair. (Don't explain, just assign):

Murdstone: ______________________ at fault.

Champerty: ______________________ at fault.

Assume Champerty's damages to be $100,000 (the cost of repairs plus tow charges and salvage, if any). In accordance with your allocation of fault, above, how will the damages be payable?

U. S. Navy pays Champerty: __________________.

Champerty pays U. S. Navy: __________________.

Part B.
(Part B counts as eighty per cent of this question)

Discuss any potential salvage claims that might be made by anybody or any entity involved in saving Champerty. Explain why their services were or were not salvage.

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3. There is an oft-repeated saying among naval officers: "A collision at sea can ruin your whole day."

QUESTION THREE
(suggested time: forty-five minutes)

The ocean carriage of bananas is a surprisingly tricky business. More than one case of bad bananas can be found in Federal Reporter and Federal Supplement. The mournful song, "Yes, we have no bananas," indirectly refers to a boatload of bananas that went bad in transit. The problem is that bananas like to ripen in a certain way. They continue to ripen after harvesting.

If bananas are cut too late or refrigerated more than 24 to 48 hours after harvesting, they may reach a ripening stage called the "climacteric" before refrigeration is accomplished. During the climacteric phase bananas emit substantial amounts of ethylene gas. If this gas is released in an enclosed space it will accelerate the ripening of other bananas. This is so even if the other bananas were properly cut, loaded, ventilated and refrigerated in a timely manner. In other words, as has been written, "Unus putridus fructus contamnabit omnes." [One rotten (or overripe) apple (or banana) will spoil the whole barrel].

Once the bananas are loaded aboard ship, the handling procedures are equally intricate and vital to prevent the bananas from reaching the climacteric phase prematurely. Within 24 to 36 hours of loading, the pulp temperature must be reduced to within four degrees fahrenheit of the constant temperature at which the bananas are to be kept until unloaded. There are also strict requirements regarding continued refrigeration.

Manana's Bananas, a banana shipper in Colombia, uses computer-controlled refrigerated ocean containers to ship bananas to ports in the United States. The refrigeration units on each container employ devices that electronically monitor the temperature of the air entering and leaving the refrigeration unit. Additionally, the refrigeration units are equipped with recorders called "Ryan recorders" which make graphical records of temperatures within the containers.

Manana's Bananas delivered ten of these containers filled with bananas to the dock at Cartagena, Colombia, where they were promptly loaded aboard carrier's vessel American Gastronome for shipment to Boston. Upon American Gastronome's arrival in Boston after an uneventful voyage, inspectors employed by the buyers of the bananas opened the containers to inspect the contents. The inspectors smelled ethylene gas and found ten containers of overripe bananas suitable only for baking banana bread.

Manana's Bananas sued carrier for damage to cargo.

As the court which decided this case observed, the burden of proof in a cargo damage case shifts more often than the wind on a stormy sea. Trace the burden of proof through the following litigation steps:

1. What evidence will Manana's Bananas have to offer in order to establish a prima facie case?

2. What evidence will the carrier have to offer in order to rebut the prima facie case?

3. If carrier rebuts the prima facie case, what must Manana's Bananas then prove in order to carry its burden of proof at trial?

4. What affirmative defenses can carrier prove in response to Manana's Bananas case in chief?

Be specific with reference to the facts in connection with your answers to (1), (2), (3) and (4).

QUESTION FOUR
(suggested time: forty-five minutes)

The American law school curriculum does not treat actions against governments in much detail. Therefore students acquire the vague impression-- correct so far as it goes-- that governments were once immune to actions but today have largely waived their immunities. The trouble with this impression is that, as so often occurs in the law, the devil is in the details. Admiralty litigation frequently calls on plaintiffs to sue governments. The details of immunities and waivers, and of the methods and prerequisites for making claims and bringing actions, demand careful attention.

Admiralty actions against the United States are governed by the Suits in Admiralty Act, 46 U.S.C. App. ss. 741-752, and by the Public Vessels Act, 46 U.S.C. App. ss. 781-789. These statutes operate to waive the defense of sovereign immunity, but only in accordance with their terms.

Read the Public Vessels Act in your statutory supplement. Notice that it incorporates by reference the Suits in Admiralty Act. You should also, therefore, read 46 U.S.C. App. ss. 741-745,

which are the relevant sections of the Suits in Admiralty Act. Then answer the following questions based on your reading of the statutes. Your instructor is aware that you have not previously studied the Public Vessels Act or the Suits in Admiralty Act. However, this question is not a test of your retained knowledge. Rather, it is a test of your ability to read, understand and interpret unfamiliar statutes in the light of your knowledge of its general subject matter. That is a job which lawyers often must do.

Please answer each of these sub-questions "Yes," or "No," followed by a brief explanation and a citation to the relevant section of the Public Vessels Act or the Suits in Admiralty Act. Your correct "Yes," or "No" answer counts as one-third of each sub-question. Your brief explanation counts as one third. Your correct citation to the relevant section of the statute counts as the last one third.

1. USS Chandler, DDG-996, was operating at an unsafe speed in a 300-foot-wide channel in the Columbia River. The destroyer threw up a bow wave that damaged plaintiff's barge causing the loss of barge and cargo. Does the Public Vessels Act permit a claim against the United States arising out of damage by a U. S. Navy destroyer to a barge?

2. Does the Public Vessels Act permit the barge-owner in sub-question 1 to commence an action in rem against the destroyer by causing its arrest pursuant to Admiralty Rule C?

3. If the barge owner waits two and one half years before commencing suit, will the claim be time-barred?

4. Marine Coatings, Inc., as subcontractor to Shipyard, performed repairs on USS <u>Neosho</u>, AO-59. Shipyard became bankrupt. Marine Coatings has not been paid by Shipyard. Does the Public Vessels Act permit a claim against the United States for money alleged to be unpaid for repairs to a public vessel, where the repairer would have a maritime lien on the vessel if she were privately owned?

5. Independently of the Public Vessels Act, does the Suits in Admiralty Act permit the claim described in sub-question 4?

END OF EXAMINATION

* * *

NOTE

With reference to Question One, about the captain who is also the cook, the mate and the bos'un, your instructor will award a six-pack of Sam Adams to anybody who can correctly identify the author and name of a poem, the refrain of which goes as follows:

> Oh! I am the cook,
> And the captain bold,
> and the mate of the <u>Nancy</u>, brig;
> and the bos'n tight,
> and a midshipmite,
> and the crew of the captain's gig.

This is a humorous poem about survival at sea. The cook, the captain and the rest of the mariners are adrift in a boat. As the days pass, it becomes necessary for some of the castaways to eat others. This process continues on until only the cook is left.

For a real (and not humorous) story of cannibalism in a lifeboat, see <u>R. [The Queen] v. Dudley and Stephens</u>, 14 Q.B.D. 273 (1884) (survivors found guilty of murder, but sentence of death commuted to six months imprisonment). [This well-known English case can be found at several locations on the web].

ADMIRALTY AND MARITIME LAW
Mr. Martin
May 15, 2004 SSN: ____________________

FINAL EXAMINATION

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ADMIRALTY AND MARITIME LAW
Mr. Martin
May 14, 2005 SSN: ____________________

FINAL EXAMINATION

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QUESTION ONE

Comment on the following statements. They are all true, but need elaboration as to meaning, application, significance and context.

1. The principle of the Limitation Act (and of the Fire Statute as well) is the same as that found in the Harter Act and the Carriage of Goods by Sea Act.

2. The Rule of The Pennsylvania states a drastic and unusual presumption which makes especially important the strictest compliance with the Rules of the Road.

3. Congress, when it passed the Jones Act, apparently did not want to waste any time thinking about the special problems of maritime workers.

4. The owners of cargo aboard a salving ship have no right to share in the salvage award, even where cargo is damaged as a result of the salvage operation.

5. The lien of the so-called preferred ship mortgage actually isn't preferred over many other liens.

QUESTION TWO

California and Hawaii Sugar Company, a nonprofit agricultural cooperative association, brought an action in Admiralty to recover for cargo loss and damage against Columbia Steamship Company and M/V Columbia Brewer arising out of the stranding of the vessel in the shallow waters of Old Providence Island off the coast of Nicaragua in the early hours of June 25, 2004.

Columbia Steamship Company denied liability to cargo and asserted a counterclaim to recover cargo's share in contribution to General Average.

On May 18, 2004, California and Hawaiian Sugar Company, Inc. (plaintiff), entered into a voyage charter party pursuant to which it chartered the Columbia Brewer from Columbia Steamship Company, Inc. (defendant), for the transporting of bulk sugar from a port in Hawaii to a port on the Gulf of Mexico. On or about June 7, 2004, plaintiff delivered to defendant and to the Columbia Brewer at the port of Nawiliwili, Kauai, a cargo of 11,941 short tons of bulk sugar. The sugar was received in apparent good order and condition for shipment, and a bill of lading was issued accordingly. The Columbia Brewer departed Nawiliwili, Kauai, and sailed through the Panama Canal without incident. One June 24, 2004, the vessel completed its transit of the Panama Canal and set a course for New Orleans.

On June 25, at approximately 6:28 A.M., the vessel stranded just off Old Providence Island in the Caribbean Sea. After the stranding of the vessel, the master attempted to back off the strand with the main engine. His attempts were unsuccessful. On June 27 he signed a Lloyd's Open Form Salvage contract and declared General Average. In the course of the ensuing salvage operations, approximately 1300 tons of sugar were transferred from the Columbia Brewer to the M/V Passat in order to lighten the stranded vessel. On July 6 the transfer of sugar to the Passat was completed and the Columbia Brewer was refloated with the assistance of the salvage

tug *Rescue*. Approximately 500 tons of bulk sugar were lost or damaged in the course of transfer and retransfer of the cargo.

Plaintiff, seeking damages for the cargo loss resulting from the stranding, and for its proportion of the salvage award and related fees and expenses, took the position that it was entitled to judgment because the stranding of the *Columbia Brewer* was due to the unseaworthiness of the vessel in that certain charts required by Coast Guard regulations were not present in the vessel's chartroom, the radar was inadequate, some of the gyrocompass repeaters were disconnected, and the fathometer malfunctioning. The defendant shipowner took the position that the stranding was solely due to a neglect or error in navigation by the master. The shipowner also denied that the vessel was unseaworthy and, in the alternative, argued that there was no causal connection between the stranding and any alleged unseaworthy condition.

The charter contained a "U.S.A. Clause Paramount" under which the provisions of the Carriage of Goods by Sea Act ("COGSA") are incorporated in the charter party and the bill of lading issued subsequent thereto. The charter also included a "New Jason Clause" which obligated the plaintiff, as shipper, to pay salvage costs attributable to cargo as well as expenses in the nature of General Average brought about by accident or damage for which the defendant, as shipowner, is not liable.

The district court found that the stranding was due, not to failure to supply the vessel with appropriate charts or to any malfunction of the vessel's navigational equipment, but rather to

the failure of the master, Captain Webb, to make proper use of the information available to him and to make course corrections when he discovered that his vessel was to the southeast of the island, which he intended to pass on the southwest. On this basis, decide the liability issues raised by the fact pattern. Take special notice of, and describe, shifting or shiftings of the burden of proof between the parties as you work out the liability issues.

QUESTION THREE

Accompanying this examination, and printed on white paper, are certain of the district court's findings of fact in a case called Moore v. The Sally J., 27 F.Supp 2d 1255 (W.D.Wash. 1998). Your instructor calls it "The case of the galley slave".

Discuss the Jones Act, unseaworthiness, and maintenance and cure issues raised by these findings of fact.

QUESTION FOUR

Accompanying this examination, and printed on contrasting color paper, is a copy of 43 U.S.C. ss. 2101-2106, known as the Abandoned Shipwreck Act of 1987. (This Act cross-references several other statutes. However, these other statutes are not relevant to this examination question and accordingly they are not reproduced).

Study the Abandoned Shipwreck Act, then answer the three questions that follow. In your answers, cite the specific sections of the Abandoned Shipwreck Act to which you refer. Accurate

citations, correct in form, will be given some of the examination credit on this question.

Your instructor is aware that you have not studied the Abandoned Shipwreck Act in this class. However, this question is not a test of your retained knowledge. It is, rather, a test of your ability to read an unfamiliar statute, understand it, and connect it to knowledge that you do have. That is a job which lawyers often have to do.

Part A.

In the early months following German and American declarations of war in 1941, German submarines ranged mercilessly off the American east coast. The submarines sank merchant ships almost at will, so poor was American anti-submarine protection at that time. Often the submarine would lie on the surface at night, offshore from a brilliantly lit coast, waiting for a target to be silhouetted against the shore. Under these conditions, SS Marvin Gardens was sunk off the coast of Long Island, New York, in February, 1942.

Marvin Gardens was a 5000 ton general cargo vessel of a standardized type produced in numbers during and after the First World War. (Hence Marvin Gardens is of no historical interest and not eligible for listing on the National Register of Historic Places). Her carcass lies intact on a sandy bottom 2-1/2 miles off Long Island. Recently Colin Diver, a treasure hunter from Philadelphia, located the wreck and brought the ship's bell to the surface. (The bell, with the ship's name cast into it, is the

surest evidence that a would-be salvor has actually reached a particular sunken wreck). Diver knows that claims to ownership of the wreck will be made by the State of New York and by the insurance company which paid the owner's claim upon the loss of the vessel, the latter acquiring ownership rights by subrogation. Will the United States District Court for the Eastern District of New York, sitting in admiralty, decree a salvage award to Diver or, alternatively, determine that Diver owns all rights to the wreck, if Diver initiates an in rem action against Marvin Gardens in that court seeking these alternative forms of relief?

(The wreck is located on the submerged lands of New York and within the territorial jurisdiction of the Eastern District of New York).

Part B.

Juno was a thirty-four gun frigate which entered the service of the Spanish Navy in 1790 and sailed for twelve years in that kingdom's service in the Atlantic Ocean and Caribbean Sea. On October 19, 1802, a storm arose which separated Juno from her squadron, and Juno began taking on water. Her crew jettisoned her cannons in an attempt to lighten the ship. On October 25 Juno encountered the American schooner La Favorita, and the two ships sailed together westward in hopes of reaching an American port. Juno continued to take on water, however, and during a lull in the storm on October 27 her captain ordered the passengers and crew of Juno to begin transferring to La Favorita. Only seven persons were able to transfer before the storm picked up and forced the ships

apart. On the morning of October 28, La Favorita lost sight of Juno in a heavy fog. When the fog cleared, Juno was gone and would not be seen again. A total of 432 sailors, soldiers and civilians perished when Juno sank.

The wreck of Juno was located, embedded, within the submerged lands of the Commonwealth of Virginia by treasure hunter Oedipus Wrecks, Inc. ("Oedipus"). Oedipus received permission from the proper Virginia authorities to salvage the wreck. The Kingdom of Spain, however, seeks to enjoin the salvage on the basis of a well-understood principle of international law that a nation's sunken warships are never deemed abandoned absent a formal act of abandonment. (As an example of such a "formal act," treaties of peace in earlier times sometimes contained clauses by which the former belligerants abandoned claims to the wrecks of their warships sunk in waters of their former enemies). The United States officially supports this principle of international law.

Will the United States District Court for the Eastern District of Virginia, on Spain's motion, enjoin Oedipus from salvaging Juno's wreck even though Oedipus has authority from the Commonwealth of Virginia to do so? Why or why not?

Part C.

On April 8, 1868, one hundred passsengers boarded the paddle-wheel steamer SS Skylark at Manitowoc, Wisconsin, and set off for what everyone expected would be a short trip down the icy waters of Lake Michigan to Chicago. Everything went well until 6:30 A.M. the next day. The night had been cold and the water rough, and the

ship's crew had kept a large stove in the main cabin going all night. At daybreak the porter cleaned the stove, stepped to the rail, and threw the still-hot ashes over the side. Unfortunately, the porter threw the ashes into the wind. The wind blew the ashes back into Skylark where they started a fire. The ship sank, and with it died all but two of those aboard. The ship lay on the bottom of Lake Michigan for 141 years until a commercial salvor named Harry Leggs found it.

Leggs salvaged the purser's safe from Skylark and (without opening it) filed an in rem action in the United States District Court for the Northern District of Illinois seeking title to the wreck of Skylark (and all associated rights) or, in the alternative, designation as exclusive salvor and a salvage award. No one claiming under the rights of the original owner of Skylark appeared. However, the State of Illinois answered the complaint with an assertion of its title pursuant to the Abandoned Shipwreck Act.

Surprised by Illinois's apperarance on the litigative scene, Leggs amended his complaint to include a claim that the Abandoned Shipwreck Act was unconstitutional. Eventually the constitutional claim was decided against Leggs and in favor of the constitutionality of the ASA by the United States Court of Appeals for the Seventh Circuit.

On remand to the district court, Leggs and Illinois stipulated that Skylark was not listed in nor eligible for inclusion in the National Register of Historic Places. They also stipulated that

the wreck was located within the submerged lands of the State of Illinois. Leggs and Illinois disputed whether or not the wreck of Skylark was embedded in Lake Michigan. The district court found as a fact that the wreck was embedded. How then should the district court (a) decide Legg's claim of title to the wreck, (b) decide Leggs's claim for salvage, and (c) what should the district court do about the purser's safe?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ZILLY, District Judge.

This matter came on for trial on March 26, 1998, before the Court, sitting without a jury. Plaintiff Dorothy Moore was represented by Eric Dickman of the Dickman Law Group. Defendant, Western Pioneer, Inc. was represented by Matthew C. Crane of Bauer, Moynihan & Johnson. At the conclusion of the case the Court took the matter under advisement. The Court has considered the evidence presented at trial, the exhibits admitted into evidence, the deposition testimony of David Miller Wise, M.D. and Greg Coleman, and the arguments of counsel, and being fully advised, now makes its Findings of Fact and Conclusions of Law as follows:

I.

FINDINGS OF FACT

1. Plaintiff Dorothy Moore was a seaman and employed by defendant Western Pioneer, Inc. at all pertinent times. Defendant Western Pioneer, Inc. is a corporation and its principal place of business is Seattle, King County, Washington.

2. Defendant vessel, SALLY J, is a commercial freighter owned and operated by Western Pioneer. The vessel's home port is Seattle, Washington. At all relevant times, Moore was employed by Western Pioneer in furtherance of the purposes of the vessel.

3. Beginning in 1990, Ms. Moore worked as a vessel cook for defendant on its vessels. (Exhibit 1) Each trip was the subject of a separate contract between the parties.

4. In January 1996, Ms. Moore joined the vessel SALLY J after it arrived in Dutch Harbor, Alaska on what is referred to as trip no. 104. Ms. Moore remained on that vessel until the end of trip no. 104 on January 31, 1996. Ms. Moore was also the vessel cook for that vessel on trip no. 105 (February 9, 1996, through March 8, 1996), trip no. 106 (March 15, 1996, through April 13, 1996), and trip no. 107 (May 3, 1996, through May 29, 1996).

5. As the vessel cook, Ms. Moore's obligations included cleaning the entire galley area, including the stove, as well as ordering all cooking and cleaning supplies. Ms. Moore had various supplies to clean the galley stove, including grill stones, grill screens, scrubbing sponges, steel wool, detergents, solvents, and oven cleaner. On prior occasions, Moore had used oven cleaner to clean the inside of the galley stove. It was Ms. Moore's custom to keep the galley clean. It was also her practice to give the vessel stove a deep cleaning during the vessel's return voyage to Seattle, Washington.

6. During the return portion of trip no. 106, Ms. Moore was ordered by the vessel master, Captain Larson, to clean the stove "like new." Captain Larson ordered Ms. Moore to clean the stains from the sides of the stove.

7. Moore told Captain Larson she didn't think she could clean the side of the stove "like new." Captain Larson replied that he thought she could, and asked her to give it a try. He test cleaned a small patch with a scrubbing sponge. After less than a minute using the scrubbing sponge, Captain Larson cleaned off a patch of the baked-on-food residue from the left side panel of the stove. Mr. Greg Coleman, the mate on board the SALLY J at the time, testified by deposition that Captain Larson's getting down on his hands and knees to clean a small part of the stove was out of character for Captain Larson. Moore saw the cleaned patch, and at no time thereafter did she protest or ask for assistance in cleaning the remainder of the side of the stove.

8. Mr. Coleman testified it usually took about an hour or two to clean just the grease off the stove, but that cleaning would not remove the stains on the sides of the stove. Cleaning the oven was usually limited to getting the grease off to prevent a fire, and getting the food waste off to be sanitary.

9. Ms. Moore tried to clean the sides of the stove as ordered, but found it very difficult. Ms. Moore tried SOS pads, copper wire

scrubbers, Scotch Brite sponge pads, grill screens, Simple Green, lemon juice, vinegar, pickle juice, and sandpaper to manually clean the sides of the stove as ordered. There was no safe cleaner or device on board the SALLY J that would clean off the stains as Ms. Moore was ordered to do. Ms. Moore even asked the vessel engineer for a sander to sand off the stains. The engineer said no sander was on board.

10. Western Pioneer alleges that oven cleaners such as "Mr. Muscle," a caustic solvent normally used to clean the interior of a stove, should have been used to clean the external surface of the stove. Based on the oven cleaner label, the material data safety sheet, and the testimony of Mr. Thomas Way, a Certified Professional Ergonomist, such use would be a misapplication of oven cleaner. Use of the oven cleaner to clean the outside of the galley stove in an enclosed galley on a moving vessel would create an unseaworthy condition. Oven cleaner is not fit for the purpose of cleaning the outside of the galley stove while the vessel is underway. In addition, Ms. Moore reasonably believed that the sides of the stove were aluminum. Although experts for each side tested the stove sides and agreed that the sides were in fact polished carbon steel, this was not readily apparent to Ms. Moore. The type of oven cleaner defendant contends should have been used, such as "Mr. Muscle," has warnings stating that it should not be used on aluminum surfaces. On the first day of cleaning the stove, Ms. Moore cleaned the sides of the stove from 4:00 a.m. until 10:00 p.m. Ms. Moore stopped during the day to make meals for the crew. After making meals for the crew, Ms. Moore went back to work scrubbing the ingrained stains on the stove. The next day, Ms. Moore worked from 4:00 a.m. to 3:00 p.m., again with breaks for making meals. Ms. Moore estimates she spent between 15 and 20 hours cleaning the stove.

11. While cleaning the galley stove "like new," Ms. Moore was not supervised. No one had instructed Ms. Moore on how to clean the stove.

12. Ms. Moore made the sides of the stove as clean as she could by hand. When Captain Larson inspected the stove, he said he was satisfied with Ms. Moore's results and knew Ms. Moore could get the job done.

13. Prior to the captain's request to clean the stove, there was an "incident" between Captain Larson and the plaintiff. The Court, in a previous ruling, excluded evidence about the incident. However, as a result of the incident, the working arrangement between the two was strained.

14. Ms. Moore failed to use reasonable care in connection with the work she accomplished. Although she found it very difficult to clean the stove like new, she failed to ask for help, advise the Captain or mate of the difficulty, or otherwise take steps to avoid the harm and resulting injury caused by 15 to 20 hours of hard repetitive work. Plaintiff also aggravated the injury by returning to work before the injury was properly treated.

15. After the scrubbing job, Ms. Moore suffered swelling and soreness of her wrists, forearms and hands. On April 17, 1996, Ms. Moore was seen at Peterson Chiropractic for an unrelated neck and back adjustment. The chart notes indicate Ms. Moore was suffering pain at her wrists and forearms. (Exhibit 9) The chiropractor recommended that Ms. Moore see a doctor at the nearby Highline Walk-In Clinic.

16. On April 18, 1996, Ms. Moore went to the Highline Walk-In Clinic where she was seen by J. Britten, M.D. The doctor's chart notes makes several references to pain and discomfort Ms. Moore was suffering at and behind her right thumb. Ms. Moore was diagnosed as having DeQuervain's tenosynovitis and was provided a wrist splint for her right hand that she was to wear for two weeks. (Exhibit 10).

17. Dr. Britten did not give Ms. Moore an unfit for duty slip, nor did he tell her she should not return to work.

18. Ms. Moore thought her right hand would get better with time, so she returned to work on trip no. 107 on or about May 3, 1996. At that time, Ms. Moore did not realize how much damage had been done to her thumbs. Ms. Moore thought she was able to perform her duties as a cook. Nevertheless,

Ms. Moore continued to wear the brace she was given at the Highline Walk–In clinic whenever she could. However, Ms. Moore found that doing her job was painful. The pain in Ms. Moore's hands did not go away.

19. When Ms. Moore returned to work on May 3, 1996, for trip no. 107, she did not advise the defendant, or its representatives, that she had sustained an injury on trip no. 106. In her contract she signed on May 3, 1996 for trip no. 107, Ms. Moore warranted that she was fully fit for performing the essential functions of her job, and that she had no physical disabilities or lingering injuries at that time that would limit her performance except for those listed. In the space reserved for listing such limiting conditions, Ms. Moore stated "NONE." That statement was not true.

20. When Ms. Moore joined the vessel for trip no. 107, Captain Larson saw her with a brace on her hand. He assumed she had been treated by a doctor paid for by Western Pioneer, and thus assumed she had received a medical release to return to work. He asked Ms. Moore if she could work, and she said yes. At no time between trip nos. 106 and 107 did Ms. Moore fill out an injury report, which she knew was required by the company.

21. During trip no. 107, Ms. Moore performed her normal duties as a cook, including cleaning. Ms. Moore was required to remove the brace from her right hand whenever she was cooking or cleaning. She favored her right hand, and testified that during the normal course of working that trip, she overworked her left hand. She was frequently required to remove her hand braces while working. No separate incident occurred on trip no. 107 that led to her left hand and thumb injury.

22. Upon her return home from trip no. 107, Ms. Moore returned to the Highline Walk–In Clinic on May 29, 1996. The chart notes from the clinic state Ms. Moore had been suffering from pain in her wrists for six weeks or since April 1996 (during trip no. 106). (Exhibit 10).

23. Ms. Moore was referred to Dr. Wise, a plastic and reconstructive hand surgeon. Dr. Wise was primarily in charge of Ms. Moore's treatment from that point on.

24. On June 4, 1996, Dr. Wise examined Ms. Moore. The chart notes for that date state:

> She[Ms. Moore] states that she had the onset of bilateral hand and wrist pain following one particular project on one trip recently what she calls trips number 106 and 107.
>
> ... She had a stove on one of the ships that had a porous aluminum side, and her captain wanted it "clean like new."

(Exhibit 11).

25. Dr. Wise testified that the type and nature of the injuries Ms. Moore presented with on June 4, 1996, were consistent with her reported history of cleaning the stove. On a more probable than not basis, the injuries were the result of Ms. Moore's cleaning the stove on the SALLY J as ordered by Captain Larson. No medical evidence is offered to contradict this view, and it is accepted by the Court.

26. Dr. Wise first tried conservative care, consisting of physical therapy, injections, and use of a number of braces and casts, without success. Some of Ms. Moore's injuries cleared up with conservative care. Others did not.

27. Eventually, Dr. Wise performed excision interposition arthroplastic surgery on each of Ms. Moore's thumbs. The tissue inserted between Ms. Moore's joints came from a graft from her groin. After each of the two surgeries, the surgery site was attacked by cellulitis. This was a very painful infection, secondary to surgery. Each time, Ms. Moore was hospitalized and given intravenous antibiotics. (Exhibit 11).

28. In August 1997, Ms. Moore was diagnosed with multiple sclerosis. As a result, she has been required to use a walker to assist her. The use of the walker has aggravated her injury.

29. Dr. Wise released Ms. Moore from medical care on October 20, 1997. This Court accepts Dr. Wise's opinion that Ms. Moore's cleaning of the galley stove on the SALLY J was the cause of the medical conditions described and treated by Dr. Wise.