



TransLaw

Chair's Corner

Lisa A. Harig, Chair of the Transportation and Transportation Security Law Section



In this issue of TransLaw, we feature profiles of two prominent attorneys in the transportation field: Thomas W. Anderson and Kevin G. Houlihan.

Mr. Anderson is the former General Counsel for the Minneapolis-St. Paul Metropolitan Airports Commission and was the recipient of the 2017 John T. Stewart Transportation Lawyer of the Year award in October 2017. Kevin G. Houlihan is currently the Assistant Chief Counsel for Transportation Security Litigation at TSA and the recipient of the 2017 John T. Stewart Transportation Security Lawyer of the Year.

We also have articles covering a variety of transportation modes and issues. Emma Jones writes about the future of the "safe port" warranty in maritime

charter contracts and how political unrest and financial risk (rather than just the potential for physical harm) have become issues. Continuing with a maritime theme, Laura Gongaware contributed an article about the treatment of historic shipwrecks that have been recovered from the water and are now on land. Finally, Britney Wilson discusses the state of paratransit service in New York City and the impact of the Americans with Disabilities Act and its regulations.

We have several upcoming programs that should be of interest to Section members, including a conversation with former Federal Maritime Commissioner William Doyle in April and the annual Transportation Security Law Forum in



Section leadership and award recipients from Left to Right: Sam Negatu, Alison Graab, Hector Huezo, Monica Hargrove, Kevin Houlihan, Tom Anderson, Lisa Harig, Thomas Lehrich, Dave Bannard, Steve Osit, Alice Koeth, and Dave Rifkind.

May. See the FBA website and emails for further details about these events. I encourage each of our members to actively participate in the Section by attending an event and/or authoring an article for TranLaw. If you have an idea for a program or article that you'd like to see, please contact one of the TTSL officers. ❖

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Consulting Editor, FBA: Cathy Barrie

Transportation Lawyer of the Year – Thomas W. Anderson



At the Section's annual Chief Counsels' Reception, Thomas W. Anderson was given the John T. Stewart, Jr. 2017 Transportation Lawyer of the Year award. Tom retired in the fall of 2017 after serving for 38 years as the General Counsel of the Metropolitan Airport Commission ("MAC"), the owner and operator of the Minneapolis-St. Paul International Airport ("MSP") and six other general aviation reliever airports in the area of the Twin Cities in Minnesota.

As was evident from Tom's remarks upon accepting the award, he is a passionate advocate for both the value and importance of building and maintaining transportation infrastructure and for the lawyers who have chosen this area of the law. As Tom stated, "good transportation systems and transportation infrastructure are critical to the social and economic health and well-being of the country. They mean JOBS and economic opportunity. I know most about airports, so let me cite the Minneapolis-St. Paul region. Minneapolis is geographically isolated from major population centers, on the northern plains. Cold winters, and mosquitoes the size of hummingbirds. Yet the Twin Cities are the home to 17 Fortune 500 Companies. They have a healthy business climate, great schools, terrific restaurants, and a thriving arts community. This year, in February, the Twin Cities are hosting the Super Bowl. Why has all of this happened? Because of the public and private investments the community has been willing to make, including investments in the airport."

As for the importance of transportation lawyers, Tom said "transportation attorneys have always played a key role. They roll up their sleeves and do the hard work of identifying and articulating the issues, advocating for their clients' positions, and finally, finding areas of consensus and common ground. On issue after issue, we have been problem solvers. Over our years of practice together, we have worked through important and complicated issues. It has not always been easy, but I think we each understood the importance of finding solutions."

Through that long career, Tom not only worked through the myriad legal and other related issues that have arisen with the incredible changes in commercial aviation, he was a leader among airport lawyers and aviation professionals. Among his major accomplishments, Tom:

- brokered a financial agreement between MAC, then-Northwest Airlines, and various Northwest entities to preserve thousands of jobs at MSP and maintain MSP as a hub for Northwest Airlines;
- throughout the 1990s, participated in discussions, including legislative debates, on the viability of keeping MSP at

its current location or relocating it to a new site; this "Dual Track" Process required MAC to simultaneously plan for both potential outcomes; in 1996, the Dual Track Process culminated when the Minnesota Legislature directed MAC to implement a \$3.1 billion MSP 2010 Long-Term Comprehensive Plan;

- negotiated a 20-year agreement with the airlines serving MSP approving the \$3.1 billion airport development plan;
- assisted in developing one of the first Part 150 noise programs in the nation, providing sound insulation for residences near MSP;
- defended and settled the noise litigation matter of City of Minneapolis, et. al. v. MAC, which resulted in residential noise mitigation beyond the typical standards, into the 60-DNL contour;
- worked on the security transformation of MSP in conjunction with the newly-established TSA after the September 11, 2001 terrorist attacks;
- helped achieve FAA approval of the use of airport revenues to fund a pro rata share of a rail line through MSP, based on airport-related passenger traffic, thus establishing a key precedent for funding ground transportation projects;
- worked closely with FAA and communities to craft revisions to Performance Based Navigation flight procedures to be more responsive to community concerns; and
- as MAC General Counsel since 1979, Tom managed the litigation of over 200 state court cases and over 100 federal court cases.

Since 1984, Tom has been a valued member of the Airports Council International – North America Legal Committee, and served as chair of its Steering Group for nearly three decades, one of the longest tenures in the history of the association. In recognition of his outstanding contributions, Tom recently received the ACI-NA Leadership award "For decades of extraordinary service to the Legal Committee of Airports Council International-North America and airports throughout North America."

He is also a member of the American Bar Association Section of State and Local Government Law, and the former Chair of its Public Transportation Subcommittee. He has served for years as a member of the ACRP panel that selects and oversees the compilation of legal research digests. In addition, Tom is active in many business and civic organizations, including the Minnesota State Bar Association, where he has served for many years on the Operations Committee and Investment Subcommittee; the Airport Foundation MSP, operator of Travelers Assistance and several airport arts and beautification programs; PORTICO Interfaith Housing Collaborative; and as Chair of the Downtown Coalition for Grief Support, a coalition of nine downtown areas churches that offers ongoing programs of grief education and support.

Tom is truly the 2017 Transportation Lawyer of the Year!

Transportation Security Lawyer of the Year – Kevin G. Houlihan



On October 26, 2017, the Transportation and Transportation Security Law Section of the Federal Bar Association selected Kevin G. Houlihan, as the Transportation Security Lawyer of the Year. Kevin serves as Assistant Chief Counsel for Transportation Security Litigation in the Office of Chief Counsel of the Transportation Security Administration (TSA). Kevin has supervised TSA's handling of some of the most pressing

lawsuits involving TSA over the life of the agency including the most current cases in which TSA has secured important victories in constitutional challenges to TSA use of watchlists in passenger prescreening

Kevin obtained his J.D. from the College of William & Mary, and his Master and Bachelor of Arts degrees in English Literature from George Mason University. While attending William & Mary, Kevin was named the Draper Scholar and received a full scholarship to pursue graduate studies in law at Queen Mary, University of London, where he obtained an LL.M. in Comparative Law. Upon returning to the United States in 2004, Kevin began work at TSA handling enforcement cases involving violations of transportation security regulations. In 2005, Kevin served as the Special Legal Assistant to the Chief Counsel, working with the Chief Counsel on a daily basis on matters of the highest importance to the agency. He then joined the Litigation Division and eventually became the lead TSA team attorney for *In re* September 11th Litigation, the

consolidated tort litigation involving claims arising out of the terrorist-related aircraft crashes of September 11, 2001. Kevin represented TSA's interests by working with the Federal Aviation Administration (FAA) and the U.S. Attorney's Office for the Southern District of New York (S.D.N.Y) to evaluate requests for Government discovery and authorize Government depositions and document productions while balancing the security risks with the need for transparency.

Kevin was named OCC Trial Attorney of the Year in 2010, and promoted to Assistant Chief Counsel for Transportation Security Litigation in 2013. In his current position, Kevin has played a key role in securing important favorable rulings in lawsuits brought by passengers who allege that they have been placed on the No Fly or Selectee watchlists and challenge the adequacy of the redress process. In addition, Kevin oversees a number of cases in litigation challenging key TSA vetting and credentialing programs, including cases in the U.S. Courts of Appeals implicating the TSA PreV® program, the Alien Flight Student Program, the Master Crew List program, Transportation Worker Identity Credentials and Air Cargo Security programs. Kevin regularly works with the Department of Justice (DOJ) (including the Office of Solicitor General, Civil Appellate staff, the Federal Programs Branch and National Security Division) to develop legal strategy to protect and expand TSA authorities in high-profile cases at the U.S. Supreme Court, courts of appeals, and district courts.

Kevin contributes to the legal community by representing TSA at conferences held by the American Bar Association (ABA) and participating in panel discussions at such events as the ABA Young Lawyers Fall Meeting, ABA Forum on Air and Space Law and by serving as a judge for the George Washington University National Security Law Moot Court Competition.

Save the Date

The Lunch and Learn Brown Bag program has a special guest on April 25, the **Hon. William P. Doyle, ME, Esq.**, Former Commissioner of the Federal Maritime Commission and the new CEO & Executive Director for the Dredging Contractors of America will discuss port and water way dredging.

The program will be held at **12 noon** at:

Stinson Leonard Street LLP
1775 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006-4605



Stuck in Neutral: The Americans with Disabilities Act and the State of Paratransit Service in New York City

Britney Wilson

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in the provision of public services, including transportation.¹ Discrimination occurs when a “public entity which operates a fixed route system . . . fail[s] to provide . . . paratransit and other special transportation services to individuals with disabilities.”² The ADA requires that paratransit services be “comparable to the level of designated public transportation services provided to individuals without disabilities,”³ and the ADA regulations establish the “minimum service criteria” required under the Act.⁴

Less than twenty percent of subway stations in New York City are accessible to people with disabilities.⁵ As a result, many elderly and disabled New Yorkers rely on paratransit transportation—rides that transport passengers who are unable to use the fixed route system—to get around.⁶ New York City’s paratransit service, Access-a-Ride, has long been the subject of intense criticism.⁷ The New York City division of the Metropolitan Transportation Authority, New York City Transit (NYC Transit), administers the Access-a-Ride program.⁸ NYC Transit contracts with private carrier companies who use an array of accessible vehicles to provide service.⁹ By analyzing three primary complaint areas among Access-a-Ride users—late or “no show” rides, unreasonable lengths of travel time, and lack of travel flexibility¹⁰—this article will examine how the vagueness of the ADA and its regulations about the meaning of “comparable” service has left riders vulnerable to Access-a-Ride’s interpretation of the mandate to provide paratransit transportation.

The ADA and Paratransit

Courts have acknowledged that “the text of the ADA itself offers little guidance” on what would make a paratransit service comparable to the level of public transportation available to people without disabilities.¹¹ The regulations suggest that paratransit services are generally considered to be comparable as long as there is a procedure to determine who gets to use them, they operate at the same times as other forms of public transportation, and there are no restrictions placed on where or for what purpose people with disabilities can travel.¹² Courts have stated that “paratransit service was not intended to be a comprehensive system of transportation for individuals with disabilities, “. . . [it] is intended simply to provide to individuals with disabilities the same mass transportation service opportunities everyone else gets, whether they be good, bad, or mediocre.”¹³ But Access-a-Ride users’ complaints illustrate how such limited interpretations of comparability under the ADA, its regulations, and in the courts have led, in many instances, to the failure to provide people with disabilities with the same opportunities everyone else gets—good, bad, or mediocre.

Lack of Travel Flexibility

One of the main critiques that Access-a-Ride users have of the service is its lack of flexibility.¹⁴ Access-a-Ride users must schedule their trips by 5 pm of the day before they want to travel.¹⁵ At the time users schedule a trip, they are given a computer-generated pick up time based either on the time they requested to be picked up (known as a “pick up time”) or the time they need to arrive at their destinations (known as an “appointment time”).¹⁶ Unlike public transportation users without disabilities, if an Access-a-Ride user does not have every place she needs or wants to go the next day planned out before 5 pm of the day before, she cannot travel. There is no mechanism for requesting a ride the same day. Also, unlike a public transportation user without a disability, who can choose to leave an event early or leave work late, there can be no unexpected or spontaneous changes for Access-a-Ride users. Access-a-Ride users who want to cancel trips scheduled for the same day they are traveling are required to do so two hours in advance or risk penalties that may affect their service eligibility.¹⁷

Similarly, the ADA regulations do not reflect great concern for the maintenance of flexibility in the lives of people with disabilities. At the time the regulations were promulgated, interpretations of the comparability requirement focused largely on the need to develop a ride scheduling plan to maximize efficiency and prevent people from being denied rides due to capacity constraints, by at least guaranteeing rides to people who requested them in advance.¹⁸ As one court explained, “while overcrowding may prevent fixed route passengers from boarding particular buses or trains, all the passengers have to do is wait a little longer for the next bus or train to come, whereas there is no next bus or train for paratransit riders.”¹⁹ Thus, the ADA regulations require providers to offer rides to all eligible paratransit users who have reserved trips at least 24 hours in advance.²⁰ They do not, however, say that riders should only be allowed to travel if they have scheduled their trips 24 hours in advance. Therefore, what began as an attempt to address “capacity constraint” concerns has morphed into an Access-a-Ride rule that constrains users’ capacity for spontaneity or flexibility.

Unreasonable Lengths of Travel Time

Access-a-Ride customers are also often forced to endure “hours[-]long trips around the city” before reaching their destinations.²¹ Access-a-Ride emphasizes that it is a “shared ride,” meaning that riders should expect to pick up and drop off other passengers before they get where they’re going.²² For example, the service tells customers to anticipate a “maximum ride time” of 1 hour and 5 minutes to travel a

distance between 3 and 6 miles.²³ Much to their customers' detriment, Access-a-Ride does not specify where passengers can expect to be taken during their time spent traveling—en route to their destination or in the opposite direction. It also does not specify in what order, geographical or chronological, according to time spent on the ride, they can expect to be dropped off.

The minimum service criteria in the ADA regulations prohibit “operational pattern[s] or practice[s] that significantly limit[] the availability of service” including “[s]ubstantial numbers of trips with excessive trip lengths,”²⁴ but neither the statute nor the regulations elaborate on the meaning of “substantial” or “excessive.” However, the Federal Transit Administration (FTA) states that “[a] paratransit trip should be comparable in length to an identical trip on the fixed route system, including the time necessary to travel to the bus stop, wait for the bus, actual riding time, transfers, and travel from the final stop to the person’s ultimate destination.”²⁵ However, unlike Access-a-Ride users, people without disabilities presumably would be traveling in the geographic direction of their destinations while doing all of these things, and would not be subject to pre-planned routing decisions that could lengthen their travel time.

Late or “No-Show” Rides

Finally, Access-a-Ride is often late and sometimes does not show up at all.²⁶ An audit conducted by the New York City Comptroller found that “more than 31,000 riders” were left stranded in 2016.²⁷ The ADA requires that “response time” be “comparable, to the extent practicable,” to public transportation services that people without disabilities use, and the minimum service criteria prohibits “[s]ubstantial numbers of significantly untimely pickups for initial or return trips” and “[s]ubstantial numbers of trip denials or missed trips.”²⁸ The statute does not clarify the meaning of “to the extent practicable” and the regulations do not define “substantial,” “significant” or “untimely” or establish any criteria for defining those terms.

Access-a-Ride builds in an automatic 30-minute wait period “for traffic or delays” before rides can even be considered late.²⁹ While the ADA regulations state that conditions beyond the control of the paratransit provider, such as traffic and weather, will not be included when determining whether a pattern of significant untimely or missed trips exists, it does not expressly allow for a built-in wait period in anticipation of these conditions. Instead, the lack of clarity around what constitutes untimeliness has allowed Access-a-Ride to create its own mechanism that conveniently decreases the likelihood of its lateness being deemed “substantial” or “significant.”

Evidence suggests that the generality of both the comparability requirement and the minimum service criteria was intentional. Commenters on the Notice on Proposed Rulemaking that ultimately became the ADA regulations reportedly thought “it would be better to take a less specific approach to comparability” in order to allow local governments the freedom to develop systems that would meet the needs of

their disabled populations.³⁰ The absence of explicit standards and definitions in the ADA and its regulations about what comparability means, what it would entail, and how to ensure and monitor that it is achieved has left local governments, and in the case of Access-a-Ride—private contractors’—too much wiggle room. The ADA regulations required public entities to submit an initial plan for compliance with the paratransit requirement by 1992.³¹ They are also required to submit annual updates to these plans,³² but plans without concrete standards upon which to base them are bound to be limited in their effectiveness.

Conclusion

The requirement that paratransit services be “comparable to the level of designated public transportation services provided to individuals without disabilities” is promising but incomplete. While localities may be better suited to determine how specific services operate, there should be certain explicit standards and elements of comparable transportation—like flexibility, timeliness, and length of travel time—(developed by or in consultation with people with disabilities) that apply to all paratransit users. These standards should be based on a reassessment of how paratransit is currently working in comparison to public transportation for people without disabilities in order to better ascertain the meaning of “comparable.” Finally, there should be a federal system to oversee the implementation of paratransit service plans based on those clearer standards.

As Access-a-Ride users’ complaints have shown, the failure to include more substantive consideration of what comparable transportation means has left many people with disabilities under and insufficiently served. In the case of Access-a-Ride at least, that responsibility has been redistributed a second time to contractors and private entities with their own interests and motives that may not always align with those of their customers.

Britney Wilson is an attorney and Bertha Justice Institute Fellow at the Center for Constitutional Rights. Read or listen to more of her experience as an advocate and paratransit user in her Longreads essay or her segment on This American Life (<https://longreads.com/2017/09/01/on-nycs-paratransit-fighting-for-safety-respect-and-human-dignity/>; <https://www.thisamericanlife.org/629/expect-delays/act-three-0>).

Endnotes

¹42 U.S.C. § 12132; see also 42 U.S.C. § 12142. Additionally, the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits entities that receive federal aid from discriminating against individuals with disabilities are fulfilled as long as the entity complies with the requirements and regulations of the ADA. See *Tandy v. City of Wichita*, 208 F.Supp.2d 1214, 1220–21 (D. Kan. 2002), *aff’d in part, rev’d in part, on other grounds, dismissed in part*, 380 F.3d 1277 (10th Cir 2004) (“The relationship between [Title II of the ADA and Section 504 of the Rehabilitation Act]

in the context of transit transportation is that a recipient of Department of Transportation funds complies with its § 504 obligations by complying with ADA requirements”).

²⁴42 U.S.C. § 12143 (a).

³⁴42 U.S.C. § 12143 (a) (1).

⁴⁴42 U.S.C. § 12143 (c) (3); *see also* 49 C.F.R. § 37.123-37.133.

⁵Disability Rights Advocates, Center for Independence of the Disabled New York (CIDNY), et al. v. New York City Transportation Authority (NYCTA), et al. (N.Y. State Supreme Court), <http://dralegal.org/case/center-independence-disabled-new-york-cidny-et-al-v-new-york-city-transit-authority-nycta-et-al-ny-state-supreme-court/> (last visited Feb. 11, 2018).

⁶*See* Barone, Vincent, *MTA proposes Access-a-Ride improvements amid growing complaints*, AM New York, Jun. 21, 2017, <https://www.amny.com/transit/mta-proposes-access-a-ride-improvements-amid-growing-complaints-1.13754246> (last visited Feb. 11, 2018) (stating that there are 148,000 registered Access-a-Ride users); *see also* Center for Independence of the Disabled, New York, *Access-a-Ride Fact Sheet*, <https://www.cidny.org/transportation/> (last visited Feb. 11, 2018); 49 C.F.R. § 37.3 (defining paratransit as “comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems”).

⁷*See* Ramey, Corinne, *Flaws Cited in MTA Program for Disabled Travelers*, The Wall Street Journal, Jan. 21, 2018, <https://www.wsj.com/articles/flaws-cited-in-mta-program-for-disabled-travelers-1516564473> (last visited Feb. 11, 2018); Kanno-Youngs, Zolan, *MTA’s Access-a-Ride Program Fails Disabled Passengers, Audit Says*, The Wall Street Journal, May 17, 2016, <https://www.wsj.com/articles/mtas-access-a-ride-program-fails-disabled-passengers-audit-says-1463532576> (last visited Feb. 14, 2018).

⁸MTA, Guide to Access-a-Ride Service, http://web.mta.info/nyct/paratran/guide.htm#what_is (last visited Feb. 13, 2018).

⁹*See supra*.

¹⁰*See supra*, note 5.

¹¹*Anderson v. Rochester-Genesee Regional Transp. Auth.*, 337 F.3d 201, 208–09 (2d Cir. 2003).

¹²*Tandy*, 208 F.Supp.2d at 1222; *see also* 49 C.F.R. § 37.121(b) (stating “[t]o be deemed comparable to fixed route service, a complementary paratransit system shall meet the requirements of Sec. Sec. 37.123- 37.133 of this subpart”).

¹³*Fell v. Spokane Transit Authority*, 128 Wash.2d 618, 629 (1996) (internal citations and quotations omitted).

¹⁴*See supra*, note 4, Barone, Vincent, *MTA proposes Access-a-Ride improvements amid growing complaints*, AM New York, Jun. 21, 2017, <https://www.amny.com/transit/mta-proposes-access-a-ride-improvements-amid-growing-complaints-1.13754246> (last visited Feb. 13, 2018) (citing the vice president of paratransit’s comments that he’d heard users’ demands for greater ‘flexibility’ and discussing the “current 24-hour-in advance [scheduling] requirement”).

¹⁵MTA, Guide to Access-a-Ride Service, <http://web.mta.info/nyct/paratran/guide.htm#reserve> (last visited Feb. 13, 2018).

¹⁶*See supra*.

¹⁷MTA, Guide to Access-a-Ride Service, <http://web.mta.info/nyct/paratran/guide.htm#cancel> (last visited Feb. 13, 2018).

¹⁸*Anderson*, 337 F.3d at 209 (internal quotations and citations omitted).

¹⁹*Id.*

²⁰49 C.F.R. § 37.131 (b).

²¹*See, e.g., supra*, note 4, Barone, Vincent, *MTA proposes Access-a-Ride improvements amid growing complaints*, AM New York, Jun. 21, 2017, <https://www.amny.com/transit/mta-proposes-access-a-ride-improvements-amid-growing-complaints-1.13754246> (last visited Feb. 14, 2018).

²²MTA, Guide to Access-a-Ride Service, http://web.mta.info/nyct/paratran/guide.htm#what_is (last visited Feb. 14, 2018).

²³MTA, Guide to Access-a-Ride Service, <http://web.mta.info/nyct/paratran/guide.htm#RideTimes> (last visited Feb. 14, 2018).

²⁴49 C.F.R. § 37.131.

²⁵United States Department of Transportation, Federal Transit Administration, *Frequently Asked Questions, Civil Rights/ADA, At what point is a paratransit ride no longer comparable to fixed route based on the time spent traveling?*, https://www.transit.dot.gov/faq?combine=&term_node_tid_depth=2086 (last visited February 11, 2018).

²⁶*See supra*, note 5, Ramey, Corinne, *Flaws Cited in MTA Program for Disabled Travelers*, The Wall Street Journal, Jan. 21, 2018, <https://www.wsj.com/articles/flaws-cited-in-mta-program-for-disabled-travelers-1516564473> (last visited Feb. 14, 2018) (explaining that “[r]iders and advocates have long complained about Access-A-Ride which they say is frequently late to arrive or doesn’t show up altogether”).

²⁷Kanno-Youngs, Zolan, *MTA’s Access-A-Ride Program Fails Disabled Passengers, Audit Says*, The Wall Street Journal, May 17, 2016, <https://www.wsj.com/articles/mtas-access-a-ride-program-fails-disabled-passengers-audit-says-1463532576> (last visited Feb. 14, 2018).

²⁸42 U.S.C. § 12143 (a) (2); 49 C.F.R. § 37.131.

²⁹MTA, Guide to Access-a-Ride Service, <http://web.mta.info/nyct/paratran/guide.htm#onTheDay> (last visited Feb. 14, 2018); 49 C.F.R. § 37.131.

³⁰Transportation for Individuals With Disabilities, 56 FR 45584-01, 1991 WL 171006 at 45600.

³¹49 C.F.R. § 37.135 (b).

³²49 C.F.R. § 37.135 (c).

The Future of the “Safe Port” Warranty: Smooth Sailing or Murkier Waters?

Emma C. Jones, Blank Rome LLP

In an age when cyber security breaches regularly make headlines, and autonomous vessels are appearing on the not-so-distant horizon, it's important to consider how age-old contracts like maritime charter parties will fare in the face of rapidly-changing technology and the security risks that come with it.

The “safe port” warranty is a tenet of charter party language, and an unsafe port or berth is often asserted in commercial negotiations as justification for damages resulting from delays or damage at port. While there is not a great deal of case law analyzing the warranty in the context of modern technological risks and threats, the cases and arbitration awards that we do have provide an interesting background against which to consider the potential for an expansion of the definition of the safe port warranty in an increasingly tech-based world.

Background

The definition of a “safe port” most commonly used by courts and arbitrators is from a British case from 1958 called *The Eastern City*: “a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship”¹

The practical application of a safe port (or safe berth²) warranty can be found in charter party language, generally in time charters, providing that the charterer shall only nominate ports and berths where the vessel may “safely lie, always afloat” or “NAABSA” (Not Always Afloat But Safely Aground). The safe port warranty has been interpreted to mean that there is a safe approach for a vessel to reach the specific port or berth, not necessarily that *all* approaches will be safe. The definition of an “approach” includes adjacent areas a vessel must traverse to either enter or leave the port, which includes the entirety of a river as well as any bridges that a vessel may need to pass. The test as to whether an unsafe condition is “avoidable by good navigation and seamanship” is whether, in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the port or berth. Where such language is used, it is a charterer's non-delegable duty to provide a port or berth that is safe for the specific vessel under charter.

An owner's remedy if charterer's duty is breached is to refuse to accept charterer's orders to proceed to an unsafe port or berth, or if the condition was unknown to owner before entering, to recover damages for costs incurred due to nomination of such an unsafe port or berth.

Traditional Application of the Safe Port Warranty

While the definition of a safe port is not a question that is frequently litigated, often there are assertions of unsafe ports or berths in commercial negotiations, even if ultimately no claim is made. The most common types of unsafe port claims

arise when vessels encounter challenges reaching a port due to swells, tides, currents, ice, unforeseeable weather, dangerous berth conditions, or missing or misleading navigational aids.

There also have been assertions that a “political” danger renders a port unsafe. In one case, where the load port had been under threat of guerilla attacks and was placed outside Institute Warranty limits by war risk underwriters, an arbitration panel found that the Libyan load port was in a danger zone and that the owner was justified in withdrawing the vessel on the basis of charterer's safe port warranty.³ By contrast, in considering whether the port of Ras Tanura, Saudi Arabia was unsafe as a result of a boycott on vessels that had called at Israeli ports, the United States Court of Appeals for the Second Circuit concluded that, in the circumstances, the safe port warranty could not be extended so as to place liability for the loss of the voyage on the charterer. The Court's justification was that the parties had never considered the risk of loading interference from a boycott, and that owner was aware of the vessel's prior call to Israel so therefore had knowledge of and control over the facts surrounding the potential source of “unsafety.” The Court noted that the term “safe” was implied in the sense of physical safety, not “political” safety.⁴

English law provides further guidance as to what makes a port “unsafe.” In a case from 1861, the House of Lords analyzed a situation where the Chilean government had declared a port closed because of a rebellion, and if the vessel were to proceed on charterers' orders, she would have been liable to confiscation. The court stated, in relevant part:

If a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty.⁵

In more modern times, the House of Lords rejected charterers' argument that a port could only be unsafe in a physical sense, finding that the outbreak of war between Iran and Iraq, a “political” unsafety, invoked charterers' warranty to nominate a safe port.⁶ On the other hand, the London Court of Appeal overruled a lower court holding that the port of Massawa, Eritrea was prospectively unsafe for a vessel to proceed to because it was a characteristic of that port that vessels proceeding to it or at anchor outside it could be subject to attack by pirates. The court proposed a test to ask, “if a reasonably careful charterer would on the facts known have concluded that the port was prospectively unsafe.”⁷

The limited case law and arbitration awards discussing “non-physical” risks in the context of a safe port warranty are few, and they reach different conclusions depending on factual circumstances. But the rule appears to be that if a

reasonable owner or master would refuse to send a vessel to a port for fear it would be seized, damaged, or destroyed, the port could likely be considered unsafe.

Murkier Waters

While even the cases conducting an analysis of “political” unsafety still focus largely on the risk of physical danger to a vessel, it does not seem out of the question to consider less traditional instances of unsafety as falling within the realm of an unsafe port assertion. For example:

1. What if a port develops a reputation for corruption, and a shipowner knows it likely will face spurious detention claims unless certain “fines” are paid? Could an owner refuse to accept charterer’s orders in such a situation, or at least open a commercial dialogue to request a different port order under the purview of the safe port warranty, arguing that such a situation would render the port unsafe?

2. Consider the practice at some Chinese ports of requiring crew members to surrender mobile phones or other electronic devices for inspection upon arrival. Such inspections have been said to be conducted at random or if a ship was specifically identified as posing a security threat.⁸ If a port authority or foreign government was targeting specific ships and requiring surveillance of crew members’ work and personal devices, could an argument be made that such a port was unsafe for that particular ship?

3. What if a cyber-criminal threatens a vessel with remote hijacking if it enters a certain port without paying some sort of ransom? It is conceivable that a cyber-criminal could hack a port’s IT system such that its infrastructure is compromised, posing a physical danger to vessels entering the port. Alternatively, even if such a criminal did not have the actual capability to do so, it still could make that threat. Could owners assert that such a threat warrants a port unsafe?

All of these scenarios seem increasingly more plausible given the developments in technology and the risks of security breaches. And of course, there are countless conceivable variations to these hypotheticals. Under the “traditional” definition of a safe port, the answer to the first two hypotheticals is “probably not,” whereas the third probably could support a finding of unsafe port. This is because the first two hypotheticals identify only financial damage and privacy concerns, respectively. In the third, however, regardless of the cyber-criminal’s actual capabilities, there appears to be a real risk of physical harm to the vessel.

The reference in the above definition to a “safe port” for the “particular ship” and to “avoidance by good navigation and seamanship” implies that the safe port warranty is not applicable to a port defect that is of an operational rather than a physical nature. The limited case law available indicates that a finding that a port is unsafe will generally require some risk of physical danger, as, even in the “political unsafety” cases, the ultimate risks involved damage to or seizure of the particular ship. That said, all of the case law on this topic hails

from a time before any of those hypotheticals were plausible.

In any case, the analysis of whether or not a port or berth is safe will be a fact-based analysis, which is why there are a number of ways the definition of a safe port could feasibly evolve to adapt to today’s increasingly technology-reliant age. Even under the 1958 definition in *The Eastern City*, the exposure to fraudulent “fines,” the requirement that crew members surrender their cellphones upon arrival, or a threat of cyber warfare to a ship, arguably could be dangers which cannot be avoided by good navigation and seamanship.

Conclusion

There does not appear to be any immediate risk of upheaval to a sixty-year-old definition of a safe port. But, it is important to think critically about how such long-standing charterparty terms and principles could (or should) be altered in the context of new technologies and risks that could not have been foreseen at the time these maritime customs developed and charterparty definitions were forged.

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Endnotes

¹*Leeds Shipping v. Societe Francaise Bunge (The Eastern City)*[1958] 2 Lloyd’s Rep. 127, 131.

²“Port” also encompasses “berth” for the purposes of this article.

³*In the Matter of the Arbitration Between Arietta Compania Naviera S.A. and World Wide Transport, Inc., “The Arietta Venizelos,”* 1973 AMC 1012, 1022 (1972).

⁴*Pan Cargo Shipping Corp. v. United States*, 234 F.Supp. 623, 638 (2d Cir. 1967), cert. denied 389 U.S. 836 (1967).

⁵*Ogden v. Graham* (1861) 1 B. & S. 773.

⁶*The Evia* (No.2) [1981] 2 Lloyd’s Rep. 613, [1982] 1 Lloyd’s Rep. 334 (C.A.) and [1982] 2 Lloyd’s Rep. 307 (H.L.)

⁷*K/S Penta Shipping A/S v. Ethiopian Shipping Lines Corporation, “The Saga Cob”* [1992] 2 Lloyd’s Rep. 545.

⁸*Margaret Zhou and Helen Huang, Alert: Anti-terrorism Measures for Ships Calling at Ports in China*, UK P&I CLUB PUBLICATIONS, <https://www.ukpandi.com/knowledge-publications/article/alert-anti-terrorism-measures-for-ships-calling-at-ports-in-china-141306/> (last visited February 13, 2018).

The Shifting Course of Protections for Historic Shipwrecks Once Submerged, But Now on Land

Laura L. Gongaware

Cultural heritage located on land receives extensive legal protection by local and national governments. Few question the importance of protecting historic sites like the pyramids of Gaza, the Roman Colosseum, and the Incan ruins at Machu Picchu. Comparatively, historic shipwrecks and other cultural heritage located underwater receive minimal protection, both in terms of legislation to protect that heritage and funding to enforce existing laws. Well known shipwrecks like the RMS TITANIC are the exception when it comes to the protection of historic shipwrecks, not the norm, and even the protection afforded to the TITANIC was the result of a long-fought battle.

For those interested in cultural heritage, the dichotomy in treatment between land-based cultural heritage and underwater cultural heritage is difficult to grasp, particularly because each historic shipwreck is akin to a miniature Pompeii, capturing one moment in time. Historic shipwrecks are also often gravesites and thus arguably deserving comparable protection to gravesites on land.

Treasure salvors typically target historic shipwrecks that reportedly sank carrying monetarily valuable cargo, such as gold or whiskey, and in their search for that cargo, treasure salvors often destroy the vessel itself and any items of little monetary value onboard. It is those items that are frequently the most historically significant, and thus in destroying the vessel and those items, much of the historic significance of the shipwreck is lost.

In the United States, through the Abandoned Shipwreck Act of 1987 (the “ASA”),¹ the States themselves are largely tasked with protecting historic shipwrecks embedded in their navigable waters and territorial sea. Specifically, under the ASA, “[t]he United States asserts title to any abandoned shipwreck that is—(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.”² Title to the abandoned shipwreck is then “transferred to the State in or on whose submerged lands the shipwreck is located.”³

Despite the transfer of title to the States, the ASA does not require that the States enact legislation to protect those wrecks or set specific standards for protection. Instead, the ASA states that “it is the declared policy of the Congress that

States carry out their responsibility under [the ASA] to develop appropriate and consistent policies. . . .”⁴ The ASA then directs the National Park Service to prepare guidelines “to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.”⁵ Funding for the States to assist with the protection of historic shipwrecks is also notably absent from the ASA.

Thus, under the ASA, each State is essentially left to its own devices when it comes to protecting its historic shipwrecks. Many States have enacted legislation and have set up departments to implement those laws. However, those departments often lack both monetary and human resources to enforce the laws and punish violators.

The nature of many of the major rivers in the United States, such as the Mississippi River and the Missouri River, raise additional protection problems, because these rivers have significantly changed course over time. Thus, in states like Missouri, some historic vessels that sank in a river are now buried in privately-owned land. These wrecks are not currently located in State submerged lands, and



arguably, may not be “embedded” as defined in the ASA.⁶ If the ASA does not apply to those wrecks, then the State would not have title to them, and those wrecks may be outside any protective laws enacted by that State.

For example, in the late 1980s, the Hawley family and several friends found the MISSOURI PACKET buried in a cornfield in Booneville, Missouri. The MISSOURI PACKET sank in 1820—one year before Missouri became a state. Although she sank in the Missouri River, the river changed course over time. Thus, at the time of her discovery, the MISSOURI PACKET was no longer located in the river, but was instead buried in private land.

When the MISSOURI PACKET sank in 1820, she was allegedly carrying a cargo of whiskey and silver coins. However, the Hawleys found only wooden barrels that once contained pork, and thus, the discovery was of little monetary value. The MISSOURI PACKET’s engine and boilers, however, were intact.

As one of the first steamboats to travel on the Missouri River, the MISSOURI PACKET had significant historic value, especially because the wooden hull of the vessel and part of the paddle

wheel were beautifully preserved. At the time, the Hawleys did not appear interested in the historic significance of the vessel and substantially damaged the hull in the process of removing the engine and boilers. The machinery was essentially ripped from the vessel with a backhoe and several of the vessel's large wooden planks broke into pieces in the process (as seen in a video taken by a videographer hired to film the discovery). The Hawleys then reburied the vessel and did not initially report their findings.

At the time of the MISSOURI PACKET's discovery, Missouri had not yet enacted legislation to protect its historic shipwrecks, although some involved in the discovery believe the fate of the MISSOURI PACKET resulted in the enactment of Missouri's existing legislation. Even under the existing legislation, which protects "any submerged or embedded abandoned shipwreck in [Missouri] which meets the national register of historic places criteria,"⁷ the MISSOURI PACKET may not have been protected given the changing course of the Missouri River. For similar reasons, the MISSOURI PACKET also may not have qualified for protection under the ASA. Thus, until maritime cultural heritage is given greater priority and gaps in the existing legislation are filled, significant parts of our past will continue to be lost irrevocably.

The Hawleys went on to discover the ARABIA PACKET, a steamboat that sank in 1856 and was fully loaded with cargo when discovered. In 1991, they opened the Steamboat Arabia Museum in Kansas City, Missouri, to display the ARABIA PACKET and its cargo. In 2013, the MISSOURI PACKET's engine was moved to the Steamboat Arabia Museum, where it is

now on display. Although the Hawleys preserved the ARABIA PACKET and opened a museum for the vessel, their actions have inspired several others in Missouri to search for historic shipwrecks. This resulted in the destruction of several other historically significant steamboats, like the 1865 steamboat TWILIGHT, which was raised by one of the men involved in the discovery of the MISSOURI PACKET, and now allegedly sits exposed to the elements in his backyard.

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Endnotes

¹43 U.S.C. §§ 2101 et seq.

²*Id.* at § 2105(a).

³*Id.* at § 2105(c).

⁴*Id.* at § 2103(a) (emphasis added).

⁵*Id.* at § 2104(c).

⁶The ASA defines "embedded" as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." *Id.* at § 2102(a).

⁷Mo. Rev. Stat. § 253.420.



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