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Book Review: The Law of Tug, Tow, and Pilotage

Francis John Gorman
University of Baltimore School of Law

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BOOK REVIEW

THE LAW OF TUG, TOW, AND PILOTAGE. By Alex L. Parks.† Cornell Maritime Press, Centreville, Maryland (2d ed. 1982). Pp. 1228. Reviewed by Francis J. Gorman.††

The increasing use of tugs and barges, especially in ocean-going commerce, has made reference to the law of tug and tow a more frequent occurrence for practicing maritime attorneys. This increase in tug and barge traffic,¹ together with the many changes that have taken place in maritime law since the publication of the first edition of Alex Parks's *The Law of Tug, Tow, and Pilotage* in 1971, are two reasons why a maritime attorney should have his second edition.

Parks's second edition retains many of the best features of the earlier edition.² The author clearly and succinctly states principles of law and sets forth exhaustive lists of authority, which provide ready assistance to the practicing attorney. The parallel citations to American Maritime Cases (AMC) are also helpful as they lead the maritime researcher into AMC's superior index and key number system.

The author has substantially enlarged the second edition of *The Law of Tug, Tow, and Pilotage*. The book includes almost five thousand cases, twice the number cited in the first edition. This increase is due to the addition of decisions from the United Kingdom, Australia, Canada, and New Zealand (the "Commonwealth"). By discussing United Kingdom and Commonwealth decisions, Parks hopes to promote cross-citation among the courts of the United States, the United Kingdom, and Commonwealth countries.³

The access to international decisions should prove to be a valuable resource to both American and foreign courts. Maritime traffic has broad international implications,⁴ and American courts have used

† Adjunct Professor of Admiralty, Willamette University College of Law; Partner, Parks, Montague, Allen & Greif, Portland, Oregon.

†† Partner, Semmes, Bowen & Semmes, Baltimore, Maryland; B.S.F.S., 1963, Georgetown University School of Foreign Service; J.D., 1969, Georgetown University Law Center; Assistant Editor, American Maritime Cases; Lecturer in Maritime Law, University of Baltimore School of Law; Member of the Maryland and District of Columbia Bars.

1. For example, one Baltimore newspaper carried a photograph of the *M/V Baltimore*, a 10,000 gross ton American flagship built in 1945 and converted to a container ship in 1966, with a note that she was replaced by a tug and barge service to feed container cargoes between Baltimore and other East Coast ports. *Baltimore Morning Sun*, Feb. 8, 1983, at B6, col. 2; see also Mank & Klugh, *Tugboat Liability—Charting a Perilous Course*, 34 FED'N INS. COUNS. Q. 85 (1983) (explaining that increased traffic is attributable to the low cost of waterborne transportation and the tug's dual role as a transporter of barges and as an assistor of large ships).
2. The first edition was reviewed in 1972 by Associate Professor Peter N. Swan. See Swan, *Book Review*, 51 OR. L. REV. 418 (1972).
3. A. PARKS, *THE LAW OF TUG, TOW, AND PILOTAGE* xxi (2d ed. 1982).
4. See *Marlex Petroleum, Inc. v. The Har Rai*, 1982 A.M.C. 1395 (Can. Fed. Ct.) (American plaintiff sought to enforce maritime lien arising under United States

Commonwealth and United Kingdom decisions as persuasive precedent,⁵ especially in the fields of marine insurance⁶ and collision.⁷ Parks has added hundreds of Commonwealth and English cases to his discussions of these topics.⁸ For example, Parks discusses the British Marine Insurance Act of 1906,⁹ which was paralleled by similar enactments in the Commonwealth. In analyzing creditor's rights in the United Kingdom, the author notes that United Kingdom law allows a creditor to arrest a sister ship and proceed in rem against a vessel to which supplies were provided to enforce certain claims, regardless of whether the claim gives rise to a maritime lien.¹⁰

Throughout his twelve hundred page volume, Parks provides an exhaustive survey of the law of towing and pilotage. The book begins with a succinct discussion of the historical development of the use of tugs and tows.¹¹ General admiralty and maritime principles are reviewed,¹² as well as their application to towage.¹³ Among the other topics treated by Parks are the warranty of workmanlike service,¹⁴ the

law in an action in rem against Indian ship in Canadian court); Watson, *Transnational Maritime Litigation: Selected Problems*, 8 MAR. L. 87 (1983) (discussing problems arising in multinational litigation); cf. Case Note, *Owner's Instructions to Master not to Sign Freight Prepaid Bills of Lading and to Require that all Bills of Lading Incorporate Terms of Time Charter is a Repudiation of Time Charter*, 10 J. MAR. L. & COM. 458 (1979) (discussing decision of England's House of Lords and noting that the issue decided had never been considered by American courts).

5. See *Ford Motor Co. v. M/S Maria Gorthan*, 397 F. Supp. 1332, 1336 (D. Md. 1975), 1976 A.M.C. 1734, 1739 (citing *Clifton v. Palumbo*, [1944] 2 All. E.R. 497); see also M. Cohen, *Anglo-American Maritime Cross Citer Supp. no. 1*, in AMERICAN MARITIME CASES ELEVENTH 5-YEAR DIGEST (1973-1977) 1375, 1376-81 (1979) (listing British Commonwealth precedents cited in American cases).
6. See *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 433 (1953), 1953 A.M.C. 952; *Standard Oil Co. v. United States*, 340 U.S. 54, 59 (1950), 1950 A.M.C. 365.
7. See *National Steel Co. v. Kinsman Marine Transit Co.*, 369 F. Supp. 498, 512 (E.D. Mich. 1972), 1974 A.M.C. 1070, 1083 (citing *The Agra and the Elizabeth Jenkins*, 1 L.R.-P.C. 501 (1867)); *International Regulations for Preventing Collisions at Sea*, 1972, 28 U.S.T. 3459, T.I.A.S. No. 1, at 8587.
8. THE LAW OF TUG, TOW, AND PILOTAGE xviii.
9. 6 Edw. 7, ch. 41, discussed in THE LAW OF TUG, TOW, AND PILOTAGE 512-13.
10. THE LAW OF TUG, TOW, AND PILOTAGE.
11. *Id.* at ch. I. Parks explains that the distinction between a "tug" and a "tow" is that a towboat pushed its tow, while a tugboat pulls its tow. *Id.* at 4-5.
12. *Id.* at ch. II. Although the second edition has a very good treatment of some general topics, the practitioner should be aware that the book does not cover the full range of admiralty and maritime law. See *infra* text at note 36.
13. THE LAW OF TUG, TOW, AND PILOTAGE ch. III. Among the principles discussed in the third chapter are contracts, private or common carriage, cross insurance endorsements, forum selection clauses, fundamental breach of contract, indemnity, hire, unseaworthiness, the Harter Act and COGSA, errors in navigation, and management. Two significant principles noted by Parks are the "dominant mind doctrine" and the effect of exculpatory clauses in towing contracts in light of *Bisso v. Inland Waterways Corp.*, 349 U.S. 845 (1955), and *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291 (1932). THE LAW OF TUG, TOW, AND PILOTAGE 70-71. The exculpatory clause analysis discusses both American and Commonwealth law. *Id.* at 87-97.
14. THE LAW OF TUG, TOW, AND PILOTAGE 29-30. Parks repeats his view that the

reciprocal duties of the tug and the tow,¹⁵ maritime insurance¹⁶ and liens,¹⁷ government regulation,¹⁸ charters,¹⁹ pilotage,²⁰ and salvage.²¹

The chapters dealing with pilotage, salvage, and reciprocal duties are the central focus of Parks's treatise.²² The discussion of reciprocal duties is particularly clear.²³ For example, Parks discusses the tug's

warranty of workmanlike service does not apply to a towage situation. *Id.* at 29. He notes that the extension of the warranty "would preclude limitation of liability under the 'personal contract' doctrine; and create confusion in the industry which has come to rely upon the principle that damage actions under towage contracts are *ex delicto* and not *ex contractu*." *Id.* at 29-30.

This reviewer has also questioned the automatic application of the warranty of workmanlike service by some courts to property damage and personal injury/death situations. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 TUL. L. REV. 1165 (1981); Gorman, *Ryan Indemnity in Maritime Property Damage Cases: What of Proportionate Fault?*, 8 U. BALT. L. REV. 42 (1978). *But see* Alvey, *The Implied Warranty of Workmanlike Performance in Towage: A Viable Theory?*, 7 MAR. LAW. 1 (1982) (advocating extension of warranty to towage).

15. THE LAW OF TUG, TOW, AND PILOTAGE chs. IV, V; *see infra* notes 23-24 and accompanying text.
16. THE LAW OF TUG, TOW, AND PILOTAGE ch. VIII. The chapter on marine insurance contains the greatest revision and supplementation of the first edition. In the Foreward, Nicholas J. Healy describes this chapter as presenting a "broad comprehensive view" of all aspects of marine insurance and a radical change from the first edition, with more than two hundred additional pages on this subject. Parks indicates that this chapter is the nucleus of a separate treatise which is yet to be published. *Id.* at 507. *See* L. BURGESS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES (2d ed. 1981) (sole American text on marine insurance).
17. THE LAW OF TUG, TOW, AND PILOTAGE ch. IX. This chapter has a thorough discussion of maritime liens, which are the central principles of creditors' rights under maritime law.
18. *Id.* at ch. VII. This chapter, which deals with government regulation, concentrates on the laws and regulations enforced by the United States Coast Guard. Parks discusses inspection and manning requirements for tugs and barges, wages, discharge, and various problems that arise with seamen. Because many tugs and tows operate on inland waters carrying domestic interstate commerce, Parks has included a thorough discussion of water carrier regulation by the Interstate Commerce Commission (ICC). *Id.* at 473.
19. *Id.* at ch. X. Chapter X deals with charter parties, which are documents that set forth the contractual terms between a person taking over the use of a ship (the charterer) and the shipowner. Parks distinguishes between the limited chartering of tugs and barges that occurs in domestic commerce because of ICC regulations, and the frequent chartering of ocean-going tug and barges in foreign commerce. Parks then concludes this chapter with a discussion of arbitration.
20. THE LAW OF TUG, TOW, AND PILOTAGE ch. XI; *see infra* notes 30-32 and accompanying text.
21. THE LAW OF TUG, TOW, AND PILOTAGE ch. XII; *see infra* notes 33-35 and accompanying text.
22. THE LAW OF TUG, TOW, AND PILOTAGE chs. IV, V, XI, XII.
23. For example, the general duties of the tug are set forth as follows:
Generally speaking, in every American contract of towage (unless the parties agree to the contrary and such agreement is not invalid as being against public policy), the towing company undertakes that it possesses sufficient knowledge and skill to perform the contract safely; that it will use its best endeavors, skill and diligence for that purpose; that it will provide a seaworthy vessel, properly equipped and manned, and of suffi-

obligation with respect to the condition and length of tow lines and the tow's obligation to have proper anchors.²⁴

Chapter IV treats collision and limitation of liability and the particular application of collision law to tugs and barges. The textual discussion on this topic follows the organization of the 72 COLREGS.²⁵ Parks discusses a 1975 Supreme Court decision, *United States v. Reliable Transfer Co.*,²⁶ and contends that the *Pennsylvania*²⁷ rule has continuing validity.²⁸ Parks describes shipboard radar and the liability of a shipowner for failure to use radar on a vessel.²⁹ Parks also summarizes the law on limitation of liability, and provides a useful comparison of the procedures used in the United Kingdom and Commonwealth countries.

The discussion of pilotage in Chapter XI begins with its origins in Roman law and the Hanseatic Ordinances, both of which required captains to take pilots or incur a penalty. Parks briefly mentions Article II of the United States Constitution, the Judiciary Act of 1789, and the savings to suitors clause contained therein. Moreover, the author comments upon the 1541 case of *Re Rumney and Wood*³⁰ in a light vein.

cient capacity and power to perform the service undertaken, under conditions which are to be reasonably anticipated.

THE LAW OF TUG, TOW, AND PILOTAGE 135. Similarly, Parks describes the duty of the tow:

Generally speaking, the owner of a tow owes the duty of furnishing a seaworthy vessel suitable for the conditions to be anticipated. If the tow has a crew aboard it, the crew must be competent and sufficient. In addition, the tow must be properly equipped with all the necessary equipment such as anchors and lights.

Id. at 212.

24. *Id.* at 144, 214.

25. The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (commonly called the 72 COLREGS), were developed by the Inter-Governmental Maritime Consultative Organization (IMCO), and were subsequently ratified by the United States, becoming effective in 1977. International Regulations for Preventing Collisions at Sea, 1972, 28 U.S.T. 34, 59, T.I.A.S. No. 1, at 8587. The new Inland Rules, which became effective on December 24, 1981, for most inland waters, closely parallel the 72 COLREGS.

26. 421 U.S. 397 (1975).

27. 86 U.S. (19 Wall.) 125 (1873). For a general discussion of the *Pennsylvania* rule, see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 494-98 (2d ed. 1975).

28. For a different view of whether the *Pennsylvania* rule should be overruled in light of the *Reliable Transfer* case, see Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 803 (1977); Tetley, *The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?*, 13 J. Mar. L. & Comm. 127 (1982).

29. THE LAW OF TUG, TOW, AND PILOTAGE 273-77. Radar equipment is not required of tugs by law, but federal regulations require radar on all self-propelled vessels of 1600 gross tons or more. 33 C.F.R. § 164.35(a) (1983). Other federal regulations require a backup radar system and automatic radar plotting devices. 33 C.F.R. §§ 164.37, 164.38 (1983). Parks predicts that radar will eventually be required on all vessels.

30. THE LAW OF TUG, TOW, AND PILOTAGE 1004 (discussing *Re Rumney and Wood*, Act Book, No. 128 (1541)).

Two pilots whose vessels ran aground were tried and sentenced by the President of the Admiralty Court, who used the following "vituperative" language:

And I dismiss, absolve, and discharge you and each of you as being unworthy, unfit, unskillful, inexperienced, lazy, negligent and careless men from the charge, care, and practice of conducting, commanding, and piloting any ships whatsoever as well from any ports whatsoever within this famous realm of England as to ports over the sea³¹

In fact, the master's duty to relieve a pilot is a delicate problem. Parks notes that the master exercises this duty "at his own peril," and he describes the liability of a pilot, of a shipowner, and of the ship in rem for negligence of a pilot. The book contains a full treatment of harbor pilotage, which is the local non-compulsory use of tug captains to dock and undock large ships. Parks repeats his arguments in favor of the standard pilotage clause, and explains the moral and economic justifications for the clause.³²

Salvage, discussed in Chapter XII, is a fitting topic for inclusion in this book because ninety-five percent of all salvage operations are performed by tugs.³³ The author emphasizes cases involving salvage services by tugs and pilots, and considers distinction between towage and salvage situations. Pilots can be salvors of their own vessels under certain situations under the law in the United States, the United Kingdom, and Commonwealth countries. Salvage suits are almost always in rem actions within the federal courts' exclusive jurisdiction, although occasionally a state court will enter a salvage judgment under a common law alias.³⁴ The salvor usually does not have a right to possession. There are, however, modern cases involving claims for possession and title to ancient wrecks.³⁵

The appendix contains nine forms, three more than the first edition. Unfortunately, none of the forms in the appendix are integrated into the textual discussion. Two forms set forth towage agreements, one from the perspective of the tug owner and the other from that of the tow owner. These two forms will be helpful to any attorney who is asked to prepare or negotiate a towage contract.

Despite the expansion of Parks's treatise, several topics are not ad-

31. THE LAW OF TUG, TOW, AND PILOTAGE 1003-04.

32. *Id.* at 1030-84.

33. For the practical aspects of salvage, Parks refers readers to E. BRADY, BRADY ON MARINE SALVAGE OPERATIONS (1960).

34. *See* Young v. Smith, Eq. No. 16-495 (Md. Cir. Ct. Anne Arundel Co., Dec. 29, 1966), 1966 A.M.C. 2654.

35. *See, e.g.,* Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 548, 561 (S.D. Fla. 1982), 1983 A.M.C. 1018, 1046; Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978), 1978 A.M.C. 1404.

equately treated. In his appendix of forms, Parks does not include the Lloyd's Open Form of Salvage Contract. Parks similarly does not discuss topics such as the history and jurisdiction of admiralty and maritime law, international sales transactions and bills of lading, and personal injury and the Harborworkers and Longshoremen's Act. These subjects are well covered in the Gilmore and Black treatise,³⁶ which remains the premiere reference on *general* American admiralty and maritime law.

In addition, Parks could have more thoroughly treated the state regulation of pilots by state boards and commissions that appoint and license. A suggested addition to a third edition is a state-by-state survey of the structure and operation of the boards and commissions in the leading maritime states.

Despite these minor shortcomings, Parks's new edition is a definite improvement over the first edition and offers much more to the practicing maritime attorney. In a case involving a tug or a barge, no brief should be prepared without consulting the second edition of *The Law of Tug, Tow, and Pilotage*. Park's second edition serves as a practical research tool because of its crisp style and numerous case citations, and should be a welcome addition to a maritime attorney's desk.

36. See G. GILMORE AND C. BLACK, *supra* note 27.