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The Need for Enhanced Responder Immunity for Salvors Based on Lessons Learned from the *Deepwater Horizon*

By Jonathan K. Waldron, Partner
BLANK ROME LLP

Immediately following the explosion on the *Deepwater Horizon*, emergency response vessels rushed to the rig to save lives, render assistance to those in peril and fight the fire. In the ensuing months, responder companies worked to clean up the oil that was pouring into the gulf in an effort to mitigate the spill. Notwithstanding these valiant efforts to help in the worst environmental disaster in U.S. history, these emergency and cleanup responders are entwined in complex and protracted specialized multidistrict litigation (MDL) despite the fact that protections were put in place following lessons learned from the *Exxon Valdez* specifically to prevent such occurrences. Salvors could find themselves in the same situation in future incidents unless enhancements are made to current law.

Background on Responder Immunity Under the Oil Pollution Act of 1990 (OPA 90)

Following the *Exxon Valdez* incident in 1989, Congress included a responder immunity provision in OPA 90 to protect from liability those individuals or corporations who provide care, assistance, or advice in mitigating the effects of an oil spill. As detailed in the OPA 90 Conference Report, Congress intended that responses to oil spills be immediate and effective and noted that without such a provision the

substantial financial risks and liability exposures associated with spill response could deter a prompt, aggressive response.

This immunity does not prevent any injured parties from recovering their full damages resulting from the spill incident, as OPA 90 provides that the responsible party (RP) is liable for any of the removal costs or damages that a responder is relieved of pursuant to this immunity consistent with the OPA 90 "polluter pays" principle. This immunity does not apply if a responder acts with gross negligence or willful misconduct, or in cases involving personal injury or wrongful death.

Litigation Against Responders

Following the *Deepwater Horizon* incident on April 20, 2010, which resulted in the deaths of 11 and injuries to 17 men working on the platform and the discharge of approximately five million barrels of oil, and which required thousands of responders working several months to contain and clean up under challenging conditions, numerous claims and lawsuits were filed.



JONATHAN WALDRON

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Soundings

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Articles, letters, questions and comments should be directed to Debra Colbert, Managing Editor, at the following address:

American Salvage Association

103 Oronoco Street
Suite 200
Alexandria, VA 22314
(703) 373-2267
dcolbert@americansalvage.org

President
Tim Beaver

Vice President
Paul Hankins

Secretary/Treasurer
Todd Schauer

Director
Richard Fredricks

Assistant to the Director
Patricia Welch

Managing Editor
Debra Colbert

Editor Emeritus
Jim Bladh

Production/Graphics
Traci Fischer

Unfortunately, the OPA 90 standard specific to responders has proven inadequate to protect responders from becoming entwined in such suits. In these cases, plaintiffs have been successful in simply alleging gross negligence (without providing any supporting facts), and to cast “exposure” claims resulting from alleged exposure to released oil or from approved dispersants used to treat that oil as personal injury claims falling outside the scope of the specific responder immunity provisions.

The cases have been catalogued into pleading bundles called “Master Complaints” under various categories. One of the Master Complaint bundles named as defendants all parties involved in post-explosion response actions, which includes the manufacturer of the dispersants used, the companies providing the aircraft spraying dispersants, the contractors leading the incident command for BP, as well as the nation’s two leading oil spill response contractors. This complaint alleges various torts causing personal injury as a result of exposure to oil and/or dispersants and damages to personal and real property as a result of dispersants or oil coming into contact with such property. A separate Master Complaint bundle named as defendants all the owners and/or operators of the rescue vessels that answered the *Deepwater Horizon* distress call and responded to the fire emergency after the explosion. This is similar to suits that could have been filed against salvors had there been salvage actions related to the incident.

However, due to the complexity of the MDL the litigation is expected to last for years. An inordinate amount of time is being spent in discovery and motions and the priority of the litigation is mainly and naturally focused on the complaints directly against the RPs. Court activity related to the responders is for the most part being deferred in order to deal with the direct actions against the RPs. As a result, responders will incur millions of dollars in attorneys’ fees and other costs in defending these suits; money that could otherwise have been spent on new equipment or in otherwise enhancing the nation’s ability to respond to marine casualties and oil spills.

These actions against the Good Samaritans are troubling because the OPA 90 immunity regime is intended to protect responders from extensive and


costly litigation and potential liability. Although the responders have argued for immunity and preemption against liability as it relates to the *Deepwater Horizon* claims asserted against them in the current litigation, these defenses are proving time-consuming and expensive to assert, and there is no consequence to plaintiffs for bringing claims against responders, even when they have full recourse against the RP.

Coalition to Improve Responder Protections

Absent enhanced liability protections, it is unlikely that responders will again take such immediate and bold response actions at the time of spill incidents. Indeed, as a result of this incident, responders are requiring extra layers of indemnification as well as seeking detailed directions and approvals from government officials before taking any response actions. These type of actions are not in the overall public interest and are inconsistent with the overall intent of OPA 90 to encourage a prompt and aggressive response to minimize damage to the greatest extent practicable.

The good news is that a strong initiative is underway to represent the overall common interests of the response industry through the formation of a coalition to seek enhanced legislation to fill the immunity gaps identified as a result of the *Deepwater Horizon* incident. This coalition broadly represents interests related to emergency lifesaving and firefighting, salvage, oil well containment, spill response, dispersants, and spill management. A legislative solution is particularly important as these entities constitute the first responders, salvors and firefighters, to both the casualty itself and the resulting oil spill and their response must be immediate and without hesitation for fear of liability.

The coalition has finalized proposed legislation and work is ongoing to get the legislation introduced in Congress as soon as possible. It is expected following the publication of the *Deepwater Horizon* Joint Investigation report on September 14, 2011 that Congress will start to conduct additional spill hearings and move forward to advance spill related legislation. Of course, Congress will have a number of priorities to address before the year ends including war related issues, the economy, and the nation’s deficit. However, it is imperative that the

maritime industry rallies around this response industry coalition initiative to ensure enactment of responder immunity enhancements as quickly as possible. The goal of the coalition is to ensure that these enhancements are included in any spill legislation that is ultimately enacted. 

Jonathan Waldron is a partner at Blank Rome LLP in its Washington, D.C., office and concentrates his practice in maritime, international, and environmental law. He is a member of the Maritime Law Association and frequently speaks and writes on maritime issues.

ASA Announces New Leaders for 2011-2013

Tim Beaver, Chief Executive Officer of Global Diving & Salvage, Inc., has been elected President of the American Salvage Association at its recent meeting in Arlington, VA, October 3, 2011. He succeeds Mauricio Garrido, who served as President from 2009-2011. Paul Hankins, Donjon-SMIT, LLC, has been elected Vice President. Todd Schauer, Resolve Marine Group, has been named Secretary/Treasurer.



TIM BEAVER


“This new leadership team will serve to energize the ASA’s approach to the diverse fronts tackled by the ASA,” said Beaver.

In addition, David DeVilbiss (Global Diving & Salvage, Inc.); Dan Schwall (Titan Salvage); and Bob Umbenstock (Resolve Marine Group) were reelected to ASA’s Executive Committee.

Paul Smith (The Glosten Associates, Inc.) and Bob Urban (PCCI, Inc.) were elected Chairman and Vice-Chairman, respectively, of the ASA Associate Membership Committee, and serve on the Executive Committee in this capacity.

“ASA owes great thanks to Mauricio Garrido, who led us as President since 2009. His guidance served our members and the industry well over his term in office,” Beaver continued.

“This year and beyond, ASA will remain focused on the OPA 90 salvage and marine firefighting

regulations for tank vessels, pending regulations for non-tank vessels, responder immunity, Arctic response, the ongoing partnerships with the U.S. Coast Guard and NOAA, as well as continuing to strengthen our industry’s commitment to the marine environment,” Beaver noted. 

President’s Message

BY MAURICIO GARRIDO
President - American Salvage Association


As I prepare to hand over the helm of our Association, a feeling of satisfaction emerges for we continue to surpass expectations. During the past 11 years, our nimble organization has achieved so much with so little and at times it feels as if we are just getting started.



MAURICIO GARRIDO

We have developed a self-supporting and ever-growing training program which has been tightly embraced by the U.S. Coast Guard as it clearly returns lots on the investment. Our partnerships with the USCG and NOAA continue to get stronger turning into a common sense approach to sharing views and ideas of common benefit for both our membership and the agencies. The ASA was able to provide a positive contribution to the OPA 90 regulatory process and while the Salvage and Firefighting regulations may not be perfect, they are out and undergoing a “test drive” with the tanker community. Our new Education Committee will certainly serve to project the ASA’s long-term commitment to raising the maritime awareness of the American public.

And on the issue of responder immunity, I believe we must press ahead to seek legislative support to protect the salvage responder. The shipping community at large and the environment itself cannot afford a “gun-shy” industry concerned about criminal and civil liability exposure.

Thanks to everyone for their support during my tenure as President. I look forward to continue fully engaged in increasing the recognition our industry deserves. Each and every one of you must remain focused on our mission while helping grow our membership so our voice can be heard louder every time. 

UPCOMING EVENTS



**November 30-
December 1**

21st Annual Clean Gulf
Henry B. Gonzalez
Convention Center
San Antonio, TX
www.cleangulf.org

**November 30-
December 2**

International Workboat Show
Morial Convention Center
New Orleans, LA
www.workboatshow.com

December 5-8, 2011

Salvage & Wreck Removal
Conference 2011
Salvage Law & Practice
Seminar
London, England
[www.informaglobalevents.com/
KT0123ASEM](http://www.informaglobalevents.com/KT0123ASEM)

February 20-24, 2012

Great Lakes Waterways
Conference
Cleveland, OH
www.passengervessel.com

March 6-8

Inland Waterways Conference
St. Louis, MO
www.passengervessel.com

March 15

Quebec Salvage Conference
Quebec City, Canada
www.imq.qc.ca

March 19

ASA 2012 Spring Meeting
Stamford, CT
www.americansalvage.org

March 19-21

Shipping 2012
Stamford, CT
www.shipplng2012.com

May 15-17

Clean Pacific 2012
Long Beach, CA
www.cleanpacific.org

ASA Holds Fall Membership Meeting; Co-Sponsors National Maritime Salvage Conference



On October 3, ASA held its Fall Membership meeting in Arlington, Virginia, for the purpose of gathering together members of the association to conduct business, but also to elect new officers (see story page 3). The meeting was attended by many ASA General Members, Corporate Associate Members, and Associate Members. In fact, the association voted to allow three new General Members to join ASA's ranks: Ballard Salvage and Diving, Inland Salvage, and River Salvage. Welcome!

ASA and Marine Log co-sponsored, once again, the National Maritime Salvage Conference on October 4-5, also in Arlington, and hosted more than 125 attendees from industry and government. A very successful ASA-led Training Seminar was held on October 6.

Some of the activities that took place are highlighted on the next two pages. 🌐

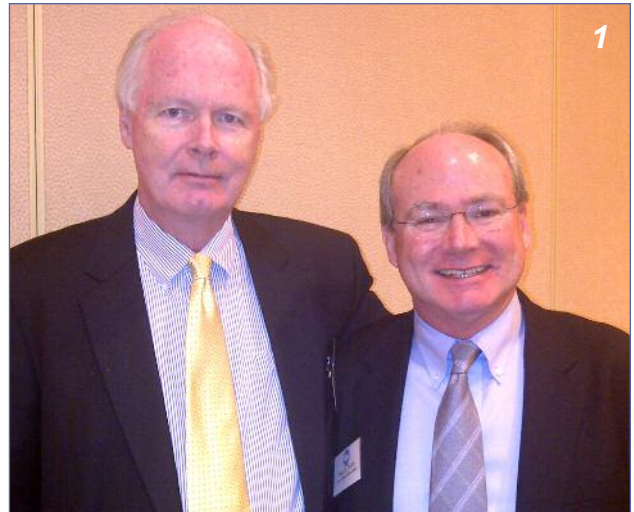


Photo 1: Bob Urban, PCCI, left, stands with Paul Smith, The Glostén Associates, after they were elected as Vice-Chairman and Chairman, respectively, of ASA's Associate Membership Committee. **Photo 2:** Former Supervisors of Salvage Dick Fiske (left) and Chuck Maclin (far right) stand with current Supervisor of Salvage Captain Pat Keenan, USN, after ASA's Fall meeting. **Photo 3:** Rep. Frank LoBiondo, Chairman of the Subcommittee on Coast Guard & Maritime Transportation, addresses attendees at the National Maritime Salvage Conference, urging cooperation and partnership between government and industry. **Photo 4:** New ASA General Member Inland Salvage's David Grecho talks with newly elected ASA President Tim Beaver.





Special Thanks to Our Sponsors



Photo 5: Newly elected ASA Executive Committee members (left to right) Dan Schwall (Titan Salvage), Bob Umbenstock (Resolve Marine Group), Todd Schauer (Resolve Marine Group), and David deVilbiss (Global Diving & Salvage) stand together. **Photo 6:** ASA's new Chief Financial Officer Lee Hill just after presenting the association's 2012 budget. **Photo 7:** ASA Past Presidents George Wittich, left, and John A. Witte, Jr., share a laugh at ASA's Fall Membership meeting. **Photo 8:** New ASA President Tim Beaver presents outgoing President Garrido with a ship's clock at the closing lunch of the National Maritime Salvage Conference.



Spotlight on Donjon Marine Co., Inc.


Founded in 1964 by Mr. J. Arnold Witte, Donjon's President and Chief Executive Officer, Donjon Marine Co., Inc.'s principal business activities were at that time marine salvage, marine transportation, and related services.

Today, Donjon provides a broad spectrum of marine services, including dredging, marine salvage, heavy lift transport, tug/barge transportation, demolition, pollution control and remediation, shipbuilding and repair, as well as land-based metals recycling, demolition and landfill remediation/site management. Based in New York and New Jersey, Donjon and its affiliates maintain offices, assets and personnel throughout the Northeast, with operations spanning the globe.

With the creation of Donjon Shipbuilding & Repair, LLC, the latest addition to its family of services, Donjon controls the largest shipyard of its kind on the Great Lakes, utilizing years of

experience and knowledge to meet the needs of an ever-growing industry to provide shipbuilding, dry-docking, ship repair, barge construction, vessel conversion, repowering, maintenance, steel fabrication, steel assembly, and other related services through the Great Lakes region and beyond.

The company's extensive equipment includes five crane barges, 15 tugboats, four dredges, three dump scows, 17 hopper scows, 12 deck barges, as well as other vessels and equipment.

In early August, Donjon was awarded the U.S. Navy's award-fee contract for marine salvage, salvage-related towing, harbor clearance, ocean engineering and point-to-point towing services to support the U.S. Navy's Director of Ocean Engineering, Supervisor of Salvage and Diving. Donjon was also awarded a contract to supply the Navy with Engineering Support Services on a worldwide basis. 

www.donjon.com

Towing Manual: Offshore and Ocean Towage with Related Shipping Matters and Opinions

A Book Review by Dick Fredricks,
ASA Executive Director

I recently received a copy of a new book written by Captain Jan ter Haar, a friend of mine who had a long and distinguished career at SMIT; first with Smit International Ocean Towage and Salvage Company and then with SMIT Salvage. Jan now heads his own consultancy, JtH Marine Consultancy. The book is titled *Towing Manual – Offshore and Ocean Towage* with related shipping matters and opinions.

While I know something about the subject, the fact is that I did not go to sea as long as I had originally intended and now have been a long time behind a desk. Anyway, I have enjoyed reading the *Towing Manual* and being reminded of some things that I knew about and had done, some things that I knew about but had not done,

other things that I was aware of but did not really understand, and a whole lot of things that I was completely unaware of. The *Towing Manual* contains chapters on tug construction, winches, propulsion, work conditions, firefighting capacity, towing material, pre-towing arrangements, emergency towing gear, departure, anchor chasing, stability, contracts, as well as abbreviations and annexes.

The *Towing Manual* is more than just a great reference book as it offers the reader – seaman and desk jockey alike – a graduate level education on the history and practice of ocean towing.

Published by the STC-GROUP, The Netherlands. Available on line at: www.tugandosv.com or from the author via: jthmc@hotmail.com. 



Meet the ASA Membership

For membership information, please contact Matt Miller, Chairman, ASA Membership Committee via email at mstmiller@glostent.com, or Dick Fredricks, ASA Director, via email at rfredricks@americansalvage.org.

Corporate Associate Members



Dawn Services, LLC
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Meet the ASA Membership

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www.adc-int.org



Offshore Marine Service Association
Harahan, LA USA
Tel: (504) 734-7622
www.offshoremarine.org



International Salvage Union
London ENGLAND
Tel: +44 (0) 20 7645 9104
www.marine-salvage.com



Spill Control Association of America
Bel Air, MD USA
Tel: (443) 640-1085, x119
www.scaa-spill.org



North American Marine Environmental Protection Association
Southport, CT USA
Tel: (203) 255-4686
www.namepa.net



The National Association of Marine Surveyors, Inc.
Chesapeake, VA USA
Tel: (800) 822-6267
www.namsglobal.org

General Members

For membership information, please contact Matt Miller, Chairman, ASA Membership Committee via email at msmiller@glosten.com, or Dick Fredricks, ASA Director, via email at dfredricks@americansalvage.org.



American Marine Corporation
Honolulu, HI USA
Tel: (808) 545-5190 (24 Hours)
www.amarinecorp.com



Mammoet Salvage Americas Inc.
Rosharon, TX USA
Tel: (281) 369 2200
www.mammoetsalvage.com



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www.smit.com



Ballard Diving & Salvage
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Tel: (713) 534-0700 (24 hours)
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