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## LIABILITY OF THE UNITED STATES FOR MARITIME TORTS

*Walkley E. Johnson, Jr.\**

The United States Government owns and operates by far the largest fleet in the Americas. It is a fleet which includes not only the high profile carriers, cruisers and destroyers but a miscellany of tugs, barges, tankers, frigates, car floats and lighters. It includes cargo vessels as well as warships. Thus, the potential for the commission of maritime torts is manifest simply from the number and variety of government vessels at sea. Add the myriad responsibilities exercised by Government agencies such as the United States Coast Guard, and the potential for tortious involvement is enormous.<sup>1</sup>

In view of the extent to which Government vessels and activities permeate both commercial and recreational maritime activity, it is of no little significance to the maritime community that Congress has elected to waive the Government's right to sovereign immunity. The vehicle by which this immunity is waived, and the cornerstone of the law governing the United States' liability for maritime torts, is the Suits in Admiralty Act (SIA).<sup>2</sup>

### JURISDICTION UNDER THE SUITS IN ADMIRALTY ACT

It should be noted at the outset that the scope of the SIA was vastly expanded by an amendment in 1960. Accordingly, in cases instituted prior to 1960, jurisdiction was frequently founded upon the Federal Tort Claims Act (FTCA).<sup>3</sup> Prior to 1960 the FTCA was applicable in a number of maritime tort situations, but since the Act expressly excepts from its coverage any action that might be

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1. The Coast Guard, for example, performs such disparate maritime activities as the maintenance of aids to navigation, 14 U.S.C.A. § 2 (Cum. Supp. 1976); inspection and certification of passenger vessels, 46 U.S.C. § 390a (1970); marking sunken wrecks, 14 U.S.C.A. § 86 (Cum. Supp. 1976); search and rescue of persons and property in distress, 14 U.S.C.A. § 2 (Cum. Supp. 1976); and ice patrol in the vicinity of the Grand Banks of Newfoundland, 46 U.S.C. § 738a (1970).

2. 46 U.S.C. § 741 *et seq.* (1970).

3. 28 U.S.C.A. § 2680(h) (Cum. Supp. 1976), *amending* 28 U.S.C.A. § 2671 *et seq.* (1965).

brought under the SIA,<sup>4</sup> the broadening of SIA jurisdiction in 1960 necessarily restricted reliance upon the FTCA. At present, the jurisdiction of the SIA "extends to the full range of admiralty cases which might have been maintained had a private person or property been involved . . . ."<sup>5</sup>

The broad range of situations in which the SIA affords jurisdiction is not readily evident from a casual reading of the statute, and it may be helpful to review the changes brought about by the 1960 amendment. The pertinent portion of the statute reads as follows:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, *or if a private person or property were involved*, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title.<sup>6</sup>

The effect of the amendment was to increase enormously the types of cases that came within the purview of the Act. With the addition of the language "or if a private person or property were involved," the Act encompassed situations involving not only vessels and cargo but virtually any circumstance giving rise to admiralty jurisdiction.<sup>7</sup> At the same time the deletion of the reference to merchant vessels gave the Act sway over actions involving military and other public vessels theretofore solely within the purview of the Public Vessels Act.<sup>8</sup>

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4. *Id.* § 2680(h) (Cum. Supp. 1976), *amending* 28 U.S.C.A. § 2680 (1965).

5. S. REP. NO. 1079, 92d Cong., 2d Sess. (1972).

6. 46 U.S.C. § 742 (1970) (emphasis added). The language italicized was added in 1960, and at the same time the following language, which immediately followed the language quoted above, was deleted: "as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation."

7. *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974). In *Roberts*, an action was instituted by the heirs of an Air Force navigator who was killed when his plane crashed in navigable waters on its approach to the Naha Air Base, Okinawa. The complaint sought relief under the general maritime law, the Death on the High Seas Act and the FTCA. The trial court held that jurisdiction was proper under the FTCA, but on appeal the Ninth Circuit reversed, holding that the action was maritime in nature and therefore jurisdiction could be founded only under the SIA. Since the plaintiff neither had pleaded the SIA nor filed suit within the Act's two year limitation period, the court indicated that the Government's motion to dismiss should have been granted.

8. 46 U.S.C. § 781 *et seq.* (1970).

From the changes effected in 1960, it is apparent that the types of situations in which the United States may be sued under the SIA are not intended to be less extensive than the types of situations in which private parties could sue one another in admiralty.<sup>9</sup> It would also appear from section 3 of the Act<sup>10</sup> that the principles of law applicable to the Government in such situations are intended to be identical to the principles applicable to controversies between private citizens.

In practical application, however, serious questions arise as to whether it is possible to draw a fair analogy between all activities of the Government with those of private parties and also whether a particular standard of care required of the private mariner can be carried over into a remotely comparable situation involving Government agencies. What, for instance, are the customs and usages of the lighthouse trade or the search and rescue industry? How are activities of a strictly governmental nature to be compared with those in the private sector? Efforts of courts in dealing with this enigma will be the principal topic of the remainder of this article.

Venue provisions under the SIA are reasonably straightforward. The suit may be filed "in the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."<sup>11</sup> It should be noted, however, that under the same section it is provided that "[t]he libelant shall *forthwith* serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing."<sup>12</sup> Failure to serve the libel "forthwith" is deemed jurisdictional and bars relief.<sup>13</sup> The second and an ex-

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9. See notes 7 & 8 *supra*.

10. 46 U.S.C. § 743 (1970).

11. *Id.* § 742.

12. *Id.* (emphasis added). It has been held that "forthwith" refers both to the mailing of the copy to the Attorney General and to the service upon the United States Attorney. A delay of four and one-half months in mailing a copy to the Attorney General was fatal. *Battaglia v. United States*, 303 F.2d 683 (2d Cir. 1962).

13. In *City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708 (2d Cir. 1960), a petition imploding the United States was filed on February 25, 1959, but service was not made on the United States Attorney until April 27, 1959, nor was a copy mailed to the Attorney General until April 29, 1959. Upon motion of the United States, the trial court dismissed the

tremely important jurisdictional limitation is the two-year statute of limitations provided in Section 5 of the Act.<sup>14</sup> The statute cannot be waived, and there is authority to the effect that not even the infancy, insanity or disability of the plaintiff will serve to toll the statute.<sup>15</sup>

### THE STANDARD OF CARE

If the suit is filed within two years and process has been "forthwith" served, the plaintiff should then have an opportunity to prove that his loss was proximately caused by the fault of the United States. There are, however, hazards along the way, and the plaintiff should anticipate some reluctance on the part of the judiciary to open the public coffers to the same extent that a jury might tap the treasury of a large corporate defendant.<sup>16</sup>

Since the SIA provides that the Government is to be judged based on principles of law applicable to private parties in like situations,<sup>17</sup> the courts have often felt compelled to draw direct analogies with private enterprise. But since the Government engages in many activities which are unique, the analogies tend to be strained, and as a result generally unfavorable to the claimant. The validity of the analogies has been further taxed by the apparent belief of some district and appellate courts that, despite the SIA's full waiver of sovereign immunity, the United States is still entitled to a certain degree of deference. Nowhere is this sentiment more evident than in those cases dealing with the services provided by the Coast Guard, and a review of this line of cases offers a good perspective of the problems inherent in any attempt to establish the Government's duty of care in an area in which it has virtually preempted the field.

The focal point of any discussion of the Government's duty of care

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impleading petition. In affirming, the Second Circuit stated: "'Forthwith' means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion." *Id.* at 710.

14. 46 U.S.C. § 745 (1970).

15. The nonwaivability of this limitation was established in *Isthmian Steamship Co. v. United States*, 302 F.2d 69 (2d Cir. 1962). The Second Circuit has held that not even the infancy, insanity or disability of the plaintiff will serve to toll the statute. *Sgambati v. United States*, 172 F.2d 297 (2d Cir. 1949).

16. There are no jury trials under the SIA. 46 U.S.C. § 742 (1970).

17. 46 U.S.C. § 742 (1970). See note 6 *supra* for relevant portions.

in a maritime tort situation necessarily must be the Supreme Court's decision in *Indian Towing Co. v. United States*,<sup>18</sup> where the Court provided the framework for defining the appropriate standard of care in situations involving the Coast Guard's exercise of discretionary functions. Prior to *Indian Towing*, the question had been whether the Government could be liable at all in such situations; after *Indian Towing*, the question became what standard of care was appropriate under the facts.

The case arose as a result of the grounding of the tug *Navajo* and the consequent loss of her barge's cargo. The plaintiff contended that the grounding occurred as a result of the Coast Guard's negligent failure to maintain the light on Chandeleur Island. The Government replied that the lighthouse service was a uniquely governmental activity and that the provisions of the FTCA<sup>19</sup> "imposing liability 'in the same manner and to the same extent as a private individual under like circumstance . . . ' must be read as excluding liability in the performance of activities which private persons do not perform."<sup>20</sup>

In rejecting the Government's argument, the Supreme Court pointed out that the statutory language is under "*like* circumstances," not "*the same* circumstances."<sup>21</sup> Thus, the Supreme Court recognized that governmental activities necessarily differ from those of private enterprise and that the waiver of sovereign immunity contained in the FTCA should not be modified by the exemption of governmental activities having no counterpart in private industry. The Court went on to say that once the public had come to rely on the light on Chandeleur Island, the Coast Guard had an obligation to see that the light was properly maintained. In other words, the Court suggested that the Coast Guard in this instance

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18. 350 U.S. 61 (1955). The claimant in *Indian Towing* lost at each level before finally prevailing on a petition for rehearing before the Supreme Court. The district court granted the defendant's motion to dismiss on grounds that the United States had not consented to be sued "in the manner in which this suit is brought." This action was affirmed by the Fifth Circuit. 211 F.2d 886 (5th Cir. 1954) (per curiam). The Supreme Court granted certiorari, 348 U.S. 810 (1954), and affirmed by an equally divided Court. 349 U.S. 902 (1955) (per curiam). A petition for rehearing was granted, 349 U.S. 926 (1955), and, in a 5-4 decision, the Supreme Court reversed.

19. The language of waiver under the SIA is similar. 46 U.S.C. § 742 (1970).

20. 350 U.S. at 64.

21. *Id.* (emphasis added).

was similar to a "good Samaritan" who, having voluntarily undertaken a service, was obliged to continue to perform "in a careful manner."<sup>22</sup>

Prior to *Indian Towing*, the decisions of the lower courts had been notoriously paternalistic toward the Coast Guard. In *P. Dougherty Co. v. United States*,<sup>23</sup> an early case instituted under the SIA, a divided Third Circuit went so far as to hold that "public policy dictates that the United States should not be held liable for fault of the Coast Guard in the field of rescue operations."<sup>24</sup> The court reasoned that to hold the Coast Guard responsible for its negligence would be detrimental to the morale and effectiveness of its personnel and would discourage immediate aid to those in distress. The majority, however, gave little consideration to the intent of Congress in granting a full waiver of sovereign immunity. Obviously, had Congress intended that the Coast Guard constitute an exception, it would have written an exception into the Act, just as it had provided exceptions in the FTCA.

The dissenting opinion took cognizance of the provisions of the SIA, recognizing that the Coast Guard was governed by the same principles of admiralty law as the private citizen, and suggested that the decision of the majority was influenced more by sentiment than by an understanding of the intent of Congress.<sup>25</sup> While the position of the dissent was accepted in *Indian Towing*, the sentiment that swayed the majority to a decision favorable to the Coast Guard has not been entirely absent from subsequent decisions.

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22. *Id.* at 65.

23. 207 F.2d 626 (3d Cir. 1957).

24. *Id.* at 634.

25. The author of the opinion, Chief Judge Biggs, noted:

I cannot bring myself to believe that Congress, implicitly and *sub silentio*, intended to relieve the United States for liability for the torts of Coast Guard vessels. In asserting the contrary proposition I cannot help but believe that the majority is substituting sentiment for the plain provisions of the Public Vessels Act. *Id.* at 641-42.

The suit was brought under the Public Vessels Act, 46 U.S.C. § 781, *et seq.* (1970), which provides that "[s]uch suits shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith . . . ." Chapter 20 of Title 46 embodies the SIA, and the Court was, therefore, obliged to apply those principles of law "obtaining in like cases between private parties." 46 U.S.C. § 743 (1970).

## THE PRIVATE SALVOR (GOOD SAMARITAN) ANALOGY

Although it was clear after *Indian Towing* that Coast Guard activities enjoyed no immunity, it was not entirely clear what standard of care would be required of Coast Guard personnel discharging discretionary functions. The Supreme Court had mentioned the good Samaritan analogy, but it had not discussed in any detail the extent to which the analogy might be applicable.

In *Dougherty*, which unlike *Indian Towing* involved an attempted rescue at sea, the Court compared the Coast Guard's activities to those of a private salvor voluntarily seeking to assist a vessel in distress and suggested that such a salvor would be liable only for gross negligence or willful misconduct. Later cases dealing with Coast Guard rescue missions have continued to employ this private salvor analogy, frequently using the concept interchangeably with the good Samaritan doctrine.<sup>26</sup> The majority of the decisions, however, has not adopted a standard of gross negligence but have held that the Coast Guard discharges its duty of care so long as it refrains from worsening the victim's situation.<sup>27</sup> These decisions reason that since the law provides that the Coast Guard *may* "perform any and all acts necessary to rescue and aid persons and protect and save property,"<sup>28</sup> the Coast Guard, like a private salvor, has no duty of affirmative action and will be liable only for active negligence resulting in a distinguishable injury.

There is serious reason to suspect that such an analogy still constitutes a hedge against a full waiver of sovereign immunity. There are some obvious and substantial distinctions between the Coast Guard and a private salvor which suggest that the Coast Guard might have a duty of affirmative action. Private salvors, for instance, are not charged with a statutory responsibility for maintaining and operating rescue facilities.<sup>29</sup> They are not afforded special

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26. Although in rescue cases courts use the private salvor and good Samaritan analogies interchangeably, a private salvor is distinguished from the latter in that he expects a reward for his services. GILMOR & BLACK, *LAW OF ADMIRALTY* 532 (2d ed. 1975).

27. See *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962); *Frank v. United States*, 250 F.2d 178 (3d Cir. 1957).

28. 14 U.S.C. § 88 (1970).

29. It should be noted that although the Coast Guard may not have a mandatory duty to undertake a particular rescue mission, it does have a mandatory obligation to "develop, establish, maintain and operate . . . rescue facilities for the promotion of safety on, under and over the high seas and waters subject to the jurisdiction of the United States." *Id.* § 2.

rescue training and equipment at public expense and do not publicize themselves as providing rescue services. The noncontracting private salvor is by definition a volunteer who is motivated, at least in part, by the prospect of a salvage award. In contrast, it should be noted that Coast Guard personnel are trained, equipped and paid to render search and rescue services to the public.

These distinctions were fully recognized and discussed in *United States v. Gavagan*.<sup>30</sup> Although the suit in *Gavagan* was filed under the FTCA prior to the 1960 amendment, the issue would have been essentially the same under the SIA, that is, what standard of care would be required of a private party under like circumstances. In *Gavagan* the fishing vessel *Donald Ray* and her crew were lost in a storm. A contributing cause of the loss was the negligent failure of the Coast Guard Rescue Coordination Center in Jacksonville, Florida, to evaluate and disseminate information vital to the rescue effort. The Government made the usual argument that, in attempting to assist the *Donald Ray*, the Coast Guard was acting as a private salvor and, as such, was responsible only for "distinguishable" damages.<sup>31</sup> The implication of this argument was that, since the Coast Guard had no mandatory obligation to assist, it could withdraw from the effort at any time, having no responsibility to follow through with the mission to its conclusion.

The Fifth Circuit, however, rejected such an inflexible application of the private salvor analogy<sup>32</sup> and indicated that if there must be an analogy, "the situation is more comparable to that of professional salvors operating under contract without regard to success or failure."<sup>33</sup> More importantly, the opinion recognized the futility of attempting to analogize activities which are often uniquely governmental to activities of private persons.<sup>34</sup>

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30. 280 F.2d 319 (5th Cir. 1960).

31. *Id.* at 326.

32. *Id.* The application of the private salvor or good Samaritan analogy is often justified as necessary to encourage rescue efforts. The absence of such a policy is thought to deter those who might otherwise volunteer their assistance. The *Gavagan* court recognized that imposition of liability on the Government would not deter rescue operations as the vast machinery of the Government was not put into operation because of the hope of reward but because of policy determinations made by the legislative and executive branches of government.

33. *Id.* at 327.

34. Specifically, the court noted:

As our discussion has shown, what was undertaken here resembled private marine

With *Gavagan* as precedent, it would have been reasonable to expect the courts to accept the doctrine that Coast Guard personnel must be held to that standard of competence which is reasonably consistent with their training and experience, and the seriousness of their endeavors. One is generally judged by the standards of his profession, and in other areas of governmental activity it has been recognized that public servants must discharge their responsibilities in a manner commensurate with the extent of their training and the nature of their undertaking.<sup>35</sup> But the more adaptable standards suggested by *Gavagan* were short-lived. In *United States v. DeVane*,<sup>36</sup> the Fifth Circuit held in a split decision that *Gavagan* did not alter the duty of care owed by the Coast Guard but actually adopted the good Samaritan doctrine. The basis of this interpretation of *Gavagan* was a passage in which the court stated that "the facts fully [met] the requirements of the good Samaritan doctrine."<sup>37</sup>

It is difficult to read *Gavagan* in its entirety and not be persuaded that the court interpreted the Coast Guard's responsibility as encompassing something more than an obligation simply to avoid worsening the victim's condition. If the court had intended only to adopt the good Samaritan doctrine, the vast majority of its opinion was superfluous. As pointed out in the dissent in *DeVane*, the court in *Gavagan* first applied the standard of reasonable care and then stated that in addition the facts met the good Samaritan test.<sup>38</sup>

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salvage in many ways. But it was something much more indeed. The Government may not escape liability because we cannot find any private person either who had done so or might undertake such a vast project for search and rescue . . . . Of course, to the extent that the activity is the same as that normally done by private persons the law (here the maritime law on salvage) would control. To the extent, however, that it is different then the case does not fail because of a void in the legal precedents. The court trying the case has the obligation to determine on appropriate standards what the law would be were there such a private person performing the unusual function. . . . That leads us then to the time-honored capacity of the federal judiciary in the realm of maritime law to fashion and mold its substantive as well as procedural aspects. *Id.* at 327-28.

35. For example, it has been held that an FBI agent seeking to thwart an airplane hijacking would be held to the standard of care expected of "the reasonable FBI agent with training in handling such affairs." *Downs v. United States*, 522 F.2d 990, 1002 (6th Cir. 1975).

36. 306 F.2d 182 (5th Cir. 1962).

37. 280 F.2d at 328.

38. 306 F.2d at 187.

The view expressed in the *DeVane* dissent has found support in the First Circuit. In *United States v. Sandra & Dennis Fishing Corp.*,<sup>39</sup> a suit was instituted under the SIA by reason of the death of five members of the crew of the *Barbara and Gail*, who were lost when a Coast Guard patrol boat negligently towed the fishing vessel onto a bar. In affirming the trial court's finding of liability, the court stated:

In seeking exoneration the government makes much of the principle that a salvor who is a 'good Samaritan' is not held to ordinary standards of care. Whatever may be the limits of this principle with respect to volunteered salvage, we believe that if the Coast Guard accepts a mission it should conduct its share of the proceeding with acceptable seamanship. We refuse to take the government's view and be a party to adding to the honored motto, "*Semper Paratus*," [Always Ready] the words "*Interdum Prudens*" [Sometimes Careful].<sup>40</sup>

Thus in *Sandra & Dennis* the First Circuit held that the Coast Guard had no obligation to undertake a rescue mission but that once such a mission was undertaken the Coast Guard was obliged to perform with due care. Unfortunately, there is no discussion as to whether the duty of care is to be measured in terms of the standard expected of the week-end yachtsman or that of a Coast Guardsman trained and experienced in rescue work.

#### THE NEED FOR MORE ADAPTABLE STANDARDS

With the exception of *Gavagan* and *Sandra & Dennis*, the decisions involving Coast Guard rescue work seem to fall back too readily upon the private salvor concept. They offer little discussion of what Congress really intended when it provided that suits under the SIA "shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."<sup>41</sup> Can it be said that this language compels the trial court in each instance to draw a specific analogy with private enterprise, or does it simply call for the application of the same general

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39. 372 F.2d 189 (1st Cir. 1967).

40. *Id.* at 197 (emphasis added, citations and footnote omitted).

41. 46 U.S.C. § 743 (1970).

principles of tort liability utilized in litigation between private parties? Certainly, there are situations in which the Government's duty of care should be commensurate with that of a private salvor, but there does not appear to be any reason to apply the analogy so inflexibly as to fail to take cognizance of the realities of the Government's situation.

The Supreme Court has long recognized that the Government engages in activities unique unto itself and that the waiver of sovereign immunity includes these uniquely governmental activities.<sup>42</sup> The fact that this might result in the imposition of liability in unprecedented situations should be no deterrent to the application of ordinary standards of care.<sup>43</sup> If it is recognized that the Government will be liable for negligent acts incident to uniquely governmental activities, it must also be recognized that there will be situations in which governmental functions cannot be validly analogized to any specific private undertaking. Such a situation could fairly be said to exist with respect to the search and rescue activities of the Coast Guard, which, with its training and experience and its network of rescue coordination centers, scarcely could be compared to the good Samaritan who comes upon the scene by accident, untrained and uninformed.

It is not intended to overemphasize the decisions concerned with Coast Guard rescue work; there are equally significant decisions interpreting the SIA and involving agencies other than the Coast Guard. In *DeBardleben Marine Corp. v. United States*,<sup>44</sup> the author of the *Gavagan* opinion analyzed the responsibility of the United States under the SIA by reason of the publication of an erroneous chart found by the trial court to be the proximate cause of the plaintiff's damages. On appeal the Government argued that publication of the inaccurate coast and geodetic survey chart was analogous to the publication of an inaccurate road map or an erroneous scientific treatise and that there could be no liability in the

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42. See notes 17-21 *supra* and accompanying text.

43. In *Rayonier v. United States*, 352 U.S. 315, 319 (1957), the Court noted:

It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

44. 451 F.2d 140 (5th Cir. 1971).

absence of a special relationship between the parties. The court rejected the analogies and applied a standard of care which was deemed compatible with the actual circumstances, taking full cognizance of the fact that the charts were prepared and disseminated with the knowledge that they would be relied upon by mariners for navigation.<sup>45</sup> The opinion is significant for its recognition of the need to require of the Government a standard of care accordant with the actual circumstances in which the particular agency is functioning. Direct comparisons with private endeavors are neither necessary nor, in many cases, possible.

#### LIABILITY FOR ABUSE OF DISCRETION

The original justification for the analogy between the Coast Guard and the private salvor was the fact that most of the Coast Guard's functions are discretionary. That is, the legislation authorizing the Coast Guard to render aid to vessels in distress, mark sunken wrecks and maintain aids to navigation is phrased in terms of "may" rather than "shall," so that during the course of discharging these functions the Coast Guard is deemed to be charged with less than the ordinary standard of care. Very little consideration has been given to whether and under what circumstances the Coast Guard might be liable for an abuse of discretion in failing even to attempt a particular mission.

*Indian Towing*, of course, recognized that the Coast Guard had no obligation to undertake the lighthouse service and simply held that once it had elected to place a light on Chandeleur Island and had engendered the public's reliance thereon, it was obliged to exer-

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45. The court noted:

These are not just casual publications which may be of interest to or fall in the hands of an indeterminate number of users. These charts are published by the Government with the certain knowledge that they (i) will be disseminated through reliable channels to ships and crews and (ii) will be relied on as accurate portrayals of the waters covered. Indeed, this expectation is mandated as a rule of prudent conduct on the part of shipowners. Sailing without a chart or with an obsolete one ranks as more than a mere indiscretion. Many Courts have found such ships to be unseaworthy. Others have found mariners who follow such practice guilty of 'glaring' or 'gross' fault. What the maritime law exacts of shipowner [sic] through decisions of admiralty courts may hardly be ignored by the Executive Agency responsible for such charts. The Government must therefore bear the burden of using due care in the preparation and dissemination of such charts and notices. *Id.* at 148-49.

cise due care to maintain the light in good working condition.<sup>46</sup> But a different situation is presented when the Coast Guard is informed of a dangerous shoal, knows that vessels have repeatedly grounded in the area and, yet, steadfastly refuses to mark the hazard with an aid to navigation. Can the Government be liable for the agency's abuse of discretion in failing to undertake the job at all?

The waiver of sovereign immunity under the FTCA excepts any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>47</sup> The SIA, however, contains no such exception, and nothing bars the imposition of liability solely on the grounds of abuse of discretion. Nevertheless, it seems probable that the courts will be as slow to find an abuse of discretion as they have been to modify the private salvor analogy. It is a theory, however, that potential litigants should bear in mind.<sup>48</sup> In undertaking the lighthouse service, the ice patrol, the search and rescue, etc., the Government has preempted the field. Undoubtedly, these are appropriate governmental functions, but they are also publicly-financed services, the performance of which the public can expect only from the Government. Accordingly, it does not seem unreasonable that the Government be held responsible for any abuse of discretion in failing to undertake a particular mission.

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46. 350 U.S. at 65.

47. 28 U.S.C. § 2680(a) (1970).

48. This view has received at least tentative endorsement by the Fourth Circuit in *Lane v. United States*, Civil No. 74-2169 (4th Cir. Nov. 25, 1975).

*Lane* arose as a result of the foundering of a cabin cruiser when it collided with an unmarked, submerged wreck in the Intracoastal Waterway in the vicinity of Pungo, Virginia. The owner brought an action against the United States under the SIA, alleging negligence on the part of the Government in failing to mark or remove the wreck pursuant to the provisions of the Wreck Acts, 14 U.S.C.A. § 86 (Cum. Supp. 1976); 33 U.S.C. §§ 409, 414 (1970). At trial there was evidence to the effect that a number of pleasure craft had foundered on this wreck and that the Coast Guard and Army Corps of Engineers had ignored requests that the hazard be marked or removed. The trial court found that the United States had breached a mandatory duty either to mark the wreck or remove it and rendered judgment for the plaintiff. On appeal, the Fourth Circuit reversed as to the Government having a mandatory duty but remanded for determination by the trial court as to whether the Coast Guard had abused its discretion in failing to take corrective action. On remand, the court held that the United States did abuse its discretion in failing to mark the wreck. *Lane v. United States*, Civil No. 209-73-N (E.D. Va. Mar. 31, 1976).

## CONCLUSION

Theoretically, the federal government is answerable under the SIA for the commission of maritime torts to the same extent and under the same principles of law applicable to private individuals in like circumstances. In practical application, it is difficult to establish the Government's duty of care, since it is engaged in activities which have no counterpart in private enterprise. Strained comparisons, such as the private salvor analogy, applied so frequently in Coast Guard rescue cases, do not reflect the very real differences between the private volunteer and the trained professional. More flexible standards, as suggested in *Gavagan* and *DeBardeleben*, would appear to be compatible with the provisions of the SIA and would produce a more just result.

Although many of the functions of government agencies giving rise to maritime tort claims are exercised as a matter of discretion, the SIA does not exclude liability grounded upon an abuse of discretion, and this theory of recovery is one that might be expected to find eventual acceptance by the courts and greater application as litigants become more aware of the remedy.