

The Battle for the R.M.S. Titanic: Its Impact on Commercial Salvage and Underwater Exploration

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I. INTRODUCTION

On April 10, 1912, the R.M.S. Titanic set sail from Southampton, England on a voyage that would end in tragedy. Shortly before midnight on April 14, 1912, the “unsinkable ship” struck an iceberg approximately 360 miles southeast of Newfoundland, Canada, and sank in just over two and a half hours. Only 705 passengers and crew survived the sinking; more than 1500 people lost their lives.

The story of the great ship’s sinking has become a staple of modern history. Now exploration of the Titanic has made legal history. On October 4, 1999, the United States Supreme Court resolved a seven year legal battle over access to the Titanic by refusing to review and overturn an appellate court decision restoring public and scientific access to the Titanic.

The legal battle for the Titanic resolved a number of significant legal issues that directly affect underwater exploration and the commercial recovery of shipwrecks around the world. The appellate court ruled that American admiralty courts may properly assert jurisdiction over shipwrecks located in international waters. The appellate court also ruled that American courts may not prohibit U.S. citizens and

foreign nationals from exploring shipwrecks on the high seas without first obtaining jurisdiction over the explorers, and that traditional salvage rights do not include the exclusive right to control access and photography.

The Titanic case should pave the way for additional exploration of historic shipwrecks lost in the deep ocean. The precedent set by the case eliminates the threat to explorers of being subjected to criminal sanctions in a foreign jurisdiction simply for looking at a sunken shipwreck in a public place. It also protects the commercial recovery of shipwrecks because it maintains a “safe haven” in U.S. admiralty courts for the adjudication of claims of ownership and salvage rights to shipwrecks lost in the deep ocean. Finally, it reaffirms the long-standing principle that a commercial salvor may operate free from interference from others, and salvage rights take precedence over visitation rights.

II. DISCOVERY AND EXPLORATION OF THE TITANIC

On September 1, 1985, Dr. Robert Ballard of the Woods Hole Oceanographic Institution (“WHOI”) discovered the Titanic using sonar and photographic equipment towed behind the U.S. Navy research

vessel Knorr. The wreck was discovered lying in two sections, separated by large debris field, at a depth of 12,500 feet. The expedition confirmed the accounts of several Titanic passengers that the ship’s 882 foot hull ripped in half as it sank. Surveys of the wreck site revealed that the water-filled bow remained impervious to increasing water pressure during its descent and retained its shape. The bow was discovered resting upright, buried 50 feet in the bottom, almost 2000 feet from the stern. The air-filled stern, however, had imploded during its descent and was now a large, twisted heap of steel and debris. The remains of the passengers and crew had been devoured by marine organisms. The only trace of human existence remaining were shoes and other man-made items that littered the bottom.

As news of the Titanic’s discovery quickly spread around the world, a deep rift developed between members of the 1985 expedition. Three observers from The Institute of France for the Research and Exploration of the Sea (“IFREMER”) were on board the Knorr when the Titanic was discovered. The French believed that the Americans had stolen the credit for discovering the Titanic, and they became increasingly bitter at the attention Ballard received from

media. This animosity would deepen, stoking the flames of controversy over whether to salvage the Titanic or leave it undisturbed as a monument to the victims of its tragic sinking.

Ballard returned to the Titanic in 1986 to survey and photograph the wreck using WHOI's deep diving submersible Alvin and the remotely operated vehicle Jason Junior. The expedition conducted ten dives and took more than 57,000 photographs of the wreck site. Many of these photographs were eventually published in National Geographic magazine, and the 1986 expedition was the subject of a National Geographic Society documentary. On his final dive to the Titanic, Ballard placed a bronze plaque on one of the ship's bow capstans commemorating the efforts of those who discovered the Titanic and requesting that "any who may come hereafter leave undisturbed this ship and her contents as a memorial to deep water exploration."

Ballard never permanently recovered any artifacts from the Titanic, nor did he assert a claim to the wreck in court. Instead, he worked to promote an international agreement to protect the Titanic from commercial salvage and to obtain passage of the R.M.S. Titanic Maritime Memorial Act of 1986 by the U.S. Congress. The Act expresses the sense of Congress that "limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." The Act also proscribes the assertion of

jurisdiction by the United States over the Titanic wreck site and encourages the adoption of an international treaty governing future activities at the wreck site. To date, however, the international treaty envisioned by the Act has never been achieved.

IFREMER did not share Ballard's sentiment that the Titanic should remain undisturbed. In August 1987, IFREMER and an American company, Titanic Ventures, L.P., salvaged the first artifacts from the Titanic. Using the submersible Nautile, the expedition conducted 32 dives and recovered 1800 artifacts, including the crow's nest bell rung by lookout Frederick Fleet before the ship's collision with the iceberg, an aluminum megaphone, a fire safe, and lapis lazuli china from the first class dining room. The expedition also recovered a black leather bag containing \$62,000 in currency, 300 gold coins, and several items of precious jewelry. At the end of the expedition, the artifacts were transported to France for restoration and conservation.

To the members of the 1987 expedition, the recovery of artifacts symbolized their effort to share the tragedy of the Titanic's sinking with the world. To many others, the recovery of artifacts symbolized a desecration of the grave of 1500 souls. The expedition sailed into a storm of controversy — the London Daily Express called its participants "Gallic Ghouls of the Deep," The Washington Post termed it "Vandalism for Profit," and Discover magazine proclaimed "We All Loot in a Yellow Submarine."

In June 1991, a joint

Canadian-Russian-American expedition used the Russian research vessel Akademik Mstislav Keldysh and its advanced deep water submersibles, Mir I and Mir II, to study the Titanic's marine environment and film the IMAX documentary "Titanica." The expedition recovered steel samples from the debris field for metallurgical testing, which revealed that the steel used to make Titanic was more brittle than that used today, and a loss of its ductility in the cold North Atlantic waters most likely contributed to the ship's sinking. The expedition shot 40,000 feet of 70 mm IMAX film, documented 28 species of animals and fish, and collected hundreds of samples of fish, rock, bacteria, specialized coral, and core samples from the deep ocean floor.

Although the 1991 expedition did not recover any artifacts, it represented a threat to the salvors' ability to exercise exclusive control over the wreck site, which is a prerequisite to obtaining the legal right to conduct exclusive salvage operations. The expedition also highlighted the fact that IFREMER and Titanic Ventures had not conducted any salvage operations at the wreck site in more than four years, which opened the door to a claim by a second salvor that the original salvors had abandoned their salvage operations. The lawyers were about to be engaged.

III. WHERE EXPLORERS GO, LAWYERS FOLLOW

In 1992, a would-be salvor, Marex Titanic, Inc. ("Marex"), filed a lawsuit in the U.S. District Court in Norfolk,

Virginia seeking the exclusive right to salvage artifacts from the Titanic. On August 12, 1992, the court asserted jurisdiction over the Titanic, issued a warrant to “arrest” the shipwreck, and ordered the U.S. Marshal to take possession of any artifacts recovered from the Titanic until the court made a determination of ownership. Marex, however, had never performed any salvage operations at the Titanic site. As soon as Titanic Ventures learned of Marex’s action, it intervened to assert a superior salvage claim and to prohibit Marex from engaging in salvage operations. After a hearing to determine which party had exclusive salvage rights, the court sided with Titanic Ventures and entered an order vacating the August 12, 1992 order. The court’s order, however, was later reversed by the appellate court on technical grounds, which left the question of salvage rights unresolved.

IFREMER and R.M.S. Titanic, Inc. (“RMST”), the successor in interest to Titanic Ventures, finally conducted another salvage expedition to the Titanic during the summer of 1993. The salvors recovered 800 artifacts from the Titanic, and produced 105 hours of videotape, during 15 dives to the wreck.

On August 26, 1993, RMST filed a lawsuit in Norfolk against the shipwreck and asked the court to declare it to be the sole and exclusive owner of any items salvaged from the Titanic. Relying on the presence of a single wine decanter recovered from the Titanic in the courtroom, U.S. District Judge J. Calvitt Clarke, Jr. asserted “constructive jurisdiction” over

the Titanic and the wreck site. The court ordered the U.S. Marshal to “arrest” the Titanic and the artifacts already recovered, and he appointed RMST custodian of the wreck, wreck site and the artifacts recovered.

On June 7, 1994, the court entered an order awarding RMST “salvor in possession” status over the Titanic. This gave RMST exclusive possession of the wreck site and any artifacts recovered for as long as RMST continued to return to the site. Even though salvage activities were ongoing, the court declared that RMST “is the true, sole and exclusive owner of any items salvaged from the wreck in the past, and so long as [RMST] remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights. . .” The court further ordered that “default judgment is entered against all potential claimants who have not yet filed claims [to the Titanic or its artifacts] and such claims are therefore barred and precluded so long as [RMST] remains salvor in possession.” The court later explained that one of the main factors it considered in awarding RMST salvor in possession status and ownership of the artifacts was the company’s promise not to sell the Titanic artifacts.

The effect of the court’s June 7, 1994 order was that RMST was given title to the artifacts recovered as a de facto salvage award, “all the world” was barred from asserting claims to any artifacts recovered from the Titanic in the past or in the future, and RMST’s right to recover artifacts and exclude others from the wreck site would be extremely difficult to

challenge.

After the court entered its order in 1994, IFREMER and RMST conducted another salvage expedition to the Titanic. The salvors recovered over 1000 artifacts and produced 125 hours of videotape of the wreck site. As before, the artifacts were immediately transported to France for restoration and conservation. The artifacts were eventually displayed to millions at museum exhibitions around the world, including at the Science and Industry Center in Paris, France, and the National Maritime Museum of Great Britain in Greenwich, England (setting an attendance record). Additional exhibitions were held at museums and other venues in Stockholm, Sweden; Hamburg, Germany; Norfolk, Virginia; Long Beach, California; and St. Petersburg, Florida.

In 1995, RMST learned that Hollywood director James Cameron intended to use the Keldysh and Mir submersibles to conduct location filming of the wreck for his upcoming movie “Titanic.” RMST immediately threatened to pursue litigation on the grounds that filming the wreck would violate its rights as salvor in possession. Cameron filmed the Titanic anyway, without seeking permission or a license. Cameron’s underwater photographic team captured the Titanic in its advanced state of decay, and later won an Oscar for cinematography. RMST never fulfilled its threat to pursue litigation; it later explained that it determined not to sue Cameron because he only intended to shoot “secondary” photography and not to recover

artifacts.

RMST faced one of its greatest legal challenges in 1996 when John Joslyn, an RMST shareholder, challenged RMST's right to retain salvor in possession status on the grounds that the company was financially incapable of utilizing its rights. Joslyn's challenge was unsuccessful, but it forced the court to note "RMST's financial condition leaves much to be desired." The court recognized RMST's pledge not to sell artifacts forced it to rely on "inventive marketing ideas," such as the sale of coal and cruises to the wreck site, to finance its operations.

RMST sought an injunction when Joslyn subsequently expressed an intention to visit the Titanic simply to photograph it. On August 9, 1996, Judge Clarke issued an order prohibiting Joslyn from photographing the wreck. Additionally, on August 13, 1996, Judge Clarke entered an amended order expanding RMST's rights as salvor in possession to include the exclusive right to control access to the Titanic "for any purpose," and to control photography of the wreck and wreck site.

Judge Clarke subsequently explained that he made this unprecedented expansion of traditional salvage rights because RMST was unable to recoup its salvage expenses through the sale of artifacts and, therefore, it was entitled to the exclusive right to market images of the Titanic as a means of making a profit. Although he placed substantial reliance on RMST's pledge that it would not sell artifacts, Judge Clarke apparently was unaware

of RMST's charter agreements with IFREMER, which permitted the sale of Titanic artifacts as a "collection" to "any entity that will make them available for exhibition to the public." The judge also failed to recognize that the charter agreement excluded gold, jewelry and currency from the definition of "artifacts," and that RMST had already pledged the contents of the black bag recovered in 1987 as collateral for various loans. Incredibly, Judge Clarke explained that his decision to award RMST exclusive photographic rights was also based on his finding that RMST had located the Titanic.

Joslyn appealed the August 13, 1996 injunction, but the appeal was dismissed before a hearing by agreement of the parties. The court's injunction, however, would eventually form the basis of the current legal dispute over public access to the wreck.

In 1996, RMST and IFREMER returned to the Titanic to raise a large section of the hull dubbed the "Big Piece." After lift bags were attached to the "Big Piece," it rose to within 200 feet of the surface. Unfortunately, the salvors misjudged a crucial stage of the recovery process — they did not have divers or equipment capable of attaching steel chains to the "Big Piece" at a depth of 200 feet. The salvors decided to tow the hull section to shallow water, where they hoped it would be easier to retrieve. A few hours later, however, they watched helplessly as the lift bags snapped their couplings and the "Big Piece" sank to the bottom.

IV. THE CURRENT

LEGAL DISPUTE

Two competing expeditions to the Titanic were planned in 1998. RMST planned to return to the wreck to recover the "Big Piece" and additional artifacts, and to produce the first live television broadcast from the wreck itself. The P.P. Shirshov Institute of Oceanology, which owns the Keldysh and Mir submersibles, planned to return to the Titanic to conduct additional scientific experiments. The scientific expedition was to be financed by a British tour company, Deep Ocean Expeditions ("DOE"), which proposed to charge an international group of passengers \$32,500 each to dive to the wreck and participate in the scientific research. Each dive on the expedition, which was promoted as "Operation Titanic," would be filmed, and passengers would receive videotapes of their dives to keep as mementos. DOE and the Shirshov Institute pledged not to recover any artifacts or disturb the Titanic, but they did not seek RMST's permission to visit the wreck. This perceived slight touched off another round of litigation.

When RMST learned of Operation Titanic in April 1998, it was engaged in negotiations with Discovery Communications, Inc. to license the exclusive television broadcast rights to its 1998 expedition for \$6 million. RMST wasted little time before filing a motion for a preliminary injunction in its lawsuit against the Titanic. RMST's motion requested that any person or entity mentioned in Operation Titanic's promotional material be prohibited from exploring or photographing the Titanic.

RMST mailed its motion to most of Operation Titanic's participants. It did not, however, initiate formal legal proceedings against them or make them parties to the case. Moreover, many, if not all, of Operation Titanic's participants lacked any contact with Virginia or even the United States.

On May 27, 1998, Judge Clarke held a one-sided hearing on RMST's motion for a preliminary injunction. RMST's President, George Tulloch, testified about RMST's past efforts and the irreparable injury RMST would suffer if Operation Titanic proceeded. Judge Clarke refused to hear any evidence that would establish that RMST had nothing to do with discovering the Titanic. Instead, he described his finding that RMST located the Titanic as "the law of the case," stating: "You are a little bit too late, because I've decided to the contrary."

On June 23, 1998, Judge Clarke issued a preliminary injunction indefinitely prohibiting the expedition participants and "all the world" from entering a 168 square mile area of the high seas encompassing the Titanic for any reason, including exploration and photography. Judge Clarke reaffirmed that his 1996 decision to award RMST the exclusive right to control access to and photography of the Titanic was based on his finding that RMST located the Titanic, and that RMST was entitled to expanded salvage rights because it had agreed not to sell artifacts. He did not acknowledge any of the prior scientific/photographic expeditions to the Titanic, nor did he consider the multiple documentaries and films that

have featured the Titanic. Instead, Judge Clarke belittled the harm Operation Titanic's participants would suffer if they were prohibited from visiting the Titanic, referring to it as "nostalgic," "minimal," "sentimental" and "speculative." In fact, Judge Clarke seemed annoyed that he was even forced to consider their rights at all, stating: "Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on irrational." In one particularly memorable finding, Judge Clarke rationalized that Operation Titanic's participants would not suffer any harm because they could each save \$32,500 by staying home to watch the Titanic on television.

One of the expedition participants, Christopher Haver, immediately appealed the injunction to the U.S. Court of Appeals in Richmond, Virginia. The appeal was later joined by DOE. Several prominent organizations filed amicus curiae ("friend of the court") briefs urging the reversal of the injunction, including The Explorers Club, which supplied the plaque that Ballard placed on the ship's bow in 1986; the Advisory Council on Underwater Archaeology; and Columbus-America Discovery Group, the successful salvor of the S.S. Central America. Nobody filed amicus curiae briefs on behalf of RMST.

Despite the injunction, both expeditions went forward in 1998. In August, RMST succeeded in raising the "Big Piece" and presenting the first live television broadcast from the Titanic wreck. A few days after RMST left the wreck site, the Keldysh arrived with a team of

scientists and a dozen passengers. On September 9, 1998, the first paying passengers dived to the Titanic, in defiance of the court's injunction. A week later, RMST filed a notice requesting that Judge Clarke hold the expedition participants in criminal contempt of court — which usually results in the imposition of fines or imprisonment — for violating his injunction.

The Court of Appeals heard oral arguments on October 29, 1998. An undercurrent of tension ran through the arguments, as each side was bombarded with questions exposing the strengths and weaknesses in their positions. The fact that an expedition had gone forward despite the injunction overshadowed the proceedings, as it was clear that exploration of the Titanic would continue with or without the court's permission.

On March 24, 1999, the appellate court issued its decision affirming the district court's order in part, reversing it in part, and remanding with instructions to the district court to modify its order. The appellate court rejected RMST's argument that an injunction is valid against a non-party who resides outside the court's territorial jurisdiction (i.e., outside Virginia). Therefore, the court reversed the portion of the injunction prohibiting exploration of the Titanic because the district court lacked personal jurisdiction over the participants in Operation Titanic.

The court also rejected RMST's argument that it

deserved the exclusive right to control access to and photography of the Titanic as a “bonus” for agreeing not to sell artifacts. The court found that no precedent existed to support such an expansion of traditional salvage rights. Indeed, the court found that such an award was contrary to the purpose of salvage law, which is to recover ships lost at sea, because it would encourage salvors to leave ships in place so they can collect revenue by licensing access and photographic rights.

On the other hand, the court affirmed RMST’s right to recover artifacts without direct interference from others. The court also decided that an American court may properly assert “constructive” jurisdiction over a shipwreck located in international waters, finding that the precedent for such an assertion exists in the 3000 year history of international maritime law.

On June 22, 1999, RMST filed a petition in the United States Supreme Court asking it to review and reverse the appellate court’s decision eliminating RMST’s “exclusive right to exploit” the Titanic by controlling access and photography. RMST also asked the Supreme Court to permit the district court to hold individuals who are not parties to its salvage case in contempt of court for visiting and photographing the Titanic. RMST candidly admitted that it was seeking binding precedent that would affect the right to explore and film historic shipwrecks located throughout the world. In fact, RMST argued that, if left intact, the appellate court’s ruling would “encourage lawlessness and anarchy on the high seas.”

Finally, RMST argued that it was in the public’s interest to reverse the appellate court’s decision because RMST could be forced to sell the Titanic artifact collection if it was no longer able to control access and photography at the wreck site.

RMST’s petition was opposed by Haver and DOE, as well as three prominent underwater explorers who had been named in the June 23, 1998 injunction: underwater photographer Ralph White, who has participated in five expeditions to the Titanic and has made 23 submersible dives to the wreck; former U.S. Navy submarine commander Dr. Alfred S. McLaren, the current President of The Explorers Club; and former U.S. Navy deep submersible pilot Dr. Don Walsh, the world record holder for the deepest dive in a manned submersible and current President of International Maritime Incorporated. All of the respondents ridiculed RMST’s assertion that anarchy would reign on the high seas if the Supreme Court decided not to review the case. Each of the respondents urged the Supreme Court to deny RMST’s petition for review and uphold the appellate court’s decision.

The Supreme Court rejected RMST’s appeal on the first day of its new term, October 4, 1999. By deciding not to review the case, the Supreme Court effectively upheld the appellate court’s decision, and brought seven years of litigation over access to the Titanic to a close.

V. FUTURE EXPLORATION

As a result of the

court’s decision, future exploration of the Titanic is likely to continue, although infrequently. Because the Titanic sits at such an extreme depth, it is impossible to reach the wreck without using extraordinarily sophisticated and expensive underwater equipment. Currently, there are only five submersibles in the world that can reach the wreck: Alvin, Nautile, Mir I, Mir II and Shinkai 6500. The Alvin, which is owned by the U.S. Navy, is unlikely to be used for either salvage operations or non-scientific dives. It is also unlikely that the Shinkai 6500 will visit the Titanic. It is prohibitively expensive to transport the Shinkai 6500 from Asia to the North Atlantic, and therefore not commercially viable to use it at the Titanic wreck site. Consequently, any future expeditions to the Titanic are contingent upon the availability of the Nautile, Mir I and Mir II submersibles at reasonable rates.

RMST has the right to continue salvage operations without interference. However, RMST makes no assurance that it will ever return to the Titanic. Its salvage expeditions historically have been conditioned upon the availability of the Nautile, which it cannot guarantee, and its ability to license photography, which it can no longer do. In fact, Discovery Communications paid all of RMST’s 1998 charter costs (\$3,345,000) as a “licensing fee” for the audio and visual rights to the 1998 Titanic expedition. If RMST is unable to license photographic rights, it may never return to the wreck site. However, if RMST does not continue conducting regular

salvage operations, it risks losing its salvor in possession status. It is possible that RMST may opt to conduct future salvage operations using sophisticated, but less expensive, remotely operated vehicles instead of submersibles. This would limit RMST's ability to recover artifacts from inside the wreck, but it would permit RMST to maintain its legal status.

IFREMER, which operates the Nautile, will not take travelers to the Titanic, although it has retained the right to take competing salvors so long as it provides RMST with a right of first refusal until the year 2005. If RMST loses its salvor in possession status, the French may offer their services to another salvor. However, since IFREMER charges over \$1 million for a one month charter of the Nautile and its mother ship Nadir, there may be few takers.

Finally, scientific and photographic expeditions are

BIOGRAPHY

David G. Concannon, Esquire is a Philadelphia-based trial lawyer with an international legal practice. Mr. Concannon is counsel to The Explorers Club, on whose behalf he filed an amicus curiae brief in the appellate court advocating the public and scientific community's continued right of access to the R.M.S. Titanic. He subsequently represented Ralph White, Dr. Don Walsh and Dr. Alfred McLaren as respondents opposing R.M.S. Titanic, Inc.'s appeal to the United States Supreme Court.

likely to continue visiting the Titanic aboard the Keldysh. In fact, "Operation Titanic 1999" visited the wreck site in September 1999. The expedition successfully completed ten submersible dives to the wreck site using the Mir I and Mir II submersibles. The fare for diving passengers was \$35,500.

VI. CONCLUSION

Since its discovery, images of the Titanic have appeared in documentaries, books, magazines, and one of the most successful films of all time. More than 5000 artifacts have been recovered from the wreck site, conserved and displayed to millions world wide. The courts have decided that the ocean is large enough to accommodate continuous multiple uses of the Titanic, including scientific study, photography and the recovery of

artifacts.

The precedent set by the Titanic case should pave the way for additional exploration of other historic shipwrecks, including the R.M.S. Lusitania and R.M.S. Britannic. As a result of the Titanic case, explorers may not be penalized for merely looking at shipwrecks without taking anything but photographs. At the same time, salvors may continue their operations without interference from others, as it is now clear that salvage rights take precedence over visitation rights. The Titanic, which was the largest man-made movable object in the world when it sank, has become a legal leviathan which should affect exploration on the high seas for years to come.