UK P&I CLUB

US Bodily Injury News

OCTOBER 2008

Collective expertise

Personal injury and illness have represented the largest single group of liability claims by value for the last ten years, now averaging roughly a third of the total claims paid out by the Club.

Welcome to TMA's US Bodily Injury News. This latest issue reports on some of the latest legal and practical developments observed by our Bodily Injury Team here in the US.

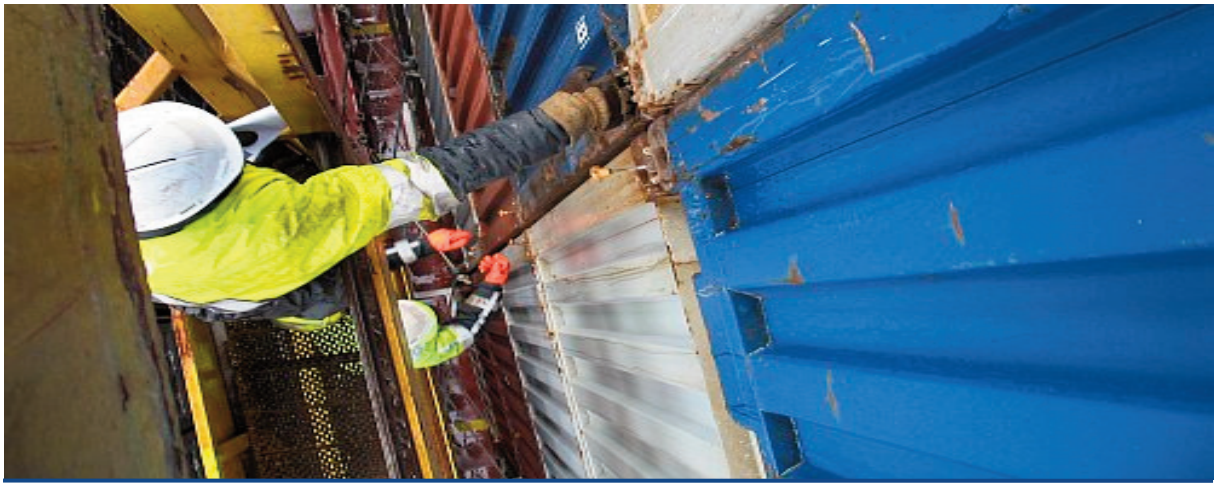
In addition, the annual Bodily Injury Team Workshop for Members will be taking place in our Jersey City office on 23rd/24th October. A programme of speakers from both Thomas Miller and external experts will provide sessions showing how Members can reduce or mitigate bodily injury claims through intervention in the US and abroad. We will also work through some actual case studies to highlight areas for concern and loss prevention.

More than half of the Club's personal injury claims over $100,000 are brought in the American courts. The TMA Bodily Injury Team are a specialist group of executives from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with these demanding cases on our Members' behalf.

Under the leadership of Louise Livingston they apply collective team expertise and experience to a variety of bodily injury matters. Louise, Karen Hildebrandt, Jana Byron and Dee O'Leary are all former practising attorneys in both Federal and State Court. The team attend settlement conferences and mediations on behalf of Members.

Dee is the latest member of our team. She joined TMA after 17 years of practising law in New York city with a specialist maritime firm. Profiles of the team members and their other US colleagues can be found in the TMA 'Making Contact' document on the UK Club website – www.ukpandi.com.

Mike Jarrett
President & CEO, Thomas Miller (Americas) Inc.



UK P&I CLUB IS MANAGED BY **THOMAS MILLER**

ALSO IN THIS ISSUE

Maintenance and Cure

What are the implications of maintenance and cure for Members?
- Karen Hildebrandt explains …

The concept of maintenance and cure has been around since early times, yet it is not always easy to get your mind around the application. When does it start? Is there a limit? When does it end, and who determines when it ends? When is treatment not curative of a condition but palliative, that is comforting, but not bettering the physical condition?

These concepts are more difficult when a seaman is stricken with a life-threatening injury or incurable disease. A review of US cases shows the application of maintenance and cure principles can take on a personal application to the case the court has before it.

Recently the US District Court for the Northern District of Florida examined such a case. A seaman was declared unfit for duty due to illness which was later diagnosed as lung cancer. He underwent chemotherapy and radiation treatment in an attempt to cure the cancer. A MRI taken six months after the initial diagnosis revealed the cancer had metastasized to the seaman's brain. Treatment was continued and the cancer was determined to be in remission.

The seaman attempted to return to work but he and the shipowner mutually agreed to terminate his employment. At that time the doctors advised there were new lesions to the brain. The shipowner filed a motion for summary judgment asking for a declaration that its legal obligation to provide maintenance and cure to the seaman was complete.

The standard for provision of maintenance and cure is that it be provided to a seaman until he or she has reached "maximum medical cure" and not just "fit for duty". If a seaman's injury or illness is deemed incurable, or if treatment given reduces pain and suffering only, i.e. palliative vs. curative, maximum cure has been reached and the ship-owner's duty is terminated.

The question before this court was whether the seaman had reached maximum medical cure as there is no treatment to cure his cancer, or whether he was entitled to maintenance and cure because treatment "improved" his physical condition.

Courts look at previous decisions for guidance for their own. In one case a seaman suffered a brain injury in a fall on the ship and the shipowner petitioned the court for relief after a year of providing benefits. However, doctors for both the seaman and the shipowner opined there was a "likelihood of future gains" in the seaman's condition with continued treatment, and the court found he had not reached maximum medical cure and reinstated maintenance and cure.

In a second decision the seaman had an incurable kidney disease that could be controlled by dialysis or a kidney transplant; without either he would die.

The court found the dialysis treatment was allowing the seaman to lead a "normal" life indefinitely, but he had not reached maximum medical cure and maintenance and cure was to be continued. In another, a seaman fell ill while in the service of the vessel and it was determined he was suffering from acute enteritis.

He responded to treatment and was found fit for duty, wherein the shipowner ceased maintenance and cure. However, the seaman suffered several relapses and it was eventually determined he had chronic idiopathic colitis, which is incurable.

The court ordered maintenance and cure be paid until the point of maximum medical cure which in this instance was when an accurate diagnosis was made and the illness found to be incurable.

In the case at hand the court relied heavily on the testimony of the seaman's treating physicians that any treatment was not curative but palliative. Treatment would not control or eradicate the illness or result in any betterment of his physical condition. Thus the seaman had reached maximum medical cure and maintenance and cure could be terminated.

We live in an age where previously incurable diseases can be cured or at least controlled, and medicine moves ever forward in that regard. However, it makes the goal of determining maximum medical cure and the end of the maintenance and cure obligation more indefinite. As the court noted, maintenance and cure is not meant to be long term disability insurance!

Members are reminded when hiring or when crew-members are returning to duty after an injury or illness, a thorough physical examination should be done to assure the crewmember is truly fit for the duties to be undertaken.

In the event of serious crew illness or injury, medical care managers can assist in finding the appropriate medical care, attend appointments with the seamen, speak to doctors/nurses/therapists as appropriate, make sure the seaman has what is needed and assist in helping the Member and Club determine when maximum medical care has been reached.

The Member should also note US courts apparently are taking an individual approach to each case.

It may be in cases where the determination of maximum medical cure is contested the Member, with the assistance of the Club, may have to file an action for a judicial determination of entitlement to further maintenance and cure.

"Cure" is payment for reasonable and necessary medical care for all medical conditions which manifest themselves or become aggravated while crew member in service of the ship;

"Maintenance" is payment for food and lodging ashore similar to the those on the ship. This is normally fixed by contract and generally, but not always, upheld by US courts;

Due when a crew member becomes injured or ill during their service to the ship, whether ashore or during recreation;

Continues until diagnosis of an incurable disease is made, further medical treatment will not result in improvement or only controls pain;

Is not limited to a shipboard injury or illness but applies to any injury or illness which manifests itself during service to the ship;

Is a strict liability obligation of the employer and the ship - without regard to fault;

Failure to pay maintenance and cure can result in a maritime lien and subject the ship to arrest;

The crew member's right is only waived by the most extreme misconduct on the part of the crew member;

Entitlement can be challenged if a crew member intentionally fails to disclose, conceals or misrepresents medical facts during a pre- employment physical examination (PEME) but employer must show the nondisclosure was an important part of the decision to hire the crew member.

Karen Hildebrandt

Karen was a partner at a leading maritime law firm before joining TM(A) in 1998. She specializes in bodily injury claims.
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Death on the High Seas

The statute, as enacted, reads in pertinent part:

. . . whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued . . .

Since the 1920, the Death on the High Seas Act ("DOHSA") has been the statutory scheme applied by US courts when faced with claims involving deaths arising from wrongful or negligent acts or omissions occurring more than three nautical miles from the United States or its territories, including territorial waters of another nation.

The statute permits the personal representative of any person whose death was caused on the high seas, including passengers, seamen or other crew-members, and other maritime workers, to maintain a suit for damages for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative. A claim under the Act must be brought within three years of the decedent's death.

DOHSA actions may be brought only by the decedent's personal representative. The personal representative does not sue for the benefit of the decedent's estate, but rather as a trustee for the benefit of the decedent's spouse, parent, child or dependent.

The law of the state where the action is brought determines whether a claimant has the requisite legal relationship with the decedent to qualify as a personal representative under the statute.

The Act provides that an action may be brought in federal court in the US, invoking the court's admiralty jurisdiction. The statute does not confer the right to a jury and there is normally no jury in admiralty cases. Thus, as a general rule, there should be no jury in these actions.

This does not mean, however, that all DOHSA claims must be decided in federal court by a judge. Rather, recent US Supreme Court decisions have implied that actions may also be brought in state court and tried before juries when joined with another claim that affords a right to a jury, such as a Jones Act claim.

Damages under the Act are limited to pecuniary damages (i.e. damages for economic loss to a beneficiary such as loss of support, services and

inheritance). Damages for a beneficiary's non-pecuniary losses, such as loss of society and comfort or a beneficiary's post-death grief, are not permitted.

Likewise, punitive damages and damages for the decedent's pre-death pain and suffering are not normally recoverable under the statute.

Because of DOHSA's limitation on recovery to pecuniary damages only, there has been much litigation over whether it is the exclusive remedy for death on the high seas or whether other statutes or case law precedents can be used to supplement the recovery permitted under DOHSA.

Following are the generally accepted principles applied by US courts:

1. *DOHSA and the Jones Act.*
   The personal representative of a seaman may recover under both the Jones Act and DOHSA where a seaman is killed as a result of employer negligence, but the damages for the seaman's wrongful death are limited to pecuniary damages. While the Jones Act provides for a "survival" remedy for pre-death pain and suffering of the decedent-seaman, DOHSA does not. The Supreme Court has declined to rule on whether this Jones Act survival claim is pre-empted by DOHSA and this question is still open to judicial debate among the lower courts.

2. *DOHSA and General Maritime Law.*
   Concerning non-seamen and seamen claims against non-employer third parties, the General Maritime Law recognizes causes of action for negligence, unseaworthiness and products liability. Although the General Maritime Law recognizes claims for non-pecuniary damages in some instances involving maritime death not subject to DOHSA (such as death that occur within the territorial waters of the US), the General Maritime Law's wrongful death remedies are entirely pre-empted by the remedies available under DOHSA when the death occurs on the high seas. There is still some question concerning whether a General Maritime Law survival claim is pre-empted by the Act.

3. *DOHSA and state wrongful death statutes.*
   Like the General Maritime Law, state wrongful death statutes are preempted by this statute. The issue of whether a state survival remedy is available, however, has yet to be decided by the Supreme Court.

4. *DOHSA and foreign wrongful death statutes.*
   DOHSA specifically preserves a right of action based on a foreign nation's wrongful death statutes.

In sum, although these principles are generally accepted and applied by US courts in DOHSA actions, there is still room for legal maneuvering when it comes to determining damages under the Act.

Although pecuniary losses are normally predictable and fairly easy to calculate, non-pecuniary and survival damages can be difficult to quantify and often hinge on the subjective leanings and sympathies of the judge or jury and the deep pockets of the defendants.

Therefore, it is imperative that both US and non-US vessel owners and operators collect the proper evidence and establish a record of the facts and circumstances surrounding the incident that resulted in death.

Guidance from the Club should be sought immediately upon death to ensure that the incident and investigation process is legally protected. It is also crucial that the accident scene and any vessel parts or protective clothing involved in the accident are preserved and that the facts and circumstances surrounding the accident documented.

The ship's investigating officer should be mindful, however, to limit their investigation to the facts surrounding the incident rather engaging in speculating as to the cause of the incident. For example; names and contact information for witnesses and what they observed, lighting, weather and sea conditions at the time of the incident, etc. and the collection of relevant ship documents (i.e., deck logs, course recorders, showing ship's position at time of event resulting in death, etc).

Jana Bryon

Jana joined TM(A) in November 2005 after seven years of practice as an attorney specializing in maritime matters. She handles both Defence and P&I claims.
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Is comparative fault still a defense?

Maritime law has long recognized the principle of comparative fault (also know as contributory negligence), as a defense in a personal injury case. That principle provides that a jury verdict or court judgment is reduced by the proportionate or comparative fault of the injured party.

Comparative fault has increasingly come under attack by the plaintiff's bar or ignored in its entirety by juries. Counsel for injured seamen in the US are frequently alleging that a violation of a safety statute or regulation is *negligence per se* and a defendant ship owner or employer cannot introduce the plaintiff's own negligence in causing or contributing to their accident.

Negligence per se has been well established in the Maritime Law of the United States. In *Kernan v. American Dredging Co. (1959*) an employer violated a Coast Guard regulation regarding the placement of open-flame kerosene lamps at a specified height above the water. That violation resulted in the death of a seaman. The violation precluded the court from considering the decedent's comparative fault.

In *Wuestewald v. Foss Maritime Co. (N.D. Ca. 2004)*, a tankerman with 20 years experience used a portable ladder to go from the barge to the dock in accordance with the defendant's custom and practice. A portable ladder was considered safer than the risks associated with having a ladder fixed in place on a tankbarge which could move up or down with the tide. Plaintiff climbed the ladder to the dock without difficulty but the ladder slipped as he returned to the barge. There was evidence that plaintiff failed to properly secure the ladder. In addition he had several safe alternatives.

The court held that defendant violated a US Coast Guard regulation (46 C.F.R. Sec. 42.15-75(d)), which required vessels to provide, "satisfactory means" of moving around the vessel during the performance of the necessary work of the vessel. In finding defendant violated the regulation and was thus *negligent per se,* the court focused on the specific language in the regulation which referred to a "gangway" as a satisfactory means but did not mention a ladder.

In *Pilare v. Matson (N.D. Ca. 2006)*, plaintiff claimed the ship was in violation of a Coast Guard regulation requiring "satisfactory means be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel." (46 C.F.R. Sec. 42.15-75). Plaintiff claimed that the presence of a flange, which extended between twelve and eighteen inches into an eight foot wide walkway in the engine room at a height of about five feet two inches violated the regulation. The court found that the fact the walkway was free from obstacles for 6½ feet of its overall width was a "satisfactory means" of accessing the workplace and that the employer was not *negligent per se*.

A court also rejected a plaintiff's claim that an unguarded cutout in the platform of a ballast tank violated a Coast Guard regulation. The court's reasoning was that the wing tank platform was not an exposed area, even though plaintiff was required to walk there, because in the ship's normal operation the access to the ballast tanks is only through a series of bolted manhole covers. *Wilson v. US Ship Managment (S.D.N.Y. 2007)*

Similarly, in *Johnson v. Horizon Lines (S.D.N.Y. 2007)*, the court rejected plaintiff's claim that an open hatch on deck violated a US Coast Guard regulation requiring "suitable hand covers, guards, or rails shall be installed of all exposed and dangerous places such as gears, machinery, etc".

Distinguishing an open hatch from a permanent fixture on the ship, the court refused to find *negligence per se* while leaving the jury to decide the issue of defendant's negligence for leaving the hatch cover open and the extent to which plaintiff was responsible for his own injuries because he could have closed the hatch himself.

In order to establish *negligence per se* a plaintiff must prove five elements to bar the defense of comparative fault:

1. violation of a US Coast Guard regulation;
2. plaintiff is a member of the class of persons the regulation was intended to protect;
3. the injury is the type against which the regulation is designed to protect;
4. the regulatory violation is unexcused; and
5. violation caused or contributed to the injury.

Although the court decisions discussed above involve USCG regulations, the regulations of a ship's flag state, the ship's own safety management system requirements may provide new arguments for *negligence per se* to foreign seamen filing suits in the United States.

Louise Livingston

Louise was a partner at a San Francisco maritime law firm, specializing in bodily injury claims. She joined Thomas Miller in March 2002 Louise is the leader of the TM(A) Bodily Injury Team. Tel +1 415 956 637

Recent developments in longshore injury and death claims

A few recent decisions involving longshoremen have occurred over the past year in the Fifth Circuit covering Louisiana, Mississippi and Texas, which are of particular interest to the Bodily Injury Team.

As those in the maritime industry are aware, cargo shifting during heavy seas is not uncommon. Although the discharge of shifted cargo is controlled by the stevedoring company, the vessel owner is not free from the problem. Under the Longshore and Harbor Workers' Compensation Act (LHWCA) §905(b), a vessel owner still owes several duties of care to longshoremen discharging cargo.

As a general proposition, the vessel owner owes three duties to the discharging stevedore: 1) the "turnover duty", 2) the duty to avoid an act of negligence, and 3) a limited duty to intervene. In the context of a shifted stow, it is the turnover duty that is implicated. The turnover duty requires a vessel owner to a) turn over its ship and equipment in a condition in which an experienced stevedore can perform its job with reasonable safety, and b) warn the stevedore of latent or hidden dangers known to the vessel owner, or which should be known to it.

In the recent Fifth Circuit decision, *Kirksey v. Tonghai Maritime, 535 F.3d 388 (5th Cir. 2008)*, a longshoreman was injured during the discharging of steel coils from the hold of the vessel, which had shifted during the voyage. The trial court found that the coils and steel pipe had been poorly stowed, making it difficult to discharge the cargo, but that this unstable condition was open and obvious to the longshoremen.

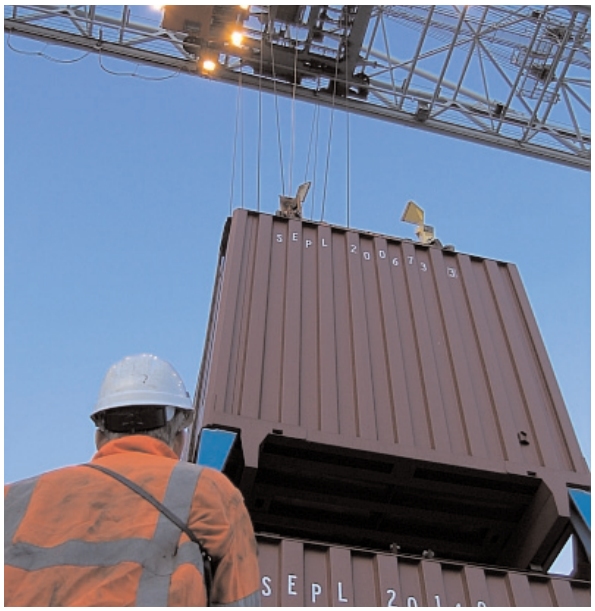
In a previous case, a longshoreman jumped down into the hold and slipped on exposed plastic wrap, and the court held that the open and obvious defense was available to a shipowner in relation to the second of its two turnover duties, that of the duty to warn of latent or hidden dangers.

But until Kirksey, a vessel owner was not able to assert the "open and obvious defense" as to the first turnover duty, that of providing a reasonably safe vessel. In this case, however, the Fifth Circuit found the shipowner had no obligation to warn of a obvious danger or defect in the stow, and that any failure to warn the stevedores that the ship had encountered such heavy seas would also be fruitless, as any danger was clear to the naked eye.

In another recent Fifth Circuit decision involving the LHWCA, the Court took a surprising step away from applying federal law to a claim involving an on-the-dock injury to a shipyard employee brought against a vessel. Instead the court held state law could be considered.

Although an injured longshoreman can sue a vessel owner in either state court or in federal court, the vast majority of decisions have held the substantive law to be applied in either forum is set forth in §905(b) and the cases interpreting it.

As noted in the preceding section discussing the Kirksey case, this statute places three distinct duties on the vessel owner: the turnover duty, a duty to exercise reasonable care to avoid negligence, and a limited duty to intervene.



In a recent June 2008 decision, *McLaurin v Noble Drilling, Inc., 529 F.3d 285 (5th Cir. 2008)* a scaffold carpenter employed by a shipyard was injured when a piece of equipment suspended by a crane fell, crushing his arm and hand. He had been employed to paint a vessel owned by Noble Drilling, which was at the shipyard. The worker recovered workers' compensation benefits from his employer through the LHWCA, and then sued the vessel owner, Noble Drilling, alleging a right of recovery under both LHWCA §905(b), and state law because of the vessel owner's negligence. The carpenter alleged Noble had assumed control over the work area through its on-site personnel, and failed to exercise due care to ensure the safety of the area.

The trial court found the worker could not recover under the three duties 905(b) places on the vessel. The court also concluded that 905(b) was the exclusive remedy, and thus prohibited the worker from pursuing Noble under state law. The carpenter appealed the dismissal of his state-law claim, arguing that the exclusivity provision of 905(b) would block recovery only if he had been "entitled" to recover for vessel negligence under §905(b). Because he had no real claim, as the trial court found, he should be allowed to bring a state claim. The Fifth Circuit agreed with the injured shipyard worker and sent the case to the trial court for consideration of his claims under state law, because the accident had occurred on the dock and not on the vessel.

In most instances, the damages a surviving family member can recover for the wrongful death of a maritime worker, such as a seaman or longshoreman, are limited to pecuniary damages. Pecuniary damages are mainly economic damages for things such as funeral expenses, loss of income, loss of support, and pre-death pain and suffering.

One exception to the rule existed, however, for the family of a longshoreman whose death occurred in state waters. They were able to recover "non-pecuniary damages", which includes money for their own mental anguish and grief, loss of society, and loss of consortium. While the Fifth Circuit had previously affirmed non-pecuniary damages to longshoremen family members who were dependent on the deceased for financial support, such as minor children or widows, it was an open question as to whether those not financially dependent on the deceased longshoreman could recover those damages. Courts in different regions of the country have answered the question in various ways: can a non-dependent family member of a longshoreman killed in state waters recover non-pecuniary damages? Last year the Fifth Circuit took the opportunity to set forth its position on that question.

In 2007, *In the Matter of American River Trans. Co., 490 F.3d 351 (5th Cir. 2007)*, a young longshoreman died after jumping into state waters to save a co-worker. The parents of the deceased sued their son's employer for his wrongful death, hoping to recover both pecuniary and, through the exception for long-shoremen, non-pecuniary damages. The trial court held that the parents, who could not prove they were dependent on their son, could not recover non-pecuniary damages. The parents appealed the decision but the Fifth Circuit agreed with the trial court. It held that the goals of maritime law - providing special solitude to seamen and achieving uniformity in law - would be better served by allowing only financial dependents to recover non-pecuniary damages.

This decision narrows the class of family members entitled to recover non-economic damages from a longshoreman's death, enabling vessel owners and employers to better estimate and insure against the possible risk of exposure. It also creates a clear-cut line of who may recover, and arms the lower courts with a rational and fair test for entitlement to non-economic damages.

Lauren Wygant

Lauren recently spent a month in our New Jersey office. A graduate of the University of Houston, Texas she is now in her second year of practice with the Houston law firm Royston, Rayzor, Vickery & Williams.