

UK P&I CLUB



US Bodily Injury News

MAY 2011

Stowaways

What happens when you discover stowaways onboard?

Attorney reporting

Our guidelines explained

Changes to Federal Rules

Expert discovery streamlined

Punitive damages

Broader interpretations hit shipowners

Get SMART

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



Mike Jarrett
President & CEO,
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US Bodily Injury News

The TMA Bodily Injury newsletter enables a wider sharing of the Team's expertise and experience. We always welcome your feedback on the topics we cover in these newsletters. Suggestions for subjects for future coverage are also particularly welcome. Please send your comments or suggestions to Louise Livingston at Louise.Livingston@thomasmiller.com

Further information on these topics can be obtained directly from the TMA Bodily Injury Team (see back cover for contact details).

Save the date

The Thomas Miller Americas Bodily Injury Team Round Table has been scheduled for September 15th and 16th this year.

Once again our New Jersey office will be playing host to our Members' executives, both here in the United States and abroad, who have a special focus on bodily injury issues.

We used Member feedback from last year's event to design the programme which starts early on a Thursday afternoon with lunch and a speaker addressing specific litigation and P&I cover issues in respect of piracy.

The main session of the day looks into investigating incidents both criminal and civil from an investigating attorney's point of view and will address the issues they face.

Claims executives can assist investigating attorneys by alerting the Master to what documents they need; what types of electronically stored information will they require and how they preserve it will all be considered together with the practical difficulties of access and communications.

Three incidents will be chosen for practical case study to address the issues faced by all our Members, regardless of whether their fleets are US or foreign flag.

As always, the evening's drinks and dinner will be a further opportunity to share past experiences and network on these issues.

Friday morning will pick up where we leave off. A trial counsel will lead a discussion of the importance of investigation in the context of litigation for one of the previous days incidents. The session will use prerecorded video depositions to demonstrate how an answer to a deposition question can affect the entire case. We expect some lively debate at this session. The session rounds up at lunch permitting longer distance travellers a chance to make it home before the weekend.

Our Round Table events have attracted increasing numbers of attendees from non-US Members providing an even more varied and rewarding cross-section of maritime and legal expertise. We look forward to seeing you as part of the event.

Finally, we are sad to inform you that John Ferrie, one of the founders of our Bodily Injury Team, passed away in March. He will be missed both for his wise counsel on professional matters and his infectious enthusiasm for baseball. John's obituary can be found on page 14.

Squatters on the sea

We have all heard about them, perhaps even been a bit intrigued by their stories, but in reality, for a shipowner, a stowaway discovered onboard one of their vessels presents big headaches.



Dolores O'Leary
Claims executive

Who are they?

A stowaway is a person who hides on a ship, or in cargo, or in a container which is subsequently loaded onto the ship, without the consent of the shipowner or Master and who remains onboard the ship once she leaves port. Stowaways tend to be young, poor and desperate for a better life. In recent years, the greatest number of stowaways have come from Africa.

What kind of problems do they present?

The presence of stowaways on board a vessel creates a multitude of issues:

- Immigration issues at next port of call
- Financial issues for shipowner/charterer
- Keeping stowaway(s) secure while onboard the vessel
- Repatriation issues
- Obtaining proper travel documentation for stowaways
- Health/medical issues of stowaway
- Safety issues

What can the shipowner do?

Prevention is highly recommended. Good security measures at the port will help to prevent stowaways from ever boarding the vessel.

- Do not rely solely on port security
- Master should inform all crew of threat of

- stowaways before arriving in port
- Maintain regular patrols of ship
- Ensure that the ship is equipped with securing wire, tape, locks and seals to show spaces have been searched and sealed
- Lock and seal all outside doors, hatches, accesses to holds, etc.
- Keep only one door available for accommodation
- Check identification of all people boarding ship
- Use local security staff to assist ship's staff
- Ensure that ship has good lighting on all deck spaces
- Conduct a thorough search of the ship before leaving port

Note: The International Ship and Port Facility Security (ISPS) Code was developed to establish an international framework of measures to enhance maritime security and has provided ships with procedures to prevent stowaways from boarding the ship. In ports and terminals where there are



stringent restrictions on people entering the facility, together with a vigilant deck watch, potential stowaways have difficulty in attempting to board at these locations. The high risk threat is from ports and terminals where the ISPS Code is not being implemented. This would include many of the ports of Africa, certain South American countries and the Caribbean. The task of preventing stowaways at these ports is more difficult and thus falls to the master and shipowners to put in place measures to deter stowaways.

- The stowaways should be interviewed to determine their identity, their country of origin and their reasons for stowing away. Any identification papers found with the stowaways should be confiscated. The stowaway questionnaire, mentioned below, should be prepared
- The shipowner, P&I club and local agent (at next port) should all be informed immediately.
- The stowaway should be informed of emergency procedures.
- The stowaway should NOT be put to work onboard the vessel.

Although stowaways create problems, they should not be considered to be criminals and should be treated fairly and humanely, pursuant to the United Nations Declaration on Human Rights and the European Convention on Human Rights.

How is the stowaway repatriated?

Once a stowaway has been discovered, the focus turns to how to best repatriate them. The local agents and the local club correspondents will assist with this and will alert the proper authorities at the port of disembarkation. If the stowaways have no travel documentation, temporary travel documents will have to be obtained by local agents or club correspondents in conjunction with the appropriate embassy or consulate. It can take some time to arrange for temporary travel documents, thus it is best to alert the local agents/club correspondents to this fact as early as possible. It sometimes requires a personal visit by the consular officer to the ship which can be difficult. Further, it is common for stowaways to lie about their nationality and it may take some time just to determine the identity and nationality of the stowaway through a series of interviews, photographs and expert assistance. The Club provides a questionnaire for the master to use when interviewing stowaways. The questionnaire provides spaces for fingerprints and photographs. The completed questionnaire should then be sent to the local correspondent to assist in obtaining travel documents.

What is shipowner's liability?

In order to be covered under the P&I rules, the Member must have a legal liability for the costs and/or expenses relating to the stowaways. The carrier will normally be liable for a person on board who is not in possession of valid identification papers. The carrier is also likely to be



What do you do once a stowaway is discovered?

- The stowaway should be placed in secure quarters, with guards, if possible.
- The stowaway should be provided with food and water.
- If more than one stowaway has been found, it is preferable to place them in separate secure quarters.
- The stowaway should be searched and any weapons and/or drugs found should be confiscated.
- The health of the stowaways should be assessed and they should be provided with medical assistance if needed.

held liable for the cost of food, clothing, hotel accommodations, repatriation, guards where necessary, and the cost of obtaining temporary travel documents.

The Member may also be liable for fines incurred where stowaways have escaped from the ship or for fines imposed by the authorities for persons arriving on the ship without necessary travel documentation. Such fines are covered under the P&I rules.

Note: Some charterparties contain stowaway clauses which may shift liability for stowaways to the charterers, often depending on how access to the vessel was obtained. It is recommended that owners and charterers ensure that they are familiar with the stowaway clause contained in their charter party.

Other issues that often arise:

What if the authorities refuse to accept the stowaways?

If the authorities at the disembarkation port refuse to allow the stowaway to disembark, unfortunately, the stowaway must remain on board. The vessel must take all measures to keep the stowaway secure and must then attempt to disembark at the next port of call, if possible.

Can the vessel deviate in order to disembark the stowaway?

While not preferred, it may sometimes be necessary to deviate to disembark the stowaways. In those rare instances when deviation becomes necessary, it is best to confer with the Club to assure that the deviation is covered and SOL cover is not needed. [Deviation costs may be covered under Rule 2, Section 7.]

In a recent case, Brazilian authorities, despite being advised prior to the vessel's arrival, refused to allow a Nigerian stowaway to disembark. Both the agents and local correspondents met with the Brazilian authorities numerous times begging them to accept the stowaway who was now becoming disruptive and violent. The Brazilian authorities flatly refused. The vessel's next port of call was in Algeria, which was also known to be unfriendly to vessels carrying stowaways – most times refusing to allow disembarkation of the stowaways. In this instance, the Club, in

conjunction with Robmarine (a company who specializes in stowaway matters), assisted the member in an effort to find a country near or within the vessel's intended route within which to disembark the stowaway.

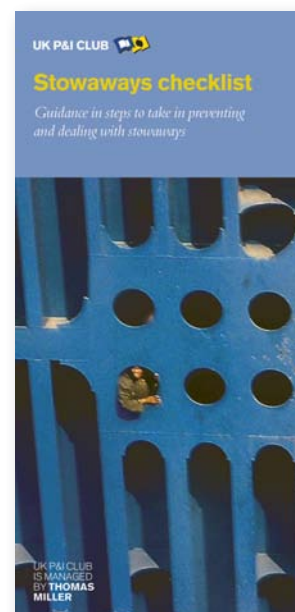
What if the stowaway claims political asylum?

If a request for political asylum is made, the immigration authorities will usually take responsibility for the stowaway from that point onward. They may, in some cases, demand a guarantee or other form of security from the shipowner, to cover all or part of the costs of detention and repatriation. If the stowaway is not granted asylum, the immigration authorities will make the necessary arrangements for repatriation of the stowaway, but the shipowner may be held liable for the repatriation expenses.

What if the stowaway is dead?

If a deceased stowaway is discovered, the same procedures must be followed to determine the identity of the stowaway and repatriate the body. Since the stowaway cannot be interviewed, identification will obviously be more difficult if no travel documents have been found with the stowaway. The local correspondent will liaise with the appropriate consulates and/or embassies and work to verify identity and then obtain travel documentation. The local correspondent will also liaise with a funeral home to prepare the body for transport. This process can take weeks or even months.

The Loss Prevention department's Stowaways Checklist provides guidance for Masters and shipowners on dealing with these issues in a handy format. Please contact the Loss Prevention department at lossprevention.ukclub@thomasmiller.com or check the website www.ukpandi.com/loss-prevention for a copy.



Revisions to Federal Rules save time and money

Amendments to the Federal Rules of Civil Procedure offer additional protection of communications with experts and their draft reports



Jana Byron
Claims executive

Recent changes to the Federal Rules of Civil Procedure (FRCP), which apply to all civil cases in the Federal Courts of the United States, came in to effect nationwide in December 2010. The revisions included changes to FRCP Rule 26, which deals with the discovery of draft expert witness reports and communications between retained experts and counsel. They are intended to streamline the litigation process and facilitate unencumbered communication between counsel and their experts.

The old rule regarding expert discovery resulted in the “widespread practice (of) permitting discovery of all communications between attorney and expert witness,” resulting in increased litigation costs and attorneys engaged in protracted litigation disputes in an effort to obtain discovery of everything considered by the expert witness, including communications between opposing counsel and their retained experts.

In addition, in an effort to work around the old rules, many lawyers would retain two sets of experts: the first would act as a consulting expert who would assist counsel in preparing the case (developing theories and strategy, etc), who would then turn the fruits of his or her labor over to a testifying expert to prevent disclosure of communications between counsel and the expert during the developmental stages of the case.

In its Report to the United States Supreme Court, the body which approves amendments to Federal

Rules of Procedure, the Judicial Conference described the state of affairs before the rule changes as follows:

Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side’s drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert’s opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts’ work.

The amendments to Rule 26 are intended to address these concerns and provide practical, clear and workable solutions.

Limiting Revision to Rule 26(a)(2)(B)(ii)

Under the old Rule 26, the report prepared by an expert was required to include “the facts or data or other information considered by the witness.” Under the new Rule, “or other information” has been omitted. The new disclosure standard is stricter and, according to the Advisory Committee Notes, the refocus on “facts and data,” is intended to “limit disclosure...by excluding theories or mental impressions of counsel”. This revision is slight, but important.

Addition of Rule 26(b)(4): Protection for draft expert reports and communications between attorney and expert

Subsections (B) and (C) have been added to Rule 26(b)(4) to protect draft reports and

communications with experts from discovery in litigation. These subsections provide:

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;*
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or*
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.*

Again, these new subsections have been enacted to provide a practical solution and encourage unencumbered interaction between counsel and retained experts without fear of exposing the substance of those interactions to the other side during the course of discovery.

Conclusion

Overall, these revisions should streamline the discovery process, decrease costs and significantly alter the way that attorneys and their retained experts communicate with each other by removing much of the risk of disclosure and encouraging open communication about the case. These amendments also bring US federal law more in line with the law in the UK, as well as other jurisdictions where communications between attorneys and trial experts are not subject to disclosure. The amendments only apply prospectively in matters pending in a US federal court and not in state court proceedings.



TMA BI Team's Attorney Reporting Guidelines...how they help Club Members

As is often noted in the BI News, injury cases in the United States are some of the most financially volatile cases the Club deals with. They are also often cases which can be filed and served up to three years after the incident.



Linda Wright
Claims Executive

In an effort to monitor and minimize claim and fee reserves for UK Club bodily injury cases, Thomas Miller Americas' Bodily Injury Team developed attorney reporting guidelines that are specific to bodily injury (BI) cases brought in the US. They work in conjunction with the Club's overall Value for Money (VfM) Program. In accepting an assignment of a case, attorneys – who are appointed because of their experience in handling bodily injury matters – are required to follow these guidelines.

The basis for determining claim and fee estimates is the most likely financial outcome (MLO) of the case. The MLO is a combination of claim expenses, including, for example, maintenance and cure and unearned wages, the forum where the lawsuit is pending as well as the likely settlement value of the case. It also includes other financial costs such as prejudgment interest on a potential jury verdict.

Legal fees and costs, including expert witness fees also factor into the overall MLO of any case. For example, some plaintiff attorneys are known to settle early. In others, plaintiff attorneys insist that the defendant shipowner or employer bear the financial cost of working up their entire defense case to ensure the defendant fully understands plaintiff's case before any settlement discussions will be considered. Still, others will only settle on the court house steps. Clearly, these factors have a

significant impact on the MLO of a case and defense counsel are expected to consider them when preparing the litigation budget

Counsel is initially required to provide a detailed preliminary case assessment report within the first thirty days of the case assignment. The initial case assessment must include, among other things, a detailed preliminary budget and case strategies for handling the matter. Although significant developments such as trial dates, mediation dates, and motion dates are required to be reported promptly, updated status reports are to be sent at a minimum of every ninety days thereafter.

To ensure that the case progress is recorded on a timely basis, defense counsel are also required to complete a checklist with each report. The checklist identifies specific tasks, for example jurisdictional motions, plaintiff's deposition, defense vocational rehabilitation expert reports, during particular stages of litigation and requires counsel to report the date when each task is completed. The result is that every 90 days a comprehensive report and updated timeline are prepared. This helps keep the attorney on track and the Member and Club updated on a regular basis.

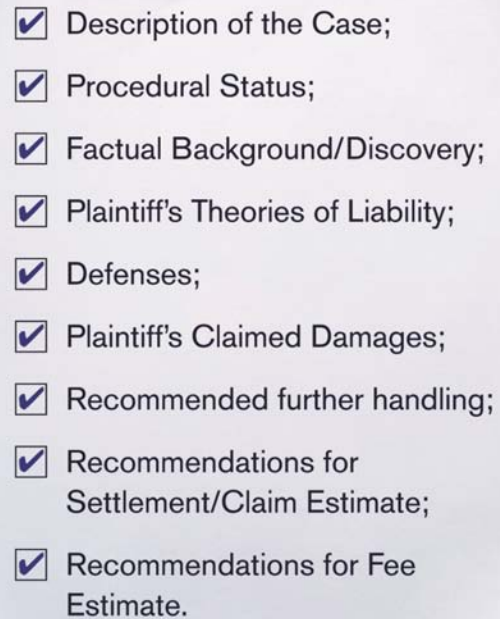
To assist the Club and the Member in determining the MLO, counsel are required to prepare their reports using specific headings including an update on fees/costs paid to date versus the budget; procedural status; factual background and discovery; plaintiff's theories of liability; defenses; plaintiff's damages; and recommended further handling. Attorneys are also required to address the recommended claim/settlement estimate in each report because every case, regardless of the state of litigation, has a settlement value. The guidelines make clear that it is the attorney's job to resolve all BI cases expeditiously, economically and efficiently.

Counsel is required to review and update the

settlement value of the case based on the evidentiary developments to date. They are required to make recommendations on how settlement can be initiated and/or accomplished. As factual and expert discovery develops the settlement value of a case may change and the purpose of requiring the defense attorney to address these issues regularly is the VfM mantra, "NO SURPRISES".

Compliance with the reporting guidelines allows the Member and Club not only to regularly follow the substantive and procedural progress of the case but to know what costs have been incurred and to check the expenses against the budget. If the Member and Club know at the outset what the financial cost of litigating a particular matter will be, they may take a different view on the timing and/or amount of settlement. With few exceptions, it makes no business sense to spend as much or more in litigation costs as is spent on settling a claim. Counsel's performance is judged, in part, on how well they comply with the guidelines including how accurate their budgets were.

The Team regularly reviews claims with Members to agree on estimates and evaluate the cases. Members can always check current estimates on their files through the Club's website using ClaimsTrac. The estimates drive renewal terms for Members and are thus a critical element for underwriting especially if reinsurance or specialist cover needs to be arranged. Accordingly, the attorney reporting guidelines are designed to contribute to current and accurate estimates for the life of a bodily injury case and accurately reflect a

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- A spiral-bound notebook with a light blue cover and a white page. The page contains a checklist of nine items, each preceded by a blue checkmark in a square box. The items are: Description of the Case; Procedural Status; Factual Background/Discovery; Plaintiff's Theories of Liability; Defenses; Plaintiff's Claimed Damages; Recommended further handling; Recommendations for Settlement/Claim Estimate; and Recommendations for Fee Estimate.
- ☒ Description of the Case;
 - ☒ Procedural Status;
 - ☒ Factual Background/Discovery;
 - ☒ Plaintiff's Theories of Liability;
 - ☒ Defenses;
 - ☒ Plaintiff's Claimed Damages;
 - ☒ Recommended further handling;
 - ☒ Recommendations for Settlement/Claim Estimate;
 - ☒ Recommendations for Fee Estimate.

Thomas Miller Americas' Bodily Injury Team developed attorney reporting guidelines that are specific to bodily injury cases brought in the US. They work in conjunction with the Club's overall Value for Money Program. In accepting an assignment of a case, attorneys – who are appointed because of their experience in handling bodily injury matters – are required to follow these guidelines.

Punitive damages in seafarer cases: more good news...Not!

The State Courts in Washington and California have lost no time in issuing opinions that significantly broaden the application of the U.S. Supreme Court's decision in *Atlantic Sounding v. Townsend* (See BI News November 2009), a summary of the cases:



Louise S. Livingston
Senior Claims Director and Bodily Injury
Team Leader

California State Court

California trial court holds punitive damages recoverable in Jones Act negligence and unseaworthiness cases. *Larson v. Kona Blue Water Farms, LLC*, 2010 AMC 1230, (Cal. Sup. Ct. Alameda, February 2010)

Plaintiff Larson's complaint, filed before the Supreme Court's decision in *Atlantic Sounding v. Townsend*, alleged severe injuries to his neck, back, arms and legs and that the defendant's reckless disregard and gross negligence entitled him to an award of punitive damages. Shortly after the Supreme Court's decision in *Atlantic Towing v. Townsend*, defendant moved to dismiss the punitive damages claim as it related to the Jones Act and unseaworthiness claims. In a very lengthy decision discussing the interplay between State law and Federal Maritime law, the court concluded that punitive damages were recoverable in Jones Act and general maritime law causes of action under both the Supreme Court *Atlantic Sounding* case and a California case allowing punitive damages in a seaman injury case, *Baptiste v. Superior Court*. Note, however, that three months later a Federal Court in Hawaii denied the identical motion against the same defendant.

Washington State Court

Punitive damages are recoverable for wrongful death under the Jones Act and general maritime law. *Nes v. Sea Warrior*, 2010 AMC 2297 (Wash. Sup. Court, King County, July 16, 2010)

Plaintiff moved for a pre-trial order establishing her right to seek punitive damages under Jones Act negligence statute. In a decision lacking any facts or the circumstances giving rise to the motion, the King County Court (Judge Eidie), noting the *Kona Blue Water* decision above, and following *Atlantic Sounding v. Townsend*, held that punitive damages are available in maritime actions, including the Jones Act for wrongful death unless Congress clearly and intentionally removed that remedy from the Act. Because the Jones Act statute lacked any such clear intent, plaintiff Nes could recover punitive damages at trial.

Punitive damages awarded for the first time for failure to pay unearned wages. *Lanphere v. Evich* King County Superior Court Case No: 09-2-1576-2SEA. January 2011.

Lanphere, a "fish picker" aboard a fishing vessel owned by defendant, was allegedly injured, when the pant leg of his rain gear became entangled the unguarded rotating shaft in the vessel's engine room. Plaintiff had two knee surgeries, to reconstruct his medial collateral ligament, the medial meniscus and to reconstruct his posterior cruciate ligament. When Lanphere left the ship, his employer paid him \$5,332 in estimated wages. The ship's gross earnings were \$85,129 and plaintiff should have received \$8,512 in wages. The employer's adjuster only paid an additional \$1,000 after the vessel's gross earnings were calculated.

Lanphere filed suit under the Jones Act and general maritime law. He argued he was entitled to

a finding of negligence *per se* (a species of strict liability), because his employer violated a USCG regulation (46 CFR §28.2151) which required suitable hand covers, guards, or railing in way of machinery such as gearing, chain or belt drives and rotating shafts. The court agreed and held defendant negligent *per se* due to the regulatory violation. As a result, under the Jones Act defendant was not entitled to a finding of comparative fault.

Plaintiff also claimed that Evich owed him unearned wages and, again, the court agreed. The court held plaintiff was entitled to an additional \$2,180.24 in “unearned” wages. The court also found that although Lanphere had returned to his work as a heavy machinery operator, it was inconsistent with his physical abilities and contrary to medical recommendations. The court concluded that Lanphere was doing the work out of economic need and doing the work was exacerbating his injury, causing him additional pain and suffering. While the court declined to award punitive damages for failure to pay cure, it nevertheless, awarded \$100,000 in punitive damages for defendant’s intentional and willful refusal to pay the additional unearned wages of \$2,180.24. In doing so, the court refused to follow the punitive damage 1:1 ratio expressed by the U.S. Supreme Court in *Exxon v. Baker*. The total judgment against the defendant was \$1,120,166.96, plus attorney fees and costs. (WA Sup. Kings, January 6, 2011)

And in even more good news...

A Washington State Court of Appeal held that a ship owner could not condition payments of maintenance and cure on a seaman submitting to a “Cure IME”. *Mai v. American Seafoods Company* (Wash. St. Ct. of Appeals, Div. I, Case No. 63969-2-I, March 14, 2011).

Mai injured her knee while moving boxes aboard defendant’s fish processing vessel. She had two knee surgeries but continued to have complaints of pain. Treatment included a gym membership to strengthen her leg and delay knee replacement surgery and pain medications. Defendant questioned whether such treatment was curative and eventually terminated maintenance and cure on the basis the treatment was palliative but would pay for previously recommended knee replacement surgery if plaintiff chose to have it.

Plaintiff’s doctor recommended the surgery and plaintiff asked defendant to authorize payment for the surgery. Defendant required that plaintiff undergo a cure IME before authorizing the knee replacement surgery claiming it wished to investigate the need for surgery before approving it. Plaintiff produced evidence that defendant wanted the IME by a local doctor to eventually serve as an expert witness in the imminent litigation and because the surgery was expensive.

Months later the plaintiff underwent the IME and the doctor agreed with the surgical repair of the knee. Defendant agreed to pay for the surgery but refused to pay maintenance for the period plaintiff did not submit to the IME.



The Appellate Court reiterated the standards for maintenance cure concluding that all ambiguities and doubts, including conflicting medical evidence, as to the seaman’s right to receive maintenance and cure are to be resolved in favor of the seaman. The court went even further and held that even if the IME produced a contrary medical opinion, the defendant could not reject the treating doctor’s recommendation. The court awarded plaintiff attorney fees for wrongful failure to provide maintenance and cure.

The plaintiff’s bar will inevitably argue for far broader interpretation of this decision in resolving questions about a defendant’s maintenance and cure obligation.

Get SMART

On March 15, 2011 The Strengthening Medicare and Repaying Taxpayer Act of 2011 – H.R. 1063 - (SMART Act) was introduced in the Congress of the United States.



Karen C. Hildebrandt
Vice-President

The Act, which has bi-partisan support as well as the support of many industry groups, aims to improve the efficiency of the current Medicare Secondary Payer system as well as speed repayments of amounts owed to the Medicare Trust Fund. The sponsors have identified many of the areas which the Team has noted are continuing problems for our Members in attempting to comply with Medicare reporting requirements and settlements involving Medicare eligible persons.

The SMART Act aims to speed settlement times by placing time limits for responses from CMS with regard to conditional payment requests, allowing the parties to obtain the amount of

Medicare repayments owed before settlement, rather than after. It also would include a minimum dollar threshold below which conditional payment reimbursement and mandatory reporting would not be required. There would be good faith exceptions to the \$1,000 a day non-reporting penalty established. Social security numbers of individuals would not be required for reporting. Member and attorneys have frequently reported problems in obtaining social security numbers from individuals who are leery of identity theft. A three year statute of limitations would apply to conditional payments and mandatory reporting actions.

This is just the first step in getting this proposed law passed. There will be hearings in both the House and the Senate and both bodies would have to vote affirmatively on the Act and then have it signed into law by the President. A similar bill introduced last year did not progress. Some of the provisions of the Act will be subject to further regulation which would delay implementation. However, this Act is seen by industry groups as a step in the right direction to easing the current system while at the same time protecting the Medicare Trust Fund.



And finally...

US Supreme Court declines to address issue of negligent infliction of emotional distress *Stacy v. Rederiet Otto Danielsen*, 609 F.3d 1003, 2010 AMC 1782 (9th Cir. 2010)...now what?



Linda Wright
Claims Executive

Our readers may recall that this case arose from Stacy's claim of negligent infliction of emotional distress when he learned four days after the event that a fisherman he did not know died in a collision with defendant's ship (See BI News November 2010). The US Supreme Court, unfortunately, denied the petition for certiorari in *Rederiet Otto Danielsen v. Stacy* (No. 10-791). The case must now proceed through discovery and trial before any further appeal can be taken. This means that plaintiff is allowed to produce evidence of his emotional distress despite the fact that he did not

actually see, he was not in the zone of danger, and did not learn of the death of a fellow fisherman until a full four days after the incident. The decision was not unexpected, but was nevertheless disappointing. Of over 500 petitions for certiorari reviewed that day, only six were granted.

The US Supreme Court is not obligated to and did not give any explanation for its denial of the petition. One reason may have been because the appeal was interlocutory; an interim, discretionary appeal to resolve an important issue of law. The shipowner is allowed to seek certiorari again if they are found liable at trial. If the precedent is applied successfully in future cases, the Supreme Court might agree to hear one of those and bring sanity back to the West Coast.

Already plaintiffs' attorneys on the West Coast are bringing the case to the attention of others on blogs, in classrooms, and seminars, touting the new case law for its potential to considerably expand the list of plaintiffs claiming negligent infliction of emotional distress.



John Ferrie (1937-2011)

It is with great sadness that we have to report that our colleague John Ferrie died on March 22nd aged 73.



John had worked for Thomas Miller Americas (TMA) San Francisco from 1986 through to 2002.

He worked for several US shipping companies during his long career and was an expert on bodily

injury claims. John joined TMA SF at the outset of our West Coast operation and together with Joe Pascucci formed a very effective claims team.

John's experience and commitment was a huge asset to TMA and the UK Club members who benefited considerably from his full understanding of the issues and dynamics of handling serious injury claims in USA. John was the first leader of TMA's Bodily Injury Team and participated in several of the very successful UK Club Cruise Conferences run by Phil Nichols.

John's other passion in life was baseball. He was an ardent New York Yankees fan and many of us (particularly those of us not brought up on the sport) grew to enjoy baseball, largely thanks to John's enthusiasm and willingness to explain to the uninitiated what was going on.

John moved back to the New York area from San Francisco when he retired in 2002 to watch his beloved Yankees and return to his roots.



Recent articles in Bodily Injury News over the last three issues

CREW ISSUES: ARBITRATION AGREEMENTS

Post accident arbitration agreements *Dolores O'Leary*

In an effort to avoid the risk associated with personal injury litigation in the US, a new path is being forged – the post accident arbitration agreement...and it seems to be catching on.
July 2010

CREW ISSUES: EMOTIONAL DISTRESS

Negligent infliction of emotional distress claims expand *Linda Wright*

Ninth Circuit Court of Appeals expands availability of negligent infliction of emotional distress claims in *Stacy v. Rederiet Otto Danielsen*, 609 F.3d 1003, 2010 AMC 1782 (9th Cir. 2010).
November 2010

CREW ISSUES: EMPLOYMENT CONTRACTS

Round Table Seminar 2010 highlights – 2

Gary A. Hemphill, Phelps Dunbar L.L.P.
Foreign seafarers' entitlement to maintenance and cure & enforcement of forum selection and arbitration clauses.
November 2010

The enforceability of arbitration clauses in employment contracts *Karen Hildebrandt*

Recently, there has been a proliferation of decisions dealing with arbitration clauses in seafarer's employment contracts and their enforceability. This article suggests practical tips to remember from some of those decisions.
November 2010

CREW ISSUES: MAINTENANCE

Round Table Seminar 2010 highlights – 1

Nick Politis, Flynn Delich & Wise L.L.P.
Pre-employment medical examinations and the consequences of misrepresentation by a seafarer. Owner's obligation to pay maintenance: Actual expenses or collective bargaining agreement rate? Is an owner obligated to pay cure for unrelated conditions discovered during treatment for a shipboard illness or injury?
November 2010

Maintenance rates in union contracts: the Federal courts' perspective

Marc Warner, LeGros Buchanan & Paul P.S.
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Maintenance and cure: Latest developments

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CREW ISSUES: PUNITIVE DAMAGES

Atlantic Sounding Co. Inc. v Townsend

David McCreadie & Eddie Godwin, Lau, Lane Pieper, Conley & McCreadie, P.A.
Putting this case in context on punitive damages for the wilful failure to pay maintenance and cure.
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CRUISE LINE ISSUES

Cruise ship crime reporting

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Kaye Rose & Partners LLP
A summary of the impending Cruise Vessel Safety and Security Act and the requirements it places upon ships carrying more than 250 passengers calling at US ports.
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MEDICAL EVACUATION

US Coast Guard medical evacuations

Daniel J Fitzgerald (Freehill Hogan & Mahar LLP) & Karen Hildebrandt

With limited medical capabilities on most seagoing vessels, it is not uncommon for vessel masters to request medical assistance from coastal governmental agencies. Karen Hildebrandt shares her recent experience.
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MEDICARE

Are Medicare set-asides required in liability cases?

Jana Byron
The significance of the new reporting requirements in the second of a two part series on addressing Medicare issues in personal injury settlements in the US. In part 1, we covered the new reporting requirements enacted under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA").
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New reporting requirements for personal injury payments to Medicare-eligible claimants

Jana Byron
Non-compliance penalties of \$1,000 per day enhances the significance of the new reporting requirements
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STATE PRACTICE AND PROCEDURE

You have a CBA with a contractual maintenance rate; so what?

Louise Livingston
Washington state courts refuse to enforce certain contractual terms of collective bargaining agreements.
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Proving medical services in Texas

Christina Schovajsa, Eastham, Watson, Dale & Forney, L.L.P.

Texas, as we all know, can be an unusual place where strange things happen both inside and outside courtrooms. Recently, during the course of a personal injury lawsuit in Harris County, Texas, a strange thing happened...
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Washington State: shifting discovery burdens

Phil Lempriere & Molly Henry, Keesal Young & Logan
A new opinion issued by the Washington Supreme Court will require a party objecting to discovery requests to seek a protective order instead of the traditional method of waiting for the requesting party to bring a motion to compel. The Club's legal correspondents in Seattle explains the case of *Magana v. Hyundai Motor Am.*, Case No. 80922-4 (Nov. 25, 2009)
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Collateral estoppel

Karen Hildebrandt
We all have heard of "serial plaintiffs", those who seem to be injured on every ship or jobsite they work and do not hesitate to bring a lawsuit to recover for their injuries. Those suits routinely demand recovery of damages for loss of future earning capacity. But if a plaintiff recovers for loss of future earnings in one lawsuit, can they recover the same damages in all future lawsuits?
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Depositions in the United States – do we really have to?

Louise Livingston
Why sworn affidavits just won't do. While sworn affidavits are permitted in certain situations in litigation in the United States, for example, in support of motions, they are by no means an exclusive method of presenting evidence. The reason sworn statements are not favored in the United States is because there is no opportunity to ask questions of the witness.
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Texas responsible third-party practice

Tom Nork, Phelps Dunbar
Can the jury now fully consider and apportion liability? A unique procedural practice the Responsible Third-party Rule applies to any cause of action based on tort.
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Collective expertise



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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 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 courts. Linda Wright has 29 years' experience as a P&I correspondent dealing with personal injury claims. The Team review and determine strategy and estimates in all major injury cases and attend settlement conferences and mediations and trials with, and sometimes on behalf of, our Members.

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