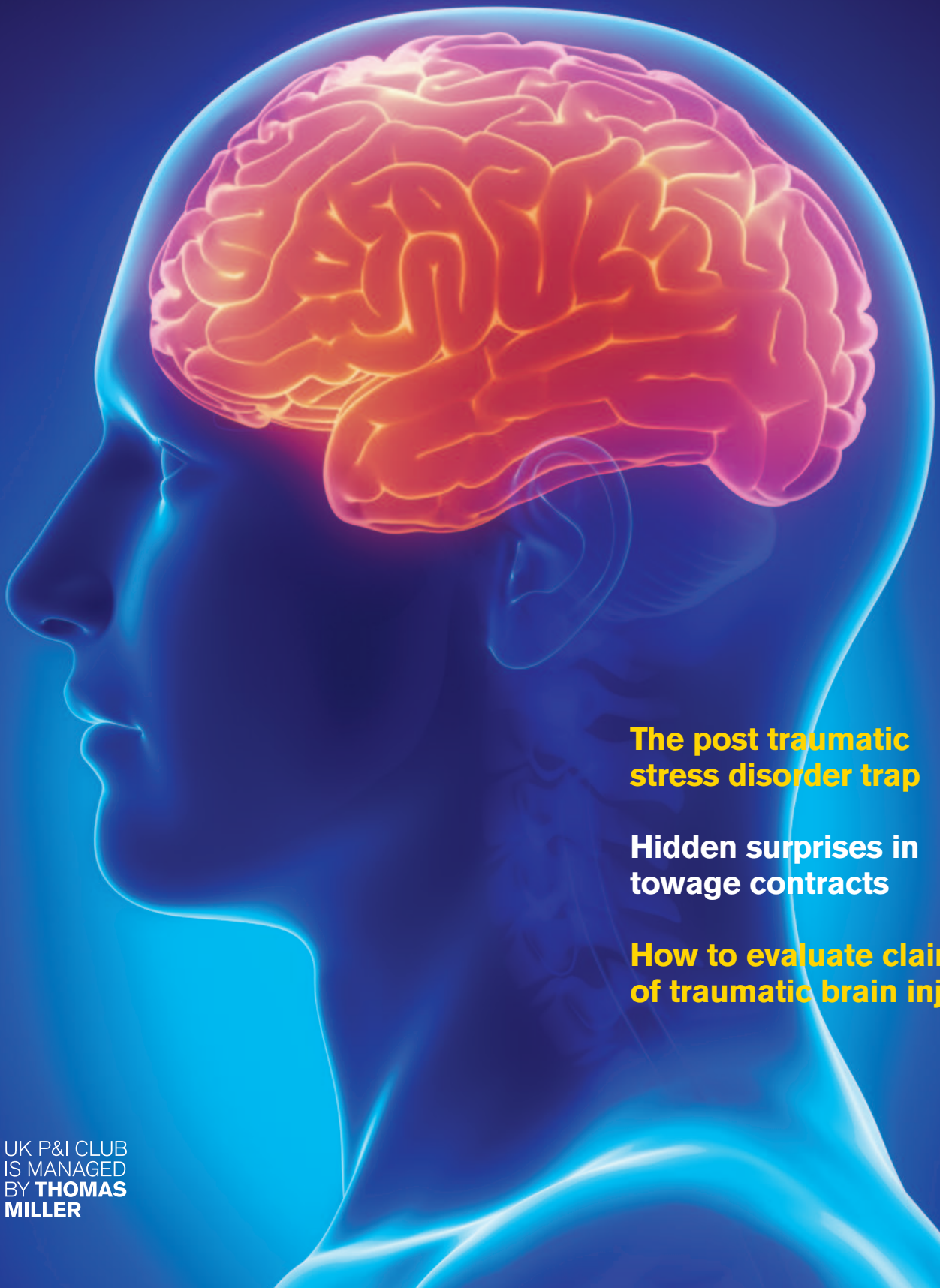
UK P&I CLUB

SUMMER 2014

BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team



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IS MANAGED
BY **THOMAS MILLER**

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Bodily Injury News

Bodily Injury News is the bi-annual newsletter of the Thomas Miller Americas' Bodily Injury Team.

The topics it addresses are highly relevant to all our Members worldwide given more than half of the Club's personal injury claims over $100,000 are brought in the American courts.

We welcome your feedback on the topics we cover as well as suggestions on subjects to address in future issues. Please send your comments and ideas to Louise Livingston at louise.livingston@thomasmiller.com

The information in this newsletter is not legal advice and should not be relied upon as such.

Save the date

Set aside September 18th to join us at our Bodily Injury Seminar, at our offices in Jersey City, New Jersey. This year, the single-day format will focus on updates and recent developments including procedural differences between arbitration and trials, and responding to adverse jury verdicts. This year, we also have a guest speaker who will provide an overview of the Costa Concordia salvage operation. The event is always extremely popular, combining expert instruction with engaging and practical hands-on case studies and workshops. The seminar is followed by cocktails and dinner.

Our seminar is aimed at both US and non-US based operators, and has 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. If you are interested in attending this seminar, please contact susan.pietri@thomasmiller.com

This edition of BI News covers injuries caused by lifeboat drills, traumatic brain injuries, strategies for dealing with long-term illness claims, PTSD and hidden surprises in towage contracts.

As always, we welcome your feedback on the topics we cover in our newsletter and invite you to suggest future topics. Contact details for our Bodily Injury Team can be found on the back page. ■

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

How to evaluate claims of traumatic brain injury

Recently, it seems that allegations of traumatic brain injuries are popping up more and more. What exactly is a traumatic brain injury and how does it affect your case? **Dee O'Leary** gives a short primer on traumatic brain injuries.

What is a traumatic brain injury and what causes it?

Traumatic brain injury (TBI) is also known as intracranial injury. A TBI is caused by a bump, blow or jolt to the head or a penetrating head injury that disrupts the normal function of the brain. Not all blows or jolts to the head result in a TBI. The severity of a TBI may range from "mild," i.e., a brief change in mental status or consciousness to "severe," i.e., an extended period of unconsciousness or amnesia after the injury. The majority of TBIs that occur each year are concussions or other forms of mild TBI.

What effect does a traumatic brain injury have?

TBI can cause a host of physical, cognitive, social, emotional, and behavioral effects, and the outcome can range from complete recovery to permanent disability or death. Depending on the injury, treatment required may be minimal or may include interventions such as medications, emergency surgery or surgery years later

Distinct types of traumatic brain injuries

There are two major types of TBI:

1. Penetrating injuries

In these injuries, a foreign object (e.g., a bullet) enters the brain and causes damage to specific parts of the brain. This focal, or localized, damage occurs along the route the object has traveled into the brain. Symptoms vary depending on the part of the brain that is damaged.

2. Closed head injuries

Closed head injuries result from a blow to the head which occurs, for example, in a car accident when the head strikes the windshield or dashboard. These injuries cause two types of brain damage:

a) Primary brain damage, which is damage that is complete at the time of impact, may include:

- **Skull fracture:** breaking of the bony skull
- **Contusions/bruises:** often occur right under the location of impact or at points where the force of the blow has driven the brain against the bony ridges inside the skull
- **Hematomas/blood clots:** occur between the skull and the brain or inside the brain itself
- **Lacerations:** tearing of the frontal (front) and temporal (on the side) lobes or blood vessels of the brain (the force of the blow causes the brain to rotate across the hard ridges of the skull, causing the tears)
- **Nerve damage (diffuse axonal injury):** arises from a cutting, or shearing, force from the blow that damages nerve cells in the brain's connecting nerve fibers

b) Secondary brain damage, which is damage that evolves over time after the trauma, may include:

- Brain swelling (edema)
- Increased pressure inside of the skull (intracranial pressure)
- Epilepsy
- Intracranial infection
- Fever
- Hematoma
- Low or high blood pressure
- Low sodium
- Anemia
- Too much or too little carbon dioxide
- Abnormal blood coagulation
- Cardiac changes
- Lung changes

Symptoms of a traumatic brain injury

These may include:

- Unconsciousness
- Inability to remember the cause of the injury or events that occurred immediately before or up to 24 hours after
- Confusion and disorientation
- Difficulty remembering new information
- Headache
- Dizziness
- Blurry vision
- Nausea and vomiting
- Ringing in the ears
- Trouble speaking coherently
- Changes in emotions or sleep patterns

How is a traumatic brain injury diagnosed?

If the injury is more severe, diagnosis is easier because it is usually clear from the symptoms that some type of brain injury has occurred. If the brain injury is milder, diagnosis can be more challenging and further assessment may be needed to diagnose the brain injury.

Imaging technology can be employed to help assess the severity, location and type of injury to the brain. CT scans and MRIs are two commonly used diagnostic tests used to confirm a brain injury.

Healthcare providers may also utilize a neuropsychological assessment, which is a specialized task-oriented evaluation of human brain-behavior relationships.

It relies upon the use of standardized testing methods to evaluate higher cognitive function as well as basic sensory-responses. Evaluating cognitive issues can be difficult because many of the symptoms are subjective. That difficulty is compounded by the absence of any prior neuropsychological testing for comparison.

Traumatic brain injuries and Lawsuits/Arbitrations

Evaluating a Plaintiff in a lawsuit, who claims to be suffering from a TBI, can prove to be even more problematic. Trying to disprove dizziness, difficulty concentrating or fatigue is challenging due to the subjective nature of these complaints. Think about this… someone claims that they feel dizzy, irritable, have blurred vision and are having trouble remembering things. How do you verify this? Is it due to a brain injury? Could it be old age? Hunger? Or could it be lack of sleep or something else?

Plaintiffs will claim permanent disability, ongoing need for cognitive and other therapies which increase the medical costs and reduce or eliminate future employment options.

When faced with a TBI claim, particularly a mild TBI, an expert witness is required to disprove (or verify) the claim. Neurologists, neuropsychologists and psychologists to name a few, may need to be hired to perform a battery of tests in order to determine whether the plaintiff is truly suffering from a mild brain injury or just making allegations of a TBI. CT Scans and MRIs can be costly and may be inconclusive, the mere allegation of a TBI in a lawsuit can significantly increase the cost of defending the lawsuit and has a significant impact on the claimed damages. ■

REMEMBER

1. Always take *any* head injury case seriously and conduct a thorough investigation.

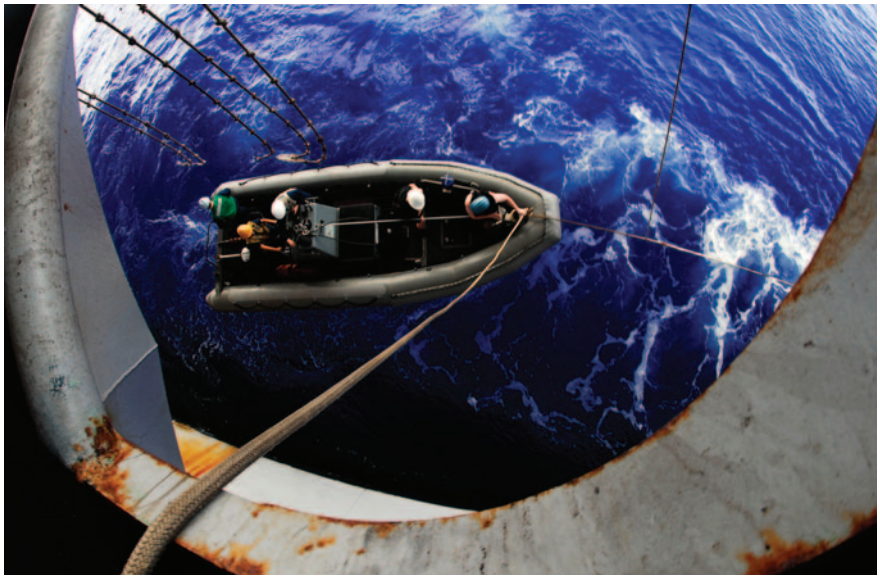
2. When a TBI is alleged, locate the best experts to examine, test and verify or disprove the injury

Injuries and fatalities during training exercises

16% of lives lost by merchant mariners happen during training exercises or drills supervised by qualified and experienced seafarers. **Linda Wright** investigates why this figure is so tragically high and what we can do to reduce it.

For many decades it has been a requirement that lifeboats and other lifesaving equipment are available to all persons aboard a ship. Over time the design and capacity of lifeboats have included protection and enhanced safety for anyone using them. The changes were usually made as the result of high profile incidents that caused injuries and loss of life – most notably the TITANIC in 1912.

Today, mandatory lifeboat drills are routine. However, incidents since the 1990s indicate a relatively high number of injuries and deaths during drills compared with other shipboard accidents. Several international marine safety organizations did studies to draw attention to the number of incidents, identify common factors, review the launching systems, and to make recommendations to the marine industry to improve safety during use of lifeboats. Each incident reviewed gave them lessons learned – but at what cost?



Marine safety studies

A study by a UK safety group accumulated data over a ten year period indicated that lifeboats and their launching systems had caused fatalities approaching 16% of the total lives lost by merchant mariners. Even more survived lifeboat incidents but suffered severe injuries of the spine and lower extremities. All of these accidents occurred during training exercises or drills, supervised by qualified, experienced seafarers.

Varied causes

The causes of accidents were varied. Some involved malfunctions of the lifeboat equipment or operational misunderstandings; others human error or miscommunication.

An example of miscommunication can be seen in an incident involving a bulk carrier fitted with two fully enclosed lifeboats each with a capacity of 25 persons. Both lifeboats were designed with on-load/off-load release mechanisms. The off-load mode – used once the boat is waterborne – required the removal of the safety pin and the pulling of a release handle in the wheelhouse to release the lifeboat from the ship. If the lifeboat was not yet in the water, the crew had to pull the safety pin and *lift* the safety interlock.

The Master was a Russian national newly in command, and the remaining crew members were Ukrainian, Polish, Chinese and Sri Lankan. The working language onboard was English. The whole crew, except the Master, had worked together for several months and were fully familiar with the launching procedures per the company/ship safety manual. The Master and several other crew members were in the lifeboat for the drill. The Chief Officer monitored the drill on deck. While the lifeboat was being lowered, the CO noted an increased river current and stopped the lifeboat before it reached the water. He notified the Master via VHF radio of the situation. The Master, believing the boat was waterborne, replied he was starting the motor. It was understandably very noisy within the lifeboat at this time, so he was unable to hear further communications from the CO. He next tried to release the boat by pulling the release handle, but the safety lock and interlock were still secured. A crew member noticed the Master was attempting to release the lifeboat, and advised him of the necessity to release the pin and interlock. As the pin was removed and the interlock disengaged, the hooks released and the lifeboat fell to the water with a forceful impact. The Master suffered three fractured vertebrae, which resulted in paralysis of his lower extremities. Other crew members suffered minor injuries.

Here, there was no malfunction of launching gear, but rather lack of familiarity of the Master with the launching procedure, and a miscommunication (language issue?) between the Master and the Chief Officer. Directives were sent out by the Owner to all their ships' crew members regarding the essential need to have all parties confirm procedural steps during launching drills.

Complex lifeboat designs

As the design of lifeboats has progressed, the requirement to understand the mechanics of launching operations has become more complicated. The Club handled a claim in which a deck officer was killed when a lifeboat fell from its stowage level to the ocean below. After the aft hook disengaged during a drill, the boat fell 9 to 10 meters in a vertical position. The lifeboats had been taken ashore a few months earlier for inspection and testing, and then reinstalled by a shore crew. This accident occurred during the first drill in which the boats were lowered to the water. An investigation revealed the crew were not familiar with the hooks or the importance of the reset lever being properly aligned with green marks. The complicated operating instructions and diagrams supplied by the manufacturer were unclear and of poor quality. Owners should contact manufacturers for clearer instructions if the crew members do not understand them.

Flawed design and mysterious malfunctions

Sometimes the design of the launching system is itself flawed. One incident involved a release mechanism of a safety hook which opened without any physical action by the crew. The boat fell over 8 meters to the water causing three crew members to sustain fractures to their ankles, legs and spine. The investigation discovered that when the hoisting wire became kinked on the drum, the mass force of that action caused the hook to release without any contact by a crew member. The recommendation was to replace such safety hooks with a modified version which included a safety lock pin.

Some lifeboat incidents occur which cannot be explained by the experts. Another lifeboat drill injury occurred when a boat was being raised by a winch to within a foot or two of being in the fully stowed position. The winch was automatically programmed to stop at this point, as the rest of the stowing was done by use of a hand crank on deck. All mechanisms were working properly but when a crew member inserted the hand crank to fully stow the boat, the hand crank suddenly began to rotate and whipped around and struck the crew member in the head causing injury and hearing loss. There was no brake malfunction and the incident could not be duplicated in further testing. There was corrosion on the electrical panel and some improper fuses in place, but the investigation was inconclusive as to the cause of the hand crank failure.

With mandatory requirement to perform lifeboat drills Members must properly train their crew members in all aspects of the procedures for launch and retrieval of the boats. The lessons learned from the prior incidents can be summarized:

- The entire crew should be capable of operating the lifeboat systems, easily understanding the mechanics and procedures even with minimum training or experience.
- Communication between the crew during drills must be clear, with confirmed completion of each step throughout the exercise.
- When the design of the lifeboat launch system and its components are complicated, Members should consistently train on the operation, repair and maintenance of the entire lifeboat system. If necessary, require that the manufacturer supply easily understood instructions and diagrams to explain the proper operation OR create a common operating procedure safety manual independent of the manufacturer instructions.

Constant training

The only remedy for human error is continuous training and adequate risk assessment procedures. The most effective training for the seafarers is for them to know *why* something is done a particular way, to better understand the procedures – not just remember them. As a result their understanding gives the crew members more confidence in the systems. Training should specifically address the launching of lifeboats. Drills must be reliable and safe with minimum risk to those participating.

The IMO amended SOLAS in 2006 and 2008 to address conditions under which lifeboat drills are conducted, introduce changes to the maintenance and inspection requirements, and drills without requiring crew members to be onboard the boat. The review and studies included guidance for the launch of free-fall lifeboats during drills, and the servicing of launching systems and on-load/off-load release mechanisms. The intent is to prevent accidents and instill confidence in the crew members during abandon-ship drills. ■

The post-traumatic stress disorder trap

Noreen D. Arralde outlines how recent changes to the DSM make it even easier to obtain a diagnosis of this already overdiagnosed condition.

Being diagnosed with post-traumatic stress disorder (PTSD) just got easier and for employers and shipowners who find themselves defending against spurious PTSD claims, that's not good news.

The DSM V changes

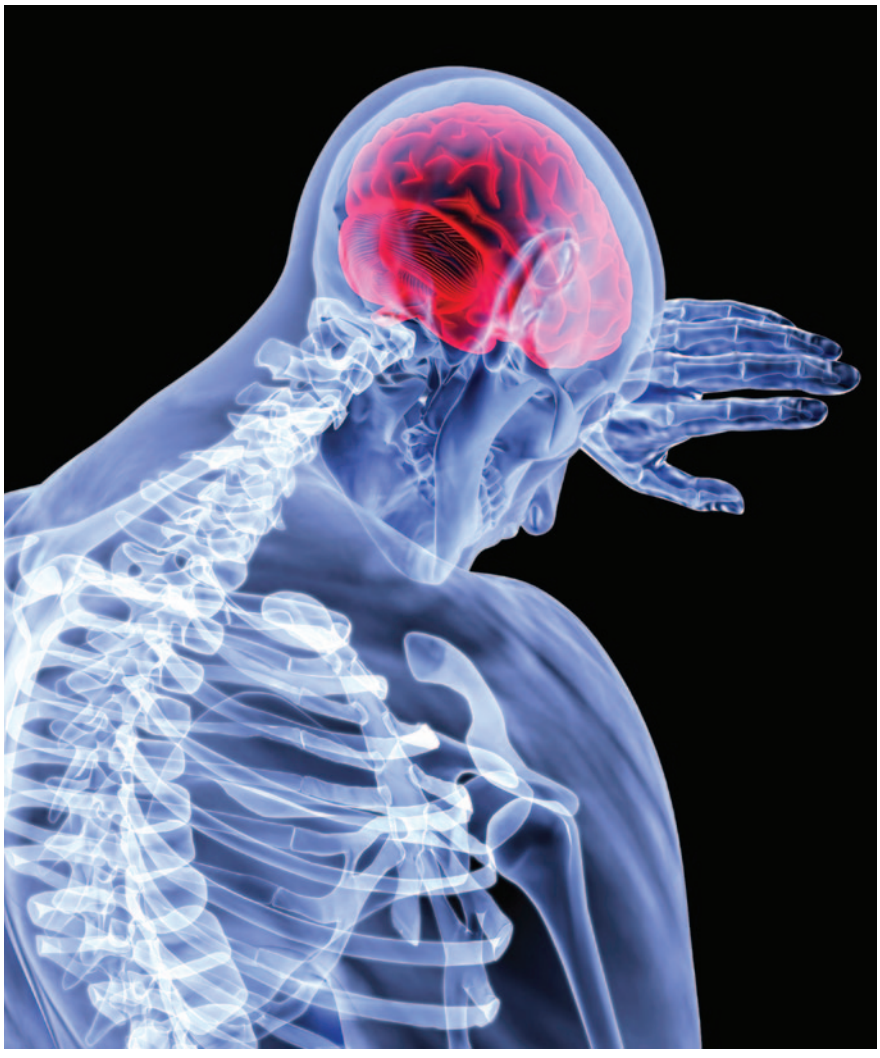
The Diagnostic and Statistical Manual Fifth Edition (DSM V), which was released by the American Psychiatric Association (APA) in May 2014, contains new guidelines and criteria for many psychiatric conditions. DSM V was released amid considerable controversy, particularly with respect to its criteria for diagnosing PTSD, a condition which many experts believe is already drastically overdiagnosed.

The new DSM criteria make it easier to diagnose PTSD in three significant ways. First, DSM V eliminates the requirement that a person experience extreme fear, helplessness and horror at the time of a traumatic incident. Second, it adds a set of symptoms that make a PTSD diagnosis much more likely. Third, it allows a diagnosis of PTSD to be made even if the person reporting symptoms did not experience or witness a traumatic event, but merely learned that a traumatic event occurred to a relative or friend.

Opening the floodgates

These changes open the floodgates for abuse by civil litigants motivated by secondary gain. PTSD is already a common claim in attempting to establish or exaggerate damages in civil lawsuits. Since the symptoms of PTSD are entirely subjective, i.e., there is no way to independently verify the reported symptoms, under the former criteria the means by which experts could try to limit the misuse of the PTSD diagnosis was to challenge whether the triggering event was extreme enough to warrant the diagnosis and whether the person had an immediate reaction of extreme fear, horror or helplessness. DSM V eliminates those requirements. Another limiting factor, that the person reporting symptoms experienced direct personal contact with the traumatic event, has also been eliminated.

Going even further, DSM V adds a set of symptoms to the criteria which proponents of the changes referred to as "often seen in patients with PTSD." But these changes make it nearly impossible to challenge a diagnosis of PTSD based upon symptomatology. The symptoms associated with PTSD according to DSM V are: re-experiencing, avoidance, negative cognitions and mood, and arousal. So, if a person reports



re-experiencing the traumatic event, he meets the criteria for PTSD; whereas if another person reports avoiding the traumatic event, he too meets the criteria for PTSD. Symptoms of negative or depressed thoughts or mood indicate PTSD, just as do symptoms of heighted or aroused thoughts or mood.

In adopting these changes to DSM V, the APA does not appear to have been at all concerned about the realities of civil litigation. The new PTSD criteria are rife with potential for abuse.

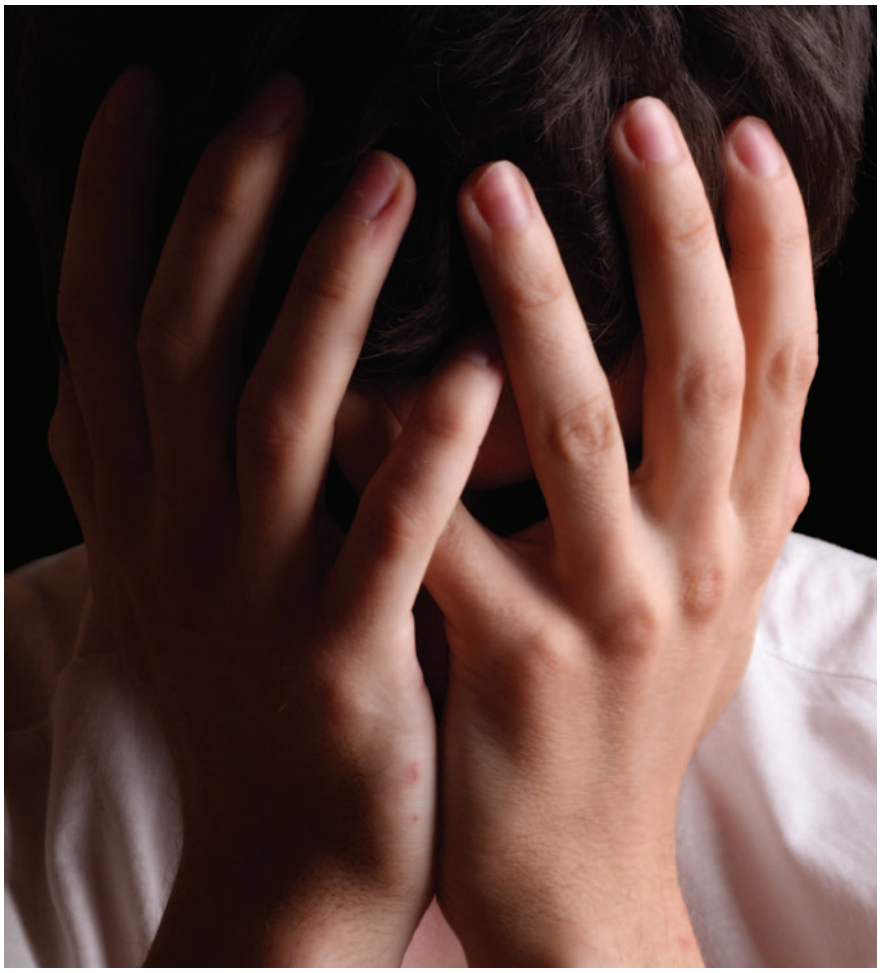
PTSD is already overdiagnosed

There are a growing number of experts who are beginning to question how frequently PTSD is diagnosed. The condition was first diagnosed in the wake of the Vietnam War as a way to categorize post-combat reactions previously called shell-shock. PTSD was originally based on the idea that certain combat experiences were so traumatic they could give anyone PTSD. It has been a generally accepted statistic that 30 percent of Vietnam War veterans suffered from PTSD.

In recent years, however, some experts have begun to challenge the accepted data about the prevalence of PTSD among Vietnam veterans. By examining records of reported symptoms and diagnoses for more than one thousand veterans, a Columbia University scientist found the percentage of vets who suffered from PTSD was closer to 18 percent and other scientists have argued that even those figures are too generous, and that PTSD was overdiagnosed among Vietnam vets by as much as 300 percent.

The same pattern of overdiagnosis continued in the wake of the wars in Iraq and Afghanistan. The generally accepted reported data states one in five soldiers suffered from PTSD. Subsequent studies, however, using more stringent criteria, concluded just over four percent of soldiers serving in Iraq and Afghanistan showed symptoms significant enough to warrant a PTSD diagnosis. Despite these subsequent studies, the "one in five" statistic is still widely reported.

There are no readily available studies reporting on the prevalence of a PTSD diagnosis among the general population. There is reason to believe, however, that the pattern of overdiagnosis among civil litigants is as high, if not higher, than among veterans.



Gaming the system

The reason for the upsurge of PTSD among war veterans may well be the design of the benefits system. Since PTSD is considered a disability related to military service, veterans diagnosed with the disorder are eligible to receive disability pay. Veterans diagnosed with PTSD typically show little improvement from treatment, and as a group report worse symptoms until they are diagnosed as fully disabled—at which time their disability payments reach a maximum level.

Civil litigants have the same financial incentive to game the system by obtaining a PTSD diagnosis. Because the diagnosis depends upon self-reported behaviors and feelings and is made even easier to obtain under DSM V, employers should expect to see more claims of PTSD from employees who suffer work-related accidents, even if those accidents are not considered particularly traumatic.

For the Club's Members, DSM V likely means more claims of PTSD from injured workers and also more bystander PTSD claims from third parties, such as passengers, who may be diagnosed with PTSD simply because they learned that a traumatic event occurred to someone close to them.

Opportunity lost

DSM V presented an opportunity to tighten the criteria for PTSD, so that better diagnosis and treatment for those truly suffering from PTSD could be achieved. Instead, the APA has created a model which will likely be exploited by lawyers and misused in the courts, fueling the suspicions surrounding PTSD. ■

Ending long-term liability obligations

Treatment for serious injury and incurable disease can last decades and be an administrative burden on shipowners. **Markus McMillin** shines a spotlight on structured settlements as a viable solution.

Maintenance and cure is owed to a crew member when he or she becomes injured or ill during their service to the ship. It is a strict liability obligation of the employer without regard to fault. A shipowner is obligated to provide maintenance and cure until such a time as an ill or injured seaman is either (1) found "fit for duty" or (2) reaches "maximum medical improvement". A seaman reaches maximum medical improvement when the condition will not improve with additional medical treatment. The fact that a seaman continues to receive palliative treatment (to simply relieve pain) does not entitle him or her to further maintenance and cure if the medical condition complained of does not improve.

But what about the case where a seaman has a serious injury or incurable disease where curative treatment can continue for years or even decades? As discussed in prior articles, the shipowner is obligated to continue to pay maintenance and cure in situations where there is a likelihood of future improvement of the seaman's condition. In some cases, the maintenance and cure obligation can continue indefinitely. This obligation can be an administrative and financial burden for a shipowner. However, there is sometimes a viable solution to the problem: a structured settlement.

A structure involves the purchase of one or more annuities from a life insurance company which guarantee payment of certain sums of money over time. The cost of an annuity is well below the total future benefits paid out.

Settlement with structures

In a recent case, the Club handled for a Member, a 64 year old crew member fell from a piece of equipment and shattered his tailbone causing nerve damage and

rendering him incontinent for both his bladder and bowel. An incidental finding during the work up on his tailbone suggested kidney cancer for which the Member was also responsible to treat under the maintenance and cure obligation. The crew member was eventually found to have reached maximum medical improvement for all medical conditions but had on-going need for medications and medical supplies for the remainder of his life. To achieve a full resolution of a clear liability incident, a settlement proposal was made consisting of several different structures to cover some elements of the claim in addition to a lump sum payment on others. The crew member agreed to the settlement which included payments (some for the remainder of his life) for life insurance to a specific retirement date, pension contributions, health insurance contributions, lost wages, and medications and medical supplies. When the settlement package was paid out to the crew member directly and into annuities on his behalf, the Member was relieved of any further financial obligation. One important point was to identify the costs of future medical treatment under Medicare and to protect Medicare's interests by way of a structure.

In another case, a crew member was diagnosed with polycystic kidney disease (PKD) which manifested itself while the crew member was in the service of the ship. PKD is an incurable genetic disease. Although she was found to be unfit for duty, her condition was initially stable after the use of medication and no further treatment was recommended. Unfortunately, there was no specific maximum medical improvement determination was made by her treating doctor. Some months later, the crew member requested further cure but it was denied by the Member on the basis that the crew member was stable and there was no indication at the time the crew member needed further treatment including dialysis or a kidney transplant. The crew member eventually sought further treatment on her own.

The case was arbitrated on whether or not maintenance and cure should be reinstated. By the time arbitration commenced, some three year later, the crew member's condition had deteriorated to the point of her needing to start dialysis.

The arbitrator ruled in favor of the crew member awarding damages and that maintenance and cure be reinstated. The cure obligation and treatment duration was left open-ended – basically until she receives a kidney transplant plus at least two years of post-transplant treatment (predicted to be in the region of 8-10 years in total) or if no transplant could be arranged, until her condition deteriorated to the point of her death, expected to be anything up to 10 years.

Due to the financial and administrative burden of the on-going cure obligation, structured settlement options were proposed to plaintiff's counsel, but the estimated future care costs he claimed for his client were completely unrealistic. Now, 18 months post-arbitration, the Member has evidence of the actual annual treatment costs for this crew member. The Member can make another structured settlement proposal to resolve the case with finality.

In conclusion, treatment for some serious injuries or incurable diseases can last years or even decades. The shipowner's maintenance and cure obligation can last the same period of time as well. Although the final numbers have to of course be agreed to by both parties, a structured settlement is a viable solution to relieve a shipowner from the administrative and financial burden of long-term maintenance and cure obligations. ■

Second Circuit holds overtime included in unearned wages

If crew expect significant and quantifiable income from overtime, it must be included in unearned wages. **Jana Byron** explains.

Entitled to recover

On 25th June 2013, the Second Circuit Court of Appeals issued a decision in *Padilla v. Maersk Line Limited* in favour of the class of plaintiff seamen who had been discharged from service of the ship before the end of their contract due to illness or injury. The central issue on appeal was whether the plaintiffs were entitled to recover, as part of their claim for unearned wages, overtime pay they would have earned had the voyage been completed. In issuing its decision, the Second Circuit affirmed the district court's ruling that these seamen were indeed entitled to recover overtime as part of unearned wages.

To understand the impact of the decision, it is first necessary to briefly review a seafarer's entitlement to maintenance, cure and unearned wages. Under the General Maritime Law, a seaman who falls ill or is injured during his service to the ship is entitled to maintenance (reasonable living expenses) and cure (medical expenses) until he reaches maximum medical improvement. Failure to pay maintenance and cure can result in an award of punitive damages against a shipowner.

The right to unearned wages

A seaman is also entitled to collect his unearned wages to the end of the voyage. While there is much debate about what "to the end of the voyage" means, there is no doubt that a seaman who is injured or falls ill is entitled, under most circumstances, to some form of unearned wages. In fact, as one court noted, "[t]he loss of unearned wages is no less an aspect of damages to a seaman than the loss of maintenance and cure." Moreover, the right to unearned wages is correlative to the right to maintenance and cure; thus the seaman should be awarded all three (if claimed) or none at all.

At issue in *Padilla* was whether, as part of unearned wages, the class of plaintiff seaman was entitled to recover overtime wages in their calculation of unearned wages. The lead plaintiff, Mr. Padilla had been a chief cook aboard the MAERSK ARKANSAS. His voyage was scheduled to end on 26th February 2007.

However, on 6th November 2006 he sustained an injury and was discharged from the vessel unfit for duty. Maersk voluntarily paid his unearned wages at his base pay, as well as maintenance and cure, for the duration of his contract, but refused to pay him overtime wages. In May 2007, Padilla sued Maersk on behalf of himself and a proposed class of similarly situated seafarers who had not been paid overtime as part of their unearned wages.

In the district court, Maersk argued that Padilla's union contract limited his recovery to base wages but the district court was not convinced, holding that unearned wages include overtime pay where a seafarer reasonably expects to earn overtime pay on a regular basis throughout his service in an amount that was not speculative and he would have earned but for the injury or illness (in the case of Mr. Padilla, the court found that this amount would be approximately $13,000).

The case proceeded at the district court level and, after certifying the class, the court awarded damages to the plaintiff class in the amount of $836,819.40 in unpaid overtime wages. An appeal to the Second Circuit followed. On appeal, Maersk argued that the class was not entitled to include overtime in unearned wages because overtime was not encompassed in the definition of "unearned wages" under the General Maritime Law. The plaintiffs, on the other hand, argued that, because overtime was a substantial and routine component of the wages the plaintiffs' compensation, they were entitled to overtime payments because the General Maritime Law required that they be restored to the same position they would have been in "but for" the injury or illness.

"But for" test

In affirming the district court application of the "but for" test, the Second Circuit found that there was no dispute that the seafarers on defendant's voyages regularly received substantial overtime payments. As a matter of fact, said the court, "the record reflect[ed] that…Padilla and other Maersk seafarers regularly earned 100% or more of their base pay in overtime wages." Accordingly, the court concluded that under the General Maritime Law unearned wages includes overtime pay:

In reaching this conclusion, we align ourselves with the other circuits who apply the same test. See *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122-24 (11th Cir. 1995) (holding that tips should be included in the measure of unearned wages because a seaman would have earned them but for his injury); *Lipscomb,* 83 F.3d at 1109 (concluding that accumulated time off is part of seaman's unearned wages under general maritime law); *Aksoy v. Apollo Ship Chandlers, Inc.,* 137 F.3d 1304, 1306 (11th Cir. 1998) (calculating unearned wages as average tip income plus guaranteed minimum wage); *Morel v. Sabine Towing & Transp. Co.,* 669 F.2d 345, 346 (5th Cir. 1982) (holding that accumulated leave time is part of total wages and payable in addition to maintenance); *Shaw v. Ohio River Co.,* 526 F.2d 193, 199 (3d Cir. 1975) (same).

Implications for Members

The Club believes that its implications of *Padilla* are significant and potentially far reaching. First, on its face, Padilla instructs very clearly and articulately and leaving no room for doubt that where a crew member expects to receive significant and quantifiable income from overtime during the course of his employment, such overtime should be included in unearned wages paid to him. More importantly, however, the close correlation between unearned wages and the doctrine of maintenance and cure needs to be kept in the forefront of every shipowner's mind when making a determination of the amount of unearned wages due to a seaman. Failure to pay maintenance and cure can expose a shipowner to significant punitive damages and there has been a judicial trend towards expanding the application of punitive damages to other areas on maritime law, such as claims for unseaworthiness. It is not a stretch to expect to see a decision or award for punitive damages for a shipowner's failure to pay proper unearned wages that include anticipated overtime wages. ■

Hidden surprises in towing contracts

Louise S. Livingston gives us an insight into indemnity provisions in a tug escort's terms and conditions.

On a summer day in August a large foreign flag bulk carrier was departing a US West Coast Harbor. As usual, tugs were engaged to assist the ship away from the berth, tug lines were released from the ship and retrieved by the tug. This task was coordinated between the tugs and ship by the crew at the ship's mooring station and the crew member on the tug's forward deck. As far as the ship's Master and crew knew, it was an uneventful departure.

Imagine the Owner's surprise a year later when they were served with a Summons and Complaint by an injured tug crew member. The complaint was for negligence under the General Maritime Law of the United States. Plaintiff alleged a permanently disabling injury to his left knee as a result of the ship's crew suddenly dropping the tug's line without ensuring plaintiff was out of the way.

Having had no notice of any accident at the time of the ship's departure, the Owners were not able to investigate the alleged accident. Though it made the lawsuit very difficult to defend, it is common not to have a report of injury from the tug.

Indemnity provision

The real surprise for Owners was the indemnity provision in the tug escort terms and conditions clearly covering (a) any claims, liabilities and costs (including attorneys' fees) that are asserted against the tug operator; (b) which arise out of or are related to any service rendered by [tug operator] pursuant to the Schedule, (c) *including claims, liabilities and costs attributable to [tug operator's] own negligence or the unseaworthiness of it's tugs* (d) *in excess of $100,000.*

The indemnity provision clearly covered plaintiff's alleged accident and injury during the performance of tug services. The charterparty between Owners and subcharterers required Owners to indemnify subcharterers for liability arising out of employment of tugs and stevedores.

Maintenance and cure

The tug crew member was equally clearly a Jones Act seaman and thus entitled to maintenance and cure[3] from his employer. By the time Owners were notified of the lawsuit, the tug company had been paying maintenance and cure benefits for over one year; the total amount exceeded the $100,000 amount the tug company retained.

During the litigation the tug operator informally asserted its indemnity claim against Owners. Plaintiff alleged a permanently disabling knee injury. He was awarded damages by the Court including an award for future medical expenses to treat his depression arising from his permanent inability to return to his job. Despite that judgment, which was paid by Owners, the crew member continued to receive treatment well beyond the time estimated by the Court. Thus, the Owner's obligation to indemnify the tug company also continued.

Maximum Medical Improvment

Many jurisdictions in the US place an extremely high burden on employers to demonstrate a crew member has reached MMI and is no longer entitled to maintenance and cure. In some jurisdictions it is virtually impossible to challenge an injured seaman's treating physician's opinion that on-going treatment is required. The case was in one of those jurisdictions. Owners, with assistance from the tug operator, attempted to negotiate a settlement of the maintenance and cure obligation with plaintiff's attorney without success. Next, Owners and the tug operator filed a court action to reduce the amount payable to the crew member – again without success. By this time, over 1½ years had passed. Prior to filing yet another action in court Owner's counsel approached plaintiff' attorney about a settlement – this time negotiations were successful. The success was likely due in part to the fact the crew member wanted to be re-employed by the tug company in a different capacity. The on-going maintenance and cure claim was a disincentive for the tug company to re-hire the plaintiff. The end result was a significant additional expense to Owners in excess of $150,000.

P.S. The Club has recently learned the plaintiff is now fully fit for duty and is requesting his old job back. ■

You may have missed…

Our May 2012 Bodily Injury News gave particular emphasis to 'maintenance and cure'. The breadth of exposure through this avenue of claim is not widely understood. The seemingly limitless potential for punitive damages where owners fail to pay maintenance and cure is explored as is the trend towards palliative treatment which raises the prospect of a continued cost for owners. Recent issues and developments arising from crew injury through falling overboard and parting mooring lines are also reviewed.

[3] Maintenance and Cure is a strict liability obligation of the employer to provide a daily stipend and pay for medical care until the crew member is determined to have reached Maximum Medical Improvement (MMI).

Personal Injury litigation shake-up

Lisa M. Conner of Flynn, Delich & Wise LLP explains the major changes to personal injury litigation procedures in Los Angeles County Superior Courts.

Los Angeles County has California's largest court system and had about 4,400 employees and 540 judges with an annual operating budget of $734 million in 2012[1]. A projected $85 million budget shortfall for the fiscal year beginning 1st July 2013, prompted cuts and forced the closure of seven regional courthouses and the elimination of more than 500 jobs[2]. These cuts have resulted in drastic changes to the way personal injury lawsuits are administered in the Superior Court for the County of Los Angeles.

Filing new cases

Generally speaking, prior to 18th March 2013, personal injury lawsuits could be filed in any judicial district in Los Angeles County where the bodily injury occurred or where a personal injury defendant resided. Personal injury cases were direct calendar matters, assigned to a specific judge and courtroom (or department) for all purposes, including dispositive motions and trial.

As of 18th March 2013, all personal injury lawsuits are to be filed in the Central District of Los Angeles at the Stanley Mosk Courthouse in downtown Los Angeles. Most of those matters which had been filed in other Courthouses were transferred to downtown Los Angeles. From 1st June 2014, only four court rooms in Los Angeles will hear personal injury matters for all pre-trial purposes. Departments 91, 92, 93, and 97, affectionately called "the PI Courts," handle all personal injury law and motion matters, including all dispositive motions, such as motions for summary judgment and or adjudication.

Judicial case management

With the new changes, Trial and Final Status Conference hearing dates are automatically set when a Complaint is first filed at the Stanley Mosk Courthouse. No other hearing dates are scheduled by the Court. PI lawsuits are no longer closely monitored by the Court as they had been in the past. The lawsuits are now exempt from the customary Case Management Rules which practicing Los Angeles attorneys and their clients have become accustomed to. For instance, the Court no longer holds a Case Management Conference at the start of the litigation or Status Conferences. Thus, there are no early meet and confer requirements amongst counsel. Court-ordered alternative dispute resolution sessions, such as mediations, arbitrations or settlement conferences are a thing of the past, as are mandatory Post-Mediation Status Conferences.

Reserving hearing dates for motions

Prior to March 18, 2013, motion hearing dates could be reserved with a simple phone call to your assigned Judge's calendaring clerk. Now, counsel must utilise an online Court Reservation System (CRS). The CRS must also be used for scheduling an ex parte hearing or motions to be heard before a general appearance is made. The filing/reservation fees for scheduling a law and motion hearing are non-refundable. Because of the limited number of Judges available to hear all PI motions, it is more often than not the case that the earliest available hearing date will fall after a statutory deadline to have the motion heard. The parties are then

[1] http://articles.latimes.com/2013/jun/13/local/la-me-court-cuts-20130613

[2] Id.

forced to either stipulate to a Trial continuance, to include a continuance of all statutory and procedural deadlines, or to file an ex parte application to continue the Trial.

Discovery disputes in the PI Courts

The PI Courts no longer entertain motions to compel further responses to discovery requests unless and until (a) the parties have participated in an Informal Discovery Conference (IDC) or (b) the moving party submits evidence, by way of a declaration, that the opposing party has failed or refused to participate in an IDC. The purpose of the IDC is to help the parties informally resolve discovery disputes by agreement rather than by motion practice. PI Court judges are available to conduct 30-minute, in-person IDCs on a daily basis. While the PI Court judges will not make a ruling at the conclusion of an IDC, the parties will have a very good idea of how the judge would rule should the moving party proceed with filing a motion to compel.

Personal Injury trials

As discussed above, Trials are scheduled when a PI Complaint is first filed at the Stanley Mosk Courthouse. The assigned date is usually set approximately 1½ years after the Complaint is filed. Trial continuances are now routinely granted with or without good cause and without articulating any reason or justification for the change, provided that all parties agree and there is no violation of the "five-year rule," set forth in California Code of Civil Procedure Section 583.310. However, the Stipulation to Continue Trial must be filed at least eight court days prior to the Final Status Conference date.

Under former Superior Court Local Rules, jury fees were to be posted within 25 days of trial. The Revised Superior Court Local Rules now require that jury fees must be posted within 365 days of filing the Complaint.

Parties must report to their assigned PI Court (Department 91-93, 97) on the date of Trial. Parties will then be sent to the Master Calendar Court (Department 1) to receive their Trial Court assignment. The Master Calendar Court manages the assignment of trials to thirty-one dedicated Trial Courts. These thirty-one departments, spread throughout Los Angeles County, are devoted solely to trials. Counsel will not know whether their trial will be taking place in Los Angeles, Long Beach, Santa Monica, Van Nuys, Chatsworth, Torrance, Pasadena or Pomona until they receive their Trial Court assignment. Obviously, this makes it difficult to evaluate for clients the demeanor of the judge and the make-up of the juror pool. Counsel cannot confirm for experts or witnesses where a trial will be taking place, nor make their own travel arrangements, until assigned to a Trial Court.

A party has fifteen days after the assignment of a trial judge to exercise a peremptory challenge, pursuant to California Code of Civil Procedure Section 170.6(a)(2). Interpreting the new Local Rules, the peremptory challenge must be made at the time of the assignment in Department 1, or a party may waive its right to challenge the assigned trial judge by making an appearance before that judge. A Frequently-Asked Questions (FAQ) circular issued by the Los Angeles Superior Court on September 16, 2013, summarized the situation, indicating that under the new system a party essentially has 20-30 minutes to vet the assigned judge before deciding whether to exercise a challenge under Section 170.6. It will be important to stay in communication with one's client once the trial judge is assigned to immediately agree whether to file a challenge.

Transfer of particular cases to Independent Calendar Court

Parties seeking to transfer a case from a PI Court to an Independent Calendar (I/C) Court must file and serve a Motion to Transfer form or a Stipulation. PI Courts will transfer a matter to an I/C Court if the case is not a "Personal Injury" case or if it is "complicated." In determining whether a PI case is "complicated," the PI Court will consider whether the case will involve numerous parties, cross-complaints, witnesses (including expert witnesses), and/or pretrial hearings. Parties opposing a motion to transfer have five court days to file an Opposition (using the same Motion to Transfer form). The PI Courts will not conduct a hearing on any Motion to Transfer or Stipulation, but will make an independent determination whether to transfer the case.

Future changes

The handling of PI litigation by Los Angeles County continues to evolve. Case in point, pursuant to a recent "Notice to Attorneys" issued by the Public Information Officer of the Superior Court, effective March 1, 2014, the North District of the Los Angeles County Superior Court system has "resume[d] handling filings and pre-trial matters in unlimited jurisdiction personal injury cases at the Antelope Valley Courthouse." Similar to the PI Courts at the Stanley Mosk Courthouse, the courtrooms these cases "will be assigned to will adjudicate all pretrial matters, they will not conduct trials." Cases pending at the Antelope Valley Courthouse will eventually be referred to Department 1 at the Stanley Mosk Courthouse for a Trial Court assignment. There is an online tool located on the Los Angeles Superior Court website (www.lasuperiorcourt.org) to assist attorneys or pro se litigants in determining whether a PI case should be filed at Stanley Mosk Courthouse or the Antelope Valley Courthouse.

The judges in the PI Courts have been accommodating during this period of transition and often spend time during their morning and afternoon calendars explaining to attorneys how the process is evolving. Litigators can expect that there will be further changes and modifications to the Los Angeles Superior Court system with respect to PI matters. ■

Ms Conner is a partner at Flynn Delich & Wise in Long Beach, California. Her practice includes defending shipowners and their P&I Underwriters in all aspects of personal injury and wrongful death cases. She also defends cases under the US Longshore and Harbor Workers' Compensation act. She is an active member of the Maritime Law Association of the United States and the Longshore Claims Association.

Expertise and experience

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Thomas Miller Americas' Bodily Injury Team

This dedicated team supports Members based both in the United States and abroad in dealing with a diverse and complex range of personal injury and illness cases. The one common factor is the influence of US jurisdiction or emergency response.

In the past six months, the team has handled cases ranging from suspicious death, passenger's leisure activity injuries, long-term occupational illness, engine room and cargo handling fatalities, through to shore-side accidents, loss of limbs in mooring activity and even sexual assault.

As well as supporting Member's claims and enquiries directly, the team share their collective experience through the pages of "Bodily Injury News".

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