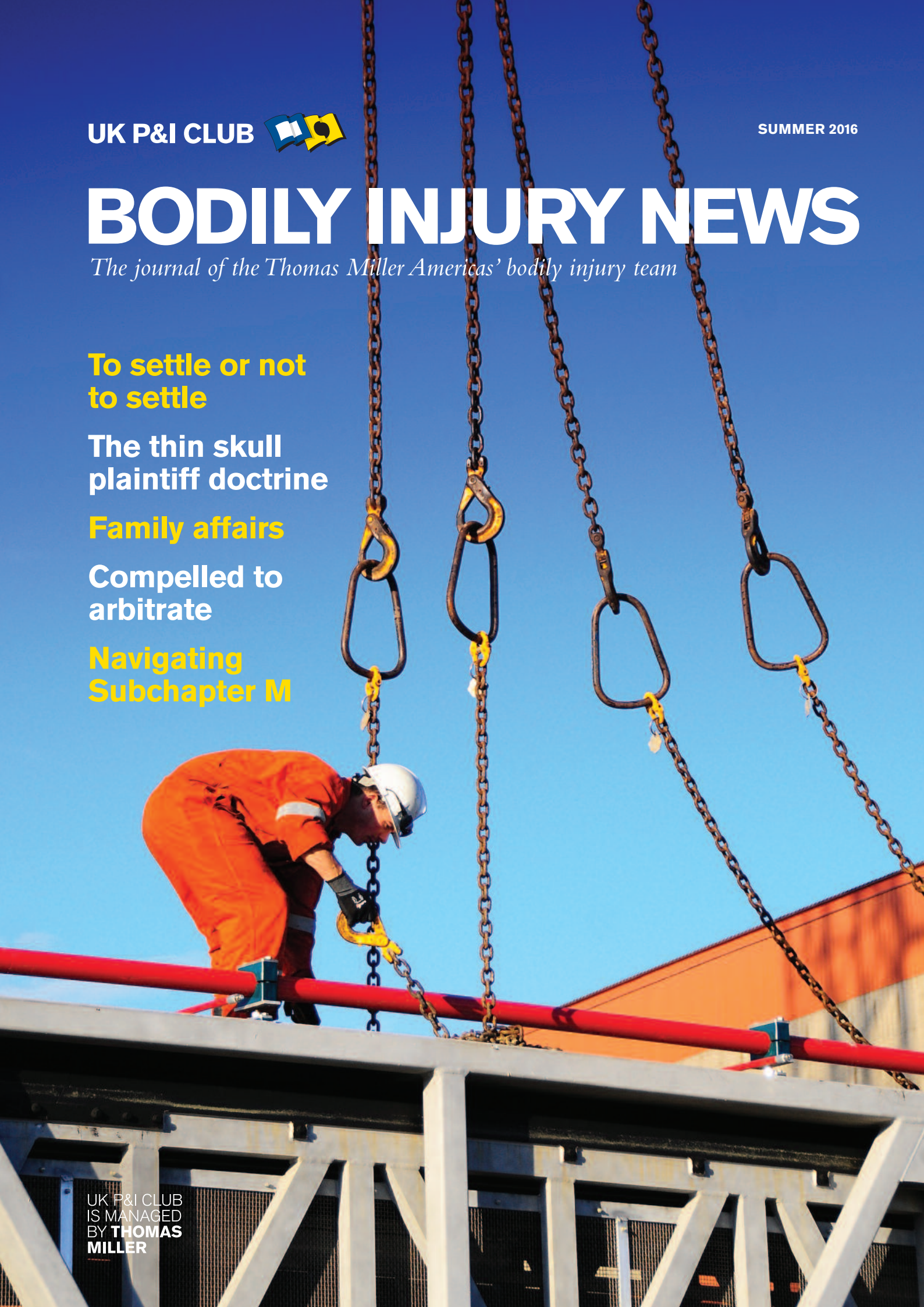

UK P&I CLUB

SUMMER 2016

BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team

To settle or not to settle

The thin skull plaintiff doctrine

Family affairs

Compelled to arbitrate

Navigating Subchapter M

UK P&I CLUB 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.

Staying the course

2015 was another very good claims year for the Club. The cost of claims in 2015 was one of the lowest for a decade and the claims profile was very similar to that of 2011, which was one of the best claims years on record. The number of claims notified to the Club has continued to fall across all categories of claim. The number of claims brought to the Club today is just over half that of the peak during the shipping boom of 2007 and 2008.

While this is encouraging and it is almost certainly driven by macroeconomic factors, such as the condition of the shipping markets, it must also reflect, in part, the Club's approach to the quality of its Membership. It is important however, not to become complacent. Although the frequency of claims is down, the average cost of claims is increasing. The average cost per claim is now 40% higher than it was a decade ago. People claims (injuries and illnesses) cost on average almost double what they did ten years ago despite a reduction in the number of claims in this category in 2015.

The cost of US bodily injury claims continues to be expensive and unpredictable, and when a claim does arise, having the expertise on hand to manage complex claims can make the difference. The TMA Bodily Injury Team was established to bring their unrivalled collective expertise to bear in working with Members and Club lawyers to develop strategies to manage these challenging claims. This year's Bodily Injury Seminar will be held on Wednesday October 5, 2016 at the TMA New Jersey office in Jersey City. The seminar is aimed at both US and non-US based operators and is always well attended by a cross section of Club Members. The single-day format will combine legal updates as well as practical exercises. A formal invitation with the topics to be covered will be sent shortly. If you are interested in attending the seminar, please e-mail susan.pietri@thomasmiller.com.

This edition of BI News contains articles on thin skulled plaintiffs; support for injured crew; overseas arbitration clauses; requiring the surrender of US Merchant Mariner's documents as condition of settlement; and, the impact of Subchapter M on Jones Act Claims.

As always, we welcome for 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. ■

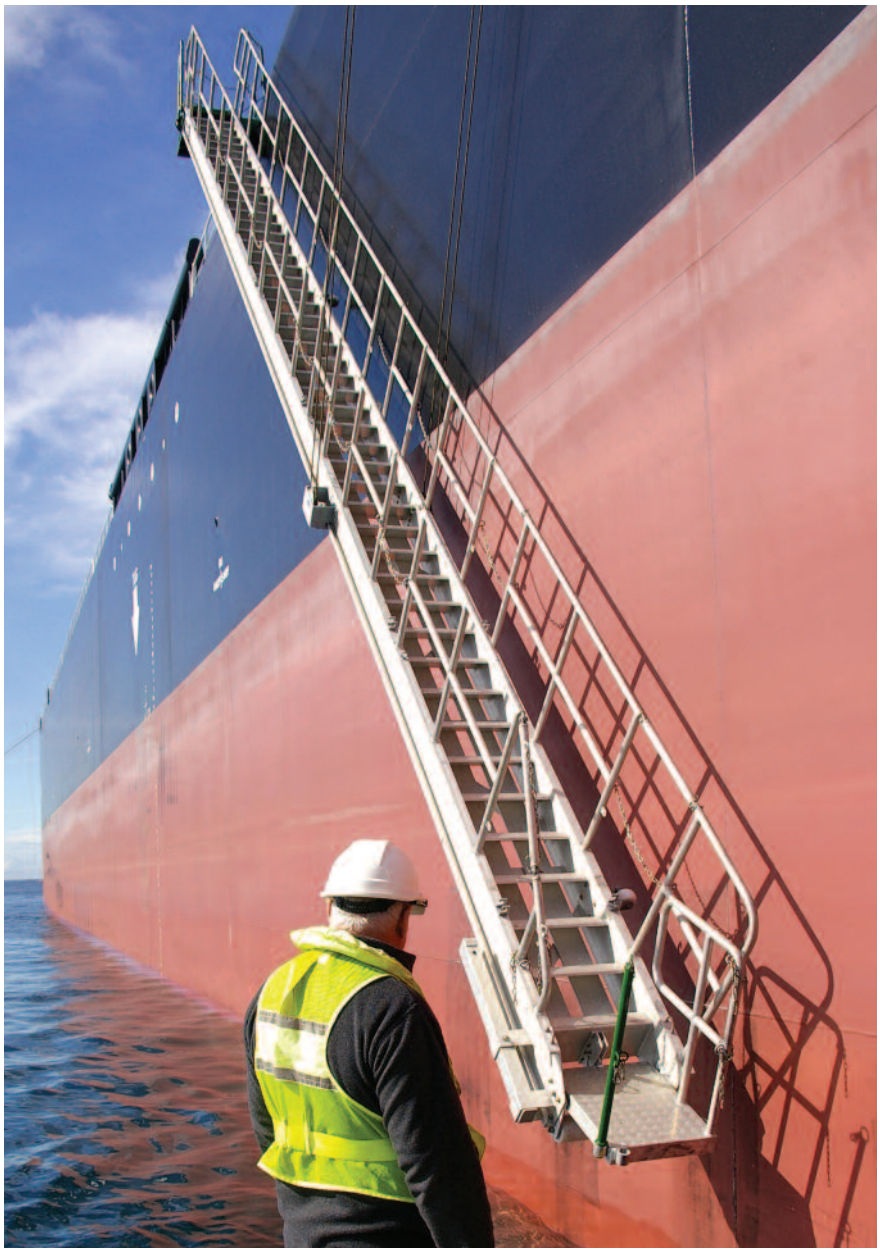
Mike Jarrett
President & CEO, Thomas Miller (Americas) Inc.

To settle or not to settle?

Settlement strategies – surrendering merchant mariner documents and union membership as a condition of settlement – can it be done? **Louise Livingston** summarizes the Club's recent experience.

A seaman employed aboard one of the UK Club's US Flag Member's ships fell off a ladder he was painting and sustained injuries. He was provided prompt medical treatment and maintenance. He engaged a lawyer and sued the Club's Member in State Court.

The parties engaged in extensive litigation and the case was mediated shortly before the trial scheduled during the summer of 2011. The plaintiff crewmember alleged he was permanently disabled from any work as a seaman as a result of the injuries he sustained on the Member's ship. He supported his permanent medical disability claim with his expert treating physicians' reports. His claim for damages was supported by his vocational rehabilitation expert.



The Member vigorously disputed liability on the basis of plaintiff's deposition testimony, medical records, photographs taken near the time of the accident and the paint splatters at accident site. With the assistance of a biomechanical expert, the Member was prepared to defend the case at trial to establish that the accident could not have happened in the manner the crewmember alleged and that the plaintiff had substantial comparative fault for his accident. In addition, the medical evidence did not support a claim of permanent physical disability as a US Merchant Seaman.

The full day mediation did not result in a settlement; the parties were over $500,000 apart. The start of trial was a few weeks away and costly trial preparation was in full swing. The parties nevertheless continued to discuss settlement through the mediator.

Conditions of Settlement

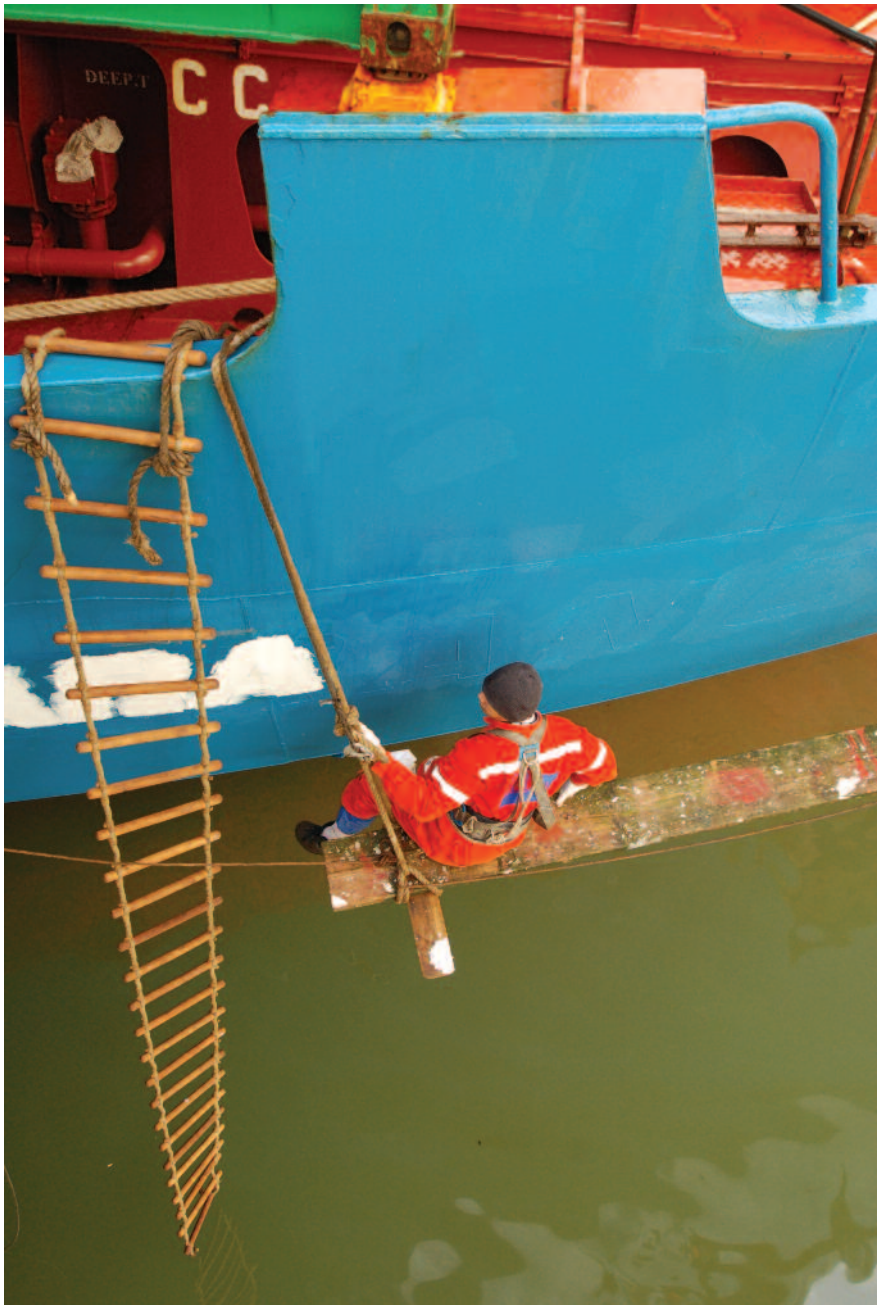
After extensive negotiations, the Member agreed to "take one for the US Flag Employers" and offered a substantial additional amount of money on certain conditions. Taking plaintiff at his word for his disability, the settlement offer was conditioned on the plaintiff formally relinquishing his US Merchant Mariner's document and withdrawing from his union for a period of twenty-five years. The offer expressly contemplated compensating plaintiff for his physical disability and the economic damages flowing from his inability to work as a seafarer. After discussing the offer with his

attorney, plaintiff accepted the conditions and the settlement was concluded.

No Sail agreed

The release contained the usual No Sail agreement in which the plaintiff specifically acknowledged that in consideration for the amount paid, he agreed to never seek employment with the Member or any affiliated company and waived any rights to future injury benefits including maintenance and cure if he breached the No Sail agreement. However, the release went further and required the plaintiff to notify the USCG and his union that he was no longer physically capable of performing the duties of a merchant mariner; to surrender his merchant mariner document; and, to agree he would not reapply for any merchant mariner's document for a period of twenty five years. Plaintiff expressly agreed to provide the Member with proof of his compliance with these terms.

Within weeks of submitting the required notices to the US Coast Guard and his union and accepting the proceeds of the settlement, plaintiff wrote to the US Coast Guard withdrawing his prior letter surrendering his credentials. Plaintiff stated he had not only been tricked by his attorney but that he had made a full recovery from his permanent disability. The plaintiff later claimed and was awarded disability benefits through the US Social Security Administration.



Breach of the Settlement Agreement

Four years after settling his injury case the plaintiff re-applied for his merchant mariner document with the US Coast Guard. His answers to the USCG medical questionnaire failed to disclose his prior shipboard injuries or permanent disability status. The USCG issued plaintiff a Merchant Mariner's document authorizing him to sail as a seafarer.

In a fortuitous phone call, the Member was asked by the crewmember's union whether the Member had ever received a Fit For Duty slip from the crew member in relation to his injuries aboard their ship. This information allowed the Member to seek enforcement of the No Sail agreement through the previously agreed arbitration provision contained in the release. The parties had agreed that the Mediator would serve as the Arbitrator in the event of a breach of the settlement terms.

The Arbitration hearing was held in early 2016. The Arbitrator concluded the crewmember had breached the No Sail agreement which was a material term of the settlement agreement. The Arbitrator further found that the No Sail agreement was not an unfair restraint on trade. The plaintiff was ordered to return his merchant mariner's document to the US Coast Guard and to advise the Coast Guard as well as his union that he was required by the terms of his 2011 settlement agreement to do so.

The Member duly sought to enforce the Arbitrator's award in State Court. The crewmember recently moved to vacate that award on the grounds it is unfair to prevent him from working in his chosen profession. Watch this space! ■

The thin skull plaintiff doctrine

Noreen Arralde investigates the unforeseeable damages that can drive up the costs of negligence claims.

A crewmember leaves his bag of laundry at the top of the stairwell "for a second" while he runs back to his room to get something he forgot. A moment later, another crewmember trips over the laundry bag, which he says he didn't see because he was carrying his laundry in a bin in front of him. He falls down the length of the stairwell, fracturing his ankle. It seems certain that the shipowner will be liable for the negligent act of the first crewmember, and that there will be damages owed to the second crewmember. But what will those damages be?

The second crewmember, as it turns out, has diabetes. This condition prolongs his recovery and during the time he is laid up, his diabetes worsens due to lack of exercise. He ends up with diabetic retinopathy, resulting in near-total blindness. At 46 years old, he is found permanently not-fit-for-duty due to blindness.

The shipowner questions how its liability for damages can include the crewmember's blindness since the shipboard fall didn't cause the crewmember to be blind. Shouldn't its liability be limited to the fractured ankle?

The unknown unknown

During a fire and boat drill while the crewmembers are running up a stairwell carrying a firehose, one crewmember strikes his head on the overhead, causing a whiplash-type injury to his neck. This is not the first time a crewmember has struck his head on this same overhead, although no one has previously been seriously injured. An investigation reveals that the chief mate, aware of the prior incidents, had instructed the crew to run up the stairs and also reveals that the overhead was built too low by several inches, according to the ship design plans. It seems certain that the shipowner will be liable for negligence and unseaworthiness and that there will be damages owed to the crewmember. But what will those damages be?

The crewmember, as it turns out, has a congenitally narrow spinal canal. The whiplash-type injury he sustains results in a spinal cord lesion, which leaves him a quadriplegic. His condition is permanent, despite months of intense rehab. At 52 years old, he is found permanently disabled due to quadriplegia.

The shipowner questions how it could possibly be liable for damages due to paraplegia when the shipboard injury sustained was whiplash. The fact that the crewmember developed quadriplegia was the result of his unique – and previously unknown – physical condition. After all, other crewmembers had been injured in the same fashion and their damage claims were minimal.

Walking on eggshells

Welcome to the world of the "thin skull" or "eggshell" plaintiff. The thin skull plaintiff doctrine extends the liability of a defendant, which has caused the plaintiff harm, to *unforeseeable* damages suffered by the plaintiff. The doctrine is a departure from the general rule that a defendant is liable for all *foreseeable* damages caused by its negligent conduct. The thin skull plaintiff doctrine applies in the context of personal injury cases and is based on the notion that an "innocent party who suffers injury at the hands of a negligent defendant should not be forced to absorb the costs of his misfortune."[1] The thin skull plaintiff doctrine has been found to apply in the maritime context.

The doctrine recognizes damages for exacerbation of pre-existing physical conditions unique to the plaintiff, even if those conditions are unknown to the defendant. In the first of the two examples given above, the thin skull plaintiff doctrine would apply even if the shipowner was aware the crewmember suffered from diabetes. In the second example, the thin skull plaintiff doctrine would apply even if the shipowner – and plaintiff himself – were previously unaware he suffered from a narrow spinal canal. The doctrine has been described as follows:

> It is as if a circle was drawn around the person, and one who breaks it, even by as much as a cut finger, becomes liable for all resulting harm to the person. The defendant is liable when its negligence operates upon an unknown physical condition, or upon a latent disease, to produce consequences, which could not have been anticipated.[2]

The thin skull plaintiff doctrine does not relieve a plaintiff of the obligation to establish that the defendant's conduct caused the initial harm – and that the defendant's conduct was tortious. In our two examples, the plaintiff must, in the first instance, establish the shipowner was negligent and/or the ship was unseaworthy. Once that is established, the doctrine acts as an exception to the rule of foreseeability. For plaintiffs, the doctrine is a tool for obtaining full damages in cases of unusual suffering. For defendants, the doctrine can seem unfairly punitive since a minor shipboard incident can end up costing in the millions of dollars. As unfair as that seems, the thin skull plaintiff doctrine is an integral part of the law of torts, which will likely be with us for the long term. ■

[1] Derosier v. New England Telephone & Telegraph, 81 N.H. 451 (1925). [2] Restament of torts (Second), section 461.

Family affairs

Markus McMillin reviews the issues to consider when family members travel to support a sick or injured crewmember.

There are many concerns for the Member and Club when a crewmember is seriously ill or injured abroad. First is the health and well-being of the crewmember. All parties want the best medical care available under the circumstances and, if possible, repatriate the crewmember to his or her home country as soon as possible under medically safe conditions so they can recover from the injury or illness close to the support of their family.

However, what about circumstances where the crewmember cannot be safely repatriated in a relatively swift time period? In such cases, the Club often finds that the family of the crewmember wants to travel to the crewmember. Each situation is unique, but there are a number of important issues to consider when a family member wants to travel to the sick or injured crewmember.

Timing is everything

What is the projected time of repatriation versus when the family member will arrive to support the crewmember? Depending upon the type of illness or injury, if doctors think a safe repatriation could happen within a week, it might not be worth the time and effort to arrange a family member to travel to support the crewmember. Conversely, a longer duration before a safe repatriation can be completed tips the scale toward having a family member visit.

Documentation in order?

Does the family member have a passport, and is a visa required to visit the country where the crewmember is hospitalized? Sometimes it is extremely difficult, if not nearly impossible, to obtain a passport or visa on short notice. Emergency arrangements can sometimes be made, but it depends upon the native country from which the family member is traveling and also the country to where the family member is going.

In general, people tend to recover quicker when they have the support and care of family members. But serious consideration must be given to whether or not the family member may have an

ulterior motive. For example, the family member may try to thwart any effort to repatriate the crewmember. This can be the case if the family member is trying to establish grounds for bringing a law suit in the country where the crewmember is being treated. In one recent case, the crewmember's brother, the legal next-of-kin, refused to allow repatriation to take place even after doctors released the crewmember to travel and suitable arrangements for rehabilitation in his home country had been made. Similarly, the family member may try to engage a lawyer in the country where the crewmember is hospitalized. The Member could find they are embroiled in long and expensive litigation in an unfavourable jurisdiction. Thus, it is important to review whether there is an employment contract with a clear arbitration clause that should be enforced in the event the crewmember's family took any steps to establish jurisdiction or to file suit where the ill or injured crewmember is hospitalized.

Help or hindrance?

The supporting family member could unreasonably question the treating doctor's medical decisions and generally make treatment of the patient challenging. It is difficult to know if a family member will be a hindrance in advance of their arrival at the treating hospital, but if the Member's interaction with the family member is strained at the outset, serious consideration should be given as to whether to agree to send the family member in the first place.

There is no specific Club cover for the costs associated with sending a family member to support an ill or injured crewmember; however, it is something the Club will consider in very limited and very serious circumstances such as life-threatening or traumatic brain injury cases. For instance, in one recent case, where a crewmember was refusing amputation of his infected leg, which was severely severed at the calf in an onboard incident (a life-threatening situation), the Club agreed to pay for sending the crewmember's wife to support him. The Member separately agreed to pay for the crewmember's father to travel as well. The crewmember eventually agreed to the amputation. It was beneficial to have family members present to support the crewmember in the emotional time after the surgery. They stayed until he was repatriated about two weeks later.

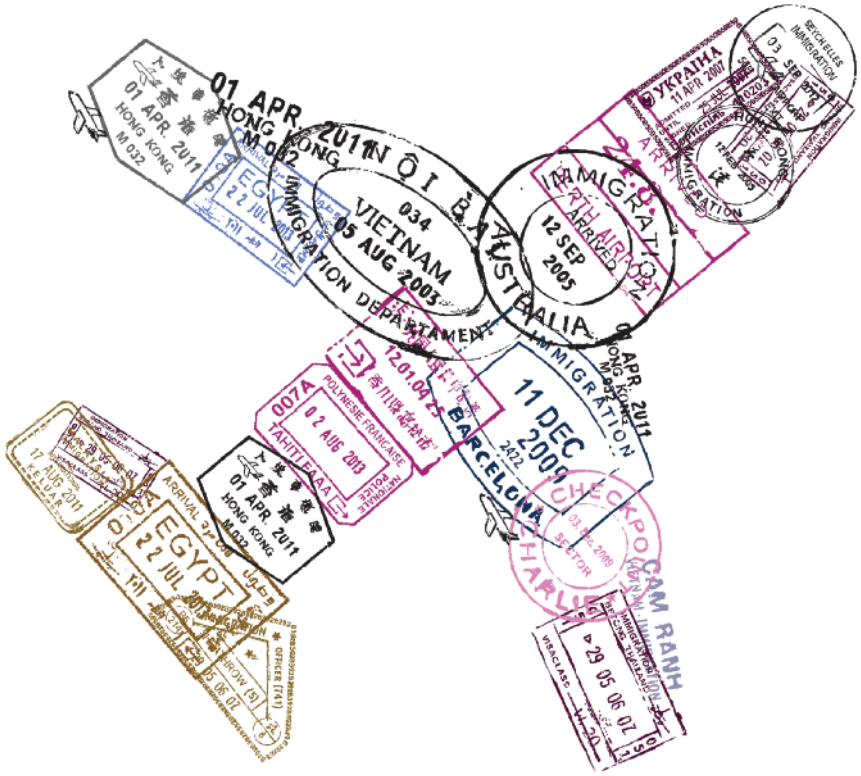
It is important to note that family members who join the ill or injured crewmember at the treating hospital will often want to travel with the crewmember on the repatriation home; however, it is not always possible due to cost, limited availability aboard flights, or inadequate visas. Thus, it should be made clear in advance that there is no guarantee the family member will join the crewmember on the trip home just because there was an agreement to send the family member to the treating hospital.

Other issues to consider are what is the anticipated cost of sending the family member to the crewmember's location, including airfare, food, lodging, phone cards, an interpreter and contact/facilitator? What is the duration of the family member's stay? Does the treating hospital have the equivalent of social workers who often provide support for family members, especially when planning discharges?

Mistaken identity

Lastly, the Member needs to make sure that the family member who asks to travel to support the crewmember is, indeed, family. In one case, the crewmember asked the Member to bring his wife to the US because it was expected he would have a protracted hospitalization. Shortly after the wife arrived, the crewmember's condition deteriorated to the point where he could not make decisions regarding his care. It turned out that the "wife," who had been brought to the US at great effort and expense, was, in fact, the crewmember's girlfriend who had no legal authority to made decisions on his behalf. The crewmember's actual wife then had to be brought to the US, also at great effort and expense, to make critical medical decisions.

There are many issues to consider regarding sending a family member to support an ill or injured crewmember. The facts of each case dictate whether the Member and/or Club should aid the family member in doing so. Careful consideration should be given to all the issues surrounding whether or not to aid a family member in traveling to support an ill or injured crewmember. ■



Compelled to arbitrate

Foreign arbitration clauses in crew contracts can be an effective means of managing crewmember bodily injury claims, but only if courts will enforce them. **Julia Moore** looks at the reasons why.

While courts in the United States have generally embraced arbitration agreements in other industries (financial, commercial contracts, etc.), when it comes to bodily injury claims filed by seafarers in the US, the judicial record has been checkered, but improving. Over the past ten years, the US federal courts have increasingly shown a willingness to enforce such agreements and, at this time, five federal circuit courts have upheld arbitration provisions in collective bargaining agreements calling for the application of foreign law.

Enforcing foreign arbitration clauses

A recent decision by the United States Court of Appeals for the Eleventh Circuit in *Suazo v. NCL (Bahamas), Ltd. slip op.* No. 14-15351 (May 10, 2016, 11th Cir.) confirms that the US federal courts are receptive to enforcing foreign arbitration clauses in seafarer contracts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Convention Done at New York June 10, 1958,* T.I.A.S. No. 6997, 21 U.S.T. 2517 (Dec. 29, 1970) (the "New York Convention").

The *Suazo* decision was the first time that the Eleventh Circuit addressed the question of whether a cruise ship employee, whose employment contract contained an arbitration agreement governed by the Convention and Chapter 2 of the Federal Arbitration Act, could avoid arbitration by showing that the high costs of arbitrating his personal injury claim in a foreign forum effectively prevented him from vindicating his statutory rights. After noting that the case presented a question of first impression, the Court rejected Plaintiff's arguments and affirmed the decision of the district court ordering the parties to arbitration.

The Eleventh Circuit

The key issue was whether Plaintiff Willman Suazo, a Nicaraguan citizen, could assert an "effective vindication" defense to a motion to compel arbitration under the New York Convention or if such a defense was available only in connection with a motion to enforce an arbitral award *after* arbitration had taken place. Noting that no circuit court had decided this precise issue, the Eleventh Circuit suggested that such a rule would be supported by both precedent and public policy. Ultimately, the Court decided the case by finding that Suazo failed to carry his burden of proof that the costs of arbitration effectively barred him from enforcing his statutory rights and it affirmed the district court's order compelling arbitration.

Fundamental to the Court's decision was the specific language of the arbitration clause in the seafarer's contract of employment and the collective bargaining agreement which was incorporated by reference into that contract: NCL employed language making arbitration under the New York Convention mandatory and exclusive, the designated place of arbitration was the seafarer's home country or Nassau, Bahamas, if the home country was not a ignatory to the New York Convention, the clause contained a choice of law provision and the contract incorporated a cost allocation clause, which gave the seafarer the option to use a union designated attorney and proceed to arbitration at no cost, or alternatively, to retain counsel at his own expense. These are clauses that ought to be considered for inclusion in a seafarer employment contract.

In particular, the cost allocation provision in the CBA played a significant role in the Eleventh Circuit's decision. The Court highlighted the inherent contradiction of Suazo's argument that he was too poor to pay the costs of arbitration, but rejected the option to arbitrate with NCL at no cost using a union lawyer. The Court stated: "The agreement gave him a choice: arbitrate for free with your union-chosen [attorney] representative, or pay your own way with counsel of your choice. Having chosen the latter course of action, we will not second guess the bargain struck in the contract and let Suazo eat his cake and have it too." ■

Navigating Subchapter M

Daniel Fitzgerald, a Partner with Freehill Hogan & Mahar LLP, New York, discusses the US Coast Guard's towing vessel inspection rule.

After 12 years in the making, the US Coast Guard ("USCG") has published the new inspection regime for towing vessels, which will be located in a new Subchapter M within Title 46 of the Code of Federal Regulations ("Subchapter M"). The new regulations are scheduled to be published on June 20, 2016. Back in 2004, Congress passed the Coast Guard and Maritime Transportation Act of 2004, requiring more stringent regulation of uninspected towing vessels. Congress reclassified towing vessels as vessels subject to inspection and authorized the Secretary of Homeland Security to establish requirements after highlighting several fatal towing vessel incidents. In September of 2001, a towing vessel struck a bridge at South Padre Island, Texas. The bridge collapsed, and five people died when their cars entered the water. On May 26, 2002, a towing vessel struck the I-40 highway bridge over the Arkansas River. The bridge collapsed and 14 people died when their cars or trucks went into the Arkansas River. The USCG and several towing industry groups (including the Towing Safety Advisory Committee (TSAC), American Waterways Operators (AWO) and the American Bureau of Shipping) have been working hard to finalize the rulemaking.

Cost of compliance?

It is estimated that this development will affect 5,509 towing vessels operated by 1096 different companies. Notably, the new rules added several "grandfathering" provisions for many items, so some requirements will not apply to existing vessels or vessels whose construction began before the effective date of the rule. This should result in reduced implementation costs for most operators. The USCG had to

consider over 3,000 comments before it could finalize Subchapter M and established a voluntary Towing Vessel Bridging Program in 2009 to ease the transition. The annual inspection fee for towing vessels subject to Subchapter M will be $1,030 and will start a year after the initial inspection. The USCG estimates that the average cost of compliance per vessel during the phase in period is $16,267 with an additional $5,045 cost per company.

Safer working?

The stated intent of the rulemaking is to promote safer work practices and reduce casualties on towing vessels by requiring that vessels adhere to prescribed safety standards and safety management systems or to an alternative, annual Coast Guard inspection regime. Subchapter M creates a fairly comprehensive safety system that includes company compliance, vessel compliance, vessel standards, and oversight in a new subchapter dedicated exclusively to towing vessels. The new Subchapter will generally apply to all US flagged towing vessels 26 feet or more, and those less than 26 feet moving a barge carrying oil or hazardous materials in bulk. The new rulemaking lays out different inspection mechanisms and sets forth new equipment, construction and operational requirement for towing vessels.

There is some flexibility as operators will have the choice of two inspection regimes. Under the Towing Safety Management System (TSMS) option, routine inspections will primarily be performed by qualified third party organizations, including classification societies, with periodic audits by the USCG. Alternatively, operators can choose not to develop and implement their own TSMS and may undergo a more traditional inspection by the USCG. The USCG inspection option is likely to be more appealing to smaller companies who may not be able to implement a comprehensive safety management system.

Inspected towing vessels will now be issued a Certificate of Inspection ("COI"), which will specify the minimum manning for each vessel in all of the vessel's areas of operation. Significantly, the rulemaking provides that "We do not envision an appreciable increase in the number of qualified individuals needed to man inspected towing vessels." It is anticipated that some operators will notice and object to changes in manning levels and decision makers would be well-advised to work very closely with companies when establishing initial manning levels. Notably, the USCG declined to implement any hours of service requirement or crew endurance management system requirement at this time.

Subchapter "M" will promote safer work practices and should reduce casualties throughout the towing industry. It is yet to be determined how some aspects of the new inspection program will be implemented and whether the estimated average compliance costs were accurate. Navigating the implementation of Subchapter M will present some challenges for the USCG and towing companies but ultimately, the towing vessel industry and its insurers should take comfort in the achievement of minimum safety standards, which should help protect lives, the environment and property. ■

Expertise and experience

A specialist group from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with the particularly demanding cases of bodily injury in America.

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.

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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