UK P&I CLUB

US Bodily Injury News

DECEMBER 2012

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IS MANAGED
BY **THOMAS**
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Editorial

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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.

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

We 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).

Holiday quiz question: What is the key hazard facing the man on our front cover? Email your answer to nick.whitear@thomasmiller.com

Hurricane Sandy

This month our New Jersey office was hit by the full force of winds and storm usually only experienced by ships and their crews. Hurricane Sandy battered the office along with the rest of the New Jersey and New York shorelines knocking out our communications and cutting off power for several days for many of our staff at home.

I am delighted to say that our Business Continuity Plan worked well and the immediate response of our San Francisco office and the ability of many executives to work from their homes meant that our service to Members were maintained with no failures in any critical areas of case handling or support. My thanks to all my colleagues for their support and to our Members for their understanding and good wishes during that period.

September Seminar

This year's Bodily Injury Seminar was a 'sell-out' as the agenda attracted nearly thirty participants ,representing both US and Foreign flag carriers

Our members were drawn from a variety of operators, both owners and charterers, from liner, tug & barge,tanker to cruise and bulk trades. The program was split over two days. The first half of the seminar focused on employment law issues in relation to crew claims. Guest speakers from US law firms shared their expertise and supported the breakout sessions where a hypothetical case study helped crystallise the earlier presentations into more tangible learning.

The group discussions were able to continue into the evening on a more informal basis at a local restaurant.

The following day's session was a comprehensive case study into a third party longshore injury case tackling the procedural difficulties and challenges in evaluating liability and setting claim reserves in any multi-defendant litigation. We plan to hold the seminar again in September 2013 and encourage members to put forward suggestions for specific subjects they would like us to address.

Farewell Karen

Regular contributor to this newsletter Karen Hildebrandt has taken a well-earned retirement having served Thomas Miller Americas for fourteen years, most of that as a member of the Bodily Injury Claims Team.

Always highly valued by Club members and colleagues alike, Karen's unflappable approach and her considerable experience of bodily injury claims work has been widely recognised. We miss her and wish her all the best in her retirement.

Round Table Seminar 2012 Highlights

Day one of the Bodily Injury Seminar focussed on the challenges of dealing with employment issues in maritime cases.

Markus McMillin
Claims Executive

Harassment and employment issues in the maritime context: The hybrid case

Harassment, discrimination and retaliation claims often involve a complex interplay of law and policy in the maritime context. The claims can overlap under federal law (Title VII), state law and the employment policies of the employer. These claims are sometimes brought in conjunction with bodily injury claims under the traditional maritime causes of action of the Jones Act, unseaworthiness and maintenance and cure.

What is harassment? What is discrimination?

Discrimination is an adverse employment action based upon a crewmember's protected class. Traditional protected characteristics and classes include: race, colour, gender, sex, national origin, and ancestry. But they also include: sexual orientation, marital status, age, religious creed, veteran status, disability, medical conditions, pregnancy and pregnancy-related conditions, and worker's compensation status.

Harassment involves one crewmember's unwelcome or unwanted conduct (1) related to a protected characteristic of another crewmember or (2) of a sexual nature.

What is "unwelcome or unwanted" conduct is determined by what the victim perceives – *not* what the harasser intends. The victim need not express that the conduct is unwelcome or unwanted and the conduct can be unwelcome even if the victim appears to consent.

There are two types of sexual harassment: (1) quid pro quo ("this for that") and (2) hostile work environment. The former occurs when requests for sexual favours are linked to a grant or denial of a tangible job benefit (such as a promotion or a good review). There is an implied threat that if the sexual advance is refused, a tangible employment action will occur (such as termination, demotion or a poor review).

Hostile work environment involves unwelcome or unwanted conduct that creates a hostile or offensive working environment and makes the crewmember feel uncomfortable. The unwelcome or unwanted conduct must be severe or pervasive so that it alters the conditions of employment. Factors to consider include: frequency of the conduct; severity of the conduct; whether it is physically threatening, humiliating or a mere offensive statement; and whether the conduct unreasonably interferes with an employee's work performance.

Harassment can be verbal, physical or visual, and can involve anything from whistling and catcalls to unwanted touching to displaying offensive photos or cartoons.

What is retaliation?

Retaliation is an adverse employment action based upon a crewmember's protected activities. Those activities include such actions as making a complaint (formal or informal) of harassment or discrimination; participating in a federal (Title VII) or state

employment proceeding, such as testifying; opposing an unlawful employment policy or practice; or whistleblowing*. An adverse employment action for the employee engaging in a protected activity could include: increased workload; diminished responsibilities; decrease in pay; refusal of overtime; failure to promote, undeserved negative performance evaluation; or termination. Further, although there is a very high bar to prove it, an employee could be "constructively discharged" if he/she is forced to quit by creating working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in the crewmember's position would feel compelled to quit.

It is well worth preventing shipboard harassment, discrimination and retaliation because the consequences can be significant and involve: low crew morale; infighting; deterioration of the chain of command; poor performance (which may result in safety concerns); inability to retain high-performing seafarers in permanent positions; loss of money and effectiveness if a crewmember must be replaced mid-voyage; and the cost of transportation, maintenance and cure, attorneys' fees, settlement payments or money damages.

Defenses

Under federal employment law (Title VII), if the employer has not taken any tangible employment action, the employer may avoid liability if it can show (1) it took reasonable steps to prevent and promptly correct any sexual harassing behaviour and (2) the crewmember unreasonably failed to take advantage of any opportunities to prevent or correct the sexually harassing behaviour.

The maritime employment context

Maritime employers have unique challenges with regard to harassment, discrimination and retaliation claims because their employees work and live together in close quarters aboard a ship, often for long periods of time. An employer needs to make and enforce strong shipboard policies to prevent such claims from arising. The policies must clearly define and prohibit harassment, discrimination and retaliation; require training of all employees; require proper reporting and be sure to describe the procedure; and require proper investigation steps and description of that procedure. All the shipboard polices should be posted and handed out to the crew. The employer should obtain signatures confirming the crewmember has received the policies and training. Training should be done with new crewmembers and refresher training should be done for regular crewmembers. Employers are cautioned against relying upon other operators or unions to provide private harrassment and discrimination training.

Members should be aware that there can be important legal and insurance coverage issues in these kinds of cases. Protection and indemnity (P&I) insurance doesn't traditionally cover harassment, discrimination and retaliation claims; those claims would be covered under Employer Practices Liability (EPL) insurance. But there could be an interplay between the two covers if a Jones Act/unseaworthiness/maintenance and cure claim is brought in conjunction with a harassment/discrimination/retaliation claim. Separate counsel may be needed along with the separate insurance cover. There are also important differences concerning jurisdiction and forum, burdens of proof and the kinds of claims and damages that are available between the two types of claims. For instance, attorneys' fees are recoverable in employment claims and not under a purely maritime claim, and emotional distress standard under Title VII is less onerous.

Handling a crewmember's complaint

The employer's company policy should require that all crewmember complaints be reported to the master or to a shore side hotline. Despite time constraints and operational concerns, if possible, the master should be the shipboard investigator. He/she should investigate immediately; be discreet, alert and sensitive to privacy concerns; treat everyone with respect; not take sides; not engage in retaliation and be sure to fully document his/her investigation. The master should notify shore side management of the crewmember's complaint and, to the extent possible aboard the ship, take remedial action to defuse any tensions (separate the two or more crew involved in the claimed actions). Next, the master needs to make a determination if a crewmember has indeed engaged in harassment, discrimination or retaliation and take action – up to and including termination of the offending employee. The master should also notify the complaining crewmember of his/her decision. And again, document all decisions and actions in detail. Finally, the master and the company should take steps to prevent future incidents including: re-training existing crewmembers, and train new crewmembers; the investigating master should update the relieving master; and be alert to any potential for a retaliation action.

* The disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority, of mismanagement, corruption, illegality, or some other wrongdoing.

Allocation of fault in Bodily Injury cases

The second session at this year's Bodily Injury Seminar was on allocation of fault in a multi-defendant bodily injury case. The hypothetical study was based on an actual case handled by the Club.

Louise S. Livingston
Senior Claims Director

Though that particular case involved a serious injury to a longshoreman, the principles of the exercise were applicable to all types of bodily injury claims involving more than one defendant.

Members attending the seminar were provided with a written factual summary of an incident in which the member's ship was outbound under the control of a mandatory local pilot. The waterway was narrow. As the member's ship reached her safe steerage speed, the local pilot ordered the tugs away so the ship could proceed under her own power.

During the course of her transit, the member's ship passed a number of ships berthed on either side of the waterway without incident. One ship, however, had a spring line part which struck and seriously injured a longshoreman.

The incident was investigated on behalf of the member's ship, and the ship with the parted line. Litigation against the member's ship and the moored ship promptly ensued. During the course of the law suit, the member's position was that its ship's speed was safe and it was using reasonable care. The member blamed the accident on the poor quality, insufficient number and poor tending of the other ship's mooring lines.

The ship with the parted line, however, blamed the accident on, among other things, the high speed of the member's ship and the absence of a tug escort during the entire transit of the waterway.

The seminar participants then heard a summary of arguments of the different parties; Karen Hildebrandt, in her final roundtable appearance before retirement, represented the plaintiff; John Turner from the London offices' People Claims syndicate represented the moored ship, and Louise Livingston represented the member's ship interests.

After the summary arguments, the participants were divided into four groups each with two Bodily Injury Team members facilitating. Their task, as insurance and claims representatives for the member, was to allocate fault amongst the plaintiff, the member and the other defendant. The next step was to determine what an appropriate claim estimate would be – based on that allocation of fault. The final task was to determine an appropriate legal fee estimate. The four groups reported back as follows:

Group 1
Allocation of Fault:
Plaintiff 10%, Moored Ship 60%, Member 30%

Claim Estimate: $3 million
Fee Estimate: $500,000

Group 2
Allocation of Fault:
Plaintiff 10%, Moored Ship 60%, Member 30%

Claim Estimate: $1.5 million
Fee Estimate: $500,000

Group 3
Allocation of Fault:
Plaintiff 5%, Moored Ship 80%, Member 15%

Claim Estimate: $500,000
Fee Estimate: $400,000

Group 4
Allocation of Fault:
Plaintiff 10%, Moored Ship 70%, Member 20%

Claim Estimate: $600,000
Fee Estimate: $500,000

Next, the seminar participants viewed video excerpts of a mock jury discussing allocation of fault and damages after the plaintiff's case was presented and after the member's case was presented. It was quite an eye opener for many people.

After the video, each of the four groups reconvened to determine whether the mock jury discussions changed their view of the allocation of fault and the value of the case. It did and the groups results were as follows:

Some of the take-away messages from the session included the unpredictability with which US juries hear and interpret evidence; the challenges in educating juries about basic concepts which industry people take for granted; and finally, even though a member may be absolutely correct on the law and the facts, it is not always easy to prove and prevail.

Group 1		
Allocation of Fault:		***Allocation unchanged***
Plaintiff 10%, Moored Ship 60%, Member 30%		
Claim Estimate:	$4 million	*Claim Estimate raised by $1million*
Fee Estimate:	$1 million	*Fee Estimate raised by $500,000*
Group 2		
Allocation of Fault:		***Allocation unchanged***
Plaintiff 10%, Moored Ship 60%, Member 30%		
Claim Estimate:	$1 million	*Claim Estimate reduced by $500,000*
Fee Estimate:	$500,000	*Fee Estimate unchanged*
Group 3		
Allocation of Fault:		***Allocation revised***
Plaintiff 10%, Moored Ship 45%, Member 45%		*Plaintiff extra 5%, Moored Ship relieved of 35%, Member extra 30%*
Claim Estimate:	$600,000	*Claim Estimate raised by $100,000*
Fee Estimate:	$500,000	*Fee Estimate raised by $100,000*
Group 4		
Allocation of Fault:		***Allocation revised***
Plaintiff 40%, Moored Ship 0%, Member 60%		*Plaintiff extra 30%, Moored Ship relieved of 70%, Member extra 30%*
Claim Estimate:	$1.8 million	*Claim Estimate raised by $1.2 million*
Fee Estimate:	$500,000	*Fee Estimate unchanged*

Navigating the thicket of HIPAA regulations: evaluate and implement compliance to ensure safe harbor

The civil and criminal penalties for failure to comply, however, are significant and mandate serious attention to HIPAA compliance.

Jerry D. Hamilton
Hamilton, Miller & Birthisel, LLP

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What is HIPAA?

The Health Insurance Portability & Accountability Act (HIPAA) is a United States federal statute enacting broad reforms to health care and insurance to "improve portability and continuity of health insurance coverage"; to combat waste, fraud and abuse in health care and insurance; and to simplify insurance administration, among others. Under legislative authority from Congress, the Department of Health and Human Services (DHHS) has promulgated extensive regulations for HIPAA compliance. HIPAA's most significant requirements are the Privacy Rule regulating disclosure of "protected health information", security rules governing transmission and storage of protected health information, and other rules regulating medical billing and claims handling, among numerous other requirements and regulations.

HIPAA's application to the maritime industry

While the general maritime law and judicial decisions of the United States courts suggest that HIPAA does not apply extraterritorially, that is beyond United States territorial boundaries, this limitation is most likely limited to foreign-flag vessels employing foreign seamen. To the extent that a maritime operation increases its relationship to the United States, such as an American crew, flag, or ownership, or sailing within US territorial waters, it becomes more likely that HIPAA may apply. Even within the United States, many traditional maritime industry actors, such as vessels, seamen, and owners, may not need to become entangled in complying with thicket of regulations promulgated under HIPAA, which applies primarily to health care providers, health plans, and their business associates, not to employers or individuals. However, HIPAA *may* apply where a maritime entity surpasses traditional human resources functions and becomes involved in medical issues such as monitoring maintenance and cure, conducting or overseeing pre-employment medical examinations for seamen, or otherwise storing, reviewing, or managing protected health information. Therefore, maritime actors, especially vessel owners, are strongly advised to review whether their operations comply with HIPAA to avoid civil and potentially criminal penalties from a DHHS enforcement action.

The presumption against extraterritoriality may preclude HIPAA from applying to foreign vessels and seamen

Although no court has directly addressed whether HIPAA applies to foreign vessels and foreign seamen, the presumption against extraterritoriality suggests that HIPAA may not extend beyond the United States, its boundaries, vessels, and citizens.

The Supreme Court has held that federal statutes are generally presumed not to apply outside the United States unless the statute explicitly states Congressional intent to apply extraterritorially. Under this principle, foreign flagged vessels in US waters are not subject to federal statutes that interfere with the operation and affairs of the vessel. See *Benz v. Campania Naviera Hidalgo, S.A., 353 US 138 (1957) (NLRA); McCulloch v. Sociedad*

Nacional de Marineros de Honduras, 372 US 10 (1963). For example, consistent with the presumption against extraterritoriality, the Death on the High Seas Act (DOHSA) and Longshore and Harbor Workers' Compensation Act (LHWCA) both explicitly state their intent to apply on the high seas. See *46 U.S.C. § 30302; 33 U.S.C. § 939(b).*

Because HIPAA lacks any clear statement of Congressional intent for it to apply extraterritorially, HIPAA would appear to be inapplicable to foreign seamen employed by foreign-flagged vessels in most circumstances. Nevertheless, caution must be taken because foreign-flagged vessels in US territorial waters may be subject to federal law under certain circumstances. See e.g. *Cunard S.S. Co. v. Mellon, 262 U.S 100 (1923)* (applying National Prohibition Act to foreign owners in US waters), and *International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970)* (foreign owners subject to National Labor Relations Act (NLRA) in labor dispute with American longshoremen related to work at US ports); *Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119 (2005)* Americans with Disabilities Act (ADA) applies even to foreign flagged vessels owned by foreign company. Until further guidance is available regarding the maritime application of HIPAA, it would seem that applying HIPAA to foreign seamen within a foreign-flagged vessel would violate the principle of extraterritoriality by interfering with the internal operations and affairs of the vessel.

Application of HIPAA within the United States

Within the United States, HIPAA generally applies to "covered entities"; health plans, health care providers such as doctors, health care clearing houses. Recently, federal legislation and regulations extended certain HIPAA provisions to "business associates" of covered entities. See Health Information Technology for Economic and Clinical Health Act (HITECH Act), part of the American Recovery and Reinvestment Act of 2009.

Traditional maritime entities are likely not covered entities

Most traditional maritime actors, such as vessels, owners, and seamen, usually do not act as medical providers, health plans, or clearing houses and therefore are likely not "covered entities". Generally, employers, third-party administrators, disability plans, and workers' compensation plans are not covered entities. While an employer providing a group health plan is not a covered entity, the health plan itself is a covered entity, and the employer may need to comply with the "business associate" requirements to the extent that the employer performs administrative functions on behalf of the health plan. If, however, the employer merely acts as a conduit for summary health information, and limits its activities to processing enrolment and payroll deductions, the employer is not subject to HIPAA compliance. Where an employer exceeds these boundaries, the employer may cross over into the scope of a "covered entity" and become subject to HIPAA regulations.

Therefore, in most cases, where the maritime entity limits its activities to traditional human resource and payroll functions, without handling protected health information and medical records, it appears that the entity is probably not a "covered entity" under HIPAA.

HIPAA compliance for shipboard and shoreside medical activities

HIPAA compliance is most likely a potentially significant issue where maritime entities become involved in overseeing shipboard medical facilities, making medical decisions, monitoring maintenance and cure, storing passenger medical records, and handling crew medical records or pre-employment examinations containing protected health information. In particular, vessel owners face the largest potential exposure for failing to ensure HIPAA compliance, partly because most major maritime players have a United States presence and would likely fall within the scope of HIPAA, particularly for shoreside activities. Within the United States cruise industry, most owners are foreign companies sailing foreign flagged vessels

with a mixture of foreign and American crew, but most also maintain a United States base of operations or corporate office. While a foreign seaman employed by a foreign owner on a foreign-flagged vessel may not be subject to HIPAA, the shoreside principal office co-ordinating a crew member's care in maintenance and cure would certainly be maintaining a complete set of medical records for the crew, and may fall within either the "business associate" or even "covered entity" requirements and regulations under HIPAA and HITECH.

For example, a vessel owner overseeing the maintenance and cure of an injured crew member as required by general maritime law would arguably be engaged in "claims processing or administration" or "benefit management." See 45 C.F.R. 160.103. In fact, the shoreside crew medical records in the possession of the vessel owner within its United States base of operations may be subject to HIPAA. For example, even a third-party computer server hosting medical records is considered a "business associate" for HIPAA purposes. Therefore, to the extent that a maritime entity has possession or involvement with any medical information, records, or functions other than traditional human resources or payroll, a full HIPAA compliance analysis must be conducted.

No private right of enforcement

Even where HIPAA applies, courts have clearly held that there is no private right of action for purported violations of HIPAA and its regulations, as the statutory comments indicate. See 65 F.R. 82566. While there is no individual right, however, the DHHS can begin enforcement actions against violators. Sanctions and punishment include civil sanctions such as monetary fines where the violator was unaware of the violations, or criminal penalties, including fines and prison terms up to ten years, where the violations were known to the accused. Therefore, any concern involving HIPAA arises not from the threat of individual litigation in American courts, but regulatory compliance with DHHS. Failure to comply, however, will have significant consequences, and therefore conducting a thorough HIPAA compliance analysis is advisable for all maritime entities possibly within its scope.

HIPAA compliance must be evaluated

While this brief overview cannot address the complex and challenging HIPAA compliance issues, maritime industry actors are strongly advised to evaluate whether any HIPAA compliance issues may be on the horizon. If HIPAA potentially applies, the entity or individual should obtain a professional analysis of the statute and accompanying regulations, and compliance should be ensured to avoid an enforcement action from the DHHS.

DISCLAIMER – the foregoing is not legal advice and should not be relied upon as such.

Maintenance and cure: modern case law in practice

The following is an excerpt from a presentation Noreen Arralde delivered to the Cruise Line Industry Association (CLIA) Leadership Forum in Florida, November 2012.

Noreen Arralde
Claims Executive

In describing the obligation of a maritime employer to its workers, Supreme Court Justice Joseph Story, sitting as circuit judge in the case of *Harden v. Gordon* (1823), penned one of the most far reaching opinions in Admiralty Law: "Seamen are, by the peculiarity of their lives, liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment…"

While present day professional seamen are much more sophisticated and educated than the seamen of the 1800s, the maritime employer of the 21st century is still legally required to provide living expenses during the seaman's period of convalescence (maintenance) and all the ill or injured seaman's medical expenses (cure) until the point of maximum medical improvement. Modern admiralty courts still interpret the seaman's right to maintenance and cure very broadly and continue to resolve doubts as to the obligation to pay and the necessity of medical treatment in favor of the seaman.

Employer-employee relationship

The right to maintenance and cure arises from the employer-employee relationship, but is not always co-extensive with it.

In *Leblanc v. BGT Corp.* (1st Circuit, 1993), the court held a seaman was entitled to maintenance and cure for an injury which he sustained after his employment aboard ship was terminated. Leblanc slipped descending a ladder while (or shortly after) removing his belongings from the ship. The court reasoned that the "triggering event," i.e., the injury for which maintenance and cure was sought, took place within the period of time needed for "winding up the seaman's employment," thus the employer was obligated to pay maintenance and cure.

The question often arises whether a seaman is entitled to maintenance and cure for an injury which is sustained while the seaman is not employed, but is receiving maintenance and cure for a shipboard injury or illness. In *Duarte v. RCL* (Florida Third District, July 19, 2000), the court held that a seaman was entitled to maintenance and cure for injuries sustained in an automobile accident which occurred while he was off the ship receiving maintenance and cure for a shipboard injury. The fact that the seaman was receiving maintenance and cure meant, as far as the court was concerned, that the seaman was still "in the service of the ship."

The injury or illness occurred in the service of the ship

Historically, an illness or injury must have "become manifest" while the seaman was "in the service of the ship" to qualify for maintenance and cure.

But in *Messier v. Bouchard Trans. Co.* (2nd Circuit, July 20, 2012), the Second Circuit Court of Appeals abandoned the historical rule in favor of a broader rule which obligates maritime employers

to pay maintenance and cure for conditions which were present, but may not have been not manifest, during the seaman's shipboard service. Messier was working aboard a tugboat when he suffered a back injury. Blood work performed during the medical care for the back injury revealed he had lymphoma, which must have been present while working aboard the tugboat. Despite the fact he showed no symptoms until after he had disembarked the tugboat, the Court of Appeals held he was entitled to maintenance and cure. "As long as the illness was present during the seaman's service," maintenance and cure was due. Messier represents a broadening of the maintenance and cure obligation by a modern admiralty court.

Medical care is aimed at cure

Maritime employers are not obligated to pay for palliative care under the maintenance and cure obligation. But the modern emphasis on quality of life care can make determining whether a recommended course of treatment is considered "palliative" or "curative" difficult.

In *Alario v. Offshore Service Vessels* (5th Circuit, May 14, 2012), the court held that the employer's maintenance and cure obligation did not extend to injections which would have relieved pain but would not "change the structural problems" in the seaman's injured neck. Similarly, in *Whitman v. Miles* (1st Circuit, November 23, 2010), the court held that the employer's maintenance and cure obligation did not include prescription drugs which may "slow or arrest progression of symptoms" associated with an incurable illness, but not cure the underlying illness.

But in *Haney v. Miller's Launch* (U.S.D.C. Eastern District New York, November 10, 2010), the district court *suggested* maintenance and cure should respond to the modern reality that palliative care is an increasingly popular approach to treating permanent medical conditions. Note that *Haney* is a cautionary case, not binding precedent.

The employer has a right to reasonably investigate claims for maintenance and cure

Upon receiving a claim for maintenance and cure, an employer is entitled to investigate and require corroboration of the claim.

In *Hale v. Maersk Line, Ltd.* (Virginia Supreme Court, Sept. 14, 2012), the court set aside the jury's finding the employer was unreasonable in denying a seaman's claim for maintenance and cure and ordered the case to be re-tried. The court considered it significant that the employer's denial of maintenance and cure was in response to the fact that the seaman provided no evidence of his medical condition and the medical records the employer was able to obtain on its own did not contain any evidence of a medical condition justifying payment of maintenance and cure.

Hale claimed he suffered post-traumatic stress disorder and depression as a result of being sexually assaulted by police officers while on shore leave in Korea. The only evidence of any injury was a hospital record stating Hale had a black eye. The employer, therefore, denied the claim for maintenance and cure. In reversing the jury's finding that the employer had wrongfully denied the claim, the court said: "Upon receiving a claim for maintenance and cure, a shipowner … is entitled to investigate and require corroboration of the claim. Failure to pay … is reasonable if a diligent investigation indicates the claim is not legitimate or if the seaman does not submit medical reports to document the claim."

A maritime employer has defenses to claims for maintenance and cure

A seaman whose injury or illness was caused by intoxication or drug use is not entitled to maintenance and cure.

In *Coleman v. Omega Protein* (U.S.D.C. Eastern District of Louisiana, Sept. 9, 2011), the seaman claimed he was entitled to maintenance and cure after an accident in which he fell and hit his head. Post-accident blood tests came back positive for cocaine. The levels found in his blood indicated cocaine use 24 to 48 hours before the accident. Despite the seaman's claim he had not used cocaine, the court found the evidence indicated otherwise and held he was not entitled to maintenance and cure since his accident was caused by his willful misconduct in using cocaine.

A seaman who willfully fails to disclose a medical condition is not, under certain circumstances, entitled to maintenance and cure.

In two recent cases, *Lett v. Omega Protein* (August 6, 2012) and *Atlantic Sounding Co. v. Petrey* (Nov. 23, 2010), the Fifth Circuit Court of Appeals upheld

the employers' right to deny maintenance and cure to seamen who willfully failed to disclose pertinent medical facts where the following circumstances were present: (1) the non-disclosed medical facts were material to the decision to hire the seamen and (2) there existed a causal link between the concealed medical facts and the conditions for which maintenance and cure was sought.

Doubts are generally resolved in favor of the seaman

In *Vaughn v. Atkinson* (1962), the US Supreme Court said "ambiguities or doubts regarding the seaman's right to maintenance and cure are to be resolved in the seaman's favor."

Fifty years later, modern admiralty courts continue to resolve disputes as to entitlement to maintenance and cure and the necessity of medical treatment in favor of seamen. In *Alario v. Offshore Service Vessels* (5th Circuit, May 14, 2012), the court denied the employer's motion to dismiss the claim for maintenance and cure holding that the possibility "even though remote" that the seaman had job restrictions meant he had not reached maximum medical improvement. In *Bickford v. Marriner* (District of Maine, August 8, 2012), the employer provided evidence that the ship was not in the water and the seaman not working on the date he claimed he was injured. The court resolved what it said was "doubt" as to entitlement to maintenance and cure in the seaman's favor and ordered the employer to pay maintenance and cure.

Modern admiralty courts are inclined to interpret the seaman's rights even more broadly than in the past, while continuing to resolve ambiguities and doubts in the seaman's favor. The threat of punitive damages for wrongful failure to pay – as this newsletter has discussed in past issues – makes it all the more important that maritime employers "get it right" when making decisions regarding the limits of maintenance and cure. When there is any doubt, these decisions should always be discussed with the Club.

Non-party subpoenas: pointers for respondents

You have just been advised that there is a stranger in your reception area holding a subpoena for testimony and production of documents at an attorney's office in an unknown city on an unspecified date and time…

Dee O'Leary
Claims Executive

After breathing a sigh of relief that you have not been sued, you realize you are being asked to provide testimony and/or documents in a lawsuit that your company is not even a party to. What now? What do you do?

First, some background on subpoenas.

Subpoenas are typically used by parties in a lawsuit to obtain evidence from third parties not involved in that lawsuit. A party to a lawsuit does not need to use a subpoena to obtain evidence from another party. It can instead use any of the discovery devices contained in Rules 26 to 37 of the Federal Rules of Civil Procedure. Thus, most subpoenas are used to obtain evidence from a non-party.

Generally speaking, there are three types of non-party deposition subpoenas:

1. deposition subpoena for testimony;
2. deposition subpoena for testimony and records;
3. deposition subpoena for records only.

Pursuant to Rule 45 of the Federal Rules of Civil Procedure (which apply throughout the United States), a subpoena must contain the following information:

- the identity of the court from which the subpoena was issued;
- the identity of the court in which the underlying action is pending, along with title of the action and the civil action number;
- the identity of the person to whom the subpoena is directed;
- the text of Rule 45(c) and (d) which set out the rights and duties of the witness with respect to responding to the subpoena, objecting to the subpoena or moving to quash the subpoena;
- the time and place for either the production of the documents or attendance at hearing, trial or deposition;
- categories of documents sought (if subpoena requests documents);
- method of recording testimony (if testimony is sought).

The only people who can issue a subpoena are the clerk of the court or a qualified attorney. A qualified attorney is one who is authorized to practice in the jurisdiction of the issuing court, *or* authorized to practice in the jurisdiction where the underlying action is pending.

The issuing court is the court to which applications to quash (ie. stop), modify or compel compliance with the subpoena must be made. It is also the court with the power to hold a non-compliant witness in contempt.

It should be noted that a deposition subpoena issued out of the wrong court is void and unenforceable. Be sure to determine whether your physical location and place of business is within the federal district from which the subpoena was issued. If not, you may have grounds to quash the subpoena.

Service of a subpoena

A subpoena is a form of judicial process by which an issuing court obtains jurisdiction over a nonparty. To initiate this process, the issuing party must serve the subpoena properly. Generally speaking, a party has 30 days to respond.

A subpoena may be served:

- within the district of the issuing court;
- outside the district of the issuing court, but within 100 miles of the location specified for the deposition, hearing, trial, or production of documents;
- anywhere within the state of the issuing court if state law allows for that service;
- at any other location authorized by a court based on a motion for good cause, if a federal statute so provides.

A subpoena may be served by any person not a party to the action who is over the age of 18. Rule 45 provides that a subpoena must be hand delivered to the person named therein. If the subpoena is directed to a corporation, it must be personally served on a corporate officer or other agent authorized under the Federal Rules. If the subpoena requires that person's attendance, the fees for one day's attendance must be tendered with the subpoena.

Service within the district

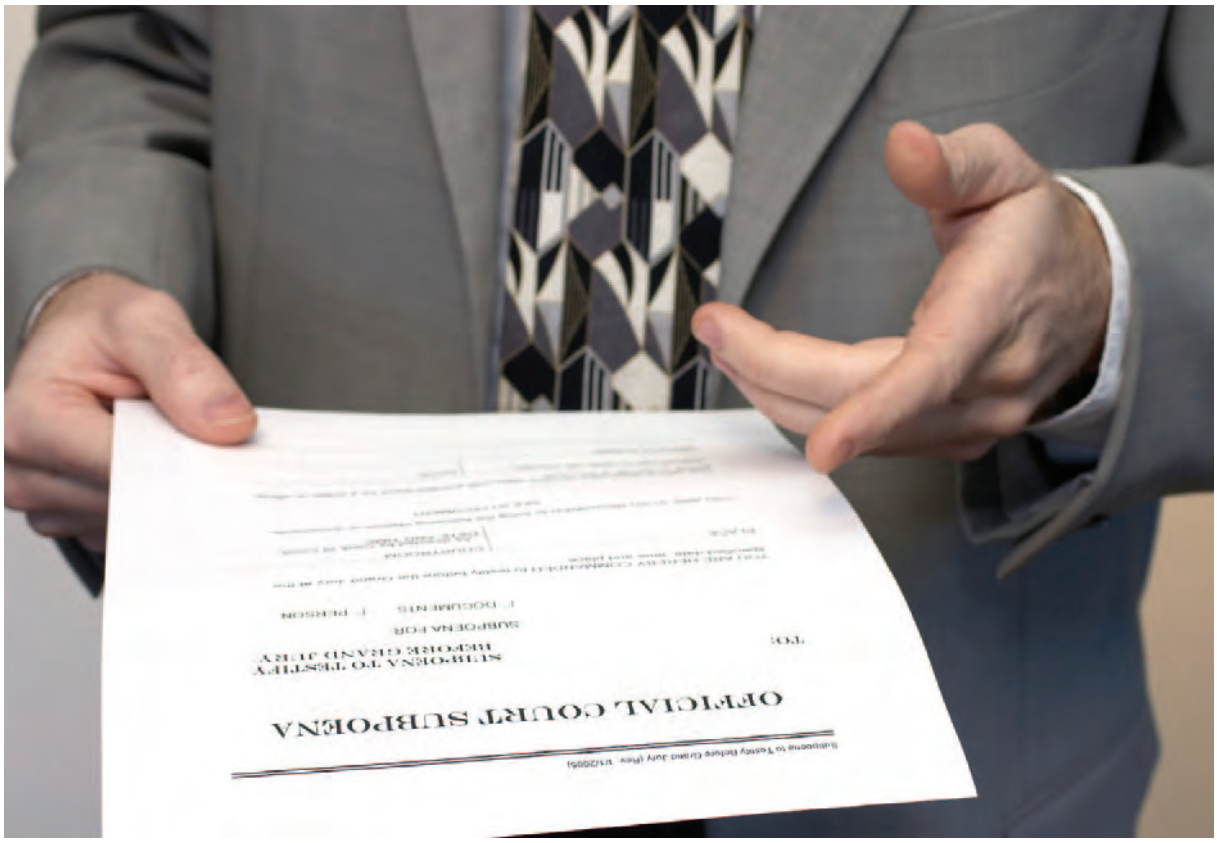
An individual's presence within the issuing court's jurisdiction is generally sufficient to bring the individual within the reach of the court's subpoena power. Courts are split on whether service on a corporate officer in the issuing court may subject the corporation to the jurisdiction of that court. Some courts require that a corporation or other organization have sufficient "minimum contacts" with the issuing court's district for the corporation to be subject to the issuing court's jurisdiction. (check with your attorney on this point.)

100 mile bulge

The issuing court may issue a subpoena outside of its district but within 100 miles of the place specified for the deposition, hearing or trial, production of documents is referred to as the "100 mile bulge."

Jurisdiction

Federal district courts have statewide subpoena power in certain circumstances. Although this provision is irrelevant in states where there is only a single federal judicial district (such as Idaho) it can be significant in a state where there are multiple judicial districts, such as New York, Texas and California. For example, under the rule, a party would be able to issue a subpoena out of the Southern District of New York court (SDNY) commanding a non-party located over 300 miles away, in Buffalo say, to produce documents or



appear for trial in SDNY because the Federal Court has statewide subpoena power. However, the issuing party in this example could not command the non-party witness to appear for a deposition in the SDNY if it is more than 100 miles from where the non-party witness lives, works, or regularly transacts business in person. Additionally, the court in this example could quash or modify the trial subpoena if it required the witness to incur substantial expense to travel more than 100 miles to attend the trial.

What to do once you receive a subpoena?

Prior to complying with any subpoena, it is advisable to analyze whether you are a potential litigation target. Generally, a subpoena is used by a litigant to obtain evidence from a non party that will be used against another party during a pending litigation. However, in some cases, a litigant who serves a subpoena for testimony and/or documents may view the non-party as a potential defendant or cross defendant. If a non-party served with a subpoena suspects it may be a potential target, the non-party's counsel should take immediate steps to investigate and insulate the non-party from exposure. Additionally, a non-party who suspects that it might be a litigation target should have an attorney review all documents to be produced prior to production. If a subpoena seeks testimony, a non-party should be adequately prepared by its counsel to avoid saying something foolish during deposition that may get the non-party sued.

Make sure the subpoena is valid and proper

It is always best to check with your attorney so that he or she may examine the subpoena to verify that the correct form was used. There is a marked difference in State versus Federal courts here. In some state courts, a subpoena can be either issued by the clerk of the court in which the action is pending or any party's attorney of record. In Federal Courts, however, a subpoena must be issued either from the court for the district in which the deposition is to be taken or in which the document production is to be made. If the subpoena was issued from the wrong court, grounds may exist for a court to find the subpoena invalid.

As discussed above, generally, a non-party witness is not required to travel more than 100 miles to be deposed and thus, a subpoena that requires this may be found to be invalid. Also, if the subpoena seeks documents located in a state other than where the action is pending, the subpoena may be found to be invalid. If the subpoena seeks disclosure of "trade secrets" or other confidential information, disclosure may be prohibited or a protective order issued.

Challenging a subpoena

A non-party subpoena may be challenged by:

- written objections
- a motion to quash the subpoena
- a motion to modify the subpoena
- a motion for a protective order

The appropriate method of resisting a subpoena depends upon the subpoena, the documents sought to be produced and the court. If a non-party elects to challenge a subpoena, it needs to act promptly and be certain that there are sufficient grounds to do so.

To the extent possible, a non-party should avoid fighting a costly battle over evidence in a pending lawsuit. A non-party may best be served by limiting expense and complying with the subpoena, if it is not a litigation target, has no direct or indirect interest in the litigation, or is not asked to disclose confidential information.

In summary, subpoenas are serious legal documents and need to be addressed in a consistent, conservative manner so that potential exposure to the underlying dispute is limited and any internal distractions which can interfere with your normal business operations are minimized.

When in doubt as to how to respond to a subpoena, be sure to promptly consult your in-house counsel, legal department, or outside counsel prior to taking any action.

Value for Members (VfM) aka: Value for Money

Ten years ago the Club established the Value for Money program with a network of attorneys in the US, Canada and the UK.

Linda Wright
Claims Executive

Following the introduction of the VfM program, the Bodily Injury Team recognized a need for consistency in the information reported by attorneys handling bodily injury claims as well as frequency of such reports. In response, the Team developed Attorney Reporting Guidelines and a Litigation Checklist which requires counsel to report on a regular basis, provide specific information in response to standardized categories and confirm when tasks such as discovery and motions have been completed during the course of the litigation. The reporting requirements are in addition to the budgeting and general case handling required by the Value for Money program. Although the VfM model is used for all types of claims, this article addresses its use in handling bodily injury claims.

The focus of VfM and Attorney Reporting Guidelines is to create a claims handling team consisting of the member, claims executive, and the assigned lawyer. A preliminary evaluation of the case as well as a detailed preliminary budget is required shortly after assignment. Subsequent reporting is required at specified intervals and requires the defense counsel to recommended various strategies, provide an analysis of the "most likely outcome" of the case legally and financially, and an updated and detailed fee and cost budget. The budget is, of course, expected to be proportional to the value of the case.

The initial and subsequent status reports are intended to provide the claims team with regular and clear information, specific strategies and the financial costs of the various strategies. This generates open communication, discussion and eventual agreement between the member, claims executive and the defense attorney on the best strategy to achieve the "most likely outcome".

When the claims team agree on a strategy knowing the full costs of the strategy, expectations about the outcome of the case are managed and a realistic claims and fee estimate is established. The estimate necessarily reflects an amalgam of: member liability; maximum potential exposure; fees and disbursements; pre-judgment interest; third-party liability (if any); and comparative fault of the plaintiff. With this detailed analysis and consistent reporting, surprise developments are minimized.

So what are the benefits of VfM for you, the Club's member?

- Consistency of reporting
- Regular review and open discussion of the case with the Club and the lawyer
- Pro-active claims management
- Agreement on strategies and budgets/estimates
- Assigned tasks for each team member in developing information
- Realistic expectations of fee and claim estimates as litigation progresses
- Prompt discussion of all significant developments immediately
- Accountability of defense counsel for budgeting
- And in the end… No Surprises!

And finally…

A compilation of recent US legal developments – the good and the bad news.

Jana Byron
Claims Executive

Regrettably, the Club and our Members are all too familiar with the risks attendant to litigating personal injury cases in the US. These cases can be extremely expensive, seemingly endless and, most importantly, very unpredictable. It seems that the trade press and on-line blogs are brimming with a non-stop parade of horror stories of excessive verdicts against shipowners in personal injury cases where the liability is questionable at best.

Recently, however, some good news has been coming out of the US courts with trial and appellate level judges making level-headed and well reasoned decisions in favour of shipowners. While the Club does not see this as an indication of a trend, we think it is important to highlight that the US judicial system, though imperfect, does work. In this article we will focus on some positive decisions regarding the law on maintenance and cure. Stay tuned for more good news in upcoming issues of Bodily Injury News.

First the good news…

Texas Supreme Court overturns $2.5 million compensatory damages award for failure to pay maintenance and cure

Generally speaking, a shipowner's failure to pay maintenance and cure may, in and of itself, cause injury or aggravate an injury a seaman sustains, thus creating a separate compensable injury. The case law on this subject is murky, at best, but in *Weeks Marine, Inc. v. Garza,* the Supreme Court of Texas (that state's highest court in the state court system), recently clarified what evidence is required to support a claim for a separate compensable injury caused by a shipowner's failure to pay maintenance and cure.

In that case, the plaintiff, a deckhand on one of the shipowner's barges, was injured when the steel friction bar held by one of his co-workers sprang forward striking the plaintiff in the head, and knocking him unconscious. The next day, his co-worker took the him to see a doctor at the owner's expense. He was diagnosed with a contused cranium, a mild concussion and a cervical sprain, and was released to return to work without restrictions. When the plaintiff's pain did not subside, he again saw the same doctor at the owner's expense and he was again released for work without restrictions.

When his pain persisted, the plaintiff went to his own doctor who advised him not to work and recommended conservative treatment. When he reported no improvement, his doctor prescribed facet injections and, eventually, surgery. The plaintiff subsequently underwent surgery almost two years after his accident. The medical treatment that he received from his own physician was not paid for by the owner.

The plaintiff brought suit against the owner, alleging Jones Act negligence, unseaworthiness, unpaid maintenance and cure, and compensatory damages caused by the owner's alleged unreasonable failure to pay maintenance and cure. After a jury trial, plaintiff was awarded $1.12 million on his negligence claim, $35,000 in unpaid maintenance and cure and $2.5 million based upon his employer's alleged unreasonable failure to pay maintenance and cure. These awards were upheld on appeal and the owner sought review from the Supreme Court of Texas.

The owner appealed the $2,500,000 element of the judgment for unreasonable failure to pay maintenance and cure on the grounds that there was no evidence that the owner's failure to pay was the cause of further injury or harm over and above the initial Jones Act injury. The Texas Supreme Court agreed, emphasising that, under

the case law, "a seaman's trilogy of potential claims can become a trilogy plus one" if the owner's failure to provide maintenance and cure results in an additional physical injury. But, the court reasoned, when a seaman recovers for the primary injury under the Jones Act, there must be evidence to support a finding that the owner's failure to pay maintenance and cure actually caused a separate physical injury distinct from the injury claimed under the Jones Act or worsened the seaman's physical condition. Although the plaintiff argued that he endured additional pain, suffering and mental anguish as a result of the owner's failure to pay maintenance and cure, the Court was not swayed. Instead, the court concluded there was no evidence that the owner's failure to pay maintenance and cure meant the plaintiff failed to receive any treatment. Nor that his treatment was delayed in any way or that his treatment would have been handled any differently by his doctor. Accordingly, the Texas Supreme Court found that the plaintiff had failed to prove that the owner's failure to pay maintenance and cure caused a separate injury or worsened his condition such that he would be entitled to recover compensatory damages both for the Jones Act injury and the alleged additional injury attributable to the owner's failure to provide maintenance and cure.

Foreign arbitration clauses in crew contracts

Over the last several years, enforcement in the US of foreign arbitration clauses has been hotly contested after the Eleventh Circuit's decision in *Thomas v. Carnival Corp.* 573 F.3d 1112 (11th Cir. 2009). However, foreign arbitration clauses in employment contracts are being enforced again.

In *Thomas* the Filippino plaintiff, sued Carnival Cruise Lines in Federal Court in Florida. The complaint included causes of action for Jones Act negligence, unseaworthiness, failure to pay maintenance and cure as well as failure to pay wages under the Federal Seaman's Wage Act. Plaintiff's employment contract required arbitration in the Philippines under Panamanian law, the law of the flag. The lower court compelled arbitration in the Philippines. Plaintiff appealed arguing, among other things, that because Panamanian law applied, the arbitration clause operated as a prospective waiver of his US statutory rights. In deciding the case, the 11th Circuit generated a new public policy defense contained in the New York Convention on Arbitration. The Justices on the 11th Circuit panel deciding *Thomas* found the arbitration agreement unenforceable because foreign law preventing plaintiff from asserting his US statutory claims. In many cases which followed the *Thomas* decision, courts would enforce the clause only if the arbitration took place in the US applying US law and/or permitted the employee to recover under the Jones Act and General Maritime Law claims of unseaworthiness and maintenance and cure. (See, Bodily Injury News November edition 2010)

Recently however, the Southern District of Florida and the 11th Circuit have begun enforcing foreign arbitration clauses in crew contracts. In *Lindo v. NCL (Bahamas), Ltd.,* Docket # 10-10367 (August 29, 2011), the 11th Circuit issued a comprehensive opinion, reviewing prior cases including *Thomas,* and held that because there is a strong presumption in favor of enforcing arbitration clauses and because the New York Convention on Arbitration provided for post-arbitration judicial review of an award (at which time the public policy defense is properly considered), arbitration agreements should be enforced as they had been after the 11th Circuit's 2005 decision in *Bautista v. Star Cruises,* 396 F.3d 1289 (11th Cir. 2005).

Shortly after the *Lindo* opinion was issued the 11th Circuit decided *Henriquez v. NCL (Bahamas) Ltd.* Docket # 09-15344 (September 6, 2011). The unpublished decision followed both *Lindo* and *Bautista* and enforced a Nicaraguan crewmember's arbitration agreement in his employment contract. That arbitration clause required arbitration in Nicaragua pursuant to Bahamian Law. The *Henriquez* court rejected the *Thomas* public policy argument stating it was only after arbitration that a court may refuse to enforce a foreign arbitral award if it was contrary to the public policy of the country. The public policy exception argument was not properly raised at the arbitration enforcement stage. The court also rejected *Henriquez'* fraud and duress arguments firmly holding all of his claims were properly the subject of arbitration.

As a procedural matter, crewmembers typically file their lawsuits in state court. The defendant employers then remove the case to Federal Court pursuant to a provision in the Federal Arbitration Act (the US statute which implements the New York Convention). Defendants then seek to stay (stop) or dismiss the case in favor of foreign arbitration pursuant to the employment contract. Plaintiffs next attempt to remand the case back to state court. If

plaintiff's motion to remand is successful the case is sent back to state court for further proceedings.

In the 11th Circuit there was no right to appeal an order remanding a case back to state court except when a forum selection clause was involved. Very recently, however, the 11th Circuit decided *Maxwell v. NCL (Bahamas) Ltd.* Docket # 11-12557 (October 18, 2011) and heard an appeal of the Federal trial court's order to remand the case to state court. The Circuit Judges first determined that they had jurisdiction to hear the appeal because an arbitration agreement is a type of forum selection clause.

In the appeal, defendant NCL argued that the trial court's reliance on the *Thomas* decision (discussed above) conflicted with *Bautista v. Star Cruises* and the 11th Circuit panel hearing the appeal agreed. In reaffirming *Bautista* in its *Lindo v. NCL (Bahamas) Ltd.* decision, the Court confirmed the defenses to enforcement of an arbitration agreement in an employment contract are limited to fraud, mistake, and waiver. The Court reasoned that those three defenses could be applied neutrally throughout the world. The *Maxwell* court also agreed with its recent *Lindo* and *Henriquez* decisions holding that a public policy defense is not a defense to the enforcement stage of an arbitration agreement and the *Thomas* court's attempts to expand those defenses was improper.

Now the bad news…

The "Townsend factor" expands punitive damages and remedies to include spouses of Jones Act seaman stating claims for loss of consortium.

The United States Supreme Court's opinion in *Atlantic Sounding Co., Inc. v. Townsend* allowed recovery of punitive damages for an employer's willful and wanton failure to pay maintenance and cure. (See BI News November 2009 issue). Since that decision, the plaintiff's maritime bar has pushed to broaden the scope of the *Townsend* decision to expand the remedy of punitive damages available to seafarers. Various courts have held that punitive damages are recoverable in Jones Act negligence and unseaworthiness cases; for wrongful death under the Jones act and general maritime law; and for failure to pay unearned wages. (See Bodily Injury News May 2011).

Though the cases after *Townsend* reported in the BI News focused on the expanding application of punitive damages in maritime personal injury cases, at least one court (in Washington State) has applied the *Townsend* decision to expand the cause of action for loss of society, i.e. the value of a person's society, companionship, affection, sexual relations, comfort, solace and protection. Such a cause of action is for non-pecuniary (i.e., non economic) losses. Loss of consortium claims had, for the most part, previously been limited to incidents arising within State territorial waters at least within the Ninth Circuit, which includes Washington State.

In *Barrett v. Jubilee Fisheries, Inc.,* Docket # C10-01206 MJP (U.S.D.C. W.D. Wa. August 11, 2011) the Court held that the spouse of an injured seaman could state a cause of action for loss of society. Plaintiff argued that the Supreme Court's decision in *Townsend* severely restricted the scope of the Supreme Court's prior decision in *Miles v. Apex Marine* 498 U.S. 19 (1990). In *Miles* the Court expanded the limitation on damages found in the Jones Act (economic damages only) to include claims arising under the general maritime law doctrine of unseaworthiness. *Miles* limited damages in unseaworthiness cases to economic losses only. In restricting *Miles,* the *Townsend* Court concluded that common law remedies which pre-existed the enactment of the Jones Act in 1920, still existed and were thus recoverable under the general maritime law.

In applying the *Townsend* decision to the case before it, the Judge in Barrett held that the cause of action of unseaworthiness and the remedy of loss of consortium both existed in the general maritime law before the Jones Act and thus still existed as available remedies to Mrs. Barrett. Mrs. Barrett was thus permitted to pursue her cause of action for loss of society as a result of the negligence of her husband's employer which injured him.

Stay tuned for more good news.

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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 from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with these demanding cases. Under the leadership of Louise Livingston they apply collective team expertise and experience to a variety of bodily injury matters. The team review and determine strategy in all major injury cases and regularly attend settlement conferences and mediation.

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