

Torts and Admiralty: **What's Been Happening in the Last Year** **While You've Been Practicing Law**

An Admiralty and Maritime Update
2005-2006

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1. SEAMEN

(A) Foreign

Rosario Soares, an Indian national, was injured on a Tidewater vessel in the territorial waters of the United Arab Emirates. He brought a Jones Act action against the vessel operators, vessel owners, and his employer in the Civil District Court of Orleans Parish. The Fourth Circuit Court of Appeals affirmed the district court's finding that the plaintiff had a remedy in the United Arab Emirates, and therefore, he had no remedy in Louisiana state court under the Jones Act preemption provision. Additionally the appellate court noted that, under 46 USC section 688(b)(2), the burden is on the foreign seaman to show he has no remedy in either the country where the injury occurred nor in the seaman's home country in order for him to be entitled to a remedy in a United States court. *Soares. v. Tidewater, Inc., 895 S.2d. 568 (LA 4th Cir., January 2005)*

UPDATE: On May 10, 2004, following the state district court's dismissal of Soares' action, the plaintiff filed a complaint in federal court against Tidewater, Jackson Marine, and his employer Al Wasl Marine. The defendants filed Motions to Dismiss, or Alternatively for Summary Judgment, or Alternatively to Abstain. The United States District Court for the Eastern District of Louisiana granted the defendants' motions finding this case was "strikingly similar" to *Jackson v. North Bank Towing Corp., 213 F.3d. 885 (5th C., 2000)*. The District Court was not swayed by the plaintiff's attempt to distinguish this case from Fifth Circuit precedence and found that the issue before the Court was not whether United States courts have jurisdiction to hear claims by foreign seamen, but whether or not the state court found the U.S. District Court was a court of competent jurisdiction. The District Court honored the Fourth Circuit Court of Appeals' decision that section 688(b) precludes a claim by a foreign seaman in any U.S. court—federal or state. Consequently, the plaintiff's claims were barred by *res judicata*. *Soares v. Tidewater, Inc., et al, 2006 WL 851393 (U.S.D.C., E.D. LA, March 2006)*

(B) Penalty Wages

James White suffered chemical burns while moving unsealed and unmarked hazardous liquids while working on a vessel near Egypt. He filed suit alleging causes of action under the Jones Act; unseaworthiness, maintenance and cure; and

for penalty wages under 46 U.S.C. section 10313. White claimed his employer failed to pay all of his wages within the time period specified by statute and was, therefore, entitled to penalty wages. The United States District Court for the Southern District of Texas found that the plaintiff was not entitled to double wages even if he had not received all of his wages within the prescribed time absent a showing that his employer had intentionally withheld or arbitrarily or willfully refused to pay the wages. *White v. Waterman Steamship Corp.*, 365 F.Supp.2d. 817 (U.S.D.C., S.D. TX, January 2005)

(C) Misrepresentations

Rickey Brown was injured in August 1998 while lifting a sack of corn. He then applied to work as a seaman and misrepresented his back injury on the employment questionnaire. Brown hurt his back a second time and was fired for, among other things, failure to disclose his prior back injury on the medical/employment questionnaire. Two months later, Brown applied to work as a floorhand for Parker Drilling Offshore Corporation. When asked on a medical questionnaire whether he had “Past or Present Back and Neck Trouble”, Brown checked “No”. Brown then injured his back a third time and sued his employer, Parker Drilling. After a jury trial awarding the plaintiff damages for his maintenance and cure and Jones Act claims, an appeal was taken. On rehearing, the Fifth Circuit Court of Appeals held that Parker had established that the plaintiff had intentionally concealed his prior back injuries and, consequently, the withholding of maintenance and cure was reasonable. However, the seaman was in a valid employment relationship for purposes of his Jones Act negligence claim, notwithstanding his misrepresentations on the health questionnaire. (Judge Stewart concurred in part and dissented in part). *Brown v. Parker Drilling Offshore Corporation*, 410 F.3d. 166 (5th Cir., May 2005)

(D) Respondeat Superior

Paul Sobieski, a crewman, was watching television aboard the *M/V Joseph Block* when his crewmate snuck up behind him and “tractioned [Sobieski’s] neck, chiropractor style”. Sobieski suffered a neck injury as a result of the incident for which he sought treatment over a period of time. His employer paid 100% for this treatment. Several months later, Sobieski experienced a “lock up pinch” in his neck which caused him to fall down his basement stairs resulting in a broken neck. His

employer stopped paying full medical coverage at that point. The United States District Court for the Northern District of Indiana granted summary judgment in favor of the employer on Sobieski's Jones Act claims. The Seventh Circuit Court of Appeals affirmed the decision and refused to impose liability on the seaman's employer pursuant to the doctrine of *respondeat superior* as the crewmate at fault was not acting in furtherance of the ship's business and tractioning was not part of his official duties. The Court rejected the contention that all seamen aboard a seagoing vessel are acting within the course and scope of their employment. Additionally, the Court found the employer was not directly liable under a negligence theory because there was no evidence that it had actually known of the crewmate's chiropractor or masseur activities. *Sobieski v. Ispat Island, Inc., et al*, 413 F.3d. 628 (7th Cir., June 2005)

(E) Negligence

Jeffrey Withhart was employed as a mate/second captain aboard a Sea Mar vessel. On December 3, 2001, Withhart left the wheelhouse of the vessel in congested waters to attend to personal business and it collided with a vessel owned and operated by Otto Candies, L.L.C. Withhart was injured and sued Otto and Stolt Offshore. Otto filed a third party complaint against Sea Mar demanding defense, indemnity, contribution and/or recovery. Sea Mar ultimately paid Otto over \$26,000 for damage to its vessel. Withhart then amended his complaint to add Sea Mar and others as defendants. Subsequently, Sea Mar filed a negligence counterclaim against Withhart for property damage to its vessel and for indemnification of the amount paid to Otto. The U.S. District Court for the Western District of Louisiana dismissed the counterclaims under Rule 12(b)(6). The Fifth Circuit Court of Appeals reversed the decision and remanded the matter finding that (1) general maritime law recognizes suits by vessel owners for property damage caused by negligent seaman and (2) neither the Jones Act nor the Federal Employers' Liability Act precludes a shipowner-employer from suing its own seaman-employee for property damage arising from the seaman-employee's negligence. *Withhart v. Otto Candies, L.L.C.*, 431 F.3d. 840 (5th Cir., December 2005)

(F) Fees and Costs

The Fifth Circuit has held that 28 U.S.C. section 1916, which exempts seamen from pre-payment of costs and fees associated with the prosecution of suits and appeals, is not enforceable in light of the later enacted statute allowing court reporters to require the pre-payment of transcript costs.

Beasley v. U.S. Wedding Service, Inc., 129 Fed.Appx. 901 (5th Cir., May 2005)

2. MARITIME LAW

Michael Davis was permanently paralyzed when he was ejected from a boat in which he was a passenger. Davis sued several defendants with whom he ultimately settled during a second trial in October 2003. He filed suit, however, on September 23, 2003 against Teleflex and Teleflex Canada—parties not joined in the first suit. He filed a second, almost identical, action against the Teleflex parties on October 28, 2003. The cases were consolidated and removed to the U.S. District Court for the Western District of Louisiana. The District Court granted summary judgment in favor of the defendants and the plaintiff appealed. On appeal, the Fifth Circuit affirmed the District Court’s decision to apply Article 425, finding that the principles of general maritime law asserted by the plaintiff and the plaintiff’s right to bring an additional lawsuit were unrelated issues. As Article 425 preliminarily requires a litigant to bring all causes of action arising from the same transaction or occurrence in one suit, the District Court was correct in its application. Davis’ attempt to find an exception to the *res judicata* rule was also unsuccessful because, even though Davis reserved his right to file suit “against any and all parties to this matter, named and unnamed”, the Appellate Court read that language to mean only parties to the suit in which the judgment was rendered. The Fifth Circuit did not find Davis had reserved the right to sue a third party that somehow was related to this case, but was never made a party to the suit or settlement agreement. *Davis v. Teleflex Inc., 137 Fed.Appx. 714 (5th Cir., June 2005)*

Bollinger shipyards constructed the L/B SUPERIOR GALE for Superior Energy Services in 2002. The vessel subsequently experienced problems with the low fuel/low oil pressure alarm which Bollinger had its subcontractor International Marine Systems fix. Approximately 3 months later, the ship caught fire while en route to Fourchon, LA. The fire was fought by both the GALE’s crew as well as the crew of Schouest Offshore’s C-ADVENTURER which was called for assistance.

Superior filed suit against International Marine Systems and Bollinger seeking consequential damages and tort damages. Schouest filed suit against Superior and the SUPERIOR GALE seeking salvage for the services rendered to the ship and Superior filed a third party claim in that action against Bollinger for any damages it might owe to Schouest. Bollinger filed a Motion for Partial Summary Judgment asserting that the Vessel Construction Agreement between Bollinger and Superior prohibits consequential damages and that maritime law prohibits recovery in tort for the alleged improper construction of the vessel. Superior opposed the Motion arguing that the Louisiana Products Liability Act applies and allows both a tort cause of action against Bollinger and recovery of consequential damages. After a thorough discussion, Judge Porteous of the Eastern District of Louisiana held that the damages to the lift boat due to the fire allegedly resulting from defective construction or repair were governed by maritime law and the *East River* economic loss rule, not by the LPLA, because the action was grounded in contract law. Additionally, the contract at issue specifically precluded consequential damages. *Chouest Offshore Services, L.L.C. v. Superior Energy Services, et al*, 409 F.Supp.2d. 757 (U.S.D.C., E.D. LA, July 2005)

3. TORTS AND LIABILITY

(A) Maritime Tort Law

Leon Georgio and Jacques Sanborn were in a thirty-eight foot sport fishing boat which allided with an unlit, unmarked, “orphaned” oilfield production platform in the Gulf of Mexico. Both plaintiffs were injured in the accident and sued the State of Louisiana through the Department of Natural Resources alleging the state failed to light the platform and that was the cause of the allision. The site was at a structure put on State Lease 8342, granted to the Gulf Oil Corporation by the State Mineral Board on October 10, 1979. A release of the lease was recorded on April 3, 1994 after it had “expired by its terms.” The lease was declared “orphaned” on January 20, 1995. The state district court found the State of Louisiana 100% liable and the state appellate court affirmed. The Louisiana Supreme Court granted writs and reversed the decision. The Supreme Court found the state law principles of strict liability set forth in Louisiana Civil Code Article 2317 may apply as a supplement to remedies available under general maritime law because that article doesn’t conflict with the substantive general maritime law. However, because the

Supreme Court found the State of Louisiana neither owned nor had custody of the structure, the State had no duty to light it. Plaintiffs had failed to establish liability under Article 2317. Consequently, the lower courts' decisions to use state law as a supplement to maritime law was affirmed, but the actual application was reversed. *Giorgio v. Alliance Operating Corp., et al*, 921 So.2d.58 (LA Supreme Court, January 2006)

The STOLT ACHIEVEMENT, a chemical tanker, and the LINDHOLM, a dredge boat owned by Weeks Marine collided in the Houston Ship Channel. The District Court found both parties to be at fault and apportioned liability equally. Additionally, the District Court awarded each 50% of the damages claimed, plus Stolt received 50% of its loss of use damages. On appeal, the ruling was affirmed and the Fifth Circuit noted that the "superseding cause doctrine applies where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." The Court further noted that, "a subsequent negligent act does not excuse prior negligence except in most unusual circumstances." Since the acts in this case took place within a very small window of time, the parties shared fault. *Stolt Achievement, Ltd. v. Dredge B.E. Lindholm, et al*, 2006 WL 1011744 (5th Cir., April 2006)

4. MARITIME CONTRACT LAW

PMI entered into several contracts with various companies to provide workers for oil companies' rigs. Chevron and Matrix contracted with PMI and agreed to provide transportation for PMI workers from the shore to the rig. Chevron and Matrix also entered into contracts with SEACOR Marine, who owns and operates several vessels used on the Outer Continental Shelf, to provide supplies and personnel to the rigs. SEACOR, knowing it would be obligated to transport PMI employees, contacted PMI directly and required it to sign a "Vessel Boarding and Utilization Agreement Hold Harmless". On December 15, 2000, Donald Johnson and Gerald Hoffpauir (PMI employees) were injured while transferring from a Chevron platform. A third plaintiff, Donald Fleming, was injured on February 1, 2001. The plaintiffs brought suit against SEACOR. SEACOR filed third party complaints against PMI and Gray Insurance Company (PMI's CGL insurer). Eventually, all plaintiffs settled and the SEACOR/PMI and Gray issues remained.

Judge Lemelle in the Eastern District of Louisiana, Judge Doherty in the Western District of Louisiana and Judge Haik in the Western District of Louisiana were each assigned one of the cases and reached various decisions which were affirmed in part, vacated in part, and remanded. On appeal, the Fifth Circuit Court of Appeals found the vessel boarding agreement was supported by consideration and enforceable despite PMI's argument that the contract was unsupported by consideration because SEACOR owed PMI a pre-existing duty under its contracts with the oil companies to transport PMI employees to the oil platforms. Additionally, the contract for a vessel operator to transport laborers to offshore platforms is a maritime contract governed by federal maritime law. Consequently, the Louisiana Oilfield Anti-Indemnity Act does not apply to preclude enforcement of the indemnity terms. *Johnson v. Seacor Marine*, 404 F.3d. 871 (5th Cir., March 2005)

5. JONES ACT

(A) Duty to Warn

Eddie Patterson was a superintendent aboard the SOLITAIRE, the largest pipe laying vessel in the world. He was eventually transferred to the LORELAY where he was one of the highest ranking members of the crew, supervising approximately 75% of the four hundred crew members. He was also a member of the Vessel Management Team which was responsible for the safety of the ship. During an inspection, Patterson noticed standing water on the port crossover deck, and checked it later that day with the barge foreman, Jerry Williamson. After checking the water, Patterson was injured when he fell on the port stairway. At the time of the accident, Patterson was wearing wet boots and failed to use the handrails. Patterson sued the owner of the vessel and the U.S. District Court for the Eastern District of Texas awarded him damages finding the owner had failed to warn of the dangers of descending the port stairway in wet boots. The Fifth Circuit Court of Appeals reversed the decision finding the owner had not breached the duty to warn as Patterson, a main safety official, should have known the dangers associated with descending the stairway. *Patterson v. Allseas USA, Inc.*, 137 Fed.Appx. 633 (5th Cir., June 2005)

6. VESSELS

Rocky Cain, a toolpusher employed by Transocean, was assigned to work at the Singapore site building the *Cajun Express*, a semisubmersible drilling rig. The rig was eventually moved from Singapore to Grand Isle, LA. It was, at the time, capable of drilling for oil and gas in limited weather conditions, but had yet to be completed. Cain was injured on the vessel before it was fully complete—that is, the blisters were still being installed and the drilling systems were not yet commissioned. In a separate case involving an individual on the same rig who was injured a month after Cain, Judge Lemelle of the Eastern District of Louisiana relied on the Fifth Circuit precedent at the time and held that the *Cajun Express* was not a “vessel in navigation” because it was still under construction and had not yet begun performing its intended purpose. Immediately prior to Judge Lemelle’s decision, however, the U.S. Supreme Court decided the *Stewart v. Dutra Construction Co.* case which expanded the definition of “vessel”. Relying on the Supreme Court case, Judge James rejected Transocean’s contention that the *Cajun Express* was not a vessel in navigation because it was not “equipped, certified, or capable of performing the function for which it was intended, to drill for oil and gas” and that it was still under construction. Judge James found that the rig was a vessel in navigation because it was capable of being used as a means of transportation and, in fact, had transported seaman during its sea trials. The judge noted and discussed inconsistencies between the *Stewart* case and the Fifth Circuit decisions relied on by the defendant. ***Cain v. Transocean Offshore Deep Water Drilling, Inc., 2005 WL 1959147 (U.S.D.C., W.D. LA, August 2005)***

The United States Supreme Court held that the Rules of Construction Act defines the term “vessel” for purposes of the Longshore and Harbor Workers’ Compensation Act as including “every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” It need not be used primarily for that purpose, nor does it need to be in motion to qualify as a vessel. A watercraft that is not capable of being used for maritime transport in any meaningful sense because it has been permanently moored or otherwise rendered practically incapable of transportation or movement does not qualify as a “vessel”. The definition is the same for Jones Act purposes. ***Stewart v. Dutra Construction Company, Inc., 543 U.S. 481, 125 S.Ct. 1118 (U.S. Supreme Court, February 2005)***

The Fifth Circuit explored the issue of whether an unpowered floatable structure is a vessel for Jones Act purposes following the United States Supreme Court decision

of *Stewart v. Dutra Construction Co.*, 543 U.S. 481. Addie Holmes sued Atlantic Sounding Company and Weeks Marine after she was injured while working as a cook on the BT-213, a barge on the deck of which a two-story “quarters package” is mounted. The BT-213 was moved by tugs from place to place to house and feed employees during dredging projects. The entire crew consisted of two cooks and two janitors. There was no evidence presented which showed that they were transported on the BT-213 when it was moved. (For a listing of BT-213 features, see full case). The Fifth Circuit concluded that the Supreme Court’s definition of “vessel” for LHWCA purposes also applies to the Jones Act because the opinion referred to the Jones Act and the LHWCA interchangeably and did not, in any way, limit the definition to LHWCA cases only. The fact that the barge in this case had no means of self propulsion was of no moment to the Appellate Court because the Supreme Court did not decide the *Super Scoop* in the *Stewart* case was a vessel for that reason. In conclusion, the Fifth Circuit accepted “*Stewart’s* teaching that the class of water-borne structures that are vessels for LHWCA and Jones Act purposes is broader than we have heretofore held” and found the BT-213 to be a vessel. The Court also revisited its prior analysis in the *Gremillion v. Gulf Coast Catering Co.* case in light of *Stewart’s* teachings. ***Holmes v. Atlantic Sounding Co., et al*, 437 F.3d. 441 (5th Cir., January 2006–superceding opinion)**

Rodney Strong was a member of a Cardinal Wireline Services crew transported to the Amoco oil platform by utility boat to assist in plugging an oil well. The well was on the Outer Continental Shelf off the coast of Louisiana. A liftboat was jacked up next to the platform to provide additional workspace for the various operations at the well. When the Cardinal crew arrived, the deck of the liftboat was full of equipment from the electric line crew and the weather was deteriorating, so the Cardinal crew had to unload their equipment onto the cluttered deck. Because of the condition of the deck, the Cardinal crew members had to “swing” equipment to different locations from the liftboat crane. After they completed their wireline work, they again had to “swing” equipment to each other in an effort to replace the tools (testimony showed they proceeded in this manner due to the clutter and the placement of their tool boxes). At this point, Rodney Strong injured his back while swinging a “stuffing box” to his co-worker. Strong sued alleging the matter was governed by the Outer Continental Shelf Lands Act (OCSLA) and that the state law prescriptive period was tolled while he received benefits under the Longshore and Harbor Workers’ Compensation Act. B.P./Amoco moved for summary judgment arguing that federal maritime law

applied of its own force and that the three year statute of limitations barred Strong's claim. The U.S. District Court for the Western District of Louisiana denied the summary judgment and the decision was appealed. The Fifth Circuit Court of Appeals held that the liftboat, although jacked up and not "under sail", was a vessel on navigable waters. Further, maritime law has consistently been applied to a shipowner or charterer's failure to adequately satisfy the duty of care to those working on the vessel. As such, the Court rejected Strong's arguments that OCSLA applied because wireline work is generally considered non-maritime and that the liftboat was merely incidental to the wireline work done on the platform because it was additional workspace. *Strong, et al v. BP Exploration & Production, Inc., 440 F.3d. 665 (5th Cir., February 2006)*

Ashley Bunch worked as a barge cleaner at Canton Marine Towing's Missouri facility. The facility was actually a cleaning barge moored to the bed of the Missouri River. Bunch was ferried almost daily to Canton's Illinois facility aboard the Sir Joseph. The trip lasted approximately 20 minutes. The majority of Bunch's work consisted of cleaning third party barges. He did, however, work as a deckhand for approximately 10 days of the work year on the Sir Joseph. For purposes of summary judgment, the district court assumed Bunch spent, at most, 10% of his work time as a deckhand. The cleaning barge on which Bunch worked was originally built for navigation, but was now moored to the bed of the Missouri River by spud poles which vertically passed through the hull of the vessel and were embedded into the bed of the waterway. Strong currents would cause the vessel to shift, but it was not moved other than one time from the Illinois side of the River to the Missouri side. It did not have propellers and did not move by itself, but it did contain water pumps, vacuum tanks, cleaning tools, a generator, a CB radio, and a satellite.

Bunch was injured when he was climbing back aboard the Sir Joseph from a barge he was checking for cleanliness. He sued the defendants for damages under the Jones Act and the defendants moved for summary judgment claiming Bunch was not a seaman. The district court granted the motion finding Bunch did not have a substantial connection to a vessel in navigation. Bunch appealed arguing the cleaning barge was a "vessel in navigation". On appeal, the Eighth Circuit agreed with Bunch, holding the cleaning barge was a "vessel in navigation" for Jones Act purposes following the US Supreme Court's *Stewart v. Dutra Construction Co.* decision. The Court found the barge was not permanently moored, it floated; strong

currents would shift it periodically; and the barge was not taken out of service or rendered incapable of maritime transportation. The Eighth Circuit also noted, as has other courts, that a vessel is not defined by its capability for self-propulsion. *Bunch v. Canton Marine Towing Co, Inc.*, 419 F.3d. 868 (8th Cir., August 2005)

7. NAVIGABLE WATERS

When determining whether a maritime tort took place on navigable waters, the Louisiana Third Circuit Court of Appeals held that, “In Louisiana, waterways are navigable in law when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” Since the bayou where the boat owner was injured was, by its depth, width, and location, rendered available for commerce, it was a navigable waterway. *Trahan v. Teleflex, Inc., et al*, 922 So.2d. 718 (La.App. 3 Cir., February 2006)

8. INDEMNITY

Billy Hoda, an employee of Green’s Pressure Testing, was injured while working aboard a Rowan Drilling vessel on the Outer Continental Shelf. Hoda sued Rowan, which filed a third party complaint against Greene and Atlantic Insurance Company for defense. The parties had an indemnity provision which required Green to indemnify Westport and Westport’s contractors (Rowan) from claims by Green employees. The parties moved for summary judgment over the enforceability of the indemnity provision—the issue was whether the contract was non-maritime, which would invalidate the provision under the Louisiana Oilfield Anti-Indemnity Act, or whether it was maritime, which would allow enforcement of the provision under federal maritime law. As always, the issue turned on the specifics of the case. The Fifth Circuit affirmed the District Court’s decision finding the contract requiring the torquing up and torquing down of blow-out preventer stacks from a jack-up rig used as a work platform on the OCS constituted a maritime contract as that function was an integral part of drilling, which was the primary purpose of the vessel. The indemnity provision was enforceable under general maritime law. *Hoda v. Rowan Companies, Inc.*, 419 F.3d. 379 (5th Cir., July 2005)

Ingalls Shipbuilding contracted with Transocean Offshore to install various drilling modules aboard one of its vessels. In connection with the shipyard work, Transocean executed a Purchase Agreement with Pyramid Constructors, Inc. to design a derrick structure and install component parts. Transocean also entered into a Master Service Agreement with Craft Welding to provide services on the derrick. Nigel Broussard, an employee of Certified Employment Services, was working on the vessel at the time of the incident pursuant to a Contract Labor Agreement between Certified and Ingalls. Broussard sued Transocean and Transocean filed third party claims against Ingalls, Pyramid, Craft and other contractors. The contracts entered into required Transocean to be named as an additional insured on the comprehensive general liability policies, but Ingalls had failed to do so. Ingalls filed a fourth party complaint against Certified alleging it was obligated to indemnify and defend Ingalls for any liability it had to Transocean. On Appeal, the Fifth Circuit determined that the indemnity provision in which Certified agreed to indemnify Ingalls did not apply to a claim by Transocean that the shipyard breached its agreement to provide it with insurance coverage for the negligence claim asserted against it by Broussard. Additionally, Certified's liability insurer was not obligated to cover Ingalls' breach of contract even though Ingalls was named as an additional insured. *Ingalls v. Federal Insurance Co.*, 410 F.3d. 214 (5th Cir., May 2005)

9. JURISDICTION

(A) Admiralty Jurisdiction

A husband and wife on their honeymoon in Hawaii capsized their kayak. While struggling in the water, the wife was attacked by a shark and killed. The husband survived and washed up on land several hours later. An onlooker saw the kayak incident through his binoculars and contacted Coast Guard. The Coast Guard didn't contact the Honolulu office for approximately twenty minutes at which time the Operations Center sent a Coast Guard cutter out to investigate. The cutter conducted a brief search, but called it off early when darkness fell. The surviving spouse filed suit against the United States Coast Guard. On appeal, the Ninth Circuit held that the action fell within the Court's admiralty jurisdiction even though the allegedly negligent acts took place on land because (1) the injury occurred at sea and the accident (2) had the potential to have a disruptive impact on maritime commerce because the "efficacy of search-and-rescue operations has a direct effect

on the health and lives of seamen.” *Manouchehr Taghadomi v. United States of America*, 401 F.3d. 1080 (9th Cir., March 2005)

(B) In Rem Jurisdiction

Martha’s Vineyard Scuba Headquarters, Inc. located a shipwreck at the bottom of the Atlantic Ocean, approximately 50 miles south of Nantucket. The ship, which went down in 1909, was believed to contain several millions of dollars in precious cargo. Before undertaking the multi-million dollar task of raising the gold and coin, MVSHQ sought exclusive salvage right as salvor-in-possession of the shipwrecked vessel, and a preliminary injunction against others who were attempting to seize the opportunity. The “threshold question” presented to the Court was whether it had jurisdiction over a sunken vessel lying in international waters approximately 50 nautical miles from American soil. The District Court noted the lack of case law in the area and looked to the Fourth and Fifth Circuits for guidance. After deciding it would be impossible for anyone to bring the wrecked ship into the jurisdictional boundaries of any court, and recognizing that no salvor would undertake the enormous task of retrieving the goods without protection, the Court determined it had constructive *in rem* jurisdiction over the ship. The Court stated that, “constructive *in rem* jurisdiction is a legally sound solution to an otherwise irreconcilable dilemma.” *Martha’s Vineyard Scuba Headquarters, Inc. v. The Wrecked and Abandoned Steam Vessel R.M.S. Republic*, 2005 WL 3783838 (U.S.D.C., D. Massachusetts, July 2005)

10. LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT

The United States Department of Labor denied Longshore and Harbor Workers’ Compensation Act benefits to a widow after her husband’s death. The Benefits Review Board reversed the decision and awarded Mrs. Morganti benefits. The Second Circuit Court of Appeals affirmed the decision after (1) refusing to adopt the rule that waters may not be navigable waters of the United States because it would be economically difficult to profitably use them commercially; (2) declining to adopt a “transient and fortuitous” exception to the general rule that a person injured on actual navigable waters is engaged in maritime employment; (3) holding that a worker injured on actual navigable waters was an employee engaged in maritime

commerce for the purpose of LHWCA benefits even though he performed some data processing. This is so because the worker was actually present on navigable waters, was identified as an “engineer” and his activities were consistent with his status as an engineer; and (4) determining that a person on any object floating in actual navigable waters is considered to be on actual navigable waters, even though the object is not a vessel. *Lockheed Martin Corp. v. Morganti*, 412 F.3d. 407 (2nd Cir., June 2005)

Edward DiFidelto was awarded benefits under the Longshore and Harbor Workers’ Compensation Act. His employer, Delaware River Stevedores, petitioned for judicial review of the Benefits Review Board’s award, seeking relief for a period of time during which DiFidelto failed to report the earnings information requested by his employer. The sole issue before the court was whether the Delaware River Stevedores, Inc. had authority under 33 U.S.C. section 908(j) to require DiFidelto to report information regarding his earnings when it was not paying him compensation at the time of its requests. The United States Court of Appeals for the Third Circuit answered the question in the negative, finding the claimant was not required to respond to his employer’s requests for earning reports during the period when his employer had ceased paying compensation. *Delaware River Stevedores v. Edward DiFidelto*, 440 F.3d. 615 (3rd Cir., March 2006)

11. AMERICANS WITH DISABILITIES ACT

Several disabled individuals who purchased tickets for a round trip Norwegian Cruise Line trip from Houston sued NCL for violations of Title III of the Americans with Disabilities Act of 1990. The Fifth Circuit Court of Appeals held that Title III does not apply to foreign flag cruise ships in U.S. waters. The Appellate Court held that, absent a clear indication of congressional intent, general statutes do not apply to foreign flagged ships. The United States Supreme Court reversed the decision finding that foreign flagged cruise ships operating in U.S. waters were places of “public accommodation” and “specified public transportation” within the meaning of Title III. However, the barrier removal provision of the ADA—which was asserted in this case—would not apply if removal would bring the vessel into non-compliance with the International Convention for the Safety of Life at Sea or any other international legal obligation or if it would pose a direct threat to the health and safety of others. That is, the ADA is applicable except in cases where

application would apply with the ship's internal affairs. *Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169 (U.S. Supreme Court, June 2005)

Distinguished by: *Global Industries v. Pipeliners Local, et al*, 2006 WL 724815 (U.S.D.C., W.D. LA, March 2006) wherein the United States District Court for the Western District of Louisiana held that the National Labor Relations Act did not apply to a foreign flagged vessel because it was a law that pertained to the internal affairs of the vessel. Absent a clear statement of congressional intent, a law which pertains to the internal affairs of a foreign flagged ship will not apply.

12. GOVERNMENT

(A) Suits in Admiralty Act, Public Vessels Act, Federal Employees Compensation Act

A seaman employee of the United States was injured during the tow of a retired U.S. Navy vessel. He and his wife filed suit under the Suits in Admiralty Act and the Public Vessels Act against both the towing and transportation company and the private contractor that arranged for the tow. The towing company filed a third party complaint against the United States and the contractor, seeking indemnity or contribution. Contractor filed a cross claim seeking the same against the United States. The United States District Court for the Eastern District of Pennsylvania granted judgment on the pleadings for the United States. The Third Circuit Court of Appeals affirmed the decision finding that the United States' immunity from first party liability under the Federal Employees' Compensation Act precluded the right of contribution against the United States. Even though there is a substantive right to contribution in maritime law, it is dependent on the indemnitor's first party liability.

The Court determined that, to allow contribution from the United States, would undermine FECA's objectives. *In re: Petition of McAllister Towing and Transportation Company, Inc.*, 432 F.3d 216 (3rd Cir., December 2005)

The Third Circuit Court of Appeal overruled its prior decision in *Bovell v. United States Dep't of Defense* when it held that the Suits in Admiralty Act's two year statute of limitations is subject to equitable tolling in an appropriate case. The Court changed its position following the United States Supreme Court case of *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 which held that statutes of limitations

governing actions against the United States are subject to “the same rebuttable presumption of equitable tolling applicable to suits against private defendants.” *Hedges v. United States of America*, 404 F.3d. 744 (3rd Cir., April 2005)

Four girls who went over the gates of the Robert C. Byrd Locks and Dam while riding jet skis sued the United States under the Suits in Admiralty Act (SIAA). The district court granted summary judgment in favor of the government and the case was appealed. The Fourth Circuit Court of Appeals, en banc, held that the SIAA implicitly contains a discretionary function exception to its waiver of sovereign immunity. On remand, the District Court held that the Army Corps of Engineers’ decisions regarding the size, prominence, and readability of warning signs were not protected by the discretionary function exception; that the Corps had a mandatory duty to post conspicuous warning signs; and the Corps’ failure to warn could form the basis of a claim against the United States under the general principles of maritime law. *McMellon v. United States of America*, 395 F.Supp.2d. 422 (U.S.D.C., S.D. West Virginia, October 2005)

(B) SOVEREIGN IMMUNITY

Northern Insurance Company of New York filed an admiralty suit against the Chatham County, Georgia seeking damages from a collision between a malfunctioning County drawbridge and a boat insured by the petitioner. The District Court found that, although Eleventh Amendment immunity does not extend to counties, sovereign immunity extends to counties and municipalities that exercise power delegated from the State. The Eleventh Circuit affirmed the decision based on Circuit precedent. The United States Supreme Court reversed the decision finding that the County, which was not acting as an “arm of the State” for Eleventh Amendment purposes in its operation of the drawbridge, was not entitled to sovereign immunity from the admiralty suit. *Northern Insurance Company of New York v. Chatham County, Georgia*, 2006 WL 1071413 (U.S. Supreme Court, April 2006)

13. CARRIAGE OF GOODS BY SEA ACT

This case arose from damage to shipped goods. The shipper filed an *in rem* action against the vessel seeking to recover for damage to his cargo. Subsequent to the

vessel owner undertaking the ship's defense, the vessel owner added the stevedore who discharged the cargo as an additional defendant. After a default judgment was entered against the stevedore, the shipper added the stevedore's insurer as a defendant pursuant to the Louisiana Direct Action Statute. The District Court dismissed the insurer and dismissed the claim against the vessel owner. On appeal, the Fifth Circuit affirmed the decision finding the insurer demonstrated sufficient prejudice from the stevedore's failure to give timely notice of the shipper's claim against it so as to preclude the shippers' claim against the insurer pursuant to the LDAS. Additionally, the Appellate Court held that vessel was engaged in a private carriage of the coils, as opposed to a common carriage, and the voyage charter incorporated the Carriage of Goods by Sea Act. As the stevedore who damaged the cargo was an agent of the shipper, not the vessel owner, the exoneration provisions available shifted the liability to the shipper. Consequently, dismissal of the vessel owner was appropriate. *Thyssen, Inc. v. NOBILITY M/V, et al*, 421 F.3d. 295 (5th Cir., August 2005)

14. LIMITATION OF LIABILITY

John Soles suffered injuries to his spine, teeth, and body while working on a spud barge. He filed suit in Alabama state court against several named defendants (served on April 7, 2004) and three fictitious corporations, stating that the defendant corporations' real names would be added once he obtained them. The complaint alleged that Soles was injured on a spud boat owned, operated, and/or controlled by the defendants and contained several substantive allegations. Soles learned the name of the vessel owner during discovery and moved to amend his complaint on December 7, 2004. As it turns out, the owner of the vessel, P.G. Charter Boats, had a president and sole shareholder named Richard W. "Pud" Gazzier. Mr. Gazzier was a named and served defendant in the suit filed on April 7, 2004. P.G. did not claim that Mr. Gazzier was not authorized to receive written notice on its behalf. On May 7, 2005, the vessel owner filed a limitation of liability action in the district court. The sole issue before the Eleventh Circuit Court of Appeal was whether P.G., the vessel owner, received "written notice of the claim" within the meaning of 46 U.S.C. section 185, triggering the running of the six month filing period. The Appellate Court answered the question in the affirmative, finding the six-month period for filing a petition in federal court was triggered when Soles served the original state court complaint on Gazzier naming fictitious defendants who owned or

operated the vessel on which he was injured. *P.G. Charter Boats, Inc. v. John S. Soles*, 437 F.3d. 1140 (11th Cir., January 2006)

15. DAMAGES

(A) Punitive

Glen and Hilton Rebaradi were fishing from their skiff in the Atchafalaya River when a crew boat passed causing a wake that flipped the boat. The plaintiffs were thrown into the water and injured. They sued Crewboats, Inc., owner of the offending vessel, the captain, and several insurance companies who provided liability insurance. Among the claims asserted was one for punitive damages claiming the defendants' action "in the operation of its vessel, M/V SUN RUNNER, at the time of this accident were willful and reckless and exhibited callous and grave disregard for the rights of the plaintiffs and others in the vicinity of the accident site" and "constituted gross negligence within the meaning of general maritime law and under Louisiana law." The defendants filed a peremptory exception raising the objection of no cause of action, arguing that punitive damages were not recoverable under Louisiana law or the general maritime law. Judge Comeaux, of the 16th Judicial District Court, rendered judgment in favor of the defendants and dismissed plaintiffs' claims for punitive damages. The First Circuit Court of Appeals found that where the defendants' acts were willful and reckless and exhibited callous and grave disregard for the rights of others, and fishermen's action was neither a Jones act nor a Death on the High Seas Act case, punitive damages were not barred under *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). As no federal legislation touched upon circumstances presented in a case of reckless or willful acts, the punitive damages in this case were not barred by the *Miles* damages uniformity principle. *Rebaradi v. Crewboats, Inc.*, 906 S.2d. 455 (LA 1st Cir., February 2005).

16. SALVAGE

Salvor brought a motion to confirm an arbitration award in its favor for the salvage of a vessel and for an award of attorney fees. The Eleventh Circuit Court of Appeals affirmed the District Court's ruling denying the award of attorney fees. The Appellate Court found attorney fees could not be granted in an *in rem* action to

enforce a salvage lien because they were not part of the value of the salvage lien against the vessel and were not a measure of the labor expended by the salvor, the skill of the salvor, the value of the salving property, or the risk to the salvor or the property. *Offshore Marine Towing, Inc. v. MR23, et al*, 412 F.3d. 1254 (11th Cir., June 2005)

17. WRONGFUL DEATH

Jorge Figueroa, a seaman employed by GREG DANOS, was killed while attempting to tie off a vessel to a platform in March 2005. The platform was located approximately 30 miles offshore in the high seas. Figueroa's survivors filed suit seeking, among other things, punitive damages. The defendants argued that the action was governed by the Death on the High Seas Act (DOHSA) and that, under same, non-pecuniary damages are not recoverable. Judge Zainey of the Eastern District of Louisiana analyzed the matter and found that the plaintiff had no grounds to recover punitive damages under any theory. The Jones Act does not distinguish between deaths occurring in territorial waters and those on the high seas, but it does limit an action only to the seaman's employer. The DOHSA, on the other hand, applies to any party whose wrongful conduct resulted in the death of an individual on the high seas. DOHSA and the Jones Act both limit compensation to pecuniary loss only—DOHSA by statute and the Jones Act by jurisprudence. A third theory possibly available to the plaintiff would be a wrongful death claim under the general maritime law. A maritime cause of action for the wrongful death of a seaman, however, can not circumvent the statutory limitation on non-pecuniary recovery, according the U.S. Supreme Court in *Miles v. Apex*. Accordingly, the plaintiff had no avenue to pursue the collection of punitive damages. *In the Matter of Offshore Transport Services, L.L.C., et al*, 409 F.Supp.2d 753 (U.S.D.C., E.D. LA, July 2005)

18. CRUISE SHIPS

Ashley Harts filed suit against Carnival Corporation after she was allegedly raped by one of the ship's crew. Carnival moved for summary judgment arguing the action was time barred because the plaintiff failed to provide the full particulars of her claim within 185 days of the date of her injury and failed to file suit within 1

year as required under the terms of her Guest Ticket Contract. Harts argued the Contract's time limitations were inapplicable because she was a minor at the time she was injured and, as such, the 3 year statute of limitations for maritime torts should apply to the case. She sought protection under 46 USC section 183b(c) which states that "if a person who is entitled to recover on any such claim is mentally incompetent or a minor...any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of appointment of such legal representative provided, however, that such appointment be made within three years after the date of such death or injury." The Court held that Congress specifically used the present tense word "is" in the statute and, as Ms. Hart was not currently a minor, she could not seek section 183b(c)'s protections. The argument that Ms. Hart was a minor when she was injured and became "entitled to recover" did not sway the Court. *Harts v. Carnival Corporation*, 2005 WL 2455817 (U.S.D.C., S.D. FL, June 2005)

19. LIENS

MeesPierson, a Dutch banking corporation, entered into a loan agreement with Copropriete de Navire Shamrock, a French corporation, for Shamrock to construct a vessel. Eventually, Shamrock defaulted on the loan and Fortis (MeesPierson's successor) filed suit. In ranking the liens, the United States District Court for the District of Maine concluded that contributions owed to a public administrative body created by the French government to provide French crew members with health and life insurance coverage, as well as a pension, during the period of the vessel's arrest were not "wages of the crew" entitled to preferred ship status as a maritime lien under the Ship Mortgage Act because the contributions were owed to a third party, not the crew directly. *Fortis Bank (Nederland) N.V. v. M/V SHAMROCK, et al*, 379 F.Supp.2d. 2 (U.S.D.C., D. Maine, July 2005)

Motor-Services Hugo Stamp, Inc. filed for a maritime lien against the Regal Empress, alleging it had not been paid for services performed in its shipyard. MTN, a telecommunications and internet service provider for the ship, sought to have its equipment removed from the ship prior to its sale. MTN owned, operated, controlled, serviced, and maintained the equipment. The Eleventh Circuit Court of Appeals affirmed the District Court's determination that the equipment at issue was

appurtenant to the vessel because it was essential to the ship's mission. That is, telecommunications and internet services aboard a luxury cruise ship are essential. As such, the equipment was subject to the maritime liens asserted against the vessel. *Motor-Services Hugo Stamp, Inc. v. M/V. Regal Empress, et al*, 165 Fed.Appx. 837 (11th C., February 2006)

The shipping agent and stevedores brought an *in rem* action against a vessel for payment for services provided. They filed a complaint on February 7, 2003 seeking to have the vessel arrested. That same day, Topal Navigation Company, Inc., the owner of the vessel, deposited \$205,178.08 into the registry of the court in lieu of arrest. After judgment was entered in favor of the plaintiffs, the vessel appealed. On appeal, the vessel argued that the district court erred in awarding damages to Pacorini, one of the stevedores, because it had waived its maritime lien. The Fifth Circuit rejected this argument noting necessities suppliers enjoy a strong presumption that they have not waived maritime liens and a defendant must prove the plaintiff's clear and deliberate intent to do so. In this case, the Fifth Circuit found that Pacorini did not waive its maritime lien by filing a premature *in rem* suit, where it did not immediately seize the vessel, but instead notified the vessel representatives prior to suit, prompting them to post security and avoid arrest. Additionally, an arrangement under which the lead cargo interest agreed to guarantee payment to Pacorini for discharging the zinc portion of the liner out cargo was contingent upon Pacorini's inability to secure payment from an alternative source. This arrangement was not evidence of Pacorini's "clear and unequivocal" intent to rely exclusively on the credit or security of a cargo receiver to constitute waiver of a maritime lien. *Pacorini USA v. Rosina Topic M/V*, 127 Fed.Appx. 126 (5th C., March 2005)

20. EXCULPATORY CLAUSES

A boat owner sued a marina after his boat was vandalized and sank while in the marina's custody and care. The United States District Court for the District of Connecticut held that exculpatory clauses are not *per se* unlawful under maritime law and may be enforced under appropriate circumstances. The three relevant factors to consider when deciding whether to enforce an exculpatory clause in a marine contract are (1) the nature of the services covered by the contract; (2) whether the exculpatory clause is being applied to intentional, reckless, or grossly negligent behavior, rather than to ordinary negligence; and (3) whether exculpatory provisions were obtained through overreaching. The Court also held that a party to

a maritime contract should not be permitted to shield itself contractually from liability for gross negligence. *Dominici v. Between the Bridges Marina*, 375 F.Supp.2d. 62 (USDC, D. Conn., June 2005)

21. INTEREST

The Louisiana First Circuit Court of Appeals awarded 13 years of pre-judgment interest in a breach of contract case where the delay between the time at which the cause of action arose and the date of final judgment was not attributable in any great way to a lack of diligence in reaching a resolution, but was caused by a variety of circumstances including a delay in discovering the cause of the suit; the insurer's delay in filing suit; delay caused by pre-trial resolution of the company's claims against third parties; delays in filing post-trial depositions and memoranda; and disagreements as to computations in the proposed judgment. *Imperial v. PKB Scania, Inc.*, 2006 WL 400085 (La.App. 1 Cir., February 2006)

22. JURY TRIALS

Following a jury trial, the Fifth Circuit Court of Appeals reversed the jury's decision finding the plaintiff was a seaman and remanded the case to the U.S. District Court for the Western District of Louisiana for further proceedings on the LHWCA and negligence claims only. On remand, the District Court allowed the plaintiff to amend the complaint to assert a Rule (9)h declaration and the defendant appealed claiming it had a Seventh Amendment right to a jury trial. The Fifth Circuit affirmed the District Court's decision finding the defendant's right to a jury trial never arose as the plaintiff never asserted diversity jurisdiction, or any other basis of jurisdiction, which would provide Baker Hughes with the right to a trial by jury. The Court stated, "Despite Baker Hughes's rhetoric that because factual diversity exists, the right to a jury trial vests in Baker Hughes, it is well settled that the plaintiff is the master of his complaint, and Becker has the exclusive power to invoke diversity jurisdiction." Additionally, none of the plaintiffs post-remand claims provided such a right. *Becker v. Tidewater, Inc., et al*, 405 F.3d. 257 (5th Cir., March 2005)

