

UK P&I CLUB 

WINTER 2016/17

BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team

Medical Repatriation

Medical Case Management

Limitation of Liability

Pain and Suffering

Charity Golf Day

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

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Bodily Injury News

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

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

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

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

Another successful seminar



This year's Bodily Injury Seminar covered a variety of important areas relevant to both US and foreign flag shipowners. Twenty-five Members representing all vessel types, attended the seminar in our Jersey City office to listen to experts talk on: Limitation of Liability, How to Evaluate Pain and Suffering Damages, Crew Mental Health, Medical Case Management, and Medical Repatriation.

An afternoon break-out session tasked the different groups with putting a US\$ value on claim scenarios which the Club has previously handled. This highlighted how difficult it is to estimate bodily injury claims with all the complexity of the US jury system, the various heads of damages (particularly Pain and Suffering) to be taken into account along with consideration of available defenses and the possibility of contributory negligence. From the feedback we received, this once again proved to be a popular and valuable session which we plan to repeat at the seminar in 2017.

Play for Pink

We were delighted to see the maritime community come together at our annual Charity Golf Day in support of The Breast Cancer Research Foundation, and raise just under US\$120,000. Eighty-eight golfers did their best to replicate the form shown by the US Ryder Cup team the previous weekend, with the tournament won by Chaffe McCall from New Orleans, who will return to defend their trophy at next year's event. Many of the speakers and attendees at the BI Seminar also supported the golf outing either by playing or attending the dinner, where we had a total attendance of 130.

MLC Certificates

At the end of November, the Club advised of the application process for MLC Certificates for UK Club Members, which is outlined on the Club's website and Members may apply for MLC Certificates using the application form on our website, on a per vessel or per fleet basis. From 18th January 2017 all merchant ships of 500 gross tons or over flagged to a ratifying state and engaged in international voyages will need to show compliance by carrying a Maritime Labour Certificate and Declaration of Maritime Labour Compliance.

2017

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

Please mark your diaries for two events next October, firstly, our charity golf outing on Tuesday 3rd October 2017 at Forsgate Country Club, to be followed on Wednesday 4th October by our Bodily Injury Seminar to be held in our office in Jersey City. We hope to improve upon this year's amount of just under US\$120,000 raised for Breast Cancer Research, and are planning a special venue for the Bodily Injury dinner following the seminar. Further details to be advised in due course. ■

Mike Jarrett

President & CEO, Thomas Miller (Americas) Inc.

Caring for sick and injured seafarers on the move

From this year's Round Table Seminar, **Markus McMillin** recounts the insights and experiences of **Rowland Raikes** of London-based Medical Rescue International, acquired over 25 years of arranging medical repatriations.

Medical repatriation is the transportation home or to another medical facility of a seafarer following an accident or illness when medical personnel and/or equipment are required for the journey. There are two primary themes underlying medical repatriation. First is the welfare of the patient. Second is controlling costs.

Patient welfare

The medical condition of the seafarer is critical in determining whether he or she can be repatriated. Not only is advice obtained from the treating doctors as to whether the seafarer can be repatriated, but often other doctors who are specialists in the particular area of concern for the seafarer are consulted.

Other considerations include: is the prognosis for short- or long-term treatment? Are the medical facilities at the country of disembarkation, as well as those of his home country, suitable for the seafarer's treatment? If the seafarer's home country does not have medical facilities capable of handling his or her particular medical issues, is an interim destination available?

Depending upon the seafarer's medical needs, there are different methods of medical repatriation:

- Road
- Commercial aircraft, where the seafarer is seated, in a lie flat seat or on a stretcher
- Air ambulance
- With a nurse or doctor escort, or both
- With or without wheelchair assistance for commercial airlines
- With or without oxygen/artificial respiration.

A cast of thousands, (or ten)

Many parties are involved in the caring for and repatriating of sick or injured seafarers:

- Ship's Master and crew
- Crewing Department
- Ship's Agent
- The Club
- Club Correspondents in the country of disembarkation and home country



MEDICAL REPATRIATION

- Treating hospitals
- Medical case managers
- Medical assistance companies
- Seafarer's family
- Receiving medical authority or facility.

Managing the advice, recommendations, and concerns of all these different interests can be a challenging task.

Selecting a medical escort also hinges on a number of important considerations:

- Current location of the seafarer
- Nationality of the seafarer
- Nationality of the escort
- Availability of the escort
- Professionalism of the escort
- Ensuring escort is properly insured.

International politics can also play a role: Rowland gave one example where, clearly, the most qualified nurse escort should not assist because she was Israeli, and it was not advisable for her to travel to the seafarer's home country in the Middle East.

There is also often an economic motivation to medically repatriate seafarers if it can be done safely with no harm to the seafarer. Medical costs of overnight intensive care units can swing widely. It could be as low as US\$2,000 a night in Vietnam to US\$21,500 a night in New York. Medical repatriation costs can also vary significantly depending upon the needs of the seafarer. Air ambulances are commonly used in the most serious cases. Costs can differ greatly. For instance, an air ambulance from Dar Es Salaam to Johannesburg is about US\$20,000, but one from New Jersey to Manila can be almost US\$200,000. If a seafarer is critically ill, obtaining a waiver from the crewmember or next of kin for the medical repatriation on an air ambulance is advisable.

Jumping hurdles

The challenges to a successful medical repatriation can be numerous. Some common hurdles are: (1) family

involvement can sometimes complicate the seafarer's treatment and repatriation process; (2) the seafarer's condition is not as described (he or she is medically worse off than initially disclosed); (3) the seafarer can not obtain medical clearance to travel; (4) difficulty in obtaining commercial airline tickets for seats which will accommodate both the seafarer and escort; (5) the commercial airline refuses the patient either prior to arrival or upon arrival at the airport due to his/her medical condition; (6) the seafarer's condition deteriorates during repatriation. On this last issue, Rowland described an unsuccessful repatriation where extraordinary

measures were taken – and very high costs incurred – to get a seafarer home, just to have the person take a turn for the worse during travel and expire shortly after returning home.

In sum, there are a great many considerations involved in performing medical repatriations. Some cases can be relatively easy and inexpensive, while others can be quite complicated and costly – it all depends upon the seafarer's illness or injury, and the circumstances of each particular case. With the latter, neither the Club nor the Member could manage the process alone and we are grateful there are companies like MRI to assist. ■





The benefits of an “in-house” medical professional

When treating crewmembers, medical services can be difficult to monitor, not only to maintain proper treatment but also to contain rising costs, especially in the US. **Linda Wright** looks at the advantages of medical case management.

Many Members have seen case management companies use their medical professionals to confirm proper treatment is administered, while challenging costs of surgical procedures, lab tests and other treatments to keep expenses down. At the same time, the welfare of the crewmember is in focus, while working toward Fit for Duty (FFD), Maximum Medical Improvement (MMI), and Fit to Travel (FTT) statuses.

How is this accomplished?

At this year’s Bodily Injury Seminar, Julie Licari, Managing Director of Med Solutions International, presented an overview of the medical manager’s goals, explaining what monitoring a case involves.

There are three goals of a medical case manager (MCM):

- Work with Member and Club to monitor and manage injured/ill crewmember’s medical treatment
- Focus on treatment, to ensure welfare of crewmember
- Control costs by steering to a network facility, precertifying cost and care, prevent over-treatment, pursue Fit for Duty, Fit to Travel, and MMI

The initial notification of the incident often originates with notice from a Member, or their agent, or the Club. If an emergency situation originates on board a ship at sea, the urgent assistance of a tele-medical service may be

required. Some such services continue the case management once the ship arrives in port.

When an MCM has been notified of an incident, immediate notice (if not already made) to the Club is essential. After the required parties are alerted, the MCM coordinates with the ship agent to provide transportation to a medical provider, and to process the necessary medical visa during treatment.

The case handling factors considered by an MCM include medical facility selection – network hospital or clinic; guiding the exam, outlining medical needs/tests; and cost containment and precertification. There is an intervention in anticipation of

MEDICAL CASE MANAGEMENT

crewmember's arrival at the facility, to inform medical personnel of the details of the symptoms/incident, so they can coordinate care from the onset. This also establishes the MCM as an important member of the patient's care team, with access to medical information.

The registration and billing departments are provided with details to fast track the medical aid to the crewmember on arrival, and to offer billing instructions.

If the patient is admitted to the hospital, the MCM contacts the ER physician to determine the possible diagnosis based on the initial lab tests. Once a bed has been assigned, the attending physician, nursing station, hospital case manager, and social worker are all added to the list of contacts. Together they outline their roles for the treatment process.

Daily check-ins with the crewmember's medical team include updates on the following:

- Patient status, last 24 hours' events, and psycho-social comments
- Problem review
- Plan for next 72 hours
- Estimate date of discharge
- Goals for discharge – medical goals need to be met; anticipated discharge date; necessary medical follow-up/ waiting time after discharge for repatriation
- Probability of patient needing hotel/ other stay after discharge prior to repatriation
- Update of discharge criteria.

The Member should expect daily updates on medical status, at a minimum. Many times a life-threatening medical condition will require multiple updates throughout the day.

Often the crewmember has increased anxiety due to not only the medical condition, but being in a strange locale – not in their home state, or far from their country – with no family support. An MCM can manage these psychosocial issues by offering



supportive counseling and establishing close contact with the patient. Purchasing items of comfort for the crewmember like familiar food, calling cards, phones, etc. can reduce anxiety. If non-English speaking, a translator in their native language can give them a better understanding of their treatment, and assist in answering questions they may have.

The above information is available to both US and foreign crews. The only difference is post-hospital care. The foreign crewmember is repatriated once they are fit to fly, with any follow-up treatment continuing in their homeland. A US crewmember will be discharged and sent home for recuperation/rehabilitation. An MCM can continue monitoring the patient's care, with the emphasis on obtaining MMI status.

In summary, Ms Licari listed these following objectives for an MCM:

- Advocate for crewmember, Member and Club
- Conservative vs. surgical treatment
- Medical necessity determination
- Do not over treat
- Control the costs of medical treatment.

The MCM's ability to monitor the treatment and control costs is essential when there are serious injuries or illnesses to your crews. The Club has consistently seen the advantages of having an "in-house" medical professional providing service immediately when a case is opened. The people claims for Members are historically the most costly cases. The answer to providing quality care at more reasonable prices is to appoint a recommended MCM at the earliest opportunity. If you have any questions on appointing MCMs, please contact your Club account executive. ■

Getting back to basics – Limiting Liability

One of this year's BI Seminar topics was: Using Limitation of Liability in bodily injury and death cases, presented by **Wayne Meehan** of Freehill, Hogan & Mahar, New York. **Louise Livingston** highlights the key points.

What is the US Limitation of Liability Act?

A statute which permits an owner to limit liability where the loss or damage occurred without the privity or knowledge of the owner. [46 U.S.C. 30505].

Who can limit liability?

American or Foreign Owners can limit liability. Owner includes an entity which "mans, victuals and navigates the vessel." Owners include Bareboat Charterers and possibly managers.

Limitation complaint

A limitation action is commenced by filing a limitation complaint in Federal Court. The complaint first seeks complete exoneration from liability – a finding of no liability. Alternatively, if liability is established, the petition seeks a court order limiting the Owner's liability to the post-casualty value of the ship plus freight earned on the voyage.

However, a special provision of the US limitation act requires that for personal injury and death claims involving seagoing vessels, the minimum fund is \$420 per gross ton. Accordingly, a limitation fund in a bodily injury or death case is a minimum of \$420 per gross ton or the post-casualty value of the ship plus earned freight, whichever is higher.

Most Courts accept a P&I Club Letter of Undertaking as security for the limitation action.

Who proves what?

Claimants in a limitation action have to prove the Owner's liability on general

negligence standards. If the claimants fail to establish liability, the limitation case ends. If the claimants prove liability, the Owner must then show that the negligence causing the harm was outside the Owner's "privity & knowledge."

What is within an Owner's privity and knowledge?

A court will find privity and knowledge of the Owner if: a) the owner had *actual knowledge* of the negligence which caused the casualty; or b) *should have been aware* of the negligence through reasonable diligence.

Whose knowledge is relevant for limitation analysis? For corporate owners; the relevant knowledge is the knowledge of the individual responsible for the phase of the operation out of

which the loss or injury occurred. While a Master's knowledge is not normally attributable to an Owner, *for death and personal injury claims involving seagoing vessels, a Master's knowledge is attributable to the Owner.*

What are the benefits of filing a Limitation Action?

- All claims must be filed in the Limitation Action
- Eliminates the risk of multiple requests for security
- Possibly avoid jury trials
- Provides an effective settlement tool.

Next, specific cases were discussed to illustrate the considerations in deciding whether to file for limitation.



LIMITATION OF LIABILITY



Staten Island Ferry Casualty New York – 2003

The first example discussed was the Staten Island Ferry casualty in New York in 2003. The ferry ran into a concrete pier resulting in 11 deaths, several amputations, 2 people rendered quadriplegic and hundreds of other injuries. The facts were such that granting of limitation was unlikely, but the City of New York (as owner of the ferry) filed for limitation anyway. Why?

1. City faced multiple claims and there was a substantial saving in legal fees by filing for limitation since the City only had to fund one litigation.

2. By filing, Owners established federal admiralty jurisdiction, which provided an argument that there was no right to jury trials. The judge decided in Owner's favor and held that plaintiffs were not entitled to a jury trial, which resulted in significant savings, both in terms of settlements and in the verdicts in the cases which were tried.

3. There were many non-maritime attorneys involved in the case, and based on the threat of limitation, Owners were able to settle many of the serious claims at extremely favorable levels.

Bright Field – New Orleans – 1996

In December 1996, the M/V Bright Field was proceeding downriver, lost power and slammed into the Riverwalk Mall. In addition to property damage and business interruption claims, Owners faced hundreds of bodily injury claims. Again, the facts were such

that Owners faced an uphill battle in establishing the right to limitation. Nevertheless, Owners decided to file for limitation anyway. Why? For many of the same reasons why it made sense to file for limitation in connection with the Staten Island Ferry case discussed above.

An additional consideration and benefit was: By filing for limitation, all of the claims went forward in federal court rather than in state court in New Orleans. The federal judge set up a scenario whereby the damages were decided by magistrate judges. The claims were segregated into categories (e.g. by types of injury or proximity to the accident site, etc.) Once the magistrate judges placed values on representative cases, the balance of the claims were settled consistent with the magistrates' awards. Having the cases go forward before magistrate judges in federal court rather than state court, New Orleans resulted in significant savings in terms of damage awards.

Bow Mariner – Explosion off Virginia Coast – 2004

The last case which was discussed was the M/T Bow Mariner, a tanker which exploded approximate 50 miles off the Virginia coast. The ship was a total loss and 21 crewmembers were killed. At first blush, this appeared to be a case where it made sense to consider filing for limitation. After some consideration, a decision was made not to file for limitation. Why? – because of the circumstances, there was little to gain from filing for limitation, but by filing, Owners would have been inviting claims and litigation.

Owners faced bodily injury and death claims, and a claim by the US government for environmental damage. But, limitation would not have been particularly helpful with these claims. Many of the crewmembers were Filipinos, and the majority of the bodily injury and death claims were going forward pursuant to the POEA in the Philippines. Moreover, for bodily injury and death claims, the minimum limitation fund was approximately \$9.5 million (based on the requirement of \$420 per gross time). Owners did face a substantial claim for environmental damage as a result of the release of fuel from the vessel; however, under OPA 90, claims for environmental damage due to the release of oil are not subject to limitation. On the other hand, if Owners had filed for limitation, the court would have issued a deadline within which all claims had to be filed. The net result is that by filing for limitation, Owners would have invited the filing of claims and Owners would have immediately been in litigation in the US, facing all the time and expense which that entails.

Owners elected not to file for limitation, but rather, aggressively pursued settlements. All of the claims were resolved within 6 to 9 months of the date of the incident, and since there was no US litigation, the legal fees and expenses were minimized.

The lesson is that while limitation can be a very effective tool, it is not for every case, and whether to file should be decided on a case-by-case basis. ■

Wayne Meehan is a partner in the firm of Freehill, Hogan & Mahar, LLP, a maritime law firm based in New York City. He graduated from the US Merchant Marine Academy and sailed as a deck officer on US-flagged vessels before graduating from Boston University School of Law. Wayne has more than 30 years experience of handling all types of marine claims. He has developed a particular expertise in handling marine casualties. Among other cases, he handled the Caribbean Sea collision with DUKW 34 (July 2010), M/V Bow Mariner (February 2004), State Island Ferry Casualty (October 2003) and the M/V Bright Field (December 1996).

Evaluating pain and suffering

How do shipowners and their lawyers evaluate the pain and suffering component of a bodily injury claim, and how best to defend against them? **Dee O’Leary** and **Noreen Arralde** asked **Jerry Hamilton**, of Hamilton, Miller & Birthisel in Miami, to explain and advise.

Since pain and suffering damages do not directly reflect economic loss, judges and juries have wide discretion in making awards for pain and suffering, making them very difficult to evaluate. The likeability of the plaintiff is an important factor in evaluating pain and suffering claims. Does this plaintiff present well? Will the judge and jury find this plaintiff to be likeable and believable? Will they sympathize with the plaintiff’s circumstances? These factors must be considered when deciding how to value claims for pain and suffering.

Pain and suffering: What does it include?

Awards for pain and suffering can include compensation for:

- Physical pain and suffering
- Disability and disfigurement
- Mental anguish and anxiety
- Loss of enjoyment of life

There is no exact standard for measuring pain and suffering damages. Awards are generally measured by the

notion of “fair and reasonable.” The amount should be “fair and reasonable in light of the evidence.” Judges typically instruct juries as follows:

“In light of the evidence, you may award damages for any bodily injury sustained by plaintiff, and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity of the enjoyment of life, experienced in the past, or to be experienced in the future.”

Pain and suffering: When can it be awarded?

Pain and suffering awards made at trial include both past and present pain and suffering. Juries are asked on the verdict sheet to make an award for pain and suffering “in the past” and a separate award for pain and suffering “in the future” based upon the evidence presented. The award for past pain and suffering encompasses from the point of injury through the date of the award. The award for future pain and suffering encompasses from the date of the award through the plaintiff’s life expectancy, or through the date which the jury finds the pain and suffering will continue.

Pain and suffering can be awarded in settlements, awards at trial, as well as in arbitrations. At trial, the pain and suffering award may be influenced by plaintiff’s medical bills, which may be presented as gross figures without any reduction for third party payments. Juries will generally not know whether insurance paid any portion of the medical bills and may also not know the amounts which were actually paid, as opposed to the amounts which were billed. These “boarded medical expenses” can greatly increase pain and suffering awards.





Life care planners can also greatly increase pain and suffering awards. These so-called experts are used by plaintiffs to bolster claims for future medical expenses and personal needs.

Pain and suffering: Is there a formula?

Historically, a general rule for pain and suffering awards in cases involving liability was “three times specials” or three times the plaintiff’s actual economic losses. However, this rule was found to have shortcomings because doctors involved in litigation often inflate medical bills, and a formula such as this ignores other important factors which may decrease (or increase) the plaintiff’s entitlement to an award.

Many plaintiffs will ask juries for a “per diem” amount for pain and suffering. In this way, plaintiff presents a low daily payment, which seems reasonable to a jury, but when multiplied by the number of days in the plaintiff’s life expectancy becomes a huge number. Most states allow a plaintiff to suggest a per diem amount, although some states (such as New York) prohibit suggesting any figure for pain and suffering to the jury.

Rather than a rigid formula, one should consider the following factors when trying to value the pain and suffering component of a claim:

- Injury
- Medical expenses
- Impact on quality of life
- Impact on employment prospects
- How plaintiff presents as a witness
- Verdict and settlement research
- Defendant’s reputation in the community where the case will be tried.

The injury

Juries tend to award higher amounts for injuries with high impact evidence, such as broken bones, surgery and brain injuries. Juries tend to believe these types of injuries cause real pain and suffering. Juries tend to award lower amounts for soft tissue injuries and injuries which are entirely complaint-based. This is particularly true when there is no visible impact. In these type of cases, juries also tend to scrutinize the medical records more carefully.

Not surprisingly, juries tend to make the highest pain and suffering awards in cases involving paralysis, amputation and significant scarring. These cases have the highest impact evidence and, therefore, the highest value. Juries can recognize the obvious impact on a person’s life.

Medical expenses

Past and future medical bills guide the

pain and suffering award. Here is where the impact of doctors hired for litigation purposes can really drive up the value of a claim.

Impact on quality of life/ employment prospects

The impact of the injury on plaintiff’s activities of daily living, job prospects, relationships, and family are all relevant when evaluating pain and suffering claims. Although juries are instructed against sympathy, they are more likely to make large pain and suffering awards to plaintiffs who can demonstrate the injury caused their life to become, essentially, worthy of sympathy.

Verdict/settlement research

Past awards and settlements in similar cases can be a useful guide, although awards for the same injury can vary widely, even within the same jurisdiction.

Defendant’s reputation

If the incident giving rise to the claim gained notoriety, the defendant may find itself subject to unfair bias by the judge and/or jury. The same is true if the defendant has an unsavory reputation in the community. Contrarily, if the defendant enjoys a good reputation in the community, it may find a jury is less likely to hit it with a large pain and suffering award.

Pain and suffering: What does the future hold?

Jury awards for pain and suffering in the United States tend to be ten times greater than average awards in Europe. This has led to a push for tort reform to impose a cap on pain and suffering awards. Today, 29 states impose some type of limit on pain and suffering damages. Some would argue that even in those jurisdictions with a cap on pain and suffering awards, the cap is too high. Nonetheless, it is a start.

Conclusion

As can be seen above, valuing cases involving substantial claims for pain and suffering can be very difficult. The Club is always here to assist. ■

Play for Pink

Just under \$120,000 was raised for charity when Thomas Miller (Americas) Inc. held its annual Charity Golf Day at Forsgate Country Club, New Jersey, on 4th October.



Expertise and experience

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

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

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

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

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