UK P&I CLUB

SUMMER 2017

BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team

Arbitration of non-US seaman's contracts

Shipowner's duties to longshoremen

Judge versus jury

Death on the high seas

Mental well-being of seafarers

Washington State Court expands punitive damages

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 any of the Bodily Injury Team.

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

Collective expertise

Welcome to this summer edition of Bodily Injury News that reports on some of the latest legal and practical developments observed by our Bodily Injury Team here in the US. In this issue, Dee O'Leary and Dan Tadros look at the validity and enforceability of arbitration clauses in foreign seamen's contracts. Noreen Arralde explains the 11th Circuit Court of Appeals recent decision upholding the view that a shipowner's duties to longshoremen are governed exclusively by Section 905(b). Julia Moore examines the District Court's interpretation of trial evidence is not grounds to overturn a jury verdict in shipowner's favor, and Linda Wright takes a look at death on the high seas, revisiting Genevieve Holloway's instructions on what to do if a crew member dies onboard.

The Year in Review

In this year's Review of the Year 2017, the Club advised Members of four collisions with fishing vessels. All involved fatalities to the crew of the fishing vessels. The primary reason for these collisions appears to be the failure of the bridge teams involved to maintain a proper look-out, in particular, a proper radar look-out. Masters and their bridge teams are reminded that the navigation of fishing vessels tends to be less predictable than that of larger merchant ships. This is not such an issue for larger fishing vessels but the navigational behaviour of smaller fishing vessels can be more erratic. With this in mind, the Club's Loss Prevention department has produced guidance aimed at helping navigators identify different fishing methods, what to be aware of when approaching fishing vessels, and what is likely to be visible from the bridge of a large merchant vessel. Please see the UK Club website under the publications tab.

Also noted in the Review of the Year, the cost of cargo and personal injury claims has remained broadly consistent over recent years, and together, typically account for half of the total claims notified to the Club.

Still playing for pink

In 2016, we were delighted that so many of the maritime community joined us for our annual charity golf day in support of The Breast Cancer Research Foundation, eighty-eight golfers raised just under US$ 120,000. We hope that our 2017 event will raise even more funds for the foundation. This year's annual charity golf outing will be on Tuesday 3rd of October 2017 at Forsgate Country Club in Monroe Township, New Jersey. Anyone interested, please contact Susan Pietri at susan.pietri@thomasmiller.com.

Sharing expertise

The Bodily Injury Seminar has become a regular fixture in the calendar. This year's seminar will follow on from the Club's Play for Pink day, and will be on the 4th at the TMA New Jersey Office. The seminar is aimed at both US and non-US based operators, and is always well attended by a cross section of the Club's Members. We will continue the single day format and will combine legal updates, strategies for handling cases as well as practical exercises.

A formal invitation with the topics to be covered will be sent shortly. If you are interested in attending, please email cherrine.creary@thomasmiller.com. ■

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

Striving for validity

Significant numbers of non-US seamen continue to try to link their cases to US jurisdictions due to the perception that this jurisdiction is more likely to provide a favorable result. Senior Claims Executive **Dee O'Leary** and Attorney **Dan Tadros** look at the validity and enforceability of arbitration clauses in foreign seamen's contracts.

Many UK Club Members have clauses in their contracts with their foreign crewmembers that provide for arbitration of a dispute, instead of litigation. The Federal Arbitration Act ("FAA") provides that a written provision in a maritime transaction or contract evidencing an agreement to settle by arbitration a controversy arising out of such contract or transaction shall be valid, irrevocable, and enforceable…(9 U.S.C. Sect. 2)

Generally speaking, Arbitration clauses are enforceable provided:

- The agreement to arbitrate is written
- The agreement provides for arbitration in a territory of a Convention signatory
- The agreement arises out of a commercial relationship
- A party to the agreement is not an American citizen, or the contract contemplates performance abroad.

Provided the above four conditions are met, U.S Courts will have jurisdiction over claims falling under the Convention. Claims subject to the Convention are removable to Federal Court and a US District Court may order that arbitration be held in accordance with the agreement. Despite this, many foreign crewmembers still try to bring a lawsuit in the US.

Dan Tadros, a partner at Chaffe McCall in New Orleans, explains below how a Louisiana Court got it right in a recent case he handled for a UK Club Member.

The United States District Court for the Western District of Louisiana twice rejected a foreign seaman's challenges to the written arbitration agreement incorporated into his employment contract.

In *Shah v. Blue Wake Shipping,* the Plaintiff, an Indian citizen, was allegedly injured while working as an ordinary seaman onboard a vessel that was transiting the Pacific Ocean. The sole connection of the case to the United States was the foreign-owned and foreign-flagged vessel's fortuitous call in the Port of Lake Charles, Louisiana. Moreover, Plaintiff's employment contract incorporated in full the terms of the Collective Bargaining

Agreement ("CBA") executed between the vessel's operator and the Singapore Organisation of Seaman, of which Plaintiff was a member. The CBA provided for arbitration in Singapore of any dispute arising therefrom:

6. REFEREE
In the event of any dispute or disputes arising out of the operation of this Agreement, the dispute or disputes shall be referred by either party to the President of the Industrial Arbitration Court who may select a referee appointed under section 43 of the Industrial Relations Act to hear and determine such dispute or disputes.

Notwithstanding this arbitration agreement, Plaintiff filed suit in Louisiana state court under the Jones Act, the US general maritime law and the laws of Singapore. The vessel owners timely removed Plaintiff's lawsuit to the US District Court for the Western District of Louisiana, pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Plaintiff sought remand to state court, disputing the incorporation of the CBA into his employment contract and the arbitrability of his claim.

The district court rejected Plaintiff's challenges to the arbitration agreement. Both the Magistrate Judge and the District Judge held that the lawsuit had been properly removed under the Convention and that the district court had federal question jurisdiction. Accordingly, Plaintiff's motion to remand was denied.

Shortly thereafter, Plaintiff filed a second motion to remand the case to state court, alleging that his efforts to initiate arbitration in Singapore had been unsuccessful. The Magistrate Judge denied Plaintiff's motion for a second time, confirming that the matter should be resolved by the method designated in Plaintiff's employment contract and the incorporated CBA.

This result is a notable victory for vessel owners, who often have to defend foreign seamen's personal injury claims in US courts and under US law, despite the fact that there is hardly any connection between the incidents giving rise to the claims and the United States. What is more, this decision is valuable precedent in favor of the validity and enforceability of arbitration agreements in foreign seamen's employment contracts. Such agreements in advance, to a forum acceptable to both parties, provide much needed certainty in the resolution of truly international maritime disputes.

The issue of the validity and enforceability of arbitration clauses in seamen's employment contracts continues to spur litigation in US courts. The outcome of each case might vary according to factors such as the exact wording of the arbitration clause, the manner in which the CBA was incorporated into the seaman's employment contract, and the competence of the designated arbitral tribunal to hear the dispute. ■

Daniel A. Tadros (tadros@chaffe.com; 504-585-7054) and Alan R. Davis (davis@chaffe.com; 504-585-7088), Chaffe McCall, LLP, were the attorneys for the owners in the above-captioned case. Chaffe McCall has been a correspondent for the UK Club for many years. They handle all types of maritime matters, including marine casualties, personal injury, marine insurance, maritime liens, carriage of goods and oil pollution/environmental criminal matters.

905(b) or not 905(b)…?

Senior Claims Executive **Noreen D. Arralde** explains the Eleventh Circuit Court of Appeal's recent decision upholding the view that a shipowner's duties to longshoremen are governed exclusively by Section 905(b).

The Eleventh Circuit Court of Appeals, which has appellate jurisdiction over the states of Alabama, Florida and Georgia, recently decided a case involving the death of a longshoreman and in its decision, the court affirmed the limited nature of shipowners' duties to longshoremen. In prior editions of this publication, we have explained that the US Congress amended the Longshore and Harbor Workers' Compensation Act ("the Longshore Act") in 1972 to provide an increase in the statutory benefits longshoremen receive from their employers, and in exchange abolished the ability of longshore workers to sue vessel owners for a breach of the warranty of seaworthiness. Under Section 905(b) of the Longshore Act, the vessel's liability is based on a narrow negligence standard, as opposed to unseaworthiness.

Limited basis

The standard to find the vessel liable for injuries to longshoremen under Section 905(b) of the Longshore Act was pronounced by the United States Supreme Court in 1981 in the *Scindia* case. Since *Scindia,* courts have generally held that in order to recover for vessel negligence, a longshoreman must prove a breach of one of these three duties:

- Turnover Duty
- Active Control Duty
- Duty to Intervene

Longshoremen are considered to be "expert and experienced" in their field. The burden is on the longshoreman-plaintiff to prove breach of a narrow duty by the vessel-defendant. Courts generally focus on the conduct of the plaintiff as opposed to the defendant.

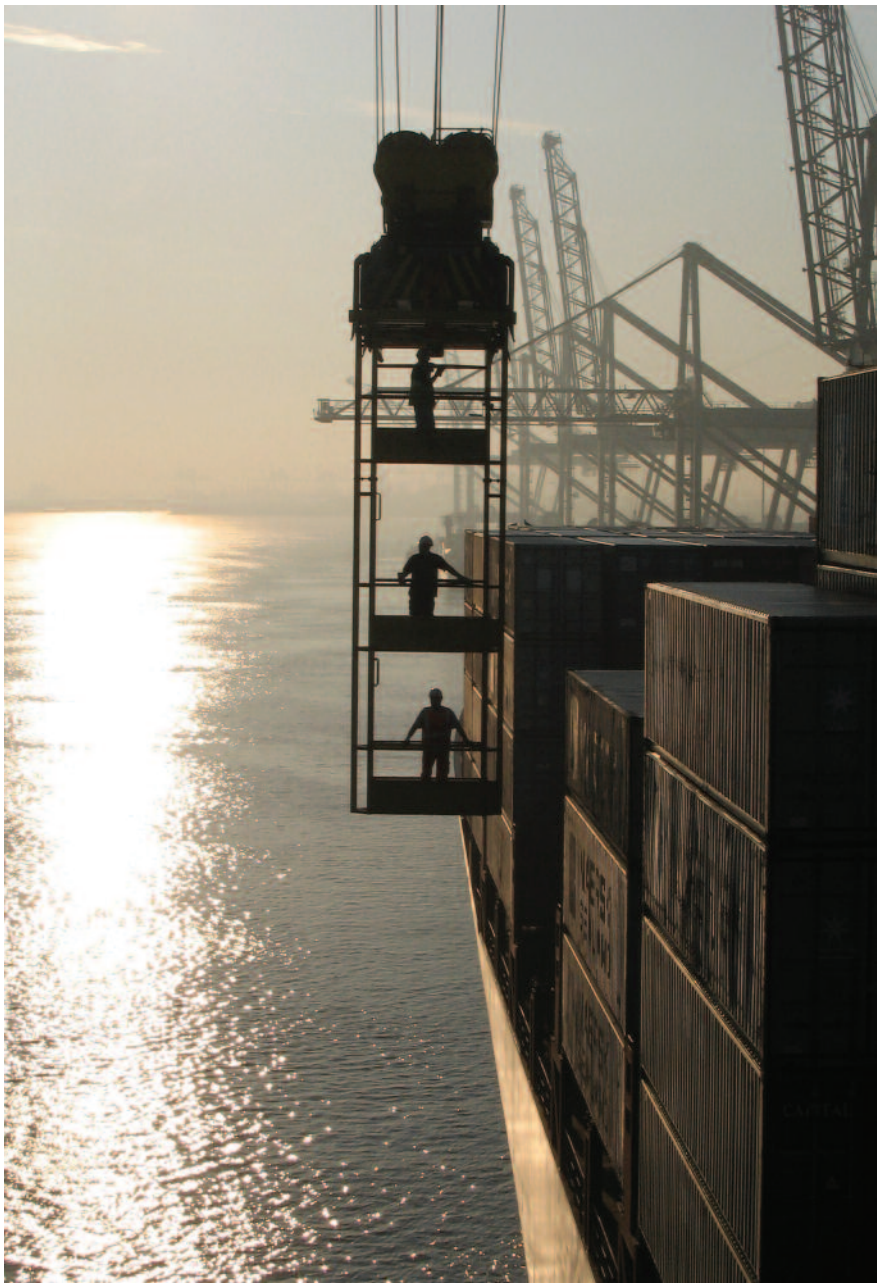
Section 905(b) is longshoremen's only means of recovery against vessel

In a decision the Eleventh Circuit issued in December 2016, the court held that Section 905(b) is the sole means by which longshoremen may recover against a vessel for injury or death caused by negligence. In *Seaboard Spirit, Ltd. v. Hyman,* plaintiff argued that the vessel should have been subject to dual liability – as a vessel under Section 905(b) – and also as a stevedore under Section 933, since the vessel owner also employed longshoremen. The standard for imposing liability on stevedores under Section 933 of the Longshore Act is understandably much lower than that imposed on vessels under Section 905(b) since the objective of the Longshore Act amendments was to shift responsibility to the party best able to prevent injuries: the stevedore.

Hyman was a longshoreman employed by a stevedore company who was fatally injured when he was crushed between a moving vehicle and the stern ramp of a ro-ro vessel. It was alleged that the vessel's crew performed stevedore duties and plaintiff argued, therefore, that the vessel should be subject to separate liability under the heightened duties imposed on stevedores in Section 933, as well as the duties imposed on vessels by Section 905(b). The court held there was no precedent for holding a shipowner subject to independent liability under both Section 905(b) and Section 933, and it declined to do so.

Dual capacity doctrine did not apply in these circumstances

The court noted that the dual-capacity doctrine arises in Longshore Act cases when longshoremen are employed by vessel owners. In such cases, longshoremen retain the right to workers' compensation benefits from their employer-shipowner *and* the right to sue the employer-shipowner for vessel negligence, but the claims for vessel negligence are subject to the Section 905(b) standards articulated in *Scindia*. The dual capacity doctrine is an anomaly which permits a longshore-employee to sue his shipowner-employer for vessel negligence, while also collecting workers' compensation benefits.[1]



As the court noted, Hyman was not employed by the vessel; he was employed by a stevedore company. Therefore, the Eleventh Circuit held the dual capacity doctrine did not apply and plaintiff's sole remedy against the vessel was governed by Section 905(b). Plaintiff was not able to establish a breach of the vessel's *Scindia* duties on the facts of the case since it had been established at trial that the proximate cause of the accident was either "Hyman's decision to position himself in the pinch point" between the vehicle and the ramp or "miscommunication between [the driver] and Hyman coupled with Hyman's position in the pinch point."

District Court created uncertainty which Eleventh Circuit has now resolved

After the trial, the district court had stated that its findings as to the cause of the accident did not limit any future causes of action against the shipowner as stevedore. This statement by the district court led to the appeal which resulted in the Eleventh Circuit's holding that Section 905(b) is the sole means by which longshoremen may recover against a vessel for injury or death caused by negligence. The issue appears resolved, for now, by the Eleventh Circuit's decision. ■

[1] There is a lien for workers' compensation benefits paid, which prevents double recovery in these dual-capacity cases.

Bob Blanck of the firm Blanck, Cooper & Hernandez, the UK Club's correspondent in Miami, tried the case to the district court and argued the appeal to the Eleventh Circuit.

Judge versus jury

Senior Claims Executive **Julia Moore** examines the District Court's interpretation of whether trial evidence might be grounds to overturn a jury verdict.

A recent decision by United States Court of Appeals for the Sixth Circuit, *Ghaleb v. American Steamship Company, slip op.* No. 16-1076 (6th Cir. March 31, 2017), 2017 U.S. App. LEXIS 5645, illustrates why maritime bodily injury litigation in the United States has a reputation for being unpredictable. In *Ghaleb,* a jury unanimously found in favor of the shipowner on a crewman's bodily injury claims. Despite the verdict, the district court judge overturned the jury's decision and entered judgment for the plaintiff. The shipowner appealed and, in a split decision, the court of appeals reversed the district court and reinstated the verdict. The *Ghaleb* decision reaffirms the general rule that a judge cannot substitute its judgment for that of the jury, but it also reveals how the same evidence and testimony could have been interpreted differently to support the opposite conclusion.

The *Ghaleb* decision arose out of suit for bodily injuries allegedly sustained by Abdulmonke Ghaleb ("Ghaleb") while working aboard a tug and barge owned by American Steamship Company ("ASC"). The incident occurred while the tug and barge were being separated for winter lay-up and the barge was being connected to a shore-side power source using a large, heavy electric cable. The cable needed to be lowered from the barge to an electrician on the dock and the maneuver required four crewmen, including Ghaleb, working under the direction of the Chief Engineer. At some point, Ghaleb was directed to tie a heaving line to one end of the cable so the heaving line could be tossed to the electrician on the dock. While Ghaleb was engaged in this task, one of the crewmen slipped on ice on the deck and dropped the power cable, causing a second crewman to drop the cable, which then slid along the deck into Ghaleb's heels and knocked him down. Ghaleb allegedly sustained personal injuries as a result and he subsequently filed suit against ASC claiming Jones Act negligence, unseaworthiness and negligence *per se* based on ASC's violation of a work-hours statute regulating the vessel.

Substituted judgement

At trial, Ghaleb presented testimony and business record evidence that he and the other crew involved in power cable maneuver had exceeded the statute's work-hours limits. Importantly, neither the crewmember who dropped

the cable, nor the Chief Engineer, testified that fatigue was a factor in the incident and, despite having the burden of proof, Ghaleb presented no evidence on fatigue other than the fact that the crew had violated the statute. After nine days of trial, the jury returned a unanimous verdict in favor of ASC and rejected Ghaleb's claims entirely, including the negligence *per se* claim. Ghaleb then filed a motion for judgment as a matter of law on every claim seeking to set aside the jury's verdict. The district court denied the motion with respect to the claims of negligence and unseaworthiness but granted the motion on the negligence per se claim, overruling the jury's verdict and finding that there was no explanation for the incident other than a lack of "immediate and wakeful readiness," i.e. fatigue, which the district court presumed to exist by virtue of the statutory violation and despite the fact that Ghaleb presented no evidence that fatigue caused the incident. In essence, the district court substituted its judgment for that of the jury and created its own theory of recovery for Ghaleb. ASC appealed and the Sixth Circuit Court of Appeals reversed the district court decision and reinstated the jury verdict in ASC's favor.

A reasonable jury?

Starting with the settled proposition that a court can only set aside a jury verdict in favor of a plaintiff when the evidence "overwhelmingly" supports the plaintiff's claim, the Sixth Circuit conducted a meticulous review of the evidence in order to determine whether Ghaleb had proved that his accident was caused by fatigue and that no reasonable jury could have concluded otherwise. The appeals court then determined that Ghaleb had *not* presented adequate evidence that fatigue alone was the legal cause of the incident. Therefore, since a reasonable jury could have found that the incident was a faultless accident, or would have occurred without regard to fatigue, it was error for the district court to substitute its judgment for that of the jury, even if the district court's theory was "plausible" and even if a different jury might have found for Ghaleb. While the appeals court acknowledged that fatigue, hypothetically, might affect a crewmember's performance and could contribute to almost any mishap, the trial court did not have the authority to set aside a jury's verdict in the absence of any evidence that crew fatigue *actually* contributed to the incident: "[w]hether Ghaleb established fatigue's role in his accident *as a matter of law* comes down to a counterfactual: could a rested sailor have slipped or dropped a cable? Because he could, Ghaleb had the burden to convince a jury that fatigue actually contributed to that happening here. Unfortunately for Ghaleb, he failed to do so."

Significantly, the appellate court's decision was not unanimous and the dissenting judge vigorously argued that the direct and inferential evidence supported Ghaleb's position that the hours worked were extreme, the cable was heavy and, therefore, fatigue had to play a role in causing the incident. The dissent argued that the "minimal" evidence of causation allowed under the Jones Act compelled a conclusion that plaintiff had proved his negligence *per se* claim. Using the same evidence relied upon by the majority, the dissent posited that no reasonable jury could have found that the incident would not have occurred in the absence of fatigue. Although it was not enough to sway the final decision, the dissenting judge's analysis prompted the majority to remark that Ghaleb "had a decent case" and might have won with a different jury hearing the same evidence. ■

Death on the high seas

Linda Wright and **Genevieve Holloway** advise Members on what to do with the body when death occurs at sea.

When the unexpected death of a crewmember occurs at sea, steps must be taken to preserve the body and show respect for the deceased and their families. Appropriate contact with family members by shoreside personnel is important and proper procedures for handling the body must be implemented, which is particularly critical if the ship is days or weeks from arriving at a port where the body can be disembarked. The Club has the following advice for its Members regarding handling of the body.

Don't place the body in the freezer

It is a common misconception that the best course of action to preserve a dead body is to freeze it. However, when a body is frozen, the tissues dehydrate and the body develops freezer burn, causing the skin to discolor. This can make it impossible for family members to recognize the deceased and, to the extent relevant, may make interpretation of any pre-mortem injuries difficult. Efforts should be made to minimize distress to family members, who will clearly be going through a very difficult and emotional time.

Rapid freezing of bodies can also cause post-mortem injury, including cranial fracture. Handling bodies when they are frozen can also cause fracture, which will negatively influence the investigation and make the medico-legal interpretation of the examination results difficult.

Also, if frozen, it takes about three days for the body to thaw before an autopsy can take place, and the body will decompose much more quickly than if it had been refrigerated. There is, therefore, a danger of losing vital information if the body is frozen instead of refrigerated.

Store the body in the refrigerator

If it is anticipated that the body will not be stored on board for longer than two months, then the body should be refrigerated at 4° Celsius/39° Fahrenheit. In the unlikely event that a body is to be stored on board for longer than two months, then freezing or embalming may be necessary. Of course, the Club should be involved in all decision-making should it be necessary to store a body onboard for a lengthy period of time.

Whenever possible, the body should be retained and preserved for post-mortem examination and for burial ashore by the family. For the sake of the deceased person's relatives, preserve the body in the best possible condition. The body should put into a body bag and kept in a refrigerator or cold store, which will have to be set aside for that purpose. The aim is to store the body at approximately 4°C/39° Fahrenheit.

Family and crew concerns

Following a death at sea, there will likely be emotional responses from family and fellow crewmembers. Once the family has been notified of the death, there may be religious or cultural customs requested. However, at sea, there are limited resources available to implement all requests for traditional death customs. Members should make every attempt to satisfy the family's requests, while communicating with the Club to determine coverage confirmation. If possible, it may be beneficial to have a priest, minister, or grief counsellor visit with the crew upon arrival at a port, particularly in cases of suicide.

Disposing of the body at sea is disfavoured, unless there is a specific request from the family in writing.

Death at sea is difficult for crewmembers and family ashore. The respect and preservation of the remains, while maintaining traditional customs, is an effort to which all parties aspire. With Club and Member cooperation, we can accomplish a process to ensure a dignified death in the event of unexpected death of a crewmember. ■

Mental well-being of seafarers

Managing the emotional well-being of crew at sea is as important as their physical health. But are we paying enough attention?

Loneliness, isolation and fatigue – these are usually the answers seafarers give when asked how they feel in their job. Being thousands of miles away from home and loved ones, it is no surprise that a seafarer's life can be a lonely one. The hostile environment, with low, or no, social interaction, can easily bring about depression and mental health issues.

For many seafarers, forming relationships on-board can be very difficult, and a clash of personality and culture types can be unavoidable, particularly when spending such long periods of time confined within a restricted space.

In 2013, Swansea University in the UK undertook research, which showed that between 2001 and 2005, merchant seafarers scored the second highest level of suicides amongst all professions, after coal miners. Today, the rate of suicide for international seafarers is triple that of shore workers, according to the International Maritime Organisation (IMO).

Despite such high suicide rates within the industry, seafarers' mental well-being is seen as a taboo subject, and is a poorly discussed issue. Due to a high level of prejudice and poor education about tackling mental health and its implications, seafarers are not likely to seek counselling or professional support, and this often leads to grave consequences.

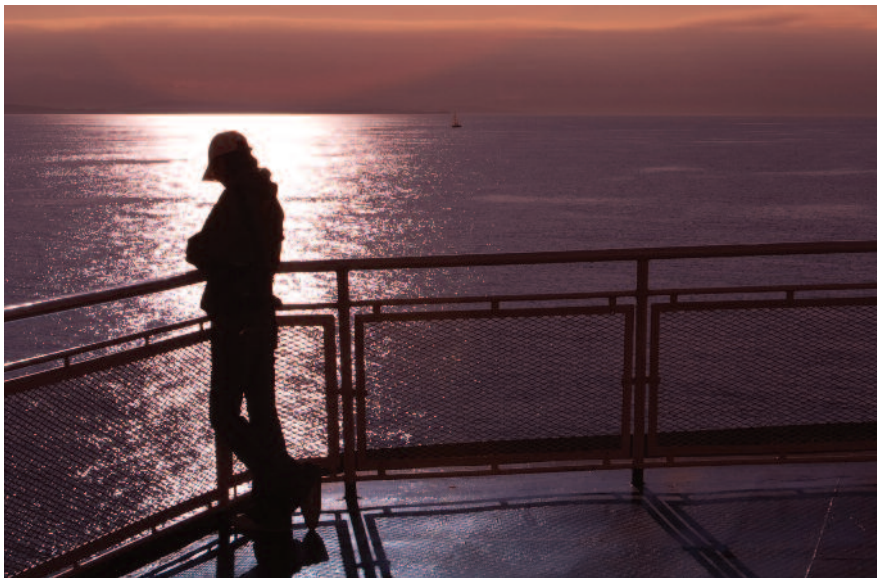
What are the risk factors?

- Stress
- Poor attention to mental health
- Fatigue
- Isolation

Suicides are preventable

- Early intervention is key
- Encourage social engagement
- Provide adequate rest periods
- Foster positive work environment

Seafarers are known to be more likely to suffer from mental health problems than their shore-based colleagues. This shouldn't really come as a surprise to anyone as the demands of modern shipping mean longer periods away from home with little shore leave.



Five steps to better mental health

1. Communicate and be more open. If you are struggling, let someone know!
2. Healthy body, healthy mind – try to take at least 15 minutes of exercise a day e.g. circuits.
3. Take some time to yourself – take some time for yourself each day to wind down.
4. Focus on the positive – be thankful for at least one thing every day.
5. Avoid social isolation – connect with your fellow crewmembers! Speak to someone you haven't necessarily got to know yet and learn a new fact about them.

Further support is available from ISWAN's Seafarer Help and the Sailors' Society Wellness at Sea App. ■

SeafarerHelp is the free multilingual helpline for seafarers and their families, available 24/7, 365 days a year. Contact us via any of the methods below, whatever the problem, wherever you are in the world, and we will do our best to help you.

SMS: +44 (0)762 481 8405
Skype: info-seafarerhelp.org
Live chat: www.seafarerhelp.org
Email: help@seafarerhelp.org
Call collect on +44 (0)207 323 2737

The Sailors' Society free Wellness at Sea App provides interactive challenges on each of the five elements of Wellness at Sea: Social, Emotional, Physical, Intellectual and Spiritual. Users receive daily feedback enabling them to monitor their progress. Android and iPhone compatible. For more information, visit www.sailors-society.org/wellness

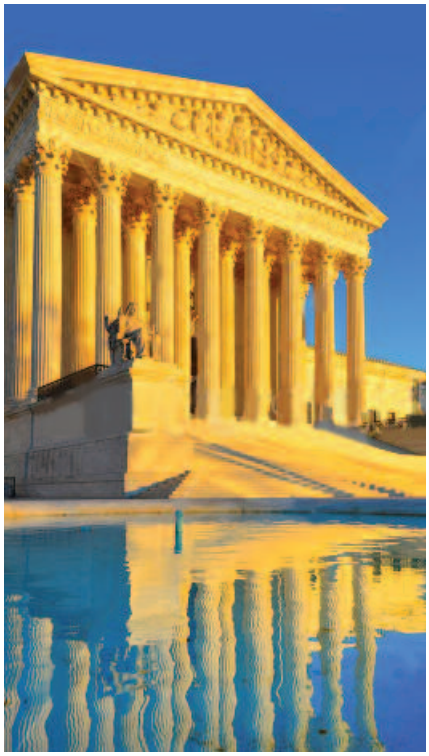
Courts in conflict

The Washington State Supreme Court expands punitive damages in unseaworthiness claims. We examine the implications for our Members

As regular readers of BI News know, since the 2009 decision in *Atlantic Sounding Co. v. Townsend,* 557 U.S. 404, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009) [See BI News Winter Edition November 2009], in which the US Supreme Court permitted the recovery of punitive damages for a shipowner's willful failure to pay maintenance and cure, lawyers representing injured and sick crew have sought to expand punitive damages to Jones Act and Unseaworthiness claims. [See BI News May 2011].

On March 9, 2017, the Washington State Supreme Court held that a seaman making a general maritime law unseaworthiness claim can recover punitive damages as a matter of law. In *Tabingo v. American Triumph, LLC* (Washington Supreme Court No. 92913-1, March 9, 2017) the plaintiff was working as a deckhand trainee aboard a fishing trawler owned and operated by American Seafoods Company. He was on his hands and knees near the hatch's hinge gathering the remaining fish to put through the hatch to the deck below. The deck hand started to close the hatch but realized Tabingo's hands were close to the hatch and tried to stop the hatch closing. The hydraulic hatch control handle was broken and the hatch closed on Tabingo's hand resulting in the amputation of two fingers. Tabingo claimed the shipowner knew about the broken hydraulic hatch control handle for two years before his accident but failed to repair it.

Tabingo filed suit against the shipowner asserting claims for Jones Act negligence and unseaworthiness under the general maritime law. He included a claim for punitive damages for the unseaworthiness claim. Before any factual discovery had been done, the shipowner filed a motion to strike the punitive damages claim relying on the Fifth Circuit decision in *McBride v. Estis Well Serv, LLC,* 768 F.3d 382 (5th Cir 2014) which held that punitive damages were not recoverable in general maritime law claims. The Washington State trial court agreed with American Seafoods finding and dismissed Tabingo's punitive damage claim.



Tabingo filed an interlocutory petition and the Washington State Supreme Court accepted direct review of the trial court's decision. The Court generally following the three part analysis in *Atlantic Sounding,* and held that Tabingo could seek punitive damages because claims for unseaworthiness and punitive damages had existed in the common law for a long time; the common law tradition of punitive damages extended to maritime claims; and, there is no evidence that unseaworthiness claims were excluded from the general admiralty rule allowing punitive damages.

Of particular interest is that the Court went on to determine that under Washington State Jurisprudence, punitive damages may be available in Tambingo's case. After reciting the long history of courts providing seaman special protections as wards of admiralty, the *Tabingo* Court concluded that under Federal law, punitive damages may be available for anything from *reckless* to malicious conduct. The Court continued holding that assuming the truth of Tabingo's allegations that the hatch handle had been broken for a period of two years (creating an unseaworthy ship), such conduct could fall into the realm of reckless or malicious behavior justifying an award of punitive damages.

Though the *Tabingo* decision is binding precedent only in state courts in Washington, claimants will rely on the decision as persuasive authority in Federal and state courts throughout the United States.

What is most troubling is the lowered standard of conduct to reckless which is less egregious than willful, intentional or malicious. Thus, the overall effect of this decision will be routine allegations of reckless conduct to support a claim for punitive damages for unseaworthiness. Because the determination of what is reckless conduct is a fact issue, it will be less likely for a defendant to prevail on a motion for summary judgment on the punitive damages issue.

With this *Tabingo* decision, there is now a clear conflict in the general maritime law between a State Supreme Court and the Fifth Circuit Court of Appeal. It is possible that the United States Supreme Court could grant a Petition for a Writ of Certiorari to decide the issue. As of the time of writing the employer has not filed a Petition for Writ of Certiorari. ■

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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Linda joined Thomas Miller (Americas) in May 2010. Previously, she was a P&I Club correspondent on the Pacific West Coast for 29 years.