UK P&I CLUB

US Bodily Injury News

NOVEMBER 2009

Managing costs in partnership

Focus on Member service, together with financial strength and security, is central to the UK Club's business strategy. One of the key areas is the relationship with the suppliers of legal services across the world, but particularly in London and the US.

Back in 2002 Thomas Miller (Americas) Inc decided to adopt a network of Preferred Attorneys around the United States. Three workshops were held at that time with the Preferred Attorneys to introduce the concepts of the Value for Money program. The network was established on the basis that work would be given to the Preferred Attorneys unless the particular expertise required was not available or the Club Member had a preference outside the network.

In October 2009, Thomas Miller (Americas) Inc. invited its network of Preferred Attorneys to Value for Money presentations in New Jersey and San Francisco. Forty-two attorneys from the U.S. East and Gulf Coasts attended the three hour presentation in New Jersey, and a week later twenty-two attorneys from the U.S. and Canadian west coasts attended a similar presentation in San Francisco. The presentations were designed to reinforce Value for Money principles and best practices including early case assessment, strategic budgeting and invoicing guidelines. The senior managers who made the presentations emphasized the importance of the relationship between the Clubs' Members, Thomas Miller claims executives and our Preferred Attorneys. Feedback from the attorneys who attended has been overwhelmingly positive.

Fees paid to external suppliers of claims handling services are the Club's largest expense after the expenditure on claims settlements themselves. Skilful management of lawyers' services will improve the value for money delivered to Club Members.

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

ALSO IN THIS ISSUE

- COLLATERAL ESTOPPEL
- DEPOSITIONS
- PUNITIVE DAMAGES
- MEDICARE REPORTING
- TEXAS 3RD PARTY PRACTICE

Mandatory arbitration of foreign seaman's wage claim upheld

The US Court of Appeals for the Ninth Circuit ruled that a wage claim by a foreign seafarer against his employer for service on a foreign vessel is subject to arbitration. In the instant case, plaintiff Philippine seafarer brought suit against defendant cruise line alleging violation of the Seamen's Wage Act.

Defendant cruise line's motion to compel arbitration in the Philippines was granted by the federal district court and plaintiff appealed. The order compelling arbitration was upheld by the appellate court, which ruled that federal law favors arbitration and that the collective bargaining agreement between with seamen's labor union and the cruise line comported with the requirements of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and federal law. *Balen v. Holland America Line*, No. 07-36011

The 13-page opinion is available at: www.ca9.uscourts.gov/datastore/opinions/2009/10/02/07-36011.pdf.

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Lawyers are an important part of the service delivered to Club Members as a result of the geographical and jurisdictional challenges facing shipowners in the Americas. They are frequently involved in the higher profile cases. Thomas Miller's initiatives in this area are concentrating on maintaining the standard and increasing the productivity of the relationships.

Among the aspects of claims handling which Thomas Miller Americas and the Club have pursued to achieve continuing improvements in productivity, there are two which are particularly significant in managing legal fee spend and ultimately the impact of bodily injury claims on Members' records.

Firstly the selection and evaluation of appropriate lawyers to ensure only those best equipped to deal with cases are instructed. The two key areas of specialisation are the technical aspects of the case e.g. navigational claims, bodily injury cases or contractual arrangements, and the knowledge and experience of the relevant jurisdiction or body of law.

Secondly, Thomas Miller Americas will be developing fee structures with preferred law firms that align their interests with those of the Members and the UK Club. Whilst the hourly rate is likely to remain the main basis for charging it is not ideal and by definition can reward inefficiency.

Our program focuses on reward structures that concentrate on early cost-effective settlements where appropriate and, ultimately, a reduction in the total dollars paid as the process becomes more efficient.

In the wider area of improving performance across all suppliers, the Club and Thomas Miller Americas are using technology to reduce the administrative costs of the legal purchase process and to help managers evaluate the productivity of providers. OASIS, the claims file system used by the P&I claims executives, helps monitor and control the process more effectively.

The Value for Money (VfM) program was established in 2002 to improve the management of the Club's suppliers. However, recent commercial and financial pressures on shipowners have further reinforced their demand for improved productivity from the resources they have invested in both general Club services and those specific to their claims.

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

Collateral estoppel

We all have heard of "serial plaintiffs", those who seem to be injured on every ship or jobsite they work and do not hesitate to bring a lawsuit to recover for their injuries. Those suits routinely demand recovery of damages for loss of future earning capacity. But if a plaintiff recovers for loss of future earnings in one lawsuit, can they recover the same damages in all future lawsuits? Karen Hildebrandt shares her recent experience.

Karen Hildebrandt recently handled a claim where a seaman alleged he sustained personal injuries during the course of his employment aboard a Member's vessel after two weeks of employment. He brought suit in the Texas Federal Court demanding recovery for various items of damages including loss of future earning capacity.

Defense counsel learned during discovery that the plaintiff had brought at least two previous lawsuits against other shipping companies, wherein he claimed, and recovered for, loss of future earning capacity.

In the first lawsuit, the case was tried resulting in an award for future lost earnings. Evidence in the case included the seaman's treating physician testifying the seaman could not return to work at sea because of the physical requirements of the job as well as his economist testifying as to his future economic loss. The decision was appealed by the shipowner who noted the award for future lost wages was based on false testimony as the seaman had already returned to work as a seaman. However, the appeals court affirmed the judgement.

The second lawsuit was settled prior to trial. The settlement agreement signed by the parties specifically set out an amount for loss of future earning capacity. Counsel handling the Member's defense filed a motion for partial summary judgment arguing that the legal theory of collateral estoppel applied and the seaman cannot recover for loss of future earning capacity as he had already litigated and recovered for same in two previous cases.

Collateral estoppel, also known as issue preclusion, is a legal doctrine which prevents the relitigation of the same issue in subsequent lawsuits once an issue has been determined by a court. Counsel argued that the issue of loss of future earning capacity is identical to the issue litigated in the two previous actions, in that plaintiff was again claiming he would be unable to return to his previous employment as a seaman and sought a determination of his future earning capacity.

The issue of future economic loss was fully litigated during a 4 day trial as well as an appeal. As counsel argued, to allow the seaman to again litigate a claim for future loss of earning capacity could result in a potential triple recovery for the seaman and encourage litigious behavior, unfairly prejudicing the Member.

Unfortunately the judge did not issue a separate written decision solely on the motion. He considered the motion during the trial of this case, which resulted in a defense verdict. However, the Bodily Injury Team is on the lookout for similar cases where the issue of collateral estoppel can again be raised by motion and hopefully favorably decided.

Karen Hildebrandt

Karen was a partner at a leading maritime law firm before joining TM(A) in May 1998. She specializes in bodily injury claims.

Depositions in the United States – do we really have to?

Why sworn affidavits just won't do. Louise Livingston explains why it is a necessary and important inconvenience.

Overseas Members are often puzzled and frustrated by the obligation to produce a witness for deposition in the United States.

Many courts outside of the United States permit evidence to be given by a witness in the form of a sworn statement or affidavit. This is typically a document prepared by the attorney for the party offering the affidavit to say precisely what is needed and to attach helpful documents.

While sworn affidavits are permitted in certain situations in litigation in the United States, for example in support of motions, they are by no means an exclusive method of presenting evidence. The reason sworn statements are not favored in the United States is because there is no opportunity to ask questions of the witness.

The Federal Rules of Civil Procedure (which apply to all civil actions in the United States District Courts) and state rules of civil procedure have provisions which require a party to a lawsuit to produce a witness for deposition in the place where the lawsuit is pending. The parties may, however, agree to a different location.

Failure of a party to produce witnesses for deposition can lead to a court imposing monetary sanctions in the form of attorney's fees and costs to travel elsewhere for a deposition. A court may also order issue sanctions against that party. For example, if a foreign defendant fails to produce a witness to testify about business records, that defendant may be barred from introducing those records into evidence at trial.

A deposition is usually oral testimony taken under oath before a certified short hand reporter. The proceeding is similar to court testimony but takes place in a less formal setting usually in a conference room or ship's office. The witness is generally allowed to take breaks and consult with his or her attorney during the course of the deposition. They are sometimes also recorded by video and are increasingly taken by videoconference.

The oral testimony is transcribed by the court reporter into a booklet of questions and answers. The witness is given a limited period of time, usually 30 days, within which to review and correct any errors in the transcribed testimony. If no corrections are made, the transcript is deemed complete.

It should be noted that changes in testimony such as "yes" to "no" or "light" to "dark" and other similar substantive changes can be used to attack a deponent's credibility at trial. That is why almost every attorney who prepares a witness for deposition will repeat the mantra: "Listen to the question"; "Think about the question"; "Make sure you understand the question"; and, "Only answer the question, do not volunteer information." The only caution that is repeated more often is, "tell the truth."

Depositions are most frequently used as investigative tools in the context of the discovery phase of a lawsuit. They are sometimes referred to as discovery depositions. Generally the scope of the questions an examining attorney can ask is very broad. As a result what may seem to an inexperienced witness to be irrelevant or even impertinent questions will usually be allowed by a Judge if they are reasonably calculated to lead to the discovery of admissible evidence.

Discovery depositions allow each party to find out what a witness personally knows about a particular incident; to test whether they are reliable and credible witnesses, i.e., where they were positioned, what was their sight line, were they wearing their glasses, etc. Such depositions also allow each side to find out about other witnesses and other evidence with bearing on a particular incident. Those depositions are usually known as depositions of percipient witnesses. Percipient witnesses will include deck and engine officers and crew, port captains, port engineers.

Often a Member is asked to send a master or chief engineer to the United States to sit for a deposition. This is usually very difficult to arrange especially if the officer no longer works in the Member's organization or is away on holiday. Coaxing a vacationing officer to travel to the U.S. where they might fear being arrested for the alleged incident, can be quite challenging. Moreover, the Member faces additional travel and hotel expenses among other costs. While it may be expensive and inconvenient, it is usually far less expensive than to send their lawyer overseas and possibly paying for opposing counsel's lawyer as well as a court reporter from the U.S. to where the witness lives unless a number of other witnesses can be deposed at the same time.

Depositions are also used to examine witnesses about business records and documents including accident reports, Safety Management Systems, etc. This includes questions about how and why records are kept and who is responsible for maintaining them. They can often be used to establish the evidentiary foundation for certain business records that a party may wish to introduce at trial. This type of deposition is sometimes known as a business records deposition or a "Person Most Knowledgeable" deposition. It is for this type of deposition that many Members, most of whom are defendants in a lawsuit, are required to produce seemingly uninvolved employees for testimony.

While usually an investigative tool, in many jurisdictions in the United States if a party can establish the witness is unavailable to testify at trial (usually because they cannot be served with a trial subpoena), their deposition testimony may be read into the court's record as if that witness were testifying at trial.

Depositions can also be used to preserve oral testimony for use at trial, for example, when a ship's master for a foreign shipowner will not be available to testify at trial due to his or her sailing schedule. Trial testimony is often preceded by a discovery deposition to find out what a witness knows so that direct or cross examination for use at trial can be prepared.

Depositions can often be the turning point or one turning point in how each side views their own case. If a deposition goes extremely well for a defendant, strengthening their defense, the lower the settlement value they may place on the case. Conversely, if a deposition goes very poorly for plaintiff, it might spur prompt settlement discussions.

The key factor in oral depositions, as opposed to the less frequently used deposition upon written questions, is the opportunity for each side to probe the witness' knowledge, evaluate their ability to testify as a witness at trial and have a formalized dialogue with the witness thus allowing each party the maximum opportunity to learn what a particular witness knows. The ultimate goal with depositions among other discovery tools is that there are no surprises at trial.

Louise Livingston

Louise was a partner at a San Francisco maritime law firm, specializing in bodily injury claims. She joined Thomas Miller in March 2002. Louise is the leader of the TM(A) Bodily Injury Team.

Atlantic Sounding Co. Inc. v Townsend

David McCreadie & Eddie Godwin put this case in context on punitive damages for the wilful failure to pay maintenance and cure.

In *Atlantic Sounding Co., Inc. v. Townsend*, the U.S. Supreme Court addressed a Circuit Court split that existed regarding a seaman's ability to recover punitive damages for the willful and wanton failure to pay maintenance and cure. Although the Supreme Court was deeply divided regarding the issue (the vote was 5-4), ship owners are now subject to an award of punitive damages for the willful and wanton failure to pay maintenance and cure.

The case itself arose out of Mr. Townsend's trip and fall incident aboard a tug. When Mr. Townsend asserted that the fall injured his shoulder, the employer sent Mr. Townsend to a local clinic for medical treatment. Allegedly dissatisfied with the "looks" of the clinic, Mr. Townsend refused medical treatment and unilaterally decided to leave the tug and return to his residence in Florida.

Within days of the accident, the employer filed a declaratory judgment in federal district court to determine whether Mr. Townsend's alleged desertion from the vessel and other corporate policy violations constituted a defense to the payment of maintenance and cure. Mr. Townsend responded by filing a counterclaim and a separate lawsuit that alleged Jones Act negligence, general maritime unseaworthiness and maintenance and cure. As part of his maintenance and cure claim, Mr. Townsend requested punitive damages for the willful failure to pay maintenance and cure.

Approximately one month later, the employer paid all of Mr. Townsend's outstanding maintenance and cure on a "without prejudice" basis. Notwithstanding the employer's decision to resolve the maintenance and cure demand, Mr. Townsend continued to pursue his punitive damages request and attempted to conduct discovery on the finances of the employer. Mr. Townsend's attempts to obtain sensitive information from the employer resulted in the filing of a motion to strike Mr. Townsend's claim for punitive damages based upon the argument punitive damages were unavailable as a matter of law.

The employer's argument was based upon federal appellate court decisions that denied the recovery of punitive damages in a maintenance and cure case based upon the logic utilized by the Supreme Court in *Miles v. Apex Marine Corp*.

Specifically, the argument asserted that common law courts should not expand the remedies for seamen beyond those allowed by Congress when it enacted the Jones Act in 1920. And, because punitive damages are not available under the Jones Act, punitive damages should not be available to seamen in a general maritime law maintenance and cure claim.

The district court refused to address the merits of the employer's argument because the binding appellate court (the Eleventh Circuit Court of Appeals) had previously held that punitive damages were available in a maintenance and cure case. As a result, the employer relied upon a valuable tool to request interlocutory review of important questions of law: a 28 U.S.C. § 1292(b) designation.

Section 1292(b) designations are a procedural device that allows a party to immediately appeal an issue to a federal appellate court as long as the issue (a) involves a controlling question of law, (b) there is a substantial ground for difference of opinion, and (c) resolving the question of law materially advances the termination of the litigation.

The district court granted the interlocutory appeal, but the Eleventh Circuit Court of Appeals also refused to address the merits of the employer's argument based upon the court's "prior panel rule." The prior panel rule means that a single three judge panel may not overrule prior decisions of the appellate court unless there is Supreme Court precedent directly on point or the appellate court issues an *en banc* decision, a decision after a hearing by all the justices of the Circuit Court of Appeals. Atlantic Sounding requested *en banc* review of the issue, but the Eleventh Circuit denied the request.

With no option left for obtaining a decision on the merits, Atlantic Sounding sought and obtained Supreme Court review. In Townsend, the majority of justices distinguish Miles on the basis that it addresses remedies available in a wrongful death cause of action and does not affect remedies for a maintenance and cure claim. The majority also found that the enactment of the Jones Act did not change what they described as a long standing tradition of plaintiffs recovering punitive damages under general maritime law that existed prior to 1920.

In view of Townsend, ship owners should take extra care in investigating and analyzing maintenance and cure issues. For ship owners who are confronted with a claim for punitive damages for the failure to pay maintenance and cure, it is important to remember to assert that the punitive damages are limited to the amount of the maintenance and cure that is ultimately awarded. This argument is based on the 1:1 ratio for punitive damages to compensatory damages in maritime cases that was articulated by the Supreme Court in *Exxon Shipping Co. v. Baker.*

Although not specifically related to maintenance and cure, ship owners should remain vigilant against efforts to expand Townsend beyond its conceptual "banks." One area of concern is unseaworthiness. Seamen will argue that Townsend casts aside the uniformity principle set forth in Miles and, therefore, punitive damages are available for a seaman's unseaworthiness claim even if those damages are not available under the Jones Act.

A complete analysis is beyond the scope of this article. The short answer, however, is that Townsend should remain limited to maintenance and cure claims and that Miles already rejects efforts to expand the remedies arising out of an unseaworthiness claim beyond what is available under the Jones Act.

David McCreadie

David, an attorney with Lau, Lane, Pieper, Conley & McCreadie, P.A. in Tampa, Florida, where he specializes in maritime law. David argued Atlantic Sounding Co, Inc. v. Townsend as well as Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) (restrictive test for determining seaman status) before the U.S Supreme Court.
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Eddie Godwin

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New reporting requirements for personal injury payments to Medicare-eligible claimants

With non-compliance penalties of $1,000 per day, Jana Byron explains the significance of the new reporting requirements

As everyone is well-aware (we hope) the new reporting requirements under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) have been enacted and will be in effect shortly. These new requirements have the potential to affect nearly every US or foreign business that pays a personal injury or wrongful death settlement, judgment or award in the US because they require that such payments be reported electronically to Medicare whenever the claimant is Medicare-eligible. The teeth contained in the new requirements are significant. Failure to report as required can result in civil penalties of $1000 per day on non-compliance.

By way of background, Medicare is a federally funded public health plan that is administered by the Center for Medicare and Medicaid Services (CMS). Under the Medicare Secondary Payor Act ("MSP"), if Medicare pays medical expenses that are covered by other insurance, Medicare is entitled to recover those payments either from the primary insurer or from any self-insured entity that, in whole or in part, carries its own risk.

Although Medicare has been entitled to seek reimbursement from insurers and self-insureds since 2003, CMS has encountered problems in monitoring and enforcing its reimbursement rights. To address this problem, CMS has adopted these new reporting requirements that are geared towards allowing Medicare to identify those claims where CMS might have a right of recovery. (It should be noted that the new reporting requirements are separate and distinct Medicare set-asides, which are used to protect Medicare's future interests when a settlement involved provisions for future medical care. Medicare set-asides will be discussed in detail in the next issue of Bodily Injury News).

The new reporting requirements, which went into effect on July 1, 2009, are found in Section 111 of the MMSEA. In sum, Section 111 of MMSEA

requires businesses paying personal injury settlements, judgments or awards to (1) determine whether a claimant is receiving or is entitled to receive Medicare benefits at the time the payment is made; and if so (2) report the payment of a settlement, judgment or award to CMS in electronic format.

Registering as an RRE

But before a business entity can provide the required report(s), it must first register with CMS as a "responsible reporting entity" ("RRE"). The term RRE includes those businesses that self-insure and the phrase "self-insured" has been construed broadly by CMS and the courts as including businesses that retain a deductible, are responsible for a co-pay or otherwise obtain reimbursement for some or all of the payment made to a claimant. This would include ship-owners or charterers who pay claimants under the "pay-to-be-paid" rule of most P&I clubs. The details on how to register as an RRE are contained at the CMS website (www.Section111.cms.hhs.gov).

Once the information requested is completed, the RRE is assigned an identification number and provided with additional information on precisely how and when to report. Although the RRE must complete the registration process itself, it may

delegate the subsequent reporting to an agent or third-party administrator. While the deadline to register was September 30, 2009, the rules do not – at least at present - provide for any penalty for failing to register, only failing to report.

Determining Claimant's Medicare Status

Once an RRE has registered, it is in a position to comply with the reporting requirements. To do so, when paying a personal injury settlement, judgment or award, the RRE must determine first whether the claimant is receiving or is eligible for Medicare benefits at the time the payment is made. Generally speaking, US citizens or residents age 65 and older are eligible for Medicare benefits. Persons under 65 who have received Social Security Disability or Railroad Retirement disability benefits for at least 24 months or have end-stage renal disease are also entitled to receive Medicare.

To assist RREs in determining Medicare eligibility, CMS is establishing a query system through which an RRE will be able to enquire, and Medicare will confirm, whether a claimant is a Medicare beneficiary. The query system, however, will not address whether a claimant is Medicare eligible but not presently receiving benefits.

Personal Injury Payments and Medicare – guide to abbreviations

CMS: Center for Medicare and Medicaid Services - US federal agency which administers Medicare, Medicaid, and the Children's Health Insurance Program.
www.cms.hhs.gov

RRE: "responsible reporting entity" – A business or organisation required to report the payment of a settlement, judgment or award to CMS.
www.cms.hhs.gov/mandatoryinsrep/

MMSEA: Medicare, Medicaid, and SCHIP Extension Act of 2007

MSP: Medicare Secondary Payor Act

Reporting Payments to a Medicare Beneficiary

According to CMS, "RREs are to report once there has been a settlement, judgment, award or other payment," paid to a claimant who is entitled to Medicare benefits. If the RRE determines that the claimant is not Medicare eligible, there is no obligation to report.

If the claimant is Medicare-eligible, reports are to be submitted in accordance with the schedule provided to each RRE by CMS and must include the claimant's Social Security number, along with other detailed information about the claimant, the injury and the payment. As before, once an RRE is registered, it may engage an agent or third-party administrator to submit the required reports on the RRE's behalf.

However, the RRE is still ultimately responsible for ensuring that the reports are submitted in compliance with CMS guidelines, and therefore responsible for any fine for non-compliance.

Accordingly, an RRE that has retained an agent to fulfil its reporting obligations would be well advised to negotiate a comprehensive indemnity clause into the agreement with the agent in the event that the agent fails to comply with CMS requirements.

When Will All This Happen?

As noted above, RRE's were required to register with CMS prior to September 30, 2009. CMS has advised that the system will be tested between now and March 31, 2010 and that live submissions have been delayed until the calendar quarter of April to June 2010. Under the current schedule, RREs will not be required to report payments made prior to January 1, 2010.

Jana Byron

Jana joined TM(A) in November 2005 after seven years of practice as an attorney specializing in maritime matters. She handles both Defence and P&I claims.

Texas responsible third-party practice

Can the jury now fully consider and apportion liability? Tom Nork discusses a unique procedural practice.

In 2003, the Texas Legislature ended the requirement that a third party who bears some responsibility for a plaintiff's injuries must be joined in the lawsuit for the third party's liability to be submitted to the jury.[1] This procedure is called joinder in legal practice

Texas' old joinder practice was replaced with a more lenient "designation" practice. Now, a defendant may designate a Responsible Third Party ("RTP") so that the RTP's negligence may be presented to the trier of fact. The Responsible Third-party Rule applies to any cause of action based on tort.

"Responsible Third Party" means anyone alleged to have caused or contributed to cause in any way the harm for which recovery of damages is sought. RTPs may include persons who are not subject to the court's jurisdiction or who are immune from liability to the plaintiff.

By designating a RTP who shares the blame for the injury, the defendant can reduce its own percentage of responsibility. A party is liable only for the percentage of responsibility attributed to it by the trier of fact (court or jury). Thus, any liability attributed to the RTP will reduce the potential liability for the remaining defendants, and prevent a jury from simply apportioning any remaining percentage of fault to the non-settling defendants after establishing the percentage of fault attributable to the plaintiff and any settling defendants.

A defendant must file a motion to designate a RTP. This motion must be filed on or before the sixtieth day before the trial date, unless the court allows a later filing. The defendant must state with some measure of specificity the connection between the RTP and the cause of action. The court must grant leave to designate the named person as a RTP unless an objection is filed. If the court grants the motion for leave to designate a RTP, the person named in the motion is designated as a RTP without any further action by the court or any party.

[1] *Tom is happy to supply further information regarding law or cases cited in this article.*

To defeat a motion to designate a RTP, the objecting party must establish that (1) the defendant did not plead sufficient facts implicating the RTP and (2) after being given the opportunity to add more facts, the defendant still did not satisfy the applicable pleading requirements.

If a defendant chooses to designate a RTP, the plaintiff may join that party, even though the statute of limitations would have otherwise expired, as long as the joinder is accomplished not later than sixty days after the RTP is designated. Even if the plaintiff does not join the RTP as a defendant, a jury charge inquiring about the relative responsibility for the injury among the plaintiff, the defendants, the designated RTP, and any settling person may be submitted to the jury.

A question regarding the conduct of any person cannot be submitted to the jury without sufficient evidence to support the submission. The filing or granting of a motion for leave to designate a person as a RTP, or the finding of fault against a RTP, does not by itself impose liability on the RTP in that suit or in any other proceeding.

After a RTP is designated, a party may move to strike the designation of a RTP on the grounds that no evidence has been produced during discovery that the designated RTP is in fact responsible for any part of the plaintiff's injury or damages. The court must grant the motion to strike unless the designating party presents sufficient evidence to raise a fact issue about the designated person's responsibility for the plaintiff's injury or damages.

Further, the Proportional Responsibility chapter of the Texas Civil Practices & Remedies Code is designed to apportion fault among all actors involved in a tort, including entities that are immune from tort claims, such as an employer who falls under a worker's compensation scheme. The court or jury shall determine the percentage of responsibility for each plaintiff, each defendant, each settling party and each responsible third party who has been properly designated.

Significantly, a plaintiff may not recover damages if his percentage of responsibility is greater than fifty percent. If the plaintiff is not barred from recovery under the fifty percent rule, the court shall reduce the amount of damages to be recovered by the plaintiff by a percentage equal to the plaintiff's percentage of responsibility.

If the plaintiff has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the plaintiff by the sum of the dollar amounts of all settlements.

The Responsible Third-party Rule, therefore, dovetails neatly with Texas' policy whereby a defendant is liable to a plaintiff only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the tort at issue.

As a practical matter, the Responsible Third-party Rule might have application in Jones Act and longshore 905(b) cases. In a Jones Act case filed in Texas state court, the Responsible Third-party Rule might be applied if it is found to be procedural rather than substantive.

The law is untested on this precise point; however, Texas law suggests that treatment of the Responsible Third-party Rule is a procedural issue.

If it is applicable, the Responsible Third-party Rule may come into play with foreign defendants who are not amenable to service of process or jurisdiction. Such defendants may include foreign cargo interests, manning agencies, and ship repairers who may be liable for conditions leading to a seaman's injury.

The Texas RTP practice is a valuable tool to Members who are named defendants in Texas litigation. It allows the defendant to limit its exposure to its own percentage of fault and damages by adding other responsible parties, regardless of whether the Court has jurisdiction over them.

Tom Nork of Phelps Dunbar

Tom is counsel in the firm's Houston office. His practice includes handling a broad range of maritime cases, including Jones Act and LHWCA personal injury claims, collision, cargo claims, pollution, contract and general liability claims. In litigation matters his practice includes representing clients with energy, insurance, environmental and employment related disputes. Tom is also experienced in maritime-related transactions, including vessel construction loans, shipyard contracts, vessel purchases and multi-party joint ventures.
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The Team

More than half of the Club's personal injury claims over $100,000 are brought in the American courts.

The TMA Bodily Injury Team are a specialist group of executives from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with these demanding cases on our Members' behalf.

Under the leadership of Louise Livingston they apply collective team expertise and experience to a variety of bodily injury matters. Louise, Karen Hildebrandt, Jana Byron and Dee O'Leary are all former practising attorneys in both Federal and State Court. The team review and determine strategy in all major injury cases and attend all settlement conferences and mediation with, and sometimes on behalf of, our Members.

Profiles of the team members are set out here below:

The full complement of US colleagues can be found in the TMA 'Making Contact' document on the UK Club website – www.ukpandi.com.

Louise S. Livingston

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Louise is an attorney specializing in bodily injury claims. Before joining Thomas Miller (Americas) in March 2002, Louise was a partner in a San Francisco maritime law firm. She leads TM(A)'s Bodily Injury Team.

Karen C. Hildebrandt

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Karen was a partner at a leading maritime law firm before joining TM(A) in May 1998. She specialises in personal injury claims and is a member of TM(A)'s Bodily Injury team.

Jana Byron

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Jana joined Thomas Miller (Americas) in November 2005 after seven years of practice as an attorney specializing in maritime matters. She handles both Defense and P&I claims. She is also a member of TM(A)'s Bodily Injury Team.

Dolores O'Leary

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Dee joined TM(A) in December 2007 after 17 years of practicing law in New York City with a firm specializing in maritime matters. She handles all P&I claims and is also a member of TM(A)'s Bodily Injury Team.