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| **Maritime Personnel** |
| **Source:** MLA**Doc. No.:** 765**Date:** May 3, 2002**Committee:** [MARINE TORTS AND CASUALTIES](http://www.mlaus.org/committee-profile.ihtml?id=210) **FORMAL REPORT OF THE COMMITTEE ON****MARITIME PERSONNEL**The Committee met on Thursday, May 2, 2002 in New York at the Spring Meeting of the Association. Forty-one members and guests participated in a lively meeting on proposed changes in legislation and important cases and developments affecting maritime personal injury practitioners.* **Tort Reform:**

**The movement by big business to revise the civil liability system, considered a political dead letter before September 11th, may be enjoying its best legislative year ever. Already, airlines, landlords and real estate owners in Manhattan, as well as New York City itself, have won important protections against lawsuits arising out of the attacks.****But the administration and the business groups have now moved beyond the September attacks, and to the consternation of consumer organizations, and trial lawyers, have found a growing number of lawmakers sympathetic to calls by a variety of industries to protect them from lawsuits. However, because the Senate is under Democratic control, it is probably unlikely that any proposals will pass the Senate this year.*** **September 11th Victim Compensation Fund:**

**Those eligible to receive compensation from the fund include representatives of the more than 3,000 victims who died at the World Trade Center, the Pentagon and in Shanksville, Pennsylvania. Under the regulations, the Department of Justice presumes that most families of victims who died will receive no less than $250,000, and awards are expected to average about $1.85 million before life insurance, death benefits and other collateral sources are deducted. Charitable aid will not be deducted from the awards. The final rules allow offsets to be minimized and the amount of non-economic loss compensation to be increased to $100,000 for each dependent. So far only ten families have filed complete paperwork with the fund.*** **Punitive Damages:**

**a. *In re Exxon Valdez*:****In November of 2001, the U.S. Court of Appeals for the Ninth Circuit has affirmed the lower court's determination that punitive damages may be awarded in the lawsuit brought by fishermen against Exxon Corporation for economic damages resulting from the 1989 oil spill from the M/V Exxon Valdez. The appellate court, though, remanded the case, directing the lower court to lower the $5 billion punitive damage award. The 17 to 1 ratio between punitive damages and actual damages in the award far exceed the constitutionally acceptable ratio of 4 to 1 suggested by the U.S. Supreme Court. The highest permissible civil penalty would be $786 million. *In re Exxon Valdez*, 2002 AMC 1 (2002). Under admiralty law only a preponderance of the evidence is required for a punitive award.****b. Philip Morris Loses Appeal:****In November of 2001, a state appeals court in San Francisco upheld a $26.5 million judgment against Philip Morris, dismissing the company's claim that it was "grossly excessive." Jurors ordered Philip Morris in 1999 to pay Patricia Henley, who had smoked for (35) years and suffered from inoperable lung cancer, $1.5 million in compensatory damages and $50 million in punitive damages, a judgment that was then the largest ever in a smoking-related case. A judge halved the punitive damages later that year, finding them excessive.*** **IMO/ILO Ad Hoc Expert Working Group On Liability And Compensation Regarding Claims For Death, Personal Injury And Abandonment Of Seafarers: At The 83rdSession Of The IMO Legal Committee In October Of 2001, Two Sets Of Guidelines Were Proposed And Are As Follows:**

**a. Shipowners should arrange financial security for seafarers in the event of abandonment and carry a certificate on board vessels attesting to the existence of such security.****However, International Group P & I Clubs do not provide cover for crew maintenance, repatriation expenses or other risks arising out of abandonment by reason of insolvency.****b. Shipowners should arrange effective insurance or other financial security in respect of their obligation to pay contractual compensation for death to and personal injury suffered by seafarers, and carry a certificate on board vessels attesting to the existence of that security.****At meetings of the Working Group on Seafarers' Claims for Personal Injury or Death, it was shown that such claims do not give rise to significant problems and that International Group P & I Clubs handle seafarers' claims fairly, efficiently and expeditiously.****Unfortunately, the Guidelines produced are not only of doubtful utility, they are also of doubtful practicality. The International Group P & I Clubs have indicated that they would be unable to issue notifications to individual seafarers. In addition, the International Group P & I Clubs have pointed out that claims for liabilities to seafarers are always subject to Club Rules and Terms of Entry (including deductibles) and that payments could not therefore be guaranteed to individual seafarers.****This means that International Group P & I Clubs will not be able to issue the certificates envisaged in either of the Guidelines.*** **Ad Hoc Committee On Revision Of 46 USC:**

**This project has been reactivated but completion of documents and submittal to Congress continues at a slower pace. David Davies, Paul Hofmann, Al Frevola, Captain Dangler and James Maloney are reviewing some (900) pages of a draft.*** **Supreme Court Cases:**

***Chao v. Mallard Bay Drilling*, 122 S.Ct. 738 (2002), held that OSHA regulations cover local uninspected vessels like tugboats, fishing boats, offshore oil rigs and barges. There is concurrent authority with the Coast Guard, which provides only some safety requirements. A memorandum of understanding as to the extent of the reach of each was upheld.****The Court on 28 May, decided *Federal Maritime Com'n. v. South Carolina State Ports Authority*. The Court held that the Eleventh Amendment is a bar to an adjudication of an administrative complaint against a state. It has been criticized as another "state's rights" decision of a conservative court. The other case in which certiorari was granted is a products liability case dealing with whether there is an implied preemption by the Coast Guard of a claim arising form the failure to install motor boat propeller guards. *Sprietsma v. Mercury Marine*. Case below, 197 III. 2d 112, 258 III. Dec. 690, 757 N.E. 2d 75 (2001).****In *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the U.S. Supreme Court unanimously reversed a decision by the Sixth Circuit Court of Appeals that Williams, a former Toyota employee, was disabled within the meaning of the Americans With Disability Act ("ADA"). While the Court of Appeals based its decision on the fact that Williams was incapable of performing the specific physical requirements of her job, the Supreme Court held that this is not the proper basis for inquiry in resolving ADA claims. Rather, the Supreme Court held that the proper inquiry is whether Williams was incapable of performing physical activities that are of central importance to most people's daily lives.*** **Charterer's Duty:**

**The Fifth Circuit ruled that a time charterer has only a legal duty to exercise reasonable care. In this case, the plaintiff, an oil platform worker, claimed that he was injured while unloading cargo from a vessel because the cargo had previously been loaded improperly. The cargo had been packed by a third party. *Dahlen v. Gulf Crews, Inc*., No. 00-31119 (4 Feb. 2002).*** **Shipowner Liability To Longshoremen:**

**The Ninth Circuit ruled that a shipowner had a duty to intervene and to tend to its mooring lines properly when a longshoreman was injured. He was helping to re-moor the ship when it broke free from a dock during high winds. The duty to intervene arose when the high winds increased the strain on the mooring lines. *Christensen v. George-Pacific Corp*., 279 F. 3d 807 (1 Feb. 2002).****In addition, the court held that, although the plaintiff was injured on the dock, the case was a maritime tort case because it had the necessary "maritime flavor" and was under the Extension of Admiralty Jurisdiction Act.*** **Violation Of An Emergency Evacuation Plan:**

**The Fifth Circuit has ruled that an Emergency Evacuation Plan for a mobile offshore drilling unit does not create legal tort liability. The Coast Guard requires an evacuation plan. Two employees were injured when there was an evacuation due to a hurricane warning. The appellate court held that there was no legal responsibility other than ordinary tort or contract law*. In the Matter of Graham Offshore, Inc*., 287 F. 3d 352, 2002 WL 480894 (28 March 2002).*** **Recovery For Emotional Injuries:**

**In 1997, the Supreme Court decided *Metro-North Commuter R.R. v. Buckley*, 571 U.S. 424, a railroad worker's case and thus relevant to Jones Act and maritime tort laws. Plaintiff was exposed to large amounts of insulation dust containing asbestos and feared a severe injury. However, at the time of suit, no injury had been found. The Supreme Court ruled that without showing symptoms of a disease there was no physical impact required by the prior case of *Conrail v. Gottshall*, 512 U.S. 532 (1994).****Since *Buckley*, cases have gone in different directions and also impact on aviation cases under the Warsaw Convention, wherein the Supreme Court has interpreted the treaty as requiring a physical injury and not only a mental injury. *Eastern Airlines v. Flloyd*, 449 U.S. 530 (1991) (fear of crash).*** **Asbestosis:**

**A jury in Baltimore awarded five plaintiffs $30 million against Halliburton Company. The ruling is the fourth significant asbestos ruling against Halliburton since late October 2001, according to Merrill Lynch.****Should its appeals in all those cases fail, the company would have to pay $153 million to about (50) plaintiffs. Recently, Halliburton estimated that its net liability for asbestos cases would be $125 million. The company estimates that its gross liabilities will be $704 million and expects to recover $578 million from its insurers.****Over the last few years, several large companies, including W. R. Grace and Owens Corning Fiberglass, have had to file for bankruptcy protection after being overwhelmed by asbestos claims.****Over the last (25) years, Halliburton has settled 194,000 asbestos claims, the company said. The average payment was about $200, according to Allen Brooks, executive director at CIBC World Markets.****As of September 30th, the company faced 146,000 open asbestos claims and 182,000 more from a former subsidiary called Harbison-Walker.*** **House Bill To Cover Crew Members By The Longshore And Harbor Workers' Compensation Act, Or Other Compensation Coverage:**

**A bill, HR 3262, §202, has been offered in the House of Representatives that would include a provision allowing a Jones Act employer to opt out of the Jones Act and Death On the High Seas Act and to be covered instead by a workers' compensation act. It is ostensibly a tax bill. This would have to be done by mutual agreement, but obviously can be a take it or leave it proposition when employment is offered.*** **Seamen Status:**

**In Roberts v. Cardinal Services, Inc., 266 F. 3d 368 (5thCir. 2001), the court held that an offshore worker engaged in plugging and abandoning oil wells, who spent only 27.7% of his time on a vessel, was not a Jones Act seaman. The rule requires 30% and must be substantial in duration or nature.****In *Richard v. Mike Hooks*, 2001 WL 1223532 (2001), the Louisiana Supreme Court held that even though plaintiff spent over 30% of his time on his employer's vessels, he was not a seaman because the vessels were all dockside and he was not a member of a dredging crew.*** **Vessel Status:**

**A gambling ship, which had a Coast Guard license, was held not to be a vessel in navigation because it was permanently moored. An engineer was relegated to state workers' compensation. *Grobe v. Hollywood Casino-Aurora, Inc*., 2002 AMC C-273 (Ill. Ct. App. 2001).****An unusual case involving a gaming ship was a dram shop type claim. In *Young v. Players Charkes, L.L.C.*, 47 F. Supp. 2d 832 (S.D. Tx. 1999), some plaintiffs were injured and others killed by a driver who became intoxicated at a floating casino. A similar situation was *Quinn v. St. Charles Gaming Co., Inc*., 2002 WL 183852 (La. App. 3rdCir. 2002). A patron was in a fatal vehicle accident. Admiralty law applied by virtue of the Admiralty Extension Act, which pre-empted a Louisiana dram shop statute.*** **Negligence and Unseaworthiness Claims:**

**In *Perkins v. American Electric Power Fuel Supply, Inc.,*246 F. 3d 593 (6th Cir. 2001), a deckhand fell from a barge to a tugboat deck. He was using a ratchet. The Circuit Court held the employer negligent for failing to have handrails, safety chains or guardrails. Further, the ratchet was defective and malfunctioned and this, along with a lack of safety devices, made the barge unseaworthy.****The Fifth Circuit also held that the negligence of a third party, in failing to provide a safe workplace, may be imputed to a Jones Act employer, where there is a contractual relationship and the employee is acting in the course of her employment on the third party's premises.*Rannals v. Diamond Jo Casino*, 265 F. 3d 442 (2001).*** **ISM Code:**

**The ISM Code is part of an international safety treaty. It requires a good deal of record keeping, including a safety manual and records on safety problems. What is made available could be crucial to any case where a shipowners' records or manuals are pertinent. So far, no one has seen a tort case in which the ISM is involved where the call would be for the records and liability found. The Code includes follow-up remedial action for accidents. One person present at the meeting reported a case in which a safety officer testified where ISM records were at issue. A question was raised as to whether there is a privilege not to reveal records of remedial action or self-criticism.*** **The Longshore Act And A State Labor Law:**

**We previously reported a case from New York State's highest court, where a strict liability Labor Law was held applicable to a maritime construction worker on a work platform on navigable waters. At issue was the state "scaffold law," involving falls from a height either by someone or something falling and injuring someone.*Cammon v. City of New York*, 95 N.Y. 2d 583, 721 N.Y.S. 2d 579, 2001 AMC 210 (2000).****Now the Second Circuit in a similar case, concerning a Longshore Compensation Act employee, has held that other sections of the New York Labor Law may apply in an accident to a dockworker, working on a barge doing repair work on piers. He was held not to be a Jones Act employee, but in his action against the third party, he was allowed to move to amend his complaint to assert other sections of the Labor Law, neither of which were absolute liability provisions. *O'Hara v. Weeks Marine, Inc*., 2002 WL 483539 (4/1/2002). There was evidence in the record that the shipowner had breached a duty by directing the plaintiff to do heavy work, causing injury.*** **Maintenance and Cure:**

**The Fifth Circuit has held that an award of maintenance and cure is not reduced by the crew member's own contributory negligence, even if his Jones Act claim is reduced. Maintenance and cure is contractual. *Boudreaux v. U.S*., 280 F.3d 461 (2002).*** **A General Maritime Law Claim For A Crew Member:**

**In *Freeze v. Lost Isle Partners*, 116 Cal. Rptr. 520 (Ct. App. 2002), plaintiff was held not to be a Jones Act crew member, although she was injured while mooring her employer's barge. The appellate court sent the case back to determine her rights under the General Maritime Law as a generic seaman, as she did not come under the LHWCA either. Prior to the Jones Act, crew members could sue their employer for unseaworthiness and managerial negligence. *See* *The Osceola*, 189 U.S. 158 (1903).****My sincere thanks to Paul Edelman, Esq. for helping me prepare this formal report.****We are always looking for additional and interesting projects, relevant decisions, and are also continuously seeking potential new members.****Respectfully submitted,****John P. Schaffer, Chair** |