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| **Maritime Personnel** |
| **Source:** MLA **Date:** October 1, 1999 **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 Tuesday, October 12, 1999, in Orlando, Florida at the Fall Centennial Meeting of the Association. John Schaffer chaired the conference. Twenty-three members and guests participated in a lively meeting on recent cases and other developments affecting the MLA, practice of Committee members and other personal injury practitioners.    **1. P&I Club Coverage**    Plaintiffs' lawyers always bemoan the difficulty in obtaining money even on judgments where a shipowner is insolvent. The problems occur under P&I policies which have a "pay to be paid" clause. If the shipowner can't pay, the P&I club can deny the duty to pay. Direct actions against the P&I clubs in London have not been allowed under a House of Lords decision (*Padre Island/Fanti*). Direct actions are also disallowed in New York because of a special provision of the New York Insurance Law. *Cucurillo v. American S.S. Owners*, 1969 AMC 2334 (N.Y. Sup. 1969). *See* *also* *Aasma v. American S.S. Owners*, 95 F.3d 400 (6th Cir. 1996).    Attempts to get around this have met with some success and some disappointment. In the famous *Liman* case, *Liman v. American S.S. Owners*, 1969 AMC 1669 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (2d Cir. 1969), it was held that an insolvent assured could trigger indemnification from its P&I club by essentially borrowing money to initially pay the claim or deductible. More recently, a restrictive decision came down, *DiCola v. American S.S. Owners (In re Prudential Lines)*, 158 F.3d 65 (2d Cir. 1998). On another front, in the long-drawn-out *Morewitz* case in Alabama, a verdict was finally collected based on local law allowing a direct action, not English law. The case was started in 1985. But the P&I club did business in Alabama and this was ultimately the most important and deciding issue.    Paul S. Hinton, Esq., of London gave his view of the P&I problem from a Club perspective. He questioned whether traditional Shipowner Mutual Clubs were refusing to pay or whether the problem lay with the growing number of commercial insurers who were entering the P&I market and who might not recognize the moral and strategic value of ensuring that genuine death and personal injury claimants do not go uncompensated. It was pointed out that the P&I industry was anyway under growing legislative obligations around the world to pay certain categories of claims directly. International pollution legislation already gave a right of direct action and that seemed likely to be extended to bunker spills, wreck removal and passenger claims. However, in view of the mutual nature of traditional P&I, it remained important to the Clubs to retain the pay to be paid system in the area of claims by commercial organizations, but those same mutuals generally respected the need for sympathy in personal situations such as death and injury. The traditional Clubs had been around for over 100 years and should be better able to take a strategic view of shipowners' responsibilities. The Clubs could not make an absolute commitment to pay any death or personal injury claim, not least because it might include an element of punitive damages or result from defenses not being raised in default proceedings.    In the Regency Cruise Line bankruptcy, some passenger claims have been paid based on required bonds, but other claims apparently have still not been paid after many years. Some payments have not seemed to be generous.    Pat Bonner, Esq., has an article coming out soon on P&I insurance, which will be published in the Maritime Law Reporter.    **2. The Proposed Hague Convention On Jurisdiction and Enforcement Of Judgments**    The United States, where most if not all states allow enforcement of foreign judgments, has spearheaded meetings to propose a convention to broaden enforcement of U.S. judgments in foreign courts. Unfortunately, the effort has been headed by academicians, diplomats and experts on foreign affairs, with few practitioners being involved. Our State Department has asked for participation by the MLA and, at present, Alan van Praag, Esq., of New York is representing the MLA and spoke at our conference. The officers of the MLA have also been involved with trying to fashion an MLA position, as well as Michael Marks Cohen, Paul Hofmann, Paul Edelman and John Schaffer. There are some problems because plaintiff and defense attorneys have not agreed on a single position.    Therefore, the MLA will be suggesting that the U.S. "opt out" for maritime claims under the proposed convention. This is primarily because the EU and other countries do not recognize *in* *rem* and *quasi in rem* claims as we do. There is no concept of long arm statute jurisdiction, or even doing business jurisdiction. A*Rhoditis*-type claim, giving jurisdiction on the base of operations concept, would not be recognized. Enforceability of forum selection and law selection clauses also poses a problem. Since compromises with other countries are not likely on those issues, an opt out seems the best course to follow.    Alan van Praag went to The Hague in late October to "opt out" for maritime claims, so as not to change the present status quo.    (The above items were not on our original agenda.)    **3. *Lubrano v. Waterman S.S. Co.*, 175 F.3d 274 (2d Cir. 1999)**    This case involved the applicability of indemnity agreements today, based on*Ryan v. Pan Atlantic*, a case decided by the Supreme Court in 1956, after which an injured longshoreman's employer was routinely impleaded by a shipowner until 1972 changes in the Longshore and Harbor Workers' Compensation Act. *Ryan*held that a stevedore (and other like contractors) warranted their services to the ship with a warranty of workmanlike performance and therefore there was an implied indemnity. *Lubrano* involved the question of whether a stevedore had to indemnify a shipowner, which successfully defended itself against the stevedore's longshoreman employee, for the expenses of the defense. The court held that there was no longer an implied term of the contract which would allow indemnity for the stevedore's negligence because of the 1972 change in the law. The 1972 amendments disallowed an unseaworthiness claim by the worker and indemnity claims by the shipowner against the employer. Compensation payments were raised substantially. Since a shipowner is no longer liable to a shore side worker for unseaworthiness, *i.e.*, liability without fault since 1972, the *Lubrano* Court decided that absent an express indemnity clause, a *Ryan* implied indemnity is no longer available. Therefore, the shipowner could not recover against the injured man's employer, even if the employer were negligent.    **4. Punitive Damages**    The New York Times had an article on 6 June 1999 dealing with success rates in these cases. The number of recoveries is minuscule, although the occasional jury verdict is dramatic. Claims seem to be less than before, with liability suits down by 9 percent, shown in a study of 16 states. Another study indicated that in state courts, punitive damages were recovered in only 364 of 762,000 cases filed, a percentage of .047 percent.    In July of 1999, a Los Angeles jury ordered General Motors Corp. to pay $4.9 billion to six people who were burned when their 1979 Chevrolet Malibu exploded after its fuel tank was ruptured in a rear-end crash.    The case arose from a fiery crash on Christmas Eve 1993. Patricia Anderson, her four children and a family friend were driving home from church when their car was rear-ended by another vehicle traveling at high speed. Ms. Anderson testified that as her car filled with smoke and flames, she struggled to free her children, who all sustained burns.    General Motors said the injuries were due to the severity of the rear-end collision rather than to any problem with the fuel system, and argued the Judge improperly barred the auto maker from introducing evidence that the 1979 Malibu had an "outstanding safety record" and that the driver of the vehicle that rear-ended the victims' car was drunk at the time of the crash.    Lawyers for the plaintiffs were allowed to put certain internal General Motors documents before the jury, and they used them to argue that General Motors' executives balked at redesigning fuel systems to reduce fire risk because the additional cost of $8.59 a car was greater than paying claims for fuel-fire deaths. General Motors' lawyers argued that the documents didn't reflect company policy.    In August of 1999, the Judge cut the damages by over $3 billion but General Motors said it would appeal.    In *Motts v. M/V Green Wave*, a seaman's widow filed a wrongful death and survival action against the vessel, its owner and its manager. 1999 WL 345685 (S.D. Tx. 1999). Plaintiff's decedent sustained a fractured pelvis during emergency repairs to a exploded engine cylinder and thereafter as a result of co-defendants' negligence and gross negligence in the denial of medical evacuation, plaintiff's decedent died one month later from a medical decline greatly exacerbated by defendants' failure to timely obtain appropriate medical care.    After a bench trial the court affixed liability and ultimately awarded plaintiff a substantial seven figure verdict, including punitive damages of $250,000.00 against the vessel manager where its corporate officers, in their conscious indifference to the great risk of serious injury or death to seaman, denied plaintiff timely and adequate medical care which proximately caused his death. The court awarded it under Texas state law since the conduct consummated in Louisiana and plaintiff's death occurred in Texas. The award was designed to specifically deter similar conduct in the future by the vessel manager.    **5. Coast Guard Rule-Making**    In May, the U.S. Coast Guard issued an Interim Final Rulemaking on Suspension and Revocation Procedures. Public comments were due 23 July 1999. These initial rules allowed service of charges by ordinary mail to a seaman's home, requiring a reply within 20 days. Criticisms were made since some seamen are away from home for periods exceeding 20 days. This led to a change requiring service by certified mail, return receipt requested, or personal delivery. The Coast Guard would handle problems of a seaman's absence by a showing of good cause in removing a default judgment when it was proven that the seaman was at sea.    There have been quite a few changes in procedure in the last few years, of which practitioners should be aware.    **6. Study Of the Jones Act**    An article was discussed in which a risk manager task force (Risk & Insurance Management Society, Inc.) was said to be forming to explore modifying the personal injury/death provisions of the Jones Act (not the cabotage Jones Act). They claim it would save shipowners' costs of litigation if a compensation system were substituted. The shipowners claim this will not be done at the crew member's expense, but would even make medical expenses paid more promptly, as well as weekly benefits which now are usually comparatively small maintenance benefits (and only up to the time of maximum cure). RIMS backing is being sought.    **7. *Yamaha v. Calhoun*, 40 F. Supp. 2d 288 (E.D. Pa. 1999)**    The Supreme Court allowed state law to apply to a fatality in a jet ski accident in Puerto Rican waters. Decedent was a Pennsylvania resident. On remand, the court had to decide which state law or laws would apply.    The district court held that damages were recoverable under Pennsylvania law, but that since Puerto Rico did not allow punitive damages in these cases, no punitive damages would be recoverable. The decision has been certified for appeal.    **8. *DeLange v. Dutra Construction Co.*, 1999 WL 498974, 1999 U.S. App. Lexis, 4679 (9th Cir. 1999)**    In another borderline case, the court held that a "carpenter" working aboard a pile driving barge was entitled to a jury to decide his Jones Act seaman status claim. He had served in several deck hand capacities and he claimed he served over 80 percent of his time on the barge.    **9. The Center For Seafarers' Rights**    Doug Stevenson has been a champion for seamen stranded in foreign ports when their shipowners became insolvent or have severe financial problems. Solutions by way of possible international agreements are being discussed now in London. Should there be super liens for those who contribute to repatriation? Should charterers be liable for repatriation? If so, they would have a duty to do due diligence on the financial responsibility of shipowners. We distributed to the members Howard McCormack, Esq.'s September 29, 1999 fax to the Committee Chairs.    **10. DOHSA Legislation and Cases**    At the meeting, no one appeared to have news of any pending legislation. Subsequently, it has been learned that the Senate seems to have the old bill before it again, S.82, which has non-pecuniary recoveries for airline accidents, but with a cap of $750,000. If this passes and goes to a conference with the House, a compromise bill may ultimately come out and be passed. The House bill has no caps, so the ultimate bill is not yet known. After a bill is passed, there may be advanced a similar bill for shipboard fatalities.    The Second Circuit has before it a DOHSA issue concerning the TWA 800 crash, which occurred over three miles from shore, but within the twelve mile territorial sea proclaimed in 1988 by Presidential decree. The district court judge held that this area was not the high seas and that DOHSA did not apply.    **11. Do Maritime Lawyers Need Jones Act Coverage?**    John Chamberlain, Esq., of Wilton gave a lively discussion about the differences between the Jones Act and Longshore & Harbor Workers coverage, and whether the LHWCA is being extended.    **12. Maintenance--$8 per Day**    An issue in dispute is whether a union contract providing for $8 per day is binding when it is obvious that spartan living conditions, and even the value of shipboard lodging and food, exceed $8 per day. In *Lundborg v. Keystone Shipping Co.*, decided by the Supreme Court, State of Washington, 1999 AMC 2635 (Docket No. 65673-8, dated 7/29/99), the court decided not to uphold the $8 per day. It was noted that the Ninth Circuit and other circuit courts had upheld the $8 per day. But the Third Circuit in *Barnes v. Andover Co.*, 900 F.2d 630 (3d Cir. 1990) and apparently some district court cases in New York and elsewhere held that a union contract could not restrict the historic right of the seaman to maintenance. It was mentioned that District Court Judge Keenan in New York recently sent the issue to the jury.    **13. Loss Of Consortium**    In *Petition of Afram Carriers, Inc.*, decided in the Southern District of Texas, (decision of Mag. J. Johnson, *aff'd*, Dist. Ct. J. Rainey, 3 Aug. 1999, Case No. H-95-5235), a crew member's wife was allowed to sue for loss of consortium in his case against a **third party**. Miles was held not to apply and the Fifth Circuit had not ruled on the issue. Other decisions were held contra. *See* *also* *Gerdes v. G&H Towing Co.*, 967 F. Supp. 943 (S.D. Tx. 1997) (products case; wife of Jones Act seaman can sue); *Wartman v. Commodore Cruise Line, Ltd.*, 1996 W.L. 4964 (2d Cir. 1996) (recovery for wife of injured passenger).    **14. *Forum Non Conveniens***    In *Warn v. M/V Maridome*, 169 F.3d 625 (9th Cir. 1999), the court dismissed an action brought by an injured crew member who asserted a Jones Act claim, notwithstanding that the base of operations was in the United States. The accident occurred abroad, the crew was non-American and the yacht involved flew a foreign flag, *i.e.*, the U.K. The vessel was a luxury yacht and the corporate owner was from the Channel Islands with a Mexican beneficial owner. *Rhoditis* did not prevail.    In a case more to the liking of the plaintiffs' bar is *Solano v. Gulf King 55, Inc.*, 30 F. Supp. 2d 960 (D.C. Tx. 1998). Judge Kent allowed a Nicaraguan citizen to sue in the United States when he was injured on a shrimping vessel stationed in Nicaragua and supervised by Nicaraguan employees. The stock was held by Americans and the vessel was owned by a Texas corporation. All major operational and maintenance decisions had to be confirmed in the U.S. The venture was very profitable, with the shrimp sold in the United States. All vessels in the fleet sailed under a U.S. flag. The base of operations was held to be most significant.    I would like to thank Paul Hinton, John Chamberlain and Alan van Praag very much for sharing their views with the member and guests.    We are always looking for additional and interesting projects, relevant decisions, and we are also continuously seeking potential new members.    Respectfully submitted,    John P. Schaffer, Chair |