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| **Maritime Personnel** |
| **Source:** MLA**Doc. No.:** 754**Date:** November 2, 2000**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, November 2, 2000 in New York, New York at the fall meeting of the Association. John Schaffer chaired the conference. Twenty-five members and guests participated in a lively meeting on changes in status, current cases and other developments affecting the MLA, practice of Committee Members and other personal injury practitioners.1. Recent Developments in the Death On the High Seas Act (DOHSA)

* 1. We discussed the Coast Guard Authorization Act of 2000. Rumor has it that the bill, if enacted this year, may contain a provision amending the Death on the High Seas Act (DOHSA) to change the portion regarding marine deaths to resemble that for aviation deaths occurring more than one marine league from shore. Recovery for loss of care, comfort and companionship would be allowed for deaths of passengers on a vessel other than a recreational vessel. We understand that the Senate has passed such a bill. We also understand that it is unlikely that the amendments will be enacted this year.

* 1. In *Brown v. Eurocopter, S.A.*, a helicopter crashed into a fixed platform in the gulf. The pilot and passengers were killed. In this case, where the helicopter crashed and then fell into the sea, Judge Kent held that DOHSA, rather than Texas law, through the Outer Continental Shelf Land Act (OCSLA) applied.

**In a later decision in this case, Judge Kent of Galveston had to decide whether the helicopter, as a commercial helicopter air taxi, would be considered in a "commercial aviation accident," as would an international passenger plane. He did so hold, so that the family could recover the non-pecuniary damages now allowed. He had no problem with the retroactivity issue. The case is Civil No. G98-529 (Galveston Div.), decided August 22, 2000.**1. **Tort Reform**

**Congress has accomplished little in the way of substantive product liability reform.****Efforts to limit punitive damages did gain some momentum in February, when the House finally passed the Small Business Liability Reform Act of 2000 (H. R. 2366). However, the bill is unlikely to become law during this year, as President Clinton has indicated he will veto the bill when and if it reaches his desk.****Under H. R. 2366, a plaintiff would need to establish by clear and convincing evidence that the defendant's conduct was willful or flagrantly indifferent to the rights or safety of others. The Bill, in its current form, would limit small businesses' joint liability for non-economic damages, and limit punitive damages against small businesses to the lesser of $250,000.00 or three times the amount awarded for economic and non-economic losses. The Bill defines small businesses as those with (25) or fewer full time employees.****In passing the Bill, the House adopted several key amendments, including permitting a court to exceed the $250,000.00 cap on punitive damages, if it finds by "clear and convincing evidence that the defendant acted with a specific intent to cause the type of harm for which the action was brought." Furthermore, an amendment clarified the definition of "Punitive Damages" so as to not include civil penalties, civil fines or treble damages assessed or enforced by a government agency under federal or state statute.****The Bill has now been sent to the Senate, where its prospects are uncertain. Since it is likely to be vetoed by the President, it probably doesn't make a big difference what the Senate does. The Bill's fate in the next Congress will depend upon who wins the White House.**1. **Punitive Damages**

* 1. **A Miami-Dade County circuit judge upheld a jury's landmark award of $145 billion in punitive damages in a class action lawsuit brought by sick Florida smokers against the nation's largest cigarette makers.**

**Circuit Judge Robert Kaye, himself a former smoker, rejected the tobacco companies' request that he reduce the record-setting award that a six-member jury had handed down in July to some 500,000 sick smokers and the relatives of people who died of cancer and other smoking-related diseases.****Judge Kaye, disregarded the tobacco companies' contention that such a large punitive damage award would bankrupt them.****Lawyers for the tobacco companies have repeatedly said the jury's award was illegal because it should have required each of the 500,000 smokers to prove they had been harmed by tobacco.****And the companies' lawyers have stressed that both Florida and federal law say a jury's award cannot be so large that it bankrupts the defendant. The tobacco companies' lawyers have said the $145 billion award would do that.****The jury's punitive damage award was seen by many as a crushing defeat of cigarette makers, coming at the close of a two-year trial in Miami and after the same jury had awarded more that $12 million in compensatory damages in the class action suit.****Jurors said they chose such a large punitive damage award because they wanted to send a strong message to tobacco companies, which, the jurors said, had deceived the public.*** 1. ***CSX Transp. Inc. v. Palank*, 1999 WL 641885 (Fl. App. 4th Dist.):**

**The U. S. Supreme Court has denied *certiorari* to CSX Transportation Inc. in an appeal of a $50M punitive damages judgment, letting stand one of the largest punitive awards ever to a single family. On July 31, 1991, an Amtrak train on a CSX track in South Carolina killed (8) and injured (50) others when the last five cars of the train derailed and smashed into a freight train parked on an adjacent track. Paul Palank was one of the passengers killed. His family sued CSX (*CSX Transportation Inc. v. Palank*), charging that the accident had been caused by the railroad's negligence in maintaining the track. In July 1995, a Florida jury awarded the Palanks $6.1M in compensatories. The compensatory award was appealed, but affirmed and subsequently paid, with interest, in 1997. A second Florida jury found CSX liable for punitive damages, then ordered the railroad to pay an additional $50M.*** 1. **In re *Horizon Cruises Litigation*, 101 F. Supp.2d 204 (S.D.N.Y., May 25, 2000), the U. S. District Court for the Southern District of New York has ruled that passengers on a cruise ship may, in appropriate circumstances, recover punitive damages in an admiralty action. In the instant action, plaintiff passengers on a cruise ship contracted Legionnaires' disease after utilizing a whirlpool spa on the vessel. They brought an action, including a claim for punitive damages, against the cruise ship owner and operator and against the manufacturer and distributor of the filter used on the spa. The cruise ship owner and operator filed cross-claims against the filter manufacturer and distributor, who moved to strike the claims for punitive damages. Noting that courts have issued conflicting opinions on the issue, the court held that the equities favored allowing punitive damage claims to be brought by passengers on a cruise ship. The court ruled that provisions in the Jones Act and the Death On The High Seas Act barring punitive damage claims were to be limited to claims filed under those statutes.**

1. ***St. Romain v. Industrial Fabrication and Repair Service, Inc*., 203 F.3d 376 (5th Cir. 2000)**

**Seaman status was denied to a plaintiff whose duties included decommissioning oil wells under offshore platforms. Part of his work was performed from a lifeboat also used as a transport vessel. But the plaintiff's employer didn't own the lifeboat and the plaintiff worked on other boats owned by nine different companies chartered by different entities. He was not connected with an identifiable fleet of vessels, having worked on vessels not under common ownership or control. The court did acknowledge that *Papai's* "Perils of the sea language" was not determinative of status. Rather, a seaman's status must be determined by examining the overall employment-related connection to a vessel, not focusing only on the facts at the time of injury. Status is a mixed question of law and fact and it is generally inappropriate to decide the issue on motion.**1. ***Lewis v. Lewis & Clark Marine Inc.*, 120 S. Ct. 2193 (2000)**

**The U. S. Supreme Court has granted *certiorari* in case of interest to the maritime personal injury community. The Supreme Court said it would use a dispute from Illinois to resolve what the justices were told are conflicting legal rules for maritime businesses on different stretches of the Mississippi River. The court said it will decide whether a man who says he hurt his back while working on a ship can sue the ship's owner in state court, even though the owner previously filed a federal lawsuit seeking to limit its liability for the accident. A week after the accident, Lewis & Clark Marine filed a federal lawsuit invoking the federal Limitation of Liability Act. About a week later, Lewis sued the shipping company in an Illinois State court. After being informed of Lewis' state court lawsuit, the federal judge dismissed the limitation lawsuit that had been filed by the shipping company. In November, 1999, the Eighth Circuit reversed and remanded the order of the district court holding that there was no conflict between the Act and the "saving to suitors" clause and thus no grounds for dissolution of the injunction imposed upon the state court action. Accordingly, the court found that the district court abused its discretion when it ignored this lack of statutory conflict and prematurely applied the "adequate fund" exception instead. Lewis' lawyer said the appeals court's ruling conflicts with those of other federal appeals courts. Lawyers for Lewis & Clark Maritime had urged the justices to reject Lewis' appeal.**1. ***Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338 (3d Cir. 2000):**

**The U. S. Court of Appeals for the Third Circuit has determined that both federal and state law are to be applied to a near-shore wrongful death action involving a non-seaman. In 1996, the U. S. Supreme Court held that plaintiffs could assert a cause of action based upon a state wrongful death or survival statute in such case where the death occurred in U. S. territorial waters. In this case, the death, which happened while the person was riding a Jet Ski, occurred in Puerto Rico. The deceased (a minor) and her parents were residents of Pennsylvania. As a result of the death, the parents sued the manufacturer of the Jet Ski. In answering the two major legal issues left undecided by the Supreme Court, the intermediate court has ruled that federal maritime law must be used to determine liability. Compensatory damages are to be determined under the law of the state of the residency of the deceased. Punitive damages are to be determined under the law of the state of the situs of the death.****We understand that a petition for *certiorari* to the U. S. Supreme Court has been filed.**1. ***Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 9/18/2000):**

**The U. S. Court of Appeals for the Second Circuit has ruled that, in a suit brought under the Longshore and Harbor Workers' Compensation Act (LHWCA), an employer who owns the vessel on which an employee is injured is not liable in tort to the employee if the employer was only negligent in its capacity as employer and not in its capacity as vessel. In the instant case, plaintiff dock builder was employed by defendant construction contractor. The job of repairing a bridge was performed from a barge chartered by defendant. Thus, defendant acted in two capacities-employer and vessel owner. Plaintiff was injured on the barge due to negligence of defendant's employees occurring on an adjacent barge while handling materials in making repairs to the bridge. Rather than seeking recovery from defendant as a LHWCA employer, plaintiff brought suit in tort against the vessel and the defendant as vessel owner. The court held that, under the LHWCA, where the negligence relates to the employer's work, not to the performance of vessel-related duties, the employee's sole recovery is against the employer, as such. We believe this case is on appeal again.**1. ***Jackson v. North Bank Towing Corp.*, 2000 WL 27857 (5th Cir. 2000)**

**The Fifth Circuit declared that, while the Jones Act bars certain foreign seamen from bringing an action under American maritime law, it does not bar actions in U. S. federal court under foreign law by foreign seamen who are injured while employed offshore in waters of nations other than the United States. This federal case involved the same plaintiff whose federal claims were already dismissed in Louisiana State court. See *Jackson v. North Bank Towing Corp.*, 742 So. 2d 1 (La. App. 3d Cir. 1999).****The Fifth Circuit withdrew its earlier opinion in *Jackson v. North Bank Towing Corp.*, 2000 WL 27857 (5th Cir. 2000) allowing a foreign seaman to prosecute foreign law claims in U. S. federal court, and subsequently held that the foreign seaman's lawsuit was barred by res judicata. See *Jackson v. North Bank Towing Corp.*, Civil Action No. 99-30030, 2000 WL 719588 (5th Cir. June 2, 2000).**1. ***Solano v. Gulf King 55, Inc.*, 212 F.3d 902 (5th Cir. 2000):**

**The U. S. Court of Appeals for the Fifth Circuit has ruled that coastal state law may be applied in cases involving foreign nationals injured on board U. S. vessels while serving as crew members where the vessels are semi-stationary. In the instant case, ten Nicaraguan seamen brought suit in federal court against the owner of a fleet of U. S. fishing vessels. The vessels were engaged in long-term fishing operations off the coast of Nicaragua. The seamen were hired in Nicaragua and paid in Nicaraguan currency. The trial court ruled that U. S. law applied, primarily based on the flag of the vessels. The appellate court ruled that the significance of the flag of the vessel in making choice of law determinations was greatly lessened where, as here, the vessels were not engaged in traditional blue water operations, but rather were operating in the waters of one foreign nation for an extended period of time. This holding would appear to be applicable to offshore supply vessels and other craft when they spend extended periods operating off the coast of one nation.**1. ***Motts v. M/V Green Wave*, 2000 U. S. App. LEXIS 9140 (5th Cir. May 9, 2000):**

**The Appellate Court took back from the survivors of Neville Motts $625,000, which the trial court (Galveston-based U. S. District Judge Samuel B. Kent) had awarded Motts' widow on account of his death in a Houston hospital after initially suffering crushing injuries aboard the M/V Green Wave. Specifically, the appellate court reversed damages for mental anguish, loss of society, and punitive damages, based upon state law, but affirmed (pecuniary) damages totaling about $675,000 for physical pain and mental anguish, loss of care, maintenance and support, and prejudgment interest.****In reversing the nonpecuniary damages awarded by the trial court under state law, the 5th Circuit held that the Death On The High Seas Act (DOHSA) "applies where the decedent is injured on the high seas, even if a party's negligence is entirely land-based and begins subsequent to that injury."**1. ***Young v. Players Lake Charles* (District Court of Texas 2000)**

**The plaintiffs' decedents sustained fatal injuries when their vehicle was struck by another vehicle driven by a motorist on a highway. The motorist had been drinking on a casino boat owned by defendants in Lake Charles, Louisiana. The defendants argued that Louisiana law governed the action, and sought dismissal on the grounds that Louisiana's Dram Shop Law insulated providers of alcohol from liability for the actions of those to whom they sell or serve alcohol.****The court acknowledge that in the absence of a maritime law on this particular subject, they needed to determine whether it should fashion such a rule or instead apply existing State Law. The court viewed the issue as follows:****Did defendants have a duty toward plaintiffs, did defendants breach that duty, and was there a causal connection between defendants' breach and plaintiffs' injury? According to . . . the general maritime law . . . plaintiffs are owed a duty of ordinary care. If a defendant fails to exercise ordinary care and the resulting harm was reasonably foreseeable, liability arises. There is nothing inherently complicated about this rule as it relates to dram shop liability.****In essence, the court concluded that there was an existing maritime rule governing the issue of dram shop liability and that it was contained within the defendants' duty to exercise reasonable care.****The court has cast doubt on the viability of the rule enunciated in a body of cases (and especially in the leading case of *Meyer v. Carnival Cruise Lines*) that courts exercising admiralty jurisdiction should apply State Dram Shop Laws as the rule of decision. More significantly, the court's ruling is a rejection of any concept of immunity, qualified or otherwise, for sellers of alcohol on vessels when sued by someone injured as a result of the intoxication of a person to whom the alcohol was provided. It would appear that vessel owners and operators can no longer feel safe simply by avoiding serving alcohol to "minors," "obviously intoxicated persons," or any others to whom State Dram Shop Laws provide an exception to immunity.**1. **Verdin v. R&B Falcon Drilling**

**A class action has been instituted in Judge Kent's court, Galveston, Texas against essentially all U. S. offshore drilling contractors alleging a conspiracy to suppress the wages of offshore workers.****The named Plaintiff and alleged class representative, Raymond Verdin, was employed by Defendant R&B Falcon Drilling USA, Inc. ("R&B") for a couple of years. He operated an R&B crew boat, which serviced R&B's inland barge drill fleet. On one or two occasions he may have operated an offshore service boat but never served on a mobile offshore drilling unit (MODU) such as a jackup, semi-submersible or drill ship. The first amended complaint adds additional defendants. The second amended complaint also adds additional defendants and substitutes Thomas Bryant in the stead of Verdin as the proposed class representative. For a brief period of time, Bryant did work on offshore drilling rigs as an electrician.**1. ***Gulf Marine and Industrial Supplies, Inc. v. M/V Golden Prince*, November 24, 2000-No. 99-30909 - New Orleans, Louisiana:**

**Under the Federal Maritime Law Act, 46 U.S.C. § 31342, legal services furnished to the vessel are not "necessaries," and the law firm which provided the services is not entitled to a maritime lien for its attorney fees, senior to a mortgage on the vessel.**1. ***Stepansky v. Florida*, \_\_\_ U. S. \_\_\_ (October 30, 2000):**

**The U. S. Supreme Court has denied the petition for a writ of*certiorari* filed by attorneys for a man prosecuted and convicted in a Florida State court for a crime committed on a foreign flag cruise ship while the ship was underway approximately 100 miles off the Florida coast.****The State Supreme Court had upheld the use of a state law allowing such prosecutions where at least 50% of the passengers were embarked and debarked in Florida.****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** |