

**Lorman Educational Enterprises
Maritime Personal Injury Seminar**

DEFENSES TO MARITIME PERSONAL INJURY CLAIMS

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I. COMPARATIVE FAULT

General maritime law never adopted the ancient doctrine, now almost obsolete, of assumption of risk, wherein contributory negligence on the part of the plaintiff precluded any recovery of damages. See Prosser and Keeton on Torts §65 at 461 (5th Ed. 1984). Thus, in Jones Act, unseaworthiness, longshore negligence and passenger negligence cases, juries are regularly charged by the judge that, if they find the shipowner to be negligent, they must determine whether the plaintiff was negligent and apportion the negligence in accordance with percentage of fault. E.g. 5 L.Sand et al., Modern Federal Jury Instructions ¶90.03 at 90-47 (1998).

The doctrine that comparative negligence required a finding that a seaman did not exercise slight care on his own behalf, or to put it another way, the seaman's fault was gross negligence was repudiated and it is now generally recognized that a seaman must "act with ordinary prudence under the circumstances." Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 339 (5th Cir. 1997) (en banc). See e.g. 3 Devitt Blackmar & Wolff, Federal Jury Practice and Instructions §95.10 at 640 (4th Ed. 1987).

A. Comparative Negligence When Following Superior's Orders

In Jones Act cases, a seaman cannot be held to be comparatively negligent, if he was injured performing pursuant to an order that was negligently given by his superior. Earl v. Bouchard Transportation Co., Inc., 917 F.2d 1320 (2d Cir. 1990). The rationale is simple: a seaman has a license which subjects him to the orders of the captain at the peril of losing a license and the possibility of incurring criminal

penalties for disobeying the order. See 46 U.S.C. §11501. However, the question arises as to how specific must the order be for the comparative negligence to be precluded. Earl was standing on a bulwark attempting to lasso the eye of a mooring line to a pier from a moving tug when he fell. The Second Circuit held that it was proper for the trial court to give a charge that following an order from the superior officer precluded comparative negligence because the jury was informed that there was a dispute whether Earl was obeying or disobeying an order by standing on the bulwark. (The Court did not acknowledge that there was a third way: namely, he was doing neither). Having found no comparative negligence, the jury had concluded that he was obeying the order to stand on the bulwark.

Arguably, if there was no evidence that the Captain told Earl to stand on the bulwark, then such a charge is questionable. Similarly, it is submitted that such a charge should not be given when a seaman is given a general order to perform a task with no specific instructions and the seaman decides to use an unsafe method to perform the task which contributes to the injury.

The application of this principle to other workers is also questionable. A harbor worker who was injured performing a duty negligently ordered by his employer was held not to be comparatively negligent, even though the harbor worker's own negligence contributed one-third to his injuries. Gravatt v. The City of New York, 53 F.Supp. 2d 388, 393 (S.D.N.Y. 1999) rev'd on other grds., 226 F.3d 108 (2d Cir. 2000) cert. denied, 532 U.S. 957 (2001). Because the harbor worker does not have the same disciplinary rules that a seaman does, the Gravatt decision is dubious authority on this point.

Other decisions regarding the availability of comparative negligence when a harbor worker is negligently ordered to perform a task that injures him have been

ambiguous. In Jackson v. Lloyd Brasileris Patrimonio Nacional, 324 F.Supp. 556 (S.D.Tex. 1970), a longshoreman was injured when a malfunctioning winch caused the plaintiff to be struck by a 55-gallon drum. The court refused to reduce damages for comparative negligence, as he was ordered by his employer's supervisors to assume a guide position near a malfunctioning winch, which ultimately struck him with a 55-gallon drum. According to the court:

“If Jackson had refused to perform his assigned task, it is reasonable for this court to infer that his future employment as a longshoreman in Galveston, Texas, would have been jeopardized. As the accident occurred suddenly and without warning, Jackson did all that he could do under the circumstances to protect himself from injury.”

Id. at 563.

Two factors make Jackson questionable precedent for the proposition that a harbor worker cannot be comparatively negligent when following a superior's orders: first, the court appears to find as a matter of fact, and not law, that the longshoreman was not negligent; secondly, this pre 1972 LHWCA Amendment case treated longshoremen as seamen, as it was bound to do under Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

In Simpson v. Royal Rotterdam Lloyd, 225 F.Supp. 947, 950 (S.D.N.Y. 1964), Judge Feinberg refused to reduce damages for comparative negligence for a longshoreman's injury, when he fractured his ankle after a 100-pound tin ingot fell on his foot during unloading operations. Judge Feinberg wrote: “There was no contributory negligence on the part of plaintiff. He was in the hold working pursuant to instructions.” Id. at 950. Simpson should also be applied with care, as it also was decided before the 1972 LWCA Amendments.

B. Causation Standard for Comparative Negligence

The U.S. Supreme Court has ruled in an FELA case that there must be a single causation standard when assessing the negligence of the railroad and the comparative negligence of the railroad employee. Norfolk Southern Ry. v. Sorrell, 126 S.Ct. 799 (2007). Since the Jones Act incorporates “all statutes ... modifying or extending the common-law right or remedy in cases of personal injury to railroad employees,” this FELA decision should apply to the Jones Act, especially since the FELA liberal causation standard that allows recovery for any negligence no matter how slight the connection to the injury has been applied to the Jones Act. See Farnarjian v. American Export Isbrandtsen Lines, 474 F.2d 361 (2d. Cir. 1973).

But what single standard of causation would the Supreme Court apply? The Sorrell opinion is more interesting on the breakout of opinions on the standard of causation than the holding of one causation standard. At the same time that it was urging the same standard of causation for comparative negligence as for negligence, the railroad argued that the “played any part, even the slightest” causation standard was a misread of the Court’s holding in Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957) and the judgment in favor of the Plaintiff should be reversed on that basis. The Sorrell majority did not bite on that argument as it had not been raised in the trial court and certiorari was only granted to examine the practice of using two different causation standards. Holding that the comparative negligence standard of causation should be the same as the negligence standard, the Court left open the question what the standard should be.

Justices Souter, Scalia and Alito did bite on the Railroad’s argument and wrote in a concurring opinion that Rogers indeed had been misread and misapplied.

According to the Souter concurring opinion, the FELA did not expressly alter the common law of proximate causation, but permitted recovery for an employer's negligence when it was only part of multiple cognizable causes of the employee's injury. 127 S.Ct. at 810 (Souter, J. concurring). In short, the "even the slightest" charge to the jury only applied to cases where liability had to be apportioned among several parties and therefore did not belong in a case where the employer is the only defendant.

Justice Ginsburg, reacting to the Souter opinion wrote a concurrence that passionately defended the "even the slightest" charge in all FELA cases. She would adhere to the causation charge in the Sand jury charges which incorporates the "even the slightest" standard in any Jones Act case. See L.Sand, J. Siffert, W.Loughlin, S. Reiss & N. Batterman, *Modern Federal Jury Instructions - - Civil* ¶ 89.02 at 89-44 (3d.ed. 2006).

The upshot is that causation is now in play. The "even the slightest" charge has been a powerful weapon in the hands of Plaintiff's counsel who could cite the remotest wrong that the employer committed and successfully connect it to the injury. If two other Justices follow the Souter concurrence in Sorrell in the next causation case to be taken to the Supreme Court, Jones Act law and practice could radically change.

II. ASSUMPTION OF RISK/PRIMARY DUTY DOCTRINE

Seamen do not assume the risks of their employment. Santos v. American Export Lines, Inc., 339 F.2d 206 (2d Cir. 1964). Congress went out of its way to point out that longshoremen do not assume the risks of their employment and any fault on the longshoreman's part would only serve to reduce damages. See Senate Committee Report No. 92-1125 (1972).

The ghost of assumption of risk does haunt some maritime cases in the form of the “primary duty” doctrine, first enunciated in Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (11th Cir. 1952). In Walker, the master of the ship was hit by drawers of steel filing cabinets, when the ship rolled. The captain had the opportunity to have the drawers repaired at several ports of call but neglected to follow up on his requests to have them repaired. The Second Circuit held that the master had a duty for the protection of others as well as for his own benefit to have the drawers repaired and his breach of duty could be a complete defense to recovery of damages, if the jury so found.

Although not specifically referred to in the decision, commentators have referred to it as the “primary duty rule.” In the Second Circuit, the “primary duty” rule has been limited to instances in which the employee neglected an independent duty arising out of the employer-employee relationship, which would have given the employer an independent right to recover against the employee for the non-performance of that duty. See Dickson v. United States, 219 F.2d 10, 16-17 (2d Cir. 1955). (Chief officer was told by the master to check a damaged ladder was not barred from recovery when he used the damaged ladder.)

In Peymann v. Perini Corporation, 507 F.2d 1318(1st Cir. 1974), the first circuit limited Walker to the proposition that when the seaman’s breach of duty was the sole cause of his injury, he may not recover. Thus, the primary duty rule did not apply when the ship was unseaworthy or the owner negligent. See Boat Dagny, Inc., v. Todd, 224 F.2d 208 (1st Cir. 1955) (Master’s negligence in failing to supervise engineer will not prohibit Master from recovery from injury due to faulty generator)

Even in its own Circuit, Walker is controversial. Two judges in one second circuit case thought Walker wrongly decided and openly criticized other circuits for not challenging the holding:

Efforts made by other circuits to distinguish the Walker case have not been particularly successful. The Fourth Circuit has construed Walker as applying only to masters of oceangoing vessels on long voyages. See [Mason v. Lynch Brothers Co.](#), 4 Cir., 1956, 228 F.2d 709, 712; [Spero v. Steamship The Argodon](#), D.C.E.D.Va.1957, 150 F.Supp. 1. However, as we have pointed out in [Dixon v. United States](#), 2 Cir., 1955, 219 F.2d 10, 16, the rationale of the Walker doctrine applies generally to a breach of contractual duty by an employee and does not depend upon the rank of the employee or the class of the vessel or the length of the voyage. We regard the Fourth Circuit's interpretation as a courteous method of escaping the consequences of the Walker doctrine without overtly repudiating an opinion of this court. The Sixth Circuit in [Chesapeake & Ohio Railway Company v. Newman](#), 6 Cir., 1957, 243 F.2d 804, 808, interpreted Walker as precluding recovery only when the breach of the contractual duty the employee owed the employer was 'the sole and proximate cause' of the employee's injury. But this Sixth Circuit effort to avoid express repudiation of Walker is as fruitless as that of the Fourth Circuit. If the employee's negligence was the sole and proximate cause of the injury, it is of no moment that this negligence constituted a breach of some contractual duty. The Walker case has been hostilely criticized in the law reviews. See 62 Yale L.J. 111; 65 Harv.L.Rev. 1238.

[Dunbar v. Henry Du Bois' Sons Co.](#), 275 F.2d 304, 307 n.1 (2d. Cir. 1960). See [Lombas v. Moran Towing & Transp. Co.](#), 899 F. Supp. 1089 (S.D.N.Y. 1995) ("the court notes that the doctrine is of questionable continued viability in this Circuit."); [McSpirit v. Great Lakes Int'l](#), 882 F. Supp. 1430, 1432 (S.D.N.Y. 1995)

The seventh circuit has similarly voiced its disapproval of Walker. See [Kelley v. Sun Transp. Co.](#), 900 F.2d 1027 (7th Cir. 1990), as has the fifth circuit. See [Kendrick v. Illinois C. G. R. Co.](#), 669 F.2d 341 (5th Cir. 1982)

Still, the primary duty rule marches on perhaps due to the eminence of its author. The Ninth Circuit has ruled that there are three principles which limit the application of the primary duty rule:

1. a claim is not barred, if the injury arose from a breach of a duty that the plaintiff did not consciously assume as a term of his employment;
2. the rule does not apply where a seaman is injured by a dangerous condition that he did not create and in the proper exercise of his employment duties could not have controlled or eliminated;
3. the rule applies only to a knowing violation of a duty consciously assumed as a term of employment.

See Bernard v. Maersk Lines, Ltd., 22 F.3d 903 (9th Cir. 1994); California Home Brands, Inc. v. Ferreira, 871 F.2d 830 (9th Cir. 1989); Ribitzki v. Canmar Reading & Bates, Ltd., 111 F.3d 658 (9th Cir. 1997).

In all practicality, the only conceivable application of the "primary duty" rule is to masters who are injured. Anyone on the vessel below the master can always point upward to someone who has the primary duty to correct or obviate an unsafe condition. However, a chief engineer has been turned away by a jury by virtue of the "primary duty" rule:

The fact that plaintiff was not the master of the vessel does not preclude the [primary duty] defense as long as plaintiff had specific employment obligations to protect against the injury that had been sustained. The evidence presented at trial indicated that plaintiff assumed the duty of chief engineer and was responsible for the safety, maintenance, and repair of the engine room. As the sole chief engineer of the sea vessel, plaintiff had expertise and knowledge of the engine room that the ordinary seaman would not have had upon visual inspection and servicing of the ship. The

ordinary seaman would not have reasonably known of any potential safety hazards in the engine room. However, plaintiff was not simply an ordinary seaman. He was hired as a licensed chief engineer with a duty to notify and take corrective action when faced with a known dangerous condition. In fact, plaintiff acknowledged this special knowledge and expertise in his testimony that he had specifically recognized and reported the need for a safety repair.

Modlin v. McAllister Brothers, Inc., 2004 U.S. Dist. Lexis 13374, 2004 AMC 2167 (S.D.N.Y. 2004)(internal citations omitted)

III. LIMITATION OF LIABILITY

This doctrine, unique to admiralty, permits a shipowner to limit its liability to the value of the vessel, plus pending freight, after a casualty, if the shipowner did not have “privity or knowledge” of the condition which caused the loss or injury. The statute has been recodified but retains its original terms. See 46 U.S.C. §30505.

The general limitation of liability statute reads, in pertinent part:

“(a) In general. Except as provided in section 30506 of this, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

(b) Claims subject to limitation. Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

(c) Wages. Subsection (a) does not apply to a claim for wages.”

Essentially, section (a) provides that where there is no privity or knowledge of the owner, the owner's liability will be limited to the value of the vessel plus freight then pending. However, another statute qualifies the limitation in personal injury and death cases:

Limit of liability for personal injury or death

(a) Application. This section applies only to seagoing vessels, but does not apply to pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters, or nondescript vessels.

(b) Minimum liability. If the amount of the vessel owner's liability determined under section 30505 of this [title](#) is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than \$ 420 times the tonnage of the vessel, that portion shall be increased to \$ 420 times the tonnage of the vessel. That portion may be used only to pay claims for personal injury or death.

(c) Calculation of tonnage. Under subsection (b), the tonnage of a self-propelled vessel is the gross tonnage without deduction for engine room, and the tonnage of a sailing vessel is the tonnage for documentation. However, space for the use of seamen is excluded.

(d) Claims arising on distinct occasions. Separate limits of liability apply to claims for personal injury or death arising on distinct occasions.

(e) Privity or knowledge. In a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner.

46 U.S.C. § 30506 The qualification to the ability to limit applies only to a SEAGOING vessel. If the value of the vessel and freight pending is less than the amount of losses, then the seagoing vessel owner must bring the fund up to \$420 per gross ton. This enlargement process takes place by way of a motion by plaintiff and an interim hearing. See e.g. Talbott Big Foot v. Boudreaux, 854 F. 2d 758 (5th Cir. 1988)

Similarly, section (e) provides that in the case of Seagoing vessels, the knowledge or privity of the master or superintendent is imputed to the owner. In other words, on a seagoing vessel, if the master knew or should have known of the condition that caused the accident, the owner is deemed to have known of the condition.

“Seagoing vessel”, is, in turn, defined by section (a) by what it is not. Tugs, towboats, and tank vessels, among others, are NOT seagoing vessels. The Second Circuit held that a diesel tanker was not a "tank vessel" for purposes of the limitation act and that "the correct interpretation of [then codified] 46 USC 183(f) is not free from doubt. However, we think that ambiguous language in statutory provisions relating to limitation of liability should be resolved in favor of interpretations increasing the instances where full recoveries from the limiting vessel are possible" Petition of the A.C. Donge Inc., 282 F. 2d 86, 90 (2d Cir. 1960). In Petition of Chester A. Poling, 1980 U.S. Dist. Lexis 9138 the court held that "while 183(f) states that the term "seagoing vessel" is not to include tank vessels, it is well established in this circuit that the term tank vessels as used in 183 (f) refers only to tankers of the river or harbor type" . See Also Petition of J.H. Senior, 73 F. Supp. 716 (2nd Cir. 1947) (holding a tanker not a tank vessel).

The 5th Circuit has gone even further, holding that "whether a barge is seagoing is determined by an examination of the function of the particular vessel . . . whether the vessel does, or is intended to, navigate in the seas beyond the boundary line in the regular course of its operations. The operations may in fact proceed on either side of the boundary line; but the court must find that, considering the design, function, purpose and capabilities of the vessel, it will be normally expected to engage

in substantial operations beyond the nautical boundary." Petition of Talbott Bigfoot Inc., 854 F. 2d 758 (1989 AMC 1004).

The shipowners' advantage in Limitation of Liability is that it permits a lawsuit that consolidates all claims into one proceeding:

§ 30511. Action by owner for limitation

(a) In general. The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter. The action must be brought within 6 months after a claimant gives the owner written notice of a claim.

(b) Creation of fund. When the action is brought, the owner (at the owner's option) shall--

(1) deposit with the court, for the benefit of claimants--

(A) an amount equal to the value of the owner's interest in the vessel and pending freight, or approved security; and

(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter ; or

(2) transfer to a trustee appointed by the court, for the benefit of claimants--

(A) the owner's interest in the vessel and pending freight; and

(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter.

(c) Cessation of other actions. When an action has been brought under this section and the owner has complied with subsection (b), all claims and proceedings against the owner related to the matter in question shall cease.

It permits a reverse lawsuit, in which the shipowner may file a petition for limitation of liability, but must do so within six months of having written notice of a claim. If the six months expires, the petition may be barred, but the owner may plead

as an affirmative defense limitation of liability in a later lawsuit by the claimant. See Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2d Cir. 1958). However, once the 6 months has passed the owner may not be able to force multiple lawsuits into its limitation forum. See Gilmore and Black, The Law of Admiralty §10-15 (2d Ed. 1975).

The procedure for implementing limitation of liability has been adopted in the Federal Rules under Supplemental Rule F. Once the petition is filed, the shipowner may force a “concurus” of all claims into the limitation suit, if there are multiple claims and the combined amount of multiple claims exceed the limitation fund. If the value of the limitation fund exceeds the total value of all claims asserted against the shipowner, then the court will not enjoin other claims. Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957). If only one claim is asserted against the shipowner, even though it exceeds the limitation fund, it cannot be enjoined from proceeding outside of the limitation court. See Ex parte Green, 286 U.S. 437 (1932).

Most limitation cases involve personal injuries or loss of lives. District courts have attempted to accommodate the policies of the Limitation Act with the policies of the Jones Act and the Savings to Suitors Clause, 28 U.S.C. §1333. In Complaint of Poling Transportation Corp., 776 F.Supp. 779 (S.D.N.Y. 1991), Judge Sweet followed the Southern District of Florida court and held that, even in a multiple claims/claims in excess of fund case, where the Savings to Suitors Clause “saved” a jury trial as remedies to suitors, then the court would accommodate the policies of both Limitation of Liability Act and the Savings to Suitors Clause by having the judge determine the limitation issues first, staying all other lawsuits, and after resolution of the limitation proceeding, the stay would be lifted to allow juries to determine relative degrees of fault and damages. See also Complaint of Great Lakes Dredge & Dock Co., 895 F.Supp. 604, 612 (S.D.N.Y. 1995); Complaint of Illusions Holdings, Inc., 78 F.Supp. 2d 238 (S.D.N.Y. 1999).

An analysis of this area of the law requires some background review. The “Savings to Suitors Clause” is part of the federal court’s grant of admiralty jurisdiction. 28 U.S.C. §1333. Pure admiralty cases are tried to a judge without a jury, as admiralty cases were never considered brought as a common law claim. However, an admiralty case which could be brought in state court which allowed a jury trial of that case could also be brought in the diversity jurisdiction side of the federal court and be granted that right to a jury. Limitation of liability cases fall within the admiralty jurisdiction and are tried non-jury. However, the lower courts have attempted to reconcile claims with an independent basis for jurisdiction that allows a jury trial, like Jones Act cases. See Red Star Towing & Transportation Co. v. Ming Giant, 552 F.Supp. 367 (S.D.N.Y. 1982). Neither the Supreme Court nor the Circuits Courts have addressed these particular issues and the shipowner continues to retain the right to argue that the entire case should be tried to a judge, notwithstanding any independent basis for jurisdiction allowing jury trial, as the Constitution does not require jury trials in admiralty. See Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).

Even if the lower courts are correct that jury trials must be allowed in limitation actions, where claims have an independent basis for federal jurisdiction, where there is only jurisdiction in the admiralty, then there should be no jury trial. See Churchill v. The F/V FJORD, 892 F.2d 763 (9th Cir. 1988), cert. denied, 110 S.Ct. 3273 (1990). However, Judge Sweet ruled otherwise in Complaint of Poling Transportation Corp., supra., 776 F.Supp. at 786, holding that even where there is no independent basis for federal jurisdiction on the jury trial claims, he had the discretion to try all claims to the jury.

Judge Leval ruled likewise in Ming Giant, supra., holding that even if there is no independent basis for federal jurisdiction on a seaman’s Death on the High Seas Act

claim, the seaman pleaded causes of action in Jones Act, which permit jury trials, and thus the Death on the High Seas Act claims could be tried to a jury, even in a limitation proceeding.

The normal procedure for determining limitation is to require the claimants to prove negligence on the part of the shipowner or, in seaman cases, the unseaworthiness of the vessel. E.g. In re The Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972). Once liability is proven, the burden shifts to the shipowner to demonstrate that there was no design, neglect, privity or knowledge on the shipowner's part. See Petition of M/V SUNSHINE, II, 808 F.2d 762 (11th Cir. 1987).

In personal injury cases, the privity or knowledge of the master of a sea-going vessel or of the superintendent or managing agent of a shipowner at or prior to the commencement of each voyage will be deemed conclusively the privity or knowledge of the owner of the vessel. 46 U.S.C. §30506 (e). Thus, if the ship breaks ground in an unseaworthy condition that the master knew about, the shipowner is denied limitation. Not so for non-sea-going vessels. The shipowner may still prove that it did not have privity or knowledge of the defective condition, even though it was apparent to the Master when the tug or barge broke ground.

As the Second Circuit has observed, knowledge or privity “turns on the facts of particular cases [and] thus the vast range of factual situations presented by limitation cases makes it difficult to extract precedential value from them.” Petition of Bloomfield Steamship Company, 422 F.2d 728, 736 (2d Cir. 1970). Notwithstanding that observation, there are some general parameters concerning what constitutes “knowledge or privity” in the limitation context.

The law of the Second Circuit has slowly eaten away at the “privity or knowledge” defense. As recently as 1983, the Second Circuit proclaimed that “to deny limitation to an owner his privity or knowledge must be actual and not merely constructive.” In the Petition of Interstate Towing, 717 F.2d 752, 754 (2d Cir. 1983). This proposition is stated more elaborately in Petition of Bloomfield Steamship Company, 422 F.2d 728 (2d Cir. 1970) where the court observed that “the privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act or negligence causing or contributing to the injuries suffered. There must be some fault or negligence on his part in which he in some way participates.” Id. at 736.

These cases would seem to suggest that absent a showing of actual, objective knowledge, the owner is entitled to a limitation of liability. However, as early as 1931 courts in the Second Circuit were not allowing limitation even where there was no question that the owner had no actual knowledge of the condition. For example, in Dexter Carpenter Coal Company v. New York Ry. Co., 50 F.2d 270 (S.D.N.Y. 1931), the court explained that although “limitation is permissible only where the owner can show lack of knowledge or privity of the unseaworthy condition...where the unseaworthiness is due to a generally decayed condition of the vessel which renders it unable to withstand the ordinary wear and tear of service, as with the case with this old barge, the owner’s lack of knowledge can only mean that the owner did not inspect the vessel or provide a regular system of inspection.”

In a similar Second Circuit case involving a barge that belonged to a railroad, an unrepaired chip in the barge planking was found to prevent limitation. As the court there observed “limitation is available only where liability is incurred without the privity or knowledge of the owner. The evidence showed that appellant’s general marine inspector inspected the barge at least once every three weeks. Adequate inspection

would have disclosed the hole in the planking. Negligent failure to discover constitutes privity and knowledge within the meaning of the statute.” McNeal v. Lehigh Valley Railroad, 387 F.2d 623, 624 (2d Cir. 1967). See also Federacione Italiana de Corsozi Agrade v. Mendask Compania de Vapores, 388 F.2d 434 (2d Cir. 1968).

The Second Circuit’s opinion in the Staten Island Ferry case first found that the ferry failed to meet the standard of care because it did not have two crewmembers at or near the pilothouse at the time of the collision:

We hold that the standard of care embodied in the pilothouse watch regulation requires that, in addition to the pilot, at least one other person in or near the pilothouse be paying attention to the navigational situation of the ship, thereby being ready to render or summon assistance in the event of an emergency such as the incapacitation of the pilot.

City of New York v. Agni, 522 F.3d 279, 287 (2d Cir. 2008) Due to fatigue the pilot on the ferry had lost “situational awareness” as the ferry approached the dock in Staten Island and allowed the boat to go of course and collide with a nearby pier killing ten passengers and injuring scores of others. The Port Superintendent had been aware that the ferry crews were not following the City’s “two pilot rule” that would have required a second pilot in the wheelhouse to take over in the event of the pilot’s disability and he took no steps to require its adherence. The Court did not require the “two pilot rule” but held that another crewmember should be at or near the pilothouse.

The court found that the negligence was within the privity or knowledge of the City through its director of ferry operations who knew that the “two pilot rule” was not being enforced. The problem with the Court’s reasoning, however, was its own

conclusion that the “two pilot rule” was not the standard of care. Hence, the Court had to go further and find “privity or knowledge” in the City’s constructive knowledge:

While a two-pilot rule may have exceeded the standard of reasonable care, the City had no other policy in place to ensure that the standard of care embodied in the pilothouse watch regulation was being observed. The captain of the Barberi was under the impression that he had the discretion to leave the assistant captain alone in the pilothouse if, in his judgment, conditions permitted. The Coast Guard regulations put the City on notice of the practices that the Coast Guard believed were necessary for the safe operation of a ship of the Barberi’s size and passenger capacity. And yet the City failed to properly train its captains or enforce a policy that would ensure that at least two people in or near the pilothouse were aware of the navigational situation at all times.

Id. at 288 Rightly or wrongly, this statement perhaps lays to its eternal rest in this Circuit any requirement that there first must be actual knowledge on the part of the owner of the fault that cause the casualty to break limitation.

This places the Second Circuit more in line with the Fifth Circuit which expressly has abandoned the “actual knowledge” standard altogether, opting instead for a standard where “the question with regard to corporate owners is not what the corporation’s officers and managers actually knew, but rather what they objectively ought to have known . . . the conditions on the morning in question could have been ascertained by [the manager] if he had used reasonable diligence”. In the Petition of Patton – Tully Transportation Company, 797 F.2d 206, 211 (5th Cir. 1986)

In sum, it appears that the legal standard for knowledge or privity has been watered down to a theoretical defense. The problem with abandoning the “actual knowledge” standard is that finding “privity or knowledge” on the basis of the constructive knowledge of management is invariably equivalent to the constructive knowledge of the crew which renders the words “privity and knowledge” in the statute meaningless.

Though stripped of much of its practical substantive value, Limitation of Liability continues to serve as a valuable tool for a shipowner. After a casualty, strategic thinking by the shipowner on the decision to petition for limitation and where to file it can often be critical. If the ship is still a valuable commodity, limitation filing can be dangerous, because it requires that the shipowner put up security to guarantee a recovery, where that recovery may not be otherwise possible. Thus, if the shipowner later goes bankrupt, the surety remains liable outside the bankruptcy.

Moreover, limitation can often have the effect of drawing claims that would not have been otherwise made. This is especially true in sinkings, where seamen may have experienced post-traumatic stress syndrome. Some would not bring claims but for notices sent to them by the shipowner that shipowner was attempting to limit its liability for the sinking.

On the other hand, being too cautious can hurt the shipowner. If there are multiple injuries and the value of the vessel is not that great, it may pay to file for limitation, in order to avoid the potential of exposing the shipowner to a jury.

Limitation can be brought by the operator of the vessel as well as the owner: The statute provides that “the term ‘owner’ includes a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own

procurement.” 46 U.S.C. § 30501.

Once the decision to file limitation has been made, the next question is where? Rule F provides a list of preferences: if the vessel has been arrested or attached, the petition must be filed in that district. If the vessel has not been attached or arrested, then a limitation petition may be filed wherever the owner has been sued. If there has been no attachment, arrest or lawsuit, then the limitation may be commenced where the vessel is located. If there are no lawsuits and the vessel cannot be found in any district, then the complaint may be filed in any district. However, the court retains power to transfer it to a more convenient district.

Under this rule, the shipowner has some room for forum shopping. If the vessel is still trading, the shipowner can direct the vessel to a favorable district, where the petition may be filed, so long as there has not been any prior lawsuits.

As a general rule, where one vessel is the active instrumentality and the other vessels are only passive instruments of navigation, the only vessel included in the limitation fund will be the vessel actively involved in the harm. Liverpool, Brazil and River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U.S. 48 (1919).

In Standard Dredging Co. v. Kristiansen 67 F.2d 548 (2d Cir. 1933) the court held that the Liverpool case could not apply to a seaman’s injury suit under the Jones Act, because a Jones Act suit does not raise a corresponding maritime lien, and “the right to limit presupposes a vessel to surrender”. Therefore, in Jones Act cases, all vessels subject to common ownership, engaged in a single enterprise, and under a common control at the time of the casualty are considered to be a flotilla, and all must

be surrendered in limitation. Id.

If the losses are greater than the limitation fund and limitation is granted, the statute apportions the losses:

§ 30507. Apportionment of losses

If the amounts determined under sections 30505 and 30506 of this title are insufficient to pay all claims--

- (1) all claimants shall be paid in proportion to their respective losses out of the amount determined under section 30505 of this; and
- (2) personal injury and death claimants, if any, shall be paid an additional amount in proportion to their respective losses out of the additional amount determined under section 30506(b) of this title.

The question then becomes does the owner get credit in the fund for settlements made. It is doubtful that a court would allow settlements to be used as a credit against the fund, as it would be akin to the shipowner subrogating itself to the rights to the fund that were held by the settling claimants. See Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d. Cir. 1961)

Attempts have been made to avoid the Limitation concursus by suing the Master or other crewmembers and shipowners have sought to include their officers and crew in their injunction. The Fifth and Ninth Circuits, however, have addressed the issue but have reached opposite conclusions. [Zapata Haynie Corp. v. Arthur](#), 926 F.2d 484 (5th Cir. 1991); [Complaint of Paradise Holdings, Inc.](#), 795 F.2d 756 (9th Cir. 1986). In Paradise Holdings, the Ninth Circuit, reasoning that a state court action against a vessel's captain could deplete the vessel owner's insurance coverage, found it may be inconsistent with the purposes of the Act to permit some limitation plaintiffs to proceed in state court against a vessel's captain and crew before the limitation fund is divided among the claimants. Id. at 763. The court upheld the district court's stay of an action against a vessel's captain.

The Fifth Circuit disagreed in [Zapata Haynie Corp. v. Arthur](#), 926 F.2d 484 (5th Cir. 1991), and found it could not broaden an order restraining suit to include suits against captains and crew members. The court found that, even if insurance coverage protection is a general purpose of the Act, rules of statutory construction did not allow the court to "reach beyond the plain language of § 187 to divine congressional intent." [Id. at 487](#). A fourth circuit court has followed the [Arthur](#) case. See [In The Matter Of The Complaint Of B & H Towing, Inc.](#), 434 F. Supp. 2d 383, 2006 U.S. Dist. Lexis 39855, 2006 AMC 1792 (E.D.Va. 2006)

IV. FELLOW SERVANT RULE

This 19th Century doctrine, long discarded by modern jurisprudence, has returned through statute under §905(b) of the Longshore & Harbor Workers Compensation Act.

Before 1972, a longshoreman and harbor worker collected compensation from their employer but also retained a right to sue the vessel under a strict liability theory of unseaworthiness. [Seas Shipping Co. v. Sieracki](#), 328 U.S. 85 (1946). However, there were some instances in which the shipowner employed the longshoreman or harbor worker directly (or the stevedore owned the ship) and the courts carved out an exception to the shipowner's exclusivity in [Reed v. The YAKA](#), 373 U.S. 410 (1963). Under [Reed](#), the longshoreman could continue to sue the ship that was owned by his employer for the ship's unseaworthiness.

In 1972, Congress removed the unseaworthiness remedy, granted the longshoreman a negligence remedy and also codified the [Reed v. The YAKA](#) doctrine, such that a longshoreman/harbor worker can sue his employer for its negligence as a shipowner. The language states as follows:

“In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person...may bring an action against such vessel as a third party.... If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of person engaged in providing stevedoring services to the vessel.”

33 U.S.C. § 905 (b). The 1984 Amendments to this Section precluded any shipbuilding or ship repairing worker from bringing any action against the vessel. Accordingly, a person “employed by the vessel to provide stevedoring services” could collect compensation but could not obtain damages against the vessel for the injuries caused by the negligence of his fellow servants.

The first question answered by the Second Circuit was: who is covered by the Fellow Servant Rule? In Guilles v. Sea-Land Service, Inc., 12 F.3d 381 (2d Cir. 1993), the shipowner argued that a relief cook who was employed by the ship and who was a harbor worker, but not a seaman, and who collected longshore compensation benefits, could not bring a third-party action against the vessel, because Congress only intended such third-party actions for those persons who provided “stevedoring services to the vessel.” The court ruled that the grant of the third-party action by the language “injury to a person covered under this chapter caused by the negligence of the vessel” was broader than the fellow servant exception and therefore third-party lawsuits against employer/shipowners were permitted even by employees who did not furnish stevedoring services to the vessel.

Can the shipowner rely on the Fellow Servant Rule, if the fellow servant is not “providing stevedoring services to the vessel?” The Second Circuit avoided deciding that question in Smith v. Eastern Seaboard Pile Driving, Inc., 604 F.2d 789 (2d Cir. 1979), as it found that the diver in that case was killed by vessel owning negligence

and not by fellow servant negligence. However, Judge Sweet has held that, if the harbor worker does not fall within one of the classes articulated in the statute, the shipowner/employer cannot take advantage of the fellow servant rule. Gravatt v. The City of New York, 53 F.Supp. 2d 388, 423 (S.D.N.Y. 1999) rev'd, 226 F.3d 108 (2d Cir. 2000), cert. denied, 532 U.S. 957 (2001). As the citation indicates, the Second Circuit reversed Judge Sweet but failed to discuss explicitly the issue stating simply that Congress intended for harbor workers to be treated the same as longshoremen. Id. By implication, then, "stevedoring services" must include other services performed within the LHWCA employer/employee relationship.

Can the fellow servant also be considered an employee of the vessel owner; in other words, can the same employee wear two hats? In Gravatt, the barge was unmanned and a dockbuilding crew was using the barge for storage of new and old materials. The foreman was held negligent in instructing the plaintiff how to hoist a piece of debris piling and the negligence caused the plaintiff to be injured. Judge Sweet held that the Second Circuit had done away with the Fellow Servant Rule:

“There is no need to determine whether the acts of negligence are attributable to the owner/employer in its capacity as owner or as employer.”

Gravatt, supra., 53 F.Supp. 2d at 424. The Second Circuit disagreed and reversed.

The First Circuit agrees with the Second Circuit and holds that, if the worker is a fellow servant, then he cannot occupy a role as a vessel owning agent. See Morehead v. Atkinson-Kewitt, J/V, 97 F.3d 603 (1st Cir. 1996), cert. denied, 520 U.S. 1117.

V. STATUTORY AND REGULATORY VIOLATIONS

A. Negligence Per Se

General maritime law goes further than state laws in permitting liability for the violations of statutes and regulations. Normally, most states only apply the negligence per se doctrine, if the statute was designed to prevent the risk of type of harm that occurred and the plaintiff was in the class of persons intended to be protected by the statute. See Prosser on Torts supra. §36 at 230. Admiralty law in seamen cases goes further: in Jones Act lawsuits, if a statute or regulation has been violated, it does not matter that statute or regulation was intended to protect against the injury or that the plaintiff was within the class of persons intended to be protected. The shipowner is negligent per se. Kernan v. American Dredging Co., 355 U.S. 426 (1957). Since this rule is adopted from the Federal Employees Liability Act, 45 U.S.C. 51, it is of doubtful validity as applied to non-seamen cases, such as longshoremen and passengers. In those cases, it is most likely that general maritime law would follow the general common law and require that the statute be enacted to prevent the harm that occurred and plaintiff was in the class of persons designed to be protected by the statute.

Under the Jones Act, if a statute or regulation is violated, then the shipowner is precluded from proving any contributory negligence, if the statute was enacted for the safety of its employees. Roy Crook & Sons, Inc. v. Allen, 778 F.2d 1037 (5th Cir. 1985).

A violation of a statutory regulation may also shift the proof of causation. In 1874, the Supreme Court in The PENNSYLVANIA, 88 U.S. 125 (1874) held that if a ship violates a statutory duty, then the shipowner must show not only that the violation did not cause the injury but that it could not have contributed to the injury. This is almost an impossible burden to overcome.

To invoke The PENNSYLVANIA Rule, there must be three elements:

1. violation of a statute or regulation that imposes a mandatory duty;
2. the statute or regulation must involve marine safety or navigation;
3. the injury suffered must be of a nature that the statute or regulation was intended to prevent.

Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 114 (3d Cir. 1996).

It is interesting that there is no requirement that the victim be a member of a class intended to be protected by the statute. However, not all statutes or regulations qualify for The PENNSYLVANIA Rule. If the statute or regulation does not delineate a clear and precisely defined duty, but calls for interpretation and judgment, then The PENNSYLVANIA Rule does not apply. See In re Marine Sulphur Queen, 460 F.2d 89, 98 (2d Cir. 1972).

The Second Circuit has limited the application of the PENNSYLVANIA rule in Jones Act cases and raises the question whether the PENNSYLVANIA rule can be applied at all in Jones Act cases:

“The facts of the instant case, however, present no compelling reason to depart from our prior precedents. Even if we were persuaded that The Pennsylvania Rule should be applied in some Jones Act cases, we would still decline to apply the rule in cases where, as here, it cannot be said with confidence that the plaintiff's injury resulted from defendants' actions.”

Wills v. Amerada Hess Corp., 379 F.3d 32 (2d, Cir. 2004)

DAMAGES

I. JONES ACT DAMAGES/PECUNIARY LOSS

A. Personal Injury

Seamen who suffer personal injuries in the course of their employment may sue their employer for negligence under the rules established by Federal Employers' Liability Act, 45 U.S.C. §51. See 46 U.S.C. §688. When injured by the negligence of his employer, a seaman is entitled to reimbursement for his loss of earnings, past and perspective; any impairment of his earning capacity; medical expenses incurred and to be incurred; any other economic loss he may have sustained or is likely to sustain. He is also entitled to pain and suffering, mental anguish, discomfort and inconvenience. Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453 (3d Cir. 1982), vacated on other grounds, 462 U.S. 423 (1983).

Loss of enjoyment of life, such as inability to play tennis, ski, sail or fully enjoy home life activities, is a compensable element of damages. See Earl v. Bouchard Transportation Co., Inc., 917 F.2d 1320 (2d Cir. 1990) citing O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1092 n.2 (2d Cir. 1978) (Feinberg, J. dissenting).

The Second Circuit in Earl stated that, although the loss of life's pleasures is a compensable item to be included somewhere in the total damage award, it made no difference whether the jury awarded it as part of the pain and suffering damages or made a separate award for those damages. Id. at 1326-27. Although the Second Circuit claims not to be in conflict with the Fifth Circuit on the issue, it is hard to reconcile the two. See Dugas v. Kansas City S. Ry. Lines, 473 F.2d 821, 827 (5th Cir. 1973) cert. denied, 414 U.S. 823 (1973). The Second Circuit distinguishes Dugas on the basis that the defendant in Dugas objected to loss of life's pleasures being included as a separate damage item, in contrast to the defendant in Earl. If that is the only distinction, then the Second Circuit dictum in Earl making loss of life's pleasures a separate compensable item makes no sense.

While the Second Circuit has indicated a preference for discounting awards for pain and suffering to present value, the Court has indicated:

"that the appropriate course is to accept the concept of discounting awards for non-pecuniary losses, but to forgo the precision appropriate for discounting future earnings. *Since an award for a non-pecuniary loss is not a payment in lieu of a series of annual installments, as is the case with future wages, it is artificial to expect the fact-finder to divide non-pecuniary damages into yearly installments, discount each to present value and aggregate the resulting figures.*

Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742, 751 (2nd Cir 1988) (emphasis added).

In determining an award for future pain and suffering, the fact finder is determining the sum that the plaintiff should have now as compensation for the pain and suffering he will endure. Id. All that is required is that the time value of money be taken into account, without any precise mathematical adjustments. Id.

It is clear that the Second Circuit's preference is that the jury not consider future pain and suffering as a "series of annual installments." Rather the jury "is invited to select some general sum that the plaintiff should receive now as compensation for the pain and suffering he will endure in future years. Normally, that sum is a round number, determined without any precise calculation." Oliveri at 849 F.2d. 749.

A seaman's pecuniary damages is normally measured after a deduction for income taxes. Norfolk & Western R. Co. v. Liepelt, 1980 A.M.C. 1811 (1980). Moreover, the jury must be instructed that any damages awarded would not be subject to federal income tax. Id. at 1817.

A seaman's award for future lost wages must be discounted to present value. Pfeifer v. Jones & Laughlin Steel Corp., 462 U.S. 423 (1983). In the Second Circuit,

the court makes trial easier by allowing the court to apply a 2% discount on earnings, if there is no credible expert testimony applying a different rate. Doca v. Marina Mercante Nicaragunse, S.A., 634 F.2d 30 (2d Cir. 1980). Emphasis should be given to the term “credible.”

The method of calculating the discount can be either a one-step or a two-step method. See Complaint of Connecticut National Bank, 928 F.2d 39, 42 (2d Cir. 1991). The one-step method discounts all wages both pre-trial and post-trial back to the date of the injury with interest awarded on the total discounted sum from the date of injury to the date of trial. See Taliercio v. Compania Empresa Lineas Argentina, 761 F.2d 126, 129 (2d Cir. 1985).

The two-step method discounts payments that would have been received for the period after the trial back to the date of the trial. It then adds payments that would have been made prior to the trial and allows interest on those payments. Connecticut National Bank, supra., 928 F.2d at 42.

Seamen's verdicts have been reduced by federal courts in New York due to excessive awards. In Scala v. Moore-McCormack Lines, Inc., 985 F.2d 680 (2d Cir. 1993), the Court found reversible error where it denied the defendant's motion to set aside a verdict where the injuries were debilitating and permanent. In Scala, the plaintiff seaman underwent two arthroscopic surgeries for injured tendons and cartilage in his left knee, spent six months in a wheelchair, and suffered attacks of temporary paralysis, one of which caused him to fall and break his arm. He also suffered depression and testified that the accident aggravated an existing back injury. Scala, 985 F.2d at 682. Following trial, the jury awarded damages for pain and suffering in the amount of \$500,000 for past pain and suffering and \$1 million for future pain and suffering. The Second Circuit reviewed a number of other jury verdicts

and found that

"in light of these awards and of all the circumstances of this case, we believe that the jury's award of \$1,500,000 for Scala's past and future pain and suffering is so excessive as to shock the judicial conscience. While a jury has broad discretion in measuring damages, it may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket. It appears that the jury did just that, and therefore the award cannot stand."

Id. at 684.

Since FELA cases have the same standard as seamen's cases, the law in those cases is instructive on excessiveness. In a case involving a railroad employee who injured his back, the Second Circuit concluded that the district court had abused its discretion when it denied the defendant's motion for a new trial to correct a grossly excessive jury award for a plaintiff having a permanent back function impairment of 15%. The Second Circuit reasoned:

"we do not mean to belittle Nairn's pain and disappointment at no longer being the active, athletic man he once was, or to minimize the very real impact of the injury on Nairn's life and lifestyle. We conclude, however, that an award for pain and suffering of at least \$400,000 for a 15% functional impairment is one that shocks the judicial conscience."

Nairn v. National Railroad Passenger Corporation, 837 F.2d 565, 568 (2d Cir. 1988).

In Taylor v. National Railroad Passenger Corp., 868 F.Supp. 479 (EDNY 1994) a 75-year old woman fell backwards on an escalator in Pennsylvania Station in New York City. The court was "cognizant that plaintiff has lost a measure of the independence she once enjoyed before the accident, and currently suffers from a condition that not only is painful but also presents little hope of improving with the passage of time." Id. at 486. The court reduced the award of \$275,000 for future pain and suffering determining that "a properly functioning jury should have found that a maximum award of \$175,000 reasonably and fairly would compensate plaintiff for her

future pain and suffering. Plaintiff therefore has the option of accepting a total reduced damage award...or facing a new trial on the issue of damages." Id.

In Schottka v. American Export Isbrandtsen Lines, 311 F.Supp. 77 (S.D.N.Y. 1969) the trial court granted the defendant's motion for a new trial where the plaintiff was awarded \$50,000 despite the fact that he had returned to work. The court there commented that "there was no evidence that plaintiff suffered any subsequent loss of ability to work. It was undisputed that he had lost no work time since returning to work. . .quite frankly, the conscience of the court is shocked by the excessiveness of the verdict." Id. at 80.

Recovery for longshoremen and passengers can have slightly different categories of damages, not allowed by the Jones Act, even in personal injury cases. Loss of society and consortium are not recoverable by the dependents of Jones Act seamen. Mobil Oil Corp. v. Higgenbotham, 436 U.S. 618, 98 S.Ct. 2010 (1978). (DOHSA). However, the spouses of longshoremen and passengers may state a claim for loss of consortium for a longshoreman or passenger injured and seeking recovery under the general maritime law for injuries at least in state territorial waters. American Export Lines, Inc. v. Alvez, 446 U.S. 274, 100 S.Ct. 1673 (1980). The Supreme Court in Miles v. Apex Marine Corp., 498 U.S. 19 (1990) held that the dependents of a seaman could not recover for loss of society under the Jones Act, which permitted only pecuniary damages.

At least one court in the Second Circuit has ruled that "Sieracki seamen," namely those workers on a ship that are not part of the ship's crew and are not employed by the shipowner or operator, are similarly prohibited from recovering non pecuniary damages, as their right to recover for unseaworthiness "falls under a judge-

made extension of the Jones Act's scheme" and since the Jones Act prohibits recovery of non pecuniary damages, it would be anomalous to permit an extension of the Jones Act to allow such recovery. See Radut v. State Street Bank & Trust Co., 2005 AMC 413 (S.D.N.Y. 2004)

Punitive damages may not be recoverable by seamen. Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993). The rationale essentially is that the Jones Act does not allow non-pecuniary damages and that the unseaworthiness remedy under the general maritime law is a no-fault remedy and punitive damages cannot be encompassed in a no-fault remedy. This decision has been read by subsequent courts as also precluding punitive damages. See Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993).

The Second Circuit has ruled that Miles v. Apex Marine Corp., *supra*, applies to non-seamen and precludes punitive damages. Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994). However, the Second Circuit rejected the argument that Wahlstrom was incorrectly decided and in a subsequent case denied punitive damages to a seaman's estate. See Preston v. Frantz, 11 F. 3d 357, 358 (2d Cir. 1993). Both Wahlstrom and Preston have been cast into doubt on the grounds that they did not apply state law, when their facts are very similar to the U.S. Supreme Court's decision in Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619 (1996), which allowed an admiralty court to apply state law to allow punitive damages to non seafarers in territorial waters. Three District courts who have addressed the question of applying punitive damages under state law to non seafarers in territorial waters have split on the question with two in favor and one against. Compare O'Hara v. Celebrity Cruises, 979

F. Supp. 254 (S.D.N.Y. 1997) (no punitive damages) with Taylor v. Costa Cruises, 1996 U.S. Dist. LEXIS 22510 (S.D.N.Y. 1996) and Gravatt v. The City of New York, 53 F.Supp. 2d 388, (S.D.N.Y. 1999) rev'd on other grds., 226 F.3d 108 (2d Cir. 2000) cert. denied 532 U.S. 957 (2001) (no limitation of damages to “pecuniary damages” as was contained in the Jones Act or the Death on the High Seas Act.)

The recent Supreme Court decision in the Exxon Valdez case casts doubt on whether punitive damages may be awarded for the recklessness of the Master or the crew. See Exxon Shipping Co. v. Baker, ___ U.S.____ 76 U.S.L.W. 4603 (June 25, 2008). The Court advised that it was evenly divided on the question of the owner’s “derivative liability” but held that punitive damages were to be capped at the level of compensatory damages. Justice Alioto did not participate. He therefore will be the “swing” vote on the next case which considers whether a shipowner can be liable for punitive damages for the recklessness of its master or crew. As he is mostly on the conservative side of the Court, it might be speculated that punitive damages may not be available for the recklessness of the Master or crew.

This decision casts into doubt a district court decision which permitted a punitive damages claim under general maritime law by passengers who survived after suffering Legionnaire’s disease on the M/V HORIZON but denied punitive damages to the representatives of the decedents who succumbed to the disease that was contracted due to a defective filter in a hot tub. See In re: Horizon Cruises Litigation, 101 F.Supp. 2d 204 (S.D.N.Y. 2000) (Francis M.J.) Congress limited death recovery to pecuniary damages under DOHSA. See Mobil Oil Corp. v. Higgenbotham, 436 U.S. 618, 98 S.Ct. 2010 (1978).

Normally, punitive damages are reserved for those unusual cases, where there has been a conscious, deliberate disregard of personal safety. See Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985). If knowing conduct is embarked upon motivated by private gain, then punitive damages may be awarded. Mason v. Texaco, Inc., 948 F.2d 1546, 1560 (10th Cir. 1991).

If the conduct is not grossly negligent, actually malicious or criminal indifference, then punitive damages should not be awarded. See Roth v. Black & Decker, U.S., Inc., 737 F.2d 779 (8th Cir. 1984) (corporations' lack of knowledge regarding government complications did not create a submissible issue on punitive damages; no evidence existed to show that corporate defendant in fact knew that the product was in a defective condition when it was sold); Berroyer v. Hertz, 672 F.2d 334 (3d Cir. 1982) (questions of liability based on professional judgment gives rise to negligence, not punitive damages). The Gravatt decision broadens the availability of punitive damages available to harbor workers as it permitted the award of punitive damages for injury caused by the storage of new and old materials together which created an unsafe condition and was characterized a wanton disregard for a harbor worker's safety. Gravatt, 53 F.Supp. at 426. This issue was not addressed or decided on appeal.

The quantum of punitive damages has been rarely litigated in maritime cases. The Exxon Valdez case limited award in oil [pollution cases to the amount of punitive damages. It is not clear if that cap exists across the board under general maritime law. Recently, the U.S. Supreme Court has employed the due process clause to rein in excessive awards of punitive damages. The **due process** clause forbids a **State** to use a **punitive** damages award to punish a defendant for injury inflicted on strangers to the litigation. See Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007). An indicator of the excessiveness of punitive damages is the disparity between

compensatory and punitive damages. The Court has reversed an award that was 500 times the amount of the customer's actual harm as determined by the jury. BMW of North America v. Gore, 517 U.S. 559 (1996). The Court cited a long history providing for sanctions of double, treble, or quadruple damages to deter and punish and stated that while these ratios are not binding, they are instructive in that single-digit multipliers are more likely to comport with due process than awards with ratios in range of 500 to 1 or 145 to 1. State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

In recent litigation in Manhattan federal court, a jury award of punitive damages of approximately three times the compensatory damages was upheld by the district court:

Here, the Silivanch plaintiffs alone were awarded \$ 2.6 million in compensatory damages. Thus, the entire punitive damage award of \$ 7 million is less than three times that amount. Moreover, only \$ 4.2 million of that will go to the Passenger Plaintiffs, and it will be shared among them. Accordingly, the ratio of punitive to compensatory damages for any single plaintiff will be even less.

Silivanch v. Celebrity Cruises, Inc., 171 F. Supp. 2d 241 (S.D.N.Y. 2001).

B. Death

This is perhaps the most controversial area in maritime law. The questions as to recovery of damages for wrongful death depend on which law applies. For seamen, the rules are fairly uniform but for longshoremen and passengers, the rules depend on whether the deaths occur in United States territorial waters or outside those waters.

Jones Act seamen have limitations in death cases similar to their limitations in personal injury cases. Only pecuniary damages may be recovered. By incorporating the provisions of the Federal Employees' Liability Act (FELA), the Jones Act adopted the Supreme Court gloss on the term "damages" under the FELA which only permitted recovery for pecuniary loss. Accordingly, any recovery by the dependents of Jones Act seamen could not include non-pecuniary loss of society. Miles v. Apex Marine Corp., *supra*.

Longshoremen and other non-seamen are not so limited, however. Deaths that occur in U.S. territorial waters are covered by the general maritime law. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (death remedy for unseaworthiness to harbor worker). The general maritime wrongful death action created by Moragne allowed the dependent plaintiff to recover for pecuniary losses of support, services and funeral expenses, as well as for the non-pecuniary loss of society suffered as a result of a death. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974).

Compounding matters further, the U.S. Supreme Court held that wrongful deaths to persons who are "not seafarers" allow the application of state law remedies for those deaths. Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619 (1996). To gain any understanding of this confusing area of the law, the facts must first be considered. Natalie Calhoun was a 12-year old who was killed when her jet ski, operating in U.S. territorial waters off Puerto Rico, slammed into a vessel anchored in the waters off the hotel frontage. Her parents brought a products liability lawsuit against Yamaha on the basis of a defective jet ski. Yamaha moved to dismiss under general maritime law but the district court certified the question to the Third Circuit whether non-dependent parents could recover losses of society, future earnings and/or punitive damages. The Third Circuit answered that state law remedies could apply to the case. Presumably, if Pennsylvania law (the

Calhouns lived in Pennsylvania) applied, those items of compensation could be awarded to non-dependent plaintiffs.

The U.S. Supreme Court, acknowledging that general maritime law had created a wrongful death remedy in Moragne also held that it did not displace any state law remedies. State law could therefore apply, if Congress did not occupy the field. Since Congress did not address questions of recoverable damages for wrongful deaths in U.S. territorial waters to non-seafarers, state law was free to apply a wrongful death remedy.

Yamaha applies only to non-seafarers. Are longshoremen non-seafarers? While long ago they were considered to be seamen, their system of recovery for personal injury death has deviated from seamen remedies. While governed by the Longshoremen and Harbor Workers Compensation Act (LHWCA), there is still an open issue whether Congress has occupied the field of wrongful death remedies for longshoremen. In other words, without any preemption by the LHWCA, a longshoreman or harbor worker may find himself or herself in the same boat as the Calhouns and permitting state law to be applied. However, the Supreme Court in Norfolk Shipbuilding & Drydock v. Garris, 532 U.S. 811 (2001) held that the wrongful death general maritime law remedy extended to negligence for harbor workers without determining if state law remedies could apply. The issue remains open.

II. SETTLEMENTS, PROPORTIONATE FAULT AND JOINT AND SEVERAL TORT LIABILITY

The U.S. Supreme Court in McDermott v. Amclyde, 511 U.S. 202 (1994) settled the general maritime law controversy over the credit for a pre-judgment settlement, when partial settlements occur and non-settling joint tortfeasors are held liable at trial.

The court opted for the proportionate fault rule which allows the non-settling joint tortfeasor to credit the proportion of fault found by the fact finder to be the share of the settling tortfeasor. This was an unfortunate result for the defendant in McDermott, because it only received a \$630,000 credit, when a pro tanto (cash) credit would have amounted to \$1 million toward the \$2.1 million judgment. Compare NYGOL 15-108 (release of one tortfeasor reduces liability of other joint tortfeasor by amount of settlement or percentage of liability of settling joint tortfeasor, whichever is greater).

When the settlement occurs after judgment has been rendered, the Second Circuit has traditionally applied the “one satisfaction rule” and reduces the judgment against the remaining judgment debtors by the amount that the settling judgment debtor paid. Singer v. Olympia Brewing, 878 F.2d 596 (2d Cir. 1989). See also United States v. Zan Machine Co., Inc., 803 F.Supp. 620 (E.D.N.Y. 1992); Phelan v. Local 305, 973 F.2d 1050 (2d Cir. 1992).

III. WORKERS COMPENSATION/OVERLAPS, OFFSETS AND CREDITS

Understandably, workers who sustain injuries in the marine industry often fall into gray areas of coverage, which might implicate state Workers Compensation remedies, Longshoremen and Harbor Workers Compensation remedies and Jones Act remedy. The Supreme Court has often referred to these workers as occupying the “twilight zone.” See 1 Schoenbaum, Admiralty and Maritime Law, §7-4 at 388 (2d Ed. 1994). A discussion of the “twilight zone” (which is referred to by the Supreme Court as the “maritime but local” zone, see Sunship, Inc. v. Pennsylvania, 447 U.S. 715 (1980)), is beyond the scope of this paper. However, Jones Act employees often begin to collect state compensation or Longshoremen and Harbor Workers Compensation Act compensation and vice versa.

The normal rule is that the acceptance of workers compensation does not waive any other remedy. Southwest Marine v. Gizoni, 502 U.S. 81, 112 S.Ct. 486 (1991). See Larson, Workmen's Compensation Law, §90.51 at 16-507 (1989). Thus, a harbor worker who files for longshore compensation under the LHWCA does not waive his right to bring a Jones Act action as a seaman; nor is there any election of remedies. See Simms v. Value Line Co., 709 F.2d 409 (5th Cir. 1983).

Collection of state workers compensation may be a different matter, however. Under New York law, compensation may be payable to employees who are subject to admiralty law in the instance that the claimant, the employer and the insurance carrier waive their admiralty rights and remedies. New York Workers' Compensation Law, §113 (McKinney 1965).

N.Y. Workers Compensation Law §113 provides:

“Awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate, commerce rights and remedies, and the State Insurance Fund or other insurance carrier may assume liability for the payment of such awards under this chapter.”

The Second Circuit recently ruled that the pursuit and acceptance of workers compensation benefits under New York Law did not operate as a waiver of any Jones Act claim. Reyes v. Delta Dallas Alpha Corp., 199 F.3d 626 (2d Cir. 1990). A waiver under federal law may occur if a formal compensation award settles the worker's claims in their entirety. Mooney v. The City of New York, 219 F.3d 123 (2d Cir. 2000). However, if an express waiver under state law is shown, then the seaman may not pursue his Jones Act rights. See Pedersen v. Manitowoc Co., 25 N.Y. 2d 412 (1968). It is submitted that there need not be shown an express, written waiver but that a waiver by conduct may be shown. Nonetheless, the seaman must “evinced an

intention to waive redress under the Jones Act.” Dacus v. Spin-Ness Realty & Construction Co., 22 N.Y. 2d 427, 430 (1966).

If the employer has made workers compensation payments, then to the extent he is sued under the Jones Act, he is entitled to an offset from damages any amounts awarded for maintenance and cure, loss of wages and medical/hospital payments and compensation paid under a workers compensation act. Massey v. Williams-McWilliams, Inc., 414 F.2d 675 (5th Cir. 1969). However, no credit is required to any element of pain and suffering or loss of future earning capacity subsequent to the date of payment of the last compensation benefit. Id. at 680.

A longshore employer has a lien on any third-party recovery by a longshore/harbor worker. See Schoenbaum, Admiralty and Maritime Law, §7-12 at 458-459 (2d Ed. 1994). The existence of this lien makes longshore cases difficult to settle, especially when they involve significant injuries which require the employer to pay generous benefits under the LHWCA together with large permanent partial disability awards. Since comparative fault is a defense under the LHWCA §905(b) cause of action, it is possible that a longshoreman’s recovery will not exceed the compensation “lien” possessed by his employer by right of subrogation. Since the employer often aggressively asserts its lien, it can make settlement difficult, because neither the employer nor the employee want to walk away from the lawsuit with less than their fair share of the proceeds.

An unwary longshoreman/harbor worker can lose his right to a third-party case pursuant to 33 U.S.C. §933 which assigns to his employer his right to recover damages against the third-party vessel within six months after the acceptance of compensation under an award and a compensation order filed by the deputy commissioner or administrative law judge. However, the award must be final. See

Pallas Shipping Agency, Ltd. v. Duris, 461 U.S. 529 (1983). Once the claim is deemed assigned to the employer, the employee cannot retain any right to sue the third-party vessel owner under the LHWCA. See Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981).

IV. CONCLUSION

The rights and remedies of various claimants under maritime law and the defenses of shipowners and other defendants can often seem deceptively simple. They often depend on what law applies at what point. Sometimes, the results of maritime cases cannot be reconciled by logic but require a full knowledge of the history of the development of general maritime law in the United States.