DEVELOPMENTS IN PERSONAL INJURY LITIGATION

A REVIEW OF RECENT INTERESTING CASES
INVOLVING PERSONAL INJURY CLAIMS (OR RELEVANT ISSUES)

Lloyd's
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I. DAMAGES – AND STATUTES THAT LIMIT THEM

A. Death on the High Seas Act (DOHSA), 46 U.S.C. app. § 761.

1. "After the crashes of TWA Flight 800, Swiss Air Flight 111, and Egyptair 990, all of which occurred off the coast of the Northeastern United States, legislation was advanced in Congress to limit the harsh effect DOHSA had on a plaintiff's ability to recover damages from aviation disasters occurring beyond a marine league from the shores of the United States." ***Brown v. Eurocopter*, 2000 U.S. Dist. Lexis 12739 (S. D. Tex. 2000).**

DOHSA applies to any death "**occurring on the high seas beyond a marine league** from the shore of any state, or the District of Columbia, . . . " 46 U.S.C. App. § 761. The United States Supreme Court has applied DOHSA to aviation accidents. *Dooley v. Korean Airlines*, 524 U.S. 116 (1998).

However, after the recent amendment, for any **"commercial aviation accidents"** after July 16, 1996, the date of the TWA crash, the following amendments to DOHSA apply:

46 U.S.C. app. § 761(b) states that DOHSA shall not apply to accidents occurring within 12 miles of shore. If beyond 12 miles, the following change is made in the recoverable damages:

"46 U.S.C. app. § 762. Amount and apportionment of recovery

(b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any State, of the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable. Punitive damages are not recoverable.

(2) In this subsection, the term "nonpecuniary damages" means damages for loss of care, comfort, and companionship. "

2. How is this relevant to energy litigation?

The federal district court in Galveston, Texas in a recent Order ruled that the term "Commercial Aviation Accident" as used in the recent amendment includes the accident of an "air taxi service" employed to transport workers to an offshore oil platform in the Gulf of Mexico. ***Brown v. Eurocopter*, 2000 U.S. Dist. Lexis 12739 (S. D. Tex. 2000) (Kent).** The court reasoned that the plain language of the statute and the existing federal regulations make clear that an accident occurring during any use of an aircraft for business purposes must be considered a commercial aviation accident.

3. As for where and when DOHSA applies for non-aviation deaths, there still is room for disagreement.

Although in an aviation case prior to the amendment (most likely applicable now to non-commercial aviation cases), in ***In re Aircrash off Long Island, New***

York, on July 17, 1996, **209 F.3d 200 (2d Cir. 2000)** the court ruled that the **DOHSA contains two limits** (1) **beyond a marine league** [approximately 3 miles] and (2) the **"high seas" (where no country is sovereign)**. By relying on President Reagan's 1988 Proclamation No. 5928, extending the territorial waters of the United States to 12 nautical miles, the court proclaimed that DOHSA did not apply within that boundary. The court noted that President Clinton has since proclaimed that a "zone of waters" "contiguous to the territorial sea" of the United States now exists up to 24 nautical miles from shore. Apparently, because that expansion occurred after the accident, the court refused to "consider its effect." *Air Crash*, 209 F.3d at 202, n.2. Should DOHSA now be inapplicable within 24 nautical miles of shore?

DOHSA already has been held not to apply within three marine leagues (nine miles) of Texas, the territorial limit of that State, as opposed to the one marine league noted in the statute. ***Blome v. Aerospatiale Helicopter Corp.*****, 924 F. Supp. 805 (S.D. Tex. 1996).** The court based its opinion upon the statement that the Act "shall ... not apply ... to any waters within the territorial limits of any state..." 46 U.S.C. app. § 767.

In ***Motts v. M/V Green Wave***, **210 F.3d 565 (5th Cir. 2000),** the Fifth Circuit Court of Appeals determined that DOHSA applies to a seaman's death occurring ashore, caused, in part, by an operating company's failure to adequately provide care and treatment for injuries he incurred from when he was crushed at sea in the engine room of the vessel by a falling piston. The court held that the statute's application is not limited to negligent acts that actually occur on the high seas. So long as the injury occurs on the high seas, the place where the negligence or wrongful act occurs is not decisive – "even though all of [defendant's] actions and Mott's death occurred onshore," the court still found DOHSA applicable.

A. Are Jones Act Seamen Recovering Non Pecuniary Damages?

1. Yes, in at least one court.

In re Denet Towing Service, Inc.,* 1999 U.S. Dist. Lexis 8058 (E.D. La. 1999*). Jones Act's decisional prohibition against recovery for loss of society and punitive damages held inapplicable in suit against non-employer. The court stated that "this court joins other courts that have studied the issue and found no basis to extend *Miles v. Apex Marine Corp*., 498 U.S. 19 (1990), beyond the seaman-employer relationship."

2. But not in others.

***In re Diamond B. Marine Services, Inc.*, 2000 U.S. Dist. LEXIS 9047 (E.D. La. 2000)** and ***Mastrodonato v. Sea Mar, Inc.*, 2000 U.S. Dist. LEXIS 8293 (E.D. La. 2000)** disagree.

3. Maintenance and cure.

***Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir. 2000).** Court found recovery of $525,069.00 for maintenance and cure – too much.

But, $15 a day for maintenance in accordance with the Collective Bargaining Agreement was just right. Refused to follow Third Circuit minority position, and followed the majority that if the Union agreed to it, it must be reasonable.

C. Jones Act Status – Do you really need a vessel?

***St. Romain v. Industrial Fabrication and Repair Service, Inc.*, 203 F.3d 376 (5th Cir. 2000).** Plug and abandon helper injured on a fixed platform was not a Jones Act seaman because he could not show a substantial work connection with either a single vessel or an identifiable fleet of vessels, despite working off of various lift boats. Summary Judgment entered for defendant because no common control of vessels.

***Wisner v. Professional Divers of New Orleans*, 731 So. 2d 200 (La.), *cert. denied*, 120 U.S. 285 (1999)**. The Supreme Court of Louisiana reversed a summary judgment for the defendant, and the court held that a commercial diver who worked off both fixed platforms and off of vessels was a seaman **as a matter of law**, despite the fact that he could not show a substantial work connection with either a single vessel nor an identifiable fleet.

The court found "[p]articularly persuasive ... the fact that Wisner's work as a commercial diver placed him on vessels for ninety percent of his work-life ..., during which time he slept and ate on such vessels. However, it is the inherently maritime nature of the tasks performed and perils faced by Wisner as a commercial diver, perhaps the most precarious work at sea, and not the fortuity of his tenure on various vessels, that makes Wisner a seaman." (*Wisner*, 732 So. 2d at 205)

D. Can Foreign Seamen Engaged in Energy Production or Exploration Bring Claims in Texas Despite the Prohibition of 46 U.S.C. app. § 688(b)?

***Stier v. Reading & Bates Corp.,* 992 S.W.2d 423 (Tex. 1999)** says **yes**, but only for claims arising under the foreign law, and only if the case survives the Texas *forum non conveniens* statute.

In ***Jackson v. North Bank Towing Corp.,* 213 F.3d 885 (5th Cir. 2000),** the Fifth Circuit first said yes, Jackson could prosecute the foreign law claims in the United States; but then said **no**, based upon *res judicata* because a Louisiana state court already determined the issue in the same case.

Louisiana state courts say **no**. ***Bolan v. Tidewater, Inc.*, 709 So. 2d 1059 (La. App. 1998).**

E. Outer Continental Shelf Lands Act, and the Removal Puzzle.

***Rivas v. Energy Partners of Delaware*, 2000 U.S. Dist. LEXIS 1230 (E.D. La. 2000) (February 1, 2000).** Injury occurred during personnel transport from platform to vessel due to the alleged negligence of both platform and vessel. Outer Continental Shelf Lands Act (OCSLA) claim brought with general maritime claim, **not removable**. Court believed that if the claims were separate and independent claims, then such would have been removable.

***But see*: *Vanscyoc v. Tidewater Marine, Inc.*, 2000 U.S. Dist. LEXIS 8303 (E.D. La. 2000) (June 6, 2000).** Nearly identical facts as *Rivas*, nearly same legal analysis, but court ruled that because the OCLSA claims (allows removal) and general maritime claims (do not allow removal) were **not** separate and independent, they should be consolidated in federal court, and, therefore, **removable**.

***See also, Fallon v. Oxy USA, Inc.*, 2000 U.S. Dist. LEXIS 13488 (E.D. La. 2000) (September 12, 2000).** Court ruled that it was not required to determine whether a maritime claim existed in order to determine motion for remand, and decided only that the OCSLA claim was present on the face of the plaintiff's pleadings. **Removal was proper**.

II. LIMITATION OF LIABILITY

A. Lift Stay – Only so Claimant can have Jury Trial in State Court?

Lewis v. Lewis & Clark Marine, Inc., **196 F.3d 900 (8th Cir. 1999),** ***cert. granted,*** **120 S. Ct. 2193 (2000)**. Held: **yes**, would only allow lifting of stay if the Saving to Suitors clause is implicated, and the claimant moves forward in state court with a jury.

Kreta Shipping, S.A. v. Preussag Int'l Steel Corp., **192 F. 3d 41 (2d Cir. 1999)**. Court says **no**; it makes no difference as to whether claimant takes advantage of the lifting of stay by bringing suit in a state court pursuant to the Saving to Suitors clause, or any other court.

– United States Supreme Court granted cert. in *Lewis & Clark*. We may soon know the answer.

B. Notice Sufficient to Start Running of Six Month Limitation Period

Billiot v. Dolphin Services, Inc., **2000 U.S. App. Lexis 21424 (E.D. La. 2000).** Billiot alleged injury on the spud barge KS-420, but in reality the vessel was the KS-410. Dolphin knew of the injury, incorrectly stated in pleadings that it was the operator of the KS-420, was the one to inform Billiot of his mistake, and both parties agreed that they would continue discovery as if they had listed the correct vessel. More than six months after filing the original Petition, six months being the time period in which a limitation action must be filed, Billiot amended his Petition to name the KS-410. Dolphin then filed a Limitation of Liability action and the district court dismissed it as untimely. The Fifth Circuit reversed, stating that because the original Petition named the wrong barge, there was no notice that a claim subject to limitation had been made.

III. PERSONAL JURISDICTION

A. New World of National Contacts

United States v. Swiss American Bank, Ltd., **191 F.3d 30 (1st Cir. 1999)**. Federal Rule of Civil Procedure 4(k)(2) stands for the proposition that if a foreign defendant is sued in federal court on a federal claim, then personal jurisdiction can be found based upon the foreign defendant's business contacts with the United States as a whole, so long as no single state is a proper state for personal jurisdiction over the foreign defendant. "When a plaintiff depends upon this recently adopted rule to serve as the necessary statutory authorization for the exercise of specific personal jurisdiction, the constitutional requirements are the same as those listed above, but the analytic exercises are performed with reference to the United States as a whole, rather than with reference to a particular state." The First Circuit Court of Appeals in a non-marine case held that:

> a plaintiff who seeks to invoke Rule 4(k)(2) must make a prima facie case for the applicability of the rule. This includes a tripartite showing (1) that the claim asserted arises under federal law, (2) that personal jurisdiction is not available under any situation-specific federal statute, and (3) that the putative defendant's contacts with the nation as a whole suffice to satisfy the applicable constitutional requirements. The plaintiff, moreover, must certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state. If the plaintiff makes out his prima facie case, the burden shifts to the defendant to produce evidence which, if credited, would show either that one or more

specific states exist in which it would be subject to suit or that its contacts with the United States are constitutionally insufficient.

191 F.3d 30, 41-42.

B. Broker Held Amenable to Jurisdiction Where Vessel Insured.

Molina v. Merrit & Furman Ins. Agency, **207 F.3d 1351 (11th Cir. 2000)**. Trial court dismissed Michigan insurance broker for lack of personal jurisdiction. The Eleventh Circuit reversed and held that personal jurisdiction existed over the Michigan broker when the Michigan broker procured insurance for an Alabama vessel, authorized a Florida agency to issue a binder for the insurance and to send it to plaintiff, and took a commission from the insurance premium, the broker "purposefully availed [itself] of the opportunity to do business with an Alabama resident in Alabama" (*id.* at 1357).

IV MISCELLANEOUS

LeBlanc v. Global Marine Drilling Co., **193 F.3d 873 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1831 (2000).** 33 U.S.C. § 905(b)'s prohibition against LHWCA employers agreeing to indemnify negligent vessels is inapplicable to "additional assured clauses."

Mallard Bay Drilling, Inc. v. Herman, **212 F.3d 898 (5th Cir. 2000)**. An explosion on a Mallard drilling barge killed four workers and seriously hurt two others. The Occupational Safety and Health Administration (OSHA) issued a citation against Mallard. The Fifth Circuit held that the citation was invalid because the United States Coast Guard "has exclusive jurisdiction over the regulation of working conditions of seaman aboard vessels ... ." (212 F.3d at 900).