Ascertainment of Maritime Victims' Status and Its Impact Upon Recoverable Damages in Injury and Death Cases

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The remedies available for Alabamians' maritime injuries and deaths depend largely upon the status of the victim at the time of the tort. Determining whether the victim is a Jones Act seaman, a longshoreman, harbor worker, business invitee, licensee, or trespasser, is critical to identifying the remedies and recoverable damages. Often, ascertaining whether the victim qualifies for Jones Act seaman status as opposed to shore-based longshoreman or harbor worker status or even business-invitee status can make the difference in whether the potential recovery is measured in the thousands of dollars or millions of dollars.

The basic rules are these:

I. REMEDIES FOR INJURIES

1. Seamen: Negligence

Congress enacted the Jones Act in 1920 (now codified at 46 U.S.C. § 30104) to remove the bar to suits for negligence articulated in *The Osceola*, 189 U.S. 158 (1903). See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). The Jones Act adopted for seamen the remedies afforded under the Federal Employer's Liability Act for railroad employees. *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009). The Jones Act limits recovery for injured seamen to pecuniary damages. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32

(1990), citing *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913).

2. Seamen: Unseaworthiness Under the General Maritime Law

Unseaworthiness is the principal vehicle for recovery by seamen for injury or death. *Miles v. Apex Marine*, *supra*, 498 U.S. at 25 (1990); *Moragne v. States Marine Lines*, 398 U.S. 375, 399 (1970). An unseaworthy vessel is a vessel not reasonably fit for its intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). The vessel owner/operator bears strict liability for unseaworthiness. *Id.*, at 550.

3. Seamen: Maintenance and Cure

A seaman who is injured or becomes ill while in the service of a vessel (even if the injury or illness occurs ashore) is entitled to maintenance and cure. "Maintenance" is comprised of money to live on (room and board) while "cure" is medical care until maximum medical recovery is attained. See *Atlantic Sounding Co. v. Townsend*, *supra*; *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir. 1995).

4. Longshoremen and Harbor Workers

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"), provides federal workers' compensation remedies for non-seamen maritime workers including longshoremen, harbor workers, shipbuilders, and ship repairmen. 33 U.S.C. § 902. "The LHWCA establishes a comprehensive federal workers' compensation program that provides covered employees and their families with medical, disability, and survivor benefits for work-related injuries and death." *In re Nature's Way Marine, LLC*, 964 F.Supp2d 1231, 1236 (S.D. Ala. 2013) citing *Howlett v. Birksdale Shipping Co.*, 512 U.S. 92, 96 (1994) "Section 904 of the LHWCA allows maritime employees to recover 'compensation from their employers for certain injuries' irrespective of fault as a cause for the injury." 33 U.S.C. § 904. The Act excludes "a master or member of a crew of any vessel" from its coverage. 33 U.S.C. § 902(3)(G).

The Act also provides a negligence remedy for covered LHWCA employees against vessel owners for injuries caused by a vessel's negligence, i.e., its privity and knowledge. 33 U.S.C. § 905(b). See *In re Nature's Way Marine*, *supra*, 984 F.Supp.2d at 1236.

5. Invitees, Licensees and Trespassers

Non-seamen maritime workers who are not covered by either the Jones Act or LHWCA may pursue remedies under state workers' compensation acts and negligence theories under the general maritime law.

II. REMEDIES FOR DEATH

1. Seamen

Congress also passed the Jones Act in response to *The Harrisburg*, 119 U.S. 199 (1886) to provide a statutory death remedy for seamen who die on the high seas. Recovery is limited to pecuniary losses such as funeral expenses and loss of support. Non-pecuniary damages such as loss of society damages are unavailable to the heirs of dead Jones Act seamen. Survivors cannot recover lost future earnings. *Miles*, 498 U.S. at 36-7.

2. All Others on the High Seas

For all other than Jones Act seamen, the remedy is provided by the Death on the High Seas Act ("DOHSA"), now codified at 46 U.S.C. § 30302. DOHSA applies to "wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States" *Ibid*. DOHSA limits recovery to the pecuniary loss sustained by the persons for whose benefit suit is brought. See *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978).

An exception exists under the statute for victims of commercial air crashes within twelve nautical miles of shore who now are permitted to seek non-pecuniary damages for loss of care, comfort and companionship. 46 U.S.C. § 762.

3. Longshoremen and Harbor Workers in Territorial Waters

For deaths in territorial waters, the United States Supreme Court in *Moragne v. States Marine Lines*, *supra*, overruled *The Harrisburg, supra,* and held that the general maritime law provided a cause of action for longshoremen and harbor workers killed in state waters by *unseaworthiness*. Subsequently, in *Norfolk Shipbuilding & Drydock v. Garris*, 532 U.S. 811 (2001), the Court held that the *Moragne* wrongful death remedy was also available for *negligence* claims in territorial waters. Following *Sealand Services v. Gaudet*, 414 U.S. 573 (1974), survivors of dead longshoremen and harbor workers may recover non-pecuniary damages such as loss of society so long as the death occurs within territorial waters. See *Miles*, *supra*, 498 U.S. at 36 ("the holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen."). "Loss of society" damages include "nurture, training, education, and guidance that a child would have received from his now-deceased parent and the services the decedent performed at home for his spouse, including love, affection, care, companionship, comfort, and protection." *McKenzie v. C & G Boatworks*, 322 F.Supp.2d 1330, 1333 (S.D. Ala. 2004).

4. Non-Seamen and Non-Longshoremen and Non-Harbor Workers In Territorial Waters – Generally

In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the Court held that non- seafarers killed in territorial waters are entitled to sue under state wrongful death and survival statutes. The Court explained "By'non-seafarers,' we mean persons who are neither seamen covered by the Jones Act, 46 U.S.C. App. § 688 (1988 ed.), nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq*.". *Id.*, 516 U.S. at 205, n. 2.

5. Non-Seamen and Non-Longshoremen and Non-Harbor Workers in Alabama Waters – Specifically

Application of *Moragne v. States Marine Lines* and *Yamaha Motor Corp.* are problematic in death cases arising in Alabama territorial waters. The Eleventh Circuit in *American Dredging Co. v. Lambert*, 81 F.3d 127 (11th Cir. 1996), followed *Yamaha* and held that the personal representatives of non-seamen (passengers in a motorboat) killed in territorial waters were entitled to recover under state wrongful death and survival statutes for non-pecuniary damages under applicable state law. The Supreme Court of Alabama in *Choat v. Kawasaki Motors Corp.*, 675 So. 2d 879 (Ala. 1996) permitted an Alabama Wrongful Death Act claim in admiralty for a child struck

by a jet ski while wading in shallow water with a toy raft. However, in *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), a panel of the Eleventh Circuit refused to permit an Alabama Wrongful Death Act claim for train passengers killed in Bayou Canot in Mobile County. Notably, *Amtrak*'s problematic holding has repeatedly been criticized and even declared "no longer good law." See *Lobegeiger v. Celebrity Cruises*, Case No. 11-21620-CIV (S.D. Fla. Aug. 23, 2011) at *n. 7.

III. PUNITIVE DAMAGES

1. General Maritime Law

Punitive damages are generally allowed in admiralty and have been since *The Amiable Nancy*, 3 Wheat. 546 (1818). See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (discussing history of punitive damages); *Atlantic Sounding Company v. Townsend*, *supra*, 557 U.S. at 409 ("The settled legal principles discussed above establish three points central to resolving this case. First, punitive damages have long been available at common law. Second, the common law tradition of punitive damages extends to maritime claims. And third, there is no evidence claims for maintenance and cure were excluded from this admiralty rule. Instead, the pre-Jones Act evidence indicates that punitive damages remain available for such claims under the appropriate factual circumstances. As a result, respondent is entitled to pursue punitive damages unless Congress has enacted legislation departing from this common-law understanding. As explained below, it has not.").

Punitive damages are permitted under the general maritime law for claims alleging unseaworthiness following *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. (Unit B) July 1981); *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987); *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972); and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987).

2. Jones Act

Punitive damages are permitted for a Jones Act seaman's claim against his employer for unseaworthiness under the general maritime law following *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1550 ("punitive damages should be available in cases where the ship owner willfully violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of Great Lakes by the district court, or where the ship owner's acts (or failures to act) recklessly increased the danger of a disaster"). Punitive damages are also available to a Jones Act seaman who sues his employer under the general maritime law for failure to pay maintenance and cure. *Atlantic Sounding Co. v. Townsend*, *supra*.

3. Longshoremen and Harbor Workers

As noted, longshoremen and harbor workers injured or killed in territorial waters can recover punitive damages in claims brought pursuant to Section 905(b) of the Longshore and Harbor Workers' Compensation Act and under the general maritime law. *In re Nature's Way Marine*, *supra*, 984 F.Supp.2d at 1236; see also *Rutherford v. Mallard Bay Drilling, L.L.C.*, 2000 WL 805230 (E.D. La. 2000) (not reported in F.Supp.2d); *Kahumoku v. Titan Maritime*, 486 F.Supp.2d 1144, 1152 (D. Hawaii 2007)("punitive damages are available under § 905(b)"); *Wheelings v. SeaTrade Groningen, BV*, 516 F.Supp. 2d 488, 496 (E.D. Pa. 2007) (same).

4. Non-Seamen and Non-Longshoremen

While fact-specific, many reported cases have permitted recovery of punitive damages for maritime torts to non-seamen and non-longshoremen. See, e.g., *CEM, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995) (malicious destruction of lobster traps); *Edwards v. Jones*, 1999 WL 641776 (D. Md. 1999) (not reported in F.Supp.2d) (collision of pleasure craft); *In re Plaquemine Towing Corp.*, 190 F.Supp.2d 889 (M.D. La. 2002) (ferry boat passengers and spouses).

IV. TESTS FOR DETERMINING STATUS OF MARITIME TORT VICTIMS

Given the foregoing, ascertaining whether your client qualifies as a Jones Act seaman or a shore-based longshoreman or harbor worker must be accomplished at the outset of any representation. What are the pertinent tests?

1. Seamen Status

The Supreme Court established a two-part test for determining "seaman" status under the Jones Act in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). The two requirements are that "(1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission and (2) a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and its nature." *Clark v. American Marine & Salvage, LLC*, 2012 WL 1565648, at *3 (S.D. Ala. 2012) (quoting *Chandris*, 515 U.S. at 368).

The first element is broad and does not require the worker to "aid in navigation or contribute to the transportation of the vessel," but the seaman "must be doing to ship's work." *Pettis v. Bosarge Diving, Inc.*, 751 F.Supp.2d 1222, 1230 (S.D. Ala. 2010) (quoting *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 355 (1991)). The first prong is broad in scope and easy to satisfy, effectively making all who "work at sea in the service of the ship" eligible for seaman status. See *Chandris*, 515 U.S. at 368. Courts within the Eleventh Circuit have routinely recognized the expansiveness of the first prong and applied it to various types of employees as such. See *Pettis*, 751 F.Supp.2d at 1230 (finding that employee who worked as deckhand, apprentice diver, diver, dive tender, and captain met first prong of "seaman" test); *Baucom v. Sisco Stevedoring, LLC*, 2008 WL 313174, *4-5 (S.D. Ala. 2008) (crane operator contributed to function and mission of vessel whose purpose was to load or unload cargo from ships); *Drakadis v. Mori*, 2012 WL 13005441, *7 (S.D. Fla. 2012) (plaintiff's carpentry work aboard the vessel contributed to its function).

The second prong requires a

substantial connection "both in terms of duration and nature" to a vessel (or an identifiable group of vessels)[1] in navigation. *Clark*, 2012 SL 1565648 at *3. As a general rule, a "worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act," although this figure is a guideline rather than a fixed requirement. *Wilander*, 498 U.S. at 371; see *Clark*, 2012 SL 1565648 at *3 ("It is clear that 70 out of 768.5 hours (or 9.1%) is insufficient to meet the substantial duration prong in *Chandris*. However,

229 hours (or 29.7%) is not clearly inadequate.); see also *Eckert v. United States*, 232 F.Supp.2d 1312, 1324 (S.D. Fla. 2002) ("17-25% at-sea time period is not 'clearly inadequate.'"); *Pettis*, 751 F.Supp.2d at 1222 (Jones Act seaman status applied even though diver never left harbors or protected waters where diver's connection to employer's vessel and its diving fleet was substantial in nature; diver spent more than 30% of his time in service of diving fleet).

In addition to the durational element, there must also be a substantial connection in nature, which requires an examination of the employee's activities and duties to determine whether he is land-based or sea-based. *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 555 (1997). The Supreme Court said in *Papai* that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea," but this "going to sea" language has been treated as "helpful," rather than determinative, by other courts. *Papai*, 520 U.S. at 555; see *Drakadis v. Mori*, 2012 WL 13005441, *7-8 (S.D. Fla. 2012) (referencing *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000)).

The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the **sea-based** maritime employees who are entitled to Jones Act protection from those **land-based** workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. *Chandris*, 515 U.S. at 368 (emphasis added).[2] In evaluating whether the employee has a substantial connection to the vessel, the courts tend to require that the duties be "seafaring" in nature and subject the worker to the "perils of the sea." See *Baucom v. Sisco Stevedoring, LLC*, 2008 WL 313174, *5-6 (S.D. Ala. 2008) (crane operator who worked aboard a floating crane barge in the Mobile River was "regularly exposed to the perils of the sea," even though not actually at sea, and had substantial connection to vessel to qualify as "seaman"); *Papai*, 520 U.S. at 558-59 (plaintiff who was hired for one day to paint the vessel at dockside was not "seaman" for purposes of Jones Act, even though union agreement classified him as deckhand; his actual duty did not include any seagoing activity); *Haskell*, 2000 WL 3338925, *3 (S.D. Fla. 2000) (plaintiff hired to "wash the yacht, check the lines, check the power supply, and check the bilge pumps" while yacht was being marketed for sale, was not exposed to the perils of the sea and did not qualify for seaman status; plaintiff's duties in employment at the time of injury were not that of a seaman, and the fact that plaintiff previously served in other employment as crew member or could serve as crew member at sea if needed was irrelevant); *Clark v. American Marine & Salvage, LLC*, 494 Fed. Appx. 32, 34-35 (11th Cir. 2012) (court held that employee who performed repairs to work barge primarily on land or while tethered to a land base – work which was not considered seafaring in nature – was not exposed to the perils of sea and did not qualify as seaman; employee argued that the 9% of repairs performed while in the water of a marina made him a commercial diver and exposed him to marine perils, but court stated this work was done under a "transitory and sporadic" connection to the vessel and did not attach seaman status). Furthermore, the courts emphasize that they should examine "the claimant's overall job assignments as they existed at the time of the injury to determine whether there is sufficient connection to a vessel in navigation, without focusing solely on the specific activity in which the employee was engaged at the time of his injury." *In re Williams Marine Const. and Services, Inc.*, 350 F.Supp.2d 975, 986 (M.D. Fla. 2004).

Thus, in spite of the uniformityof the two-part test established in *Chandris*, the determination of seaman status is a fact-dependent inquiry, requiring an evaluation of the circumstances in consideration of the policy and purpose behind the Jones Act.

While courts generally tend to make the determination of whether an employee qualifies for seaman status, a court may also decline from ruling on the issue as a matter of law and submit it to the jury as a factual question to be decided by the jury. See *Drakadis v. Mori*, 2012 WL 13005441, *10 (S.D. Fla. 2012) ("[T]he court finds that the determination of Plaintiff's status as a Jones Act seaman, a mixed question of fact and law, is a highly fact-intensive inquiry that cannot be resolved at this stage of the litigation… Defendants may ultimately prove at trial that the claimed Jones Act seaman status does not apply to Plaintiff's claims; accordingly Defendants' motion for summary judgment on the Jones Act claims for lack of seaman status shall be

denied without prejudice to raise these arguments to the jury at trial.").

2. Longshoremen and Harbor Workers

The test for Longshore Act coverage was accurately summarized in 2013 by United States District Judge Kristi Dubose in *In re Nature's Way Marine, LLC*, *supra*:

> The LHWCA extends coverage to Brunson because he is a statutory "employee." To be an employee and receive compensation under the LHWCA: 1) the person must be injured in the course of employment, 33 U.S.C. § 902(2); 2) the employer must have employees engaging in maritime employment, 33 U.S.C. § 902(4); 3) the injured person must have "status," that is, be engaged in maritime employment, 33 U.S.C. § 902(3); and 4), the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," 33 U.S.C. § 903(a)). *See, e.g., Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989). Employee status "can be used upon the maritime nature of the employment as a whole" or on the maritime nature of the employment as a whole" or on the maritime nature of the claimant's activity at the time of the injury." *Browning v. B.F. Diamond Const. Co.*, 676 F.2d 547, 548-549 (11th Cir. 1982) (citing *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 754 (5th Cir. 1981) and *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978)). As set forth by *Director v. Perini North River Assoc.*, 459 U.S. 297, 323-324 (1983) (footnote omitted): "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), ... providing, of course, that he is the employee of a statutory 'employer,' and is not excluded by any other provision of the Act. [] We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." *See also e.g., Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (discussing the expansion of the requirement that the LHWCA's prior application only to injuries sustained on the navigable waters of the United States, to now include large shoreside areas, necessitating an affirmative description of the particular employees working in those areas who would be covered – "[t] his was the function of the maritime employment requirement[]"); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990) (noting that the LHWCA was expanded to cover workers who are not actually physically on the water at the time of injury).

Id. at 1237. Judge DuBose's analysis remains "good law."

CONCLUSION

Determining the victim's status often defines available remedies and the scope of recoverable damages in maritime injury and death cases.

1 While *Papai* extends seaman status to those who have a connection to an identifiable fleet of vessels rather than one particular vessel, the Supreme Court made clear, over a pointed dissent, that the fleet must be owned in common." *Haskell v. M/V ALCAZAR*, 2000 WL 33389205, *3 (S.D. Fla. 2000).

2 This "remedial scheme" refers to the distinction between seamen and longshoremen that Congress created by passing the LHWCA. The LHWCA and the Jones Act are mutually exclusive remedies: "if an employee is a seaman, he is eligible to recover under the Jones Act, whereas if an employee is a land-based maritime worker, the remedy is the LHWCA." *Bendlis v. NCL (Bahamas), Ltd.*, 2015 WL 1124690, *6 fn. 1 (S.D. Fla. 2015).

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