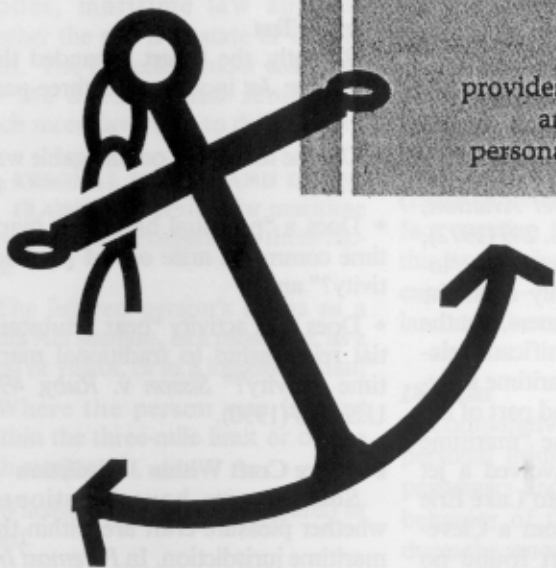




## What You Should Know About Maritime Personal Injury Claims

Steven E. Leder

Maritime law  
provides special rights  
and remedies in  
personal injury cases.



**W**HAT HAPPENS IF your client is injured while on navigable waters? What law applies? Federal general maritime law governs all acci-

dents within the admiralty jurisdiction. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). This is true whether you sue in federal or

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state court. Maritime law evolved separately from land based law. It is a patchwork of statutes and court-made law. Remedies for personal injury and death are a labyrinth of causes of action and defenses which seem strange to lawyers and claims representatives who are accustomed to land based remedies. It is easy to get lost in the maze but the basics are simple.

**MARITIME JURISDICTION** • When does maritime jurisdiction attach? The traditional rule was the "locality test." If the tort occurred in navigable waters, admiralty jurisdiction applied. In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), the Supreme Court adopted the "locality plus" test. Not only must the tort occur in navigable waters, but the wrong must bear a "significant relationship to traditional maritime activity." *Id.* at 268. The second part of the test is referred to as the "maritime nexus." *Executive Jet* involved a jet aircraft which crashed into Lake Erie shortly after take-off from a Cleveland airport. The Court found no "traditional maritime activity" and held that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land based aircraft between points within the continental United States." *Id.* at 274. The Court speculated that: "[i]t could be argued . . . that if a plane flying from New York to London crashed in the mid-Atlantic, there

would be admiralty jurisdiction . . . because it would be performing a function traditionally performed by waterborne vessels." *Id.* at 271. In fact, helicopter pilots who ferried oil platform workers out to their platforms are considered "the functional equivalent of" crewboat seamen. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 619 (1978) at n.2.

### Current Test

Recently, the Court expanded the *Executive Jet* inquiry to a three-part test:

- Did the tort occur on navigable waters?
- Does a "potential hazard to maritime commerce arise out of [the] activity?" and
- Does that activity "bear a substantial relationship to traditional maritime activity?" *Sisson v. Ruby*, 497 U.S. 358 (1990).

### Pleasure Craft Within Jurisdiction

Some courts have questioned whether pleasure craft are within the maritime jurisdiction. In *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982), the Supreme Court held that a collision between two pleasure vessels on the navigable waters of the United States was within the admiralty jurisdiction. The Fourth Circuit in *Oliver By Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984), held that admiralty jurisdiction applied to a swimmer who was struck by a plea-

sure boat after falling off a raft towed by another pleasure boat. One key criterion has been whether the case involves a "navigational error" as opposed to the mere location of the accident. *Cf. Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) (no jurisdiction where swimmer was injured diving from a pleasure boat).

### Plaintiffs Take Warning

Remember, if maritime jurisdiction applies, maritime law applies; whether the suit is in state or federal court. The remedies under maritime law are different and sometimes much more favorable to defendants.

**P**ERSONAL INJURY AND DEATH CLAIMS • Remedies for maritime personal injuries depend on three factors:

- The injured person's status as a Jones Act seaman, as a passenger, as a guest or visitor, or as a longshoreman;
- Where the person was injured (within the three-mile limit or on the high seas); and
- Whether the person was injured or killed.

### Passengers, Guests, and Visitors

A "passenger" is a person who travels in a public conveyance by virtue of a contract, express or implied, paying the carrier a fare or its equivalent. *The Vueltabajo*, 163 F. 594 (S.D. Ala. 1908). A "guest" or "visitor" is a per-

son other than a passenger or member of the crew who is aboard with the express or implied permission of the ship owner or operator of the vessel. If you pay for a cruise on a cruise ship, you are likely to be a passenger; while if you go on a friend's yacht, you are likely to be a visitor or a guest.

### Only One Duty Owed

Generally, the distinctions between status as a passenger or guest/visitor are not important under maritime law. There is only one duty of care owed to persons aboard a vessel: "reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Whether negligence exists is a fact question for the jury. However, this issue is drenched in the maritime experience—what is reasonable on land may be unreasonable at sea.

### Defenses

Comparative negligence applies to personal injury actions brought by passengers and guests. The negligent behavior of the passenger only reduces the amount of the recovery. *Nygren v. American Boat Cartage, Inc.*, 290 F.2d 547 (2d Cir. 1961). There is generally a three-year statute of limitations for passengers and guests. See 46 U.S.C. §763a. However, passengers' tickets may contractually limit the time in which to bring suit.

### Jones Act

In 1920, Congress passed the Jones Act, 46 U.S.C. App. §688. It applies only to seamen and provides a remedy for injuries or death due to an employer's negligence during employment without regard to where the accident takes place. It provides in pertinent part:

"Any *seaman* who shall suffer personal injury in the course of his employment may at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply [Federal Employer's Liability Act, ("FELA") 45 U.S.C. §51 et seq.] . . ." 46 U.S.C. App. §688(a) (emphasis added).

#### *High Employer Standard*

Jones Act negligence is different from traditional land based negligence. The Jones Act makes the employer liable in negligence "even in the slightest degree." The employer will be liable in negligence under the Act for an injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier."

#### *Low Employee Standard*

The seaman, on the other hand, need only exercise "slight" care for his own safety. The plaintiff may recover if the facts show that the negligence of

the employer played any part, even the slightest, in producing the injury or death for which damages are sought. *See, e.g. Robin v. Wilson Bros. Drilling*, 719 F.2d 96, 97 (5th Cir. 1983).

#### *Few Defenses*

Contributory negligence and assumption of risk have been abolished and comparative negligence is a rule. *See FELA*, §§53 and 54. Therefore, the negligence of the employee does not bar recovery but merely diminishes damages in proportion to the amount of negligence attributable to him. *FELA* §53.

#### *Death Actions*

In death actions, the Jones Act provides both a survival action and a wrongful death action. The Jones Act sets forth a schedule of beneficiaries who may seek damages upon the death of a seaman. Unlike the Death on the High Seas Act, 46 U.S.C. App. §§761 et seq. ("DOHSA"), the beneficiaries are mutually exclusive. That is, the primary beneficiaries are the deceased seaman's surviving spouse and children. If no primary beneficiaries exist, the deceased seaman's parents can pursue the action and, if none exist from that group, the deceased seaman's *dependent* next of kin can pursue the action. Damages recoverable in a Jones Act wrongful death action are limited to pecuniary damages (loss of support and services and funeral expenses). The statute of limitations is

three years. FELA §56 (incorporated by reference in the Jones Act, 46 U.S.C. App. §688).

### Unseaworthiness

An injured seaman may also maintain a cause of action for unseaworthiness under the general maritime law. *See, e.g., Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). "Unseaworthiness" concerns the duty of the shipowner to furnish a seaworthy ship. It imposes almost an absolute and nondelegable duty upon the shipowner to provide a vessel that is fit for its intended purposes. "The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970).

### No Passenger Cause of Action

Passengers and guests do not have a cause of action for unseaworthiness. *Palmer v. Fayard Moving & Transp. Corp.*, 930 F.2d 437, 440-441 (5th Cir. 1991). Damages recoverable for a true Jones Act seaman are limited to pecuniary loss.

### Maintenance and Cure

The obligation of a shipowner who employs seamen to pay maintenance and cure is an ancient custom that appears in medieval sea codes. *See, John B. Shields, Seamen's Rights To Recover Maintenance and Cure Benefits,*

55 Tul. L. Rev. 1046 (1981). "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. *The Osceola*, 189 U.S. 158 (1903). "Cure" is the right to necessary medical services. The obligation of maintenance and cure continues until the seaman has reached "maximum recovery." If the condition is incurable, the obligation of maintenance and cure ends at the time that conclusion is reached. *Farrell v. United States*, 336 U.S. 511 (1949). Maximum medical recovery has been reached "when it appears probable that further treatment will result in no betterment of the seaman's condition." *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979).

"Cure" is the amount necessary for medical treatment of the injury or illness. "Maintenance" is designed to provide the seaman with the kind and quality of food and lodging he would receive aboard a ship. Traditionally, the seaman is paid eight dollars per day. This is based on a 1951 union contract and in many jurisdictions, higher per diems are the rule. *See, e.g., Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 347 (5th Cir. 1982) (\$20 per day); *Peloto v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979) (\$25 to \$40 per day).

### Longshoremen's Act

The Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., is generally de-

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***Under the Pennsylvania Rule, a vessel in breach of a statute or regulation has the burden of proving that the violation was not and could not have been a contributing cause of the collision.***

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signed to provide workers' compensation to persons employed as longshoremen and harbor workers in areas where loading, unloading, repairing, or building vessels is going on, and whose work has a maritime nexus. See, e.g., *Odom Constr. Co. v. U.S. Dept. of Labor*, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981). This Act is generally beyond the scope of this article.

#### **Death on the High Seas Act**

The Death on the High Seas Act, 46 U.S.C. §761 ("DOHSA") provides a recovery for a person's (not just a seaman's) death "caused by wrongful act, neglect or default" occurring beyond one marine league (more than three miles) from shore. DOHSA is a wrongful death statute and does not provide for survival actions. It is only available if the death occurs on the high seas. The group of potential beneficiaries under DOHSA is much broader than that available under the Jones Act and includes collectively

the surviving spouse, parent, child, and dependent relatives. Damages recoverable in a DOHSA wrongful death action are, as in the Jones Act, limited to pecuniary damages.

**C**OLLISIONS • Liability for collision is based on general concepts of prudent seamanship and reasonable care, statutory and regulatory rules governing the movement and management of vessels, and recognized customs and usages. Schoenbaum, *Admiralty & Maritime Law*, §13-1 (West 1987 and 1992 Supp.). The standard is, once again, reasonable care under the circumstances. The most frequent basis of liability is violation of the "rules of the road." The International Rules were developed by treaty. *International Regulations for Preventing Collisions at Sea*, 33 U.S.C. §§1601-1608. The Inland Rules apply inside lines of demarcation set by the Coast Guard. 33 U.S.C. §§2001-2038. The International Rules and the Inland Rules are, for the most part, uniform. Under the *Pennsylvania* Rule, a vessel in breach of a statute or regulation has the burden of proving that the violation was not and could not have been a contributing cause of the collision. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

**L**IMITATION OF LIABILITY • The Limitation of Liability Act, 46 U.S.C. §181 et seq., provides that a vessel owner may limit his liability to

the value of the vessel and pending freight at the conclusion of the voyage. In addition, a fund of \$420 per gross ton of the vessel is provided for personal injury and death claims. It may be invoked in two ways:

- By complaint under Supplemental Rule F of the Federal Rules of Civil Procedure; or
- As an affirmative defense in an action brought against the defendant.

If it is brought as a complaint, it must be filed within six months of the receipt of written notice of a claim. It must be filed by the person against whom claims might be asserted and the owner must deposit with the court a bond equal to the value of the owner's interest in the vessel plus pending freight. Once the complaint has been filed, all claims and proceedings against the plaintiff vessel owner shall be enjoined upon application by the plaintiff.

### Pleasure Craft Covered

Whether or not a limitational liability action may be brought on behalf of a pleasure vessel has been the subject of intense debate by the circuits. In *Sisson v. Ruby*, 497 U.S. 358 (1990), discussed above, the Supreme Court held that federal district courts had maritime jurisdiction over a suit to limit liability for damages resulting from a fire onboard a yacht docked in a marina on navigable waters. The

Court refused to address the limitation of liability jurisdiction issue. However, it reversed and remanded the case for a hearing on the merits of the limitations action. This is the third time the Supreme Court has assumed without deciding that pleasure craft are within the Limitation of Liability Act. See also, *Coryell v. Phipps*, 317 U.S. 406 (1943); and *Just v. Chambers*, 312 U.S. 383 (1941).

**JURY TRIAL** • Generally, there is no right to a jury trial in maritime personal injury cases. This general rule is overwhelmed by the exceptions. For example, there is a right to a jury trial for a seaman's claim under the general maritime law when joined with the Jones Act claim, a Jones Act claim joined with the DOHSA claim, or a savings to suitors clause suit in which an in personam admiralty claim is filed in state court. There is no right to a jury trial for in rem actions.

**CONCLUSION** • Maritime jurisdiction and personal injury law can be confusing, not only to claims people and attorneys, but to judges as well. The difference between the right remedy and the wrong one may be hundreds of thousands of dollars. This problem is aggravated because the nature of the remedies keeps changing. Although this may be a trap for the unwary, it may be a boon to the prepared.

## **What You Should Know About Maritime Personal Injury Claims**

by Steven E. Leder

Maritime personal injury claims are nothing unusual. But how can you tell when a personal injury matter comes within maritime jurisdiction?

- Understand the maritime nexus test. The action must:

- Have occurred in navigable waters;
- Bear a significant relationship to traditional maritime activity;
- Have arisen from an activity posing a potential hazard to maritime commerce.

- Remedies for maritime personal injuries depend on:

- The injured person's status as a Jones Act seaman, a passenger, or guest;
- Where the injury occurred; and
- Whether the person was injured or killed.

- Statutory guidance can be found in:

- The Jones Act;
- The Death on the High Seas Act;
- The Longshoremen & Harbor Workers' Act;
- The Limitation of Liability Act; and
- The Federal Employer's Liability Act.

*For explanatory text see page 87.*