PITFALLS AND PRACTICAL POINTERS FOR THE TRIAL LAWYER ENCOUNTERING A MARITIME CLAIM

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A trial lawyer attempting to litigate a maritime claim without doing the preliminary and necessary research may be in for some rough sailing, and should keep the following in mind. First of all, don't miss the boat altogether: statutes of limitation are often far shorter than for land based claims, and may be as short as one year. Recognize that there are different and unique causes of action in admiralty. One significant and commonly overlooked difference is that an injured party usually *can sue his employer*. This is true even where she receives worker's compensation benefits from her employer. When setting sail, don't get lost at sea. Choice of forum clauses are routinely enforced in admiralty. You may not be able to file suit in the nearby waters of Massachusetts. After you find the appropriate forum and timely file your suit, be careful how you chart your course: you may plead yourself out of your right to trial by jury.

The elements of the claims are different, too. The standard of care may be higher. Causation is not "proximate cause." The quantum of evidence necessary to prove a maritime claim may be far lighter than for a land-based claim. To confuse things even further, the burden of proof sometimes shifts to the defendant on an essential element of the claim! If successful, damages are atypical. Loss of consortium, loss of society, and punitive damages are oftentimes not recoverable. Prejudgment interest may or may not be recoverable in admiralty.

Some of the more unusual features of maritime law claims are outlined below. This is not a Restatement of the Law of Admiralty, but hopefully a "user-friendly" guide for the land-based trial lawyer confronted with a maritime case.

A. Beware the Statutes of Limitation Differences!

(a) Cruise Ships - Virtually every cruise ship ticket requires a six month notice of claim and a one year limitation period for suit. These periods are allowed by statute. 46 U.S.C. § 30508(b). Failure to give the six month notice does not bar recovery under certain circumstances, including if the vessel knew of the injury and was not prejudiced by the failure. 46 U.S.C. § 30508(c). The one year period for filing suit is allowed whenever the U.S. is the exit port or a port of destination. If a U.S. port is not involved, the limitations period is likely two years pursuant to the Athens Convention. Henson v. Seabourn Cruise Line, Ltd., Inc., 410 F.Supp.2d 1246 (S.D.Fla. 2005).

(b) Public Vessels and Government Vessels - The doctrine of sovereign immunity applies in admiralty law for suits against the United States. Such suits are permitted only by statute. The Suits in Admiralty Act ("SAA") is a waiver of sovereign immunity for admiralty-based actions against the United States. 46 U.S.C. § 30901. The Public Vessels Act ("PVA") allows a cause of action against the United States arising out of the activities of public vessels and their personnel. 46 U.S.C. § 31101. Actions brought pursuant to either act must be brought within two years. 46 U.S.C. § 30905.

Unlike the Federal Tort Claims Act, there is no administrative claim requirement for suit filed under either the SAA or the PVA. An *exception to this rule* is for injured Jones Act seamen employed aboard the Maritime Administration's ("MARAD") vessels. (MARAD is the successor to the War Shipping Administration). 46 C.F.R. § 327.3. The claim requirements are specific and must be followed to the letter. 46 C.F.R. § 327.4. Claims must be filed with the ship's manager or general agent; a copy of the claim must be filed with MARAD. 46 C.F.R. §

327.5. Suit cannot be filed until the claim has been properly filed and disallowed by MARAD. 46 C.F.R. § 327.8.

(c) Admiralty Extension Act - This Act extends admiralty and maritime jurisdiction to cases where an injury to person or property is caused by a vessel on navigable waters, even though the injury or damage is consummated on land. 46 U.S.C. § 30101. If the action is against the United States, an administrative claim must first be presented in writing to the agency owning or operating the vessel causing the injury or damage. 46 U.S.C. § 30101(c)(2). A civil action may not be brought until the expiration of the six month period after the claim has been presented.

(d) Other Maritime Claims - Other maritime claims for personal injury must be brought within three years. These include claims brought pursuant to the Jones Act, under DOHSA, or under the general maritime law.

(e) Claims by vessel owners - For the first time in your career, you may find that your injured client is being sued by the defendant and is on "the other side of the 'v'." A unique feature of the maritime law is that a vessel owner may bring an action against an injured or damaged party pursuant to the Limitation of Liability Act. 46 U.S.C. §§ 30505 – 30512. The owner may file the civil action in a district court of the United States in admiralty jurisdiction within six months after the claimant gives the owner written notice of a claim. 46 U.S.C. § 30511. The procedure itself is governed by the Act, as well as Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Claims. Fed.R.Civ.P.Supp. F. A vessel owner is entitled to limit its liability after a maritime incident or casualty to post casualty value of the vessel and pending freight, except when the loss occurred due to its privity or knowledge. 46 U.S.C. § 30505(b). 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(e). The vessel owner has the burden of proof to show lack of privity or knowledge. Coryell v. Phipps, 317 U.S. 406, 409 (1943).

B. Look Out for the Forum Selection Clauses

Although the plaintiff may reside in Massachusetts and have boarded the cruise ship at Boston's Black Falcon Terminal, suit may have to be filed elsewhere. Nearly all passenger tickets have "forum selection clauses." These clauses have been held by the Supreme Court to be valid and enforceable. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); Reynolds-Naughton v. Norwegian Cruise Line Ltd., 386 F.3d 1 (1st Cir. 2004) (enforcing clause in ticket requiring Massachusetts resident to bring her suit in Florida).

C. Remember that an Employee can usually Sue her Employer in Tort

Consider this scenario: a client walks into your office and is already receiving worker's compensation benefits from her employer. After a thorough investigation, you are unable to find a negligent third party. You do, however, find negligence on behalf of a fellow employee. Consequently, you tell her that you cannot help her because her only remedy is workers' compensation. Three years elapse, and then you receive a call from her legal malpractice lawyer, wondering why you *never filed a complaint against her employer*.

Workers may receive workers' compensation benefits from their employer, and sue their employer in tort as well. In order to do so, they must establish either negligence under the Jones Act, or negligence of a vessel owned, operated or controlled by their employer pursuant to the LHWCA. "It is by now universally accepted that an employee who receives voluntary payments

under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act." Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 91 (1991) *citing to* G. Gilmore & C. Black, Law of Admiralty, 435 (2d ed. 1975); *see also* Rohrbacker v. Jackson & Jackson, Inc., 1991 WL 81726 (E.D. La. 1991) ("However, in a situation in which seaman status has not been determined, and indeed, is questionable, a plaintiff who pursues all potentially available remedies should not be considered to be electing a remedy.").

In general, workers injured in the course of their employment have two potential causes of action. First, "Jones Act seamen" may sue their employers for negligence. 46 U.S.C. § 30104. In the alternative, maritime workers injured by the negligence of a vessel may sue the vessel's owner for negligence, even if it is their employer. 33 U.S.C. § 905(b). A rough outline of the law pertaining to each claim is set forth below.

(a) The Jones Act - The Jones Act extended a right of action to any seaman who suffers injury in the course of her employment. 46 U.S.C. § 30104. In order to file a Jones Act claim, one must qualify as a "seaman." The key to seaman status is employment-related connection to a vessel in navigation. McDermott International, Inc. v. Wilander, 498 U.S. 337, 355 (1991). It is not necessary that a seaman aid in navigation or transportation: the ship's cleaners, cooks, and croupiers all qualify. In addition, a worker's connection to the vessel must be substantial in duration and nature. Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995). The worker's connection may be to a fleet of vessels under common ownership or control. Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997). The final step in a Jones Act analysis is whether the waterborne structure involved in the incident was indeed a "vessel." Watercraft of every type and description can be considered as vessels. In a case which our office took all the way to the U.S. Supreme Court, the dredge digging the trench for placement of the tubes

comprising the Ted Williams Tunnel was held to be a vessel. Stewart v. Dutra Construction Co., 543 U.S. 481 (2005). In reversing the First Circuit, the Supreme Court adopted the statutory definition of vessel from 1 U.S.C. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as means of transportation on water." 1 U.S.C. § 3. The Court modified the definition somewhat by construing the statutory term "capable" to mean "practically capable", stating that the question remains in all cases whether the watercraft's use as a means of transportation on water "is a practical possibility or merely a theoretical one." Stewart, 543 U.S. at 495.

The requirement that a seaman have a connection to a vessel in navigation that is substantial in duration and nature distinguishes sea-based employees, who are covered by the Jones Act, from land-based maritime workers, who have only a transitory connection to a vessel in navigation and are covered by the Longshore and Harbor Worker's Compensation Act ("LHWCA"), which is codified at 33 U.S.C. §§ 90*1- 948.* The two causes of action are mutually exclusive: a worker cannot be both a Jones Act seaman and a "maritime worker" entitled to LHWCA compensation benefits, or to bring a cause of action pursuant to 33 U.S.C. § 905(b).

(b) The Longshore and Harbor Worker's Compensation Act

Workers engaged in maritime employment but who are not Jones Act seamen may have a negligence cause of action in tort against the shipowner. 33 U.S.C. § 905(b). This action is in addition to the claim for workers' compensation benefits brought under the LHWCA. In order to bring an action, the worker must establish that she is a "maritime worker" injured by the "negligence of a vessel." "Maritime worker" is defined in 33 U.S.C. § 902, and includes longshoremen, harbor workers, and a wide range of other employees who work on or around the waterfront. "Vessel" is defined in 33 U.S.C. § 902(21) to include the vessel's master, officer, or

crewmember. Typically, the injured worker is employed by an independent contractor providing stevedoring services to a vessel. Sometimes, though, the vessel owner chooses to employ its own longshoremen. Under these circumstances, the vessel owner essentially "wears two hats" or acts in a "dual capacity." The injured worker can recover only if he can prove that the vessel owner was acting in its capacity as vessel owner, and not in its capacity as employer. Morehead v. Atkinson-Kiewit, J/V, 97 F.3d 603 (1st Cir. 1996)(*en banc*), *cert. denied*,520 U.S. 111 (1997).

D. "I'll File the Case in State Court and Avoid Admiralty Law?"

A common refrain. However, if the admiralty law can apply, it must apply. Admiralty law will apply to cases filed in either the state or federal court, and even if not specifically pleaded. The Supreme Court has stated that "With admiralty jurisdiction comes the application of substantive admiralty law." East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986) *citing to* Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 255 (1972). "[O]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable . . . [t]his is true even when the plaintiff decides to pursue her claim in the civil side of a federal court or in a state court." Austin v. Unarco Industries, Inc., 705 F.2d 1, 6 n.1 (1st Cir. 1983)(citations omitted). An exception to this rule is where the state's interest in the area substantially outweighs the federal maritime interest. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (state statute allowing damages to shellfish dealers due to oil spill applicable despite clear contradiction with federal maritime law.)

CONCLUSION

If you are unfamiliar with admiralty and maritime law, chart your course quickly but very, very carefully whenever a client walks into your office with an incident that occurred on or near the water.

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