Update on Maritime Personal Injury Cases – Admiralty Law Section Committee Meeting 2012

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I. Passenger Cases

1. Non-Enforceability of Liability Waivers for Activities Onboard Ships

i. *Johnson v. Royal Caribbean Cruise, Ltd.*, 2011 U.S. App. LEXIS 25240 (11th Cir. Dec. 20, 2011)

1. Facts:
    a. Johnson was a passenger aboard RCCL's Oasis of the Seas; which has a FlowRider – which is "a simulated surfing and body boarding activity." Before purchasing a ticket to participate in the FlowRider attraction, Johnson was instructed to sign her name to an electronic "Onboard Activity Waiver" releasing RCCL and its employees from actions "arising from any accident or injury . . . resulting from . . . her participation in any or all of the shipboard activities she has selected." Johnson then received some instruction from a RCCL employee that deviated from the regular use of the body boards (namely to stand on the body board while he was holding it) and then the employee released the board and Johnson fell off, suffering a fractured ankle. The maneuver attempted by the RCCL employee was in violation of RCCL's safety guidelines for the FlowRider (which specifically state the boards for the surf boards can be stood upon but the body boards should only be used while lying down).
2. RCCL moved for S/J arguing that the waiver precluded Johnson from recovering. Johnson filed a cross-motion for S/J arguing the waiver was rendered void by 46 USC 30509. 46 USC 30509 provides: "The owner, master, manager, or agent of a vessel transporting passengers between ports in the US or between a port in the US and a port in a foreign country, may not include in a regulation or contract a provision limiting their liability for

personal injury or death caused by their negligence or their employees or agents negligence; it also can't take away the claimants right to a trial by a court of competent jurisdiction; and that any such provision is void."

3. The district court granted RCCL's S/J and denied Johnsons'; first finding that (1) general maritime law – and thus 46 USC 30509 did not apply to this case; and (2) even if general maritime law did apply, 6 USC 30509 was inapplicable because the FlowRider activity was "a recreational and inherently dangerous activity" and 46 USC 30509 was only to prevent waivers of liability from ship owner/operator negligence in "providing transportation and other essential functions of a common carrier."
4. The 11th Circuit reversed the granting of RCCL's S/J and said that the district court failed to look to the plan and unambiguous meaning of the language of 46 USC 30509 and apply it to this case. "Had the district court done so, it would have been clear that the statute most certainly applies, and this waiver is void."
5. Note: 46 USC 30509 does not limit it's language to any type of activity or the location of the activity. Rather, it is limited to owners, masters, managers, and agents of vessels transporting passengers between ports – so, it clearly applies to waivers of cruise line negligence for off-ship activities incidental to the cruise (i.e.: wave runners; zip-lines) and, if an agency relationship between a shore-excursion operator and a cruise line can be shown, it arguably limits the waivers of a shore excursion operator as well (although the Johnson opinion did not address that).

2. Work Product Doctrine

i. 2 recent Southern District of Florida cases affirm that Accident Reports are protected by the Work Product Privilege.
   1. *Lobegeiger v. Royal Caribbean Cruises, Ltd.*, 2012 U.S. Dist. LEXIS 34718 (S.D. Fla. Mar. 7, 2012).
   2. *Bridgewater v. Carnival, Corp.*, 2011 U.S. Dist. LEXIS 106786 (S.D. Fla. Sept. 20, 2011).
   3. *In both cases, the cruise lines submitted the affidavits of managers declaring that the reports were prepared in anticipation of litigation.*
   4. In Bridgewater, the court found that the reports were "fact work product" as opposed to "mental impressions work product" opening them to discovery if the Plaintiff provided a substantial

need for the information and undue hardship to otherwise obtain the substantial equivalent.

ii. Another case in SD-Fla. Decided that photographs of accident scene was discoverable where the Plaintiff did not take her own photographs.

1. *Perry v. NCL (Bahamas) Ltd.*, 2012 A.M.C. 527 (S.D. Fla. 2011); a passenger slip and fall case.
    a. NCL argued that Plaintiff should have taken her own photos; and could obtain the substantive equivalent by taking current photos of the scene and deposing witnesses.
    b. However, the court explained that accident scene photos are "the only near-contemporaneous depiction of the area where the Plaintiff fell."
    c. The Court also noted that although the photographer was directed by an attorney to take photographs of the accident scene, he was not directed more specifically and therefore, there is no mental process of the attorney that would be revealed by the photographs.

3. Sexual Assault / Over-Service of Alcohol / Punitive Damages

i. *Doe v. Royal Caribbean Cruises, Ltd., 2012 U.S. Dist. LEXIS 36274 (S.D. Fla. Mar. 19, 2012.*

1. Facts: Cruise passenger was raped by another passenger on board the cruise ship.
    a. Court looked to the different theories of negligence on Motions to Dismiss and Strike:
        i. Court found RCCL did not have a general duty to continuously monitor its surveillance cameras;
        ii. However, Court found that Plaintiff could allege that RCCL's conduct reasonably induced the Plaintiff to rely upon the fact that she would be continuously monitored during the cruise.
        iii. The Plaintiff could allege that ship personnel actually saw her staggering through the vessel in an intoxicated state raising a reasonable inference that her attack may have been foreseeable.
        iv. Plaintiff could sue the vessel for over-serving her alcoholic beverages under the authority of *Hall v. RCCL, 888 So.2d. 654 (Fla. 3d DCA 2004).*
        v. Punitive Damages are available in passenger personal injury actions; Court looked to the 2009

USSC decision in Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009), where the USSC held that an injured seaman could recover punitive damages for his employer's willful failure to pay M&C, and the reasoning that "punitive damages available at common law historically extended to claims arising under federal maritime law . . . for wanton, willful, or outrageous conduct."

1. The District Court found that the pleading requirements to sustain a claim for punitive damages, therefore merely required an allegation that the cruise line acted in a willful, wanton and reckless manner.
2. However, the District Court questioned whether a theory of negligence based on a cruise line failing to "disclose to passengers pertinent information about the risks of crime aboard its cruises," is a proper basis for negligence under existing maritime law; and therefore called into question the viability of the claim rising to the "wanton, willful, and outrageous conduct," standard required for punitive damages.

4. No Athens Convention in Sexual Assault by Crewmember

i. *Farraway v. Oceania Cruises, Inc.;* So. Dist. Fla. Case No. 10-24312-CIV-KING (June 10, 2011)

1. Plaintiff, a minor, alleged she was raped by an employee of Oceania while she was a passenger on an Oceania cruise ship during a wholly foreign Mediterranean cruise. Oceania sought leave to file an Amended Answer to add an affirmative defense that Plaintiff's damages are limited pursuant to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (which purportedly limits the carrier's liability for death or personal injury to a passenger to no more than 46,666 Special Drawing Rights – about $70,000 US); which was set forth in Oceania's passenger ticket contract.
2. The Plaintiff set forth a number of reasons why Oceania should be precluded from arguing Athens Convention, including: (1) the Plaintiff was a minor not bound by the limitation in the ticket; and

(2) the tort of rape by a crewmember on a passenger is an intentional tort that the cruise ship is vicariously responsible for.

a. The Athens Convention provides: "The carrier (or servant or agent of the carrier) shall not be entitled to the benefit of limits of liability prescribed, if it is proved that the damage resulted from an act or omission of the carrier (or servant or agent of the carrier) done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. (Athens Convention, article 13, sections 1&2).

b. In the end, the District Court denied Oceania's Motion for leave to amend its Answer to plead the Athens Convention as an affirmative defense – because the Court found that the Athens Convention's limitations on liability are inapplicable to the alleged tort of rape by a crewmember on a cruise ship passenger.

5. DOHSA's Application to Cruise Ship Passengers dying on land – 2 decisions out of the Southern District of Florida

i. *Lasky v. Royal Caribbean Cruises, Ltd*., 2012 U.S. Dist. LEXIS 14143 (S.D. Fla. Feb. 6 2012)

1. Involved a passenger on the Navigator of the Seas who fell in his cabin while the ship was at sea and hit his head; he was seen in the ship's medical facility; and then confined to his cabin for the remainder of the cruise; went to the emergency room when the ship arrived in Ft. Lauderdale and was admitted into the hospital with a fractured neck; his condition deteriorated while in the hospital's ICU and he died in the hospital about a month after the incident.
2. RCCL moved for summary judgment that DOHSA governs the wrongful death claim and precludes the Plaintiff (the wife of the decedent) from recovering non-pecuniary damages; and requiring a bench trial.
3. Court held that "a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission was consummated in an actual injury, not at the point where previous or subsequent negligence allegedly occurred. Put another way, the right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where

the death occurred." Quoting Vancouver SS Co. Ltd. V. Rice, 288 U.S. 445 (1933).

4. Court did a review of when federal courts have permitted jury trials in cases involving DOHSA claims and found only two situations: (1) if , in addition to the DOHSA claim, the Plaintiff also asserts another claim that carries a right to a jury trial and both claims arise out of the same transaction or occurrence, then all claims must be tried by a jury; and (2) where, in addition to asserting a DOHSA claim, a Plaintiff also asserts another claim that does not necessarily entitle her to a jury trial, but that invokes the court's diversity jurisdiction. And although the USSC has recognized that federal courts may sit as diversity courts in applying the general maritime law, there is no binding precedent to support that they may do so in applying DOHSA.

ii. *Balachander v. NCL (Bahamas) Ltd.,* 800 F. Supp. 2d 1196 (S.D. Fla. 2011)

1. Involved a passenger on the Norwegian Sky who, nearly drowned in the ocean adjacent to NCL's private island, Great Stirrup Cay. He was found by his friends, and the ship's doctor was summoned, he was then airlifted first to Nassau and then to Miami, where he died 11 days later as a result of complications from the incident.
2. NCL filed a motion to dismiss Plaintiff's claims pled outside of DOHSA arguing that Plaintiff's causes of action and remedies were limited to those provided by DOHSA. The Plaintiff argued that since the incident occurred while at a private island and not upon the ship, that DOHSA should not apply.
3. The Court held that DOHSA applied and used the same reasoning: (1) the key operative fact is that decedent's illness commenced while he was on the high seas as defined by DOHSA; regardless of whether some of Defendants' negligent acts or omissions occurred on land – because the acts or omissions initially causing actual injury occurred on the high seas. This is true regardless of whether NCL is sued as a cruise ship owner or a resort owner (relying on Perkins v. Ottershaw, 2005 U.S. Dist. LEXIS 31067 – finding DOHSA applied in a suit against two corporations owning and operating a Bahamas beach resort).
4. Lastly, the Plaintiff in Balachander attempted to supplement the pecuniary-only damages permitted by DOHSA with the application of Bahamian Law which provides a recovery of damages similar in scope to Florida's Wrongful Death Act,

through the application of section 764 of DOHSA, 46 USC 30306, which states: "When a cause of action exists under a law of a foreign country for death by wrongful act . . . on the high seas, a civil action in admiralty may be brought in a court of the United States based on the foreign cause of action."

a. However, the Court denied the Plaintiff's attempt to supplement the damages through the application of Bahamian Law, finding "Section 764 of DOHSA and foreign law play no role once a court determines that U.S. law governs an action. Permitting Plaintiff to supplement DOHSA claims with claims under Bahamian law would impermissibly allow the Plaintiff to combine the most favorable elements of U.S. law . . . and . . . any other nation's law, which would have the effect of letting plaintiffs assemble the most favorable package of rights against the Defendant." The Court then said that "The U.S. Supreme Court has already affirmed that this is contrary to the purposes of DOHSA and is not permissible," making a reference to the USSC decision in *Dooley v. Korean Air Lines Co., Ltd.*, 117 F.3d 1477 (1998).

6. Notice – *Balachander* and 2 other recent cruise line cases – also speak to the issue of actual or constructive notice of conditions.

i. In *Balachander*, the District Court held that "the dangers of drowning in the ocean are open and obvious as a matter of law."

ii. *Samuels v. Holland America Line-USA, Inc.*, 656 F.3d 948 (9th Cir. September 2, 2011)

1. Samuels was on a Holland American cruise when, while the ship was anchored in Cabo San Lucas, Mexico, the Samuels family visited the nearby Lover's Beach on their own, and Samuels was seriously injured by turbulent wave action while in the Pacific.
2. The District Court granted summary judgment in favor of Holland America holding that the cruise line did not have a duty to warn Samuels because the conditions of the ocean at Lover's Beach were open and obvious and because there was no evidence of particularly hazardous conditions or of prior accidents at that location.
3. The 9th Cir. Affirmed based on the lack of record evidence that Holland America knew or should have known that the Pacific

Ocean side of Lover's Beach was so dangers that it needed to warn passengers not to swim there.

iii. *Groves v. Royal Caribbean Cruises, Ltd.*, 2012 U.S. App. LEXIS 5753 (11th Cir. Mar. 20, 2012)

1. Groves was a passenger on the Freedom of the Seas. When leaving the carpeted dining room, she slipped and fell as she stepped backwards from the carpeted area onto the granite hard floor of the wait station. Groves filed a complaint alleging that RCCL is liable for the negligent design of the area in the dining room where the accident occurred. The District Court found that Groves presented no evidence that RCCL actually created, participated in, or approved the alleged negligent design of the area and it granted summary judgment; the 11th Cir. affirmed, stating "RCCL can be liable for negligent design of the dining area if it had actual or constructive notice of such hazardous condition . . . [and] the district court found that it did not."

7. Cruise Line's Vicarious Liability for Acts of Its Medical Staff

i. There is still no opinion out of the 11th Circuit addressing whether a cruise line can be held liable for negligent acts of its medical staff. Many of the Southern District judges have been following the majority rule in *Barbetta v. S/S Bermuda Star*, 848 F.2d 11364 (5th Cir. 1988) holding that a cruise line cannot be held vicariously liable for the negligence of a ship's doctor in the care and treatment of passengers.

ii. Notwithstanding the application of the *Barbetta* 5th Cir. Rule by Southern District judges, most of those judges have held that a theory of vicarious liability through the application of apparent agency, assuming the necessary elements are satisfied, is "consistent with the general maritime tort principles of harmony and uniformity."

1. This was first suggested by (then U.S. District Court judge / Now 11th Cir. COA judge) Marcus in *Fairley v. Royal Cruise Line*, 1993 AMC 1633 (S.D. Fla. 1993).
2. *Lobegeiger v. Celebrity Cruises, Inc.*, 2011 U.S. Dist. LEXIS 93933 (S.D. Fla. 2011).
    a. Involved a Celebrity cruise passenger whose finger was amputated while she was adjusting her lounge chair on the pool deck. She saw the ship's doctor who assured her that he was very qualified and had a specific expertise in the area of severed fingers because he had treated many severed limbs and appendages as a result of machete

accidents during his medical practice in South Africa. He then informed the passenger that the injury to her finger was catastrophic and could not be reattached.

b. In addressing a Motion to Dismiss, in part, a claim against the cruise line for vicarious liability for the ship's doctor's negligence under a theory of apparent agency, the District Court acknowledged that cruise lines can be held liable for the negligence of shipboard doctors under an apparent agency theory, if they can demonstrate 3 things: (1) that the alleged principal made some sort of manifestiation causing a third party to believe that the alleged agent had authority to act for the benefit of the principal; (2) that such belief was reasonable; and (3) that the claimant reasonably acted on such belief to his detriment.

c. The Court further stated that it was unpersuaded by the cruise line's argument that the disclaimer contained in the passenger ticket contract (stating that the ship's doctor is an independent contractor) precludes a finding that a plaintiff's belief is reasonable.

3. Negligent hiring is also a valid claim with regard to cruise line liability for negligence of a ship's doctor, per the S.D. Fla.

a. *Gavigan v. Celebrity Cruises Inc.*, 2011 U.S. Dist. LEXIS 152491 (S.D. Fla. 2011)

i. Passenger aboard the Celebrity Solstice, with Norovirus symptoms, sought treatment from the ship's doctor; it was alleged that the "ship's doctor ordered a course of treatment that was medically improper and caused the passenger's condition to worsen" and, he subsequently died.

ii. Among other claims, Celebrity sought to dismiss the Plaintiff's claim for negligent selection/retention of shipboard doctors; the Court dismissed the claim for failure to plead specific facts to support the claim – but gave leave to the Plaintiff to re-plead.

1. The Court stated that "it is well-settled that a shipowner may be liable for negligently hiring and/or retaining an independent contractor"; however, "to state a claim, a plaintiff must allege facts to show (1) the contractor was incompetent or unfit to

perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness; and (3) the incompetence or unfitness was a proximate cause of the Plaintiff's injury."

8. Expert Witnesses

i. *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190 (11th Cir. 2011).

1. Passenger on an Oceania Cruise ship slipped and fell in the dining room. The Plaintiff alleged that the dining room floor was wet in the area she slipped and fell. The cruise line offered testimony that immediately after the subject fall, a waitress inspected the area and it was dry. Prior to trial, the Court sua sponte struck Plaintiff's liability expert who had conducted a ship inspection and was deposed and testified that the flooring surface in the dining room was unreasonably hazardous when wet and fell below the standards for coefficiency of friction. The District Court judge felt that the issue of the slipperiness of the floor was irrelevant and that the issue in the case was whether the floor was wet or dry at the time of the incident.
2. The 11th Cir. reversed, finding that the district court improperly excluded the testimony under Fed. R. Evid. 702; finding that the passengers principal theory of the case was that the cruise line's choice of tile flooring was unreasonable given its knowledge that the area was heavily trafficked and susceptible to spills.

II. Crew Cases

1. Overwork – causing sleep deprivation as a condition of employment. Expansion of Goetschall.

i. *Skye v. Maersk Lines Limited,* United States District Court, Southern District of Florida, Case No. 11-21589-CIV-ALTONAGA. Verdict May 16, 2012.

1. Facts:
   a. William Skye was a 57 year old Jones Act seaman who worked for Maersk Lines Limited as a Chief Mate aboard a Maersk container vessel called the Sealand Pride.
   b. He was assigned 2 four hour daily watches and his job description called for 28 additional job duties.
   c. He kept daily logs of his hours worked which show that he worked, on average, 15.75 hours a day.
   d. Maersk created and maintained an overtime budget for its crew, including the Chief Mate position. Maersk budgeted 185% of the Chief Mate's base salary for overtime for the Chief Mate position. By comparison, Maersk's overtime budget for the Captain was 26% of the captain's base salary.
   e. As a result of his long working hours and inability to receive enough uninterrupted rest, Skye alleged that he was diagnosed with Left Ventricular Hypertrophy (a physical thickening of the left ventricular portion of the heart making it difficult for the heart to pump blood and significantly increasing the risk of a heart attack), by his cardiologist in June 2008.
   f. Also, as a result of the long working hours and inability to receive enough uninterrupted rest, Skye was diagnosed with an "adjustment disorder" by his psychiatrist in 2008.
   g. Both his cardiologist and his psychiatrist related his injuries to his working conditions and lack of sleep and recommended that he retire early from working on ships (at age 54).
   h. During his last year of work, Skye earned approximately $171,000 and received found (food, shelter, medical care) which was valued by an economist at approximately $36,000.

i. Plaintiff filed suit under theories of: (1) negligence; (2) unseaworthiness; and (3) negligence per se.

j. Negligence Per Se: arises from violations of the work/rest hour laws that comprise the STCW (Standards of Training, Certification, and Watchkeeping). Which provide, in part:

    i. 46 USC 8104(d) and, that "A licensed individual or seaman in the deck or engine department may not be required to work more than 8 hours in one day."; and in 46 CFR 15.1111 (a) "Each person assigned duty as officer in charge of a navigational or engineering watch, or duty as a rating forming part of a navigational or engineering watch, on board any vessel that operates beyond the Boundary Line shall receive a minimum of 10 hours of rest in any 24-hour period." While there are some exceptions to the foregoing, the rest received may not be less than 70 hours in any 7 day period. Further, he must receive at least a 6 hour uninterrupted rest period daily.

k. During trial, Plaintiff presented the testimony of two former Maersk employees, Michael McCright and Steven Krupa. Michael McCright was a former relief Chief Mate aboard Maersk ships and he testified as to the difficult job that chief mates working for Maersk faced and that it was impossible to do the job without working a significant amount of overtime, which was exhausting. Steven Krupa was a former fleet manager for Maersk and testified that ultimately Maersk was responsible for complying with the STCW laws but that Maersk did not affirmatively do anything to check that its crew members were able to complete their job duties and comply with the STCW work/rest hours. The Plaintiff also presented the testimony of one of the Maersk captains under which William Skye worked, Cpt. James Brennan, who testified that William Skye was a good and competent Chief Mate who would complain to him that complying with the STCW work/rest hours was difficult.

l. Maersk presented arguments that it was primarily William Skye's responsiblity as Chief Mate to make sure that the work/rest hours were complied with. Further, they argued

that William Skye failed to delegate tasks which would have made it feasible for him to comply with the work/rest hours and allowed him to obtain uninterrupted rest. Additionally, Maersk argued that William Skye's injury was caused by cardiac conditions which he began complaining of in 2000 and, as such, his filing of a lawsuit in May 2011 violated the Statute of Limitations (which is 3 years). Maersk also presented testimony from cardiologist, Dr. Theodore Feldman, who testified that William Skye's Left Ventricular Hypertrophy did not preclude him from working aboard ships and was easily controlled with medication. Defendant also presented testimony from maritime safety expert, Captain Douglas Torborg, who went through three and a half years of duty logs (work hour logs) regarding William Skye and testified that, based on the exceptions to the work/rest hours of the STCW, that William Skye's working hours did not constitute a violation of the laws. Maersk argued that William Skye had long planned to retire in 2008 before finding out about his Left Ventricular Hypertrophy. Maersk also argued that William Skye was an licensed attorney (which was true) and could earn a substantial income as an attorney or as a maritime legal expert, even with his LVH (despite that William Skye hadn't ever earned any significant income as an attorney and hadn't worked as an attorney in over 20 years).

m. In the end, the jury did not find that there was statutory violations of the STCW laws. They did, however, find that Maersk was negligent and that their negligence was a legal cause of William Skye's injuries and that, as a result of such injuries, which were first able to be discovered by Mr. Skye in 2008, that he was forced to retire 10 years early. They awarded $2,088,549.00 (present value) for those 10 years of lost wages. Further, they found that William Skye's non-economic damages totaled $273,750.00. They found Maersk 25% negligent and William Skye 75% comparatively negligent.

2. Significant legal issues:
    a. Negligence Per Se:
        i. Defendant argued that the statutes which were arguably violated were not designed to protect

seaman from injuries due to overwork/fatigue/lack of sleep; rather they were enacted solely to prevent collisions – and as such, cannot form the basis for negligence per se.

1. The general rule (in non-admiralty cases) regarding statutory violations and negligence per se – is that the injury flowing from the violation must be the type of injury the statute sought to guard against – otherwise, the violation is merely evidence of negligence and not negligence as a matter of law.
2. However, in admiralty cases – the rule is (as recognized by the judge in Skye) that a violation of statute creates liability without regard to whether the injury flowing from the breach was the injury the statute sought to prevent.
    a. The seminal case on this principle is *Kernan v. American Dredging Company,* 78 S.Ct. 394 (1958).
        i. In *Kernan*, there was a statute (33 CFR 80.16(h)), which required a white light on its bow and a white light on its stern which shall be not less than 8 feet above the surface of the water, and shall be of such a character to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles.
        ii. Clearly, the statute at play in *Kernan* was designed to prevent collisions at night.
        iii. In *Kernan*, the subject "light" which was an open flam kerosene lamp on the deck of a vessel, kept only around 3 feet above an extensive

accumulation of petroleum products spread over the surface of the river – where there were several oil refineries and facilities for oil storage; and, not surprisingly, the vessel caught fire, resulting in a loss of life for the Plaintiff seaman.

iv. The US Supreme Court looked to FELA cases where there were violations of the Safety Appliance Act or the Boiler Inspection Act, where it had held that a violation of either statute creates liability under FELA if the resulting defect or insufficiency in equipment contributes in fact to the death or injury in suit, without regard to whether the injury flowing from the breach was the injury that the statute sought to prevent.

3. No contributory negligence where negligence per se, in admiralty:
    a. 45 USC sec. 53, provides, in the context of FELA: no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

b. "Emotional" vs. "Physical" injuries – and the application of *Gottshall*.
    i. Also, at issue in this case was the Defendant's arguments that injuries due to "fatigue" are legally characterized as "emotional" injuries and not

subject to compensation under the U.S. Supreme Court case of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

1. *Gottshall* was a consolidated case of two distinct cases under FELA for negligent infliction of emotional distress for stressful working conditions: one was Gottshall's case, which involved a claim for major depression and post-traumatic stress disorder arising from him seeing a co-worker/friend die of a heart attack; the other one was Carlisle (against the same Defendant – Consolidated Rail Corp.), who had worked as a train dispatcher for several years had claimed that he suffered a nervous breakdown and other injuries due to overwork.
2. The USSC held that while a claim for negligent inflication of emotional distress is cognizable under FELA, the common-law zone of danger test applies to determine who may recover for negligent infliction of emotional distress; and, under the zone of danger test, a worker could not recover for emotional injuries stemming from a stressful working environment.

ii. Then the Sixth Circuit COA arguably expanded the holding in *Gottshall* in a case called *Szymanski v. Columbia Transportation Company*, 154 F.3d 591 (6th Cir. 1998).

1. In *Szymanski*, the 6th Cir. applied the Gottshall rule to a claim of a seaman's physical injury, a heart attack, allegedly arising from what was characterized in the case as "job related stress". The 6th Cir. held that the *Gottshall* USSC precedent applied to bar the claim, under either Jones Act negligence or unseaworthiness.
    a. Szymanski was a conveyorman working on cargo vessels on the

Great Lakes, in a two-man team, working to unload cargo. The facts are that the work of conveyormen is "strenuous, fast-paced, and sometimes of long duration. He was assigned to a ship which was particularly stressful in the pace of its discharge of cargo and he suffered chest pains, while working aboard that ship; however, he was later transferred to another ship and about a month later, suffered a heart attack; was told that his days as a "conveyorman" were over by his doctors – and then filed suit under Jones Act negligence and unseaworthiness.

b. The court held that despite Plaintiff's contentions that the heart attack was a "physical impact" rather than an "emotional injury", the injury was really just a "physical manifestation" of an emotional injury and was barred by *Goetshall* (absent a zone of danger analysis).

c. The court also rejected the suggestion that the limitation to injuries caused by physical stress should be extended to those caused by "extraordinary non-physical stress," finding that there is no authority for such a distinction, "which inevitably would lead to a large increase in potential employer liability."

iii. So, that left us in Skye with a difficulty of showing that the LVH suffered by William Skye was actually a "physical injury" as opposed to a "physical manifestation of an emotional injury."

iv. The Plaintiff met this burden in Skye by presenting the expert opinions of Plaintiff's cardiologist and psychiatrist, who both spoke to the physicality of sleep deprivation over extended periods of time – causing an extended "fight or flight response" which is an extended release of adrenaline in the body – which, in turn, causes increase in blood pressure, and eventually leads to the condition of LVH. Both the Plaintiff's cardiologist and psychiatrist offered the opinions that these were "physical" rather than "emotional" injuries.

v. Further, the judge in Skye found and relied on precedent for "extended total sleep deprivation" presenting a question of fact as to whether it is a physical rather than emotional injury. The judge in Skye stated in its Order on Summary Judgment: "While the Court is cognizant that injuries to the heart, such as heart attacks and Skye's injury, affect a person physically, they may be the result of stress, over-work, an abusive work environment, or other emotional injuries, i.e. non-physical stress, which is subject to Gottshall's requirements and may not be actionable . . . . However, a case of total sleep deprivation might blur the line between what constitutes physical versus non-physical stress . . . . [E]vidence showing the chronic sleep deprivation endured by Skye over several years . . . allegedly beyond the parameters permitted under federal law, coupled with [Skye's cardiologists] opinions, sufficiently render the line between what constitutes physical versus non-physical stress in this matter a question for the finder-of-fact."

vi. Then the judge utilized a special verdict form, submitting a special interrogatory to the jury on the verdict form:

    1. Question 1: Do you find the Plaintiff, William Ske, sustained an injury and, if so, what is the nature of his injury? Please check the appropriate finding: (A) Plaintiff did not sustain an injury; (B) Plaintiff

sustained a physical injury; or (C) Plaintiff sustained an emotional injury. [The jury checked (B) Plaintiff sustained a physical injury.]

c. Issues related to Statute of Limitations
    i. Finally, in Skye, there was an issue raised by the Defendants related to Statute of Limitations. Skye had worked for Maersk a long time; and, since the year 2000 had seen a cardiologist for increased cholesterol and an arrhythmia; which the defense argued was when Skye knew or should have known of the subject injury and its alleged relation to his work conditions. Skye, however, was not diagnosed with LVH until June 2008 and did not file suit until May 2011; so, a finding that Skye "knew or should have known of his injury and its relation to his working conditions in 2000" would have acted as a bar to his claims.
    ii. The Plaintiff presented testimony at trial from Skye's cardiologist and psychiatrist who both testified that (1) Skye's LVH was not diagnosed until 2008 and, as such, Skye could not have known about it until 2008; and (2) Skye's LVH was not related to his conditions of elevated cholesterol or arrhythmia.
    iii. To deal with this issue, the judge posed 2 other special interrogatories to the jury on the verdict form:
        1. Question 3. How do you characterize Plaintiff's injury? (A) The left ventricular hypertrophy was a continuation or evolution of what was going on with Plaintiff in 2000. (B) The left ventricular hypertrophy was not related to his complaints in 2000. [The jury checked (B) – The left ventricular hypertrophy was not related to his complaints in 2000.]
        2. Question 4. When do you find Plaintiff first knew or should have known that he or his working conditions wer causing him

physical injury? Date: _____ [The jury wrote "May 2008"] thus obviating any Statute of Limitations issues.

2. Enforceability of Arbitration Provisions in Collective Bargaining Agreements

i. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. Aug. 29, 2011).

1. Prior to August 2011, there was a conflict in the 11th Cir. regarding the enforceability under the New York Convention (The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards) of mandatory arbitration provisions in a crewmeber's collective bargaining agreement.
    a. The conflict arose between two prior opinions of the 11th Cir.:
        i. *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); which compelled arbitration; and
        ii. *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009); which did not.
2. Facts: In *Lindo*, a Nicaraguan seaman working for Norwegian Cruise Lines, brought suit in Florida state court for damages for a back injury he sustained while transporting heavy trash bags to the ship. The contract specified that all Jones Act claims would be subject to binding arbitration; designating the place of arbitration to be the Seaman's country of citizenship (Nicaragua); and the substantive law to be the law of the flag of the vessel (Bahamas). The cruise line removed the case to federal court and moved to compel enforcement of the arbitration provision pursuant to 9 U.S.C. sec. 205. The Plaintiff challenged enforcement of the arbitration provision because of the application of Bahamian law to the claim, rather than the Jones Act – and argued that the arbitration provision was void as against public policy because it operated as a prospective waiver of the seaman's Jones Act claim. In support of this contention, the seaman relied primarily on the prior *Thomas* decision, which espoused this public policy defense – holding that arbitration is unenforceable if foreign law applies since the seaman cannot assert his U.S. statutory claims, such as the Jones Act.
3. The 11th Cir. granted the cruise line's motion to compel arbitration and dismissed the case, enforcing the arbitration provision through the New York Convention.

4. The 11th Cir. explained the two stages of enforcement under Chapter 2 of the New York Convention:
    a. An action to compel arbitration (arising under Article II of the convention); and
    b. At a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement (arising under Article V of the convention).
5. The Court then found that Article V articulates seven defenses, one of which is the "null and void as contrary to public policy" defense; and then found that this defense, arising under Article V, only applies at the stage of confirming an arbitral award (as opposed to applying at the stage of compelling arbitration).
    a. Therefore, a seaman may only raise this defense after completing the arbitration process – by raising the public policy defense in an effort to nullify the arbitral award.
6. In essentially overruling it's prior decision in *Thomas*, the Court concluded that *Thomas* violated the "prior panel precedent rule" because it cannot be reconciled with *Bautista*.
7. Judge Barkett (who was the author of the 11th Cir. opinion in Thomas), wrote a dissent in Lindo, making reference to the U.S. Supreme Court's "prospective waiver doctrine" as expressed in the USSC opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) [at 637 n. 19]. Judge Barkett, states her position:
    a. "In sum, I believe the Supreme Court meant what it said in Mitsubishi. The majority, however, gives the Supreme Court's prospective waiver doctrine short shrift. I would simply take the Supreme Court at its word, as we are required to do, and apply the doctrine to the case before us. And such an application compels the conclusion that the arbitration agreement in Lindo's contract effectuates precisely the sort of prospective statutory waiver that the Supreme Court "would have little hesitation in condemning as against public policy." Accordingly, I would hold that the arbitration agreement in Lindo's contract is "null and void" and thus unenforceable."
8. The progeny of the *Lindo* Decision. Subsequent opinions have followed the holding in *Lindo*:
    a. *Henriquez v. NCL (Bahamas), Ltd.*, 440 Fed. Appx. 714 (11th Cir. Sept. 6, 2011) (affirmed the order compelling

arbitration and stated "[a]s we held in Lindo, only after arbitration may a court "refuse to enforce an arbitral award if the award is contrary to the public policy of the county.").

b. *Maxwell v. NCL*, 2011 U.S. App. LEXIS 21237 (11th Cir. Oct. 18, 2011) (remanding to the district court to enter an order compelling arbitration and recognizing that "the public policy is not a valid defense to enforcement of an arbitration agreement.").

c. *Arauz v. Carnival*, 2012 U.S. App. LEXIS 7116 (11th Cir. April 10, 2012) (affirming the order compelling arbitration, citing Lindo).

d. *Lazarus v. Princess Cruise Lines, Ltd.*, 2011 U.S. Dist. LEXIS 140123 (S.D. Fla. Dec. 6, 2011) (holding Lindo compels enforcement of the arbitration provision).

e. *Centeno v. NCL*, 2012 U.S. Dist. LEXIS 39741 (S.D. Fla. Mar. 23, 2012) (compelling arbitration and finding that *Lindo* is final and binding on this Court and that Plaintiff cannot rely on *Thomas*).

f. *Lujan v. Carnival Corp.*, 2012 U.S. Dist. LEXIS 45812 (S.D. Fla. April 2, 2012) (compelling arbitration and stating that "*Thomas* is dead-letter in this Circuit.") (Lujan is presently on appeal being handled by Lipcon, Margulies, Alsina & Winkleman, P.A.).

9. The Lindo decision has had implications outside the Eleventh Circuit as well, where courts are following the same reasoning:

a. *Potenciano Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012) (seaman's employment contract arbitration clause fell within Chapter 2, and is enforceable notwithstanding a claim under the Seaman's Wage Act – citing Lindo).

ii. Arbitration provision not enforceable where the claim does not arise out of the crewmember's employment.

1. *Doe v. Princess Cruise Lines, Ltd*., 2011 U.S. App. LEXIS 19502 (11th Cir. 2011).

a. Facts: In *Doe*, a female crewmember was drugged and raped; and filed suit under both the Jones Act, the Seaman's Wage Act, and other common law torts. The cruise line moved to compel arbitration of all counts pursuant to the arbitration provision in the crewmember's

contract. The District Court for the Southern District of Florida denied the cruise line's motion; and the cruise line appealed.

b. The 11th Cir. held that in order to compel arbitration, the dispute had to relate to, arise from, or be connected with the employment agreement or services she performed under that agreement. Since her common law tort claims did not fall within that scope – they were not subject to the arbitration provision in her contract. However, the claims under the Jones Act and Seaman's Wage Act did arise from her employment and, as such, the 11th Cir. remanded those claims for the District Court to compel arbitration as to those claims only.

3. Choice of Law and Forum Non Conveniens

i. *Kyla Shipping Co. v. Shanghai Zhenhua Heavy Industry Co.*, 2012 U.S. Dist. LEXIS 59790 (S.D. Ala. April 30, 2012)

1. *Kyla* reiterates the USSC's interpretation of the doctrine of forum non conveniens, set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

a. In determining a question of choice of law, the court must consider the following factors: (1) the place of the wrongful act; (2) the flag under which the ship sails; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract between the injured party and the shipowner; (6) the accessibility of either forum; (7) the laws of the forum; and (8) the shipowner's base of operation.

4. Maintenance and Cure

i. Willful misconduct as a defense to M&C

1. *Coleman v. Omega Protein, Inc.*, 2011 U.S. Dist. LEXIS 102043 (E.D. La. Sept. 9, 2011).

a. Facts: Plaintiff seaman passed out and injured himself from a fall. Defendant immediately took Plaintiff to a family clinic, where he was treated by a doctor who later determined cocaine use was the probable cause of Plaintiff's loss of consciousness. Plaintiff filed suit alleging Defendant's negligence, vessel unseaworthiness, and breach of duty to provide maintenance and cure under

both the Jones Act and general maritime law. Defendant presented evidence of Plaintiff's cocaine use. The court granted Defendant's motion for partial summary judgment and dismissed the Jones Act negligence and unseaworthiness claims. The court next considered whether the plaintiff is entitled to maintenance and cure.

b. The district court reiterated the general rule that although the shipowner / employer's duty to provide M&C is not subject to termination for negligence on behalf of the crewmember, a crewmember's "willful misconduct," defined as "a willful mishbehavior or a deliberate act of indiscretion," is sufficient to terminate the duty.

c. The district court found, under these facts, that the seaman engaged in willful misconduct when he used cocaine, and that his injuries were caused as a result of the willful misconduct, and ruled that, as such, the shipowner was not obligated to pay M&C for the resulting injuries.

i. The court relied on prior decisions holding that the use of illegal drugs, and cocaine in particular, constitutes willful misconduct – and cited *Silmon v. Can Do II, Inc.*, 89 F.3d 240, 243 (5th Cir. 1996); and *Napier v. F/V Deesie*, 360 F. Supp. 2d 195, 201 (D. Mass. 2005).

ii. The 5th Cir. opinion in *Silmon* further notes that "it is irrelevant if the drug use occurred prior to boarding the ship."

ii. Punitive damages for failure to provide M&C

1. *Clausen v. Icicle Seafoods*, 2012 Wash. LEXIS 234 (Wash. 2012).

a. In *Clausen*, the Supreme Court of Washington, sitting en banc., affirmed a jury's award of punitive damages of $1.3 Million for willful misconduct in providing M&C, over a compensatory award of $37,420. The court noted that the Exxon 1:1 ratio for punitive damages does not apply in a Jones Act case.. The Washington Supreme Court specifically addressed whether, under *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (the Exxon Valdez oil spill case), the punitive damages had to be capped at a 1:1 ratio between compensatory and punitive damages. In upholding the punitive damage award here of $1.3 Million

(or roughly 35 times the compensatory award), the *Clausen* court stated:

i. "The Exxon case cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found. To the contrary, the United States Supreme Court expressly limits its holding to the facts presented. In the first paragraph of the opinion, the issue is framed as 'whether the award ... in this case is greater than maritime law should allow in the circumstances.' . . . . Nothing in the Exxon opinion can be read as overruling cases allowing higher punitive awards or limiting the government's ability to statutorily provide other limits. Quite the opposite, the Court seems to embrace an approach of applying a variable limit based on the tortfeasor's culpability. Here, as found by the jury and confirmed by the trial court, Icicle's conduct lies at the extreme end of the scale. The jury found that Icicle acted callously or willfully and wanton in its failure to pay maintenance and cure. And the trial court, in denying Icicle's motion to reduce the punitive damages award, entered findings of fact emphasizing Icicle's egregious conduct. The court found that Icicle intentionally disregarded Clausen's health by refusing to pay for his spinal injections and surgery that Icicle's own "hand-picked" doctor had recommended, and that Icicle provided Clausen only $20 per day in maintenance and knew Clausen was practically homeless, living in a broken down recreational vehicle, yet it wanted Clausen to take the "bait" and settle early without legal representation. The court also found that Icicle deliberately made false statements in its federal court complaint seeking to terminate Clausen's maintenance and cure; that Icicle's conduct was motivated by profit; and that the size of the punitive damages award was required because Icicle needed substantial deterrence not to treat other workers in the same way it treated

> Clausen, noting that Icicle had claimed no wrongdoing throughout the suit. Unlike the reckless conduct the Exxon Court faced, here, the jury found and the trial court described in depth that Icicle's actions were far from reckless and nearer the "most egregious" end of the culpability scale. . . . The availability of punitive damages, without a 1:1 ratio to compensatory damages, for willful withholding of maintenance and cure is necessary because it also serves as a deterrent. A variable punitive damages award creates a disincentive to employers who would otherwise prefer to hold out on paying maintenance and cure until a suit is filed, if at all."

5. Unseaworthiness (as a function of crew negligence)

i. *Flueras v. Royal Caribbean Cruises, Ltd.*, 69 So. 3d 1101 (Fla. 3d DCA 2011).

1. Facts: A female crewmember was treated by the shipboard medical staff aboard Royal Caribbean's Explorer of the Seas for symptoms of abdominal pain after the female crewmember underwent an abortion in St. Thomas. She reported to the ship's infirmary when she returned to the ship and complained of lower abdominal pain. The ship's doctor diagnosed her pain as post-operative and gave her a pain killer. The crewmember returned the next day, complaining of pain and was given a pain injection and oral pain medications. The next day, she returned to the ship's infirmary with continued lower abdominal pain and tenderness, especially on her right side, and the ship's doctor continued to diagnose her pain as normal post-surgical for the termination procedure and she was sent back to her cabin. Two hours later, the crewmember's boyfriend (who was a crewmember employed on the same vessel) contacted the ship's infirmary and explained that she needed medical attention because she was having pain and difficulty breathing. She was brought back to the infirmary and was then diagnosed as suffering from a "catastrophic intra-abdominal bleed" following the abortion and told she needed surgery immediately. An ambulance was called, which arrived 45 minutes later, and she was transported to a Bahamian hospital where she died. Her estate filed an action for unseaworthiness, alleging that the ship was unseaworthy, in part, because it was manned by a medical crew

that was not properly trained, instructed or supervised. Royal Caribbean moved for summary judgment on the ground that the ship's doctor's negligent conduct could not render the vessel unseaworthy. The Plaintiff argued that "the crewmembers' conduct and incompetency, as well as the absence of or failure to follow shipboard policies and procedures rendered RCCL's vessel unseaworthy." The trial court subsequently granted RCCL's motion for summary judgment and found that "the isolated negligent act of an individual crewmember or employee does not render the ship unseaworthy." The Plaintiff appealed.

2. In affirming the trial court, the Florida 3d DCA, stated, "it is well settled that only a condition renders a ship unseaworthy, and that isolated, personal negligent acts are categorically excluded as a basis for liability on the part of the shipowner," and cited to *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). Further, in considering whether the failure to promulgate or enforce adequate policies and procedures concerning crew medical care could constitute unseaworthiness, the court explained that it has not found any precedent imposing an affirmative duty upon a shipowner to promulgate medical policies or procedures and "decline[d] to extend the law in this context . . . ."
3. However, the Fla. 3d DCA noted, "our conclusion that the warranty of seaworthiness does not impose such an obligation does not, however, apply wehre a shipowner has chosen to promulgate relevant policies and procedures. . . . Where the shipowner has established a policy or procedure to govern one or more functions of the vessel's crew, failure to comply with the policy may result in liability, particularly if the crew instead engaged in an improper or unsafe method of work." The 3d DCA then opined that "because [the Plaintiff] has not had the benefit of discovery regarding the existence of shipboard policies and procedures and whether the crew here complied with them, the entry of summary judgment on this issue was premature."
4. Lastly, the 3d DCA distinguished isolated negligent acts (for which there is no claim for unseaworthiness) and conditions (for which there are claims for unseaworthiness) by stating:
    a. "To facilitate the determination of condition versus isolate act, courts have made two important observations: first, an act is instantaneous, while there must be some period of time during which a condition exists; and second, a

condition necessarily involves more than one act. Likewise, where the facts indicate that negligence was pervasive or repetitive, such that it would constitute an unsafe or improper work method, courts are more likely to find a condition instead of an isolated act."

III. CONCORDIA

1. Passenger ship safety recommendations agreed by IMO's Maritime Safety Committee in light of Concordia disaster.

i. The Maritime Safety Committeee passed enhanced interim safety measures regarding passenger ships in the wake of the Costa Concordia disaster, when it met in London for its 90th session in May 2012. The recommendations include:

1. Passenger ship companies review "urgently and efficiently" its operational safety measures, taking into consideration the recommended interim operational measures, including:
    a. carrying additional lifejackets, accessible in public spaces, at the muster/assembly stations, on deck or in lifeboats, so in emergencies passengers need not return to their cabins to retrieve the lifejacket stored there;
    b. reviewing the adequacy of the dissemination and communication of the emergency instructions on board ships;
    c. carrying out the muster drill prior to departure;
    d. limiting access to the bridge to those with operational or operationally related functions, during any period of restricted maneuvering, or while maneuvering in conditions that the master or company bridge procedures/policy deems to require increased vigilance (e.g. arrival/departure from port, heavy traffic, poor visibility); and
    e. ensuring that the ship's voyage plan has taken into account IMO's Guidelines for voyage planning, and, if appropriate, Guidelines on voyage planning for passenger ships operating in remote areas.
2. Further, the Committee approved new draft SOLAS requirements to require ships to have plans and procedures to recover persons from the water.

3. Additionally, the Committee also agreed to an action plan on long-term work for passenger ship safety, pending review of the report of investigation into the loss of the Costa Concordia.