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The Admiralty Practicum is published bi-annually by the Joseph A. Calamari Admiralty Law Society of St. John's University School of Law to bring to the attention of practitioners and other interested persons the highlights of recent court decisions in the admiralty field. The case summaries, comments, and notes may not discuss all issues addressed by the various courts. Therefore, readers are advised to consult the original case sources.

INJURED LAND-BASED VESSEL REPAIRMAN AWARDED SEAMAN STATUS UNDER JONES ACT, BUT CANNOT RECOVER DAMAGES FOR EMOTIONAL DISTRESS CAUSED BY AWARENESS OF THE DEATH OF A RELATIVE IN THE SAME ACCIDENT

Naquin v. Elevating Boats, L.L.C.
744 F.3d 927
United States Court of Appeals for the Fifth Circuit
(Decided March 10, 2014)

United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court that evidence was sufficient to establish employee was a seaman entitled to Jones Act coverage and that employer was negligent, but vacated judgment that employee's emotional damages arising from the death of employee's relative in the same accident that injured employee were compensable under the Jones Act, and remanded on damages issue.

Elevating Boats, L.L.C. ("EBI") produces, operates, and maintains a fleet of lift-boats[1] and marine cranes in several Louisiana port Facilities.[2] EBI employed Larry Naquin, Sr. ("Naquin") as a vessel repair supervisor, primarily tasked with the maintenance and repair of EBI's lift-boats, which ordinarily required him to work aboard the lift-boats while they were moored, jacked up, or docked in the shipyard canal.[3] Naquin would work while the vessel was being moved within the canal, and occasionally on a vessel that was operating on open water.[4] Naquin spent 70 percent of his total time working aboard these vessels, spending the remaining 30 percent of his time working on land.[5]

On November 17, 2009, Naquin was operating the shipyard's land-based crane to move a heavy iron weight that was within the crane's lifting capacity.[6] The crane suddenly failed, and toppled over onto a nearby building.[7] Naquin jumped from the crane house as it fell, but not without injury.[8] Naquin's cousin's husband, who had been working in the nearby building, was crushed to death by the crane.[9]

Naquin brought a Jones Act suit in the District Court for the Eastern District of Louisiana, alleging that EBI was negligent in their "construction and/or maintenance of the [] land-based crane."[10] The jury concluded that Naquin qualified as a Jones Act seaman and that he was injured as a result of EBI's negligence.[11] The jury awarded Naquin damages including past and future mental pain and suffering.[12] EBI appealed, contending: (i) that Naquin was not a Jones Act Seaman; (ii) that the

[1] "A lift-boat is a self-propelled, self-elevating, offshore supply vessel. Although it functions and navigates much like any other supply vessel, a typical lift-boat is equipped with three column-like legs that can be quickly lowered to the seafloor to raise the vessel out of the water and stabilize it for marine operations." Naquin v. Elevating Boats, L.L.C., 744 F.3d 927, 930 n.1 (2014).
[2] *Id.* at 930.
[3] *Id.*
[4] *Id.* at 930-31.
[5] *Id.* at 931.
[6] *Id.*
[7] *Id.*
[8] *Id.* Naquin suffered two broken feet and a lower abdominal hernia, requiring surgery and physical therapy. *Id.*
[9] *Id.* Naquin learned of his relative's death the next day in the hospital. *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* The jury awarded $400,000 for future lost wages, $1,000,000 for past and future physical pain and suffering, and $1,000,000 for past and future mental pain and suffering. *Id.*

evidence was insufficient to establish negligence; and (iii) that the district court erred by admitting evidence to support Naquin's emotional damages claim.[13]

On appeal, EBI first argued that the jury erred in finding Naquin was a seaman entitled to Jones Act coverage because Naquin was a land-based ship-repairman with no adequate connection to vessels in navigation to qualify him as a seaman.[14] EBI argued that Naquin's duties classified him as a land-based worker, thereby invoking the protections of the Longshore and Harbor Worker's Compensation Act and precluding coverage under the Jones Act.[15] To determine whether Naquin qualified as a seaman, the Fifth Circuit applied the two-prong test set forth by the Supreme Court: "First, 'an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.' Second, '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 nature.' "[16] The court summarized the relevant inquiry as "whether, in the course of his current job, [Naquin] substantially contribute[d] to the vessels' functions and maintain[ed] a substantial connection with the fleet."[17]

The court found that the first prong of the test was easily satisfied, as Naquin did the ship's work and contributed to the function of EBI's vessels.[18] In addressing the second prong of the test, the court noted that the purpose of the substantial connection requirement is to separate sea-based maritime employees entitled to Jones Act protection from land-based employees that " 'only have a temporary or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.' "[19] The court applied the Supreme Court's "rule of thumb[] '[that] [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.' "[20] Accordingly, because Naquin spent 70 percent of his time working on EBI's fleet of lift-boats, the court held that the evidence supported the jury's finding that Naquin had a substantial temporal connection to the EBI fleet.[21]

In response to EBI's argument that Naquin was not "regularly exposed to the perils of the sea," the court held that workers who spend time aboard vessels near the shore "still remain exposed to the perils of a maritime work environment."[22] The court analogized Naquin to the plaintiff in *In re Endeavor Marine*[23].[24] There, a crane operator, working exclusively on a stationary barge used to load and unload cargo at a Mississippi River dock facility, was found to be exposed to the perils of the sea.[25] The court found similarly, Naquin's primary duties exposed him to "precisely the same type and degree of maritime perils."[26] Accordingly, the court found that Naquin "contribute[d] to the function of a discrete fleet of vessels and ha[d] a connection with the fleet that [wa]s substantial in terms of both

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[13] *Id.* at 932.
[14] *Id.*
[15] *Id.* The court rejected this argument noting that in *Southwest Marine, Inc. v. Gizoni*, the Supreme Court clarified that the "Jones Act covers any worker who qualifies as a 'seaman,' without regard to whether a worker may also qualify for coverage under the LHWCA." *Id.* (quoting Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 87-88 (1991)).
[16] *Id.* at 933 (quoting Becker v. Tidewater, Inc., 335 F.3d 376, 387 (5th Cir. 2003)).
[17] *Id.*
[18] *Id.* The court noted that "EBI concede[d], Naquin spent the majority of his time repairing, cleaning, painting, and maintaining the 26-30 lift-boat vessels that EBI operated out of the [] shipyard." *Id.* Additionally, the remainder was spent aboard the lift-boats operating marine cranes and securing the decks for voyage. *Id.* Therefore, the court held "such tasks are necessary to the function and operation of any vessel." *Id.*
[19] *Id.*
[20] *Id.* at 934 (quoting Chandris v. Latsis, 515 U.S. 347, 371(1995)).
[21] *Id.*
[22] *Id.*
[23] 234 F.3d 287 (5th Cir. 2000).
[24] *Naquin*, 744 F.3d at 934-35.
[25] *Endeavor Marine*, 234 F.3d at 289.
[26] *Naquin*, 744 F.3d at 935.

duration and nature."[27] The court thereby held the evidence supported the jury's findings that Naquin's connection to the EBI fleet was substantial in both nature and duration, and that Naquin was a seaman under the Jones Act.[28]

In addressing EBI's second argument, that the evidence was insufficient to support the jury's finding of negligence, the court stated it is clear that "[e]very employer has a duty to provide its employees with a reasonably safe work environment and work equipment."[29] Testimony at trial established that the crane, manufactured by EBI, fell after a weld failed.[30] Although Naquin could not prove precisely why the weld failed, it was not disputed that EBI was the party responsible for the design and integrity of the crane, and the jury relied on this circumstantial evidence to determine EBI was negligent.[31] EBI further argued that the exclusive reliance upon circumstantial evidence equated to a dependence on the doctrine of *res ipsa loquitur*, and that because *res ipsa* was not pled or asserted, it was waived by Naquin, and could not be the basis for establishing negligence.[32] The court rejected this theory[33], noting that EBI was the only party responsible for the "indisputably defective" weld that secured the crane to its base.[34] As such, it was the direct cause of Naquin's injuries and, although circumstantial, the court held such evidence was sufficient to support the jury's finding that EBI was negligent.[35]

EBI's third argument on appeal related to the admission of evidence concerning the death of Naquin's cousin's husband, because it argued such evidence was not relevant to Naquin's claim for emotional damages.[36] The court began its inquiry by noting that the "Jones Act does not indiscriminately permit compensation for emotional damages resulting from the death of another person."[37] The court continued by acknowledging that in *Consolidated Rail Corp. v. Gottshall*[38], the Supreme Court held the "appropriate test for awarding emotional damages under the FELA—and by extension, the Jones Act—is whether the plaintiff was in the 'zone of danger.' "[39] The court found that, unquestionably, Naquin was in the zone of danger and eligible for damages relating to his emotional harm.[40] However, the court noted that there was no case law to support Naquin's argument that a Jones Act plaintiff, "once physically injured and entitled to emotional damages, is entitled to the full spectrum of emotional damages, including those arising from an injury to someone else."[41] The court cited to the Supreme Court's discussion in *Gottshall*, finding that the Court's explicit rejection of the relative bystander test's applicability under the Jones Act was instructive for determining whether Naquin could assert a claim for emotional harm arising from an injury to his relative.[42] The court also noted "the Jones Act only extended an action to recover for the death of a seaman to his immediate

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[27] *Id.*
[28] *Id.*
[29] *Id.* at 936.
[30] *Id.*
[31] *Id.* at 936-37.
[32] *Id.* at 937.
[33] The court noted it had already considered and rejected this argument, referencing its opinion in *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970). *Id.* There, the court rejected the theory stating "[w]e simply apply a rule of circumstantial evidence, not changing the burden of proof or casting presumptions against the defendant." *Id.* at 119.
[34] *Naquin*, 744 F.3d at 937.
[35] *Id.*
[36] *Id.* at 938. The district court denied EBI's motion to exclude any references to the relative's death, concluding that although prejudicial the evidence was relevant to Naquin's emotional damages claim. *Id.*
[37] *Id.*
[38] 512 U.S. 532 (1994).
[39] *Naquin*, 744 F.3d at 938 (quoting *Gottshall*, 512 U.S. at 555-556).
[40] *Id.*
[41] *Id.* at 939.
[42] *Id.* at 938-39.

family."[43] The court therefore found it would be inconsistent with the wrongful death provisions of the Jones Act if anyone other than immediate family were allowed to recover for the negligent death of a coworker.[44] Lastly, the court referenced its prior decision in *Gaston v. Flowers Transportation*[45] [46]. There, the court rejected an emotional damage claim by a Jones Act plaintiff who watched his half-brother get crushed to death but was not injured himself.[47] There, the court concluded that there was no merit in "allowing mere crewmen-bystanders to recover for witnessing the misfortune of another."[48]

Accordingly, here, the court held that its prior decision in *Gaston* and the Supreme Court's decision in *Gottshall* compel its conclusion "that emotional damages resulting purely from another person's injury, and not a fear of injury to one's self, are not compensable under the Jones Act."[49] The court held this to be true even when the plaintiff has also been injured.[50] To extend damages for the observations of a "bad sight," even when a family member is involved, would contravene the zone of danger test's intention to only compensate for physical dangers.[51] Therefore, the court held that Naquin was not entitled to emotional damages arising from the death of his relative under the Jones Act, and that any evidence regarding such damages should have been excluded at trial.[52] However, the court, unable to discern the amount of damages the jury awarded for the non-compensable harm caused by the relative's death, found the jury's award to be too tainted, and ordered the award to be vacated.[53]

The Fifth Circuit thereby affirmed the judgment of the district court relating to seaman's status and liability, but vacated the judgment relating to damages and remanded for further proceedings on the issue of damages.[54]

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[43] *Id.* at 939.
[44] *Id.*
[45] 866 F.2d 816 (5th Cir. 1989).
[46] *Naquin*, 744 F.3d at 939.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 939-40.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 940-41.
[54] *Id.* at 941.

INJURIES CAUSED BY WORK-RELATED STRESS ARE NOT COGNIZABLE UNDER THE JONES ACT

William C. Skye v. Maersk Line, Limited Corporation
751 F.3d 1262
United States Court of Appeals for the Eleventh Circuit
(Decided May 15, 2014)

The Eleventh Circuit Court of Appeals held that excessive work hours and erratic sleep schedule resulting in physical injury to a seaman in the form of left ventricular hypertrophy was not cognizable under the Jones Act.

William Skye filed suit against his employer, Maersk Line, Limited Corporation ("Maersk"), to recover money damages for negligence for an injury stemming from excessive work hours and erratic sleep schedule.[1] The action was brought under the Jones Act, 46 U.S.C. § 30104, which provides a cause of action in negligence for a "seaman personally injured in the course of employment."[2] Skye worked as chief mate for over eight years on *The Sealand Pride*, which was operated by Maersk.[3] Skye's job duties required him to work overtime, which adversely affected his health due to fatigue, stress, and lack of sleep.[4] In 2008, Skye was diagnosed with left ventricular hypertrophy, a thickening of the heart wall of the left ventricle, which his cardiologist attributed to hypertension.[5] Skye's cardiologist concluded that the "continued physical stress related to [Skye's] job, with long hours and lack of sleep" caused his hypertension, which, in turn, caused his left ventricular hypertrophy.[6]

The district court instructed the jury to decide whether Skye's injury and its causes were physical or emotional.[7] The jury returned a verdict finding that Skye sustained a physical injury.[8] The district court entered judgment in favor of Skye after the jury verdict in his favor.[9] The jury awarded Skye $2,362,299.00 in damages, which the district court reduced to $590,574.75 to account for Skye's comparative negligence.[10] Maersk moved for summary judgment on the grounds that Skye could not recover for an injury caused by work-related stress and, alternatively, that the statute of limitations barred his claim.[11] The district court denied the motion.[12] Maersk appealed the decision of the district court.[13]

On appeal, the Eleventh Circuit vacated the district court's judgment and held that Skye's claim was not cognizable under the Jones Act.[14] The Federal Employers' Liability Act, and by extension, the

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[1] *Skye v. Maersk Line, Ltd. Corp.*, 751 F.3d 1262, 1263 (11th Cir. 2014).
[2] *Id*. *See also* 46 U.S.C. § 30104. The Jones Act provides a cause of action in negligence for "a seaman" personally injured "in the course of employment," in the same way that the Federal Employers Liability Act provides a cause of action in negligence for injured railroad employees against their employers. 45 U.S.C. § 51 *et seq.*
[3] *Id*. at 1263.
[4] *Id*.
[5] *Id*. at 1264.
[6] *Id*.
[7] *Id.* at 1265.
[8] *Id.* at 1265.
[9] *Id*. at 1262.
[10] *Id*. at 1263. *See also Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 532 (1994). The Supreme Court held that plaintiffs could not recover for work-related stress under the Federal Employers' Liability Act.
[11] *Id*. at 1264.
[12] *Id*.
[13] *Id*. at 1262.
[14] *Id*. at 1267.

Jones Act, are "aimed at ensuring 'the security of the person from physical invasions or menaces.' "[15] For employers to be liable, the employees' injuries must be "caused by the negligent conduct of their employers that threatens them imminently with physical impact."[16] Therefore, because work-related stress is not a "physical peril," the Jones Act does not allow Skye to recover for injuries caused by work-related stress.[17]

The facts of this case paralleled the facts in *Consolidated Rail Corp. v. Gotshall*, where the Supreme Court held that injuries caused by the long-term effects of work-related stress are not cognizable under the Federal Employers' Liability Act because they are not caused by any physical impact or fear from the threat of physical impact.[18] The Supreme Court adopted the zone-of-danger test for injuries not caused by a physical impact – "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not."[19] Therefore, the Court would allow recovery for damages for injuries sustained as a result of his employer's negligence only if the injuries were suffered while within the zone of danger of a physical impact.[20] Here, Skye alleged that he "was injured while aboard the vessel" because "reduced manning and other conditions caused excessive duties and duty time."[21] Skye also complained that Maersk was negligent when it "failed to provide him with reasonable working hours," adequate personnel, time, equipment, and rest hours, and overworked him "to the point of fatigue."[22] However, Skye was diagnosed with left ventricular hypertrophy, an injury which gradually developed over a period of time.[23] No physical impact occurred, and, therefore, no zone of danger existed. Accordingly, Skye's injury does not fall within the zone of danger.

The Eleventh Circuit also held that the central focus of the Federal Employers Liability Act and the Jones Act is "on physical perils."[24] "An arduous work schedule and an irregular sleep schedule are not physical perils."[25] The cause of Skye's injury was work-related stress; it is inconsequential that Skye developed a "physical injury."[26] A physical injury is not enough.[27] And, according to the Supreme Court, awarding Skye for his injury would potentially lead to " 'a flood of trivial suits, the possibility of fraudulent claims … and the specter of unlimited and unpredictable liability' because there is no way to predict what effect a stressful work environment – compared to a physical accident [. . .] – would have on any given employee."[28]

Accordingly, Skye's complaint is not cognizable under the Jones Act. The Eleventh Circuit reversed the district court's decision and rendered judgment in favor of Maersk.

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[15] *Id*. at 1265. *See Consolidated Rail Corp.*, 512 U.S. at 555-56. (quoting *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985)).
[16] *Id*. *See Consolidated Rail Corp.*, 512 U.S. at 555-56.
[17] *Id*. at 1265-1266.
[18] *Id*. at 1266. *See Consolidated Rail Corp.*, 512 U.S. at 558.
[19] *Id*. *See Consolidated Rail Corp.*, 512 U.S. at 556.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 1264.
[24] *Id*. at 1266.
[25] *Id.*
[26] *Id*.
[27] *Id*. at 1267.
[28] *Id*. *See Consolidated Rail Corp*., 512 U.S. at 557.

SEAMAN'S FOREIGN ARBITRATION AWARD NOT ENFORCED WHERE THE AWARD IS FOUND TO VIOLATE UNITED STATES PUBLIC POLICY

Aggarao v. MOL Ship Management Co., Ltd., et al.
United States District Court for the District of Maryland
2014 WL 3894079
(Signed Aug. 7, 2014)

United States District Court for the District of Maryland refuses to recognize or enforce a foreign arbitration award that denies traditional remedies available to seafarers because the award violates United States public policy.

After suffering severe chest, spinal and abdominal injuries in an on-ship accident which occurred in the Chesapeake Bay, a Filipino seaman sued multiple defendants ("the Vessel Interests"[1]) in the District of Maryland for negligence pursuant to the Jones Act, under the general maritime law claims of unseaworthiness and maintenance and cure, as well as a violation of the Seaman's Wage Act.[2] Initially, the court dismissed the complaint for improper venue finding that, under the Philippines Overseas Employment Administration Contract of Employment ("POEA Contract"), plaintiff's exclusive remedy against the Vessel Interests was arbitration in the Philippines.[3] On appeal, the Fourth Circuit determined that dismissal was improper and that the correct course of action was for the district court to retain jurisdiction pending the outcome of the arbitration proceedings.[4] The appellate court reasoned that a stay would allow the plaintiff to challenge the arbitration award under the New York Convention during the award enforcement stage of the proceeding.[5,6]

On remand, the Maryland District Court granted plaintiff's motion to dismiss a Philippine arbitration decision awarded in the interim because it was violative of U.S. public policy, including "this country's strong and longstanding policy of protecting injured seafarers and providing them with special solicitude." Notably, the court stated that its decision was not based on the arbiter's providing less favorable remedies than those found under U.S. law, but instead the destruction of certain rights that seaman are guaranteed under American jurisprudence.

Finding in the award enforcement phase of the case, the District Court characterized the Philippine arbitration decision as only "purport[ing] to address [plaintiff's] claims for unpaid wages and (*sic*) contractual compensation benefits, lost future wages, maintenance and cure, moral and exemplary damages, and attorney's fees and interest."[7] The court remarked that early in the arbitration proceeding, the arbiter decided that U.S. law did not apply to any of the claims, based both on the choice of law provision of the POEA Contract and Section 10 of the Philippine Republic Act No.

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[1] The collective defendants were MOL Ship Management Co., Ltd. (management company of the vessel, "Asian Spirit"), Nissan Motor Car Carrier Co., Ltd. (time charterer of the vessel), and World Car Carriers, Inc. (Liberian company that owned the vessel).
[2] *Aggarao v. Mitsui O.S.K. Lines, Ltd.*, 741 F. Supp. 2d 733 (D. Md. 2010) *aff'd in part, vacated in part, remanded sub nom. Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012).
[3] *Id.* at 743 (including an additional order for the clerk to close the case).
[4] *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 379 (4th Cir. 2012) ("…the court should stay this case pending the arbitration proceedings to ensure that Aggarao will have an opportunity at the award-enforcement stage for judicial review of his public policy defense based on the prospective waiver doctrine.").
[5] *The Convention on the Recognition and Enforcement of Foreign Arbitrable Awards*, codified as 9 U.S.C.A. Ch.2.
[6] In its reasoning, the Fourth Circuit looked to an Eleventh Circuit opinion, *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1263 (11th Cir. 2011) (citing Article V of the Convention and holding that "[a]fter arbitration, a court may refuse to enforce an arbitral award if the award is contrary to the public policy of the country." (emphasis removed)).
[7] *Aggarao v. MOL Ship Mgmt. Co.*, No., 2014 WL 3894079 at *6 (D. Md. Aug. 7, 2014).

8042.[8] According to the arbiter, plaintiff bore the burden of showing that U.S. law applied - a burden that the arbiter determined the plaintiff failed to meet.[9]

Using Philippine law, the arbiter determined that an assessment of disability benefits (of $89,100) made by a company designated physician should, absent a showing of bad faith, "be considered as the only basis on whether or not to award disability benefits."[10] The arbiter further determined that evidence of negligence by the Vessel Interests failed to support plaintiff's claim for loss of earning capacity.[11] The arbiter determined that the POEA Contract did not entitle plaintiff to any other claims for damages or compensation in connection with his injuries beyond the $89,100 award.[12] Maintenance and cure were no longer available, according to the POEA Contract, where the company-designated physician determined that he was fit to be repatriated.[13] The arbiter awarded attorney's fees amounting to 10% of the judgment and $4,512 to compensate the plaintiff for 240 days of sick pay.[14]

In deciding the applicable law, the court looked to the choice of law provision in the POEA Contract but ultimately opted to use the *Lauritzen-Rhoditis* test.[15] The court found that five of the eight *Lauritzen-Rhoditis* factors pointed to applying U.S. law to the case.[16] Having invoked U.S. law, the court looked to general maritime claims that were frustrated by the arbitration award. The court held that "even if [plaintiff] was fit for repatriation as of 2008, he was still entitled to maintenance and cure if he had not reached maximum cure or if palliative cure would have improved his condition."[17] Additionally, the court stated that, as a seafarer, plaintiff could bring a cause of action against the time charterer for negligence and the owner of the vessel for unseaworthiness. The resulting causes of action would be against the time charterer and vessel owner, defendants that the arbiter relieved of liability for lack of a legal basis for a claim.

Understanding that a U.S. court's role in reviewing a foreign arbitration award is limited,[18] and that the public policy exception should be construed narrowly,[19] the court found that under Article

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[8] *Id.* ("As quoted by the arbiter, Section 10 of Republic Act No. 8042 stated that labor arbiters of the NLRC are to have "original and exclusive jurisdiction to hear and decide ... claims arising out of any employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages." (Arbitration Decision, Ex. 18, ECF No. 132–25, at 5.)).

[9] *Id.*

[10] *Id.*

[11] *Id.* at *7.

[12] *Id*. On April 17, 2009, plaintiff's unpaid medical bills were estimated to be well over a million dollars, and he continued to "accrue substantial medical bills and other debt as he went in and out of hospitals in Maryland for additional surgical procedures and related, serious complications." *Id.* at *4.

[13] *Id*. ("According to a June 4, 2010, declaration of the Vessel Interests' paralegal, Dr. York and a physical therapist agreed at a meeting on December 4, 2008, that Mr. Aggarao "had reached as full a recovery as Kerman Hospital could provide him," "was able to care for himself," and "was ready for the trip to the Philippines."(Decl. of Paul R. Fuhrman, Ex. 2, ECF No. 66–3, ¶¶ 14–18.)").

[14] *Id.*

[15] *Id.* at *8 ("Under the Supreme Court's *Lauritzen–Rhoditis* test, a court should consider: (1) the place where the acts causing the injury occurred; (2) the law of the flag; (3) the domicile or allegiance of the injured seafarer; (4) the allegiance of the shipowner; (5) the place of the contract of employment; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations."); *Lauritzen v. Larsen,* 345 U.S. 571, 588–89 (1953); *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306, 308–09 (1970).

[16] Determinative in the court's decision were the following facts: the injury occurred while the vessel was in U.S. waters, the vessel was flagged as Liberian ("which adopts the general maritime law of the United States"), the owner of the vessel were Liberian (again pointing to the applicability of U.S. law), "the law of the forum" is U.S. law, and one of the defendant's base of operations was Liberia (once again implicating U.S. law). *Id.* at *9.

[17] *Id.* at *10.

[18] *Id.* at *10 (citing inter alia *Int'l Trading and Indus. Inv. Co. v. DynCorp Aerospace Tech.,* 763 F.Supp.2d 12, 20 (D.D.C. 2011)).

[19] *Id.* (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998)).

V(2)(b) of the New York Convention, it possessed the power to refuse or enforce a foreign arbital award that it finds to be contrary the public policy of the United States.[20] Relying on Fourth Circuit decisions, which interpret *Mitsubishi*[21] and *Sky Reefer*,[22] the lower court succinctly stated that, "once an arbitration award is made, the court may consider whether the award adequately addressed the plaintiff's interest in the enforcement of U.S. laws."[23] Finding analogous reasoning in *Asignacion v. Schiffahrts,*[24] the court restated the proposition that, "[h]ad the panel applied a set of foreign laws which provided a basis for pursuing similar rights and protections, public policy would have been satisfied."[25] The violation of public policy was not the consequence of "the arbitral panel's failure to apply U.S. law-nor its decision to apply Philippine law" but, instead, the product of depriving the plaintiff an "opportunity to pursue the remedies to which he was entitled as a seaman and [the resulting] depriv[ation] of an adequate remedy."[26]

The court disregarded the defendant's argument that the public policy exception should not apply in the present case because the remedies under Philippine law are less favorable to the plaintiff. Instead, the award provided no remedies to the plaintiff rather than simply less favorable ones.[27] Specifically, the court found that there "were-and are-questions as to whether repatriation was in [plaintiff's] best interests," something that would be considered in a maintenance and cure claim.[28] Similarly, the arbiter's award blocked any method for the plaintiff to vindicate any claims against the time charterer for negligence and the vessel owner for unseaworthiness.[29]

Based on this foreclosure of certain remedies available to seamen under general maritime law, which the court found to be a violation of U.S. public policy, the District Court invoked its power under the New York Convention to refuse to enforce or recognize an arbitration award that denied essential consideration in a maintenance and cure claim, as well as negligence attributable to a time charterer and a vessel owner.

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Class of 2015

[20] *Id*. ("Article V(2)(b) of the Convention specifies that [r]ecognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that ... recognition or enforcement of the award would be contrary to the public policy of that country.") (internal quotations omitted).
[21] *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614 (1985).
[22] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528 (1995).
[23] *Aggarao*, 2014 WL 3894079 at *11.
[24] *Asignacion v. Schiffahrts,* Nos. 13–0607, 13–2409, 2014 WL 632177 (E.D.La. Feb. 10, 2014).
[25] *Id.* at *12 (quoting *Asignacion v. Schiffahrts,* Nos. 13-0607, 13-2409, 2014 WL 632177 (E.D.La. Feb. 10, 2014) at *10).
[26] *Id.* at *12.
[27] *Id.* at *14.
[28] *Id.* at *13.
[29] *Id.* at *14.

INDIVIDUAL GUILTY OF REPORTING A FALSE DISTRESS CALL, IN VIOLATION OF 14 U.S.C. § 88(c), REQUIRED TO PAY ALL DIRECT AND INDIRECT COSTS INCURRED BY THE UNITED STATES COAST GUARD AND THE CANADIAN ARMED FORCES

U.S. v. Kumar
750 F.3d 563
United States Court of Appeals for the Sixth Circuit
(Decided April 22, 2014)

The Sixth Circuit Court of Appeals affirmed the District Court for the Northern District of Ohio's decision, finding Kumar guilty of making a false report of a boat in distress by sentencing him to three months in prison and ordering him to pay restitution to the United States Coast Guard and the Canadian Armed Forces in the amount of $489,007.70.

Danik Kumar was enrolled in his first year of Aviation Technology Program at Bowling Green State University, Ohio in March 2012.[1] While on a solo flight assignment on March 14, 2012, Kumar believed he observed a flare rising from a boat on Lake Erie.[2] Kumar reported the sighting to Cleveland Hopkins International Airport, which instructed Kumar to fly lower for a closer look.[3] Upon further inspection, Kumar did not see a boat.[4] However, Kumar reported that he saw additional flares from the boat, as he feared that recanting his story would hurt his chances of becoming a Coast Guard pilot.[5] Kumar then described that the flares came from a 25-foot vessel with four people aboard, all wearing life jackets with strobe lights activated.[6] The Coast Guard, with help from the Canadian Armed Forces, deployed a massive search and rescue mission.[7] A month after the 21-hour search, Kumar admitted to the falsity of his report.[8]

Subsequently, Kumar was charged with making a false distress call, a class D felony per 14 U.S.C. § 88(c).[9] Kumar pled guilty. The court sentenced Kumar to three months in prison with a three-year term of supervised release and ordered he pay restitution to the Coast Guard and the Canadian Armed Forces.[10] Kumar appealed the decision.[11] The main crux of his appeal turned on whether the district court used proper discretion in ordering the amounts of restitution that Kumar had to respectively pay the Coast Guard and Canadian Armed Forces.[12]

Kumar contended that the approach taken by the Coast Guard in calculating its costs put too much emphasis on "all costs" while ignoring the "as result" limitation.[13] Kumar argued he was only

[1] *U.S. v. Kumar*, 750 F.3d 563, 565 (6th Cir. 2014).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*. During the next twenty-one hours, four vessels and two aircrafts participated in the search. *Id.* Included in the search was: a 140-foot Coast Guard cutter with a crew of twenty, three smaller boats with a crew of four each, a 65-foot search and rescue helicopter with a crew of four, and the Canadian CC130 Hercules airplane with a crew of seven. *Id.*
[8] *Id*.
[9] *Id*. at 565-566; 14 U.S.C. § 88(c). One who knowingly and willfully makes a false distress call to the Coast Guard, is "liable for all costs the Coast Guard incurs as a result of the individual's actions," under 14 U.S.C. § 88(c).
[10] *Id*. at 566.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 567. The calculations included direct costs (labor, employee benefits, fuel, maintenance), support costs, general and administrative costs, pension benefit adjustment, operating asset depreciation, and operating asset cost of capital. *Id.*

liable for costs directly attributable to his actions, not indirect costs.[14] Kumar averred that restitution is not used to punish the wrongdoer but to restore the victim to actual losses proximately caused by the wrongdoing.[15] The Sixth Circuit reconciled Kumar's argument by agreeing with the principle that the statute functions similarly to restitution.[16] However, Section 88(c) does use the word "restitution." Rather, the court found, through the plain meaning of the language of the statute, that one who gives a false report is liable for "all costs," including indirect costs, incurred by the Coast Guard as a result of his actions.[17] The court affirmed Kumar's liability for $277,257.70 to the Coast Guard.

Secondly, Kumar argued that the amount of money ordered to pay to the Canadian Armed Forces pursuant to 18 U.S.C. § 3583(d) was incorrect as the district court had no authority to grant money to any agency, but the Coast Guard.[18] The court determined that 14 U.S.C. § 88(c) did not apply to any party other than the Coast Guard.[19] However, the court ordered restitution pursuant to 18 U.S.C. § 3583(d).[20] Section 3583(d) provides the sentencing court discretion to prescribe any condition that may be prescribed as a condition of probation under Section 3563(b), including restitution under 18 U.S.C. § 3556.[21] Kumar contended that, under canons of interpretation, the more specific language of 14 U.S.C. § 88(c) preempted the more general language of 18 U.S.C. § 3583(d).[22] The court found no conflict between the two statutes and, thus, no error in the district court's determination that it had authority to order restitution to the Canadian Armed Forces.[23]

Finally, Kumar contended that the district court abused its discretion in awarding $211,750 to the Canadian Armed Forced because the figures offered by the Canadian Armed Forces contained an inadequate record.[24] Kumar argued that the figures of the Canadian Armed Forces lacked "minimal indicia of reliability," which was required to meet due process.[25] The court found the Canadian cost-calculating methodology to be similar to that of the Coast Guard, classifying reimbursable rates as either "direct operating costs" or "full costs."[26] The court adopted an amount reflecting the costs directly related to the Canadian Armed Forces' employment of the CC130 Hercules aircraft for the incident because it appeared to be a reasonable and reliable approximation of the Canadian Armed Forces' actual loss directing from Kumar's false report.[27] Accordingly, Kumar's claims of error were denied, and his sentence was affirmed.[28]

Joseph Marciano
Class of 2015

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[14] *Id*. Kumar argued that under Section 88(c), the restitution remedy reads "as a result" language and operates to limit recovery to actual losses proximately caused by the false report. *Id.* According to Kumar's expert, Forensic Accountant Dennis S. Medica, Kumar was only liable to pay a total of $118,216, which was calculated from the operation costs of the search. *Id.*

[15] *Id*. (citing *Hughey v. United States*, 495 U.S. 411, 416 (1990); *United States v. Gamble*, 709 F.3d 541, 546 (6th Cir. 2013); *United States v. Evers*, 669 F.3d 645, 659 (6th Cir. 2012)).

[16] *Id*. at 568.

[17] *Id*.

[18] *Id*. at 569.

[19] *Id.* at 568-569.

[20] *Id*. at 569.

[21] 18 U.S.C. § 3583(d).

[22] *Kumar*, 750 F.3d. at 569.

[23] *Id.; Hughey*, 495 U.S. at 415 ("In all cases involving statutory interpretation, [courts] look first to the language of the statute itself").

[24] *Id.* at 569-570.

[25] *Id*. at 570; *United States v. Elson*, 577 F.3d 713, 732 (6th Cir. 2009).

[26] *Id*. These reimbursable rates translate to $211,750 versus $372,583. *Id.* Faced with these figures, the court ordered Kumar to pay the lesser amount. *Id*.

[27] *Id*.

[28] *Id*. The court found no abuse of discretion in the district court's order of restitution and judgment of sentence. *Id.*

28 U.S.C. § 1333 GRANTS U.S. COURTS JURISDICTION TO ENFORCE A JUDGMENT OF A FOREIGN NON-ADMIRALTY COURT, IF THE UNDERLYING CLAIM WOULD BE DEEMED MARITIME UNDER UNITED STATES LAW

D'Amico Dry Limited v. Primera Maritime (Hellas) Limited
756 F.3d 151
United States Court of Appeals for the Second Circuit
(Decided June 12, 2014)

Court of Appeals for the Second Circuit held that federal admiralty jurisdiction extended to a suit to enforce a judgment from an English commercial court because United States law would classify the underlying breach of a forward freight agreement as a maritime claim.

D'Amico Dry Limited ("D'Amico") and Primera Maritime (Hellas) Limited ("Primera") executed a forward freight agreement ("FFA"), which is a derivative contract under which value is taken from freight rates for specific types of vessels on specified voyage routes, as reported on the Baltic Exchange.[1] The contract was contingent upon the parties' accurately predicting future market rates for the shipment of goods.[2] Under the FFA, Primera was obligated to pay D'Amico for rates that were lower than the rates projected in the FFA and failed to do so.[3] D'Amico filed suit in the Commercial Court of the Queen's Bench Division of the English High Court of Justice, which rendered a judgment against Primera in the amount of $1,766,278.54.[4]

When Primera failed to pay the English judgment, D'Amico filed suit to enforce the judgment in New York federal court under its admiralty jurisdiction.[5] The district court granted Primera's motion to dismiss for lack of subject matter jurisdiction.[6] The court reasoned that the English judgment was made by a Commercial Court, and English law did not consider D'Amico's claim as to be a maritime claim, thus the court lacked jurisdiction to enforce the English judgment.[7]

On appeal, the Second Circuit concluded that the proper inquiry in an enforcement action brought under the district court's admiralty jurisdiction was whether the underlying claim on which the judgment was based was a maritime claim under U.S. law.[8] The court's use of federal admiralty rules to enforce a foreign judgment illuminates the usefulness and applications of the *Penhallow* rule.[9] The rule promotes the use of admiralty courts because of their knowledge of the sea and ship culture, their uniformity in matters of international trade, the promotion of foreign judgment recognition and endorses the "distribution of power between state and federal courts, which offers a forum for international disputes, which is – at least theoretically - less likely to be influenced by local bias."[10] These policies promote a more efficient international maritime commerce system and protection of "vulnerable parties such as foreign litigants and seamen."[11] The court recognized that many foreign tribunals do not have specific admiralty courts

[1] *D'Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd.,* 756 F.3d 151, 153 (2d Cir. 2014).
[2] *Id.* at 154.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 154-55.
[6] *Id.* at 155.
[7] *Id.*
[8] *Id.* at 158.
[9] *Id.* at 157 (*see Penhallow v. Doane's Adm'rs,* 3 U.S. (3 Dall.) 54, 97, 1 L.Ed. 507 (1795)).
[10] *Id.*
[11] *Id.*

even though the foreign tribunals adjudicate maritime claims.[12] However, the lack of admiralty distinction "should not frustrate the policy of U.S. law to place maritime disputes in federal courts."[13]

The Second Circuit reversed the lower court's ruling, finding that it erred in analyzing its subject matter jurisdiction with reference to English law.[14] The court stated that U.S. law controlled the case.[15] Article III of the U.S. Constitution provides that the judicial Power extends to "all Cases of admiralty and maritime Jurisdiction."[16] The court also pointed to the long history of U.S. policy in placing maritime matters in the federal courts.[17] Such a policy is strong enough to make §1333 federal court jurisdiction exclusive.[18]

The court discussed the existence of a general worldwide consensus of which cases are Maritime and which are not.[19] However, a country may define its own maritime jurisdiction more broadly, or more narrowly, than the U.S.[20] Therefore, the court found that, "it seems reasonable to assume that the Framers of the Constitution and Congress wanted to ensure that matters deemed maritime *under our laws* have access to our federal courts."[21] The court believed that the founders would include matters of U.S. law that are considered maritime in admiralty jurisdiction, even if another country did not.[22]

It is of no consequence whether the English judgment was issued by an Admiralty or Commercial court or if the English law deemed the underlying claim to be "maritime." In determining the federal court's subject matter jurisdiction, the underlying claim need only be a maritime claim under U.S. law for the claim to be within jurisdiction of a U.S. federal court.

Robert Kaftari
Class of 2016

[12] *Id.* at 161.
[13] *Id.*
[14] *Id.* at 158.
[15] *Id.* at 160.
[16] U.S. Const. art. III, § 2.
[17] *D'amico Dry Ltd.,* 756 F.3d at 160.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

TIMELINESS OF CLAIM OVER MARITIME INSURANCE CONTRACT IS TO BE GOVERNED BY THE CONTRACT'S CHOICE-OF-LAW PROVISION RATHER THAN THE COMMON LAW DOCTRINE OF LACHES

American Steamship Owners Mutual Protection and Indemnity Association, Inc. v Dann Ocean Towing, Inc.
756 F.3d 314
United States Court of Appeals for the Fourth Circuit
(Decided June 26, 2014)

The Fourth Circuit Court of Appeals upheld the District Court for the District of Maryland's decision that parties to a maritime insurance contract may elect to avoid the common law application of the Doctrine of Laches by including a choice-of-law provision in their contract, which requires the application of that jurisdiction's statute of limitations.

The American Steamship Owners Mutual Protection and Indemnity Association, Inc. (the "Club") sought to use the equitable doctrine of laches when filing a civil action for breach of insurance contract with Dann Ocean Towing Inc. ("Dann").[1] The Club, a non profit provider of protection and indemnity insurance covering vessel owners and charterers against third-party liabilities arising from the ownership and operation of insured vessels, entered into a contract with Dann for a tugboat.[2] Dann's tugboat ran aground on a coral reef in 1998, damaging a barge.[3] Both the barge owner and the United States asserted claims against Dann for property damage and environmental damage to the reef, respectively.[4]

The claims were settled for a total of $2,170,000 in November 2001.[5] Despite originally agreeing to contribute only $1,170,000 towards the settlement, the Club paid an additional $278,552.55, after one of the underwriters of Dann's liability insurance became insolvent and could not pay its portion of the settlement.[6] The Club sought reimbursement from Dann for its additional contributions, but Dann refused to provide any monetary relief.[7] Thereafter, the Club declined to reimburse Dann for certain insurance claims that would have otherwise been payable to Dann, which totaled $131,085.43.[8] Dann responded by refusing to pay its insurance premiums to the Club for the policy years between 1999 and 2001, which totaled $452,610.23.[9] The Club filed an action against Dann, relying on the doctrine of laches over the application choice-of-law statute of limitations provision in the original contract.[10] In its pertinent part, the insurance contract stated: "any contract of insurance between the [Club] and a Member shall be governed by and construed in accordance with the law of the State of New York. In no event shall suit on any claim be maintainable against the [Club] unless commenced within two years after the loss, damage or expense resulting from liabilities, risks, events, occurrences and expenditures specified under this Rule shall have been paid by the Member."[11] The Club relied on the equitable common law relief by asserting that its delay in filing was reasonable as it made various out-of-court attempts to obtain reimbursement from Dann, a delay

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[1] *Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. Dann Ocean Towing, Inc.,* 756 F.3d 314, 317 (4th Cir. 2014).
[2] *Id*. at 316.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*. at 317.
[9] *Id*.
[10] *Id.*
[11] *Id*. at 316.

that did not prejudice Dann, who asserted that the claim was time-barred under New York's six year statute of limitations.[12]

The doctrine of laches is an equitable common law relief that has generally governed in assessing the timeliness of a maritime claim.[13] The doctrine can be raised by a defendant as an affirmative defense to a claim as long as the defendant shows (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.[14] This doctrine has commonly been applied when determining whether a claim is time-barred irrespective of any fixed statute of limitations, with certain exceptions.[15]

The district court agreed with Dann that parties may elect to avoid the doctrine of laches by including in their contract an enforceable choice-of-law provision that requires the application of another jurisdiction's statute of limitations.[16] The district court thus held that New York's six-year statute of limitations barred all the Club's claims except for one concerning the $76, 925.56 premium.[17]

Ultimately, the Fourth Circuit distinguished exceptions to the common application of the doctrine of laches in upholding the district court's ruling. These exceptions include statutory provisions that impose time-bars on personal injury actions arising out of maritime torts,[18] on certain cargo loss contract claims under the Carriage of Goods by Sea Act,[19] and on maritime salvage actions.[20] Additionally, the court relied on prior caselaw in which courts have allowed the application of contract specifications regarding jurisdiction's statute of limitations.[21] In doing so, it rejected the Club's attempt to distinguish prior caselaw due to the procedural and substantive nature of the choice-of-law clauses in each given jurisdiction.[22] The court reasoned that even assuming the New York's statute of limitations constitutes a "procedural" rule of law, New York law states that unambiguous provisions of an insurance contract must be interpreted through its plain and ordinary meaning.[23]

Accordingly, the Fourth Circuit affirmed the district court's judgment in applying New York's six-year statute of limitations to the Club's claims arising under its maritime insurance contract with Dann.[24]

Felipe Diaz
Class of 2016

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[12] *Id*. at 317.
[13] *Id.* at 318.
[14] *Id*. *See also Giddens v. Isbrandtsen Co.,* 355 F.2d 125, 127 (4th Cir.1966).
[15] *Id*.
[16] *Id*.
[17] *Id*. at 317.
[18] *Id*. at 318. *See also* 46 U.S.C. §30106.
[19] *Id*. *See also* 48 Stat. 1207, 1209 (1936) (codified at 46 U.S.C. §30701 note).
[20] *Id*. *See also* 46 U.S.C. §80107(c).
[21] *Id*. *See Cooper v. Meridian Yachts, Ltd.,* 575 F.3d 1151 (11th Cir.2009) (holding that the parties' contract, stating that "all disputes arising out of or in connection with [the contract]…shall be construed in accordance with and shall be governed by the Dutch law," clearly meant that the parties' choice of Dutch law governed not only the timeliness of pure contract claims, but also the timeliness of the indemnification and contribution action for related tort claims); *See also Italia Marittima, S.P.A. v. Seaside Transportation Services, LLC,* 2010 WL 3504834 (N.D. Cal. Sept. 7, 2010) (holding that California's statutes of limitations applied to both the breach of contract claims and the negligence claims based on a choice-of-law provision in the parties contract, which clearly promoted California law, and because laches is a common law doctrine rather than codified federal law).
[22] *Id*. at 319.
[23] *Id*. *See White v. Cont'l Cas. Co.,* 9 N.Y.3d 264, 848 N.Y.S.2d 603, 878 N.E.2d 1019, 1021 (2007).
[24] *Id*.

CRUISE LINE'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF NEGLIGENCE DENIED WHERE PASSENGER PLAINTIFFS SHOW PHYSICAL MANIFESTATIONS OF EMOTIONAL INJURIES, UNDER THE ZONE OF DANGER TEST

Terry v. Carnival Corp.
3 F. Supp. 3d 1363
United States District Court for the Southern District of Florida, Miami Division
(Decided January 16, 2014)

United States District Court, Southern District of Florida, Miami Division held that plaintiffs' partial motion for summary judgment would be granted; defendants' motion for summary judgment would be granted in part and denied in part.

Plaintiffs brought an action against defendant, Carnival Corp. ("Carnival") in connection with their claims of injury while aboard Carnival's ship, the Triumph.[1] The vessel became disabled after a fire broke out in the vessel's engine room while en route back to Galveston, Texas.[2] Plaintiffs sought compensatory and punitive damages on claims of breach of contract, negligence and gross negligence, negligent misrepresentation, and fraud.[3] Plaintiffs and defendant moved for summary judgment on multiple counts.[4] Federal Rule of Civil Procedure 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[5]

First, the court addressed the claims of plaintiffs Pamela Morris ("Morris"), Larry Poret ("Poret") and his daughter R.P. ("R.P."), passengers of the Triumph.[6] Plaintiffs alleged that they suffered serious physical and emotional injuries.[7] Carnival moved for summary judgment asserting that, despite the plaintiffs' claims, plaintiffs suffered no physical injury, emotional injury, financial injury, property damage, nor any other provable injury while on the Triumph.[8] Plaintiffs claimed to suffer from continuing stress, anxiety, and nightmares since their voyage on the Triumph.[9] All three acknowledged and agreed to the terms of the cruise ticket contract.[10] As to the breach of contract claim, Carnival asserted that it was entitled to summary judgment because the contract did not contain any provision guaranteeing safe passage, a seaworthy vessel, adequate and wholesome food, and sanitary and safe living conditions.[11] As a general rule of admiralty law, a ship's passengers are not covered by the warranty of seaworthiness.[12] The court granted Carnival's motion for summary

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[1] *Terry v. Carnival Corp.*, 3 F. Supp. 3d 1363, 1366 (S.D. Fla. 2014).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.; Fed. R. Civ. P. 56(c).
[6] *Id*. at 1367.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 1367-1368. Seaworthiness imposes absolute liability on a sea vessel for the carriage of cargo and seamen's injuries. *See Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1335 (11th Cir. 1984).

judgment on the breach of contract claim as against these plaintiffs and an additional eleven plaintiffs.[13]

Carnival contended that it was entitled to summary judgment on plaintiffs' negligence and gross negligence claims because plaintiffs offered insufficient evidence to prove that they suffered a cognizable injury or actual harm as a result of the incident onboard the Triumph.[14] To establish a negligence claim, one must prove that: "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm."[15] Negligent infliction of emotional distress requires "mental or emotional harm [. . .] that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms."[16]

Under admiralty law, recovery for negligent infliction of emotional distress is only allowed if it passes the zone of danger test.[17] The zone of danger test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by the conduct."[18] Many jurisdictions that follow this test "also require that a plaintiff demonstrate a 'physical manifestation' of the alleged emotional injury."[19] Here, Morris, Poret, and R.P. complained only of emotional injuries that manifested through sleep deprivation and nightmares.[20] While viewing the evidence in the light most favorable to the non-moving party, the court found a genuine issue of material fact as to whether these plaintiffs were entitled to recover for their emotional distress when applying the physical manifestation test.[21] Accordingly, the court denied Carnival's motion for summary judgment on the claims for negligence and gross negligence.[22]

Carnival moved for summary judgment on the negligence claim of the additional eleven plaintiffs and asserted that these plaintiffs did not suffer any serious injuries.[23] Carnival argued that the plaintiffs could not recover on their stand-alone emotional distress claims because no evidence existed proving that they suffered a subsequent physical manifestation of their emotional distress.[24] Carnival claimed that plaintiffs failed to submit any evidence of damages and that such failure required entry of judgment in Carnival's favor on the negligence claim.[25] The court determined that ten of the eleven plaintiffs' complaints of anxiety, sleeplessness, and nightmares lasting more than a day sufficiently precluded a grant of summary judgment in favor of Carnival.[26]

Additionally, the court denied Carnival's motion for summary judgment for the negligent misrepresentation and fraud as to ten of the eleven other plaintiffs.[27] The court found one plaintiff did not suffer a cognizable injury when she suffered "emotional trauma" due to her husband, a non-passenger, worrying about her.[28]

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[13] *Id*. at 1368.
[14] *Id*.
[15] *Id*. at 1368 (citing *Chaparro v. Carnival Corp*., 693 F.3d 1333, 1336 (11th Cir. 2012)).
[16] *Id*. at 1369 (quoting *Chaparro,* 693 F.3d at 1337-38 (11th Cir. 2012)).
[17] *Id*. (citing *Smith v. Carnival Corp.,* 584 F.Supp.2d 1343, 1353-54 (S.D.Fla. 2008)).
[18] *Id*. (quoting *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 547-48 (1994)).
[19] *Id*. (quoting *Consolidated Rail Corp.,* 512 U.S. at 549 n. 11 (1994)).
[20] *Id* at 1370.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 1370-1371.
[25] *Id* at 1371.
[26] *Id*.
[27] *Id.*
[28] *Id*.

Carnival moved for summary judgment on plaintiffs' claim for punitive damages.[29] Under general maritime law, personal injury claimants have no claim for punitive damages, except in exceptional circumstances, such as willful failure to furnish maintenance and cure to a seaman and intentional wrongdoing.[30] Plaintiffs failed to demonstrate intentional misconduct, therefore, the court granted Carnival's motion. [31]

Plaintiffs argued for partial summary judgment as to liability, or, in the alternative, for a presumption of liability against Carnival based upon the doctrine of *res ispa loquitur*.[32] *Res ipsa loquitur* applies if: "(1) the injured party was without fault, (2) the instrumentality causing the injury was under the exclusive control of the defendant, and (3) the mishap is of a type that ordinarily does not occur in the absence of negligence."[33] As to the first prong, the court determined plaintiffs were without fault.[34] As to the second prong, the court found that the vessel, flexible fuel lines, and diesel generator were under the exclusive control and management of Carnival's agents during the subject cruise.[35] Finally, the court determined that the recorded evidence demonstrated that the fire was a mishap that ordinarily would not occur in the absence of negligence.[36]

Accordingly, the court held that Carnival's motion for summary judgment on plaintiffs Moris, Poret and R.P. was granted in part and denied in part.[37] The court granted plaintiffs' motion for partial summary judgment, as well as Carnival's motion as to the plaintiffs' claim for punitive damages only.[38] Carnival's Omnibus motion for summary judgment was granted in part and denied in part.[39]

Brian G. White
Class of 2016

[29] *Id*.
[30] *Id*. (citing *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993,* 121 F.3d 11421, 1429 (11th Cir. 1997)).
[31] *Id* at 1371-1372.
[32] *Id* at 1372.
[33] *Id*.
[34] *Id*.
[35] *Id* at 1372-1373.
[36] *Id.*
[37] *Id* at 1373-1374.
[38] *Id* at 1374.
[39] *Id*.

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