# ADMIRALTY PRACTICUM
## SUMMER 2010

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The Admiralty Practicum is published bi-annually by the 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 presented herein may not discuss all issues addressed by the various courts. Therefore, readers are advised to consult the original case sources.

## *PENNSYLVANIA* RULE IS NOT APPLICABLE TO VIOLATIONS OF A REGULATION THAT WAS NOT INTENDED TO PREVENT THE INJURY IN QUESTION.

**The United States Court of Appeals for the Ninth Circuit affirmed a decision by the District Court of Hawaii, holding that the *Pennsylvania* Rule did not apply to a free diver's negligence claim under the Jones Act; and that in the alternative, if it did apply, the violation of a Coast Guard regulation was not actionable without clear and convincing evidence that the violation caused the accident.**

MacDonald v. Kahikolu, Ltd.
United States Court of Appeals, Ninth Circuit
581 F.3d 970
(Decided September 10, 2009)

This case stems from injuries suffered during a diving accident off of the coast of Hawaii. The defendant, Kahikolu, Ltd. ("Kahikolu"), is a company providing whale watching, scuba, and snorkeling tours in the waters off of the Hawaiian island of Maui. Christopher MacDonald ("MacDonald"), the plaintiff, is a crew member employed by Kahikolu as a lifeguard and deck hand. Occasionally, as part of his duties, MacDonald was required to undertake free dives to perform various tasks. A free dive is an underwater dive executed by holding one's breath alone, without the benefit of scuba or other air equipment. On a particular outing from Kahikolu's ship *Frogman II*, MacDonald undertook a free dive in order to retrieve a mooring line from the ocean floor at a depth of approximately 46 feet. Upon his descent, MacDonald injured his left ear while attempting to equalize the pressure in his ears. As a result, MacDonald suffered injuries consisting of permanent hearing loss, dizziness, and tinnitus.

MacDonald sued Kahikolu under the Jones Act[1], alleging that Kahikolu had failed to provide a safe working environment, among other claims. A subsequent bench trial by the district court found that MacDonald was an experienced free diver who had undergone numerous dives of up to 50 feet without injury or pain to his ears. Furthermore, the district court found that Kahikolu employees in general had made thousands of free dives free of injury, and that free diving itself was not an inherently dangerous activity. Finally, although the district court found that Kahikolu had inadequately trained MacDonald in free diving, Kahikolu was found not negligent because it did not have notice of any unsafe conditions.[2]

In both his action in district court and subsequent appeal, MacDonald argued that Kahikolu was negligent *per-se* because of noncompliance with a Coast Guard regulation requiring an operations manual to be provided to the person in charge of the dive.[3] The district court rejected the theory in finding that the regulation applied to commercial divers rather than free divers. On appeal, the Ninth Circuit reversed the district court due to concerns regarding the applicability of *Kernan v. American Dredging*.[4] In *Kernan*, the Supreme Court dispensed with the traditional negligence *per se* requirements in regard to the regulation argued by MacDonald. Rather, *Kernan* held that an employee could recover under the Federal Employers' Liability Act or Jones Act when the employee's injury or death was caused in whole or in part by the employer's fault. Therefore, the Ninth Circuit remanded with instructions for the district court to determine if Kahikolu's failure to comply with the regulation played any part, "even the slightest," in causing MacDonald's injuries.[5]

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[1] 46 U.S.C. § 30104.
[2] *MacDonald v. Kahikolu Ltd.*, 442 F.3d 1199, 1200 (9th Cir.2006).
[3] 46 C.F.R. § 197.420(a)(1).
[4] *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, (1958).
[5] *MacDonald v. Kahikolu, Ltd.*, 581 F.3d 970, 973 (C.A.9 Hawaii, 2009).

On remand, the district court again found for Kahikolu. The district court determined that while the Coast Guard regulations did require an operations manual to be aboard the *Frogman II*, the absence of the manual played no part even in the slightest in the causation of MacDonald's injuries. In its decision, the district court declined to apply the *Pennsylvania* Rule, and held that in the alternative even if the *Pennsylvania* Rule had been applied, Kahikolu had met its burden. MacDonald appealed in the present case in order to challenge that determination.

The *Pennsylvania* Rule is a venerable rule of admiralty law that has been applied many times within the Ninth Circuit. Under the *Pennsylvania* Rule, when a vessel involved in an accident violated a regulation or statute designed to prevent that accident, a presumption arises that the ship owner was at fault, and the burden shifts to the ship owner to prove lack of causation.[6] This burden has been described as difficult to discharge but can be rebutted when the defendant proves the violation could not be reasonably held to have proximately caused the injury in question.[7]

In this appeal, the Court first examined whether the district court erred in declining to apply the *Pennsylvania* Rule. The Court noted that it was not clear that the *Pensnylvania* Rule applied to cases that involve Jones Act claims, or claims that do not involve a collision or other accident relating to navigation. In *Mathes*, the Court found that the Rule did not apply to a situation where a plaintiff brought a personal injury claim against a ship whose crewman did not satisfy Coast Guard regulations.[8] The Court did not apply the Rule because there was no possible causal relation between the regulatory violation and the injury. The Ninth Circuit did not in that case, nor in any prior cases, address whether the Rule applied to non-navigational cases. Other Circuits had construed the Rule more broadly to reach those type of cases, however in none of those instances was the Rule applied to a Jones Act claim.

The Court determined however that regardless of the possible broadness with which the Rule could be applied to Jones Act claims, it would not be applicable in the instant case. Courts in the past have regularly held that in order for the Rule to be applied, the injury must be of the kind intended to be prevented by the statute or regulation that is alleged to have been violated. The regulations present applied only to commercial divers of the type using SCUBA or similar equipment, not the free diving practice in which MacDonald had engaged. More specifically, even if the manual regulated similar practices to those used in free diving, it did not address the activities of diving without equipment or equalizing pressure in one's ears. Therefore, Kahikolu was without any duty to impose any type of restriction that would have prevented MacDonald's injuries.

Finally, the Court noted that even if the Rule were applicable to MacDonald's case, the district court's decision that Kahikolu had met its burden was not clearly erroneous. The district court made no error in finding that Kahikolu's employees had done numerous successful free dives and that free diving was not a *per-se* unsafe activity. Kahikolu was under no obligation, based on its experience, to impose restrictions on free dives.

As such, the Court determined that the district court had not erred in declining to apply the *Pennsylvania* Rule, and affirmed the decision.

**David M. Millstein**
**Class of 2010**

[6] *The Pennsylvania*, 86 U.S. (19 Wall.) at 136.
[7] *MacDonald v. Kahikolu, Ltd.*, 581 F.3d 970, 973 (C.A.9 Hawaii, 2009).
[8] *Mathes v. Clipper Fleet*, 774 F.2d 980, 982 (9th Cir.1985).

## ADMIRALTY LAW IS NOT APPLICABLE TO ACCIDENTS OCCURING ON NAVIGABLE WATERS THAT DO NOT OTHERWISE HAVE A SUBSTANTIAL CONNECTION TO MARITIME ACTIVITIES.

**The United States Court of Appeals for the Tenth Circuit holds that the District Court did not err when it held that admiralty law did not apply to an airplane crash into ocean waters, because even though the harm occurred over navigable waters the event had no substantial nexus to traditional maritime activities.**

U.S. Aviation Underwriters, Inc v. Palitus Business Aircraft
United States Court of Appeals, Tenth Circuit
582 F. 3d 1131
(Decided August 26th, 2009)

This case involves a PC-12 single-engine turboprop aircraft whose engine failed over navigable waters. The history of the aircraft is as follows: The aircraft's engine was manufactured by Pratt & Whitney Canada Corporation and was installed by Pilatus, a Swiss company. Afterward, the plane was sold to Pilatus Business Aircraft LTC, a Colorado-based subsidiary of Pilatus, under a purchase agreement governed by Colorado law. Pilatus LTC sold the aircraft to Western Aircraft, Inc, its regional distributor located in Idaho. Thereafter, the plane was resold to Donald Simplot, the principal for DJS Aviation, LLC, under a purchase agreement governed by Idaho law. Subsequently, Simplot leased the aircraft to Access Air under a lease governed by Idaho law.

The Japanese Aircraft Owners and Pilots Association contacted Access Air regarding a planned trip around in the world in the PC-12 aircraft. The Association chartered the plane for the trip, beginning and ending in Boise, Idaho. During the course of their trip the aircraft showed signs of engine failure and reported an extremely dangerous internal temperature level. The crew guided the plane to an emergency crash landing into the Sea of Okhotsk. None of the passengers were seriously injured. U.S. Aviation Underwriters, Inc. insured the plane and paid Access Air for the damages resulting from the crash. Thereafter, U.S. Aviation Underwriters ("plaintiff") filed a suit against Pilatus Business Aircraft ("defendant") (the manufacturer of the plane and engine) to recover these monies.

The plaintiff brought a strict product liability and negligence suit against the defendant. The defendant argued that admiralty law governed the dispute, and as such the plaintiff was barred from recovering for the loss of the aircraft under the economic loss rule. The defendant argued that the claim was similarly barred under Idaho law as well. The district court reasoned that neither admiralty nor Idaho law applied, choosing to apply Colorado law instead. The defendant was found to be partially liable for the loss under Colorado law. Thereafter, the defendant appealed this holding. The appeal was based on two contentions: First, that the district court erred in not choosing to apply admiralty law. Second, that the district court erred when it did not apply Idaho law, specifically Idaho's comparative fault statute or Idaho's economic loss rule.

The issue on this appeal was whether admiralty law properly applied to this aviation accident. Both parties agreed that the test specified in *Executive Jet Aviation, Inc. v. City of Cleveland* governed the issue at hand.[1] In *Executive Jet*, the Supreme Court articulated a test that involves two steps of inquiry: first, whether the incident could have a disruptive impact on maritime commerce; and second, whether the character of the activity has a substantial relationship to traditional maritime activities. The second inquiry involves the evaluation of "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[2]

[1] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).
[2] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995).

In regard to the first prong of the *Executive Jet* test, the Court of Appeals reasoned that the crash was indeed likely to interfere with traditional maritime enterprises. The prong at contention was whether there was a substantial relationship between the flight and maritime activity so as to require the exercise of admiralty law. The court could not find a substantial connection. The journey was undertaken by airplane aficionados for demonstrative and evaluative purposes, and would not have taken place by sea had no airplane been available. The only existing connection was that the aircraft happened to have crashed into navigable waters. The court found that this connection should not be considered substantial because it is too attenuated. Moreover, the court in *Executive Jet* stated that mere location of a crash is not sufficient to establish a substantial connection to admiralty law. Therefore, the test was not satisfied and the court held that the district court did not err in refusing to apply admiralty law to the present case.

Regarding the second issue on appeal, the Court of Appeals held that under Colorado's choice of law rules, Idaho law should apply. Colorado law was not appropriate because this court applied the "most significant relationship test" to decide which state laws should govern the inquiry. The test calls for selecting the "law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[3] The flight was arranged and conducted by an Idaho company, and the plane and pilot were both based in Idaho. Hence, the court held that Idaho had the most substantial relationship to the parties and the accident and thereby the district court had incorrectly held that Colorado law applied. Thus, the court found that Idaho law should have governed the dispute and accordingly this case was reversed and remanded.

Several issues that were not central to the resolution of this dispute were also resolved. First, one of the plane's co-owners was entitled to sue for the personal items he lost during the crash, because the court choose to interpret the type of damages that can be claimed in a products liability broadly. Second, the district court was found to have improperly allowed evidence to be introduced regarding other in-flight shutdowns, because these other shutdowns were dissimilar from the situation at hand. Third, the defendants were not entitled to a judgment as a matter of law, because the evidence presented was sufficient to allow for jury consideration of the matters at issue.

In conclusion, the Court of Appeals held that the district court correctly refused to apply admiralty jurisdiction but reversed and remanded the case because the district court had erred in refusing to apply Idaho law.

**Jacqueline Bokser**
**Class of 2012**

[3] Restatement (Second) of Conflict of Laws § 145(1) (1971).

**PERMISSIBLE RETROACTIVE APPLICATION OF A RULE ANNOUNCING THAT AN ELECTRONIC FUNDS TRANSFER WAS NOT ATTACHABLE AS A MARITIME ATTACHMENT ORDER MEANS THAT A PARTY CAN NOT BE DEEMED TO HAVE WAIVED A DEFENSE OR OBJECTION THAT WAS NOT AVAILABLE AT TRIAL.**

**The United States Court of Appeals for the Second Circuit holds that a defendant's assertion of an objection to personal jurisdiction that was not asserted in District Court was not waived because it was based on the overruling of precedent case-law by *Shipping Corp. of India*. The retroactive effect of *Shipping Corp.* therefore requires the plaintiff on remand to assert a basis of personal jurisdiction over defendant, because defendant could not waive an objection that was unknown or unavailable in District Court.**

Hawknet v. Overseas Shipping Agencies
United States Court of Appeals, Second Circuit
590 F.3d 87
(Decided November 13, 2009)
(Amended December 22, 2009)

This case presented two issues: (1) whether the holding of *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.* applied retroactively to the present case; and (2) in the alternative, if *Shipping Corp.* did apply, whether the defendants' failure to assert an argument arising out of that holding before the District Court could be considered a waiver of that argument upon this appeal.[1]

The two issues presented arose from an agreement created in June 2005. The plaintiff, Hawknet, Ltd ("Hawknet") contracted with the defendant, Overseas Shipping Agencies ("OSA"), to charter a shipment of steel plate from Poland to Iran. Hawknet was incorporated in England whereas OSA was incorporated in Iran. Following a contractual default by OSA, Hawknet brought a maritime attachment suit in the Southern District of New York seeking to secure assets for a possible award that would result from the subsequent arbitration proceedings to resolve the default. Specifically, Hawknet sought to attach the assets of OSA and several other Iranian shipping agencies that Hawknet alleged were all connected as part of a larger Iranian business entity. The District Court ordered the attachment.

Hawknet then served the attachment on several Southern District banks that handled various electronic fund transfers ("EFTs") being sent to OSA. A dispute arose as to whether one particular source of attached EFTs was a corporate alter-ego of the larger Iranian business entity that Hawknet had named in its complaint. The source moved to vacate attachment, and a hearing was held as per Rule E(4)(f) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Admiralty Rules") to determine whether vacatur was appropriate.[2] The District Court vacated the attachment, finding that Hawknet had failed to establish the alter-ego nature of the EFT source, but issued a stay to allow Hawknet to appeal. Hawknet appealed. OSA responded that the issue was now moot as a result of the decision in *Shipping Corp*. Hawknet argued that the holding in *Shipping Corp.* did not apply retroactively to this case, and that even if it did OSA could not raise an argument based on the *Shipping Corp.* decision because it had failed to do so in District Court.

In *Shipping Corp.,* the court announced a rule that EFTs for which the defendant was a beneficiary were not property that could be attached under a maritime attachment order. This ruling overruled prior caselaw established by *Winter Storm Shipping, Ltd. v. TPI*.[3] While noting the general

[1] *Shipping Corp. of India v. Jaldhi Overseas Pte*, 585 F.3d 58 (2d Cir. 2009).
[2] Fed.R.Civ.P. Supp. R. E(4)(f).
[3] *Winter Storm Shipping, Ltd., v. TPI*, 310 F.3d 263 (2d Cir. 2002).

presumption against retroactive application of statutes and regulations, the court relied on the rule articulated in *Harper v. Virginia Dep't of Taxation*.[4] In *Harper*, the Supreme Court held that federal case law is given retroactive effect for all open cases still under review.[5] Hence, the rule announced in *Shipping Corp. of India* had retroactive effect on the present case.

Regarding the second issue presented, while appellate courts generally do not consider arguments not originally asserted in District Court, nonetheless the court refused to reach a conclusion that OSA had waived a defense/objection of personal jurisdiction in the present case because at the time the defense should have been made, the defense was either unavailable or unknown to be available. Specifically, the court articulated that "the doctrine of waiver demands conscientiousness, not clairvoyance, from the parties."[6] The holding in *Shipping Corp.* had overruled a seven-year old precedent and thereby provided OSA with a new objection to the District Court's exercise of personal jurisdiction over OSA. Thus, the court determined that OSA did not waive defenses that were previously unavailable at the time of adjudication by failing to raise them before the District Court.

Finally, turning to the merits of OSA's personal jurisdiction objection, the final question was whether personal jurisdiction was properly exercised in the case. The court found in the negative but permitted the case to be remanded so that the plaintiff could argue otherwise.

Therefore, because the rule of *Shipping Corp. of India* has retroactive effect on the instant case and the defendant did not waive defenses that were previously unavailable, the United States Court of Appeals for the Second Circuit held that the District Court's order vacating the attachment, should be affirmed and that the case should be remanded to evaluate whether the case should be dismissed for lack of personal jurisdiction.

**Gil Auslander**
**Class of 2012**

[4] *Harper v. Virginia Department of Taxation*, 509 US. 86, 113 S.CT. 2510, (U.S. VA., 1993).
[5] *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510, 2517 (U.S. Va., 1993).
[6] *Hawknet v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d.Cir. 2009).

**OIL RIG OWNERS WHO CHARTERED A VESSEL WERE NOT ACTING WITHIN THEIR ROLE AS CHARTERERS, BUT AS EMPLOYERS, IN FAILING TO PROPERLY INSTRUCT AND WARN AN EMPLOYEE OF DANGERS STEMMING FROM THE VESSEL'S ACTIVITIES IN CONJUNCTION WITH AN OIL RIG.**

**The United States Court of Appeals for the Fifth Circuit held that a district court erred in declaring that an oil rig company was acting in its capacity as time-charterer of a vessel in (i) failing to train an employee in certain tasks and (ii) failing to warn this employee of the danger of an unfolding situation between the oil rig and the vessel. The Court of Appeals affirmed the holding that other specific activities by the oil rig company fell within the scope of its role as a time-charterer, including a determination that employer indemnification provisions are not always void under the Longshore and Harbor Workers' Compensation Act when the employee is covered by the Outer Continental Shelf Lands Act.**

Seth A. Becker v. Tidewater, Inc.
United States Court of Appeals, Fifth Circuit
586 F.3d 358
(Decided October 26, 2009)

In June 1999, Seth Becker ("Seth") was injured while working on the crew of the M/V REPUBLIC TIDE ("M/V Republic") as part of a summer internship with Baker Hughes Oilfield Operations ("Baker"). M/V Republic was used by Baker pursuant to a time-charter contract with the boat's owner, Tidewater Marine ("Tidewater"). Seth was part of a crew performing well stimulation services on an offshore oil rig, the R&B FALCON/CLIFFS RIG 153 ("Rig"), owned by R&B Falcon ("Falcon"). As part of the operation, the M/V Republic's crew would unspool a coiled steel hose from the M/V Republic's stern and attach it to the Rig's wellhead. While this hose was connected, the M/V Republic's movement would cause the hose to whip across the rig's deck. Baker employees devised an apparatus known as the "blue shoe" to help keep the hose in place. To maintain stability, the M/V Republic's captains, Tidewater employees, also secured the M/V Republic to the rig with port and starboard lines, and used the bow thruster to maintain a steady position against strong currents in the area. On the day that gave rise to litigation, the crew also kept their anchor raised because of a hydraulic oil leak discovered earlier.

Unfortunately for Seth, the oil leak was just the beginning of the problems that occurred while the M/V Republic was working on the Rig. While Seth was aboard the Rig, the M/V Republic's bow thruster failed. The M/V Republic was no longer able to maintain its position against the current and the port-stern line snapped, putting the ship on a collision course with the Rig. The M/V Republic's captain told his crew to disconnect the steel hose connecting the boat to the Rig, but due to modifications made to the system the hose wouldn't detach. The captain contacted the Rig and reported the situation. Aboard the Rig, Baker's supervisor ordered three Baker employees, including Seth, to disconnect the hose from the Rig's deck.

As collision drew imminent, it became apparent to the M/V Republic's captain that intervention was necessary. The captain disconnected the starboard line without contacting the Rig employees. He throttled the boat and the hose suddenly became taut. Seth was standing in a bend in the hose and was caught in the sudden tightening. One of his legs was immediately severed and another was severely injured. Seth lost pints of blood, and was evacuated. At the hospital, doctors had to amputate Seth's other leg.

Seth sued Baker, Tidewater and Falcon under the Jones Act, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and general maritime law. Before trial, Baker and Seth entered into a Mary Carter agreement, a contract between the plaintiff and one of several defendants, whereby the

defendant agrees to settle with the plaintiff before trial, but must remain in the suit and will be reimbursed by the plaintiff's recovery from the other defendants[1]. The court awarded Seth approximately 37 million dollars, holding Baker 55% liable and Tidewater 45% liable, and ruling that Falcon was free from liability. Under a reciprocal indemnity provision in the time-charter contract between Baker and Tidewater, Baker was obligated to fully indemnify Tidewater for any liability for Seth's injuries. Baker appealed the district court's denial of summary judgment on the issues of apportionment of fault and indemnity, and Seth appealed the apportionment of fault and the court's findings on gross negligence. The Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded.

The Court of Appeals upheld the determination of the district court that Baker was obligated to indemnify Tidewater fully for liability for Seth's injuries. Although the LHWCA provides that agreements for an employer to indemnify a vessel for injuries to a longshoreman are void[2], the court found that agreements are not void when a longshoreman is entitled to relief under the Outer Continental Shelf Lands Act[3]. Seth was covered under this law because he was engaged in mineral exploration, was a non-seaman, and was injured on the Outer Continental Shelf while employed by an employer engaged in mineral production.

The court upheld the district court's rulings that: Tidewater was not grossly negligent, but normally negligent; that Tidewater did not commit a breach of contract; that there was nothing in the contract to suggest a restriction on the indemnity provision, that Baker's proposed differentiating between general damages and "special damages" was not supported; that because Baker was only an "additional assured" under the policies, there was no coverage for Seth's injuries because those risks were assumed by Baker pursuant to the indemnity agreement; and that Tidewater was not a superseding cause of the injury because the captain's actions were not so extraordinary that a reasonably prudent person would not have foreseen their occurrence.

Baker and Seth argued that the district court erred in determining that most of Baker's negligence was committed while Baker was acting as a time-charterer, and not as Seth's employer. Under § 905(a) of the LHWCA, an employee is precluded from suing his employer in tort[4]. Under this rule, Baker would be held liable to Seth as his employer. However, Baker could be liable under 905(b) if its fault occurred in capacity as time-charterer.[5] The time-charterer is responsible for directing commercial activity of the vessel, determining routes, and timing the mission.[6] The vessel owner is responsible for seaworthiness, and negligence of the crew.[7] Baker was responsible for certain operations of the ship, including the blue shoe. The district court indentified several causes of Seth's harm, all within Baker's role as time-charterer, including: (i) proceeding with gravel-packing operations while unanchored; (ii) failing to notify Falcon that the M/V Republic was unanchored; (iii) negligently modifying the Coflex hose system; (iv) failing to test, clean, or properly maintain the hose system; (v) failing to properly train Baker employees how to operate the hose system; (vi) failing to warn Seth of the gravity of the unfolding situation on the oil rig, and the dangers of the hose and the blue shoe; (vii) negligently designing the blue shoe; and (viii) failing to test the blue shoe.

The court ruled that the district court was correct in (i), (ii), (iii), (iv), (vii) and (vii). However, (v) and (vi) were not time charterer negligence under *Kerr-McGee*[8] but employer negligence, and remanded for apportionment of fault.

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[1] *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 309 n.49 (5th Cir. 1993).
[2] 33 U.S.C. § 905(b).
[3] 43 U.S.C. § 1333(b); 33 U.S.C. § 905(c).
[4] 33 U.S.C. § 905(a).
[5] *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1339 (5th Cir. 1987).
[6] *Kerr-McGee*, 830 F.2d at 1339.
[7] *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 792 (5th Cir. 1990).
[8] *Kerr-McGee*, 830 F.2d at 1342.

Finally, Baker contended that there was no authority for the district court's holding that the indemnity provision permitted Tidewater to recover attorney's fees that Tidewater incurred in establishing its right to indemnity. The court recognized that the agreement did not specifically anticipate that attorney's fees incurred would be recoverable, and that the provision was a general indemnity clause, not specifically providing for recovery. The court ruled that the prohibition barring the recovery of legal fees incurred in establishing a right to indemnification applied to the time-charter[9] and therefore remanded on this account.

**Ryan Adams**
**Class of 2012**

[9] *Dow Chem Co. v. M/V ROBERTA TABOR*, 815 F.2d 1037, 1046 (5th Cir. 1987).

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