Donna Adelsberger & Associates, P.C.

Donna Adelsberger & Associates, P.C. was established in 1995 following the dissolution of Krusen Evans & Bryne, a well known insurance and maritime firm in the Philadelphia area for more than fifty years. We continue to practice primarily in the areas of insurance defense and coverage litigation with emphasis on premises liability, errors and omissions, trucking accidents, products liability, and all aspects of admiralty law. We also maintain a general practice, including estates and commercial litigation. We are admitted to practice in Pennsylvania and New Jersey state and federal courts.

Mary Elisa Reeves

Women's International Trade Association's Woman of the Year in 2005, Lisa has twenty-three years of experience in maritime litigation and Coast Guard investigations including collisions, groundings, oil spills, injuries, cargo claims, arrests, attachments and commercial disputes on behalf of vessel owners, tugboat, ferry and commercial fishing boat operators, mariners and their underwriters. Lisa enjoys yoga and volunteering on the historic tallship GAZELA.

B.A., University of Michigan (English)
J.D. magna cum laude, Washington College of Law, American University (1985)
Active member and former director of various port and trade associations
Director, Maritime Law Association of the U.S. (2000-03)
President, Ports of Philadelphia Maritime Society (2007-Present)
Associate Editor of American Maritime Cases

Donna Adelsberger

Donna's practice focuses on personal injury defense, employment law and coverage litigation. She is also a classical pianist.

B.A. summa cum laude, Temple University
J.D., Temple University School of Law (1988)
Formerly with State Farm Insurance (1972-1987)
Adjunct Professor, Temple University School of Law (1995-2000), Penn State University (2004-Present)
Pro Bono Attorney for Support Center for Child Advocates (representing abused children in family court and criminal proceedings).

Howard Wishnoff

Since joining the firm in 2002, Howard's practice consists of personal injury defense, commercial litigation and insurance-coverage work. Howard enjoys travel abroad and is a computer enthusiast.

B.A., Temple University
J.D., Temple University School of Law (1984)
Former Senior Trial Attorney for Prudential Property and Casualty Insurance Co.

Raymond T. Letulle

After graduation from law school, Ray began practicing with the maritime group of Krusen Evans & Byrne (working with Donna and Lisa). After the firm dissolved, he continued to litigate in nearly all aspects of maritime law including vessel collisions, allisions, strandings, oil spills, personal injury, wrongful death, marine insurance coverage disputes, cargo defense and environmental coverage claims. Ray acted as a correspondent for many P&I clubs and was counsel to a number of United States tanker and shipping companies. Ray is licensed to practice in Pennsylvania and Florida.

B.A., U.S. Merchant Marine Academy
J.D., Villanova University School of Law
Former Chairman, ADR Committee
Former member of the Executive Committee of the Maritime Law Association

Susan J. Wiener

Sue defends Jones Act and other personal injury cases and litigates commercial disputes. She is also an avid runner of 5K races.

B.B.A. magna cum laude, Temple University (Business Administration, 1988)
J.D. cum laude, Temple University School of Law (1992)
Participant in the Philadelphia Mock Trial Competition (1995 to present).

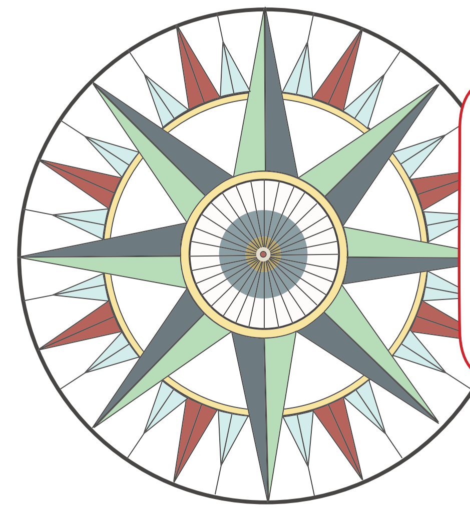
David Trevaskis

David's practice includes education law, estate planning and general litigation.

B.A., M.A.T., Duke University
J.D. cum laude, Temple University School of Law (1988)
Founder of LEAP-KIDS in 2001, dedicated to the development and training of law-related education. Director of Pro Bono Programs for the Pennsylvania Bar Association (2001-present).

Paralegals

Kelly Eckert and Phoebe Montayne



Maritime Connection

NEW DEVELOPMENTS

Donna Adelsberger & Associates, P.C. Attorneys at Law

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Articles by
Lisa Reeves
267-257-8225 (Cell)
mreeves@dlalawyers.com

Main Office
6 Royal Avenue
Glenside, PA 19038
215-576-8690 (Telephone)
215-576-8695 (Telefax)

New Jersey Office
One Greentree Centre,
Suite 201
Marlton, NJ 08053
856-795-9700 (Telephone)
856-795-1336 (Telefax)

dadelsberger@dlalawyers.com

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Coast Guard Accused of Bias

The Coast Guard has been accused of bias against mariners in licence proceedings.

Following a maritime accident, the Coast Guard investigates the incident and makes recommendations in an effort to avoid similar incidents in the future. The vessel owner and crew are often required to give statements and file a report of a marine incident with the Coast Guard. Crewmembers on watch at the time are tested for drugs and alcohol. Depending on the results of the investigation, the investigating officer has the right to recommend an action against the mariner's license based on a failed drug test, negligent navigation, or other misconduct which the officer feels may have contributed to the incident.

If proven, the mariner faces a license suspension or revocation, which can cause him to lose his job or even his livelihood. In many cases, the mariner will strike a deal with the Coast Guard (a plea bargain of sorts, although the charges and proceedings are civil, and not criminal), and accept a warning or lesser penalty in return. If the mariner disputes the charges, he is entitled to request a hearing and present evidence in his defense. In such cases, an administrative law judge (ALJ) will preside over the hearing, and decide the fate of the mariner's license after hearing testimony and evidence from both the Coast Guard and the mariner, who at this stage is usually represented by an attorney.

These ALJs are employed by the Coast Guard, who pays their salaries. This fact, standing alone, is not unusual and should not lead to the conclusion that the judges will favor the Coast Guard over the mariner. After all, federal and state judges are paid from the same tax dollars as the prosecutors and district attorneys who appear before them in criminal cases, yet they are generally considered to be fair and impartial.

Unfortunately, the Coast Guard is now facing charges that its hearings are "fixed," and that the Chief ALJ has instructed the rest of the judges to find in favor of the Coast Guard whenever possible and at all costs. These accusations have taken the form of several lawsuits against the Coast Guard, which are currently pending in the federal court in New Orleans, and have even led Congress to hold investigative hearings of its own.

The scandal broke following statements by a former ALJ who claims that she was pressured and intimidated by the Chief Judge to find in favor of the Coast Guard, irrespective of the merits of the case. This ALJ says that she refused to tow the line, and has since resigned her post and has become the star witness for the mariners who have filed suit. She has since testified at the Congressional Hearing on the subject.

The story gained notoriety when the Baltimore Sun published an in depth article on the subject on June 24, 2007. According to statistics gathered by that newspaper, the mariner was victorious in only 14 out of 6300 license proceedings. The Sun found that the Coast Guard won or settled over 97 percent of its cases. Statistics can be misleading, and the Coast Guard spokesperson has disputed these figures, explaining that most of the prosecutions involved uncontested cases, settlements, or positive drug and alcohol tests to which there is little defense. [Interestingly, one of the cases, on which the charges of bias are based, involved a mariner who claimed that his positive marijuana test was caused by his legal use of hemp oil. After

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Medicare Secondary Payer Act

The Settlement Wildcard

Although the Medicare Secondary Payer Act has been around for almost thirty years, it is only in recent years that its enforcement has given rise to the need for both lawyers and clients to carefully consider its implications on the settlement of any serious injury claim.

At its most basic, the Act provides that in the event that Medicare (a federal government program for retired and disabled individuals) pays the medical bills of covered individual, it is entitled to reimbursement from any "primary plan" which is liable in the first instance. A "primary plan" is defined as any group health care plan, worker's compensation plan, liability policy or self-insured plan.

How does this come into play in the event of a Jones Act or other personal injury claim? Under the Act, P&I insurance might be considered "liability insurance" and thereby primarily responsible for medical bills. Although the P&I Clubs would argue that they provide indemnity coverage, and not liability insurance, there is no guarantee that a court would necessarily agree. At least one court has held that the insurers of the manufacturers of breast implants were "primary plans" although they made no payment directly to the claimants, because they eventually reimbursed the manufacturers for the funds used to settle a class action. Therefore the fact that the Clubs provide indemnity cover may not shield them from liability to Medicare under the Act for any medical bills that a court later finds "covered" by the P&I policy.

If P&I insurance is not considered a liability policy, the shipowner may well be considered to be "self insured" under the Act, thereby subjecting the owner to direct liability to the government. These issues are by no means well settled, but a settlement involving an injury for which medical treatment has or may be sought raises certain questions which the shipowner and its Club or other insurer ignore at their peril.

First, one must determine whether the claimant is or will be eligible to receive Social Security benefits within the next thirty months. Eligibility turns on age (65) or permanent disability which prevents the claimant from working. Therefore, this Act has implications for any settlement with a claimant who is 62.5 years of age at the time of the settlement, or who has applied for or is receiving Social Security disability benefits.

If the injury gave rise to any past medical treatment which was covered by Medicare, the Medicare lien must be satisfied. Your attorney can contact the third party administrator with whom Medicare has contracted to determine the amount of the lien which must be satisfied. Aside from dealing with the usual bureaucracy, this is easily handled.

More problematic is finding a mechanism to "set aside" or otherwise make a provision for the payment of any future medical treatment which may be needed by your claimant. It is futile to draft a release which suggests that all payments are intended to compensate for lost wages or pain and suffering, and not for past or future medical expenses. In fact, the Medicare lien will attach to the entire amount of the settlement, irrespective of the language in the release.

This article does not attempt to offer any answers to the conundrum created by the Act, but is simply intended to put shipowners and their insurers on notice of the issue. It is important to note that the insurer and possibly the shipowner could be directly liable to reimburse Medicare, and that the statute permits the government to recover double damages. The result is that the owner and his insurer could ultimately pay three times for the same injury—first in the settlement, and then twice again to Medicare under the Act. There are many strategies for dealing with this issue—just make sure that you are aware of the issue before entering into any settlement with a claimant who might become a Medicare beneficiary in the near future.

Punitive Damages Revisited

Last year, three appellate courts looked at the issue of punitive damages in maritime cases, with varying results. It is expected that the issue will finally be put to rest when the Supreme Court hands down its decision in the ongoing saga of the EXXON VALDEZ litigation this spring. In the meantime, a brief discussion of the issues follows.

The first two decisions dealt with the imposition of punitive damages in the event a vessel owner fails to pay maintenance and cure to a seaman. Since the Supreme Court's decision in Miles v. Apex, many courts have held that punitive damages are not available in this situation, irrespective of the degree of culpability on the part of the shipowner. Although Miles did not deal directly with either maintenance and cure or punitive damages, the Supreme Court addressed the issue of whether the family of a deceased seafarer could recover non-pecuniary damages in a wrongful death action under general maritime law. The Court held that because such damages were unavailable under the Jones Act, they could not be awarded under judge made law.

In one maintenance and cure case decided this summer, the shipowner argued that "the Miles uniformity principle dictates that all subsequent courts determining the availability of damages in a maritime case, must provide for uniform results in similar factual settings regardless of whether

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Arbitration Clauses

Should they be in seamen's contracts?

Clients often ask whether arbitration agreements are enforceable in the context of a seaman's employment contract. The short answer is "no," although several recent cases from the Fifth Circuit may open the door to the arbitration of injury claims under the right circumstances.

In the first case, a seaman employed on a tugboat suffered a hernia allegedly caused by heavy lifting. The seaman underwent hernia repair surgery and returned to work several months later. Shortly thereafter, he settled his claim with the employer for a modest amount, but reserved his right to seek any damages that might later arise as a result of the accident. The settlement agreement provided that any such claims would be subject to mandatory, binding arbitration.

Two months after the settlement, he reported a recurrence of the hernia, and filed suit one year later seeking a jury trial of his Jones Act and unseaworthiness claims. The employer moved to compel arbitration in accordance with the agreement, and the seaman responded that the arbitration agreement was unenforceable, citing the Federal Arbitration Act ("FAA"), the Jones Act, and public policy.

The FAA governs the judicial enforcement of a wide range of written agreements to arbitrate, but specifically excludes contracts of employment of seamen. The Third Circuit Court of Appeals held that the separate agreement to arbitrate any future injury claim was not a part of the seaman's employment contract, even though it encompassed his claim for maintenance and cure. The Court noted that although maintenance and cure was an intrinsic part of the employment relationship, it was separate and apart form the actual employment contract. Therefore, the Court reasoned, the agreement to arbitrate was enforcable under the FAA. The Court also held that the agreement to arbitrate a seaman's Jones Act claim was not contrary to public policy.

This holding was further clarified by a subsequent District Court decision in which the employer and seaman agreed to arbitrate his injury claim in consideration of the employer's agreement to advance 50% of his gross wages during a specified recovery period. Noting the tension between the strong federal policy in favor of arbitration and the heightened protection for seamen under the Jones Act, the Court found that the agreement to arbitrate was enforceable, as long as there was no fraud or duress in its procurement. The shipowner's motion to compel arbitration was denied without prejudice pending a trial on the issue of whether the agreement was voluntarily executed by the seaman.

Interestingly, the Court placed the burden on the seaman to prove fraud, duress, or deception and held that the rule governing seaman's releases (which places the burden of proof on the employer) was inapplicable because no claims were released.

Finally a state appellate court in Texas, a jurisdiction which is notoriously pro-plaintiff in seaman's cases, has also held that such arbitration clauses are presumptively valid if there is no evidence of duress or coercion, and further that the seaman had the burden of presenting any such evidence.

The bottom line is that agreements to arbitrate any injury claims should not be placed in the contract of employment, however, the shipowner may want to negotiate arbitration agreements with seamen who suffer on the job injuries, especially if it is willing to pay a percentage of wages in consideration. We recommend, however, that you retain a maritime attorney to assist you in drafting such an agreement, or at least treat it like you would a seaman's release so that there can be no argument that the agreement was not knowing and voluntary.

Pilotage Clause

Upheld by Third Circuit

In a victory for tug boat operators, the Third Circuit recently upheld the pilotage clause and placed all of the liability for pilot error on the vessel being assisted. The issue arose following a frightening accident in which a tugboat was sucked into the propeller of a VLCC during what should have been a routine docking maneuver.

At the time of the accident, the movements of both tanker and assisting tugboats were being directed by the docking pilot, who had just taken the conn from the river pilot. For those unfamiliar with the ports along the Delaware River, a brief overview of the local pilotage system is in order. Vessels are boarded by a river pilot at the pilot station which is located in the Delaware Bay at the mouth of the river. These pilots then direct the vessel's movement up river approximately 80 miles to a terminal in Delaware, Philadelphia or Southern New Jersey. As the vessel approaches the berth, a docking pilot will board the vessel from one of the assisting tugs, and it is this pilot who gives orders to both the ship's crew and the assisting tugboats in order to bring the vessel from the channel to the dock. Traditionally, the docking pilot is a former tug captain previously employed by the company who provides the assisting tugboats. This is a sound practice because these men (and women) are intimately familiar with the maneuvering characteristics unique to each of the tugs.

The docking pilots are not paid by the towing company, but belong to an independent pilot's association who charges a flat fee based on the tonnage of the vessel and other factors. Depending on the company, the docking pilots (or their association) are paid some type of remuneration by the towing company in the form of stipends and/or benefits. In recent years, shipowners have begun to challenge their independence following accidents during docking, and have instead claimed that the docking pilot is an agent of the towing company, and that therefore the towing company should bear legal responsibility for accidents which occur due to the negligence of the pilot. Towing companies respond that both industry custom and the pilotage clause contained in the towage contract provides that the docking pilot is acting as the servant of the vessel during all docking maneuvers. Therefore while the negligence of one of the tugboat operators would give rise to the tug company's liability, the negligence of the docking pilot should not.

Although there were no injuries as a result of the accident in question, the tugboat was rendered a constructive total loss as a result of its encounter with the large propeller of the tanker it was attempting to dock. The ship's propeller was also damaged, and therefore both the vessel owner and tugboat owner lodged claims against one another for their respective losses. After a bench trial, the District Court found that the accident was caused solely by the negligence of both the river pilot and docking pilot. There was no dispute that the river pilot was considered to be the servant of the vessel, however, the shipowner contended that the docking pilot's negligence should be attributed to the tugboat company.

The Third Circuit affirmed the lower court's decision that the docking pilot was acting as the borrowed servant of the vessel at the time of the accident, and that his negligence should, therefore, be attributed to the shipowner as opposed to the tugboat owner. In reaching that conclusion, the court relied on the pilotage clauses contained in the invoices and towage contract between tugboat company and vessel owner. These clauses provide that, even if the docking pilot is an employee of the towing company, the parties agree that he nonetheless acts as the "borrowed servant" of the contracting ship during docking maneuvers. In this particular case, the argument was strengthened by the trial court's finding that the docking pilot was, in fact, an independent contractor and not an employee. It is important to note that even if the pilot had been an employee, the result would likely have been the same.

this issue will continue to be litigated...

Although this opinion would seem to settle, at least in the Third Circuit, the dispute over liability for casualties which occur during docking, there is little doubt that this issue will continue to be litigated in this and other jurisdictions in the future.

Coast Guard Accused

continued

an ALJ considered finding in favor of the mariner, the Chief Judge allegedly sent out a memo which directed the judges not to accept hemp oil as a defense to drug use charges. (There is some question as to whether current regulations permit the so-called "hemp oil" defense in any instance.) In addition, the Coast Guard says that more than a third of the 6300 cases were either withdrawn, admitted, or not yet assigned to an ALJ for hearing. Finally, the official Coast Guard statement insists that "Coast Guard administrative law judges are bound to fairly and impartially adjudicate cases. They are no different from counterparts at other agencies. At the heart of the cases they preside over is the safety and welfare of passengers, commerce and the environment. The public trust must be shared by judges, investigators, and professional mariners."

It is this public trust which has now been placed in jeopardy. The ALJ system is itself entitled to an impartial review of the claims against it. It is far too soon to tell whether the charges against the ALJ system are valid, in whole or in part. Nonetheless, mariners and those who represent them have lost faith in the integrity of the system, and go into these proceedings with the perception that the mariners will not be given a fair and impartial hearing when their license and ability to earn a living is on the line.

Following the congressional hearing which took place last summer, it has been suggested that perhaps the ALJ system should be moved from the Coast Guard to an independent agency like the NTSB. Whatever the outcome, from now on the Coast Guard will hopefully bend over backwards to give the appearance of impartiality, and that is bound to be to the mariner's benefit in hearings to come.

Punitive Damages Revisited

continued

the action is brought pursuant to the Jones Act, DOSHA or general maritime law." Although the majority of courts hold that Miles v. Apex precludes an award of punitive damages, the Eleventh Circuit was unwilling to bar such damages absent a ruling from the full panel of judges who make up that appellate court. The Court found that the reasoning of Miles would preclude such damages, however noted that the holding of Miles did not specifically address the issue, and therefore the three judge panel had no basis on which to overrule a prior decision which predated Miles, and was directly on point. The shipowner has sought a rehearing by the full panel of judges in the Circuit, and we predict a reversal.

Shortly after this decision, the Third Circuit came to the opposite conclusion, and found that Miles precluded an award of punitive damages in maintenance and cure actions.

Finally, the Ninth Circuit, which does not permit punitive damages in maintenance and cure cases, recently sanctioned such damages in a pollution case despite the fact that a federal statute already provided penalties for the willful or grossly negligent pollution.

The May 2007 decision of the Ninth Circuit denied a rehearing en banc on the issue of whether maritime law would permit punitive damages in the infamous EXXON VALDEZ case. The jury originally awarded five billion dollars in punitive damages, and the case had been reviewed by the Ninth Circuit on several prior occasions following various Supreme Court decisions in non-maritime cases on the permissible ratio of punitive to compensatory damages. In 2001, the Ninth Circuit had addressed two maritime issues involving punitive damages: a shipowner's vicarious liability for the reckless conduct of the master at sea; and the potential preclusion of punitive damages based on Miles v. Apex.

With respect to the first argument, the Ninth Circuit held in 2001 that the jury's verdict was based on the reckless conduct of Exxon's corporate managers, and not just the conduct of Captain Hazelwood. The Court had more trouble overcoming the second argument, but held that because the applicable statute (The Clean Water Act) did not address private causes of action for any damages whatsoever, the Miles prohibition did not apply.

After several trips to the Ninth Circuit on the permissible ratio of punitive damages, in December 2006, the Court reduced the damages to $2.5 billion based on recent non-maritime decisions of the Supreme Court. Exxon requested a rehearing en banc, which was denied in May 2007 over a vigorous dissent by one of the three judges, who believed that the decision to award punitive damages is contrary to the two hundred year old decision of the Supreme Court in The AMIABLE NANCY, which held that a shipowner could not be held vicariously liable for punitive damages based on the conduct of the master.

The Supreme Court granted Exxon's petition for a writ of certiorari, and held oral argument in late February. The law is anything but uniform at present, and we are hopeful that the resulting opinion will provide some guidance to the maritime industry on this troublesome issue.