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Admiralty Law

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Admiralty Law: 1994 Survey of Florida Law

Jack C. Rinard*

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I. INTRODUCTION

This article surveys opinions in maritime cases decided by the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and state and federal courts in Florida. The survey covers the period from July 1993 through July 1994.

II. UNITED STATES SUPREME COURT DECISIONS

A. *Forum Non Conveniens*

In *American Dredging Co. v. Miller*,¹ the Supreme Court affirmed a decision by the Supreme Court of Louisiana in which the state court ruled that the doctrine of *forum non conveniens* was not available as a defense or as a means of dismissing an action in lawsuits brought in Louisiana state courts pursuant to the Jones Act.² The state court’s decision was based upon a Louisiana statute which disallowed the defense in all cases arising under maritime law or the Jones Act.³ In *American Dredging*, the plaintiff, a resident of Mississippi, was injured while serving as a seaman on board a tugboat operated by the defendant in the Delaware River. The plaintiff brought suit under the Jones Act against his employer in the district court for the Parish of Orleans. Both the trial court and the intermediate appellate court ruled that, notwithstanding the provisions of the Louisiana statute, the

1. 114 S. Ct. 981, 990 (1994).

2. 46 U.S.C. app. § 688 (1988).

3. LA. CIV. CODE ANN. art. 123(c) (West 1993).

maritime doctrine of *forum non conveniens* applied in the case. After establishing in its opinion that the doctrine of *forum non conveniens* has “been given its earliest and most frequent expression in admiralty cases,”⁴ the Court proceeded to hold that the refusal of a state to apply the maritime doctrine in a maritime lawsuit, brought pursuant to the savings to suitors clause,⁵ does not significantly affect a fundamental feature of general maritime law.

The Court conceded that its decision would create “disuniformity,”⁶ but nevertheless held that the Louisiana statute prohibiting the application of *forum non conveniens* in maritime cases does not impede or impact “the proper harmony and uniformity”⁷ of admiralty law because the doctrine is nothing more than a “supervening venue provision.”⁸ Being a venue provision, *forum non conveniens* is procedural and therefore has no effect on substantive maritime law. According to the Supreme Court, the doctrine is neither a legal principle nor a rule of law upon which those involved in maritime endeavors consider or rely upon in managing their enterprises.⁹ Thus, all state courts are now free to ignore the concept of *forum non conveniens* and the jurisprudence developing that doctrine in numerous maritime cases, and instead apply local concepts of the doctrine, if such concepts exist. Due deference to the wisdom of the Supreme Court notwithstanding, it is submitted that there are many in the maritime community (shipowners, protection and indemnity clubs, and insurance companies, to name but three) who indeed give due consideration to where they may be sued in the conduct of their national and international maritime affairs. It is believed that *American Dredging* will be read with surprise and puzzlement by maritime practitioners.

B. *Settling Multi-Party Maritime Actions*

Two decisions by the United States Supreme Court will have a very significant impact upon settlements made in multi-party maritime actions. In *McDermott, Inc. v. AmClyde*,¹⁰ the Court held that at trial the non-settling defendants would receive a credit representing the proportionate

4. *American Dredging*, 114 S. Ct. at 986.

5. 28 U.S.C. § 1333(1) (1988).

6. *American Dredging*, 114 S. Ct. at 987.

7. *Id.* (citing *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)).

8. *Id.* at 988.

9. *Id.* at 988-89.

10. 114 S. Ct. 1461 (1994).

fault of the settling defendants.¹¹ Where there is a partial settlement, the proportional fault of the settling defendants will be determined at trial. The remaining defendants will receive a credit against the total liability. The credit will represent the proportional fault of the settling defendants and not the amount of the settlement. For example, suppose that one of two defendants settles with the plaintiff for \$100,000. At trial, it is determined that the loss sustained by the plaintiff was \$1,000,000, and that the settling defendant was 50% at fault for the plaintiff's damages. The remaining defendant would receive a credit of \$500,000 against the total liability of \$1,000,000. In this example, one would say that the plaintiff made a poor settlement. But it works the other way around. If the plaintiff had received a \$500,000 settlement, and the settling defendant had been found to be 10% at fault, the remaining defendant is liable for 90% of the total liability after deducting the 10% proportional fault of the settling defendant.

In *Boca Grande Club, Inc. v. Florida Power & Light Co.*,¹² the Supreme Court held that a settlement by one of several defendants extinguished actions for contribution maintained by the non-settling defendants against the settling defendant. Because the remaining defendants receive a credit for the proportional fault of the settling defendant and will thus never pay more than their own share of the loss, actions for contribution against settling parties are terminated by the settlement.

It is beyond the pale of this article to discuss the conflicts that existed in maritime decisions which led to the Court accepting certiorari in *McDermott* and *Boca Grande Club*. Nor does space permit a lengthy and detailed discussion of the ramifications of the Court's ruling in these two cases. Several obvious questions arise from the Court's rulings which deserve brief comment. What if all of the defendants settle with the plaintiff? The fundamental rationale of *McDermott* and *Boca Grande Club*, that settlement extinguishes the proportional share of the liability of the settling defendant, supports the conclusion that in such a situation the settling defendants would be protected from contribution claims by other settling defendants; thus, settling defendants would be prohibited from prosecuting claims for contribution. What happens to contribution claims between non-settling defendants? This question was not addressed in either *McDermott* or *Boca Grande Club*. However, given the fact that the decisions in those cases were based upon the concept of proportional fault, and in light of the Court's holdings in *United States v. Reliable Transfer*

11. *Id.* at 1471-72.

12. 114 S. Ct. 1472 (1994).

*Co.*¹³ and in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*,¹⁴ one may reasonably conclude that contribution claims between remaining defendants remain viable. This would certainly be the case if the concept of joint and several liability remains viable.

Was joint and several liability affected by the *McDermott* and *Boca Grande Club* decisions? This issue was directly considered by the Court in *McDermott* when the Court pointed out that accepting a proportional share credit to deal with the settling defendants was not inconsistent with the application of the rule of joint and several liability as between the non-settling defendants.¹⁵ Thus, a plaintiff will be able to utilize the rule of joint and several liability against the non-settling defendants.¹⁶

Do the principles announced in *McDermott* and *Boca Grande Club* apply in maritime cases brought in state courts? The manner in which partial settlements are treated directly affects the ultimate liability of the parties and, in this writer's view is substantive, not procedural. Therefore, the rules of *McDermott* and *Boca Grande Club* will surely apply to maritime cases brought in state court. It is entirely possible that these two decisions may not be limited to maritime actions.¹⁷ While the conflict resolved by the Supreme Court in *McDermott* and *Boca Grande Club* emerged from maritime cases, the question of how to deal with partial settlements is not peculiarly a maritime problem. The proportional credit rule is practical. It promotes partial settlements, and by extinguishing claims for contribution, cuts down on litigation. There is no reason the rule should not be applied in non-maritime cases.

C. Shipowners Turnover Duty

In *Howlett v. Birkdale Shipping Co., S.A.*,¹⁸ the Supreme Court granted certiorari to resolve the conflict existing in the courts of appeals with respect to the scope of a shipowner's turnover duty and obligation to warn of latent defects in the stow of cargo. The plaintiff longshoreman was injured when he slipped on a clear sheet of plastic that had been placed beneath a stow of bagged cocoa beans which he was helping discharge in Philadelphia. The sheet of plastic had been placed in the ship by the

13. 421 U.S. 397 (1975).

14. 417 U.S. 106 (1974).

15. *McDermott*, 114 S. Ct. at 1471.

16. *Id.*

17. See generally RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1990) (explaining the competing theories as to how partial settlements were previously handled).

18. 114 S. Ct. 2057, 2062 (1994).

loading stevedore in Guayaquil, Ecuador.¹⁹ The lower court relied upon *Derr v. Kawasaki Kisen K.K.*,²⁰ which held that a shipowner is not required to supervise a loading stevedore or inspect a loading stevedore's work.²¹ By contrast, in *Turner v. Japan Lines, Ltd.*,²² the Court of Appeals for the Ninth Circuit held that a shipowner is under a duty to supervise loading operations conducted by a foreign stevedore.²³

The plaintiff longshoreman argued that the shipowner was under a duty to make an inspection when the loading stevedore completed his cargo operations. The inspection was for the purpose of ascertaining whether any hazards existed in the stow following the completion of loading. The Supreme Court rejected this argument. The Court held that the ship's turnover duty to warn of latent defects in the cargo stow and the cargo area is a narrow one.²⁴ The shipowner's duty to warn of latent defects is limited to defects not known to a stevedore and which would not be "obvious to nor anticipated by a skilled stevedore in the competent performance of its work."²⁵ The Court further stated that the shipowner's duty to exercise reasonable care does not require him or her to supervise cargo operations of a loading stevedore.²⁶

D. Emotional Distress

In a detailed opinion, the United States Supreme Court held in *Consolidated Rail Corp. v. Gottshall*²⁷ that the Federal Employers' Liability Act²⁸ ("FELA") encompasses an action for emotional distress. As the Court put it, the duty of employers to use due care to furnish a safe place for their employees to work includes the "duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury."²⁹ The Court discussed at length the test or restrictions to adopt to limit the scope of this duty and concluded that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA

19. *Id.* at 2061.

20. 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).

21. *Id.* at 495.

22. 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

23. *Id.* at 1304.

24. *Howlett*, 114 S. Ct. at 2067.

25. *Id.*

26. *Id.*

27. 114 S. Ct. 2396, 2407 (1994).

28. 45 U.S.C. §§ 51-60 (1988).

29. *Gottshall*, 114 S. Ct. at 2399.

jurisprudence.³⁰ Under this concept, workers who are within the zone of physical danger may recover for emotional injury without sustaining physical trauma or impact.

This decision will certainly impact maritime law inasmuch as the FELA is incorporated into the Jones Act. In *Gaston v. Flowers Transportation*,³¹ the court held that a seaman could not recover for emotional distress without physical injury.³² The court specifically rejected the zone of danger test based on the circumstances of this particular case.³³ Obviously, *Gaston*, as well as many other decisions, will be outdated by the decision of the Supreme Court in *Gottshall*.

III. OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The United States Court of Appeals for the Eleventh Circuit decided few cases dealing with maritime matters during the period of this survey. Generally, such decisions applied established law.

A. *Jurisdiction—Limitation of Liability*

In *Sea Vessel, Inc. v. Reyes*,³⁴ the court reversed the dismissal of a petition for limitation of liability and held that a vessel in dry dock “was in or on navigable waters at the time of the fire.”³⁵ The district judge, based upon the recommendation of a magistrate judge, held that because the vessel was in dry dock at the time of the fire which gave rise to the injury that led to the filing of the limitation action, it was not on navigable waters and therefore, it was not within the court’s admiralty jurisdiction.³⁶ The court of appeals ruled to the contrary and relied upon the decisions by the United States Supreme Court in *The Robert W. Parsons*³⁷ and *Simmons v. The Steamship Jefferson*.³⁸ In its opinion, the *Sea Vessel* court also noted that the Limitation of Liability Act does not furnish an independent ground for

30. *Id.* at 2400.

31. 866 F.2d 816 (5th Cir. 1989).

32. *Id.* at 821.

33. *Id.* at 820.

34. 23 F.3d 345 (11th Cir. 1994).

35. *Id.* at 349.

36. *Id.* at 347.

37. 191 U.S. 17 (1903).

38. 215 U.S. 130 (1909).

maritime jurisdiction.³⁹ The court also held, contrary to the conclusion of the district judge, that the repair of a vessel on a dry dock “is a crucial maritime activity.”⁴⁰ Thus, the court found that both the “nexus” test of *Executive Jet Aviation, Inc. v. City of Cleveland*⁴¹ and the “substantial relationship to traditional maritime activity” test applied by *Sisson v. Ruby*⁴² had been fulfilled.

B. *Personal Jurisdiction—Minimum Contacts*

In *Francosteel Corp. v. M.V. Charm*,⁴³ the purchaser of a shipload of steel, a New York company, joined with the seller of the steel, a French company, to sue the carrying ship in rem, and both the vessel’s owner and manager, which were Danish corporations, for the failure to deliver the steel in Savannah, Georgia. The ship sank in the Atlantic after loading the steel in France. The court upheld the dismissal of the lawsuit for lack of personal jurisdiction over the shipowner and ship manager.⁴⁴ The plaintiffs relied upon the Georgia long arm statute which the court found conferred personal jurisdiction to constitutional limits.⁴⁵ The plaintiff, who was the shipper of the cargo of steel, subchartered M.V. CHARM from a Dutch company that in turn had chartered the ship from the defendant shipowner. After the cargo was loaded in France, bills of lading were issued calling for delivery of the steel in Savannah, Georgia. The bills of lading were signed by the master of the ship.⁴⁶ Both the district judge and the appellate court assumed that the bills of lading created a contract between the plaintiff shipper and the defendant shipowner for delivery of the cargo in Georgia.⁴⁷ However, none of the arrangements which led to the shipload of steel being dispatched toward Savannah occurred in Georgia. All events giving rise to the contractual arrangements took place outside of Georgia and, as mentioned, the ship never reached Savannah. The court found the shipowner and ship manager’s agreement to deliver the cargo of steel in Savannah was “an isolated and sporadic contact with Georgia”⁴⁸

39. *Sea Vessel*, 23 F.3d at 348.

40. *Id.* at 351.

41. 409 U.S. 249 (1972).

42. 497 U.S. 358, 362 (1990).

43. 19 F.3d 624 (11th Cir. 1994).

44. *Id.* at 629.

45. *Id.* at 627.

46. *Id.* at 626.

47. *Id.* at 627.

48. *Francosteel*, 19 F.3d at 628.

Accordingly, the district court's dismissal for lack of personal jurisdiction was affirmed. The court relied upon the Supreme Court's decision in *Burger King Corp. v. Rudzewicz*⁴⁹ and *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*⁵⁰ The facts in *United Rope Distributors* were basically identical to the facts in *Francosteel* with the exception of the destination of the ships.

C. Bills of Lading—Package Limitation

In *Marine Transportation Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp.*,⁵¹ a carrier issued its bill of lading to a shipper covering the transportation of a boat mold from Miami to San Juan, Puerto Rico. The bill of lading named Python High Performance Marine Corporation as the shipper and also identified the consignee in San Juan who was to receive the mold. The bill of lading was stamped to the effect that freight was to be collected from the consignee. The boat mold never arrived in San Juan. The carrier brought suit against the shipper for nonpayment of freight earned on other goods shipped by the owner of the boat mold. The shipper, Python High Performance, counterclaimed for loss of the boat mold. The bill of lading contained a \$500 package limitation identical to the limitation in The Carriage of Goods by Sea Act ("COGSA").⁵² The district court awarded \$40,000 to the shipper for loss of the boat mold, and held that the shipper had satisfied the bill of lading provision declaring a higher value for the goods and payment of additional freight in order to avoid the \$500 package limitation.⁵³ The court of appeals reversed.⁵⁴ It pointed out that the declaration made by the shipper was not on the face of the bill of lading, as required by law.⁵⁵ Rather, the shipper had declared a \$100,000 value in the booking notice to the carrier. The shipper had paid a \$50 charge for insurance and the district court held that this charge satisfied the requirement that additional freight be paid. The court of appeals disagreed. It pointed out that to comply with the requirement to pay additional freight, it is necessary to pay an additional amount

49. 471 U.S. 462 (1985).

50. 930 F.2d 532 (7th Cir. 1991).

51. 16 F.3d 1133 (11th Cir. 1994).

52. *Id.* at 1140-41; Carriage of Goods by Sea Act, 46 U.S.C. app. § 1304(5) (1988).

53. *Marine Transp. Servs.*, 16 F.3d at 1141.

54. *Id.*

55. *Id.*

based upon filed tariff rates.⁵⁶ In the case in question, the additional freight would have been \$200 and not \$50.⁵⁷

In *Marine Transportation Services*, the district court also held that the carrier was guilty of conversion when it refused to deliver other boat molds shipped by a separate bill of lading to the shipper.⁵⁸ The shipper attempted to pay the freight to the carrier's agent in San Juan, but was told that the cargo could not be delivered until the carrier heard from the carrier's lawyer. The district court's holding that the carrier was guilty of conversion was affirmed.⁵⁹ The conversion count was based on Florida law. The carrier argued that the district court lacked subject matter jurisdiction for such a land-based claim. The court of appeals held that the district court had ancillary jurisdiction to determine the compulsory counterclaim of the shipper.⁶⁰

D. *Statute of Limitations—Equitable Tolling*

In two decisions involving the Suits in Admiralty Act⁶¹ and the Public Vessels Act,⁶² the Eleventh Circuit held that the doctrine of equitable tolling did not operate to toll a statute of limitations. In *Justice v. United States*,⁶³ the plaintiff filed a timely action under the Public Vessels Act and the Suits in Admiralty Act. The action was later dismissed without prejudice and the plaintiff did not appeal. Thereafter, the plaintiff started another lawsuit which in turn was subsequently dismissed because of his failure to comply with sundry pre-trial proceedings and a court order dealing with discovery. Unfortunately, since the second lawsuit was brought after the expiration of the two-year statute of limitations under the Public Vessels Act and the Suits in Admiralty Act, it was dismissed with prejudice.⁶⁴ In its opinion, the court pointed out that the doctrine of equitable tolling "is potentially available" in cases brought under the Public Vessels Act and Suits in Admiralty Act.⁶⁵ Nevertheless, the court held that the dismissal of the earlier lawsuit without prejudice did not permit a later action to be

56. *Id.*

57. *Id.*

58. 16 F.3d at 1140.

59. *Id.* at 1137.

60. *Id.* at 1139.

61. 46 U.S.C. app. §§ 741-752 (1988).

62. *Id.* §§ 781-790.

63. 6 F.3d 1474 (11th Cir. 1993).

64. *Id.* at 1477-78; 46 U.S.C. app. § 745 (1988).

65. *Justice*, 6 F.3d at 1478.

filed after the limitation period expired.⁶⁶ Although the court was sympathetic to the plaintiff's plight, it noted in some detail the various avenues that were open to the plaintiff and his counsel which would have prevented the action from being time barred.⁶⁷

In the second case, *Raziano v. United States*,⁶⁸ the parents of a pleasure boater, who died as a result of a collision between his vessel and an unlit navigational mark, brought suit under the Suits in Admiralty Act two months after the expiration of the statute of limitations. The parents had made the United States Coast Guard aware of their claim, and were negotiating with the Coast Guard prior to filing suit. The district court held that the Coast Guard had knowledge of the claim and that the statute of limitations had been equitably tolled.⁶⁹ The court of appeals reversed.⁷⁰ It pointed out that there is a strong public interest in limiting the period of time in which actions can be brought and negotiations prior to filing suit will not operate to toll a statute of limitations.⁷¹ Moreover, the court found nothing extraordinary in the circumstances surrounding the negotiations which would warrant application of equitable relief.⁷²

E. *Loss of Society—Loss of Consortium*

In a per curiam opinion, the court in *Lollie v. Brown Marine Service, Inc.*⁷³ held that neither the Jones Act nor general maritime law permit recovery for loss of society or loss of consortium in personal injury cases.⁷⁴ The court relied upon *Michel v. Total Transportation, Inc.*⁷⁵ and *Murray v. Anthony J. Bertucci Construction Co.*⁷⁶

F. *Jones Act—Seaman's Status*

In *O'Boyle v. United States*,⁷⁷ the court affirmed the dismissal of a Jones Act lawsuit brought by a marine biologist serving on board a Japanese

66. *Id.* at 1478-79.

67. *Id.*

68. 999 F.2d 1539 (11th Cir. 1993).

69. *Id.* at 1540.

70. *Id.* at 1542.

71. *Id.* at 1541.

72. *Id.* at 1541-42.

73. 995 F.2d 1565 (11th Cir. 1993).

74. *Id.*

75. 957 F.2d 186 (5th Cir. 1992).

76. 958 F.2d 127 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992).

77. 993 F.2d 211 (11th Cir. 1993).

fishing vessel in international waters.⁷⁸ The plaintiff biologist was on board the vessel pursuant to a treaty and federal law⁷⁹ to compile information relating to drift net fishing operations. The plaintiff was not a member of the crew, had nothing to do with navigation of the fishing boat, was not paid by the boat owner, owed no duty to the vessel, and had no means of communicating with the ship's master because the plaintiff spoke English and the master spoke Japanese. The court was clearly of the opinion that the biologist was not a seaman and noted that only one who has the status of a seaman can recover under the Jones Act.⁸⁰ The court cited its earlier decision in *Hurst v. Pilings & Structures, Inc.*⁸¹ and the United States Supreme Court decision in *McDermott International, Inc. v. Wilander*,⁸² and held an essential ingredient to seaman status is performance of the work of the ship.⁸³ Since the biologist contributed nothing to the function of the fishing vessel, he was not a seaman.⁸⁴

G. False SOS

*United States v. James*⁸⁵ presented an unusual fact situation. A boat owner radioed the Miami Coast Guard advising the Coast Guard that his vessel was being boarded by foreign-speaking individuals from a capsized boat. The Coast Guard dispatched a vessel and a helicopter toward the offshore position which was some 200 miles from Miami. The Coast Guard vessel monitored additional radio messages from James, the boat owner, and concluded that the boat appeared to be in the Miami area and not at sea. The Coast Guard dispatched a second vessel which also monitored the boat owner's radio transmissions by direction-finding gear and pinpointed James' position in the Miami River.⁸⁶ At that point the Coast Guard realized it was dealing with a hoax and went into its "law enforcement" mode.⁸⁷

78. *Id.* at 214.

79. *Id.* at 212. The Shima-Asselein treaty authorized the plaintiff to serve as an observer on a Japanese fishing vessel, as did the Driftnet Monitoring, Assessment, and Control Act of 1987. *Id.*

80. *Id.* at 213-14.

81. 896 F.2d 504 (11th Cir. 1990).

82. 498 U.S. 337 (1991).

83. *O'Boyle*, 993 F.2d at 214.

84. *Id.*

85. 986 F.2d 441 (11th Cir. 1993).

86. *Id.* at 442.

87. *Id.* at 442 n.3.

James was arrested and convicted of sending a false distress message in violation of 14 U.S.C. § 88(c). The United States asked that the costs incurred by the Coast Guard in dispatching vessels and a helicopter, approximately \$5800, be assessed against James pursuant to statute which provides that one who sends a false distress message is “liable for all costs the Coast Guard incurs. . . .”⁸⁸ James argued that the statutory provision was contained in the statutes dealing with rescue operations, not within the statutes dealing with the law enforcement duties of the Coast Guard. Therefore, the Coast Guard could recover only its costs incurred during the rescue phase, which was far less than the total expenses. The district judge agreed and permitted recovery of only \$1000. The court of appeals reversed and stated the statute meant exactly what it said, that James was liable for all of the costs incurred in responding to his false distress message.⁸⁹

H. *Approved Tariff—Not Subject to Discount*

In *American Transport Lines, Inc. v. Wrves*,⁹⁰ the defendant sought to avoid paying the plaintiff’s bill toward shipping charges by arguing that there was an oral agreement with the plaintiff not to pay full tariff rates. The district judge found that the tariff was approved by the federal maritime commission, and the plaintiff was required to charge the full tariff rates. The court held the defendants liable for all unpaid freight charges. The court of appeals affirmed.⁹¹ Relying upon *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares*⁹² and *Allstate Insurance Co. v. International Shipping Corp.*,⁹³ the court held that irrespective of any oral agreement between the carrier and the shipper, the carrier was required to charge the full approved tariff rate.⁹⁴

I. *Jones Act—Continuing Tort Theory*

In *Santiago v. Lykes Bros. Steamship Co.*,⁹⁵ the plaintiff sought to avoid a statute of limitations defense to his Jones Act suit by arguing that under the theory of continuing tort, the statute of limitations did not begin

88. 14 U.S.C. § 88(c)(3) (Supp. V 1993).

89. *James*, 986 F.2d at 444.

90. 985 F.2d 1065 (11th Cir. 1993).

91. *Id.* at 1067.

92. 508 F.2d 1116 (5th Cir. 1975).

93. 703 F.2d 497 (11th Cir. 1983).

94. *American Transp.*, 985 F.2d at 1067.

95. 986 F.2d 423 (11th Cir. 1993).

to run until the plaintiff ceased working in the environment involving exposure to the condition which caused his injury; in this case, loud engine room noises. It was established that the plaintiff was employed by the defendant in a vessel's engine room up until the time of trial. The district court accepted the plaintiff's argument, took the statute of limitations' defense from the jury, and charged the jury that if they awarded damages to the plaintiff, they need not be concerned when the damages occurred.⁹⁶

On appeal, the court suggested that the continuing tort theory might apply in the Eleventh Circuit, but refused to rule on the question.⁹⁷ Instead of deciding the question, the court held that the jury charge was an inaccurate statement of the continuing tort theory and reversed the district court's decision because it gave an incorrect statement of law.⁹⁸ This seems to be a strange result. Since the court decided that the trial judge gave an erroneous statement to the jury as to the continuing tort theory, and reversed for that reason, why did it fail to also decide whether the theory was applicable to the case?

J. Collision—Pennsylvania Rule—Sovereign Immunity

In *Pelican Marine Carriers, Inc. v. City of Tampa*,⁹⁹ the court of appeals affirmed, without opinion, the decision of a magistrate judge in a case where a seagoing ship struck a sewer cap maintained by the City of Tampa.¹⁰⁰ The shipowner sued for the cost of repairs and incidental expenses.

The magistrate judge divided the damages seventy percent against the shipowner and thirty percent against the city. The judge applied the Pennsylvania Rule¹⁰¹ under which a vessel guilty of violating a statute that was intended to prevent collisions bears the burden of "showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."¹⁰² The statutory fault of the ship was excessive speed and the shipowner failed to carry its Pennsylvania Rule burden.¹⁰³

96. *Id.* at 425-26.

97. *Id.* at 427.

98. *Id.* at 427-28.

99. 4 F.3d 999 (11th Cir. 1993).

100. *Pelican Marine Carriers, Inc. v. City of Tampa*, 791 F. Supp. 845 (M.D. Fla. 1992), *aff'd*, 4 F.3d 999 (11th Cir. 1993).

101. *See The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

102. *Id.* at 136.

103. *Pelican Marine*, 791 F. Supp. at 853.

The Pennsylvania Rule was also applied to the City of Tampa because it had violated the permit issued by the United States Corp of Army Engineers which permitted construction of the sewer cap.¹⁰⁴ The court found the city failed to carry its Pennsylvania Rule burden.¹⁰⁵

The judge apportioned liability on the basis of comparative fault as required by *United States v. Reliable Transfer Co.*,¹⁰⁶ and as noted, found both the ship and the city at fault. It is very difficult to predict with any significant degree of accuracy the apportionment that a court may make in any given collision case. The reasons stated by courts for the selected allocation of fault often appear to be arbitrary. In this case, the judge said the ship was “substantially more at fault than the City. . . .”¹⁰⁷ So, in this particular case, where the allocation was 70/30, “substantially more” meant more than twice as much. However, the same facts could have supported a 50/50, 60/40 or 80/20 allocation without any real fear of being altered by an appellate court.

Another interesting feature of this case was the city’s claim that section 768.28 of the *Florida Statutes* barred recovery against it of any sum in excess of \$100,000.¹⁰⁸ The judge noted that while the statute indeed includes municipalities within its scope,¹⁰⁹ the statute is not applicable because general maritime law, and not state law, must be applied to the collision case, otherwise the uniform application of maritime law would be affected.¹¹⁰

K. *Unauthorized Law Practice—Tortious Interference With Contracts*

*Yanakakis v. Chandris, S.A.*¹¹¹ involved the appeal of a jury verdict of approximately \$3.2 million (of which \$2.6 million were punitive damages) in favor of attorneys who represented an injured seaman on a contingent fee basis. The action against the defendant shipowner and its insurer was based on tortious interference with the contingent fee agreement between counsel and the seaman.¹¹² The seaman signed a contingent fee

104. *Id.* at 853-54.

105. *Id.* at 853.

106. 421 U.S. 397 (1975).

107. *Pelican Marine*, 791 F. Supp. at 855.

108. FLA. STAT. § 768.28 (1993).

109. *Pelican Marine*, 791 F. Supp. at 856.

110. *Id.*

111. 9 F.3d 1509 (11th Cir. 1993).

112. *Id.* at 1510.

contract with an out-of-state lawyer who was residing in Florida, but was not authorized to practice in Florida. The out-of-state lawyer then entered into another fee arrangement with a Florida law firm. Defendants argued at trial that the initial fee contract between the out-of-state lawyer and the seaman was void because it constituted unauthorized practice of law in violation of section 454.23 of the *Florida Statutes*.¹¹³ Further, because the initial contract was unauthorized, it was void and could not support a later agreement with Florida lawyers. The district court held that, under Florida law, a fee agreement is not void simply because it springs from a void fee agreement.¹¹⁴ The court of appeals considered the issue to be one of first impression under Florida law.¹¹⁵ The court certified two questions to the Florida Supreme Court. First, whether an out-of-state lawyer that enters into a contingency fee agreement in Florida has engaged in the unauthorized practice of law which renders the fee agreement void, and second, if such a contract is void, will a fee agreement with a Florida law firm based thereon also be void?¹¹⁶

IV. DECISIONS BY UNITED STATES DISTRICT COURTS IN FLORIDA

There were relatively few admiralty decisions coming from the United States District Courts in Florida during the period covered by this article. Indeed, during the first half of 1993, which precedes the starting point for this survey, there were almost as many cases decided by the district courts as in the following twelve months. Most of the district court opinions deal with maritime personal injuries.

A. *Bankruptcy—Preferred Mortgages*

In the bankruptcy case *In re McCoy*,¹¹⁷ a creditor made several loans to the owners of a fishing vessel. As collateral, the creditor took back mortgages on real estate and a preferred ship mortgage on the shrimp vessel. The debtor defaulted, and the creditor brought an admiralty action to foreclose the preferred ship mortgage in federal court. Thereafter, the debtor filed for bankruptcy and the foreclosure action was stayed. The court permitted the creditor to proceed with its foreclosure action on the

113. FLA. STAT. § 454.23 (1993).

114. *Chandris*, 9 F.3d at 1511.

115. *Id.*

116. *Id.* at 1513.

117. 163 B.R. 206 (Bankr. M.D. Fla. 1994).

understanding that the action would be limited to obtaining an in rem judgment against the vessel and that the creditor could not seek an in personam judgment against the debtor.¹¹⁸ The district court proceeded to enter judgment in rem against the vessel for a sum far less than the total indebtedness. The creditor purchased the vessel at the marshall's sale, crediting its in rem judgment for the purchase price.¹¹⁹

The creditor then filed a claim in the pending bankruptcy action for the balance of the debt. The debtor sought to dismiss the claim on the grounds of res judicata, arguing that the judgment entered in district court foreclosed the entire debt. The bankruptcy court rejected the argument.¹²⁰ It found only three of the four elements required to establish res judicata were met; the fourth element was lacking in that there was no identity of causes of action.¹²¹ The bankruptcy court pointed out that the judgment in the admiralty case was limited to an in rem judgment against the shrimp boat and that the creditor had been precluded by order of the bankruptcy court from obtaining an in personam judgment in the ship mortgage foreclosure action.¹²² The bankruptcy judge further noted that even if all of the elements for applying res judicata had existed, it would not operate to defeat the claimant's claim.¹²³ The court reasoned that the debtor was estopped from asserting the application of res judicata as a defense against the claim in the bankruptcy proceeding because it had taken the position in the foreclosure suit that foreclosure had to be limited to an in rem judgment against the vessel itself.¹²⁴

B. *Joint and Several Liability—Absent Parties*

In *Groff v. Chandris, Inc.*,¹²⁵ a passenger sued for injuries sustained during a cruise. The defendants sought to have the jury consider the

118. *Id.* at 208.

119. *Id.*

120. *Id.* at 210.

121. There are four requirements for a prior judgment to bar a subsequent action: 1) the prior judgment must have been rendered by a court of competent jurisdiction; 2) a final judgment on the merits must have been rendered; 3) the parties, or those in privity with them must be identical in both actions; and 4) the same cause of action must be involved in both actions. *Id.* (citing to *Ray v. Tennessee Valley Auth.*, 677 F.2d 818 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983)).

122. *McCoy*, 163 B.R. at 210.

123. *Id.*

124. *Id.*

125. 835 F. Supp. 1408 (S.D. Fla. 1993).

proportional fault of the Grand Cayman Port Authority, which was not a party to the action. The defendants argued that the Florida Supreme Court decision of *Fabre v. Marin*¹²⁶ mandated such an allocation. The district judge rejected the argument and held that in the Eleventh Circuit, a defendant is not permitted to have the trier of fact ascertain the proportional fault of an entity that is not a party to the lawsuit.¹²⁷

The district judge relied upon *Edmonds v. Compagnie Generale Transatlantique*¹²⁸ and *Ebanks v. Great Lakes Dredge & Dock Co.*¹²⁹ The court relied upon *Edmonds* for the proposition that joint tortfeasors are liable to a plaintiff jointly and severally for full damages.¹³⁰ In *Ebanks*, the court held that it was error for a district court to allocate fault between one defendant and another company that was not a party to the lawsuit.¹³¹

However, the decisions in *McDermott, Inc. v. AmClyde*¹³² and *Boca Grande Club, Inc. v. Florida Power & Light Co.*¹³³ effectively overruled *Ebanks*. In *Ebanks*, seamen employed on a dredge owned by Great Lakes Dredge & Dock Company sustained injuries when that vessel was struck by a tank ship owned by Chevron Oil Company.¹³⁴ The seamen settled their claims with the owner of the tank ship and proceeded with an action against the dredge owner. At trial, the district court found that the tank ship was 100% at fault and although there was negligence involved on the part of the dredge owner, that negligence did not contribute to the casualty.¹³⁵ On appeal, the dredge owner sought to uphold the jury verdict by arguing that the result was sanctioned by *Leger v. Drilling Well Control, Inc.*,¹³⁶ which held that a settlement extinguishes the proportional fault of the settling tortfeasor.¹³⁷ To avoid *Leger*, the seamen argued that the decision in *Edmonds* reaffirmed the proposition that maritime plaintiffs enjoy the benefit of joint and several liability and, accordingly, *Edmonds* required that the judgment be reversed.¹³⁸ The court of appeals accepted the argument and

126. 623 So. 2d 1182 (Fla. 1993).

127. *Groff*, 835 F. Supp. at 1410.

128. 443 U.S. 256 (1979).

129. 688 F.2d 716 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

130. *Groff*, 835 F. Supp. at 1410.

131. *Ebanks*, 688 F.2d at 722.

132. 114 S. Ct. 1461 (1994).

133. 114 S. Ct. 1472 (1994).

134. *Ebanks*, 688 F.2d at 717.

135. *Id.* at 718.

136. 592 F.2d 1246 (5th Cir. 1979).

137. *Id.* at 1249-50.

138. *Ebanks*, 688 F.2d at 720.

held that *Leger* did not apply in face of *Edmonds*, stating “[w]e also agree that if the mere language of the *Leger* case could be construed to authorize the proceedings conducted here by the trial court, then its effect as precedent has been weakened by *Edmonds*.”¹³⁹ The adverse verdict against the seaman was reversed.¹⁴⁰ In sum, *Ebanks* has been effectively overturned by *Boca Grande Club*¹⁴¹ in which the Supreme Court adopted the rule in *McDermott*. Thus, *Ebanks* is no bar to the application of *Fabre v. Marin* in a maritime case. Further, *Boca Grande Club* arguably supports such application.

C. *Limitation of Liability*

*In re Complaint of Nobles*¹⁴² involved a limitation of liability action that was filed by the owners and the liability insurer of a sixteen foot motor boat following a collision between the boat and a boathouse. The boat was operated by the owner’s son at the time of the accident. One of the passengers of the boat died and all other occupants of the boat were injured.¹⁴³

The district court ruled on a number of outstanding motions in the case. One of the motions granted by the court was to dismiss the boat owner’s liability insurer as a limitation plaintiff. The district court pointed out that the Limitation of Liability Act¹⁴⁴ does not give insurers the right to limit liability.¹⁴⁵

The claimants also moved to dismiss the limitation complaint on the grounds that the court lacked general maritime jurisdiction and that the limitation statutes do not extend to pleasure boats.¹⁴⁶ In ruling that there was maritime jurisdiction, the court relied on *Keys Jet Ski, Inc. v. Kays*,¹⁴⁷ in which the court of appeals made it clear that the owners of pleasure vessels are entitled to seek limitation.¹⁴⁸ However, the district court was

139. *Id.*

140. *Id.* at 723.

141. 114 S. Ct. at 1472.

142. 842 F. Supp. 1430 (N.D. Fla. 1993).

143. *Id.* at 1432.

144. 46 U.S.C. app. § 183 (1988 & Supp. V 1993).

145. *Nobles*, 842 F. Supp. at 1433. It has long been established that only a vessel owner or a bare boat charterer considered to be an owner *pro hac vice* is entitled to claim the benefits of the limitation statute.

146. *Id.* at 1434.

147. 893 F.2d 1225 (11th Cir. 1990).

148. *Nobles*, 842 F. Supp. at 1435.

clearly not enamored of the rule of law which it enforced when it stated: "Allowing the owners of pleasure craft to limit their liability pursuant to the Act defies the express purpose of that statute, and provides an unintended and unjust windfall for the owner of a pleasure craft."¹⁴⁹

In denying the motion to dismiss for lack of maritime jurisdiction, the court also relied upon *Foremost Insurance Co. v. Richardson*¹⁵⁰ and *Sisson v. Ruby*.¹⁵¹ The Court in *Foremost* held that maritime jurisdiction is available only "when [a] . . . potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity. . . ."¹⁵² In *Sisson*, the Court ruled that actual disruption of maritime commerce is not necessary to support admiralty jurisdiction.¹⁵³ Such jurisdiction exists if the casualty in question "is likely to disrupt commercial activity."¹⁵⁴ The district court then proceeded to apply these principles to the collision between the pleasure boat and houseboat and ruled that the operation of a pleasure boat does bear a substantial relationship to traditional maritime activity, and that the casualty in question was one that could potentially impact maritime commerce.¹⁵⁵

The interesting aspect of this case was the manner in which the district court treated the plaintiff's motion to strike various items in the claim filed by the parents of the passenger killed in the collision. The plaintiff sought to strike the claim for recovery of losses based on net accumulations of the expected estate of the decedent. The motion to strike was denied.¹⁵⁶ The district court supported its denial upon *Sea-land Services, Inc. v. Gaudet*,¹⁵⁷ a case which permitted a survival action for a longshoreman's lost future earnings. The court expressly rejected the case of *Miles v. Apex Marine Corp.*,¹⁵⁸ in which the United States Supreme Court held that the representatives of a deceased seaman could not recover for his lost future earnings.¹⁵⁹ The district court stated that *Miles* did not apply because the

149. *Id.*

150. 457 U.S. 668 (1982).

151. 497 U.S. 358 (1990).

152. 457 U.S. at 675 n.5.

153. 497 U.S. at 363.

154. *Id.*

155. *Nobles*, 842 F. Supp. at 1436.

156. *Id.* at 1434.

157. 414 U.S. 573 (1974).

158. 498 U.S. 19 (1990).

159. *Id.* at 37.

claimants did not base their action on the Jones Act.¹⁶⁰ In other words, the decedent in the limitation action was not a seaman.

There are two difficulties with the court's conclusion. First, in *Miles*, the Supreme Court explicitly limited its holding in *Gaudet* to the facts of that case and ruled that *Gaudet* applies only to longshoremen.¹⁶¹ Second, the rejection of *Miles* leads to the anomalous result that the representatives of a non-seaman will recover more and different benefits than will the representatives of a deceased seaman. This raises obvious questions about the uniform application of maritime law and seemingly contradicts the proposition that seamen are wards of the admiralty court.¹⁶² It seems strange that a seaman whose rights have been jealously protected by maritime courts for decades is now entitled to a less beneficial remedy than a passenger killed in a motor boat accident.

The district court's rejection of *Miles* conflicts with decisions by Florida courts which have held that damages can be limited in maritime wrongful death actions brought by parents of deceased recreational boaters.¹⁶³

D. Carriage of Goods—Real Party in Interest

A shipper and its cargo insurer brought an action against the carrier for damage sustained by a shipment of pears transported from Jacksonville to Santos, Brazil. In *Im Ex Trading Co. v. Vessel, Beate Oldendorff*,¹⁶⁴ the court held that neither the shipper nor its insurer had standing to bring the action because they were not real parties in interest.¹⁶⁵ The terms of shipment were "FAS Jacksonville."¹⁶⁶ The court stated, relying upon *York-Shipley, Inc. v. Atlantic Mutual Insurance Co.*,¹⁶⁷ that title and risk

160. *Nobles*, 842 F. Supp. at 1434 n.9.

161. *Miles*, 498 U.S. at 31 (citing *Gaudet*, 414 U.S. at 573).

162. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

163. See *Lipworth v. Kawasaki Motors Corp. U.S.A.*, 592 So. 2d 1151 (Fla. 4th Dist. Ct. App.), *cert. denied*, 113 S. Ct. 465 (1992); *Perlman v. Valdes*, 575 So. 2d 216 (Fla. 3d Dist. Ct. App. 1990).

164. 841 F. Supp. 1151 (M.D. Fla. 1993).

165. *Id.* at 1153.

166. *Id.* at 1152.

167. 474 F.2d 8 (5th Cir. 1973).

of loss passed to the consignee of the pears once the shipment was delivered to the carrier in Jacksonville.¹⁶⁸ The consignee was not a party to the lawsuit.¹⁶⁹

E. Release by Seaman

*Antoniou v. Thiokol Corp. Group Long Term Disability Plan*¹⁷⁰ involved the construction and effect of a release given by a seaman to settle a Jones Act lawsuit against his employer. Antoniou was employed as a cook on board a missile recovery vessel operated by Thiokol Corporation.¹⁷¹ He brought an action against his employer under the Jones Act, which was ultimately settled through mediation. In connection with the settlement, Antoniou executed a release in favor of the vessel, its underwriters, and his employer.¹⁷² At the time the release was given, Antoniou was receiving long-term disability benefits from the defendant, and eight months after he signed the release, those benefits were terminated.¹⁷³

Antoniou sued the disability plan (the "Plan") and the Plan moved for summary judgment, arguing that the release of Thiokol Corporation also operated to release the defendant Plan.¹⁷⁴ The court granted summary judgment in favor of the plaintiff on the defendant's release defense.¹⁷⁵ The court pointed out that the defendant Plan was a separate legal entity from Antoniou's employer and that the release made no mention whatsoever of the benefit plan.¹⁷⁶ The court further noted that under maritime law, a seaman's release should be construed to be effective only as to those parties intended to be released.¹⁷⁷

Neither the court nor the plaintiff referred to the heavy burden that rests with a party who seeks to establish a release given by a seaman. It is necessary to prove not only that the release was "executed freely" and "without deception or coercion," but "that it was made by the seaman with

168. *Im Ex Trading*, 841 F. Supp. at 1152.

169. *Id.*

170. 849 F. Supp. 1531 (M.D. Fla. 1994).

171. *Id.* at 1532.

172. *Id.* at 1534.

173. *Id.* at 1532-33.

174. *Id.* at 1534.

175. *Antoniou*, 849 F. Supp. at 1535.

176. *Id.*

177. *Id.*

full understanding of his rights.”¹⁷⁸ It is submitted that to carry this burden, it would have been necessary for the defendant Plan to prove that at the time the release was given, Antoniou was informed that he was giving up all rights to benefits presently being received, as well as any and all future rights to benefits that he might be entitled to receive.¹⁷⁹

F. *Suits in Admiralty Act—Service of Complaint*

The complaint of a seaman alleging injury while serving on board a public vessel of the United States was dismissed for lack of subject matter jurisdiction in *Jayne v. United States Department of Navy, Military Sealift Command*.¹⁸⁰ The court held that the plaintiff failed to serve his complaint “forthwith” as required by the Suits in Admiralty Act.¹⁸¹ The Act requires service on both the United States Attorney in the district in which the complaint is filed and upon the Attorney General of the United States.¹⁸² Relying upon *Libby v. United States*,¹⁸³ the district court held that the service requirements were conditions placed by the United States upon its consent to be sued, and were therefore jurisdictional.¹⁸⁴ The court also ruled that the “good cause” exception in Rule 4(j) of Civil Procedure,¹⁸⁵ which permits a party to avoid dismissal of an action if it can show good cause as to why service was not effected within 120 days, was not relevant in determining whether the conditions of 42 U.S.C. § 742 had been met.¹⁸⁶

G. *Maritime Liens—Assignment—Laches*

*Galehead, Inc. v. M/V Fratzis M.*¹⁸⁷ presented the ever recurring situation in which a vessel incurs liens for supplies and necessities ordered by a charterer. The charterer goes out of business leaving the bills unpaid and the lienholders, if fortunate, are able to bring an in rem action against

178. *Garrett*, 317 U.S. at 248; see also HERBERT BAER, ADMIRALTY LAW OF THE SUPREME COURT § 3-1 (3d ed. 1979).

179. *Antoniou*, 849 F. Supp. at 1535.

180. 1994 A.M.C. 1003 (S.D. Fla. 1993).

181. *Id.* at 1010 (citing 46 U.S.C. app. § 742 (1988)).

182. *Id.*

183. 840 F.2d 818 (11th Cir. 1988).

184. *Jayne*, 1994 A.M.C. at 1005-06.

185. FED. R. CIV. P. 4(j).

186. *Jayne*, 1994 A.M.C. at 1009 (citing 42 U.S.C. app. § 742 (1988)).

187. 1994 A.M.C. 1160 (S.D. Fla. 1994).

the ship to foreclose their liens. *Galehead* presented one interesting difference. *Galehead*, one of the plaintiffs, sued as the assignee of several claims giving rise to maritime liens. *Galehead* is apparently in the business of enforcing maritime lien claims on a contingency basis. The shipowner argued that the assignment of maritime liens on a contingency basis was contrary to law and to the policy of the Federal Maritime Lien Act.¹⁸⁸ The court quickly rejected the shipowner's argument and pointed out that it is well established that maritime liens can be assigned and that the method of payment of the consideration for the assignment has no effect on the validity of such assignments.¹⁸⁹

The shipowner also argued that the doctrine of laches made it inequitable for the liens to be enforced against his ship. The basis for this claim was the fact that the owner had purchased the ship shortly after the liens were incurred and the lienholders waited for over two years to enforce the claims by an action against the ship. The court noted that the law requires the holder of a maritime lien to exercise a "high degree of diligence" in enforcing the liens against a purchaser of the vessel who has no knowledge of the liens.¹⁹⁰

Because the plaintiffs in fact arrested the vessel at the first opportunity following the vessel's return to the United States after the liens were incurred, the court ruled that the plaintiffs had fulfilled their burden and rejected the laches defense.¹⁹¹

H. COGSA—Fire Statute

In *Banana Services, Inc. v. M/V Tasman Star*,¹⁹² a shipload of bananas and plantains were delivered in a rotting condition at Port Manatee on board the motor vessel TASMAN STAR. The plaintiff, the shipper of the cargo, sued for all losses sustained as a result of the cargo being unmarketable.¹⁹³ The shipowner and charterer raised the fire statute as a defense.¹⁹⁴ The district court rejected the rule followed in the Ninth

188. *Id.* at 1161.

189. *Id.* at 1161-62.

190. *Id.* at 1165 (quoting *Dixie Mach. Welding & Metal Works, Inc. v. M/V Andino*, 1983 A.M.C. 1166 (S.D. Fla. 1982) (citation omitted)).

191. *Id.* at 1165.

192. 1994 A.M.C. 1617 (M.D. Fla. 1994).

193. *Id.* at 1621.

194. 46 U.S.C. app. § 182 (1988). Section 1304(2)(b) of COGSA incorporates the fire statute which specifies that neither a vessel nor its owner is liable for damage to cargos caused by a fire on board the ship unless the fire was caused by the "actual fault or privity"

Circuit which requires a carrier to demonstrate that it exercised due diligence to provide a seaworthy vessel before it can invoke the fire statute.¹⁹⁵ The court applied the cases from the Second and Fifth Circuits which permit a carrier to invoke the fire statute without an initial showing of seaworthiness.¹⁹⁶ If the vessel interests establish that damage was caused by fire, the burden of proof then goes back to the cargo interests to prove that the fire was caused by the "design or neglect" of the carrier.¹⁹⁷ The court found that the vessel proved that the damage was caused by fire.¹⁹⁸ The plaintiff failed to prove that the fire was caused by the actual design or neglect of the vessel and carrier.¹⁹⁹

V. FLORIDA DECISIONS

Relatively few decisions involving maritime actions were reported from the Florida circuit courts during the past year. Moreover, most of the Florida cases dealt with personal injury claims brought by seamen.

A. *Strict Liability—Sailboat Rentals*

In *Samuel Friedland Family Enterprises v. Amoroso*,²⁰⁰ the Florida Supreme Court held that the concept of strict liability as set out in section 402(A) of the *Restatement*²⁰¹ applied to the renting of sailboats. A hotel guest was injured as the result of the breaking of a crossbar on the sailboat she rented at a hotel. The guest brought an action in strict liability against both the hotel and its tenant who was the owner and renter of the sailboat.²⁰² In its opinion, the court pointed out that the concept of strict liability as stated by section 402A of the *Restatement*²⁰³ was adopted in *West v. Caterpillar Tractor Co.*²⁰⁴ The court held that the doctrine applied to commercial lessors such as the hotel and its tenant.²⁰⁵ In the *Amoroso* opinion, no mention was made of maritime law or its applicability and the

of the owner. *Id.* § 1304(2)(b).

195. *Banana Servs.*, 1994 A.M.C. at 1623.

196. *Id.* at 1623-24.

197. *Id.* at 1622-24.

198. *Id.* at 1625.

199. *Id.*

200. 630 So. 2d 1067, 1071 (Fla. 1994).

201. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

202. *Amoroso*, 630 So. 2d at 1067.

203. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

204. 336 So. 2d 80 (Fla. 1976); *Amoroso*, 630 So. 2d at 1068.

205. *Amoroso*, 630 So. 2d at 1071.

exact nature and location of the accident giving rise to the claim was not discussed. It seems quite possible that the accident could have occurred while the guest was sailing the boat on navigable waters of the United States which could lead to the application of maritime law.²⁰⁶

B. *Jurisdiction—Insufficient Contacts*

In *American Overseas Marine Corp. v. Patterson*,²⁰⁷ a seaman's personal injury claim was dismissed because the seaman failed to establish sufficient contacts between the vessel, its owner, its employer, and the State of Florida to establish general jurisdiction. The plaintiff was injured while serving as a crew member on board a vessel in the harbor at Saipan.²⁰⁸ Although it is not clear from the court's opinion, the description of the case assumes that the plaintiff was a United States citizen and probably a resident of Florida, that the vessel flew the United States flag, and that the defendant companies were United States corporations headquartered outside of Florida. Evidently, the vessel was owned by a bank and bareboat chartered. The bareboat charterer in turn entered into time charters with the United States and into an operating contract with defendant American Overseas Marine Corporation. In its opinion, the court describes what appeared to the writer to be fairly significant contacts between the defendants and the State of Florida. However, the court held that such contacts were not sufficient to establish general jurisdiction over the defendant and that it could not exercise specific jurisdiction in the case because the cause of action arose outside of the state.²⁰⁹ Although the point was not discussed, one must assume that the defendant corporation would be subject to general jurisdiction in whatever state they were headquartered and that plaintiff could pursue them in that venue.

In *Waterman Oy v. Carnival Cruise Lines, Inc.*,²¹⁰ the court held that there were insufficient contacts to support personal jurisdiction over a Finnish company. A crew member on one of defendant's cruise ships was

206. A discussion of the application of products liability and the doctrine of strict liability in maritime law is beyond the scope of this article. A good starting point is the decision of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). *Restatement* section 402A has also been applied by a maritime court. See *Goldenrod Showboat, Inc. v. Waterways Winona, Inc.*, 1988 A.M.C. 806 (E.D. Mo. 1986).

207. 632 So. 2d 1124 (Fla. 1st Dist. Ct. App. 1994).

208. *Id.* at 1125.

209. *Id.* at 1127-29.

210. 632 So. 2d 724, 727 (Fla. 3d Dist. Ct. App. 1994).

injured in the Bahamas when a lifeboat on which he was working fell without warning. The lifeboat had been built and supplied by Waterman Oy, a Finnish company.²¹¹ The court rejected Carnival's argument that Waterman's advertising in European trade publications which had reached Florida, coupled with the fact that the Finnish company supplied lifeboats, rescue boats, and tenders to other passenger cruise ships operated routinely from Florida ports, sufficed to support jurisdiction.²¹² The fact that the Finnish company knew that its tenders were used on cruise ships operating out of Florida ports was not determinative. Citing *World-Wide Volkswagen Corp. v. Woodson*,²¹³ the court pointed out that the significant question is whether the relationships the Finnish company had with Florida were such that it should reasonably anticipate being sued in Florida.²¹⁴ Finding that the relationships were insufficient, the case was reversed and remanded with instructions to grant the motion to dismiss.²¹⁵

C. Jurisdiction—Sufficient Contacts

A Delaware corporation owned and operated a pleasure yacht which it acquired in Fort Lauderdale in 1990 and which was based thereafter in Miami. The purpose of the yacht was to provide pleasure trips to guests of the parent corporation of the yacht owner. In *Morley v. Lady Allison, Inc.*,²¹⁶ the court ruled that the yacht owner was engaged in substantial and continuous business activity in the State of Florida within the meaning of section 48.193(2) of the *Florida Statutes*.²¹⁷ The court held that there was jurisdiction over a claim by one of the seamen of the yacht who was injured when the vessel was in the Virgin Islands.²¹⁸

D. Jurisdiction—Foreign Seamen

In *Haave v. Tor Husfjord Shipping*,²¹⁹ the court had little trouble sustaining jurisdiction over a Jones Act suit brought by a foreign seaman. Although the injury to the seaman occurred in Puerto Limon, Costa Rica,

211. *Id.* at 725.

212. *Id.* at 725, 727.

213. 444 U.S. 286 (1980).

214. *Waterman*, 632 So. 2d at 727.

215. *Id.*

216. 633 So. 2d 1173 (Fla. 3d Dist. Ct. App. 1994).

217. *Id.* at 1174; FLA. STAT. § 48.193(2) (1991).

218. *Morley*, 633 So. 2d at 1174.

219. 630 So. 2d 623 (Fla. 3d Dist. Ct. App. 1993).

the defendant shipowner had an office in the United States and used United States ports, including ports in Florida for its business operations.²²⁰ The court determined that the defendant had a base of operations in Florida within the meaning of *Hellenic Lines Ltd. v. Rhoditis*,²²¹ and that the multiple factors laid down by the Supreme Court in *Lauritzen v. Larsen*²²² favored the exercise of jurisdiction by a Florida court.²²³

E. *Passengers—Breach of Contract of Carriage*

In *Nadeau v. Costley*,²²⁴ the court dealt with an action by a passenger against Carnival Cruise Lines, and a member of it's crew. The plaintiff and her roommate were assigned a small stateroom aboard the cruise ship CARNIVALE. During the night, the plaintiff was awakened by her roommate's screams. The roommate was being sexually assaulted by Costley, a crew member. When the roommate screamed, Costley ran out of the stateroom, shutting the door behind him. The women attempted to telephone for help but the phone in their room was not operating. Costley returned at intervals throughout the night and verbally assaulted the women and made efforts to gain entrance to the stateroom. The women remained in their stateroom throughout the night until they heard other passengers moving in the passageways in the morning. The incident was immediately reported to the ship's purser. From the opinion, it appears that the roommate recovered in her action against the cruise line. However, a motion to dismiss was entered against plaintiff Nadeau because she was not physically injured in any way. The trial court ruled that she could not recover compensatory damages lacking any physical injury and that she could not sue for emotional injuries without some physical impact.²²⁵

The appellate court reversed and held that plaintiff had a cause of action for breach of contract based "upon a wrongful intentional act by a member of the ship's crew."²²⁶ The court also held that the trial court erred by dismissing the plaintiff's claim that the shipowner was vicariously

220. *Id.* at 623-24.

221. 398 U.S. 306 (1970).

222. 345 U.S. 571 (1953). The factors enunciated by the Court were: place of the wrongful act; law of the flag; allegiance or domicile of the injured; allegiance of the defendant shipowner; place of contract; inaccessibility of foreign forum; and the law of the forum. *Id.* at 582-92.

223. *Haave*, 630 So. 2d at 624.

224. 634 So. 2d 649 (Fla. 4th Dist. Ct. App. 1994).

225. *Id.* at 650.

226. *Id.* at 651.

liable for the crew member's intentional infliction of emotional distress.²²⁷ The court stated, contrary to the shipowner's argument, that physical injury is not necessary before a shipowner can be held vicariously liable for the intentional actions of a crew member.²²⁸

F. *Jones Act—Seaman's Status*

*Juneau Tanker Corp. v. Sims*²²⁹ involved a Jones Act suit by an unskilled laborer injured on board a tank ship in San Francisco. The plaintiff was furnished to the shipowner by a Tampa company. The court concluded that Sims met the seamen's status test established in *McDermott International, Inc. v. Wilander*²³⁰ and *Offshore Co. v. Robison*,²³¹ and affirmed summary judgment on the question of seaman status in favor of the plaintiff.²³² In *McDermott International* the Supreme Court ruled that one who is either assigned permanently to a vessel or does a significant part of his work on board a ship which contributes to the function of the ship or the fulfillment of its mission is entitled to the status of a Jones Act seaman.²³³ The *Juneau Tanker* court noted that the evidence on the issue of seaman's status did not raise any inference from which the jury could have concluded that plaintiff was not a seaman.²³⁴

In *McCann v. SeaEscape Ltd., Inc.*,²³⁵ a passenger sued claiming she was injured when the leg of a male dancer hit her in the nose. The dancer was employed by a company which contracted with the defendant to provide entertainment on board its cruise ships. The plaintiff alleged that the vessel owner was responsible for the male dancer because he was an individual working on board the ship. Summary judgment for the shipowner was affirmed by the appellate court which held that the male dancer could not be considered to be a seaman or a member of the crew, relying upon the test announced in *Offshore Co. v. Robison*,²³⁶ and, therefore, the shipowner was not liable for his actions.²³⁷

227. *Id.* at 653.

228. *Id.*

229. 627 So. 2d 1230 (Fla. 2d Dist. Ct. App. 1993).

230. 498 U.S. 337 (1991).

231. 266 F.2d 769 (5th Cir. 1959).

232. *Juneau Tanker*, 627 So. 2d at 1232.

233. *McDermott, Int'l*, 498 U.S. at 357.

234. *Juneau Tanker*, 627 So. 2d at 1231.

235. 641 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994).

236. 266 F.2d 769 (5th Cir. 1959).

237. *McCann*, 641 So. 2d at 873.

G. *Unearned Wages—Attorney's Fees*

In *Moran Towing of Florida, Inc. v. Mays*,²³⁸ the court reversed a trial court order that had awarded a seaman in a Jones Act case unearned wages and attorney's fees based upon the recovery of earned wages.²³⁹ The seaman received wages from the date of his injury through the date of termination of a collective bargaining agreement between the seaman and his employer. The appellate court found no basis in law for such an award and held that plaintiff, having been paid wages for the day on which he was injured, and having no additional obligation of service to the vessel, had no claim for further unearned wages.²⁴⁰ The attorney's fees award was not discussed in the court's opinion. Generally, attorney's fees are not awarded as part of a recovery in a Jones Act case, with the exception of cases where the employer refuses to pay maintenance and cure.²⁴¹

Attorney's fees were also discussed in the case of *Royal Caribbean Corp. v. Modesto*,²⁴² although in a different context. In *Modesto*, the plaintiff made a demand for judgment pursuant to section 768.79 of the *Florida Statutes*.²⁴³ The defendant did not respond. At trial, the plaintiff recovered far more than the amount of the demand, but the trial court refused to award attorney's fees.²⁴⁴ On appeal, the court held that there was no conflict between maritime law and Florida's rules dealing with award of attorney's fees following demands for judgment and, accordingly, reversed the trial court order denying an award of attorney's fees.²⁴⁵

H. *Release—Negligence Per Se*

A participant in a motorboat race was injured and brought suit against the race promoter. In *Torres v. Offshore Professional Tour, Inc.*,²⁴⁶ the court noted that Florida law required that promoters of events such as races are required to obtain a permit from the United States Coast Guard. The

238. 620 So. 2d 1088 (Fla. 1st Dist. Ct. App. 1993).

239. *Id.* at 1092.

240. *Id.* In a subsequent per curiam opinion the court again reversed the attorney fee order. *Moran Towing of Florida, Inc. v. Mays*, 623 So. 2d 850 (Fla. 1st Dist. Ct. App. 1993).

241. *Vaughan v. Atkinson*, 369 U.S. 527 (1962). See generally BAER, *supra* note 177, § 1-7.

242. 614 So. 2d 517 (Fla. 3d Dist. Ct. App. 1992).

243. FLA. STAT. § 768.79 (1989).

244. *Royal Caribbean*, 614 So. 2d at 518.

245. *Id.* at 520.

246. 629 So. 2d 192, 193 n.1 (Fla. 3d Dist. Ct. App. 1993).

defendant failed to obtain such a permit and the court pointed out that such failure could be construed to be negligence per se.²⁴⁷ The court held that the enforcement of a release given by Torres to the promoter which relieved the promoter from liability for breach of a positive statutory duty would be against public policy.²⁴⁸

I. *Arbitration—Waiver of Right*

In *Morex Consolidators Corp. v. Industry Shipping & Commerce, Inc.*,²⁴⁹ the plaintiff chartered a ship pursuant to a charter party that contained a typical arbitration provision. The plaintiff failed to make scheduled hire payments to the defendant shipowner. The shipowner and the plaintiff thereafter entered into a stipulation regarding the amount owed and it contained provisions for entry of judgment thereon if the charterer further defaulted in making hire payments. The charterer defaulted and the owner brought suit on the stipulation. The charterer sought to stay the action pending arbitration.²⁵⁰ The court held that the charterer waived its right to arbitrate by entering into the stipulation calling for resolution by litigation.²⁵¹

J. *Passenger Ticket—One-Year Suit Clause*

In *Collins v. Dolphin Cruise Line, Inc.*,²⁵² the court affirmed the dismissal of the plaintiff's personal injury claim which was filed eighteen months after she was injured on board ship. The passenger ticket specified that actions must be commenced within one year from date of occurrence. Moreover, the ticket, on its cover, gave ample notice and warning of the fact that there were limitations on the period in which suits could be brought for injuries.²⁵³ The court also rejected the plaintiff's argument that her action should not have been time barred because the ticket was issued to her travelling companion and not to her.²⁵⁴ The thrust of the court's ruling

247. *Id.* at 193.

248. *Id.* at 194.

249. 626 So. 2d 989 (Fla. 3d Dist. Ct. App. 1993).

250. *Id.* at 990.

251. *Id.* at 990-91.

252. 625 So. 2d 1308, 1310 (Fla. 3d Dist. Ct. App. 1993).

253. *Id.* at 1309.

254. *Id.* at 1309-10.

is that a passenger who fails to read a copy of her contract of passage, either before, during, or after the trip, accepts all risk of such failure.²⁵⁵

VI. CONCLUSION

The cases surveyed in this article give rise to several questions which only future developments may answer. For example, will the principles decided by the Supreme Court in *McDermott* and *Boca Grande Club* be applied in non-maritime cases? Will the emotional distress remedy which the Supreme Court laid out in *Gottshall* be extended to individuals injured in a maritime environment who are not seamen? Finally, will the limitations set by the Supreme Court in *McDermott International* on recoveries by the estate of a deceased seaman be equally applied in cases involving the maritime wrongful deaths of non-seamen? Not surprisingly, a survey of recent developments in any area of the law gives rise to more questions than are answered.

255. *Id.*