SeaNOTES

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Dual Capacity: Tort Claims Against Maritime Employers

Workers' compensation insurance represents a compromise between the interests of workers and their employers. The workers get a guaranteed and immediate benefit through an administrative process while employers are obligated to pay benefits promptly in exchange for immunity from suit by the injured worker. The Longshore Act's exclusive liability provision is found in Section 5(a) of the Act. In other American compensation systems, an injured worker has the right to sue a non-employer if its negligence caused or contributed to his injury. This right can be exercised simultaneously with his claim for compensation benefits from the employer. The Longshore Act contains one exception to the exclusive liability of an employer *if and only if* the worker's injury is the fault of an employer-owned vessel or its crew. This is known as 'dual capacity' liability, and the right to sue under this concept belongs to all "maritime employees" injured on "vessels."

Tort exposure only exists if the injury was caused by negligence of the employer in its capacity as vessel owner. However, even this exception has an exception. Employers who own vessels but whose employees are engaged in shipbuilding, ship repair, or ship breaking are *not* liable in tort for injuries to workers even if those injuries are the result of vessel or crew negligence. 33 U.S.C. Section 905(b). *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5th Cir.), *cert. denied*, 479 U.S. 885 (1986).

The dual capacity relationship arises when the employer is both the maritime employer and the vessel owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer. If the vessel owner permits a negligent condition to exist on one of its ships that causes injury to an employee of its Longshore employer entity, it will be liable both for Longshore benefits and be subject to suit as permitted in Section 905(b). The injuries must be due *solely* to vessel or crew negligence. The mistakes or negligence of a fellow Longshore worker will not support a tort suit. Suits for damages arising from negligent acts of a stevedore/employer or their Longshore employees resulting in injuries to an employee would also be barred. *Reed v. Yaka*, 373 U.S. 410 (1963). This concept pre-dates the 1972 Amendments to the Longshore Act, but these amendments limited a vessel owner's liability to injuries caused by ordinary negligence. There is no recovery available for injuries caused by unseaworthiness.

Further, injured workers on floating work platforms cannot recover from an employer under dual capacity doctrine when the injury is caused by the employer's negligence and not due to the fault of the "vessel" or the employer as vessel owner. *Gravatt v. City of New York*,

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226 F.3d 108 (2nd Cir. 2000); *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795 (2d Cir.1979).

Courts have underscored that vessel liability is based on "ordinary negligence." Examples illustrating potential claims include:

- An Employer owned barges and used its own longshoremen to load them. A longshoreman who slipped on ice negligently left on the gunwales of a barge owned by the vessel owner employer could recover in a Section 905(b) suit. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).
- In *New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (1989), it was found that routine maintenance of a vessel is not "ship repair," so a maintenance worker could maintain a Section 905(b) suit if he could prove vessel negligence caused his injuries.
- A relief cook sued under Section 905(b) after being injured while ascending the main gangplank of a vessel owned and operated by Sea Land. The Fifth Circuit agreed that he was a harbor worker injured by the negligence of Sea Land in its capacity as vessel owner and could recover. The court disagreed, however, with the employer's attempt to limit its coverage to longshore benefits. It found the first sentence of Section 905(b) clearly included a harbor worker within the phrase, "[i]n the event of injury to a *person covered under this Act* caused by the negligence of a vessel." *Guilles v. Sea Land Service, Inc.*, 12 F.3d 381 (5th Cir. 1993).
- A bridge construction worker who was injured when he fell through an open hatch on a construction barge chartered by his Longshore employer was barred from recovering under Section 905(b) as the negligence in leaving the hatch open was attributable to a fellow Longshore worker. *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996)(en banc).
- A tag man slipped on hydraulic fluid while working on the deck of a non-motorized supply barge used in coffer dam construction. He was barred from tort recovery under Section 905(b) against his employer, as the charterer or "*pro hac vice* owner" of the barge on which he was injured, on grounds the barge was not a "vessel" at the time of his accident. *DiGiovanni v. Traylor Bros., Inc.*, 97 F.3d 624 (1st Cir. 1996)(en banc). That determination was expressly overruled by the Supreme Court in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005).
- A journeyman dock builder was employed by a construction firm under contract to City of New York to repair a bridge. The employee was injured while working on a barge chartered by his employer at a mid river construction site. While the injured worker spent less than 1% of his time working on barges, he was injured after boarding a materials barge with another dock builder to move old piles of debris and clear access to new materials. The debris had been loaded on top of new materials, obstructing access to them and breaching the employer's policies as expressed in its safety handbook. The two workers were instructed to use timber tongs instead of a choker to move piles. There was evidence that the employer routinely engaged in this misuse of timber tongs, in violation of industry wide safety standards. The crane operator was moving timbers at the time of the accident and could not see the claimant, who was struck on the back by the timbers and knocked into the water. Although the district court held the employer as barge owner liable in tort to the injured dock builder, the Court of Appeals reversed, finding that all of the actions that contributed to the injury were performed by fellow dock builders. Thus, the employer was immune from suit, and the judgment against it was reversed. *Gravatt v. City of New York*, 203 F.3d 108 (2nd Cir. 2000).

These examples highlight a variety of factors that determine whether an injured Longshore employee can recover in tort from his employer. It should be noted that the 905(b) lawsuit implicates liability and/or P&I/Maritime Employers' Liability coverage for the employing company in its position as vessel owner, and the involvement of multiple insurers in the mix can complicate resolution of claims for such injuries. However, the involvement of another insurer also presents the possibility of an "unforced error" by the plaintiff's attorney, if the 905(b) suit is settled without the written approval of the Longshore carrier. Even though the employer is a party to both the suit and the claim, the Longshore carrier's refusal to sign an LS-33 and approve the settlement can terminate any outstanding or unpaid Longshore benefits per § 33(g) of the Longshore Act. *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007).

Any time an employee's injury is caused, even in part, by someone other than his employer, a tort suit looms as a means of enhancing his recovery. As we've discussed, under a limited set of circumstances the maritime employer can also be sued in tort as vessel owner by its employees. Significant claims expertise is necessary to skillfully navigate the murky waters of third-party and 905(b) litigation. Maritime employers can count on SeaBright to recognize this potential early in the claim process and mount an effective defense whenever possible.

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