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MARITIME RIGHTS AND REMEDIES REVISITED

Unlike land-based injuries, rights and remedies available in cases within the maritime jurisdiction depend heavily upon the "class" of the victim and the injury locale. Seafarers [1] have different remedies than non-seafarers. Seafarer rights and remedies differ depending on the location of the harm. Maritime practitioners ***314** should carefully scrutinize the facts of the case to determine how to place the client in the best position to recover.

I. OVERVIEW

Admiralty law is derived from ancient codes dating 1,000 B.C. and extending through the Greek and Roman Empires. The English law of the Middle Ages, contained in the Rolls of Oléron, was the first statement of maritime law in Europe. Based on the Lex Rhodia, which governed Mediterranean maritime commerce since before the first century, the laws were promulgated in England in 1160 under the rule of Richard I. The Rolls were eventually published in English and French and form the main basis for the development of separate and distinct rules of maritime law that exists today.

Against this historical background, the founding fathers knew that the United States needed a uniform, distinct and strong body of national maritime law if the young country were to compete and prosper in maritime commerce. Article III of the U.S. Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction" in order to ensure that maritime law remained federal and consistent among the states. [2] The federal courts have exercised this constitutional authority to create a body of common law applicable to cases within admiralty jurisdiction. Initially drawing on the "laws, customs and principles of jurisprudence" [3] which preexisted the American Revolution, federal courts have also used a variety of additional sources, including state statutes and precepts of English common law in the process. The result is the constitutionally sanctioned, judge made unique body of federal law referred to as the "general maritime law." [4]

Congress has also enacted a number of maritime statutes as part of its Constitutional legislative function. [5] Examples include statutes governing the rights and remedies of seamen, [6] the rights and remedies of other maritime workers', [7] deaths on the high seas, [8] ***315** inland navigation rules, [9] seaman employment protection, [10] and a host of other maritime concerns. [11] These statutes apply in specific fact situations and to specific classes of maritime actors. Thus, as the United States Supreme Court noted long ago, unlike any other body of American law, this country's law of the sea is a combination of Article III, § 2, cl. 1 jurisprudence and Article I, § 8, cl. 18 legislation. [12]

Congress has also regulated admiralty jurisdiction. The Judiciary Act of 1789, codified as 28 U.S.C. § 1331(1), gave federal district courts exclusive jurisdiction of maritime actions "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." [13] Exclusive federal court admiralty jurisdiction exists in actions in rem, [14] actions for limitation of liability, [15] in suits against the United States, [16] suits under the Public Vessel Act [17] and in actions involving ship mortgages. [18] Federal court jurisdiction over other in personam admiralty cases is concurrent with state courts per 28 U.S.C. §1333(1). [19] Congress has legislatively extended the scope of federal maritime jurisdiction as well. [20]

II. SEAFARERS

In the vast majority of workplace injury and death claims falling within the admiralty jurisdiction, the injured worker is either a seaman whose claims are governed by the Jones Act [21] and the general maritime law, or a maritime employee covered by the ***316** Longshore and Harbor Workers' Compensation Act (LHWCA). [22] The Jones Act and LHWCA are mutually exclusive compensation regimes. [23] If the injured employee meets the test for seaman status, [24] he is covered by the Jones Act. If not, with certain exceptions, [25] his rights and remedies are governed by the LHWCA. [26]

III. RECOVERY AGAINST EMPLOYERS

A. THE JONES ACT

The Jones Act governs a seaman's claim against his employer only. There must be an employment relationship in order for the injured seaman to bring the Jones Act claim against a particular defendant. [27] The employer is solely responsible under the Jones Act for negligence (the duties are non-delegable) and for maintenance and cure. [28] The negligence and maintenance and cure remedies are personal between the Jones Act seaman and his employer.

A Jones Act seaman may also sue the owner of any vessel on which he is working for breach of the general maritime law warranty of seaworthiness, regardless of whether the vessel is owned by his employer. [29] Unlike the Jones Act negligence and maintenance and cure rights, which are grounded in the employment relationship, the unseaworthiness warranty follows the vessel.

Any breach of one or more of the enumerated employer duties under the Jones Act which is a cause, however slight, in causing harm entitles the injured seaman to recover damages. [30] Available remedies include past lost income, future loss of earning capacity, expenses of medical care exceeding cure benefits paid by the employer, physical and mental pain and suffering and disability/loss of ***317** enjoyment of life. [31] Non-pecuniary damages such as loss of consortium and punitive damages are not currently recoverable under the Jones Act in the U.S. Fifth Circuit. [32]

B. UNSEAWORTHINESS

The vessel to which the Jones Act seaman is assigned or working at the time of injury owes the duty of furnishing the seaman with a seaworthy vessel. The vessel, its crew and appurtenances must be reasonably fit for the vessel's intended purpose to be seaworthy. [33] Unlike the Jones Act, the injured seaman must only prove an unseaworthy condition which is a proximate cause of the seaman's injuries. [34] There is no requirement of knowledge of an unsafe condition or unfit equipment. The vessel owner is essentially dealing with a species of strict liability. However, the proof burden is higher standard than the Jones Act "featherweight" proof burden. [35]

Damage remedies available to the injured seaman under the general maritime law doctrine of unseaworthiness mirror those available under the Jones Act in the U.S. Fifth Circuit. [36]

C. MAINTENANCE AND CURE

The general maritime law requires the employer to provide maintenance and cure to an employee injured in the service of the vessel regardless of fault, until he reaches maximum medical improvement or is able to return to maritime employment. [37]

The obligation to provide maintenance requires the employer to pay the seaman a per diem allowance comparable to the value of the food and lodging received aboard the vessel at sea. [38] At the very ***318** least, the employer must provide maintenance sufficient to cover the seaman's shore-side reasonable costs for food and lodging. [39]

The *Hall* decision details the proper method of computing maintenance and the seaman's proof burden in this regard. Like the Jones Act causation burden, the burden of producing evidence of expenses to prove a maintenance amount is "feather light." [40] The seaman must either spend his own money or obligate himself to another to obtain food and lodging in order to recover maintenance. [41] The seaman's food expense is confined to his personal consumption; the expenses of the seaman's spouse and children are not included. [42]

Conversely, the seaman's actual lodging costs (rent/mortgage, heat, electricity and water) are included in maintenance. [43] Unlike food, this amount is not prorated among family members.

In addition to actual expenses, the seaman must prove the reasonableness of the maintenance claimed. In determining reasonable costs of food and lodging, "The court may consider evidence in the form of the seaman's actual costs, evidence of reasonable costs in the locality or region, union contracts stipulating a rate of maintenance or per diem payments for shoreside food or lodging while in the service of a vessel, and maintenance rates ordered in other cases for seamen in the same region." [44] The court may take judicial notice of the prevailing rate in the district. [45]

The court is compelled to compare actual expenses to reasonable expenses and award the lower of the two unless actual expenses are inadequate to provide reasonable food and lodging. In this case, the plaintiff is entitled to the amount that the court determines is the reasonable cost of food and lodging. [46] This exception ostensibly eliminates the risk that inability to pay will prevent the seaman from recovering enough to obtain reasonable food and lodging.

Finally, inflation can and should be taken into account in comparing a current maintenance demand to past rates paid. [47]

***319** "Cure" is the right to payment of reasonable medical expenses for the treatment of the seaman until maximum medical improvement (MMI) is reached. The shipowner's duty to pay maintenance and cure is broad. [48] A seaman has the right to treatment by physicians of his choice, provided only that the charges by those physicians are reasonable and not significantly higher than charges for the same treatment by other physicians. [49] The employer has a duty to guarantee payment before

treatment of reasonable medical expenses without undue delay in order to insure that the injured seaman will be able to obtain the treatment he needs. [50] MMI is reached when the seaman either recovers from the injury or the condition permanently stabilizes or cannot be improved further. [51] The point of MMI is a medical determination, not a legal one. [52] The shipowner bears the obligation to investigate a seaman's cure claim and examine all medical evidence in determining whether cure is owed. [53] Any ambiguities or doubts regarding entitlement to cure or the MMI date must be resolved in the seaman's favor. [54]

The obligation to provide maintenance and cure is a personal obligation of the employer, based on the contract of employment. [55] Therefore, maintenance and cure is not dependent on a liability determination under the Jones Act or the general maritime law doctrine of unseaworthiness, and does not need to await the resolution of these issues for determination. Maintenance and cure claims can be severed from the main action and tried on an expedited basis. [56]

Against this background, if the shipowner unilaterally decides to stop paying maintenance and cure and the seaman asserts his right by bringing an action against the shipowner, the burden shifts to the shipowner to prove that maximum cure has been reached. [57] It meets its burden of proof only by providing unequivocal evidence ***320** that the seaman is at MMI. [58] A second medical opinion contrary to the treating doctor's opinions regarding diagnosis or prognosis of an injured seaman does not provide the unequivocal evidence required for termination of maintenance and cure benefits. [59] Indeed, absent an unequivocal justification to refuse to pay maintenance and cure or to terminate a seaman's maintenance and cure benefits, a shipowner may subject itself to liability for compensatory damages caused by prolonged and avoidable pain and suffering and punitive damages and attorney's fees for willful or callous refusal to pay. [60]

D. LHWCA

The LHWCA provides a workers' compensation scheme for death or disability resulting from maritime employment. The worker must satisfy four (4) requirements for coverage under the LHWCA:

The employee cannot be a Master or member of a crew of any vessel;

The employee must suffer injury during the course of employment; The employee has to be employed by an employer whose employees are employed in maritime employment, in whole or part, upon the navigable waters of the United States; and

The employee must meet a situs requirement that the injury occur upon navigable water. [61]

Known as the "situs and status test", the worker must be injured on the "navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel to satisfy the situs requirement." [62] An employee satisfies status if he is "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor ***321** worker including a ship repairman, shipbuilder and ship breaker." [63] The situs test limits the geographic coverage of the LHWCA, while the status test focuses on the nature of the injured worker's activities. [64] A non-seaman worker injured on navigable waters need not fall neatly within the status test, as injury on actual navigable waters in the course of employment satisfies the status requirement on its face. [65] Further, the amount of time that a worker spends aboard a vessel is not relevant to the status inquiry when the injury actually occurs on navigable waters. [66]

LHWCA compensation includes disability benefits, [67] prejudgment interest, [68] and two-thirds of the worker's salary for the length of disability. [69] The *quid pro quo* for compensation without employer fault is tort immunity of the employer. [70]

Two exceptions exist. First, if an employer fails to secure compensation as is required by the Act, the employee can elect to either claim compensation or to maintain a tort action at law or in admiralty for damages. [71] Under § 905(a), the defendant employer cannot plead the affirmative defenses of negligence of a fellow servant, assumption of risk or contributory negligence. [72] This was Congress' means of encouraging employer participation in the federal compensation scheme.

Second, the employee has negligence rights against his employer in its capacity as the vessel owner rather than employer. [73] This action, known as a 905(b) action, is often referred to as negligence *"qua vessel"* in the employer/vessel owner context. [74] The duties owed by the employer as vessel owner were created by the U.S. Supreme Court; they are commonly known as the "Scindia duties" and include the turnover duty, active control duty, and duty to ***322** intervene. [75] These exclusive vessel owner duties, although tailored to the traditional longshoremen and harbor worker fact situation, also apply to 905(b) actions brought by other maritime employees such as welders, oilfield service hands and the like. [76]

Section 905(b) is not jurisdictional. [77] Section 905(b) cases may be brought in federal court based either on admiralty jurisdiction or diversity of citizenship. [78] Federal question jurisdiction is unavailable because Section 905(b) did not create a new federal statutory right. [79]

Damages available to the injured maritime employee under § 905(b) can be more expansive than those available to seamen under the Jones Act. In addition to compensation for past and future loss of income, future medical expenses, pain and suffering and disability/loss of enjoyment of life, a maritime worker (and beneficiaries) injured or killed in state waters can recover non-pecuniary damages such as loss of consortium, loss of society and punitive damages. [80] A maritime employee injured or killed in federal waters is limited to pecuniary losses only. [81]

IV. THIRD-PARTY RECOVERY

A. JONES ACT

A Jones Act seaman may also sue third parties for general maritime law negligence. [82] The non-employer third party owes a duty of reasonable care under the circumstances commensurate with the ***323** reasonable care standard applicable in other general maritime law negligence claims. [83]

Although the Jones Act is not implicated in a third party suit against a non-employer, neither a Jones Act seaman nor his survivors can recover non-pecuniary damages from a non-employer third-party in the U.S. Fifth Circuit. [84]

However, there are courts that allow seaman recovery of non-pecuniary damages against third-parties. [85] These cases correctly recognize that claims against third-parties do not involve the Jones Act and are therefore not constrained by the statutory language. There is no principled reason to extend *Miles, infra*, to eliminate non-pecuniary damages in the general maritime law entirely. [86]

B. LHWCA

As previously noted, the maritime employee has a 905(b) cause of action against a vessel owner, be it employer or third party owned. In addition, the injured worker has a cause of action at law or in admiralty against non-vessel owner third parties. [87] The injured employee need not choose between compensation benefits and the third party action. [88] However, if the employee accepts compensation, he must commence the suit within six months of the acceptance, lest the right reverts to the employer. [89]

If the employer fails to bring the action within 90 days of the assignment, it reverts back to the employee. [90] The action and available damages can be based on state or general maritime law. [91] Available defenses and damages recoverable under this third party action depend upon the law that applies. [92] If the employer brings the action, he is entitled to reasonable ***324** attorney's fees, all amounts paid to the employee and the present value of future benefits owed. [93]

Additionally, recall that the maritime employee may have a cause of action against his non-vessel employer if the employer failed to secure compensation as is required by the statute. § 904(a) requires an employer covered by the LHWCA to secure payment of compensation as prescribed by the Act, which includes statutory requirements to legally underwrite LHWCA coverage. [94] The penalty for failure to secure payment of compensation from a qualified underwriter is elimination of the employer's tort immunity and a bar of the comparative fault, assumption of risk and fellow servant negligence defenses. [95] The plaintiff has the right to elect an action for damages at law or accept compensation. [96]

Like the action under § 933(a), damages recoverable under this action depend upon the law that applies.

V. NON-SEAFARERS

In *Yamaha Motor Corp., USA v. Calhoun*, [97] the U.S. Supreme Court expanded the remedies available to non-seafarers beyond the general maritime law. The case shows that the general maritime law, developed by a once benevolent federal judiciary to protect a class of persons subjected to unique employment circumstances and hazards, now lends less relief to seafarers then to individuals who remedies are normally governed by common law tort principles but are fortuitously killed in a marine setting.

In *Calhoun*, a Pennsylvania resident was killed in a collision between her jet ski and an anchored sailboat in Puerto Rican territorial waters. Pennsylvania wrongful death law allowed recovery for loss of society, lost future earnings and punitive damages. The general maritime law arguably allowed loss of society; however, loss of future earnings and punitive damages are not general maritime law remedies in this situation.

The trial court held that federal maritime law controls the exclusion of state law. The U.S. Third Circuit reversed and held that ***325** the case is governed by state law because maritime law had not clearly spoken on the issue.

The U.S. Supreme Court confirmed. State law remedies may supplement non-seafarers death claims in state territorial waters. On remand, the U.S. Third Circuit determined that compensatory damages are governed by the law of the decedent's domicile and punitive damages are determined by the law of the place of the alleged reckless conduct. [98]

Calhoun also applies to personal injury cases. Accordingly, Louisiana law allowing loss of consortium damages may supplement the general maritime law in cases of personal injuries to non-seafarers in Louisiana state waters. [99] Louisiana does not recognize punitive damages, so any punitive damage claim in a non-seafarer case emanating from Louisiana territorial waters would have to be based on the general maritime law.

VI. DOHSA

The Death on the High Seas Act applies to any death occurring more than a marine league (three nautical miles) from shore. [100] There is no distinction between seafarers and non-seafarers. Beneficiaries of Jones Act seamen killed in the service of the vessel are limited to pecuniary losses regardless of the casualty location. Under the Jones Act, beneficiaries include the surviving widow or husband and children of the seaman, and, if none, then the next of kin who are dependent upon the seaman for support. [101] Because DOHSA does not list beneficiaries as does the Jones Act through its reference to FELA, more peripheral

relatives who are actually dependent upon the victim may also claim damages. [102] Non-pecuniary damages are unavailable to seamen beneficiaries under the Jones Act and DOHSA because these controlling statutes do not provide for non-pecuniary recovery. [103]

***326** Conscious pain and suffering of the deceased seaman before death is recoverable under the survival action provisions of the Jones Act. [104] Unlike the Jones Act, DOHSA precludes a general maritime law survival action for pre-death pain and suffering. [105] Thus, the Jones Act wrongful death action against the deceased seaman's employer includes a pre-death pain and suffering claim, while the general maritime law unseaworthiness action against the vessel owner and a negligence action against a third party brought under DOHSA in the same lawsuit does not. Likewise, a seafarer/maritime employee and a non-seafarer killed in federal waters are limited to DOHSA's damage provision, as this action is governed solely by DOHSA.

No particular period of consciousness is necessary for a pre-death pain and suffering award. [106] Consciousness may be presumed in certain fact circumstances. [107] Recovery will not be allowed where there is no proof of either post-trauma consciousness or instantaneous death. [108]

Although not covered by DOHSA, beneficiaries of seamen killed in state waters are also limited to pecuniary damages. [109] The general maritime law action (unseaworthiness) for the wrongful death of a seaman in state waters was formally recognized in *Miles*, as the logical extension of the wrongful death action created in *Moragne v. States Marine Lines, Inc.* [110] Damages recoverable in this cause of action are limited to pecuniary loss. Recovery for lost future earnings is also prohibited because the Jones Act's survival provision limits recovery to losses during the decedent's lifetime. [111] Recall that a maritime employee killed in state waters has a non-pecuniary ***327** remedy, including consortium and punitive damages. [112] In this fact situation the remedy for the maritime worker is more generous than that of the seaman.

The drafters of DOHSA focused on seafarers in writing the statute. The remedy is intended to replace the economic support provided by the deceased wage earner. However, in other contexts, the DOHSA limit can leave survivors with tremendous loss and no remedy.

An example is *Tucker v. Fearn*. [113] The plaintiff's minor son was killed in a pleasure boat collision in Alabama state waters, a geographic location not within the scope of DOHSA. However, the U.S. Eleventh Circuit had previously held in a case arising out of the *Amtrak Sunset Ltd.* train disaster that the Alabama Wrongful Death Act did not apply in territorial pleasure boat accidents because it allowed only recovery of punitive damages for negligence, which conflicted with established maritime law principles permitting punitive damage recovery only in cases of gross negligence. [114] Based on dicta in *Miles*, the Eleventh Circuit applied the DOHSA remedy and limited the minor's parent's recovery to funeral and burial expenses. [115]

Although there was no commercial aviation when DOHSA was passed in 1920, commercial aircraft passenger deaths at sea are governed by DOHSA. [116] *Zucherman* and *Dooley* denied recovery for pre-terminal pain and suffering because these damages are not available under DOHSA. [117]

In 1996, politics forced a change in this patently unfair area of the law. In response to the *TWA Flight 800 Disaster* in July of 1996, Congress amended DOHSA and made the amendment retroactive to commercial aviation disasters occurring on or after July 16, 1996. [118] The amendment permits non-pecuniary damages for loss of care, comfort and companionship in cases of death resulting from a commercial aviation accident occurring beyond 12 nautical miles ***328** from the U.S. The amendment also limited the application of DOHSA in aviation accidents to incidents occurring 12 miles or farther from shore. State wrongful death statues now apply to aviation disasters occurring within 12 nautical miles of a state's shoreline. The amendment specifically prohibits punitive damages in aviation cases.

As a result, DOHSA now provides more humane remedies for air crash victims than those allowed to seafarer and non-seafarer victims of vessel casualties. The law appears vulnerable to a due process challenge under the right set of facts as it treats deaths differently based solely on the fortuity of whether one dies in a plane or on a boat.

Footnotes

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1 "Seafarers" are those persons who are seamen covered by the Jones Act or maritime workers covered by the Longshore and Workers' Compensation Act. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 203 n.4 (1996).

2 U.S. CONST. art. III, § 2, cl. 1.

3 Thompson v. Catherina, 23 F. Cas. 1028, 1030 (D. Pa. 1795).

4 The U.S. Supreme Court has defined the scope of maritime tort jurisdiction in a series of cases. Congress has also regulated maritime jurisdiction. *Id.*

5 U.S. CONST. art I, § 8, cl 18.

6 46 U.S.C. §§ 30104 - 30106.

7 33 U.S.C. §§ 901 - 950 (2018).

8 46 U.S.C. §§ 761 - 768 (2018).

9 33 U.S.C. §§ 2071 (2018).

10 46 U.S.C. §§ 2114--2118 (2018).

11 *See generally* 33 U.S.C. §§ 409, 411-412, 414-415.

12 Panama R.R. Co. v. Johnson, 264 U.S. 375, 385-87 (1924).

13 *See* Leon v. Galaran, 78 U.S. 185, 186 (1871).

14 Rounds v. Cloverport Foundry & Mach. Co., 237 U.S. 303, 305-06 (1915).

15 46 U.S.C. § 30501; Fed. R. Civ. Proc. Supp. Rule F.

16 46 U.S.C. § 30901 (2018).

17 46 U.S.C. § 31101 (2018).

18 46 U.S.C. § 31325(c) (2018).

19 This basic maritime jurisdictional tenet was reaffirmed in Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001). The U.S. Supreme Court held that the jurisdictional tension between 46 U.S.C. § 30501, The Limitation of Liability Act, and a limitation claimant's jurisdictional right under §1333(1), is resolved in favor of claimant's legitimate forum choice as long as the vessel owner's right to seek limitation is adequately protected via stipulation.

20 46 U.S.C. § 30101, commonly called The Admiralty Extension Act, applies maritime jurisdiction to injuries on land caused by negligence on navigable waters.

21 46 U.S.C. § 30104 (2018).

22 33 U.S.C. §§ 901-950 (2018).

23 Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 553 (1997).

24 Chandris, Inc. v. Laksis, 515 U.S. 347, 348 (1995).

25 *See* Green vs. Vermillion Corp., 144 F.3d 332 (5th Cir. 1998) (duck camp attendant has unseaworthiness right); Blancq v. Hapag-Lloyd A.G., 986 F. Supp. 376 (E.D. La 1997) (compulsory river pilots are neither traditional seamen nor maritime workers).

26 *Chandris, Inc.*, 515 U.S. at 355-358.

27 46 U.S.C. § 30104(a) (2012).

28 Volyrakis v. M/V Isabelle, 668 F.2d 863 (5th Cir. 1982).

29 Parks v. Dowell Div. of Dow Chem. Corp., 712 F.2d 154, 158 (5th Cir. 1983).

30 Bommarito v. Penrod Drilling Co., 929 F.2d 186, 187-91 (5th Cir. 1991).

31 *See* Johnson v. Cenac Towing, Inc., 468 F. Supp. 2d 815 (E.D. La. 2006).

32 McBride v. Estes Well Service, L.L.C., 768 F. 3d 382, 417 (5th Cir. 2014).

33 Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

34 *See* Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996).

35 *Bommarito*, 929 F.2d at 189.

36 *Compare McBride*, 768 F.3d at 387 *with* Batterton v. Dutra Group, 880 F.3d 1089, 1092 (9th Cir. 2018) for a conflicting opinion that rejects *McBride* and allows a punitive damage remedy for unseaworthiness.

37 The Osceola, 189 U.S. 158, 175 (1903); Vaughan v. Atkinson, 369 U.S. 527, 531 (1962); Vella v. Ford Motor Co., 421 U.S. 1, 3 (1975); Farrell v. United States, 336 U.S. 511 (1949); Rofer v. Head & Head, 226 F.2d 927, 931 (5th Cir. 1955).

38 Morales v. Garijak, Inc., 829 F.2d 1355, 1361 (5th Cir. 1987); McWilliams v. Texaco, Inc., 781 F.2d 514, 519 (5th Cir. 1986).

39 Hall v. Noble Drilling (U.S.), Inc., 242 F.3d 582, 587 (5th Cir. 2001).

40 *Id.* at 588.

41 *Id.*

42 *Id.* at 589.

43 *Id.*

44 *Hall*, 242 F.3d at 590.

45 *Id.*

46 *Id.*

47 *Id.* at 591-92.

48 Vella v. Ford Motor Co., 421 U.S. 1, 8 (1975).

49 Caulfield v. A. C. & D Marine, Inc., 633 F.2d 1129, 1135 (5th Cir. 1981).

50 Sullivan v. Tropical Tuna, Inc., 963 F. Supp. 42, 45 (D. Mass. 1997); Ethridge v. Ranier Investments, Inc., 1998 A.M.C. 2978, 2980, 1998 WL 886124 (D. Alaska 1998).

51 Morales v. Garijak, Inc., 29 F.2d 1355, 1359 (5th Cir. 1987).

52 Breese v. AWI, Inc., 823 F.2d 100, 104-05 (5th Cir. 1987).

53 Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1987).

54 *Caulfield*, 633 F.2d at 1132.

55 Brister v. AWI, Inc., 946 F.2d 350, 360 (5th Cir. 1991).

56 *Caulfield*, 633 F.2d at 1131.

57 Johnson v. Moreland Drilling Company, 893 F.2d 77, 79 (5th Cir. 1990).

58 *Id.*

59 Gorum v. Ensco Offshore Co., 2002 WL 31528460, at *6 (E.D. La. Nov. 14, 2002).

60 *Morales*, 29 F.2d at 1361; Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404, 417 (2009); Rowan v. Kim Carrier Towing, LLC, No. 12-712, 2015 WL 2097572, at *75 (E.D. La. May 5, 2015).

61 Dir., OWCP v. Perini N. River Ass'n., 459 U.S. 297, 306-07 (1983).

62 33 U.S.C. § 903(a) (2018).

63 33 U.S.C. § 902(3) (2018).

64 P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 78 (1979).

65 *Perini N. River Ass'n.*, 459 U.S. at 306-07

66 Bienvenu v. Texaco, Inc., 164 F.3d 901, 903 (5th Cir. 1999).

67 33 U.S.C. § 907(a) (2018).

68 33 U.S.C. § 905 (2018).

69 33 U.S.C. § 908(a) (2018).

70 33 U.S.C. § 904 (2018).

71 33 U.S.C. § 905(a).

72 *Id.*

73 Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 530 (1983).

74 Lavene v. Pintail Enterprises, Inc., 943 F.2d 528, 531 (5th Cir. 1991).

75 Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156, 167, 177-178 (1981).

76 Lormand v. Superior Oil Co., 845 F.2d 536, 541 (5th Cir. 1987).

77 Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 117-18 (5th Cir. 1976).

78 *Id.* at 118.

79 *Id.*

80 *See generally* Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 586, 606 (1974); *see* American Export Lines, Inc. v. Alvez, 446 U.S. 274, 276 (1980); Randall v. Chevron U.S.A., Inc., 13 F.3d. 888, 902-904 (5th Cir. 1994); *see* Rutherford v. Mallard Bay Drilling, LLC, No. CIV A 99-3689, 2000 WL 805230, 2001 A.M.C. 2813 (E.D. La. June 21, 2000).

81 Nicholls v. Petroleum Helicopter, Inc., 17 F.3d 119, 122-123 (5th Cir. 1994) (citing Mobile Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

82 Martin v. Walk, Haydel & Assoc., Inc., 742 F.2d 246, 250 (5th Cir. 1984).

83 Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 626 (1959).

84 Scarborough v. Clemco Indus., 391 F.3d 660, 688 (5th Cir. 2004).

85 Powers v. Bay Liner Marine Corp., 855 F. Supp. 199, 206 (W.D. Mich. 1994); Emery v. Rock Island Boat Works, Inc., 847 F. Supp. 114, 118 (C.D. Ill. 1994); Sudgen v. Puget Sound Tug & Barge Co., 796 F. Supp. 455, 457 (W.D. Wash. 1992).

86 *Scarborough* notwithstanding, the Eastern District of Louisiana issued two rulings in 2016 allowing third party non-pecuniary recovery. One of the two judges later reversed himself, and two others held that *Scarborough* controls.

87 33 U.S.C. § 933(a) (2018).

88 *Id.*

89 33 U.S.C. § 933(b).

90 *Id.*

91 Jacques v. Kalmar Industries, AB, 8 F.3d 272, 274 (5th Cir. 1993); Victory Carriers, Inc. v. Law, 404 U.S. 202, 208 (1971).

92 *Jacques*, 8 F.3d at 274.

93 33 U.S.C. § 933(e).

94 33 U.S.C. § 905(a) (2018).

95 *Id.*

96 *Id.*

97 516 U.S. 199 (1996).

98 Calhoun v. Yamaha Motor Corp. U.S.A., 216 F.3d 338, 351 (3rd Cir. 2000).

99 Felarise v. Cheramie Marine, LLC, No. 09-6355, 2010 WL 375229, at *6 (E.D. La. 2010); In re Plaquemine Towing Corp., 190 F. Supp. 2d 889, 893 (M.D. La. 2002); Liner v. Dravo Basic Materials Co., No. 00-1908, 2000 WL 1693678, at *3 (E.D. La. 2000).

100 46 U.S.C. §§ 30301--30308 (2018).

101 *Compare* 46 U.S.C. § 30104 *with* 45 U.S.C. § 51 *and* 46 U.S.C. § 761.

102 45 U.S.C. § 51; Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501, 508 (S.D.N.Y. 1965).

103 Miles v. Apex Marine Corp., 498 U.S. 19, 31 (1990).

104 45 U.S.C. § 59; Centeno v. Gulf Fleet Crews, Inc., 798 F. 2d 138 (5th Cir. 1987).

105 *See generally* Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 123-124 (1998).

106 *Compare* Hinson v. S.S. Paros, 461 F. Supp. 219, 222 (S.D. Tex. 1978) (allowing recovery for suffering for only the "fleetest seconds.") *with* Ghotra by Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1060 (9th Cir. 1997) (requiring consciousness for an "appreciable length of time" to allow recovery).

107 *See* Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 753 (9th Cir. 1980).

108 Neal v. Barisich, Inc., 707 F. Supp. 862, 867-68 (E.D. La. 1989).

109 Miles v. Apex Marine Corp., 498 U.S. 19, 19, 31 (1990).

110 *Id.* at 21-29 (citing Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)).

111 *Id.*

112 33 U.S.C. § 908(a) (2018).

113 333 F.3d 1216 (11th Cir. 2003).

114 In Re Amtrak "Sunset Ltd." Train Crash, 121 F.3d 1421, 1427 (11th Cir. 1997).

115 *Miles v. Apex Marine Corp.*, 498 U.S. at 36.

116 Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996); Dooley v. Korean Airlines Co., Ltd., 524 U.S. 116 (1998).

117 46 U.S.C. § 30305 (2018).

118 46 U.S.C. § 30307 (2018).

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