UKP&I

WINTER 2019/2020

Bodily Injury News

The journal of the Thomas Miller Americas' Bodily Injury Team

- Defending Against the Reptile Theory
- Preparation is Prevention: Strategies to Avoid Criminal Liability in the Wake of Maritime Death or Injury
- UK Club Bodily Injury Team Presents its Fighting Back Initiative
- Land or Sea: Navigation of Overlapping Regulatory Schemes
- Root Cause Analysis Reports, Privilege Issues and Emerging Law
- Current Status of Punitive Damages in the US

UK P&I CLUB IS MANAGED BY **THOMAS MILLER**

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Bodily Injury News

Bodily Injury News is the bi-annual newsletter of the Thomas Miller Americas' Bodily Injury Team.

The topics it addresses are highly relevant to all our Members worldwide given more than half of the Club's personal injury claims over $100,000 are brought in the American courts.

We welcome your feedback on the topics we cover as well as suggestions on subjects to address in future issues. Please send your comments to any of the Bodily Injury Team.

The information in this newsletter is not legal advice and should not be relied upon as such.

"Fighting Back"

Welcome to the winter edition of the Bodily Injury News.

Our 15th BI Seminar (held the day after our charity golf outing in aid of the Breast Cancer Research Foundation which raised $250k) was very well attended by a cross section of the Club membership and covered a variety of topical issues.

I would like to concentrate on the title of this piece – Fighting Back. We have decided to strengthen our ability to deal with these challenging US cases by adopting a number of changes in how we approach cases in litigation.

a) For any case going to trial, we will now conduct a Jury focus or Mock Trial exercise. These can be expensive but are invaluable in focusing on key issues.

b) Witness Preparation – this is a crucial area where expert assistance will ensure witnesses are properly prepared for depositions or for testimony at trial.

c) We will only use proven and experienced Trial Attorneys to try BI cases. This is a new initiative which recognizes that very few cases actually make it to trial and many of our established preferred maritime attorneys (particularly those outside Florida) have little trial experience. Henceforth any case going to trial will be led by an experienced Trial attorney. We are currently collecting a country wide database of Trial attorneys to be used.

d) We will not tolerate fraudulent claims activity and wherever possible will counterclaim back against any individual or their representative who brings a fraudulent claim.

   We have one action pending now on the west coast where surveillance has clearly indicated that the alleged injury is non-existent. We have adopted a zero tolerance policy on fraudulent claims and are investigating both civil and criminal remedies against any perpetrators.

On a brighter note Matthew Johnston, an attorney, joined our SF office in May and has joined our Bodily Injury Team.

In addition Leanne O'Loughlin joined TMA on November 4th as Regional Director P&I Americas. Leanne is an Irish , English and NY qualified lawyer and spent the previous ten years with another P&I Club, the last seven of which have been in New York. Leanne will be taking over my P&I responsibilities for the delivery of our claims and advisory services for UK Club members in the Americas region, when I retire at the end of February 2020 after 40 years with the UK Club (13 in London, 27 in USA).

I would like to extend my thanks and gratitude to all those companies and individuals who participated in the Thomas Miller Americas annual Play for Pink golf day. In the last four years we have raised $750k for the Breast Cancer Research Foundation.

Photos from this year's event can be found on www.tmacharitygolf.com.

We welcome feedback on the topics we cover in our newsletter and invite you to suggest future topics for both the newsletter and for our Annual Bodily Injury Seminar, please email dolores.o'leary@thomasmiller.com.

Mike Jarrett
President & CEO, Thomas Miller (Americas) Inc.

UK Club Bodily Injury Team Presents its Fighting Back Initiative

At this year's Thomas Miller Bodily Injury Seminar in New Jersey, the UK Club Bodily Injury ("BI") Team shared its "Fighting Back" initiative with Members. **Matt Johnston** explains the key takeaways from the presentation.

The BI Team emphasized its depth of experience and its uniqueness among P&I Clubs. Notably, the BI Team consists of eight attorneys located in New Jersey, San Francisco & London and boasts over 90 years of collective experience in handling bodily injury matters. The BI Team also highlighted how it functions as a collaborative group. The Team holds bi-monthly meetings to review and strategize about cases, particularly cases with high dollar values or complex issues, and to analyze trends in the maritime industry. Moreover, any case going to trial or arbitration must also go through the Team's request for trial authority process which involves gathering input from all of the team members before proceeding to trial or arbitration.

The reasons for the BI Team's Fighting Back initiative are clear. The UK Club is seeing more bodily injury cases being filed with higher demands and increasing settlement values. Over the last few years, there have been several successful plaintiff's firms getting involved in big maritime cases all over the United States. In fact, the plaintiff's bar as a whole is very well organized. The Team is aware of seminars and information sharing exclusively for plaintiff's lawyers on such topics as the Reptile Theory, a topic that Jerry Hamilton discussed in his presentation at the Seminar. The plaintiff's firms will also routinely mock try their cases before going to trial.

This changing litigation landscape means that the BI Team must be focused on pushing back against these trends. At the pre-trial phase, the Team is looking to identify cases that can be settled very early on. The Team will also take an offensive position and file counter claims against plaintiffs if there is proof of fraudulent misconduct. In discovery, the Team is using surveillance, when possible and will videotape plaintiff's deposition. When trial appears imminent, the Team will conduct mock trials, jury focus exercises or online jury research. The Team also stressed the importance of having appropriate trial attorneys with courtroom experience, and even having appellate counsel involved in the case. ■

The Thomas Miller Bodily Injury Team consists of:

Dee O'Leary (NJ);
Julia Moore (NJ);
Damon Hartley (NJ);
Taylor Coley (NJ);
Jennifer Porter (SF);
Matthew Johnston (SF);
John Turner (Lon);
Robert Shababb (NJ-TT cases).








Land or Sea: Navigation of Overlapping Regulatory Schemes

Dan Fitzgerald of Freehill, Hogan & Mahar in New York presented an interesting presentation titled Where Land Meets Sea: The Application of Land-Based Regulatory Schemes to Ships. **Damon Hartley** provides a summary of the issues.

OSHA or Coast Guard: Is the Ship Inspected?

Both the United States Coast Guard and the US Occupational Safety and Health Administration (OSHA) prescribe and enforce standards and regulations affecting the occupational safety and health of seamen aboard ships. Therefore, determining which US regulatory scheme applies to a ship—whether OSHA or Coast Guard—is not a clear cut proposition. The key distinction with respect to which regulatory scheme applies is whether the ship is "inspected" or "uninspected". An "inspected" is one inspected by the Coast Guard and that has been issued a Certificate of Inspection. This may apply to passenger, cargo, and tank ships. If the ship is considered to be an inspected ship, it is subject to regulations from the Coast Guard. While OSHA has a general statutory authority to assure safe and healthful working conditions for working men and women in the US, it is precluded from regulating working conditions addressed by another agency's regulations.

According to a Memorandum of Understanding between OSHA and the Coast Guard, the Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce regulations affecting the occupational safety and health of seamen aboard inspected ships. OSHA may exercise authority over the working conditions of employees other than seaman exposed to hazards while working on inspected ships. This includes longshoring operations, shipbuilding, ship repair, shipbreaking operations or construction workers. OSHA may also cite employers for working conditions on uninspected ships when such violations are not specifically addressed by a Coast Guard regulation. The Coast Guard does retain authority over some hazards on uninspected ships. These include lifesaving equipment, fire extinguishers, backfire flame control, and ventilation.

Type of Ship or Structure	U.S. Inland Waters	State Territorial Seas	Outer Continental Shelf
Inspected Ship	USCG for Seamen	USCG for Seamen	USCG for Seamen
	OSHA for Employees other than Seamen	OSHA for Employees other than Seamen	OSHA (no coverage)
Uninspected Ship	USCG for Equipment and Safety Checks	USCG for Equipment and Safety Checks	USCG for Equipment and Safety Checks
	OSHA for Employees, including Seamen	OSHA for Employees, including Seamen	OSHA (no coverage)
Facility or Structure	USCG (no coverage)	USCG (no coverage)	USCG and Mineral Management Service
	OSHA provides exclusive coverage	OSHA provides exclusive coverage up to territorial seas limit	OSHA for safety and health hazards not covered by other agency regulations

Seaman's Protection Act

Another way that OSHA governs employment activity on board ships is through the US Seaman's Protection Act (SPA). The SPA is a whistleblower provision which prohibits employers and other persons from retaliating against seamen for engaging in "protected activities" pertaining to marine safety compliance. One of the primary goals of the SPA is to facilitate the Coast Guard's enforcement of marine safety laws and regulations. The SPA applies to US flagged ships or any ship owned by a citizen of the US. The factors for determining citizenship are the location of the principal place of business, the base of operations and the citizenship of controlling shareholders.

Some of the acts which are protected by the SPA are providing information relating to a violation of maritime safety to the Coast Guard or other federal agency, testifying in a proceeding to enforce a maritime safety law, refusing to perform duties under apprehension of serious injury if the seaman has requested a correction of the dangerous condition and cooperating with a safety investigation by the Coast Guard or National Transportation Safety Board. Seamen can file a complaint with OSHA if they are subjected to a retaliatory action due to making a whistleblower complaint. Such actions may include firing, demoting, disciplining and refusing to rehire seamen. Allowable remedies which can be awarded to a whistleblowing seaman are back pay, job reinstatement, compensatory damages, attorney fees and punitive damages up to $250,000.

Application of the Americans with Disabilities Act to Passenger Ships

The Americans with Disabilities Act (ADA) prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." In the landmark decision Spector v. Norwegian Cruise Lines, the United States Supreme Court held that the ADA applies to foreign-flag cruise ships in US waters. Following the Spector decision, the US Department of Transportation issued regulations to ensure nondiscrimination on the basis of disability by passenger ship operators. Under these regulations, a passenger ship must make reasonable modifications to avoid discrimination on the basis of disability unless modifications would fundamentally alter the nature of the service offered, must furnish auxiliary aids/services so that a disabled person has an equal opportunity to participate and must provide effective communication with passengers who have vision and/or hearing impairments. The regulations also state that a passenger ship operator must not discriminate against a disabled person, must not require a disabled person to accept unrequested special services and cannot exclude a disabled person from the benefit of any transportation/service available to others. ■

Dan Fitzgerald is a Partner with Freehill Hogan & Mahar LLP in New York. He is a graduate of SUNY Maritime College where he obtained his Unlimited Tonnage Deck Officer's License. Dan then served with the U.S. Coast Guard for over 20 years, regularly performing marine casualty investigations and ship inspections. He continues to serve as a Captain and is currently serving at US Coast Guard Headquarters in Washington, D.C. as the Senior Reserve Attorney (RJAG) for the entire Coast Guard. Dan regularly advises his ship interest clients in various nationwide and foreign jurisdictions on personal injury, wrongful death, oil spills, casualties, and criminal/administrative investigations.

Root Cause Analysis Reports: Privilege Issues and Emerging Law

Liam O'Connell, of Farrell Smith O'Connell LLP, presented on Root Cause Analysis Reports, Privilege Issues and Emerging Law. **Taylor Coley** highlights some of Liam's recommendations.

After an onboard incident, most shipowners perform a reactive root cause analysis, which is then internally used as a tool to help discover the why's and how's – and prevent them from happening again. Typically, shipowners must balance the desire to be deeply self-critical to effectively ensure change, with the need to protect their interests from inevitable litigation. Liam spoke to Members at the Bodily Injury Seminar about ways to ensure root cause analysis reports proactively, rather than reactively, seek to address issues, and about a recent litigation victory involving protection of a root cause analysis report from litigation disclosure.

Tip: A more deliberate, thorough and proactive management approach will help ensure root cause analysis reports prevent future problems by finding the true cause of an incident.

Proactive Management	Reactive Management
Goal: Prevent Problems from Occurring ▪ Speed is not as important as accuracy and precision of diagnosis ▪ Focus is on addressing the real cause of the problem, rather than its effects	**Goal: React Quickly in Crisis Only** ▪ Treating the symptoms of the problem ▪ Focus is on alleviating the effects of the problem as soon as possible

Four steps involved in Root Cause Analysis:

- Identify and describe clearly the problem.
- Establish a timeline from the normal situation up to the time the problem occurred.
- Distinguish between the root cause and other causal factors (e.g., using event correlation).
- Establish a causal graph between the root cause and the problem.

Root Cause Analysis Report Suggestion: Stick to the Facts to Avoid Unforeseen Legal Issues!

Unnecessary Opinions

- "Watchstander was talking about his girlfriend when he should have been keeping watch!"
- "The manhole cover flipped open because we didn't want to spend $60 for a hinge."

Facts Only

- "The VDR did not capture any comments about oncoming ."
- "The manhole cover flipped open when stepped on."

Specifically, Liam addressed the "Self-Critical Analysis Privilege" in the context of his recent litigation *In re Block Island Fishing, Inc*. 323 F.Supp 3d 158 (D. Mass. 2018). In that case, a small lobster fishing boat, the HEDY BRENNA, collided with an LNG carrier, the BW GDF SUEZ BOSTON ("GDF SUEZ") in a ship traffic separation scheme off the coast of Massachusetts. The GDF SUEZ sustained a disproportionate amount of damage in relation to the fishing ship, and predictably the fishing ship filed a limitation action in the United States District Court for the District of Massachusetts.

After the collision, the GDF SUEZ returned to Boston for temporary repairs and a Superintendent from the ship-owning-company immediately came to the ship and began their internal investigation, pursuant to their company's Safety Management System ("SMS"). When the owners of the GDF SUEZ entered the limitation action to claim against the fishing ship, counsel for the fishing ship tried to force the GDF SUEZ's owners to disclose their Root Cause Analysis Report. Liam, acting for owners, moved for a protective order to prevent, or at least mitigate, disclosure under the Self-Critical Analysis Privilege.

The Self-Critical Analysis Privilege is a qualified privilege that aims to protect certain self-critical, evaluative analysis from discovery. Precedent from the District for the District of Columbia has described the privilege's intent as "to protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies for the purpose of improving health and safety." See *Felder v. Wash. Metro. Area Transit Auth*., 153 F. Supp. 3d 221, 224–25 (D.D.C. 2015) (emphasis added).

Courts in Massachusetts use a four-part test to determine when and where to apply the privilege. (1) The materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs' need for such materials, courts have denied discovery only where the policy favoring exclusion has clearly outweighed plaintiffs' need.

Liam, as counsel for GDF SUEZ, argued that Part 1 applied here because the internal investigation was conducted in accordance with the Company's obligations under an international treaty. He noted that the GDF SUEZ was Norwegian-flagged and Norway has adopted SOLAS. Further, SOLAS makes the ISM Code mandatory. The ISM Code requires companies to have safety management systems (SMS) that comply with the Code's requirements. Therefore, he argued, any internal investigation report, prepared in accordance with the Company's SMS, was actually a mandatory governmental report, entitling its contents to privileged protection.

Regarding Parts 2 and 3, Liam argued that the Company only sought protection for subjective content, and did not object to disclosure of objective data and facts by pointing out that VDR data had already been shared with opposing counsel and that the limitation action Plaintiff (aka the owners of the HEDY BRENNA) had been able to depose relevant crewmembers of the GDF SUEZ to obtain objective facts.

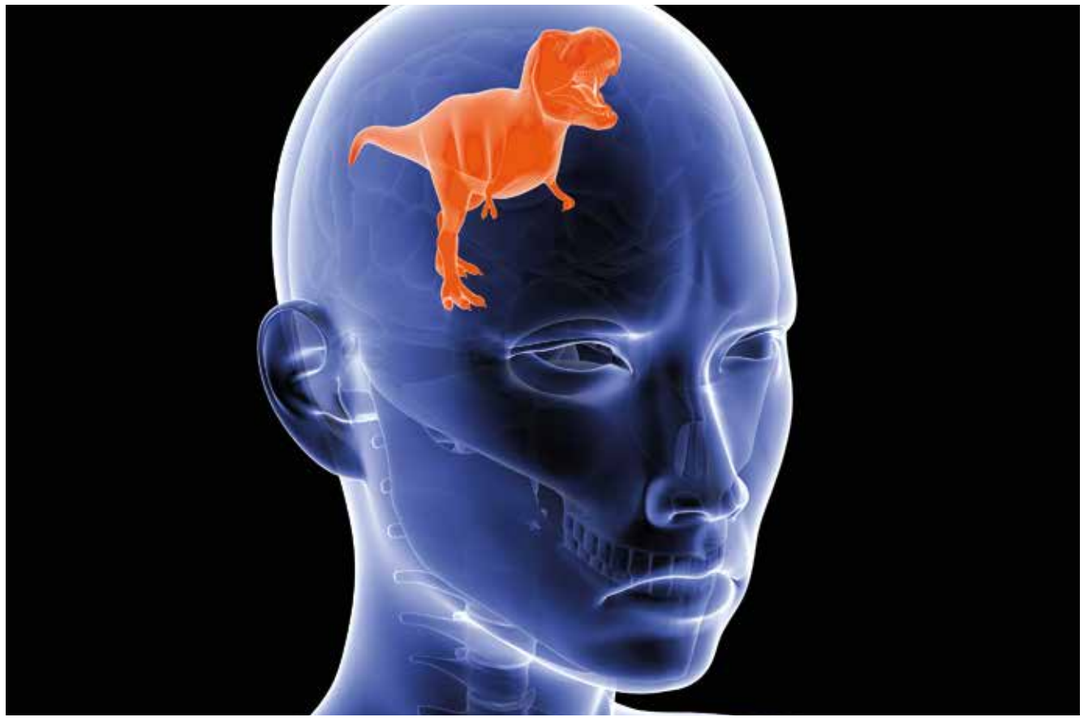
Finally, Part 4 elicited a public policy argument that was bolstered by other areas of law. For example, there is already extensive analogous precedent concerning withholding evidence of subsequent remedial measures from trial so as to not discourage companies from taking steps in furtherance of added safety. Essentially, courts are reluctant to allow a company's efforts to investigate an incident, and prevent it from reoccurring, to be held against them lest companies decide that investing in safety is not worth the possible future legal risk. Thus, the general public has a strong interest in preserving the free flow of self-critical analysis.

Ultimately, the Court in *In Re Block Island Fishing* allowed the GDF SUEZ to redact its root cause analysis report under the Self-Critical Analysis Privilege, but added a fifth part to the privilege's test: the document at issue "must have been prepared with the expectation that it would be kept confidential." Liam explained that his client in this matter was contractually required to produce their root cause analysis report to several parties-charterers and "Oil Majors". However, he was able to argue that because the report was only submitted to those parties who shared contractual privity with GDF SUEZ's owner, and only because of an obligation to do so, that the report remained "confidential".

Liam ended his presentation with a healthy dose of reality. Though the General Maritime Law of the U.S. recognizes the Self-Critical Analysis Privilege, it is not uniformly enforced or recognized. Nevertheless, defense counsel around the country have been working to present the matter to courts and secure precedentially positive results aimed at turning the tides. ■

Liam O'Connell is a Partner with the law firm of Farrell Smith O'Connell LLP, serving all New England ports. His practice includes marine insurance defense, criminal defense, regulatory compliance, oil pollution and environmental law.

Liam graduated from Massachusetts Maritime Academy with a BS in Marine Transportation and a 3rd Mates Unlimited USMM License. He served as a Commissioned Officer in the USCG, with various assignments. Notably, he served as a Marine Inspector in Houston, TX and as Officer in Charge of a US Navy small boat anti-terrorism detachment at US Submarine Base New London, CT.



Defending Against the Reptile Theory

Jerry Hamilton of Hamilton, Miller & Birthisel in Miami explained the "Reptile Theory" and how to combat it. **Dee O'Leary** summarizes Jerry's talking points.

The Reptile Theory is a litigation strategy developed by two plaintiffs' attorneys, David Ball and Don Keenan.

These two lawyers have transformed the way that testimony is solicited from key witnesses both in deposition and during trial. The lawyers hold seminars and have written several books espousing their theory, which capitalizes on the "reptilian or primitive brain" and attempts to trigger the flight or fight response. Essentially, the trick is to get the juror to think not just about the facts of the individual case, but on the impact that the case could have on themselves and the community. It is not about a single past event, but about preventing present and future risks. It is about what could happen to the jurors themselves.

The questions go something like this…

Q. When there is a high rate of crime, a store manager must react to protect the patrons from needless harm and danger, correct?

Q. You agree it is a responsibility?

Q. If it's a responsibility, it's also a requirement, correct?

Q. This requirement or rule is intended to keep the public safe, correct?

Q. So you would agree with the safety rule that the management must react to protect patrons from needless danger?

The questions work in absolutes. They start with some very basic concepts regarding safety or danger that the witness agrees to without thinking about where the questions might be going. Next thing they know they are agreeing to statements about their very own company and what they did not do that they should have done.
It often goes something like this:

Q. You would agree that safety must be the company's top priority?

Q. Because safety is your company's top priority, employees who are being unsafe cannot be tolerated?

Q. If you are unsafe and someone is hurt, then the company is to blame?

The questions threaten the witness's sense of integrity and the witness does not want to be viewed as hypocritical, so the witness either:

Admits (flight response)
OR
Tries to wiggle out (flight response)

Unfortunately, neither of these responses work and only feed the beast that is the reptile!

Jerry reported that the Reptile Theory is most effective in the defendant's 30 (b) (6) deposition or the deposition of the defendant's fact witness.

Jerry Hamilton provided some helpful information so that we are able to fight back and prepare our witnesses for this tactic.

Jerry recommends that you:

1. Explain the Reptile Theory to your defense witnesses.

2. Explain the motivation behind the questions, essentially the "trap."

3. Show the witness how to protect themselves against the safety rule questions by rejecting the made up safely rules.

The most important thing to do was to qualify the answer to the reptilian questions and be able to explain why. Below are two examples Jerry provided to show how to respond to the question without falling into the reptile trap.

Q. Do you agree that if a manufacturer makes a product that is defective and someone is injured because of that defect, then the manufacturer

is responsible for the injuries/losses caused?

A. It really depends on the facts and circumstances of the event, including whether the injured person was using the product appropriately.

And another example:

Q. Do you agree that a manufacturer assumes the responsibility for the safety of consumers using its products?

A. It depends on the circumstances, but it is also fair to generalize that consumers have responsibility for how and when they use products.

Jerry also mentioned that defense counsel should consider making motions in limine, planning voir dire. Jerry cautioned that you should not try to rebut each of the plaintiff's reptile allegations, just focus on a few important areas. The important thing is to prepare your witnesses in advance so when you see it coming, you can stop it from happening. ■

Jerry is a Board Certified Civil Trial Lawyer and is also Board Certified in Maritime Law. He has been nationally recognized as one of the Top Ten Defense Lawyers in the United States in addition to numerous other awards and accolades.

For the past 25 years, Jerry has dedicated his practice to defending his clients in complex litigation matters, such as being lead trial counsel in the sinking of the El Faro and being Florida Trial Counsel for BP in the Deepwater Horizon Claims.

Preparation is Prevention: Strategies to Avoid Criminal Liability in the Wake of Maritime Death or Injury

Maritime criminal prosecutions for injuries and deaths are on the rise. **Greg Linsin** of Blank Rome LLP offered our Members some time-tested strategies to minimize that exposure when the worst happens. **Julia Moore** summarizes his recommendations.

The time to prepare your ship officers, crew and other company employees for an investigation by the US Coast Guard is not during the aftermath of an on-going casualty. In recent years, US law enforcement has demonstrated an increased willingness to file charges under the Seaman's Manslaughter Statute, which makes a mariner or corporate employee *criminally* responsible for the death of a seafarer, even when the death was the result of simple negligence. The potential for criminal liability raises the stakes and makes the proper training of mariners and shoreside personnel a necessary part of ship operations. Despite this, many SMS and Ship Response Plans do not address casualties involving bodily injury or death, nor are ship crew and others trained to deal with the US Coast Guard in a way that avoids or minimizes potential criminal liability. Given the potential consequences, Gregory F. Linsin, Esq. of Blank Rome, LLP shared some strategies with our Members on casualty preparedness and interactions with investigators.

As a general principle, planning and training before an incident occurs are essential to a smooth casualty response and can protect against inadvertently creating additional risks. First, have an effective casualty management plan in place which clearly delineates procedures for shipboard and shoreside personnel, addresses a full range of contingencies, cross-references the ship response plan where there is overlap, contains a list of up-to-date contact details for key personnel and which has a procedure for identifying weaknesses or making improvements. Second, train personnel on the casualty management plan. Third, create a culture of compliance and assign a high-level employee responsibility for overseeing compliance.

To avoid potential criminal liability, advance training of personnel is critical. Greg Linsin recommends educating personnel on what they can expect when the US Coast Guard boards to investigate a death or injury and how to properly respond. Personnel should be made aware that US Coast Guard will take statements and gather evidence, including ship books, records and other evidence which can be made available to criminal investigators.

Personnel should be trained in advance on the following:

- Never alter or destroy records or other evidence.

It is a felony to falsify or destroy a document or evidence and it subjects both the person and the Owners to prosecution for obstruction of justice. In addition, ship crew must also allow the investigators to remove official books, logs records etc. from the ship as part of the investigation.

- Personnel are not required to speak with investigators if they do not wish to do so and that they have the right to consult with counsel first.

Ensure that all personnel know that they are not required to provide a statement to a government investigator and that the person has the right to consult with counsel first. This is especially important when the crew are foreign nationals who may not be familiar with US laws and protections. Advise that a lawyer may (or may not) be provided to individual personnel. It is critically important that if a crewmember decides to speak to an investigator, the person must tell the truth.

- All statements to government investigators must be truthful.

Lying to a government investigator is a crime in itself (felony) and can lead to an obstruction of justice charge for which the employee and the company may be liable.

- Never interfere with the investigation by encouraging someone else not to talk to an investigator or to lie to an investigator or to alter or destroy evidence.

Again, causing another person to destroy evidence of lie to a government investigator can result in obstruction of justice charges.

This type of conduct can quickly turn an administrative or civil issue into a criminal matter. Both shipboard and shoreside personnel should also be made aware that hindering an investigation, hiding records, altering documents, or lying to investigators is not in the Owners' or Managers' best interests, and that it will not "help" the employer. Owners and Managers should make it clear that they do not want any employee to impede or interfere with an investigation. It is important for Owners and Managers to know that they can be deemed liable for the conduct of their employees.

Use of a Crew Member Advisory to confirm that crew, officers and personnel understand their rights and obligations is also a valuable tool that Members should consider.

While the interests of the vessel Owners are better protected by calling counsel and the Club immediately after an incident so that an attorney appointed for their interests can attend the vessel, assist with the response and investigation, interview or debrief the crew, collect and review records and coordinate communications, Members should still be mindful of the important role that crew and personnel play in protecting against unnecessary criminal charges. ■

Gregory F. Linsin is a partner with the law firm Blank Rome LLP. Mr. Linsin concentrates his practice on white collar defense, environmental criminal litigation, internal corporate investigations, casualty investigations, and compliance counseling, with a focus on the commercial maritime industry. Mr. Linsin represents corporations and individuals in regulatory investigations, grand jury investigations, and the defense of criminal prosecutions involving environmental and safety laws and regulations, government contracts, and related fraud statutes. Before joining Blank Rome, Mr. Linsin served for 25 years with the Department of Justice, including 17 years with the Environmental Crimes Section. He served as both Assistant Chief and Special Litigation Counsel with the Environmental Crimes Section where he managed and prosecuted complex environmental criminal cases, including the criminal prosecution of an oil major in connection with the grounding of the M/T EXXON VALDEZ, and a variety of cases involving intentional MARPOL violations.

This Crewmember Advisory or Checklist can be used by a Member's attorney or risk manager when advising crewmembers of their rights during a criminal investigation. The checklist should be followed exactly and should be translated word for word if necessary. The crew/officers should be asked to sign and date a copy acknowledging receipt.

CREWMEMBER ADVISORY

Vessel:

Date:

Port:

1. At any time, representatives from the United States Coast Guard, or some other law enforcement agency, may come on board your vessel and attempt to question you about an investigation they are conducting.
2. If you are approached by a government representative on board your vessel who wants to ask you questions or conduct an interview, you have the right to request proper identification from that person. You should record the name of the person who approaches you.
3. It is important for you to understand that if you have any concerns about the questions you are being asked by the United States Coast Guard representative, or some other law enforcement agency, or questions about the interview process, you have the right under the laws of the United States and perhaps under the Flag State to remain silent and to explain that you want to consult with a lawyer.

   Such a lawyer will likely be appointed by the company. It is your decision to request the assistance of a lawyer.
4. Such a lawyer will protect your individual rights and give you guidance on whether to answer questions or agree to be interviewed by the United States Coast Guard or some other law enforcement agency. You also have the right to have your lawyer present during any questioning or interview process.
5. If you agree to answer questions or participate in the interview process, the following is important to remember:
   i. It is a serious and separate crime to lie to the United States Coast Guard or other law enforcement officer. **Accordingly, make sure that if you do say something, it is the truth**;
   ii. Answer directly and honestly. Do not guess about thinks you do not know; and

   iii. If English is not your first language, you have the right to request a translator before you answer any questions or are interviewed.

Remember: <u>if</u> you decide to answer questions, you must tell the truth.

6. If you or other crewmembers have any questions about how to respond to questions or about the implications of your answers, you should request an opportunity to consult with an attorney.
7. During an investigation, the United States Coast Guard or other law enforcement officers may remove documents or other things from the vessel, If this happens, be sure to request an inventory of what is taken. You should never use force or attempt to physically prevent law enforcement from taking documents or other items from the vessel or from searching the vessel.
8. Under no circumstances should you tamper with, hide or destroy any vessel records, documents or evidence aboard the vessel.
9. Normally, in order to remove any personal belongings of a crewmember, the law enforcement officers are required to obtain a search warrant.

   You have the right to consult with counsel if the United States Coast Guard or any other law enforcement agency attempts to remove your personal belongings.
10. It is the strict policy of both the vessel owner and manager to cooperate to the extent reasonably possible with Port State Control Inspections, including those conducted by the United States Coast Guard. While no crewmember is required to give a statement or agree to an interview by representatives of the United States Coast Guard or another law enforcement agency, that if you decide to speak with the United States Coast Guard or some other law enforcement agency, you must tell the truth at all times. If you fail to tell the truth:
    i. You will be deemed to be acting without authority and outside the bounds of your employment contract;
    ii. You acknowledge that any such untruth would be intended to benefit only you and not the company; and
    iii. Your employment with the company will be immediately terminated.

I sign my name below in agreement that I fully understand and agree with the above paragraphs 1 – 10, which have been read and explained to me and, if necessary, translated.

Crewmember:

Attorney:

Witness:

Current Status of Punitive Damages in the US

We invited **Markus Oberg** of LeGros, Buchanan & Paul to talk to the attendees of October's Bodily Injury Seminar about the recent US Supreme Court decision on punitive damages, *Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019), and where that decision has left our Members on their journeys through US waters. **Jennifer Porter** reports on the current status of U.S. law.

Markus is intimately familiar with this case as he briefed and argued the matter in the lower courts, assisted in selecting appellate counsel and guided them through the history of exemplary damages in maritime law.

As most of the maritime community is aware, on June 24, 2019, the Supreme Court held in a 6-3 opinion that a Jones Act seaman could not recover punitive damages for the unseaworthiness of a ship. The decision was much anticipated as awards for punitive damages are more frequent and often higher in the U.S. than anywhere else in the world. Prior to *Batterton*, the type of actions for which maritime employers could be potentially subject to punitive damages was uncertain. While plaintiffs' attorneys were adding demands for punitive damages to their complaints almost as a matter of course, several states such as California continue to legally prohibit insurance for exemplary damages based on public policy grounds. Many international and domestic insurance policies follow suit, specifically excluding cover for punitive damages. Thus, maritime businesses often found themselves in treacherous and unprotected waters. We asked Markus to look into how we got to the *Batterton* decision, what it means and where we go from here.

The Road to *Batterton*

The threat of exemplary damages in U.S. maritime law has a long and complex history. Some argue that the modern Anglo-American doctrine of punitive damages dates back to and were available to seafarers from at least 1763. However, in 1990 the Supreme Court held that punitive damages were not available in general maritime law wrongful death claims. *See Miles v. Apex Marine Corp*., 498 U.S. 19 (1990). This provided the industry a temporary reprieve as it became largely accepted that punitive damages were not an available remedy under maritime law. This all changed twenty years later with the Supreme Court decisions of *Exxon Shipping Co. v. Baker*, 554 U.S. 471, in 2008 and *Atlantic Sounding Co. v. Townsend*, 544 U.S. 404, in 2009. These two decisions loosened the moorings on punitive damages allowing them to drift back into shallow waters. In *Atlantic Sounding*, the Court found that punitive damages were available to a Jones Act seaman whose employer arbitrarily and capriciously failed to

pay maintenance and cure. The *Exxon v. Baker* decision, which arose from the infamous 1989 Exxon Valdez oil spill, confirmed that punitive damages were available under maritime law but had to be award in a 1:1 ratio with compensatory damages. That ratio soon became a thing of the past with present day punitive damage awards far exceeding actual damages. For example, in 2012 a Washington State court permitted an award of $1.3 million in punitive damages on top of $37,420 in compensatory damages. *See Clausen v. Icicle Seafoods, Inc*., 174 Wn. 2d (2012).

The Decision

The only issue presented in *Batterton* was to settle a conflict among the Circuits as to whether punitive damages are available for a Jones Act seaman when a ship owner breaches the strict liability warranty of seaworthiness of the ship and its appurtenances. The Circuit split was between a 2014 Fifth Circuit *en banc* decision, *McBride v. Estis Well Serv., LLC*, 768 F.3d 382 (5th Cir. 2014), which held that punitive damages were not an available remedy and the Ninth Circuit's 2018 *Batterton* decision, which held that they were. The Supreme Court ultimately sided with the Fifth Circuit and held that punitive damages are not an available remedy in a Jones Act unseaworthiness action. In the written opinion, the Supreme Court paid tribute to the age-old adage that seamen are entitled to a special solicitude. Nevertheless, the Court noted that this "doctrine has never been a commandment that the maritime law must favor seamen whenever possible." Rather, recognizing sailors as wards of admiralty "has only a small role to play in contemporary maritime law. It is not sufficient to overcome the weight of authority indicating that punitive damages are unavailable."

With that in mind, the Court distinguished between the availability of punitive damages in willful failure to pay maintenance and cure claims and unseaworthiness claims because there is an abundance of decisions (including *Atlantic Sounding*) holding that punitive damages are an available remedy with respect to maintenance and cure. In light of the lack of historical evidence of punitive damage awards in unseaworthiness claims, the Court held fast to its reasoning in *Miles* and found that neither legislative intent nor jurisprudential policy required a departure from historical precedent. The opinion concluded that allowing punitive damages in unseaworthiness claims would "create bizarre disparities in the law […], place American shippers at a significant competitive disadvantage, [and] would discourage foreign-owned ships from employing American seamen." In doing so, the Court ended a decade of uncertainty.

So where does this leave us? While the decision resolved a split between the Circuits and provided some predictability for businesses in the maritime industry, the fate of several other maritime-related causes of action may still be up for debate. The decision seems to confirm that punitive damages may be available in failure to pay maintenance and cure claims, and pollution claims but are not available in Jones Act negligence claims, seaman's personal injury claims against third parties, and claims brought pursuant to a maritime contract. However, uncertainty still remains with respect to claims brought by longshoremen pursuant to the Longshore and Harbor Workers' Act and passenger injury claims. While we still do not have clarity on several types of maritime claims, one thing remains certain- the U.S. Supreme Court again confirmed the need for uniformity in maritime law and confirmed that there must be historical precedent of allowing such a remedy. Where the courts go from here, only time will tell! ■

Markus is a Seattle-based maritime lawyer who defends claims involving the Jones Act, occupational disease, passenger injuries, cargo loss, contamination, as well as subrogation, liens and vessel arrest actions, and environmental claims, including property clean-up and remediation, and spill response. He also serves as general counsel for the Washington State Maritime Cooperative; and is admitted to practice in the state and federal courts of Washington, Alaska, and Oregon, including the U.S. Court of Appeals for the Ninth Circuit. Markus grew up in Sweden, was pre-med at the University of California, Irvine, and then spent 10 years in the insurance industry—underwriting and managing marine claims throughout the U.S. He studied law at night and received his J.D. from Seattle University School of Law in 2003.

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Thomas Miller (Americas) Inc

New Jersey
Harborside Financial Center, Plaza Five, Suite 2710,
Jersey City, N.J. 07311, USA
T +1 201 557 7300
E newjersey.ukclub@thomasmiller.com

San Francisco
44 Montgomery Street, Suite 1480,
San Francisco, California 94104, USA
T +1 415 956 6537
E sanfrancisco.ukclub@thomasmiller.com

UKP&I

New Jersey

Dee O'Leary
Senior Claims Director

+1 201 557 7402
+1 201 912 7183
dolores.o'leary@
thomasmiller.com

Taylor Coley
Claims Executive

+1 201 557 7330
+1 201 885 9132
taylor.coley@
thomasmiller.com

Julia Moore
Vice President

+1 201 557 7433
+1 201 912 7170
julia.moore@
thomasmiller.com

Damon Hartley
Senior Claims Executive

+1 201 557 7333
damon.hartley@
thomasmiller.com

San Francisco

Jennifer Porter
Senior Claims Executive

+1 415 343 0113
+1 415 203 0532
jennifer.porter@
thomasmiller.com

Matthew Johnston
Claims Executive

+1 415 343 0122
+1 415 866 4173
matthew.johnston@
thomasmiller.com