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Asserting our right "...to petition the Government for redress of grievances."

Amendment 1, U.S. Constitution, Dec. 15, 1791

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Stacked Deck: Death on the High Seas

Rusty Smith was working as a first mate on a freighter in Alaska when a pallet jack ran over his foot, breaking his big toe. Smith, a 10-year veteran in the merchant marine who has also worked on crab boats, trawlers and tugs in Alaskan waters, toughed the injury out until arriving in Dutch Harbor on Jan. 5.

At the hospital, doctors discovered an infection and put the 46-year-old Ballard, Wash., resident on an intravenous drip of antibiotics and put his foot into a whirlpool filled with betadine solution. Smith wanted the physician treating him to allow him to go on light duty, so that he could earn a living. But the doctor declared him unfit, gave him a pair of crutches and told him to return home to Ballard for further observation and treatment.

"The doctor said, "You could lose your toe or the lower part of your foot," Smith recalls.

It was then Smith found out just how tough life can get for injured, out-of-work seamen. Although the company he was working for is on the hook for Smith's medical bills, it will only have to pay a fraction of his living expenses while he's unable to work.

A shore-based employee could expect to get up to two-thirds of his income while out on workers' compensation, But under the Jones Act – a law governing maritime injuries – Smith will be lucky to get \$35, a day. The act says he is entitled to maintenance (the cost of room and board for the time he would have been out at sea) and cure (the cost of his medical bills).

It may sound good, in theory, but the reality is that boat owners and insurance companies typically end up spending very little for maintenance and may even cut corners when it comes time to pay for the cure.

Smith says that the company he worked for is trying to get him to accept \$20 a day for maintenance, although under its typical contract, an officer would get \$35. Smith, who was working without a contract, has hired a lawyer. As parsimonious as the \$20 may seem, it's typical for the industry. Payouts for maintenance in the United States generally range from \$8 to \$20 a day.

Over the long term, lawyers explain, Smith may be entitled to more than just the maintenance and cure if he is able to prove the pallet jack was poorly maintained. In instances where a seaman can prove unseaworthiness or negligence on the part of the boat owner, he can sue for emotional pain and suffering and for all of the lost wages he suffered while out of work – in the latter case, a right not typically accorded to shore-based employees under state-run workmen's compensation programs.

Additionally, if the injury is permanent, a seaman is entitled to recover the difference between his income as a seaman and his income in his next line of disabled, the seaman is entitled to full wages. But recovering these payments can take months or years, which makes the dependence on maintenance payments from insurance companies so important to injured seamen.

"A seaman cannot have a roof over his head or survive on \$20 a day anywhere in the U.S.," says Smith's lawyer, Seattle-based Anthony Urie. "Maybe in Mexico, but not in the U.S."

But if it seems harsh that an injured seaman is expected to make-do on \$20 a day, God forbid he or she should get killed at sea. If he is unmarried or has no children, his parents and siblings get nothing.

Indeed, while under U.S. maritime law a vessel's owner or insurer may be forced to compensate a

seaman who survives an accident, either may get away scot-free if he dies. The reality is this: The death of a fisherman with no wife or children costs a vessel less than an amputated pinky. "There's a saying among marine insurers," says David Anderson, a partner in the Boston-based maritime law firm, Latti and Anderson. "If you're going to hurt him bad, make sure he dies."

The law largely responsible for this state of affairs is called the Death on the High Seas Act. The 1920 law stipulates that the survivors of seamen (a legal category that includes fishermen) who die offshore as a result of an accident are entitled to sue for monetary damages and for the conscious pain and suffering of the seaman before he died. If the survivors prove that the death was the result of negligence or unseaworthiness, they are entitled to compensation for the terror of dying at sea and the financial support the seaman would have provided to them if he hadn't died.

"The damages to the wife are pre-death conscious pain and suffering and loss of income," says Carolyn Latti, of Latti and Anderson. "If he has kids they get what we call 'loss of nurture and guidance' to age 18."

Siblings and parents who suffer the loss of a loved one at sea get nothing unless they can prove the victim gave them financial support. Although relatives can get millions in the loss of a loved one in an accident ashore, U.S. maritime law recognizes no emotional component in the loss of a husband, father, or brother.

Insurance companies and boat owners have been known to go to great lengths to undermine the claim of financial support, lawyers familiar with such cases say. If the victim was a smoker, a heavy eater or wore expensive clothes, the insurance company will argue that the cost of these should be deducted from his income, says Steve Ouellette, a Gloucester-based maritime lawyer whose practice is for the most part devoted to fishermen's issues.

Urie agrees that insurers play hardball. "I represented a fellow who died on the Aleutian Enterprise," he says, referring to a catcher-processor that capsized in the Bering Sea in 1990. "He hadn't been paying child support regularly, so, the insurance company told his family, 'You can't make the argument you lost anything.'"

Urie was able to obtain a settlement for the seaman's survivors by demonstrating that in cases of non-payment of child support the state steps in, makes payments and then goes after non-payers, but the strategy demonstrated just how aggressive insurance companies are. "They try to knock down damages," Urie says.

The Death on the High Seas Act was amended in 2000 following a series of aviation disasters in the 1990s that took place over the water. When families discovered the law deprived them of the right to be compensated for their grief at the loss of their loved ones, they pressured Congress to amend it, giving them the right to sue for non-pecuniary damages – "the loss of care, comfort and companionship."

The straw that broke the camel's act, legislatively, with respect to aviation disasters and the high seas act, was the crash, in 1996, of TWA Flight 800 in the waters off Long Island. Sixteen children from Pennsylvania, on a school trip, were among the 230 victims. The children were held as having died instantaneously, and as minors were seen as having contributed nothing to family income. Nonetheless, the notion their relatives were not entitled to compensation seemed indefensible, if not shocking.

"There is something wrong when a shipping law dating back to 1920 keeps these families from having their day in court and, by limiting compensation to pecuniary losses, tells them that their loved ones had no value to them other than the salaries they brought home," said U.S. Sen. Arlen Specter (R-Penn.).

However, when the act was amended, the survivors of fishermen and other seamen lost at sea were excluded from the modified provisions.

Paul Hoffman, a maritime lawyer from New York, testified before Congress in 1998 in an effort to convince lawmakers that the survivors of seamen deserve the same legal rights they were proposing to give air travelers.

To not do so, he said, would create a "steerage class" of victims whose loved ones died in accidents afloat, Hoffman said. "It is discriminatory to create yet another class of wrongful-death victims, by allowing certain remedies to airplane accident victims dying on the high seas, while excluding from those rights the families of persons who die on ships and boats on the same waters."

Later in his testimony, he added: "Merely singling out airplane accident victims for special treatment is an affront to those whose family loved ones died at sea in vessel accidents."

Hoffman told the story of Joseph Waterhouse, a 37-year-old fisherman who died on board the Terri Lei, a fishing boat that sank in 1993 without explanation. Waterhouse's family recovered approximately \$30,000, in pecuniary damages. As far as emotional damages, his survivors, who included a 10-year-old son, got nothing.

"As to Joe's family, his son will never again be able to walk on the beach with his dad," Hoffman told Congress. "He'll never be able to speak to him on the phone to pass the time, ask his advice or tell a joke. Joe's mother will never again be able to sit down across the table and chat with him over Sunday dinner, or see all of her sons together again. But none of these intangible losses can be compensated under [the act]."

Hoffman said there was no way commercial fishermen could match the political clout enjoyed by the victims of aviation disasters and that his efforts to include seamen in the high seas act amendments failed because of opposition from the shipping industry. In order to get any changes passed, those who wanted the act amended had to content themselves with helping aviation accident victims, Hoffman says.

"The deal was 'Let's do it for aviation, but when it comes to maritime interests let's ignore the seamen,'" he says.

Like the Death on the High Seas Act, the Vessel Liability Act limits the compensation given families of seamen who die at sea. The 1850 law, which was passed to promote the U.S. maritime industry, affords vessel owners the chance to limit their liability to the value of the vessel at the end of the trip that has triggered wrongful-death suit.

Thus, if the vessel is unsalvageable and lies at the bottom of the ocean, an owner's liability may be nothing. Only plaintiffs who can prove that a boat was unseaworthy, and that its owner was aware of it, can surmount this provision of the law.

When the Vessel Liability Act is successfully invoked by boat owners and insurance companies – and it often is – victim's families get nothing.

For instance, Anderson says, if a boat goes down without a trace and no one knows why, families can't prove unseaworthiness.

Anderson says this could prove to be the case with the Arctic Rose, a trawler that sank last year in the Bering Sea for reasons as yet uncertain. All 15 persons aboard her perished. "There you have a lot of people dying," Anderson says, "but you don't know what happened, making it more difficult to prove the owner knew what caused the sinking."

Vessel owners and maritime insurance companies love the Vessel Liability Act, Latti says, because it often prevents claimants from getting any money. Insurance companies may pay a nominal sum to families to make them go away, but otherwise, the real cost of a sinking is the claim for the hull.

"Even though they are collecting premiums, if they prove limitation they don't have to pay a thing for a death," she says. "It's a great thing for them."

Moreover, with the lives of fishermen and other seamen seemingly so cheap, insurance companies don't do everything they should to make sure the boats they insure are safe, Anderson says. "If the law valued the life of seamen, the insurance companies would not let a lot of these boats leave the dock."

Taken together, the consequences of federal law – the Jones Act, the Death on the High Seas Act, and the Vessel Liability Act – is more than unfair treatment of families, Anderson says.

"When you undervalue life," Anderson says, "you make it expendable."

A DIFFERENT VIEW

Insurers have no incentive to promote safety in the commercial fishing industry, plaintiffs' attorneys say, because federal laws limit liability.

Insurance industry advocates say otherwise. Joseph C. Grasso, an attorney with Thacher Proffitt & Wood, a New York-based law firm representing the American Institute of Maritime Underwriters, says his clients are longtime supporters of improving safety in the commercial fishing industry and were instrumental in the passage and implementation of the Commercial Fishing Vessel Safety Act of 1988.

Testifying before Congress, the underwriter's institute said that from 1980 to 1984, maritime insurers they represented paid out \$1.56 in claims for every dollar in premiums they took in. The loss ratio was so high, the institute told Congress, many companies declined to insure fishing boats together, prompting fishermen to complain to Congress.

"This placed the insurance companies in the awkward position of calling attention to the fishing industry's safety record," Grasso told National Fisherman via e-mail. "Without insurance, vessel owners could offer no compensation, let alone adequate compensation, to injured seamen.

"The real answer to improving the level of safety in the fishing industry lies in strong government regulation, accompanied by adequate penalties for failure to comply."

Grasso takes exception to the notion that insurers took upon dead seamen as costing them less than injured ones. "We think that the whole discussion is irrelevant to the safe operation of vessels."

Any institute underwriter determining whether to insure a vessel will want a recent survey and information on the crew, owner and managers, Grasso says. "He's not going to say `Well, I look at the number of crew members and ask myself, "if any of them die, how much is it going to cost me?'"

Grasso says the marine insurance industry did not take a position on whether to give families of seamen killed at sea the right to sue for non-pecuniary damages, but does regard non-pecuniary damages as difficult to quantify and unpredictable.

As he sees it, the problem for insurers is that the lottery aspect of litigation encourages plaintiffs to sue. In cases in which plaintiffs persuade the court to refuse to apply liability limits, or successfully argue unseaworthiness or negligence, "the recovery may be very large," Grasso says.

Grasso would like to see a system similar to worker's compensation, providing fixed settlements for death or injury, but in most instances denying employees the right to sue their employer. "Such a system would provide greater certainty of recovery, quicker recovery and it would maximize the amount of recovery for seamen," he wrote. "It would also reduce the expensive litigation that often occurs to the detriment of all involved except trial lawyers.