Texas Ports & Courts Update

In This Edition:

(1) **Texas Port Activities and Developments – Updates regarding new projects and activities along the Texas coast.**

(2) **Recent Maritime Opinions from Texas Courts and the Fifth Circuit**

(3) **Another Interesting Harris County Jury Verdict – State district court bucks overwhelming national trends and lets insured take COVID-19 business interruption coverage case to jury, which awards nearly $50 million in damages.**

ROYSTON
EST. 1892
RAYZOR

Serving the legal needs of marine transportation companies and their insurers from four offices located along the Texas coast.

Houston / Galveston / Corpus Christi / Brownsville

Editor: Eugene W. Barr (eugene.barr@roystonlaw.com)

To subscribe/unsubscribe, please email: texasportsandcourts@roystonlaw.com

TEXAS PORT ACTIVITIES AND DEVELOPMENTS

Brownsville: Keppel AmFELS Delivers LNG-Fueled Containership to Pasha

Pasha Hawaii recently took delivery of the first of two LNG-fueled container vessels built by Keppel AmFELS at the Port of Brownsville. The vessel, *George III*, becomes one of only a few LNG-fueled ships in the US Jones Act fleet. According to Pasha, it is also the first LNG-fueled vessel operating along the US West Coast running regular operations between the mainland and Hawaii.

The *George III*, and her sister ship *Janet Marie*, which is still under construction, make up Pasha's new *Ohana* vessel class. Each vessel measures 774 feet long, approximately 43,500 dwt, and has a carrying capacity of 2,525 TEU. Their design calls for a fully-laden capacity of 500 45-foot containers, 400 refrigerated containers, and 300 40-foot dry containers.

According to Pasha and Keppel, the vessels feature an energy efficient design including a state-of-the-art dual-fueled, gas injection main engine. Reports indicate they have a top speed of 23 knots. Keppel is expected to deliver the *Janet Marie* later this year.

Corpus Christi

(1) Watco Launches Texas Coastal Bend Railroad Service

Watco Companies recently began serving the Port of Corpus Christi via its newest short line railroad, the Texas Coastal Bend Railroad (TCBR).

The TCBR provides service on 63 miles of track within the Port of Corpus Christi. A roster of five locomotives will serve port customers along the TCBR, assisting with the movement of a range of commodities, including wind turbine components, agricultural commodities, refined fuels, and military cargo.

The Port of Corpus Christi is also served by BNSF, Union Pacific and KCS.

(2) Brent Crude Benchmark Adds Crude Shipped from Corpus Christi

Indicative of the growing clout of Texas crude exports, many of which are shipped via the Port of Corpus Christi, S&P Global Commodity Insights recently announced that Platts will include the NuStar Corpus Christi, Texas North Beach terminal as a loading terminal for WTI Midland crude oil into its Dated Brent and Cash BFOE (Brent-Forties-Oseberg-Ekofisk) Market-on-Close price assessment processes for June 2023 deliveries.

The decision is a major milestone for the inclusion of US West Texas Intermediate (WTI) in the Brent benchmark, as it is the first time a crude grade from outside of the North Sea will be reflected in the Brent benchmark. The Brent benchmark is crucial to the global oil system as it is used to price more than half the world's physical crude trades.

Platts also said it is reviewing six more oil terminals as it prepares for further inclusion of US WTI Midland into the Brent benchmark, with decisions expected in the coming months. The other six terminals currently under review by Platts include Energy Transfer Houston, Pin Oak Corpus Christi, Flint Hills Ingleside, Seabrook Logistics, Buckeye South Texas Gateway, and Plains Corpus Christi.

Freeport: BASF Freeport Will Be Powered With 100% Renewable Energy

BASF and X-ELIO announced they have signed a 12-year power purchase agreement (PPA) to supply 48 MW of solar power to BASF's Verbund site in Freeport. With this agreement in place, 100% of the site's expected purchased power will be supplied from renewable energy.

Freeport is one of BASF's six global Verbund sites, which takes an integrated approach to manufacturing, research, and the overall management philosophy. Together with the maximum integration of infrastructure, processes, talent, energy, and waste management, this philosophy creates a highly efficient manufacturing site. BASF aims to reduce its greenhouse gas emissions by 25% by the year 2030 compared with 2018 and to achieve net-zero emissions by 2050.

X-ELIO's 72-MW Liberty Solar Photovoltaic project located in Houston, expected to be operational by 2024, will generate 137 GWh of clean energy per year and will also include a 60-MW energy storage system.

Galveston: Historic Battleship USS *Texas* Towed to Galveston for Repairs

USS *Texas*, the only surviving battleship that served in both World War I and World War II, recently completed a nine-hour, 40-mile journey from its longtime berth at the San Jacinto Battleground State Historic Site to a drydock at Gulf Copper's shipyard facility in Galveston. Four tugboats towed the vessel at a pace of approximately 5 knots.

Over 110 years old, USS *Texas* had been berthed at the San Jacinto Battleground State Historic Site, the location of the decisive battle during the Texas Revolution, since 1948. The vessel has suffered from a leaky, rusty hull that, at times, forced workers to pump out about 2,000 gallons (7,570 liters) of water per minute from the vessel. The vessel last went into a shipyard for repairs nearly 35 years ago, in 1988. Due to the various problems experienced by the vessel and the work to prepare it for repair, it has not been open to the public for the past three years.

The transit to the Galveston drydock is part of a $35 million project to repair the hull and otherwise restore the vessel. The repairs are expected to take up to a year to complete. The Battleship Texas Foundation, which is overseeing the project, is considering various options to eventually dock the vessel in a new Texas location, including a potential site in Galveston, to attract more visitors and increase revenue.

Houston:

(1) Port Steps Up Tariff Enforcement to Alleviate Container Backlog

The Port of Houston continues to set container volume records throughout this year. Total tonnage throughput for the first six months of 2022 grew 24% year versus the same period in 2021. The port also recorded its biggest July ever for containers, marking the sixth month of double-digit growth this year. Total volume in July was 328,498 twenty-foot equivalent units (TEUs), a 10% increase over the same month last year and the fourth-biggest month ever at the port for container volume. Moreover, the month of August set another monthly container volume record, with the port handling 382,842 TEUs. That surpassed the previous monthly record for containers set in May, when the port handled 335,000 TEUs.

Not surprisingly, various container bottlenecks have also resulted. Export dwell time, which was 10.5 days in the first week of August, has risen about 50% above the more typical 7-8 day wait for exports. Imports have also been sitting longer – 6.5 days as opposed to the more common 3-4 day wait period.

In an effort to address these issues, the Port of Houston Authority is ramping up its enforcement of a marine terminal tariff that limits the number of laden exports that can dwell there in order to decrease the port's overall container backlog. The subject tariff went into effect in February 2022 and includes language about export storage which states that "no more than 2 vessels in the same liner service may have their cargo stored on terminal at any given time, unless exception is provided by Terminal Management." *See* Tariff No. 14 (Barbours Cut Container Terminal) and Tariff No. 15 (Bayport Container Terminal).

Port officials state that the export restrictions have only impacted about three or four of the 23 different weekly liner services that come into Houston; mainly services to and from South America that call the Barbours Cut Container Terminal. These liner services were rolling 40% or more of their export cargo to later sailing, while the Port of Houston is targeting 10% or less on-dock export cargo being rolled.

(2) Reminder Regarding Reports of Marine Casualties

We note that, in some recent interactions with local USCG officials, we have been advised of an unexplained increase in untimely reporting of – and even complete failures to report – marine casualties to USCG officials. Such failures to adhere to USCG's marine casualty reporting requirements can result in unnecessary delays and significant penalties.

Just as a quick reminder, immediately after addressing any resultant safety concerns, the owner, agent, master, operator, or person in charge is required to notify the nearest USCG Sector Office, Marine Inspection Office or Group Office whenever a vessel is involved in a marine casualty consisting of any of the following:

1. An unintended grounding, or an unintended strike of (allision with) a bridge.

2. An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel.

3. A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel.

4. An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems.

5. A loss of life.

6. An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties.

7. An occurrence causing property-damage in excess of $75,000, with such damage including the cost of labor and materials to restore the property to its previous condition, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.

8. An occurrence involving significant harm to the environment (*e.g.*, actual/probable discharges of oil, hazardous substances, marine pollutants, or noxious liquid substances in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone (EEZ)).

Additionally, the owner, agent, master, operator, or person in charge must, within 5 days, file a written report (CG-2692 – Report of Marine Casualty, Commercial Diving Casualty, or OCS-Related Casualty, along with any required addendums).

Port Arthur/Beaumont: Jefferson Energy Terminal Continues Expansion

OCI N.V. recently announced it will begin construction of a world-scale 1.1 million ton per annum blue ammonia project in Beaumont. Blue ammonia is produced from hydrogen derived from natural gas where the CO2 byproduct is captured and sequestered. Green ammonia is produced from hydrogen based on renewable sources, such as wind and solar, rather than fossil fuels. This project has been designed to transition from blue to green ammonia production in the future as green hydrogen becomes available at larger scale.

OCI is set to invest several hundred million dollars in the project, which will supply an OCI import terminal in Rotterdam to receive and distribute ammonia to European customers. Additionally, the facility's strategic location will allow it to serve both the US market and export clean ammonia to Asia and other hydrogen deficit markets around the world, as well as catering for expected significant demand from new applications including power and shipping fuels.

The project is already underway, with detailed engineering and procurement work having started earlier this year. Production is targeted for Q1 2025, and the site will be designed to allow future production to double, to 2.2 million tonnes per year.

The carbon capture and sequestration link makes the project eligible for tax incentives for reducing carbon dioxide generated from processing gas. The Biden administration's new climate incentives for removing carbon from industrial processes are expected to advance ammonia as a key component of its efforts to facilitate the energy transition.

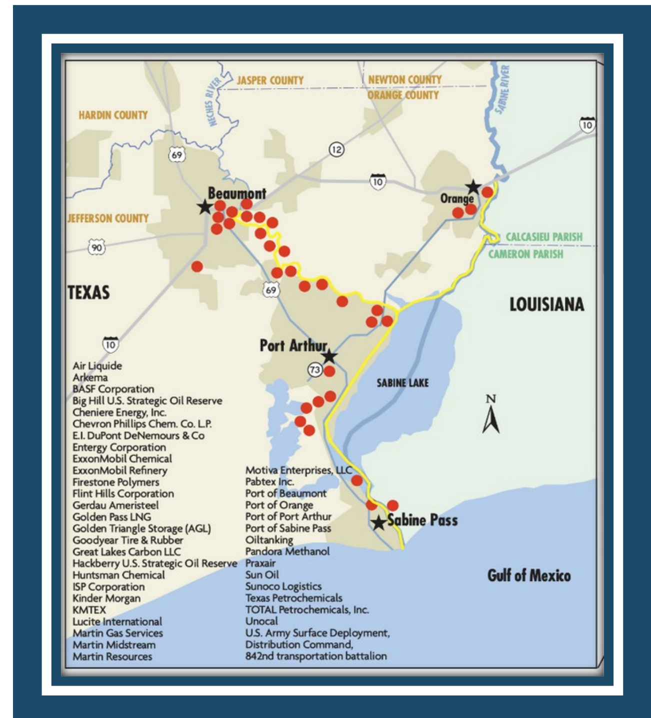
RECENT MARITIME OPINIONS FROM TEXAS COURTS AND THE FIFTH CIRCUIT

- ***BG Gulf Coast LNG, LLC v. Sabine-Neches Navigation District*, No. 22-40158, 2022 WL 4231804 (5th Cir. Sept. 14, 2022*) – Fifth Circuit rejects challenge to vessel user fees levied by navigation district.**

Just like most of the major shipping channels along the Texas coast and elsewhere in the United States, efforts are being made to deepen and widen the Sabine-Neches Waterway, which serves terminal facilities in Port Arthur, Beaumont, Nederland, and Orange.

The Sabine-Neches Waterway expansion project is a partnership between the federal government and local authorities, namely the Sabine-Neches Navigation District. The project has a price tag of over $1 billion.

In order to pay for its share for the project, the District established user fees to be charged on a cargo tonnage basis. BG Gulf Coast LNG and Phillips 66 Company, who both have cargoes that frequently traverse the waterway, objected to the fees and sued the District in Beaumont federal district court.



The district court granted the District's motion to dismiss for failure to state a claim, finding that: (1) under the Water Resources Development Act (WRDA), the District was entitled to levy fees against users of the waterway upon completion of one usable increment of the project, rather than upon completion of the entire project; (2) the ships carrying the companies' cargo were subject to the fees, as the ships had design drafts in excess of 20 feet (the pre-improvement depths of certain parts of the waterway were 20 feet or less) and, therefore, could not have utilized the entire waterway at mean lower low water prior to construction; (3) the ships were "at least comparable in size" to those used to justify deepening of selected bends and turn basins on the waterway and, thus, the ships were subject to the fee; (4) the WRDA did not impose a limit on the amount of project costs the District was entitled to collect though fees; and (5) the imposition of higher fees on hydrocarbon cargo than non-hydrocarbon cargo was levied on a fair and equitable basis and, thus, the discrepancy in fees was reasonable.

On appeal, the Fifth Circuit panel devoted a considerable amount of attention to the companies' arguments that the user fees could end up funding a much larger portion of the project than what was required under the statute. Specifically, while the statute only required that the District assume 25% of the cost of the project and the District further agreed with the US Army Corps of Engineers to cover about 40% of the project, the companies argued that the user fees could conceivably end up helping fund about 60-80% of the project when all was said and done. The Fifth Circuit was unmoved by this

potential scenario, finding that the WRDA did not set a ceiling on the non-federal share of funding for the project. Thus, the District's user fees could be used to cover costs in excess of 25% of the project's overall costs.

Link to a copy of the Court's Opinion

- ***Polaris Eng'g, Inc. v. Texas Int'l Terminals, Ltd.*, No. 3:21-00094, 2022 WL 4093122 (S.D. Tex. (Galveston) Sept. 7, 2022) (Edison) – Parties and their representatives were not required to execute releases before entering defendant's terminal facility for a site inspection.**

Site inspections are a common discovery activity in litigation. Whether the case concerns a casualty or dispute involving a vessel, a terminal, or some other premises, the parties, their experts, and their lawyers often will want to have the opportunity to inspect it firsthand. Both US federal and Texas state court procedural rules contemplate the parties' reasonable access to conduct such inspections when needed. While not so common with respect to vessel inspections, it is not extraordinary for owners/operators of terminals or other facilities to try to mandate that access to their premises be conditioned upon execution of a liability waiver. This recent decision from the Galveston federal court may temper some of those efforts.

This case involves a dispute over the construction of a crude processing facility operated by Texas International Terminals. Although the parties did not dispute that an inspection of the facility was justified, the terminal argued that attending persons should be required to execute waivers of liability before entering the facility. One of the parties objected that such a requirement improperly conditioned access upon waiver of the attendees' personal rights to seek redress should they become injured as a result of the terminal's negligence.

Citing several decisions from other courts throughout the US, the Galveston federal court sided with the objecting party and refused to require any person attending the inspection to sign a liability waiver. The court stated, "A party hosting a Rule 34 inspection should, like any premise owner who hosts a guest in the State of Texas, be required to exercise reasonable care to protect the invitee from risks that the owner is actually aware of, and also those risks that the owner should be aware of after a reasonable inspection." Furthermore, the Court ordered the terminal to provide attendees written notice of any potentially dangerous conditions existing at the facility, and to warn the attendees that, if they enter the facility, they risked encountering such dangers and were obligated to take reasonable precautions.

As noted above, it would not be surprising to see some parties point to this case in the future should premises owners/operators attempt to condition site inspections on attendees' consent to execute a release/waiver of liability.

Link to a copy of the Court's Order and Opinion

- ***Douglass v. Nippon Yusen Kabushiki Kaisha*, No. 20-30382, 2022 WL 3368289 (5th Cir. Aug. 16, 2022) – *En banc* panel finds no jurisdiction over Japanese time charterer of the *ACX Crystal*, a containership that collided with the USS *Fitzgerald* in Japanese waters.**

We previously reported on this case in our May 2021 Update.

This litigation arises from the June 17, 2017 collision between the NYK Line-chartered containership *ACX Crystal* and the destroyer USS *Fitzgerald*, which killed seven US Navy sailors and injured dozens of others. The injured sailors, their family members, and the personal representatives of the deceased filed suit against NYK in Louisiana federal district court. The federal district court found that it lacked jurisdiction over NYK and granted dismissal of the claims. The plaintiffs then appealed.

On appeal, a three-judge panel of Fifth Circuit judges likewise found that jurisdiction was lacking. However, two of the three judges stated that they would have reached an opposite conclusion were it not for their interpretation of the Fifth Circuit's 2016 opinion in *Patterson v. Aker Solutions Inc.*, which they believed imposed an overly restrictive limitation on due process.

Following the initial three-judge panel's decision – and the reservations expressed by the two judges – the Fifth Circuit decided to take the matter up for *en banc* review by a full appellate panel of seventeen judges. Although five of the seventeen judges dissented, the majority of the *en banc* panel once again found that jurisdiction was lacking.

Given that the collision occurred in Japanese waters, specific jurisdiction was out of the question since there was no basis to allege that NYK's tortious conduct in the US gave rise to the incident. Thus, the jurisdiction question concerned general jurisdiction (*i.e.*, whether NYK could be considered "at home" in the US).

The majority of the judges ultimately found that general jurisdiction over NYK was lacking. Notably, NYK had a history of substantial operations in the US (*e.g.*, NYK vessels called on at least 41 US ports, several NYK vessels were used exclusively to deliver automobile between Japan and the US, and NYK previously operated 27 shipping terminals, with its North American entities generating annual revenues of nearly $1.5 billion). However, when compared against NYK's overall worldwide activities, the NYK's US operations were not substantial enough to confer jurisdiction (*e.g.*, US port calls represented only 6-8% of NYK's worldwide port calls, and its US employees represented less than 1.5% of its total employees).

As the majority of the judges observed, the general jurisdiction test is an inherently comparative inquiry. And through such a comparative lens, NYK's contacts with the US comprised only a small fraction of its worldwide contacts. Accordingly, and consistent with the US Supreme Court's more recent, restrictive interpretations of general jurisdiction in *Daimler* and *Goodyear*, the majority found that NYK was not "at home" as necessary to confer general jurisdiction.

We also note that the majority opinion was observant of the fact that, even if the plaintiffs could clear the personal jurisdiction hurdle, their claims were problematic on other fronts as well. For example, the majority opinion commented that NYK's status as a time charterer of the *ACX Crystal* would prove challenging, as the plaintiffs would have to find a way around longstanding legal precedent confirming that a time charterer typically has little or no control over the vessel's navigation and "almost never bears liability for a collision stemming from navigational error." (More on this issue in the below case summary.)

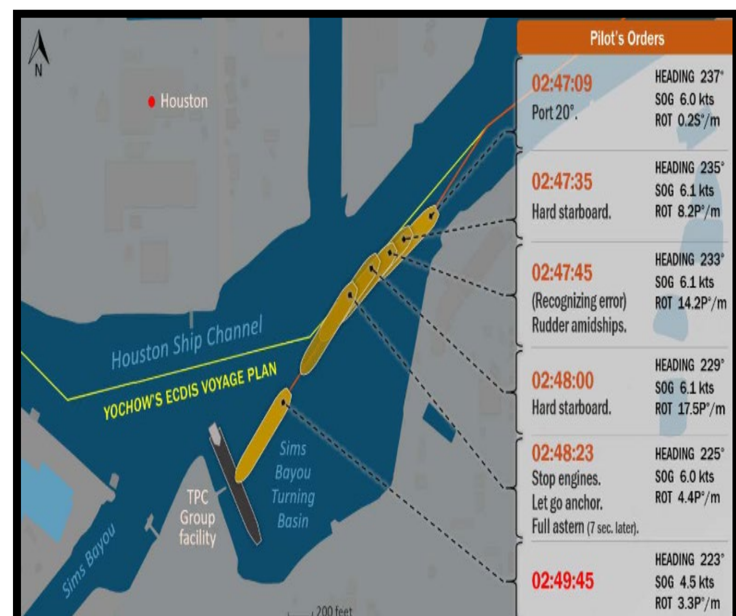
Link to a copy of the Court's Opinion

- ***Grand Famous Shipping, Ltd. v. China Navigation Co.*, No. 22-20002, 45 F.4th 799 (Aug. 15, 2022) – Fifth Circuit panel swiftly rejects attempt to disrupt well-settled law limiting time charter liability for navigational errors.**

We previously reported on this case in our January 2022 Update.

As a quick recap, this litigation arises from a June 13, 2018 allision wherein the bulk carrier *Yochow* allided with a barge and pushed the barge into a dock, damaging both the barge and the dock. The incident was allegedly due to a fatigued helmsman's incorrect action to turn the vessel to port instead of starboard as was ordered. (Referring to Herman Melville's *Moby Dick*, the Fifth Circuit panel noted that the helmsman apparently failed to abide by Stubb's twelfth commandment: "Think not is my eleventh commandment; and sleep when you can, is my twelfth.")

The *Yochow*'s owner and manager were naturally sued. But TPC, the lessee of the dock, also pursued a claim against the vessel's time charterer, China Navigation, which had chartered the vessel on a New York Produce Exchange (NYPE) form, as amended. Specifically, TPC argued that China Navigation had a duty to vet the *Yochow*'s owner and manager before time chartering the vessel, and TPC further argued that China Navigation was the *de facto* owner of the vessel. Specifically, TPC claimed that, because China Navigation exercised its right to paint its house colors on the vessel, monitored the speed and location of the vessel using software installed on the vessel, listed the vessel on its website as part of its fleet, and that the Lloyd's Registry incorrectly listed China Navigation as owner, this somehow made China Navigation the *de facto* owner of the *Yochow*. The Houston federal district court rejected these arguments and granted summary judgment to China Navigation. TPC then filed this appeal.



Citing to hornbook law stating that time charterers lack the *de facto* control alleged by TPC, the Fifth Circuit panel observed that "one of the very reasons why an entity would choose a time charter is precisely to avoid 'undertaking the responsibilities of ship navigation and management or the long-term financial commitments of vessel ownership.'" *Citing* GRANT GILMORE & CHARLES L. BLACK, JR., The Law of Admiralty 194 (2d ed. 1975). Because China Navigation, a mere time charterer, did not retain contractual control or exercise actual control over the *Yochow*, TPC's *de facto* ownership contentions were found to be unpersuasive, with the panel further observing that TPC's arguments in contravention of such long-established precedent were "unmoored from reality."

TPC's attempt to impose a duty upon a time charterer to vet a vessel's owner and manager was also summarily rejected. As a time charterer's spheres of activities are generally limited to choosing the vessel's cargo, route, general mission, and the specific time in which the vessel will perform its

assignment, the panel observed that ensuring the competence of the time charterer's contractual counterparty falls outside the scope of such spheres and, accordingly, China Navigation owed no duty to vet the *Yochow*'s owner and manager.[1] Thus, the district court's summary judgment order was affirmed in its entirety.

Indicative of the panel's decisive rejection of TPC's attempts to depart from the black letter precedent limiting time charter liability for navigational errors, this opinion was issued exceptionally fast – less than two weeks after it heard oral argument.

Richard Branca of our Houston office argued the case on appeal for China Navigation, and David Walker and Richard Branca handled the case at the district court level.

Link to a copy of the Court's Opinion

***Kiwia v. Bulkship Mgmt., A.S.*, No. 21-30353, 2022 WL 3006214 (5th Cir. July 28, 2022) – Affirming novice longshoreman's $1,076,873 damages award in 905(b) suit.**

Faustine Kiwia was hired as a longshoreman on February 19, 2019. Kiwia was provided some basic safety training that day, and he started working the next day. He suffered the subject injuries while working on a vessel less than two weeks later.

At the time of the incident, Kiwia was working on a gang to offload the *Oslo Bulk 9*, a handysize bulk carrier with a cargo of bauxite ore. Following a brief gangway safety meeting, Kiwia spent the morning assisting with the opening and closing the vessel's hatches as a crane was offloading the cargo. The gang eventually stopped work to take a lunch break.

When Kiwia returned to the deck of the vessel following lunch, his supervisor called to him from the bow, and Kiwia placed his hand on top of a hatch coaming for balance as he turned around in response. Kiwia did not realize that one of the vessel's crewmembers was closing the hatch cover at that time. No one from the vessel's crew had warned the longshoremen of the hatch cover closing, and none of the vessel's crew did a walkaround of the hatch before they started to close the hatch cover. Kiwia claimed that he did not notice the hatch cover closing because it was "imperceptibly quiet." Additionally, there were some stevedores working in the hold at that time, so it would have been unusual to close the hatch under such circumstances.

Shortly after Kiwia placed his hand on the top of the hatch coaming, the steel wheels of the closing hatch cover trapped his hand and severed his middle three fingers. A fellow longshoreman yelled to one of the crewmembers to stop the hatch closing and freed what was left of his hand. Although Kiwia was

[1] While there have been isolated cases wherein a time charterer was found liable for a collision or personal injury, those cases have typically involved conduct by the time charterer within these limited spheres of activity or due to specific contracted-for obligations. *See*, *e.g.*, *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376 (5th Cir. 1987) (assigning liability to time charterer because charterer sent vessel into unsafe waters); *Fernandez v. Chios Shipping Co.*, 542 F.2d 145 (2d Cir. 1976) (assigning liability to time charterer because improper discharge of cargo was within the scope of responsibilities contained in charterparty, and time charterer was obligated to indemnify shipowner; however, the Fifth Circuit has disagreed with the Second Circuit's analysis in this case). TPC's claims did not fit within any of these rare exceptions.

brought to the hospital for prompt medical attention, the three severed fingers could not be reattached. Moreover, Kiwia underwent a subsequent surgery to alleviate nerve pain in one of the severed fingers, which only reduced some of the pain. Kiwia filed a 905(b) claim against the vessel and its owners in Louisiana federal district court.[2]

Under the *Scindia* duties set forth by the US Supreme Court over 40 years ago, a vessel owner owes the following duties to a longshoreman:

> (1) Turnover Duty: Use of reasonable care to turn over the vessel to the longshoreman's employer in such a condition that the employer is able to, through the exercise of reasonable care, conduct its operations in a reasonably safe manner. The vessel is also required to warn the employer of any hazards that should be known to the vessel, excluding any open and obvious dangers.
>
> (2) Active Control Duty: Exercise of reasonable care to prevent injuries to longshoremen in areas that remain under the active control of the vessel. Such a duty often arises when crewmembers are assisting the longshoremen with cargo operations.
>
> (3) Duty to Intervene: Should the vessel have knowledge of a danger, and should the vessel expect that the longshoreman's employer cannot or will not correct the danger, the vessel must intervene in order to eliminate or negate the danger.

As this incident involved the crew's operation of the hatch covers, the active control duty was the *Scindia* duty at issue in this case.

Following a bench trial, the Louisiana federal district court found the vessel negligent and in violation of the active control duty, awarding Kiwia $1,076,873 in damages. Essentially, the district court concluded that the vessel's crew should have warned Kiwia's longshoreman supervisor before closing the hatch cover, and they should have also surveyed the area around the hatch before closing the hatch cover. While the district court also found Kiwia's employer 50% responsible for the incident, the finding was of no practical impact as liability under Section 905(b) is joint and several, and Kiwia's employer was statutorily immune under the LHWCA as it provided workers' compensation insurance coverage to its employees, including Kiwia.

The vessel defendants raised four issues on appeal: (1) whether the district court erred in finding that the vessel violated the active control duty; (2) whether the crew's alleged failure to warn Kiwia's supervisor or its alleged failure to maintain situational awareness while closing the hatch caused the incident; (3) whether the district court erred in finding that Kiwia bore no responsibility for his injuries or by not placing 100% of the blame upon Kiwia's employer; and (4) whether the damages award was excessive.

With respect to the first issue, the appellate panel noted that the parties' experts gave differing views as would be expected, and, while the vessel defendants challenged the veracity of the opposing expert viewpoints, as well as the testimony of one of Kiwia's co-workers regarding the usual circumstances under which a longshoreman is or should be warned of hatch closing dangers, the district court possessed fairly generous latitude to weigh the differing views. Although the vessel defendants were able to point to evidence supporting a finding that there was no breach of the active control duty, the

---

[2] Section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USC §§ 901, *et. seq.*, permits a longshoreman to seek damages in a third-party negligence action against the owner of a vessel on which the longshoreman was injured.

appellate panel concluded that the district court was nevertheless not incorrect in its weighing of the evidence and ultimate finding that the active control duty had in fact been breached.

As to whether the crew's conduct was a causative factor, the appellate panel stated this issue was a close call. While the district court concluded that Kiwia would have responded appropriately had he been warned to stay away from the hatch coaming, and that the crew's failure to maintain situational awareness when closing the hatch covering contributed to the incident, the appellate panel took note of the vessel defendants' arguments that there was no evidence that an inexperienced longshoreman like Kiwia would have properly heeded any warning or that surveying the hatch cover area prior to closing the hatch cover would have prevented Kiwia from being injured while the hatch cover was closing. Nevertheless, the panel found that there was insufficient evidence to overturn the district court's causation findings.

With respect to apportionment, the panel largely focused upon the vessel defendants' argument that Kiwia should bear some responsibility for the incident (such a finding of the longshoreman's own contributory negligence would have proportionately reduced the damages award). Although the district court found that Kiwia was inexperienced and any lack of knowledge of vessel operations should be attributed to his employer for its failure to properly train Kiwia, the appellate panel rejected the vessel defendants' arguments that such findings created an unreasonably low standard of care for Kiwia with respect to his conduct on the vessel. The panel found that his inexperience did not necessarily equate to a finding that he failed to meet the minimum qualifications typically possessed by longshoremen. As such, the panel did not disturb the district court's 50-50 liability assessment against the vessel and Kiwia's employer.

Finally, as to damages, the panel noted that prior Fifth Circuit caselaw has found that a damages award is not excessive if it is less than 133% of the highest inflation-adjusted recovery in an analogous, published decision. The district court's general damages award was found to be consistent with another reported case involving similar injuries. While that case involved a loss of four fingers and a plaintiff that took longer to return to work, the panel ultimately concluded that these differences were not significant enough to overturn Kiwia's damages award. Accordingly, the district court's judgment was affirmed.

Link to a copy of the Court's Opinion

Another Interesting Harris County Jury Verdict – State district court bucks overwhelming national trends and lets insured take COVID-19 business interruption coverage case to jury, which awards nearly $50 million in damages.

A Harris County jury recently awarded the Baylor College of Medicine in Houston $48,529,961 for lost business income and other damages arising from the COVID-19 pandemic. Baylor originally sued its three insurers, but two of the insurers were dismissed on summary judgment as their policies contained express exclusions barring coverage for viruses (not surprisingly, most insurers have added express virus exclusions in their policies issued since the pandemic's spread in late-2019/early-2020).

However, a policy issued by the third insurer, a Lloyd's group of insurers, did not contain such express exclusionary language. Nevertheless, courts nationwide have almost uniformly found that insurers do not owe business interruption coverage for the COVID-19 pandemic, as the virus does not qualify as property damage sufficient to trigger coverage under such insurance policies. Nationwide, to date, only a few intermediate state appellate courts have found that coverage was owed for pandemic-related

business interruptions. Despite the overwhelming national trend to find as a matter of law that there is no business interruption coverage for the pandemic, the Harris County district court took a different tack and permitted the case to go to the jury, which appears to have been the first US jury trial on a pandemic-related business interruption coverage claim.

Because the Lloyd's insurers were responsible for a 25% share under Baylor's all-risk coverage split between the three insurer groups, the jury verdict put the Lloyd's insurers on the hook for about $12 million.

While this case is outside the maritime and personal injury context we usually report on, the fact that it is such an outlier is arguably representative of the more plaintiff-friendly landscape that has developed in Harris County over recent years.

The case is No. 2020-53316, *Baylor College of Medicine v. Underwriters at Lloyd's Syndicates*, *et al.*, In the 295th District Court of Harris County, Texas.

This update was jointly prepared by Royston Rayzor's team of maritime lawyers and marine investigators.

Royston Rayzor's fully-staffed offices are conveniently located near each of Texas' major ports.

We can be reached on a 24/7 basis at the following locations:

Galveston
The Hunter Building
306 22nd Street, Ste. 301
Galveston, Texas 77550
Tel: 409.763.1623

Houston
1600 Smith Street,
Ste. 5000
Houston, Texas 77002
Tel: 713.224.8380

Corpus Christi
802 North Carancahua
Ste. 1300
Corpus Christi, Texas 78401
Tel: 361.884.8808

Brownsville
55 Cove Circle
Brownsville, Texas 78521
Tel: 956.542.4377