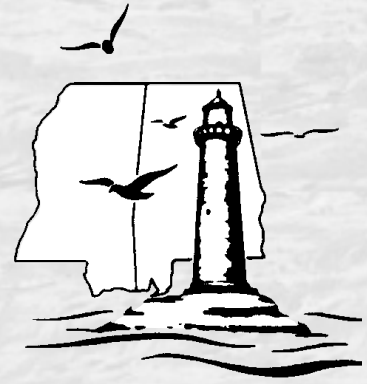


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# WATER LOG

A Legal Reporter of the Mississippi-Alabama  
Sea Grant Consortium



## Fifth Circuit Applies New Supreme Court “Vessel” Test

*Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441  
(5th Cir. 2006)

*Tara Hartman, 2L, Stetson University College of Law*

In January of 2006, the U.S. Court of Appeals for the Fifth Circuit ruled on whether a barge that acted as a “floating dormitory” could be deemed a vessel, so as to fit within the Jones Act and allow an employee cook to collect damages for an onboard accident.<sup>1</sup>

### Facts

Addie Holmes, a resident of Louisiana, was a cook aboard the BT-213, a 140-foot by 40-foot “floating dormitory” consisting of a large barge “on the deck of which a two-story, 50-bed ‘quarters package’ [was] mounted.”<sup>2</sup> The BT-213, which was owned and managed by Weeks Marine Inc. and Atlantic Sounding Company (both of which have their principal place of business in New Jersey), was moved from different locations by tugboats. Once at its destination the BT-213 housed and fed employees who worked on dredging projects at various locations. Although the entire BT-213 crew consisted of only two janitors and two cooks, there was no evidence to suggest the crew was tugged from site to site. The BT-213 had no captain, engineer or deckhand.

Interestingly, the BT-213 had a “raked bow at each end for flotation,” a radio for communication, and water pumps. However, it had never been registered nor inspected by the Coast Guard. Moreover, the BT-213 was never intended to transport passengers or cargo, and no evidence was presented to prove that it was capable of doing so. The specifics of the BT-213’s use were central to the case, as the make-up of the BT-213 determined if it would fit within the definition of a vessel, which in turn would determine whether Holmes had a cause of action.

The incident that led to Holmes’ claim took place on her first day as a cook aboard the BT-213. She alleged that upon boarding the barge and placing her belongings in her assigned locker, a television set, which rested on top of the locker, and the locker itself crashed down upon her. Holmes claimed that she suffered injuries to her neck, shoulders, ears, and nose, and dizziness.

### Lawsuit

Holmes sued both Atlantic Sounding and Weeks Marine in the state of Louisiana under the Jones Act.<sup>3</sup> The Jones Act gives injured sailors a cause of action against their employers for damages sustained during the course of employment that were caused by the negligence of the captain, a crew member or the ship owner.

*See “Vessel” Test, page 14*

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# Governors' Group Issues Gulf of Mexico Action Plan

*Goals Include Education, Conservation, Water Quality*

*Josh Clemons*

In March the Gulf of Mexico Alliance released the *Governors' Action Plan for Healthy and Resilient Coasts*, which charts a course for the Gulf states and the federal government to achieve beneficial outcomes for the Gulf region over the next three years. The Alliance's goal is to significantly increase regional collaboration, thereby enhancing the environmental and economic health of the Gulf of Mexico.

## The Gulf of Mexico Alliance

The Gulf of Mexico Alliance consists of the governors of the five Gulf states (Alabama, Florida, Mississippi, Louisiana, and Texas), who banded together in response to the U.S. Commission on Ocean Policy's call for increased regional coordination in ocean management. In its 2004 final report<sup>1</sup> the Commission emphasized that the problems and challenges of ocean and coastal management in the 21st century cross jurisdictional boundaries; thus, regional cooperation is more important than ever. The Alliance envisions and encourages participation by other governmental and non-govern-

mental entities, as well as by the Mexican states with whom the U.S. shares the Gulf.

The *Action Plan* outlines the Alliance's approach to regional partnership through March 2009. The plan calls for eleven actions to be taken in support of five regional priority issues. Gulf coast citizens helped to identify the priority issues at a series of eight community workshops held across the region.

As one would expect, the Alliance acknowledges the devastation wreaked by Hurricane Katrina and seeks not only to heal the coast but also to make the Gulf region more resilient to the storms that will inevitably occur in the future. Improved resilience should provide both ecological and economic benefits: water quality and coastal ecosystems will be better protected, and industries like fishing and tourism will be able to resume more quickly in the wake of severe storms.

The *Action Plan* emphasizes the importance of scientific research and education in achieving the Alliance's goals. Sea Grant is a leader in these areas and can add substantial expertise to the Alliance's efforts. Education is a particular strength of Sea Grant, and the Alliance recognized this by naming the Sea Grant colleges as contributors and collaborators for the priority issue of environmental education.

Leaders of the Mississippi-Alabama Sea Grant Consortium's education community have been hard at work developing strategies in this area. Dr. Sharon Walker of the University of Southern Mississippi's Department of Coastal Sciences and Dr. John Dindo of the Dauphin Island Sea Lab have proposed the establishment of an Environmental Education and Outreach Coordinator to focus on the Alliance's education priorities. The Coordinator will increase professional development programs for informal and formal educators; enhance ocean literacy through improved and increased communications via various media; establish regional networks through existing and new partnerships within the Gulf of Mexico; augment the numbers of under-represented individuals within the ocean sciences workforce; provide a common ocean sciences education focus within agencies and organizations with similar missions; and evaluate the opportunities, challenges, and outcomes. The Coordinator will contribute to building an enhanced stewardship ethic, strengthening



WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.


To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: [waterlog@olemiss.edu](mailto:waterlog@olemiss.edu). We welcome suggestions for topics you would like to see covered in WATER LOG.

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 <http://www.olemiss.edu/orgs/SGLC>

the region's science literacy, and empowering a new generation of informed leaders who will rebuild the ecosystems and economies of the Gulf Coast.

### Regional Priorities and Actions

Below are the five priorities the Alliance has identified to guide its actions. For each priority there is at least one action that the Alliance plans to take.

**Priority:** Water quality for healthy beaches and shellfish beds.

**Actions:** Improve harmful algal bloom detection and forecasting in the U.S. and Mexican Gulf states; improve beach water quality management; improve government efficiency in water quality monitoring.

**Priority:** Wetland and coastal conservation and restoration.

**Actions:** Streamline coastal restoration and conservation efforts; increase the safety of Gulf communities by better understanding the risks of localized sea level rise, storm surge and subsidence.

**Priority:** Environmental education.

**Actions:** Galvanize local communities to protect the Gulf of Mexico through targeted education; conduct a public awareness campaign for the Gulf of Mexico.

**Priority:** Identification and characterization of Gulf habitats.

**Action:** Create and provide access to interactive habitat maps for priority Gulf of Mexico habitats.

**Priority:** Reductions in nutrient inputs to coastal ecosystems.

**Actions:** Increase regional coordination in the development of nutrient criteria; implement nutrient reduction activities during Gulf recovery and rebuilding; assert an aligned five Gulf State position on the need to address Gulf of Mexico hypoxia.

The Alliance has developed an "Action Blueprint" for each proposed action, which describes more specific steps that will be taken and the outcomes that should be achieved by March 2009. This information is included in the *Action Plan* and will be of interest to coastal managers working in the priority issue areas, as well as to the coast-dwelling public at large.

The *Governors' Action Plan for Healthy and Resilient Coasts* can be viewed and downloaded at [http://www.dep.state.fl.us/gulf/files/files/GulfActionPlan\\_Final.pdf](http://www.dep.state.fl.us/gulf/files/files/GulfActionPlan_Final.pdf). ✓

### Endnotes

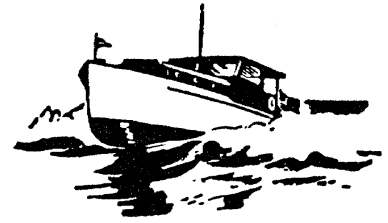
1. Available at [http://oceancommission.gov/documents/prepub\\_report/welcome.html](http://oceancommission.gov/documents/prepub_report/welcome.html).



Photographs of post-Katrina damages courtesy of NOAA.

# Appeals Court Affirms \$19M Award to Boat Passengers

## *Barge Company at Fault in Allision*



*Superior Construction Company, Inc. v. Brock*, 2006 WL 964105 (11th Cir. Apr. 14, 2006)

*Terra Bowling, 3L, University of Mississippi School of Law*

The United States Court of Appeals for the Eleventh Circuit has affirmed an award of more than \$19 million in damages to passengers of a recreational boat that allided with a stationary barge.<sup>1</sup>

### Background

At the time of the accident at issue in this case, Superior Construction Company (Superior) was the general contractor for the Florida Department of Transportation's expansion of the Blanding Boulevard Bridge over the Cedar River in Jacksonville, Florida. Superior had chartered the barge and a tugboat to assist in the project. During the project, the company frequently stationed the barge and the tug so that recreational boaters could safely pass under the bridge. However, on December 29, 2001, the company tied the barge and the tug so that they blocked a large portion of the waterway commonly used by recreational boaters to pass under the bridge. In addition, employees positioned the tug perpendicular to the barge, further hindering passage.

The barge is painted completely black, as are the hull and superstructure of the tug, making it difficult to see the vessels at night. The barge and tug had a total of twelve lights and on the night of the collision only three of ten lights on the barge, and only one of two lights on the tug, were operating. All of the lights were in poor condition.

When Charles Brock, the driver of the recreational boat, approached the bridge that night, he slowed the boat's speed and turned to pass through one of the three spans used by recreational boaters. Neither he nor his eleven passengers saw the barge until it was too late to avoid a crash. As a result of the allision, he and his passengers suffered extensive injuries.

Superior brought an admiralty action in federal district court seeking to limit its liability for the allision under the Limitation of Liability Act.<sup>2</sup> Brock and his

passengers counterclaimed. The district court found that Superior was not entitled to limit its liability and that Superior, the barge, and the tug were liable for the injuries. Superior appealed the decision, contending that the barge had not obstructed traffic and that the company had overcome the presumption that they were at fault. In addition, the company argued that the court should have assigned a percentage of fault to Brock, since a blood test taken after the accident indicated that his blood alcohol level exceeded the legal limit under federal and state law.

### Court of Appeals Analysis

In deciding the appeal, the court reviewed the district court's application of two rules that apply when a moving vessel allides with a stationary vessel. The first rule, called the *Oregon* Rule, says that the burden of proof is initially on the moving vessel to prove that the allision was the stationary vessel's fault and that the moving vessel acted with reasonable care or that the accident was unavoidable.<sup>3</sup> However, the *Pennsylvania* Rule shifts the burden to the stationary vessel if it violates a statutory rule intended to prevent collisions.<sup>4</sup> The stationary vessel must then prove that its statutory violation could not have been a cause of the accident. In cases where both vessels involved in the allision are operating in violation of statutes designed to prevent accidents, the *Pennsylvania* Rule requires the court to find that both parties contributed to the accident, unless it finds that either party could not have been at fault.

The court found that Superior had violated a federal statute stating that it is unlawful to tie up or anchor vessels in a way that would obstruct other vessels from passing through a channel.<sup>5</sup> The court listed four reasons that Superior had violated this statute. First, the barge blocked 24 percent of the entire passageway. Second, the barge was in an "unorthodox location," obstructing 68 percent of the passage most commonly used by recreational boaters. Third, the vessels were not lit adequately. Finally, the barge and the tug were virtually invisible from the water.

In light of these findings, the appeals court agreed with the district court's opinion that Superior did vio-

late a federal statute, and the presumption of fault was on the company. The court also decided that Superior failed to show that its violation of the federal statute could not have been the cause of the collision.

Since Brock was also in violation of state and federal statutes as a result of his legal intoxication, the district court applied the *Pennsylvania* Rule against him. The appeals court affirmed the district court's finding that, although Brock did violate the statutes, he met his burden of showing that his intoxication could not have been a cause of the collision. The court listed four reasons why Brock overcame the presumption of liability. First, the court found that Brock's intoxication did not have a significant effect on his handling of the boat. Second, Brock slowed the boat from 34 miles per hour to 22 miles per hour when approaching the bridge. Third, Brock had aimed the boat so that it would have safely passed under the bridge if the barge had not been in the way. Fourth, other passengers who were not intoxicated and possessed an unobstructed view of the bridge did not see the barge until it was impossible to avoid the collision.

### Conclusion

The Court of Appeals affirmed the district court's opinion that the only cause of the accident could have been

Superior's dangerous placement and improper lighting of the barge. Additionally, the court noted that the company's failure to warn the Coast Guard or recreational boaters about the placement of the barge contributed to the accident. The court also affirmed the district court's finding that Brock's intoxication could not have been a cause of the collision.

Superior also appealed the amount of damages awarded to two of the passengers, saying that the amounts were so excessive that they "shocked the conscience." The court found that the district court did not err in awarding the amounts, due to the circumstances surrounding their injuries. ♡

### Endnotes

1. "Allision" is a term used in maritime law to denote "the sudden impact of a vessel with a stationary object such as an anchored vessel or a pier." *Black's Law Dictionary* 28 (Bryan A. Garner ed., pocket ed., West 1996).
2. 46 U.S.C. App. §§ 183-89.
3. *The Oregon*, 158 U.S. 186 (1895).
4. *The Pennsylvania*, 86 U.S. 125 (1873).
5. 33 U.S.C. § 409.

*Photograph of barge tied near a bridge courtesy of the Washington State Treasurer's Office.*



# Federal Court Rules for Cuban Refugees

## *Coast Guard Should Have Allowed them to Stay*

*Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343 (S.D. Fla. 2006)

*Josh Clemons*

In February the U.S. District Court for the Southern District of Florida, Miami Division, held that the U.S. Coast Guard erred when it removed back to Cuba refugees who had arrived at the Seven Mile Bridge in the Florida Keys. The bridge is considered part of the United States, so the refugees had metaphorical “dry feet” and should have been allowed to remain and apply for asylum.

### **The Cuban Refugees and the Status of the Seven Mile Bridge**

In January the U.S. Coast Guard, which is now part of the Department of Homeland Security, interdicted fifteen Cuban refugees from a remnant of the old Seven Mile Bridge in the Florida Keys. The Seven Mile Bridge was built in the early twentieth century by railroad magnate Henry Flagler. Only a small portion of the bridge remains in use today. It still provides access to Pigeon Key, but beyond that a cut in the bridge separates it from land. The refugees landed on a piece of the old bridge that still stands beyond the cut.

Under the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(a)(1), an alien who “arrives in the United States” is considered an applicant for admission to the country and is entitled to remain here to apply for asylum. An alien who is interdicted at sea is removed to his home country. This is known as the “wet foot/dry foot” policy.

After picking up the Cubans the Coast Guard had to determine whether the Seven Mile Bridge was part of the U.S. for “wet foot/dry foot” purposes. The Coast Guard relied on a legal opinion contained in a memo from Lt. Cmdr. Kieserman of the Office of Maritime and International Law of the Judge Advocate General of the U.S. Coast Guard. Kieserman, in response to a request from the local Coast Guard office where the Cubans were interdicted, reasoned that arrival at the bridge did not constitute arrival in the U.S. This conclusion was based on the fact that the section of the bridge in question was not physically connected to U.S.

soil. Under the law of the sea, an artificial structure that does not have its own territorial sea cannot confer “dry feet.” In Kieserman’s estimation, the bridge section was analogous to a buoy moored to the bottom of the ocean. Refugees who land on such a buoy would still have “wet feet” because legally they would still be adrift on the U.S.’s territorial sea. The Kieserman memo suggested that recognizing the Seven Mile Bridge as dry land would enable “migrant smugglers” to affix platforms to the ocean bottom in U.S. waters to ply their trade.<sup>1</sup>

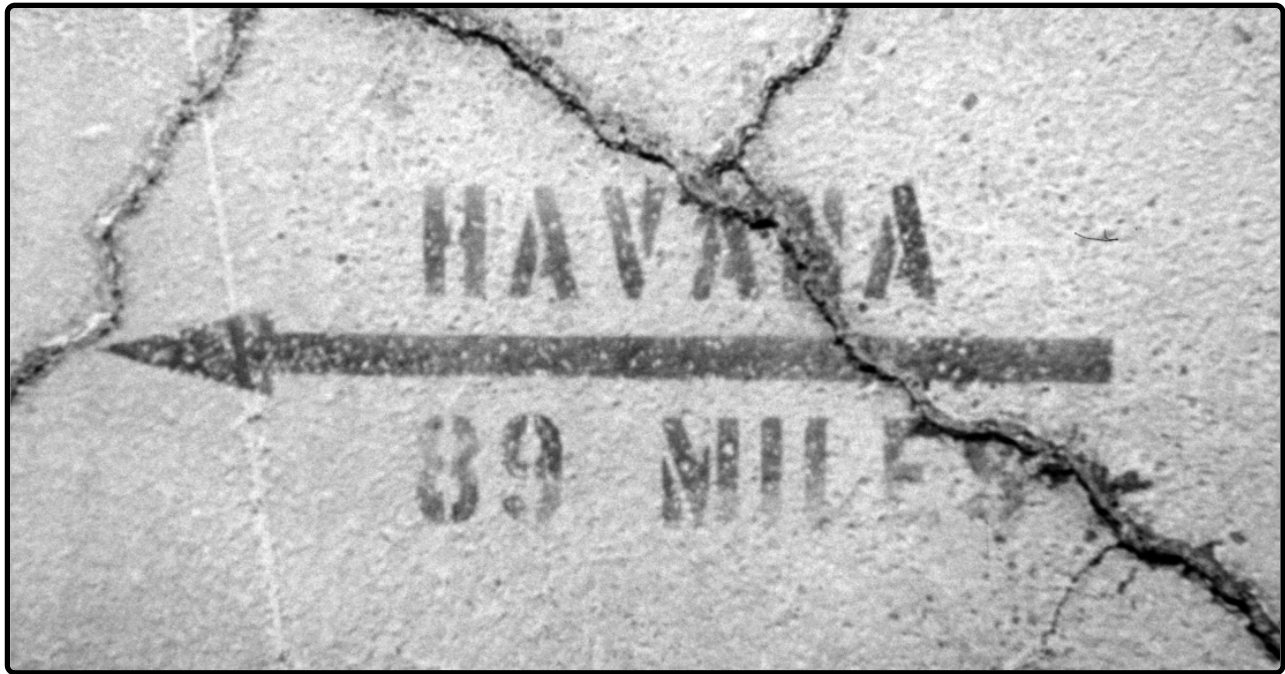
The Coast Guard, having made its judgment call on the bridge, returned the refugees to Cuba. The refugees appealed to the U.S. federal court system to determine the validity of Kieserman’s conclusion, and to seek a return to the U.S.

### **Legal Analysis**

One might think this case primarily invokes immigration law, or international law, or admiralty; however, like many cases in which individuals challenge government actions, this case is squarely within the realm of administrative law. Administrative law governs, among other things, the validity of actions taken by government agencies. In this case the agency action challenged by the refugees was Kieserman’s interpretation that the INA’s territorial reach did not encompass the Seven Mile Bridge.

When a plaintiff challenges an agency’s interpretation of a statute, as happened here, the court will initially determine whether Congress expressed its intent so clearly that there is no need for interpretation at all. If that is the case, then the court will reject any contrary agency interpretation. Congress rarely speaks so clearly, however, and most statutes contain at least some ambiguity, which the administering agency must clarify.

A key premise of administrative law is that courts generally owe deference to agency interpretations of the laws they administer. Agencies are presumed to have expertise in their fields, and as extensions of the elected executive branch of government they are more easily held accountable by the citizens they serve. However, in keeping with the principle of checks and balances, deference to agencies is not without limits. The level of deference that courts give to agency inter-



*The distance and direction to Havana, Cuba, from the southernmost pier on Key West. Photograph courtesy of NOAA's Photo Library; photographer, Captain Albert E. Theberge, NOAA Corps (ret.).*

pretations correlates to the formality of the agency's decision-making process.

When an agency has followed full, formal decision-making procedures, complete with public notice and comment, courts are very deferential; an agency interpretation of a statute will be upheld if it is a "permissible construction of the statute."<sup>2</sup> In other words, the agency's interpretation need not be the best one possible, it need only be one that is not clearly contrary to the statute. Less formal decision-making warrants less deference. Interpretations like the one at issue here, which was provided in an opinion letter, must be not only permissible but also persuasive.

In this case the court felt that it was unnecessary to pin down the required deference level. In the court's opinion the Coast Guard's interpretation was worthy of *no* deference because it was simply unreasonable. The court perceived the Coast Guard to be proposing a "bright line rule" requiring a structure to be connected to land before it is considered part of the U.S., to protect against the threat of migrant-smuggling platforms as envisioned by Lt. Cmdr. Kieserman.<sup>3</sup> This bright line rule is unreasonable, the court reasoned, because Coast Guard personnel can easily distinguish a structure of "historical significance" like the Seven Mile Bridge from "a manmade structure that was more recently anchored to the sea floor."<sup>4</sup>

In its defense the Coast Guard argued that U.S. Supreme Court caselaw requires migrants to "depart

from their vessels and come ashore onto United States soil" in order to "land" in the U.S., and that the refugees were still in U.S. territorial waters when they were picked up.<sup>5</sup> The court, having determined that the Seven Mile Bridge is U.S. territory for purposes of the INA, rejected these arguments.

### Conclusion

The court denied the Coast Guard's motion for summary judgment and ruled in favor of the refugees, reasoning that the Coast Guard's determination that the Seven Mile Bridge was not part of the U.S. for INA purposes was unreasonable. The court acknowledged its lack of authority to order the return of the refugees from Cuba, but nonetheless ordered the Coast Guard to exert its "best efforts to give [the refugees] the due process rights to which they were entitled when they landed" on the bridge.<sup>6</sup> ✓

### Endnotes

1. *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343, 2006 WL 521558 at \*4 (S.D. Fla. 2006).
2. *Chevron U.S.A., Inc. v. Nat. Resources Defense Council*, 467 U.S. 837, 843 (1984).
3. *Movimiento Democracia* at \*4.
4. *Id.* at \*5.
5. *Id.* at \*5-6.
6. *Id.* at \*6.



# Chemical Tanker Liable in Collision with Dredge

*Stolt Achievement, Ltd. v. Dredge B.E. Lindholm*, 440 F.3d 266 (5th Cir. 2006)

*Benjamin N. Spruill, 3L, Roger Williams University School of Law*

In 2006, the U.S. Court of Appeals for the Fifth Circuit upheld an equal division of damages ruling arising out of a collision between two vessels in the Houston Ship Channel. The court found that the U.S. District Court for the Southern District of Texas was not clearly erroneous in its findings of apportioned fault and preserved the equal allocation of liability.

## Background

On October 21, 2001 the dredge boat *Lindholm*, while traveling outbound in the Houston Ship Channel, collided with the inbound chemical tanker *Stolt Achievement*. Just prior to the collision the two vessels had radio confirmation that they would conduct a standard port-to-port passing. Shortly after this communication the *Lindholm* sheered from its course, changing direction abruptly and inadvertently towards the *Stolt Achievement*. Evasive maneuvers conducted by the *Stolt Achievement* failed to prevent the collision.

The lower court found that both vessels were in violation of certain sections of the Uniform Inland Navigational Rules (Inland Rules), the body of law that controls navigation on the Houston Ship Channel and other internal waterways of the United States. Because both the *Stolt Achievement* and *Lindholm* were found negligent in the events leading up to the collision the court apportioned liability equally and awarded 50 percent of damages for repairs to each party. Additionally, the *Stolt Achievement* received 50 percent of damages for loss of vessel use.

The *Stolt Achievement* appealed the apportioned liability, contending that the district court clearly erred in five instances. In an admiralty action, the reviewing court's standard of review requires reversal of the lower court only if there was a clear mistake in light of the

evidence. The reviewing court cannot reverse even if it would have weighed the evidence differently as a trier of fact.

## *Stolt Achievement's Negligence*

The court determined that the *Stolt Achievement* was negligent and in violation of Inland Rule 6 by proceeding at an excessive speed. In admiralty collision cases a party challenging its liability must meet the standards of the *Pennsylvania Rule*, a court doctrine that requires the challenging party to prove that its statutory violation was not a contributing cause of the accident.<sup>1</sup>

The *Stolt Achievement* challenged the lower court's finding that the customary speed of navigation at which it was traveling created a bow wave sufficient to disrupt the navigation of the *Lindholm*. The location of the collision occurred at a particularly narrow section of the Houston Ship Channel where Coast Guard warnings required vessels to operate at slower than customary speed. Because the *Stolt Achievement* failed to dispute the effects of its speed and the potential for a greater bow wave at the narrow section of the channel, the court found that the *Stolt Achievement* did not satisfy the requirements of the *Pennsylvania Rule*; specifically, its excessive speed was not a contributing cause of the collision.

## Expert Testimony

The *Stolt Achievement* next argued that the admission of the *Lindholm's* expert testimony was an abuse of discretion by the lower court. The *Lindholm* brought a Master Mariner to discuss ship handling and navigation. The *Stolt Achievement* argued that the witness was not qualified to discuss hydrodynamic effects of the *Stolt Achievement* on the *Lindholm*, specifically whether the *Stolt Achievement's* bow wave adversely affected the *Lindholm's* navigation. The court quickly dismissed this challenge, noting that the trial court limited the testimony to general navigation and did not admit opinions on the hydrodynamic effects of the *Stolt Achievement*.

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*The lower court found that both vessels were in violation of certain sections of the Uniform Inland Navigational Rules . . .*

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### Superseding Cause

The *Stolt Achievement* claimed that any negligence it may have committed was superseded by the actions of the *Lindholm*. The *Lindholm*'s sheer arguably cut off the *Stolt Achievement*'s liability because the sheer caused the collision and occurred independent of the *Stolt Achievement*'s negligent bow wave. The court found this analysis unpersuasive, holding that the events leading

of the *Stolt Achievement* and the *Lindholm*'s sheer equally contributed to the collision.

### Average Adjuster's Fees

Prior to trial the *Stolt Achievement* and *Lindholm* agreed on the amount of average adjuster's fees owed. Payment of adjuster's fees is an admiralty tradition requiring vessel and cargo owners to share in the cost of loss. Despite



Photograph of Houston shipping channel courtesy of NOAA's Photo Library. Photographer: Mrs. Marge Beaver, Photography Plus.

up to the collision could not be separated. The sheer alone did not cause the collision; the one harm, damage from the collision, arose out of both the *Stolt Achievement*'s excessive speed and the *Lindholm*'s sheer, caused by the bow wave.

### Apportioned Liability

The *Stolt Achievement* also challenged the lower court's equal allocation of liability, claiming that the *Lindholm* was more at fault in the collision. In determining allocation of liability a court is not bound by set standards; instead, it must weigh the number and faults of each party. The lower court found each party equally responsible for the collision. The court found no reason to alter the equal allocation of liability because the finding was supported by evidence that both the excessive speed

the stipulation, the lower court denied the *Stolt Achievement* entitlement to these fees. However, the denial was not erroneous. The court determined that the stipulation was only an agreement on the amount of the fees, not an admission of liability. In order to recover the fees, the *Stolt Achievement* only relied on the stipulation and did not prove entitlement.

### Conclusion

Finding all of the *Stolt Achievement*'s arguments regarding its negligence and liability unpersuasive, the court affirmed the apportionment of fault and preserved the equal allocation of liability. ✓

### Endnotes

1. *The Pennsylvania*, 86 U.S. 125 (1873).

# Barge-Injured Seaman Requires More Proof for Jones Act Claim

*Roulston v. Yazoo River Towing, Inc.*, 2006 WL 516808 (S.D. Miss. March 2, 2006)

*Jonathan Lew, 2L, Roger Williams University School of Law*

A federal district court in Mississippi recently decided that a seaman who is injured in the course of his employment on a boat that is not owned by his employer may succeed under a Jones Act claim<sup>1</sup> only in limited circumstances. Recovery under the Jones Act is possible if the seaman's injury was created by the employer or the employer should have discovered the dangerous condition through a reasonable inspection. Moreover, the court confirmed that a general claim of unseaworthiness failed because a seaman must prove that the employer has some ownership interest in the boat on which the seaman was injured.

## Introduction

Joey Roulston was employed as a seaman by Yazoo River Towing, Inc. (Yazoo River). He was assigned to

the *Melvin L. King* river towboat, which was owned and operated by Yazoo River, to pick up a tow of eight barges. When Roulston boarded one of the barges (ABS 1447 B) to secure it for towing, he fell into a manhole cover and severely injured his shoulder. Roulston filed a complaint under the Jones Act claiming that Yazoo River's failure to provide a safe working environment caused his injuries. He sought maintenance and cure for his injuries and Yazoo River moved for summary judgment on all claims.<sup>2</sup>

## Jones Act Negligence Claim

Roulston alleged that Yazoo River did not fulfill its general duty to ensure that an employee's workplace is free from unreasonable danger. Yazoo River argued for summary judgment because Roulston failed to produce any evidence that Yazoo River had notice of the dangerous manhole. To overcome the defendant's motion for summary judgment, Roulston had to prove that either the dangerous manhole was created by Yazoo River or Yazoo River should have been able to discover it with a reasonable inspection of the barge.

*Photograph of towboat and barge courtesy of NOAA Restoration Center; Erik Zobrist.*



Yazoo River also argued for summary judgment because Roulston testified he was the only deckhand working that night, and as the sole deckhand it was his duty to inspect the barge. Moreover, Roulston acknowledged that it was not good practice to walk on manhole covers. But the court held that even though Roulston may have been partially negligent, Yazoo River is not absolved of its liability. The court would address these issues through an evidentiary hearing; and if Yazoo River was found to be negligent, a jury would have to determine the extent to which each party was responsible.

#### General Maritime Unseaworthiness Claim

Roulston further alleged that Yazoo River breached its

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*... the plaintiff must  
“establish that he was  
a seaman with regard to  
the vessel on which he  
sustained his injury.”*

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duty to provide a seaworthy ship because every vessel owner owes all members of its crew a “duty to insure that the vessel is reasonably fit for its intended purpose.”<sup>3</sup> But Roulston did not get injured on board the ship that his employer owned; rather, he was injured on board the ABS 1447 B. The court chose to adopt the standard found in *Coakley v. SeaRiver Maritime, Inc.*, whereby the plaintiff must “establish that he was a seaman with regard to the vessel on which he sustained his injury.”<sup>4</sup> Because Roulston did not produce any evidence that Yazoo River had any type of ownership interest in ABS 1447 B, the court granted summary judgment to Yazoo River on this claim.

#### Maintenance and Cure Claim

Generally, if a seaman is injured while serving a ship, regardless of whether or not the shipowner was negligent, the owner must provide food, lodging, and medical services to the seaman until the “incapacity is declared to be permanent or...the employee has reached maximum medical recovery.”<sup>5</sup> Here, Yazoo River claimed that it reached the maximum by paying

maintenance to Roulston and cure to his medical providers until he was released. Roulston countered that Yazoo River arbitrarily discontinued his payments prematurely and his shoulder may still require additional medical treatment. Because neither party presented any further evidence to support their conflicting claims, the court denied summary judgment on this issue.

In addition to the claim for insufficient maintenance payments, Roulston requested compensation for future wages lost due to his injury. However, Roulston could not recover loss of future wages under his maintenance and cure claim because a maintenance and cure claim is limited in duration. Maintenance and cure is specifically for the period from the time the employee is injured until he has been pronounced as permanently injured or he has reached maximum medical improvement. The recovery is limited to that specific time period and it does not involve any future inability to work. Therefore, if Roulston seeks to recover lost future wages, he must pursue it under his negligence claim.

#### Conclusion

In summary, the court granted summary judgment to Yazoo River for Roulston’s general maritime unseaworthiness claim; denied summary judgment as to the maintenance and cure claim; and called for an evidentiary hearing to determine if Yazoo River negligently failed to inspect the ABS 1447 B. ✓

#### Endnotes

1. The Jones Act provides that “[a]ny seaman who shall suffer injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....” 46 U.S.C. § 688(a).
2. The party moving for summary judgment must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
3. *United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613 (1959).
4. *Coakley v. SeaRiver Mar., Inc.*, 319 F. Supp. 2d 712, 714 (E.D. La. 2004).
5. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975).

# Fifth Circuit Rules for Barge Owner in Spill Case

*In re Taira Lynn Marine Ltd. No. 5, LLC*, 2006 WL 728026 (5th Cir. March 23, 2006)

*Emily Plett-Miyake, 3L, Vermont Law School<sup>1</sup>*

On March 23, 2006, the Fifth Circuit Court of Appeals ruled on a motion for summary judgment in a case brought under the Limitation of Liability Act, in which the claimants sought recovery for purely economic losses arising from an allision between a tug and its tow and a bridge. The primary issue on appeal was whether parties who do not suffer physical damage to a proprietary interest can recover for purely economic losses resulting from a maritime allision.

## Background

On June 19, 2001, a barge owned by Kirby Inland Marine, L.P., and its tug boat, owned and operated by Taira Lynn Marine, Inc. (Taira Lynn), allided with the Louisa Bridge in St. Mary Parish, Louisiana. The cargo on the barge was a gaseous mixture of propylene and propane that discharged into the air as a result of the allision. The Louisiana State Police ordered a mandatory evacuation of all of the businesses and residences within a certain geographic radius of the bridge and accident site.

Fourteen parties made claims against Taira Lynn for injuries alleged to have been caused by the allision and evacuation. The claimants sought to recover damages under maritime law, state law, the Oil Pollution Act (OPA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In response, Taira Lynn sought to limit the actions of the claimants under the Limitation of Liability Act.<sup>2</sup> Taira Lynn moved for partial summary judgment on the ground that the claimants' recovery was barred by the controlling case, *Louisiana ex. rel. Guste v. M/V Testbank*, 725 F.2d 1019, 1023 (5th Cir. 1985), which disallowed recovery in a maritime negligence suit for losses unaccompanied by damage to a proprietary interest.

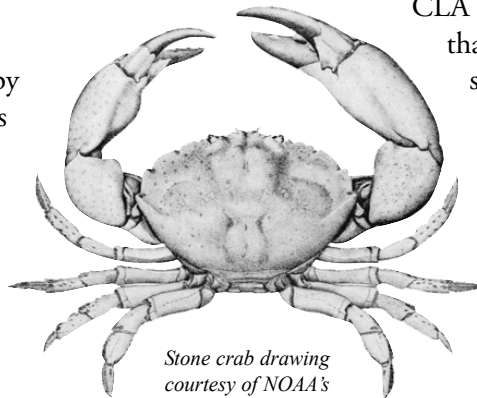
The District Court for the Western District of Louisiana found that most claimants suffered no phys-

ical damage. However, the court also found that the claims were limited to a small geographic region and that the claimants all made commercial use of the bridge. Accordingly, the court endorsed a geographic exception to the *Testbank* rule because, in its opinion, the claimants were entitled to a day in court to prove that their damages were foreseeable by Taira Lynn and were proximately caused by the allision. The court also determined that the claimants who were engaged in wholesale fishing operations either suffered physical damage or satisfied the commercial fisherman exception to *Testbank*, and that some other claimants satisfied the physical damage requirement of *Testbank*. In addition, the court declared that the OPA and CERCLA claims raised genuine issues of fact that required trial. For all of those reasons, summary judgment was denied. Taira Lynn appealed this ruling.

## Appeals Court Analysis

The appeals court began by addressing the claimants who alleged no physical damage. The court first analyzed these claims under general maritime law, which holds that plaintiffs in a maritime negligence suit cannot recover for purely economic losses absent physical injury to a proprietary interest. Taira Lynn argued that the district court erred in denying its motion for summary judgment because the claimants did not suffer physical damage to a proprietary interest. The claimants responded that because their businesses are located near the accident, and they worked and/or resided within the evacuated area, their claims should be subject to traditional foreseeability and proximate cause evaluations.

The court observed that most of the claimants suffered no physical damage directly attributable to the allision. The court refused to recognize the district court's geographic exception to the *Testbank* rule and barred these claims. The court also ruled that the district court erred in finding that the commercial fisherman exception to *Testbank* was satisfied. The court declared that the claimants were not entitled to recover under state law either, because "[t]o allow state law to supply a remedy when one is denied in admiralty would serve only to



Stone crab drawing  
courtesy of NOAA's  
NMFS Historic  
Collection.

circumvent the maritime law's jurisdiction."<sup>3</sup>

The court next considered the claims of two claimants who alleged that they suffered physical damage as a result of the evacuation. The first, Mason Seafood, lost eighty-eight boxes of frozen crabs when officials shut off electricity. The second, Advanced Materials, suffered physical damage when it was forced to prematurely terminate manufacturing runs. Taira Lynn argued that even if the two claimants did suffer damage, the damage was not directly caused by the allision and was not foreseeable.

The court agreed. Because the allision neither physically caused the disruption in electrical power that resulted in the spoilage of Mason's crabs, nor physically impacted Advanced Materials' facilities, the claimants failed to raise a "genuine issue of material fact as to whether they suffered physical damage to a proprietary interest as a result of the allision."<sup>4</sup> The court further declared that "even if we were to conclude that Mason's and Advanced Materials' inability to sell their products qualified as physical damage...they would not be entitled to recover because their damages were not foreseeable."<sup>5</sup>

The court then turned to the CERCLA claims. In order to establish liability under CERCLA claimants must show, among other things, that the release has caused the plaintiff to incur response costs. The court granted summary judgment on these claims, opining that "to justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment...[t]he claims at issue here are for economic losses resulting from the evacuation. None of the claimants has even alleged that it incurred costs in acting to contain the gaseous cargo."<sup>6</sup>

Lastly, the court examined the OPA claims. OPA provides for recovery from parties responsible for discharging oil into navigable waters for injury to, or economic losses resulting from, the destruction of real or personal property. Taira Lynn argued that OPA was inapplicable, and that even if it were applicable, the claimants could not recover because they did not

suffer physical damage to their property, and their economic damages were not directly caused by an OPA event. The court agreed, again because of the absence of property damage directly resulting from the allision. The court then conducted a further OPA inquiry, noting that the statute allows a plaintiff to recover for economic losses that result from damage to the property of another. The court found, however, that none of the claimants raised an issue of fact as to whether any property damage was caused by the pollution incident such that the claimants' damages *resulted* from such incident. Therefore, the court also granted summary judgment on the OPA claims. ♡

### Endnotes

1. Josh Clemons also contributed to this article.
2. 46 U.S.C. App. § 183.
3. *In re Taira Lynn Marine Ltd. No. 5, LLC*, 2006 WL 728026 at \*4 (5th Cir. March 23, 2006) (quoting *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193, 1195 (5th Cir. 1993)).
4. *Id.* at \*5.
5. *Id.*
6. *Id.* at \*6.

Photograph of towboat pushing barge courtesy of USDA Natural Resources Conservation Service.



"Vessel" Test, from page 1

### Legal Test

To bring a claim under the Jones Act one must prove three elements: (1) the petitioner qualifies as a seaman, (2) the seaman has a connection to the vessel, and (3) the vessel qualifies under the Act. The only legal issue in dispute in this case was the latter, and Atlantic and Weeks had the burden of proving that the BT-213 does not qualify as a vessel under the Jones Act.

### The Court's Analysis

The court began its analysis by recognizing that the term "vessel," as used for Jones Act purposes, has a broad definition. The court explained that when the status of a craft is ambiguous "it is necessary to focus upon 'the purpose for which the craft is constructed and the business in which it is engaged.'"<sup>4</sup> The court reasoned that the more the craft acts like a conventional seafaring craft, the greater the likelihood that the craft will be classified as a vessel.

The court gave five factors to consider when determining the purpose of a craft: whether the craft was assembled to transport goods, people, or cargo across water; whether a purpose of the craft is service; whether the craft was intended to be moved on a regular basis; how long the craft has remained in one place; and the presence of features that are characteristic of a vessel.

Moreover, the court articulated, the determination of the craft's transportation purpose is key to the decision as to whether a craft is considered a vessel. If the craft's main purpose is to transport it is likely to be ruled a vessel, whereas if transportation is a secondary function it will be more difficult for the craft to attain vessel status.<sup>5</sup>

The next part of the court's analysis consisted of analyzing a recent Supreme Court decision, *Stewart v. Dutra Construction Co.*,<sup>6</sup> where a longshoreman was injured on a dredge that removed silt from the ocean. The dredge was not capable of self-propulsion (it had to be moved by a tugboat), but had a captain and crew and other vessel-like features. The Supreme Court determined that as long as a watercraft is capable of being used for transportation purposes it qualifies as a vessel. Although the Supreme Court defined the term vessel for the purposes of the Longshore and Harbor Workers' Compensation Act, it reasoned that the definition would apply to the Jones Act as well.

*Stewart* has greatly expanded the categorization of watercraft as vessels under the Jones Act. Because the Supreme Court defined the dredge in *Stewart* as a vessel,

this court classified the BT-213 as a vessel as well because it is capable of transporting equipment and possesses other characteristics of a vessel including raked bow, end tanks for flotation, and anchors.<sup>7</sup>

### Conclusion

In light of the Supreme Court's recent decision in *Stewart*, and the holding that a watercraft does not have to be capable of self-propulsion to be classified as a vessel, the Fifth Circuit held that the BT-213 barge was a vessel because it was capable of transportation, though not self-propulsion, and had vessel-like characteristics. Accordingly, the court reversed the decision of the district court and remanded the case for a ruling in agreement with its determination that the BT-213 is a vessel. ♡

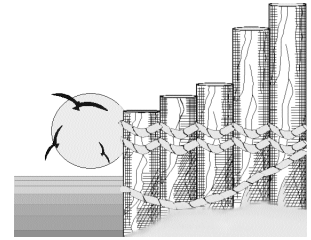
### Endnotes

1. This opinion replaces the court's contrary opinion in *Holmes v. Atlantic Sounding Co.*, 429 F.3d 174 (5th Cir. 2005), which has been withdrawn.
2. *Holmes v. Atlantic Sounding Co.*, 429 F.3d 174 (5th Cir. 2005).
3. 46 App. U.S.C. § 688.
4. *Holmes v. Atlantic Sounding Co.*, 437 F.3d 441, 446 (5th Cir. 2006).
5. The court further explained that three characteristics are usually attributed to nonvessels: the craft has a platform structure primarily to be used for platform work, the craft is stationary at the time of the incident, and any transportation function of the craft is secondary.
6. 543 U.S. 481 (2005).
7. That the BT-213 is incapable of self-propulsion is irrelevant because in *Stewart*, where the dredge had to be tugged, the Supreme Court held that the fact that a craft is not able to move by itself does not deprive it of vessel status.

Merchant Marine logo  
courtesy of the U.S.  
Merchant Marines.



# Interesting Items



## *Around the Gulf...*

In response to the U.S. Supreme Court's controversial decision in *Kelo v. City of New London* (covered in *Water Log* 25:2), the Alabama legislature introduced a **constitutional amendment limiting eminent domain** but failed to garner bicameral approval of a final version before the end of this year's session. Both chambers agreed on the amendment's core principle, which was to prohibit the use of eminent domain to shift property from one private owner to another. They disagreed only on details, including required compensation and the referendum date. The amendment was popular among property rights advocates but caused concern among local governments who feared losing a potent weapon to combat blight.

The **University of South Alabama** will receive \$2.4 million in federal funds to expand its **oyster habitat restoration program**. The funds mark a major increase, and will allow the program to begin working with sea grass beds and offshore artificial reefs. The program is intended to improve oyster productivity in places like Perdido Bay and Mobile Bay. Oysters are an important thread in Alabama's ecological tapestry, and a valuable and delicious piece of the state's economy.

Mississippi governor Haley Barbour has signed into law the **Gulf Region Water Utility Authority Act**, which creates county water authorities in the state's six coastal counties. The Act is intended to increase regional cooperation in water and sewer services, while continuing to allow local government control. The governor recommended a regional approach in the aftermath of Katrina. Federal Katrina funds will help pay for the necessary improvements.

The Texas General Land Office has paved the way for the **first offshore wind project in the U.S.** The Lone Star State has leased 11,355 acres about seven miles off the coast of Galveston Island to a company that plans to build a 150-megawatt wind farm. The project will generate enough electricity for 40,000 homes, and is anticipated to save as much as 20.7 million barrels of oil or 6.5 millions tons of coal over its 30-year life span. Revenue from the wind farm will help fund Texas schools.

## *Around the country...*

For the first time since the government began keeping records almost fifty years ago, the U.S. has seen a **net gain in wetlands**. The U.S. Fish and Wildlife Service reported that in 2004 there were nearly 108 million acres of wetlands, almost 200,000 more acres than in 1997, when the last count was made. To what do we owe this remarkable success? In the agency's eyes, "wetlands" includes not only the complex, life-nurturing ecosystems typically denoted by that word but also brand-spanking-new man-made features like stormwater retention ponds, sewage treatment pools, and golf course water hazards – essentially, any damp hole in the ground qualifies. The George W. Bush administration cites the new report as a victory in the pursuit of George H.W. Bush's goal of "no net loss" of wetlands. State wetland managers and resource protection groups like Ducks Unlimited disagree, noting that most of the newly created wetlands are of very low quality compared to the wetlands that continue to be destroyed by development.

In related news, the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency have issued **new wetland regulations** to encourage the expansion of private "mitigation banking" for wetlands destruction. Developers who destroy wetlands are required by law to mitigate the damage, and the new regulations clarify their ability to fulfill that obligation by buying credits from companies that operate so-called "mitigation banks." The new regulations were applauded by developers and mitigation bankers. ✓



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## ... Upcoming Conferences ...

### •JUNE 2006 •

Nutrient Loading and Removal in the Lower Mississippi River  
Basin: Data, Trends, and Opportunities  
June 1-2, 2006, New Orleans, LA  
 <http://www.tetrattech-ffx-com/lower>

2006 Greater Everglades Ecosystem Restoration Conference  
June 5-9, 2006, Lake Buena Vista, FL  
 <http://www.conference.ifas.ufl.edu/GEER2006/>

Great Lakes Sea Grant Network Conference  
June 11-14, 2006, Alpena, MI  
 <http://miseagrant.umich.edu/greatlakes06/>

Society for Conservation Biology – 20th Annual Meeting:  
Conservation Without Borders  
June 24-28, 2006, San Jose, CA  
 <http://www.ConservationBiology.org/2006/>

### •JULY 2006 •

30th Virginia Law of the Sea Conference: Law, Science & Ocean  
Management  
July 12-14, Dublin, Ireland  
 <http://mri.nuigalway.ie/marinelaw/2006LOSCONFERENCE.html>

8th International Conference on Mercury as a Global Pollutant  
August 6-11, 2006, Madison, WI  
 <http://www.mercury2006.org/>



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