

CC: TO JUDGE PM

THE HONORABLE BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN NEERGAARD,

Plaintiff,

v.

ISLAND COMMUTER SERVICE, LLC, and ARROW LAUNCH, INC., *In personam,* and ISLAND COMMUTER II, *In rem,*

Defendants.

SEABULK INTERNATIONAL, INC.,

Intervening Plaintiff,

v.

ISLAND COMMUTER SERVICE, LLC, and ARROW LAUNCH, INC., *In personam,* and ISLAND COMMUTER II, *In rem,*

Defendants.

NO. C01-1460R

TRIAL BRIEF OF DEFENDANT ARROW LAUNCH, INC.

I. INTRODUCTION

Defendant Arrow Launch Service, Inc., ("Arrow") is owned by Jack and Terri Harmon and is based in Port Angeles. Mr. Harmon has been in the launch business for over 20 years. He has been involved with Arrow (or a predecessor business entity) since 1989. Arrow operates launch vessels throughout ports in Puget Sound.

ORIGINAL

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Launch vessels are used to transport personnel between ships at anchor and the shore. They are also used to transport materials between ships and shore. Launch vessels are typically in the range of 40' to 60' in length. Launch services are ordinarily provided in accordance with a set schedule required by the ship.

The involvement of Arrow in this case is indirect. The DYNACHEM called Arrow and requested launch services while it was at anchor in Bellingham Bay. Arrow agreed to provide the requested services, but did not have a launch vessel available. Accordingly, Arrow made arrangements with another entity, Island Commuter, to have it perform the launch service. Island Commuter agreed to provide its vessel (ISLAND COMMUTER II), and its captain, Loren Kapp. In the course of Island's routine performance of the launch service, Mr. Neergaard was injured.

II. SUMMARY OF CLAIMS AGAINST AND BY ARROW

Among his allegations, plaintiff Neergaard alleges that Arrow was negligent. Initially, his theory was that Arrow was negligent in its selection of the vessel used for the launch service. However, Neergaard's liability expert, in his supplemental report, completely backed off that allegation once he realized that the bow railing of the launch vessel had been removed to facilitate the transfer of crew.

Plaintiff also alleges that Arrow and Island Commuter Service, LLC ("Island") were partners or in a joint venture, in an attempt to impute any negligence of Island to Arrow. First of all, Plaintiff never alleged a partnership in the complaint, so that legal theory should be precluded. Second, there is no evidence of a joint venture between Arrow and Island. In fact, the arrangement between Arrow and Island was a time charter, with Arrow as the charterer. There was no agreement to share profits and/or losses, the hallmark of a joint venture. Rather, Arrow simply hired the fully crewed ISLAND COMMUTER II on an hourly rate.

As an additional basis of recovery, Plaintiff alleges a breach of the warranty of workmanlike performance against Arrow. Plaintiff has no legal basis to make such a claim

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because, as a time charterer of the Island Commuter II, Arrow owed no warranty of workmanlike performance. Moreover, Plaintiff never pled such a cause of action in his complaint.

Other than the captain, Loren Kapp, the only crewmember on the ISLAND COMMUTER II on the day of the casualty was Max Joyce. It has been alleged that Max Joyce was an employee of Arrow. In fact, Max Joyce was paid by Arrow, but he was a borrowed employee of Island. The most important factor in determining employer status is who supervised and controlled the employee. In this case, everyone agrees that Max Joyce was under the supervision and control of Loren Kapp, the captain of the ISLAND COMMUTER II and an Island employee.

Seabulk has asserted a claim for indemnity against Arrow on the basis of the implied warranty of workmanlike service. As stated above, Arrow, as a time charterer, does not owe an implied warranty of workmanlike service. Additionally, a pure indemnity claim based on an implied warranty of workmanlike service is legally insufficient because under Ninth Circuit law, the Court is to apply principles of comparative fault (Knight v. Alaska Trawl Fisheries, Inc.), and Seabulk's own negligence must be considered. More importantly, if any warranty claim stands against Arrow, it will simply be passed through to Island, since Island performed the actual launch service, and if there was any breach of the implied warranty of workmanlike service, it was due to Island's actions, not Arrow's. In any event, the warranty simply requires "workmanlike" service. The evidence shows that the launch service rendered by Island met that standard. It was typical launch service in all respects. Unfortunately, an injury occurred due to extraneous circumstances: either the sea conditions or the fault of the plaintiff, Mr. Neergaard.

For its part, Arrow has asserted a two-part, third party claim against Seabulk. First, Arrow asserts that Seabulk was negligent and/or that the T/S DYNACHEM was unseaworthy. Accordingly, Arrow seeks indemnity and/or contribution from Seabulk on either basis. Secondly, Arrow has asserted a FRCP 14(c) third party claim, which makes Seabulk answerable directly to Plaintiff Neergaard's claims as if Neergaard had sued Seabulk in the first place.

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Seabulk was negligent in various ways leading to Neergaard's injury, including failure to train him in disembarkation via a pilot's ladder, failing to post supervisory personnel at the ladder, failing to actually supervise Neergaard's disembarkation, and improperly rigging the pilot ladder.

If Mr. Neergaard does establish a basis of liability, his damages will be reduced by his own comparative fault. His main breach of duty was in failing to step off the ladder when he should have. A transfer to a launch can be dangerous, and it is incumbent upon each participant to do his or her part. When the launch rises on the waves and it is adjacent to the man on the ladder, it is essential that he step off the ladder onto the launch. Mr. Neergaard did not do that.

Mr. Neergaard has been medically stationary since approximately the summer of 2000. However, since that time, he has made virtually no effort to seek alternate employment, a clear failure to mitigate his damages. Inasmuch as he has a college degree in marine engineering and over 20 years of practical experience in mechanical, electrical, hydraulic, and propulsion systems, he has abundant transferable skills to enable him to earn a good living for the remainder of his worklife, even with his current disability. Any further wage claim must account for his significant residual earning capacity.

III. DISCUSSION - ARROW INVOLVEMENT

On or about January 8, 2000, Arrow received a call from the captain of the DYNACHEM, to arrange launch services. The DYNACHEM was going to anchor in Bellingham Bay and needed launch service to transport crewmembers to and from shore. Jack Harmon realized that he was in a bind for an available vessel and contacted Drew Schmidt of Island to see if Island could step in and perform the service. Harmon was familiar with Island and with its vessel the ISLAND COMMUTER II. In fact, in the past, Island had performed launch service on behalf of Arrow with the ISLAND COMMUTER II and Island crew. Schmidt readily agreed to provide the vessel ISLAND COMMUTER II and its captain, Loren Kapp. Since it was wintertime, Island Commuter did not have its regular, summer workforce, so Schmidt asked Harmon if Arrow could provide a deckhand. Arrow said it would provide one of

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its employees, deckhand, Max Joyce, and leave him on the Arrow payroll. The hire rate charged by Island Commuter to Arrow was reduced from $125 per hour to $100 per hour because Arrow was providing and paying the wage of the deckhand.

The contractual relationship between Arrow and Island Commuter was a time charter. As stated by Schoenbaum in his hornbook,

> A time charter is a contract to use a vessel for a particular period of time, although the vessel owner retains possession and control. The time chartered vessel is typically fully equipped by the owner, who is responsible for normal operating expenses, repairs, the crew's wages, and insurance.

Schoenbaum, Admiralty and Maritime Law, §10-1, p 382 (1987). A time charter is in contrast to a bareboat charter. In a bareboat charter, the charterer becomes, for all intents and purposes, the owner during the period of the charter. "The legal test of a demise (bareboat charter) is whether the owner of the vessel completely and exclusively relinquished possession, command and navigation to the demisee." Id., Schoenbaum. In this case, since the vessel was at all pertinent times under the control, possession, command, and navigation of Island's employee, Captain Kapp, it is apparent that Arrow did not bareboat charter the ISLAND COMMUTER II.

The characterization of the charter is important because it is a well-established principle that in a time charter, the charterer is not responsible for the torts of the vessel owner. As stated in P&E Boat Rentals, Inc., 872 F.2d 642, 647 (5th Cir. 1989),

> We agree that a time charterer who has no control over the vessel assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.

In this case, there is no written agreement between Arrow Launch and Island Commuter Service for the time charter of the ISLAND COMMUTER II. However, there is no dispute as to the terms of the charter. The essential terms of the agreement were that Island would provide the vessel and the captain, while Arrow would provide the deckhand and pay the charter hire. Arrow and Island both agree that the deckhand was to work under the direction and control of the captain of the launch vessel.

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It may be argued by other parties that Arrow should be liable because in the past Arrow had provided training to Loren Kapp and Max Joyce This argument should be rejected because there is no allegation or evidence that Arrow improperly trained these individuals.

IV. LIABILITY THEORIES AGAINST ARROW LAUNCH:

A. Adequacy of the ISLAND COMMUTER II as a launch vessel.

As noted above, Plaintiff Neergaard's expert (Admiral Linnon) initially contended that the ISLAND COMMUTER II was not a suitable launch vessel. Specifically, his opinion was that the vessel was unsuitable because its bow railing interfered with the transfer of crew between a ship and the launch. In his March 11, 2002 report, he stated of the ISLAND COMMUTER II,

> The boat design, while ideal for her normal service, is less than ideal when used in a manner that requires passengers to board at other than the stern area. She is fitted with continuous safety rails of about 3 feet in height from just aft of the wheelhouse forward around the bow to the other side, and flush with the sides of the launch.

Admiral Linnon was mistaken as to the presence of the railings on the vessel. He later realized his mistake and corrected his opinion in his supplemental report dated July 9, 2002. In that report, he stated,

> Based on photographs, I had noted the presence of a continuous safety rail in the forward part of the Island Commuter II that could be an obstruction when attempting to board forward. It is now my understanding that the handrails at the bow had been removed for this launch service. Thus, the railings did not present an obstruction to stepping aboard from either the accommodation or pilot ladders.

Since Admiral Linnon is the only expert who ever rendered an opinion that suggested the ISLAND COMMUTER II was not a suitable launch vessel and since Admiral Linnon later recanted that opinion, there is no evidence to support an allegation that the launch vessel was unsuitable. In fact, the ISLAND COMMUTER II, which is 50' in length, is essentially the same

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type of vessel as the vessels routinely used by Arrow Launch and other launch companies for launch service.

Although the ISLAND COMMUTER II is generally used as a passenger ferry, the only characteristics that differentiate it from the Arrow launch vessels are a longer passenger cabin (aft of the wheelhouse) and the bow railing that completely encompasses the bow area. However, as noted above, for its role as a launch vessel in January 2000, the railing at the bow was removed so as to facilitate the transfer of passengers to and from the DYNACHEM. In short, with its bow railing removed, it was no different from vessels whose main work is launch service.

B. No partnership or joint venture between Island and Arrow.

There is simply no evidence to support an allegation that Island and Arrow were engaged in a partnership or joint venture. As noted above, Arrow agreed to pay Island an hourly rate of $100 per hour, and Island agreed to provide launch service with an Island captain in control of the vessel. The payment was not contingent on Arrow making a profit; it was not contingent on Island agreeing to share any losses. It was a simple time charter. Under Washington law, a partnership or joint venture will only form when

> [I]t appears the parties have entered into a business relation combining their property, labor, skill and experience...for the purpose of joint profits.

Malnar v. Carlson, 128 Wn 2d 521, 536 (1996). In this case, there are no indices of a partnership or joint venture between Island and Arrow. Arrow paid Island for services that Island provided to an Arrow client, but the two companies did not share the profits (or losses) from providing launch services.

C. Plaintiff has no implied warranty of workmanlike service claim against Arrow.

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To begin with, the plaintiff's complaint does not contain a claim against Arrow alleging a breach of the implied warranty of workmanlike service. This allegation was first raised against Arrow in Plaintiff's pre-trial statement a few weeks ago.

Secondly, as a time charterer of the ISLAND COMMUTER II, Arrow owes no implied warranty of workmanlike service. See Stranahan v. A/S ATLANTICA & TINFOS PAPIRFABRIK, 471 F.2d 369, 374 (9th Cir. 1972) ("Generally, a time-charterer like Weyehaeuser is not charged with a warranty of workmanlike service."); Allison v. Cosmos Steamship Corp., 331 F.Supp. 1319, 1320 (W.D.Wa. 1971) ("The revolution taking place in the distribution of maritime risk has not yet saddled a time charterer with the implied warranty of workmanlike service."). The warranty of workmanlike service is designed to place liability on the party most capable of preventing the injury causing accident. Knight v. Alaska Trawl Fisheries, Inc., 154 F.3d 1042, 1046 (9th Cir. 1998). Because a time charterer has no operational control over the vessel or crew, the time charterer cannot prevent accidents from occurring and the purpose of the warranty would not be served. Arrow, as a time charterer, had no operational control over the Island Commuter II and therefore, had no duty under an implied warranty of workmanlike service theory.

Finally, allowing plaintiff to recover based on this theory of liability goes well beyond the purpose of the warranty. The warranty arose from the inequity of holding a shipowner strictly liable under the doctrine of unseaworthiness to longshoremen on their vessels for injuries caused by acts of a third party. Knight, 154 F.3d at 1044. In Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133, 100 L. Ed. 133, 76 S. Ct. 232 (1956), the Supreme Court recognized an implied warranty of workmanlike service in every contract between a maritime contractor and shipowner. Under the Ryan indemnity principles, a shipowner held liable to an

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injured plaintiff under the doctrine of unseaworthiness could recover indemnification from a negligent contractor for expenses and damages paid in response to the underlying claim. Knight, 154 F.3d at 1044. Congress corrected the inequities with respect to longshoremen by eliminating the application of the warranty of unseaworthiness to longshoremen. Id. However, the Ninth Circuit has continued to recognize the warranty, also know as Ryan indemnity, in seamen cases. Id. at 1045. Nonetheless, although it recognizes the implied warranty, the Ninth Circuit has strictly curtailed its applicability. Under the holding in Knight, the warranty only arises when the shipowner is liable to plaintiff based on the doctrine of unseaworthiness and only if the shipowner is not at fault in any manner, i.e. only in those cases where the shipowner is liable solely because of acts of a third parties. Id. at 1046. Neergaard's claims against Arrow do not fall within the limited scope of when the warranty applies. Neergaard is not the shipowner and is not seeking indemnification for liability imposed on him by the doctrine of unseaworthiness. The implied warranty of workmanlike service does not flow to plaintiff in this case and plaintiff cannot recover on that basis.

Even if it owed an implied warranty, Arrow did not breach an implied warranty of workmanlike service. A breach requires that the actions of the contractor render the vessel unseaworthy. See Seattle Stevedore Co. v. Compania Maritima, 373 F.2d 9, 11 (9th Cir. 1967). An unseaworthy vessel is one that is not reasonably fit for its intended purpose. Whaley v. Rydman, 887 F.2d 976, 977 (9th Cir. 1989). The mere fact that there is an accident is not enough for a finding of unseaworthiness. Schoenbaum, Admiralty and Maritime Law, §5-3, p 166 (1987). No actions of Arrow rendered the DYNACHEM unfit for its intended purpose. Arrow chartered a vessel suitable for use as a launch vessel and insured knew the captain and crew were experienced in providing launch services. Furthermore, the actions of Island and Loren Kapp did

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not render the DYNACHEM unfit for its intended purpose. Loren Kapp operated the vessel in a prudent manner, reasonably requested that the DYNACHEM have the disembarking crewmembers use the pilot's ladder due to the weather conditions, and he configured the ISLAND COMMUTER II in an appropriate manner. It was the actions of either the plaintiff, in failing to heed the instructions of the launch crew, or the actions of Seabulk in failing to train plaintiff in disembarkation via a pilot's ladder, failing to post supervisory personnel at the ladder, failing to actually supervise Neergaard's disembarkation and/or improperly rigging the pilot ladder, that rendered the DYNACHEM unfit for its intended purpose.

D. Max Joyce was a borrowed servant of Island Commuter.

As noted above, Max Joyce was an Arrow employee, but was "borrowed" by Island to serve aboard the ISLAND COMMUTER II as deckhand. (Captain Kapp and deckhand Joyce were the only crewmembers on the vessel.) For administrative convenience, Joyce remained on the Arrow payroll, although Arrow's charter hire payment to Island was reduced from $125 per hour to $100 per hour accordingly. Joyce worked as deckhand on the ISLAND COMMUTER II on January 8, 9, 10, 12, and 13. (The accident date was January 9.) At all times, he took orders from and was supervised by Loren Kapp, the captain of the vessel. No one disputes that Joyce was under the control of Captain Kapp.

It has been alleged that Max Joyce was an employee of Arrow on January 9, 2000 in an attempt to impute any fault on the part of Joyce in the Neergaard injury (which is explicitly denied by Arrow, in any event) to Arrow. However, the facts and law show that Joyce was a borrowed servant of Island, primarily because he was under the control of Captain Kapp, an Island employee.

The U.S. Supreme Court explained the borrowed servant doctrine succinctly in Denton v Yazoo & M. Valley R. Co., 284 U.S. 305, 308, 52 S.Ct. 141, 76 L.Ed. 310 (1932):

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> When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former.

The Ninth Circuit recognizes the borrowed servant doctrine. Parker v. Joe Lujan Enterprises, Inc., 848 F.2d 118, 119-20 (9th Cir. 1987); United States v. Bissett-Berman Corp., 481 F.2d 764, 772 (9th Cir. 19 339 F.2d 348 (9th Cir. 1964). Under the borrowed employee doctrine, there are generally nine factors that the courts consider in weighing whether the employee is considered a borrowed employee of another company:

> (1) Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation? (2) Whose work was being performed? (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who had the right to discharge the employee? (9) Who had the obligation to pay the employee? Brown v. Union Oil Co. of California, 984 F.2d 674, 676 (5th Cir. 1993)

In this case, when the factors are considered, it is clear that Max Joyce was a borrowed employee of Island. The table below discusses the nine factors as they relate to the employee status of Max Joyce.

Borrowed Employee Factors

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[illegible]	Island had complete, exclusive control over Joyce aboard Island's vessel. No supervisor was present from Arrow. Captain Kapp directed the work to be done by Joyce and the manner in which the work was to be performed.
[illegible]	Joyce performed all work for the benefit of Island aboard an Island vessel.
[illegible]	Arrow agreed to pay Joyce. Island agreed he would serve under the command of Captain Kapp. Arrow did not retain any supervision or control over Joyce.
Did the employee acquiesce?	Joyce agreed, without objection, to perform work on the ISLAND COMMUTER II under the command of Captain Kapp. He continued working in the same relationship for several days after the casualty.
[illegible]	Arrow did not terminate its relationship with Joyce when he was sent to work for Island.
[illegible]	Island furnished the place of employment and the equipment used for the job.
[illegible]	In this launch service to the T/S DYNACHEM, Joyce worked on the ISLAND COMMUTER II under Captain Kapp on January 8, 9, 10, 12, & 13.
[illegible]	Island could have discharged Joyce, but everyone agrees that Island would have notified Arrow before doing so.
[illegible]	Arrow agreed to keep Joyce on its payroll. However, its charter hire was reduced from $125 per

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[redacted]	hour to $100 per hour in recognition of the fact that Island was not paying him.

In the recent case of Rodriguez v. Barge Foss 343, 1999 AMC 1593 (W.D. Wa. 1998), Judge Zilly granted summary judgment in favor of "a borrowing employee." In so doing, he analyzed the borrowed servant issue in light of the nine factors listed above. With respect to the pay issue (the last factor), Judge Zilly did not find it material that the "lending" employer continued to pay the worker because the "borrowing" employer was still obligated to pay for the worker's services through its payment to the "lending" employer. In the instant case, the situation is nearly identical because Island effectively paid for Joyce's services because it received less charter hire to account for the fact that Joyce remained on Arrow's payroll.

E. Seabulk indemnity claim against Arrow.

Seabulk intervened in this case to assert indemnity claims against Island and Arrow on the basis of a breach of the implied warranty of workmanlike service. (That is the only legal theory identified in support of the Seabulk indemnity claims.). As discussed more fully above, as a time-charterer of the Island Commuter II, Arrow did not owe a duty under an implied warranty of workmanlike service to Seabulk or anyone else.

Putting aside for a moment the legal merit of Seabulk's indemnity claim, it must be pointed out the nature of the damages sought by Seabulk. Seabulk seeks reimbursement of amounts paid for maintenance and cure, which are legitimate subjects of an indemnity claim because Seabulk was legally obligated to make those payments to or on behalf of Neergaard. However, Seabulk also seeks reimbursement of amounts paid to Neergaard for wage continuation and wage advances. Seabulk was under no obligation to make these payments and did not enter into any written agreement with Neergaard that dealt with the treatment of those advances. In short, Seabulk voluntarily made the wage advances to Neergaard and has no legal basis on which to claim reimbursement from Arrow or Island.

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Seabulk seeks 100% indemnity from Arrow on the basis of the implied warranty of workmanlike service, ignoring the fact that in the 9th Circuit, principles of comparative fault are applicable to such claims. In the case of Knight v. Alaska Trawl Fisheries, Inc., 154 F.3d 1042, 1046 (9th Cir. 1998), the court stated,

> We hold that a negligent shipowner is not entitled to receive Ryan indemnity from a negligent contractor when the shipowner is found liable under both negligence and unseaworthiness theories.

Under the Knight case, the only situation in which Seabulk could recover indemnity from either Arrow or Island is where the only grounds for Seabulk's liability are the acts of Arrow or Island. If Seabulk is liable under a negligence theory or a theory that the DYNACHEM was unseaworthy due to an act or omission of Seabulk, principles of comparative fault will apply and there will be no indemnification. Id.

Seabulk relies on the case of Bowker v. Cascade Tug, 2001 AMC 2268 (W.D. Wa, 2001), in support of its claim of 100% indemnity. The Bowker case is factually distinct. In Bowker, a tug crewmember was injured when a ramp to a dock collapsed as he was egressing from the tug to the shore. His employer paid maritime remedies and then settled his claim on the basis of the nondelegable duty of seaworthiness owed to the crewmember. His employer then sought and won indemnity against the ramp owner on the basis of the implied warranty of workmanlike service. The Court specifically stated,

> In the event that Sea Coast Towing, Inc. is found liable to plaintiff based on the defendant's duty to provide a seaworthy ship, Boyer Alaska Barge Lines, Inc. and Boyer Towing, Inc. shall be ordered to indemnify Sea Coast Towing, Inc. for all costs, fees and expenses incurred by Sea Coast resulting from the injuries to plaintiff Al Bowker, including all payments for maintenance and cure, litigation costs and expenses, attorneys' fees and judgment for damages in favor of plaintiff.

Id. The case is distinguishable from the instant case in that the tug owner/employer in Bowker had nothing whatsoever to do with the collapse of the ramp and the injury to the crewmember. In the instant case, however, Seabulk was negligent in its training of Neergaard in the disembarkation from pilot ladders to launch vessels, in failing to post supervisory personnel on

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deck in the vicinity of the ladder, in failing to supervise his disembarkation and in failing to rig the pilot ladder in compliance with accepted industry practices and applicable regulations.

In addition, as discussed more fully above, Arrow and Island did not breach an implied warranty of workmanlike service in providing launch service to the DYNACHEM.

Finally, were Seabulk to prevail on the indemnity claim, damages would be strictly limited to amounts it was required to pay plaintiff under the doctrine of maintenance and cure and unseaworthiness, including attorney's fees reasonably incurred in defending plaintiff's claim against Seabulk. Flunker v. United States, 528 F.2d 239, 246 (9th Cir. 1975). Arrow anticipates that Seabulk will seek indemnification for 100 percent of its attorney's fees and for amounts it paid as wage continuation or wage advances and contributions to Neergaard's pension. As to the former, only costs and fees related to defending the underlying claim by plaintiff are recoverable in an indemnification action. Id. As for the latter, Seabulk was not contractually bound to make the wage continuation, advances or pension contributions and so cannot recover those payments in an indemnification action. Id. ("Payments to pension funds pursuant to a contract between Flunker's union and States are not "wages" to Flunker...But they are expenditures by States which States was contractually bound to pay to the Union. ."). In short, Seabulk's indemnification claim is limited solely to amounts it paid for Maintenance and Cure and to the cost to defend plaintiff's claims, and only then on a comparative fault basis.

F. Seabulk must indemnify Arrow for expenses incurred in defending Neergaard's claim.

Arrow has incurred substantial legal fees in defending the claims brought by Neergaard. Under general maritime law, those expenses are recoverable from the party primarily at fault for the accident, in this case Seabulk. See Schoenbaum, Admiralty and Maritime Law, p. 148, §4-15 ("Tort-based indemnity may exist where there is a great disparity in the fault of the parties that are liable to the plaintiff"); See also, Dizard v. VOSHTE LYNN, 1988 AMC 795 (W.D. Wa. 1997), quoting, Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co., 410 F.2d 178,

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186 (5th Cir. 1969) ("it would be wrong to assess damages against a non-negligent or passively negligent shipowner for loss or injuries suffered solely as the result of active negligence of another party"). Arrow is not negligent and not liable to the plaintiff. Therefore, under the indemnity principles laid out above, it is entitled to recover costs and attorney's fees incurred in defending the underlying suit brought by plaintiff. See Campbell v. Offshore Logistics International, Inc., 816 F.2d 1401, 1406 (9th Cir. 1987).

V. PLAINTIFF'S DAMAGES

Plaintiff must introduce sufficient evidence at trial to demonstrate that his damages are not speculative in nature. Harmsen v. Smith, 693 F.2d 932, 945 (9th Cir. 1982); Bergen v. F/V ST. PATRICK, 816 F.2d 1345, 1350 (9th Cir. 1987).

> Although damages need not be proved to a mathematical certainty, 'sufficient facts' must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture.

Id. Lack of evidence prevents recovery. Harmsen, Id. at 945 (9th Cir. 1982). Plaintiff can only recover those elements that he can prove with reasonable certainty. Walden v. United States, 31 F. Supp. 2d 1230, 1235 (S.D. Ca. 1998).

A. Pain and Suffering.

No one disputes that plaintiff suffered a serious injury and, as a result, has had a change in his life circumstances. However, the list of injuries detailed in Dr. Awbrey's (plaintiff's medical expert) letter of June 3, 2001 is somewhat exaggerated, and some of them do not relate to the accident of January 9. 2000. The neurologist retained jointly by Arrow and Island, Dr. Marc Kirschner, opined that plaintiff suffers only mild atrophy of the right leg and that more testing is necessary to determine if the atrophy is even related to the injury or due to disuse. This is in opposition to the finding by Dr. Awbrey that plaintiff suffers massive right leg atrophy. Additionally, Dr. Awbrey characterizes plaintiff's gait disturbance as severe, while Dr. Kirschner finds it to be mild. Most importantly, Dr. Awbrey suggests that plaintiff suffers perineal nerve injury as a result of accident. Dr. Kirschner notes that the nerve injury is present in both legs

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and, as a result, is unlikely to be related to plaintiff's injury. Finally, Dr. Bruce Rolfe, defendants' orthopedic expert finds that there is not enough evidence from plaintiff's medical records to establish that he suffered a Lisfranc injury or avulsion fractures to metatarsals 1,2, and 3. Plaintiff must prove damages and must prove that the damages flow from the accident. Although he has some support for his damages, Neergaard has not proven that all the ailments and injuries he is suffering stem from the accident nor has he proven that his injuries are as severe as his experts' reports would suggest. Any damage award for pain and suffering should take into account these limiting factors. See Simenoff v. Hiner, 249 F.3d 883, 888 (9th Cir. 2001).

B. Economic Damages.

Plaintiff will seek to recover past and future economic damages from defendants, including past wage loss, future wage loss and lost benefits. However, there are several problems with plaintiff's damage claims. First, he has failed to secure employment since the time of medical stability. The medical opinions in this case state that he is physically capable of returning to work, although not in the maritime field. This failure to secure employment and to mitigate his damages should eliminate wage loss claims, or at the very least, reduce his damages. In addition, he lacks proof of his residual earning capacity, defeating his future wage loss claim. Finally, he has retained his pension benefits, medical benefits, and dental benefits and thus has no loss in that respect.

An important point to note is that Neergaard's annual earnings with Seabulk were slightly in excess of $78,000, not $90,000+ as argued by Neergaard. Due to the dates on which his work cycles started and began, Neergaard has had some years of greater than $78,000 per year. However, these years would average out to $78,000 due to the nature of the union contract. It would be incorrect and inappropriate to calculate Plaintiff's earning capacity based on an aberrant year of income.

1. Past and Future Wage Loss.

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Plaintiff should not be entitled to recover past wages because any lost wages are the result of his decision not to seek alternative employment.

> In assessing damages proximately caused by Appellant's negligence, the jury was to consider whether Appellee exercised reasonable efforts to secure gainful employment. If Appellee failed to do so, the loss of wages is said to be Appellee's choice rather than a proximate result of Apellant's negligence.

Baker v. Baltimore & Ohio Railroad Co., 502 F.2d 638, 644 (6th Cir. 1974). Neergaard has done nothing to secure gainful employment. Dr. Kirschner and Dr. Rolfe both state that he is medically stable and could return to work. Dr. Kirschner believes that Neergaard could have returned to work one year after the date of his injuries - January 2001. Dr. Awbrey, plaintiff's medical expert and treating physician, also supports the theory that plaintiff could have returned to work in this timeframe. Therefore, any loss of past income suffered by the plaintiff is due solely to his own failure to secure alternate employment and is not recoverable from defendants. At a minimum, defendants are entitled to an offset of the amount plaintiff could have earned in the time period between trial and the date he was medically stable, January 2001.

Plaintiff will seek to recover lost future earnings, however, plaintiff must prove the amount of the loss and cannot rest on mere conjecture. See Walden, 31 F. Supp. 2d at 1235.

> The base figure used to calculate future wage loss is the difference between what a person earned before the accident and what he would be able to earn upon returning to work, not necessarily in the same job.

Id. Neergaard, as an element of his future wage loss damages, must prove his residual earning capacity, what he is capable of earning in the future See Bourdreau v Wild Orchid, Ltd., 27 F. Supp. 2d 72, 81 (S. Me. 1998); Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1, 6-7 (1st. Cir. 1992). Failure to prove residual earning capacity, would make the any future wage loss award speculative and based on conjecture.

Here, plaintiff cannot prove his residual earning capacity. As the reports of Dr. Rolfe and Dr. Kirschner amply demonstrate, plaintiff is medically capable of employment and has been since January of 2001. However, he has not sought, much less acquired new employment, which

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would give the Court an indication of his residual earning capacity. Plaintiff has no other evidence to show what he is capable of earning. In short, plaintiff has no evidence to prove his future wage loss and should not be permitted to recover this element of damages.

2. Fringe benefits.

Defendants expect that plaintiff will seek damages for lost fringe benefits such as his pension, medical and dental benefits. However, plaintiff has no losses in this category inasmuch as plaintiff is receiving his pension and has been since January of 2002. Seabulk, a defendant in this matter, voluntarily made payments to plaintiff's union pension plan in order for plaintiff to retain these benefits. These benefits include $1,700.00 per month for plaintiff's life plus medical and dental insurance for life. Therefore, plaintiff has suffered a loss of his pension benefits only to the extent that his pension would have been greater had he worked until a later retirement age.

In the case of the medical and dental insurance, there is no shortfall since will receive those benefits for the remainder of his life.

With respect to the pension benefits, the economist retained by Seabulk, David Knowles, has calculated that the net present value of the shortfall sustained by Mr. Neergaard is slightly more than $28,000. The amount is relatively modest because Mr. Neergaard began receiving pension benefits of $1,700 per month at age 47, which equal $20,400 per year. Had he not been injured, he would have had to work until age 63 before he could begin collecting his pension. Even at an increased pension level from age 63 onward, it would take several years to make up the $20,400 he will have received for 16 years, particularly when the time value of money is considered.

3. Collateral Source Rule.

The collateral source rule also does not apply to payments made by Seabulk to plaintiff because Seabulk itself is a tortfeasor. The rule only prevents the defendants from deducting injury compensation received from parties other than the tortfeasor from damage awards.

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Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962). Since Seabulk is a tortfeasor, the collateral source rule does not apply.

In the event that defendant Arrow is required to indemnify Seabulk for amounts paid by Seabulk to Neergaard, Arrow should be entitled to an offset of amounts recovered by plaintiff for the same category of damages. See, Flunker v. United States, 528 F.2d 239, 245 (9th Cir. 1975); Gypsum Carrier, Inc. v. Handelsman, 307 F.2d at 534 (the tortfeasor should not be required to compensate twice for the same injury). The collateral source rule only prevents the tortfeasor from benefiting from payments made by third parties to the plaintiff; it does not mandate that defendants pay twice for the same loss. See Id.

4. Defendants' rebuttal evidence on economic damages.

In the event that plaintiff does present sufficient evidence to recover economic damages, both past and future, defendants intend to offer rebuttal evidence. Defendants, Arrow, Island, and Seabulk have secured vocational and economic experts to offer opinions regarding plaintiff's lost past and future income and the best ways for plaintiff to mitigate his damages. Seabulk's vocational expert, Stan Owings, has approached the situation from the standpoint that plaintiff's best option would be to seek postgraduate education and earn an MBA. According to Seabulk's economist, David Knowles, Mr. Neergaard will totally mitigate his earning loss by 2005. His past wage calculation is $159,402, and his future wage loss calculation is $74,160. When the education costs are added in, the total economic loss is $249,210.

The economist retained jointly by Island Arrow, Frank Ault, also performed an economic analysis based on the MBA scenario. Based on the average earnings of an MBA graduate, the economic loss to plaintiff for future wage loss, discounted to present value, and deducting federal and state income taxes saved, and FICA, and medicare deductions, would be $153, 896.00. His past wage loss would be $154,964. The total is just shy of $309,000. Because plaintiff is not required to pay federal and state income tax and FICA and medicare contributions on personal injury awards, the plaintiff must reduce lost wages by those amounts. Walden, 31 F. Supp. 2d at

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1235 ("An award for lost income, both past and future, is discounted to reflect lost wage income after both state and federal taxes have been deducted.").

Defendants Arrow and Island's vocational expert Paul Blatchford has taken a different approach to plaintiff's future employment prospects. Neergaard is a highly trained and educated marine engineer with substantial experience. While he may not be able to return to maritime employment and is restricted to fairly sedentary jobs, there are numerous positions for which Neergaard is immediately qualified. These positions include Water and Liquid Waste Treatment Plant and Systems Operator, Power Plant Operator, Water and Sewage Treatment Plant Operator, Building Services Supervisor, Field Service Engineer, Maintenance Planner, Distribution Superintendent, Electric Power Superintendent, Building Superintendent, Energy Control Officer, Stationary Engineer, Facility Manager, Dispatcher and Surveillance System Monitor, to name just a few. The salary range for these positions would be $50,000 to $70,000 per year. Per the calculations of the Island and Arrow economist, Frank Ault, using an average of $60,000 as an approximation of plaintiff's residual earning capacity, his future lost earnings would be $148,304, after appropriate discounts and deductions. Taking into account the fact that he could have returned to work in January of 2001, his past wage loss would come to approximately $82,958, for a grand total of $231,000.

Seabulk's economist, David Knowles, provided an additional analysis based on the report of vocational consultant Paul Blatchford. His figures total $358,958.

5. Any damage award must be reduced by plaintiff's contributory negligence.

Mr. Neergaard failed to exercise reasonable care for his own safety and caused or contributed to his injuries. As the launch vessel approached the rope ladder, where plaintiff was waiting, Max Joyce, the deckhand on the ISLAND COMMUTER II told plaintiff to step off the rope ladder and on to the waiting launch vessel. For some unexplainable reason, plaintiff did not follow these simple instructions and was injured. In a transfer from a ship to a launch vessel, it

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is extremely important that the person making the transfer follow the instruction of the launch vessel. Mr. Neergaard's failure to heed the instructions was unreasonable and should reduce or eliminate his recovery from Defendants Island, Seabulk and Arrow. See Simenoff, 249 F.3d at 888.

> Contributory negligence is applicable to mitigate damages when a seaman is injured of "alternative courses of action are available to the injured party, and he chooses the unreasonable course."... Contributory negligence is measured by what a reasonable person would have done under similar circumstances.

Id. at 889. Plaintiff had two alternative courses of action – following the orders of the launch vessel and stepping off the rope ladder onto the launch vessel or ignoring the instructions and standing stationary on the rope ladder, in danger of being struck by the launch vessel. Faced with these two alternative courses of action, plaintiff chose the unreasonable one, the one no reasonable seaman would have chosen; ignoring the instructions and waiting.

DATED this 23rd day of August, 2002.

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I declare under penalty of perjury of the laws of the state of Washington that on August 23, 2002, I caused to be served in the manner indicated below a true and accurate copy of the foregoing document upon the following

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