ADMIRALTY LAW

Navy Sailor's Death Implicates Maritime Law

By **James E. Mercante** And **Daniel O. Rose**

A U.S. Navy sailor was taking part in a Naval training exercise near Jamestown Island, Va., when the 23-foot Rigid Hull Inflatable Boat (RHIB) he was aboard was struck by a 600-foot flotilla of eight barges being pushed up river by a tugboat. The Navy sailor, Freddie Porter Jr., died as a result of the collision. Both the Navy RHIB and the tug operator, Vulcan Materials Company, contributed to the collision.[1]

FTCA Bars Direct Action

Generally, a serviceman who is injured or killed during active duty is barred from recovering against the United States under the Federal Tort Claims Act (FTCA) for any negligence of his or her fellow serviceman by the well-settled *Feres* doctrine. *Feres v. United States*, 340 U.S. 135, 146 (1950). The absolute preclusion in *Feres* rests primarily on the principle that the military should be shielded from the adverse effect on military discipline that would result if lawsuits challenging orders or actions in the course of military duty were permitted.[2]

While the Porter family's direct claim against the Navy was soundly barred by *Feres*, their claim against Vulcan remained viable. The Porter family, represented by co-author Daniel O. Rose, asserted its claim against the tug company in an admiralty limitation of liability proceeding initiated in federal court by Vulcan pursuant to 46 U.S.C. §30505 (2006).[3] Vulcan, in turn, sought contribution from the Navy under the Public Vessels Act, 46 U.S.C. §31101-13, for any amounts Vulcan became legally obligated to pay in excess of its percentage of comparative responsibility.[4] The framework had thus been set for the Porter family to be able to recover for their loss, notwithstanding the *Feres* bar.

After a four-day admiralty bench trial, the District Court found that the Navy's vessel was "unseaworthy" because Porter's shipmates were "incompetent" with "little experience on the water" and that their negligence contributed to the collision.[5] The Navy was allocated 80 percent fault. The tug operator, however, was found 20 percent responsible for failing to post a proper lookout.[6] Notwithstanding the substantial allocation of fault against the Navy, the District Court entered the full judgment against the tug operator under general maritime law's joint and several liability rule.[7] The *Feres* doctrine's absolute bar was, in effect, neutralized by the admiralty rule.

> The doctrine of joint and several liability remains alive and well in admiralty's general maritime law.

Joint and Several Liability

Pure joint and several liability in admiralty is well settled. See Thomas J. Schoenbaum, Admiralty and Maritime Law, §§5-4, 5-14 (4th ed. 2007) ("By long tradition, the doctrine of joint and several liability applies in admiralty" and the "adoption of comparative fault has not affected the well established rule that there is joint and several liability in admiralty tort actions"). See, e.g., *The Atlas*, 93 U.S. 302 (1876). In *Atlas*, the Supreme Court held that "[I]t is...clear, that, if [the plaintiff] did not contribute to the disaster, he is entitled to judgment...for the full amount of his loss. He may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately.... [A]ny one of them is liable for the injury done by all." 93 U.S. at 315.

The doctrine of joint and several liability has been frequently criticized. Indeed, while a majority of state legislatures have modified the "pure" rule to address the situation of substantial contributory fault, or out of a concern for protecting a "deep pocket" from perceived disproportionate liability, it nevertheless remains alive and well in admiralty's general maritime law.

The rationale for the "pure" rule was exemplified in this case. Joint and several liability only arises in situations where two or more tortfeasors are each an actual and proximate cause of plaintiff's entire injury. Actual cause, also known as "but for" causation, means that the plaintiff's injury would not have resulted but for each tortfeasor's independent negligence. As such, each tortfeasor is actually fully responsible for the entirety of the victim's injuries because they would not have occurred "but for" its own negligence. For instance, the tug operator's negligence in failing to post a proper lookout was a "but for" cause of the casualty and absent that independent negligence, there would not have been an injury. That is, a proper lookout posted by the tug operator would have prevented the collision.[8]

Under the joint and several liability rule, the Porter family was entitled to full compensation from any defendant whose tortious conduct was an actual and proximate cause of the loss. The matter of "comparative responsibility" looks only at comparing the conduct of two (actual and proximate cause) tortfeasors to determine responsibility as between them, for satisfying a judgment.[9] If one of the tortfeasors is "unavailable" and a disproportionate allocation of the judgment results, that is a matter solely between the tortfeasors; the joint and several rule dictates that an innocent plaintiff » Page 9

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Admiralty

« Continued from page 3

should not bear that burden.

This is precisely what occurred in this case. After trial, the District Court dismissed Vulcan's contribution claim against the Navy based on *Feres* and *Stencel Aero* reasoning that the United States did not waive its sovereign immunity with respect to Vulcan's contribution claim. Thus, pursuant to general maritime's joint and several rule, Vulcan remained liable for 100 percent of the judgment.

Appeal

The District Court's ruling was at the heart of an appeal filed by Vulcan to the U.S. Court of Appeals for the Fourth Circuit. There, Vulcan contended that the unique nature of a maritime mutual fault collision (which has historically recognized a "divided damages rule" where both vessels in a collision are presumed to be at fault and responsible to each other for half of the other's damages) warrants excepting its contribution claim against the United States from the *Feres* bar.

The Supreme Court has not squarely addressed this specific issue in the admiralty context. While *Feres* and *Stencel Aero* remained black-letter law in FTCA jurisprudence, there have been cases, including a Fourth Circuit opinion, *Ionian Glow*,[10] which supported an argument that an admiralty mutual fault collision rule remains outside the scope of sovereign immunity.[11]

But here, the Fourth Circuit, in affirming the district court, held that:

> the *Feres-Stencel Aero* doctrine applies to the present dispute involving a serviceman killed incident to service. To the extent that *Ionian Glow* relied on the distinctive nature of accidents occurring in the admiralty context, the Supreme Court's subsequent decision in *Lockheed* instructs that the "military nature" of the tort action is the more compelling inquiry. Furthermore, unlike in *Ionian Glow*, the "military discipline" rationale underlying the *Feres-Stencel Aero* doctrine is fully implicated here and counsels in favor of finding that the government has not waived its sovereign immunity.[12]

Conclusion

Beyond the contribution issue resolved by the Fourth Circuit, the practical import of this case is that the joint and several liability rule was applied to prevent the sailor's family from having another loss, this time legal, visited upon them. Instead, a tortfeasor found to be an actual and proximate cause of the loss was charged with the obligation of fairly compensating the family. As the Supreme Court has explained, that approach remains consistent with admiralty's history of allowing full recovery for the victim.[13]

1. *In the Matter of the Complaint of VULCAN MATERIALS COMPANY, owner of the Tug William E. Polle, for Exoneration From or Limitation of Liability*, Civ. Action No. 2:08cv377 (E.D. Va.) (J. Morgan).
2. *United States v. Brown*, 348 U.S. 110, 112 (1954); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672-3 (1977).
3. *In the Matter of the Complaint of VULCAN MATERIALS COMPANY, owner of the Tug William E. Polle, for Exoneration From or Limitation of Liability*, Civ. Action No. 2:08cv377 (E.D. Va.) (J. Morgan).
4. Id.
5. Opinion and Order, entered Dec. 17, 2009.
6. Id.
7. Id.
8. The doctrine can be further explained this way: Vulcan was not "merely '[20 percent] negligent' or '[20 percent] responsible.' Such statements make as much sense as saying that someone is '[20 percent] pregnant.' [citation omitted] Nor did... [Vulcan's] negligence cause or occasion only [20 percent] of the [claimant's] injury. Rather each [tortfeasor] was 100 [percent] negligent, each tortfeasor was an actual proximate cause of 100 [percent] of the injury and each [tortfeasor] is fully responsible for the entire injury." Wright, Richard W., "The Logic and Fairness of Joint and Several Liability," 23 Mem. St. U. L. Rev. 45 (1992).
9. Professor Wright explains that the critical distinction to make is that each tortfeasor is independently and fully responsible for the damages he or she caused (in this case the death of Porter), yet "percentages of comparative responsibility... are obtained by comparing the tortfeasors' individual full responsibility for the injury."
10. *In re Ionian Glow*, 670 F.2d 462 (4th Cir. 1982), cert. denied 460 U.S. 1021 (1983).
11. Id.
12. *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 267 (4th Cir., 2011).
13. *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256 (1979).