

Marine Asbestos Cases v. American Hawaiian Cruises, Inc., 265 F.3d 861 (9th Cir. 2001) (Filed September 10, 2001)

Cristina L. Fernandez, Class of 2003

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the Limitation Act's broader scope includes damages to park system resources, the Court held that the specific tailoring of the PSRPA compels the Court to apply the more specific statute.

In short, the Court of Appeals determined that Tug Allie-B's liability could not be limited under the act because the PSRPA's unlimited damage provisions irreconcilably conflicted with the Limitation Act and the PSRPA was the more recent and more specific statute.

Andrew Holliday

Class of 2002

**HANDLING OF ASBESTOS CLAIMS UNDER THE JONES ACT,
UNSEAWORTHINESS AND MAINTENANCE AND CURE**

A complaint under the Jones Act which claims an asbestos related medical condition requires a single baseline examination where none of the plaintiffs had been so diagnosed or significantly exposed was dismissed because plaintiffs were neither sick nor injured and had not as yet developed symptoms of disease. Nor were causes of action for unseaworthiness, maintenance and cure assault and battery or intentional infliction of emotional distress viable.

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Plaintiffs, 174 seamen who had worked aboard the S.S. Independence and/or the S.S. Constitution, appeal the dismissal of their claims under the Jones Act, 46 U.S.C. App. § 688 (2000), based on theories of unseaworthiness, maintenance and cure, assault, battery, and intentional infliction of emotional distress. Plaintiffs claim to have been exposed to asbestos in the course of employment on board the vessels. However, at the time of litigation, none of these plaintiffs has been diagnosed with any asbestos-related medical condition, but have sought recovery in the form a court-supervised medical monitoring program that would provide each plaintiff with a single baseline medical examination. Plaintiff also sought punitive damages as well as damages and costs for defendants' continuing failure to provide relief. The Ninth Circuit

affirmed the dismissal because plaintiffs failed to show how they would benefit from a single baseline examination where no abnormalities are apparent.

The principal question the Ninth Circuit addressed on appeal was whether, as a matter of law, a seaman could recover a single baseline examination under: the Jones Act, unseaworthiness, and maintenance and cure. The Ninth Circuit agreed with the district court and the magistrate judge's conclusion that the Jones Act itself does not permit recovery for medical monitoring for plaintiffs who have not yet developed symptoms of disease. However the court found the act itself affords common law principles great weight when interpreting its scope. *See Consolidated Rail v. Gottshall*, 512 U.S. 532, 544, 114 S. Ct. 2396, 29 L. Ed. 2d 427. Citing *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) the Ninth Circuit reiterated that monitoring damages to plaintiffs who have not yet developed symptoms of disease are available. However, plaintiffs must show that they are within four elements established by the Third Circuit, *In re Paoli R.R. Yard PCB Litigation*, 915 F.2d 829, 852 (3d Cir. 1990). The four *Paoli* elements are:

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
3. That increased risk makes periodic diagnostic medical examinations reasonably necessary.
4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

The Ninth Circuit stated that even if medical monitoring were available under the Jones Act to a seaman who satisfied the *Paoli* factors, the plaintiffs were not entitled to relief. Because plaintiffs failed to establish the third factor which requires sufficient evidence to raise a genuine issue of material fact as to the reasonableness and necessity of the type of medical monitoring that they seek. The Ninth Circuit was willing to assume first *Paoli* factor meaning the plaintiffs raised a genuine issue of material fact as to their exposure to asbestos and the second *Paoli* factor, which requires the plaintiffs' to quantify their increased risk of disease. However, the Ninth Circuit was not willing to assume the third and fourth *Paoli* factors which require plaintiffs to raise a genuine issue of material fact of an increased risk of disease which would make medical monitoring reasonably necessary, and that early detection would provide any clinical benefit. Because the

plaintiffs could not show that there is clinical value to administering any such treatment before the onset of symptoms of these diseases the Ninth Circuit affirmed the district court's grant of summary judgment for defendants on the Jones Act claim.

Plaintiffs also brought a claim under unseaworthiness, which arises from a breach by the shipowner of the absolute duty to furnish a seaworthy vessel; that is, a vessel that is reasonably fit for its intended use. In order to recover for an injury caused by an unseaworthy condition, a seaman must establish that: (1) the seaman's work was in the ship's service and that the warranty of seaworthiness therefore applies; (2) the seaman was injured by a piece of equipment not reasonably fit for its intended use; and (3) the piece of equipment was part of the ship's equipment or an appurtenant appliance. The court affirmed the district court's grant of summary judgement for defendant on the unseaworthiness claim, which imposes liability without fault because it would be anomalous to award the medical monitoring remedy on a lesser showing of injury. The court then dismissed plaintiffs' claim under the doctrine of cure, which provides that the vessel and her owners must provide medical care for a seaman who becomes sick or is wounded in the service of the ship. The court affirmed the dismissal of plaintiffs' claim under the doctrine of cure because plaintiffs were not sick nor could they show that they had suffered from an injury. The Ninth Circuit also found the assault, battery, and intentional infliction of emotional distress were properly dismissed because such relief is available to a seaman against his employer for personal injury are limited to maintenance and cure, unseaworthiness, and the Jones Act.

Cristina L. Fernandez

Class of 2003