Hearsay

hcampagne@lawyersweekly.com

The Leonardo in better days

Left high and dry

As far as maritime lawyer **Carolyn M. Latti** is concerned, the federal scheme for compensating families of crew members on ships lost at sea just plain stinks.

"It's depressing," the **Latti & Anderson** attorney says. "The law is very cold. A broken arm can be worth more than the death of a person who is not married and does not support anyone. And if you have someone on the water who dies instantaneously, you can have damages of $25,000 to $50,000, if even that."

LATTI

Latti represents family members in two cases involving separate seafaring tragedies that were recently decided in federal court.

On Nov. 23, 2020, all four crew members of the Emmy Rose were lost and presumed drowned when the 82-foot fishing vessel sank in a storm. The boat, which had started out from Portland, Maine, was on its way to unload its catch in Gloucester.

A year earlier, on Nov. 24, 2019, the fishing vessel Leonardo capsized and sank when it was allegedly struck by a rogue wave off the coast of Martha's Vineyard. Three of its four crewmembers were lost.

The surviving crewmember of the Leonardo and the family members of the deceased fishermen from both vessels asserted claims for damages under the Death on the High Seas Act and the Jones Act. Meanwhile, the shipowners in both cases filed actions for exoneration under the federal Limitation of Shipowner's Liability Act.

According to Latti, the Limitation of Shipowner's Liability Act presents its own hurdles to recovery, protecting the owners when they are unaware of any pertinent negligence or lack of seaworthiness at the time the vessel left port. That means a claimant must show "privity or knowledge" of the negligent or unseaworthy condition on the part of the owner.

"If you don't defeat the limitation, then the value of a claim can be limited to the value of the vessel," Latti said. "In other words, an owner can have $3 million in insurance coverage, but if the court decides you can't prove privity or knowledge, the value of your claim is worth the value of the vessel. If the vessel is at the bottom of the ocean, the claimants get nothing."

Another problem, the Boston lawyer says, is that typically the maritime policy covering a vessel is an "eroding policy," meaning the costs of legal representation incurred by the owner are deducted from the policy limits.

"Any cost — whether defense or investigation — starts to draw down the policy," Latti says. "So if you litigate the case and there's only $300,000 left [under the policy], what do you gain?"

According to Latti, over the years there have been multiple lobbying efforts in Congress by the American Association for Justice to fix the statutory framework to provide fair compensation.

In both the Emmy Rose and Leonardo cases, the parties agreed to cap the shipowners' liability to the amount of available insurance.

In the Emmy Rose case, *In re: Boat Aaron & Melissa, Inc.*, U.S. District Court Judge **John A. Woodcock** in Portland entered a consent judgment allocating damages from the $960,000 in available insurance proceeds. Latti represents the two children of deceased fisherman Ethan Ward.

Woodcock's Jan. 5 order gave Ward's children a pro rata share of the insurance proceeds in the amount of $336,500. That figure represented the total compensation for Ethan Ward's conscious pain and suffering, as well as the children's loss of support and nurture.

Salem attorney **David S. Smith**, who represents the vessel owner in the Emmy Rose matter, was unavailable for comment.

In the Leonardo case, *In re Mary Lou Fishing Corp.*, Latti represents the estates of Gerald Bretal and Xavier Vega Nieves, as well as Ernesto Garcia, the sole survivor of the sinking. As in *Boat Aaron & Melissa,* the parties reached a settlement for the $1 million available under the shipowner's insurance, leaving it to Judge **Leo T. Sorokin** in Boston to allocate each claimant's share.

On Jan. 11, Sorokin entered an order that included an award of 34 percent of the settlement to Bretal's estate, 22 percent to the Nieves estate, and 18 percent to lone survivor Garcia.

— Pat Murphy

An advocate's advocate

As the jury deliberated, Boston attorney **James R. DeGiacomo** sought permission to speak to the promising young pitcher whose burgeoning baseball career had been derailed by an accident on the family farm.

DeGiacomo, representing John Deere, begged the young man to take the company's settlement offer before it was too late. The young man would not listen.

When the jury in fact delivered a defense verdict, it was a hollow victory, recalls DeGiacomo's son.

"He felt worse than if he had lost," **Mark G. DeGiacomo** says. "He was more concerned with justice being done than who got the 'W.'"

That uncommon level of empathy is just one of many ways Jim DeGiacomo distinguished himself over his lengthy legal career, say friends and former colleagues mourning his death on Jan. 21 at the age of 91, just over a year after he grudgingly put away his oversized briefcase for good.

While he eschewed the public spotlight, DeGiacomo's sterling reputation was no secret in the legal community.

The Supreme Judicial Court appointed DeGiacomo to the Board of Bar Overseers in 1988, which he chaired from 1990 to 1991, and more than a few lawyers, law firms and even judges sought his wise counsel on malpractice and other matters over the years, according to Boston attorney **Alan D. Rose**, a former BBO chair himself.

Rose notes that he frequently used DeGiacomo as an expert witness, to great effect. The respect DeGiacomo commanded would result in cases either getting dismissed or settled for short money, he says.

But legal malpractice defense was just a minor part of DeGiacomo's legacy, according to Rose, who first heard praise for DeGiacomo's skills in the early 1970s when he was clerking for U.S. District Court Judge **W. Arthur Garrity Jr.**

Over the course of his career, DeGiacomo had been invited to become a fellow in the American College of Trial Lawyers, the American College of Trusts and Estate Counsel, and the American College of Matrimonial Lawyers, a rare instance of a lawyer achieving the highest level of esteem from peers across disparate practice areas.

Mark DeGiacomo recalls just one example of his father's uncommon ability to look around corners. James DeGiacomo was defending the owners of a luxury condominium building under construction at 2000 Commonwealth Ave. in Boston that had collapsed on Jan. 25, 1971, killing four construction workers and injuring dozens of others.

As the trial approached, the court had to consider whether the building should be torn down, something DeGiacomo's clients were resisting.

"Would you go up in that building?" the judge asked DeGiacomo.

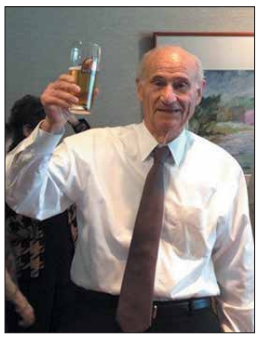
DeGiacomo could answer confidently and truthfully, "I did yesterday."

"He was a towering figure who wrote the book on lawyer professionalism and skill," says Boston attorney **Thomas F. Maffei**, calling DeGiacomo "one of the last of the generalists."

The **Sherin & Lodgen** partner considers himself one of DeGiacomo's countless mentees.

"He was never too busy to brainstorm with me over the years," Maffei says. "Despite his immense stature, he was a regular guy, never forgot his modest roots, served in the Marine Corps, and did an enormous amount of good with no fanfare or even recognition."

Maffei had lunch regularly with DeGiacomo, calling it "like going to the movies — always entertaining and always instructive."



James R. DeGiacomo at a May 2007 open house at Murtha Cullina celebrating his 50th year of practicing law

"Jim personified the ability to disagree without being disagreeable and how to contend without being contentious, both disappearing arts," says **George A. Berman** of Boston firm **Peabody & Arnold**.

Even in the face of "despicable conduct" by opposing counsel, DeGiacomo was never a "shouter," agrees **Michael S. Greco**, a retired partner at **K&L Gates**. "He treated everybody with dignity and respect."

DeGiacomo inspired two of his children to become lawyers: Mark, who practiced alongside his father at **Murtha Cullina**, and **Diane M. DeGiacomo**, chair of the litigation department at **Cain, Hibbard & Myers** in Pittsfield.

One of the things that drew her into the profession was having seen the law serve as a fulfilling vocation for someone who was "always very curious about everything," says Diane DeGiacomo.

Her father "read every [court] decision," even those unrelated to the areas in which he practiced, turning him into a "walking encyclopedia," she says.

Beyond his offspring, DeGiacomo helped provide the foundation for scores of Massachusetts attorneys in his 42 years of teaching at New England School of Law, which he also served as outside general counsel for many years. As with his legal career, DeGiacomo did not stick to a single subject.

For **Thomas S. Vangel**, before DeGiacomo was his colleague, he was his clinical evidence professor. Even then, Vangel marveled at DeGiacomo's recall for witness testimony, evidentiary issues, and comments judges had made from trials that had occurred 20 or more years earlier.

"Jim's ability to tell the story about a case was second to none," Vangel says.

After DeGiacomo helped him get hired at Murtha Cullina, Vangel worked alongside DeGiacomo in a dram shop liability case representing a senior at Boston College who had been struck by a drunken driver leaving a wedding reception at the Sonesta Hotel.

Vangel says that DeGiacomo gave an uncommon level of responsibility to a young associate, and the case wound up presenting several interesting evidentiary issues.

But the most notable aspect of the case was how it had come to DeGiacomo in the first place: a referral from a court reporter who had seen DeGiacomo in action and happened to be the neighbor of the accident victim.

"I'm not sure too many lawyers get cases that way," Vangel says.

Thirty years later, Vangel was still working side by side with DeGiacomo on his last major case, a contentious trust dispute that was only resolved after two 12-hour mediation sessions.

"He was still teaching me then," Vangel says.

DeGiacomo joined **Roche & Leen** in 1963, which became **Roche, Carens & DeGiacomo** and then merged with Murtha Cullina in 2000.

In the halls of Murtha Cullina, DeGiacomo was known affectionately as "Mr. D." Vangel credits him with instilling a culture of professionalism at the firm.

"He treated everyone the same way," Mark DeGiacomo says. "It didn't matter if you were a messenger, someone who worked in the copy room, or a billionaire client."

Throughout his career, DeGiacomo strove to help other lawyers thrive. He was a founding trustee of Massachusetts Continuing Legal Education, lecturing frequently on a variety of topics, particularly probate and trust litigation.

He was also a founding member of Lawyers Concerned for Lawyers, along with his older brother, Robert.

Through his work with the BBO, his father had seen the connection between lawyers getting themselves into trouble and drug and alcohol abuse, along with mental health, Mark DeGiacomo says.

"Rather than just meting out punishment, he wanted to try to help," he says.

— Kris Olson

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

1ST U.S. CIRCUIT COURT OF APPEALS

the particular defendants in the case. ... Nor are we aware of any other authority that supports the application of such a presumption in these circumstances. …

"We next consider the challenge that all four defendants — including Martinez — bring to the District Court's denial of a motion for a mistrial that was based on an alleged 'climate of fear' among the jurors. Here, too, we conclude that the District Court did not manifestly abuse its discretion. …

"We turn our focus, then, to a set of challenges that Sandoval, Guzman, and Larios bring concerning the testimony of FBI Supervisory Special Agent Jeffrey Wood, as they contend that their convictions must be vacated in consequence of errors that were made with respect to admitting the testimony that he provided at trial. Once again, we conclude that the challenges fail. …

"We first consider Sandoval, Guzman, and Larios's contention that the District Court abdicated its gatekeeping role in permitting Wood to testify as an expert regarding MS-13. We do not agree. …

"We move on, then, to Sandoval, Guzman, and Larios's federal constitutional challenge concerning Agent Wood's testimony, which these defendants base on the Confrontation Clause. ... We may assume that this challenge is preserved as to all three defendants, … because, even on the understanding that our review is de novo, … the Confrontation Clause challenge still fails. …

"Guzman, Sandoval, and Larios also argue that the District Court's failure to give a requested jury instruction on entrapment was reversible error. Entrapment is an affirmative defense, and 'an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it.' ... We conclude that there was not sufficient evidence of entrapment here to support such an instruction, however, and so there was no error. …

"That leaves the claim that these same three defendants press on appeal concerning the District Court's failure to give a 'missing witness' instruction concerning CW-1. We again find no error."

United States v. Sandoval, et al. (Lawyers Weekly No. 01-184-21) (118 pages) (Barron, J.) Appealed from a judgment entered by Saylor, J., in the U.S. District Court for the District of Massachusetts. Madeleine K. Rodriguez, with whom Martin F. Murphy, Christian A. Garcia and Foley Hoag LLP were on brief, for appellant Herzzon Sandoval; Michael R. Schneider, with whom Good Schneider Cormier & Fried was on brief, for appellant Edwin Guzman; Thomas J. Iovieno on brief for appellant Erick Argueta Larios; Stephen Paul Maidman for appellant Cesar Martinez; Mark T. Quinlivan, with whom Andrew E. Lelling was on brief, for the United States (Docket No. 18-1993, 18-2165, 18-2177 and 19-1026) (July 7, 2021).

U.S. DISTRICT COURT

Employment

Misclassification – Delivery drivers

Where three plaintiffs claiming to have been misclassified as independent contractors have moved for certification of a class of delivery drivers, that motion should be allowed because common issues will predominate over individual ones.

"Plaintiffs Ramon Gonzalez, Victor Rodriguez Ortiz, and Addelyn Marte bring this action, on behalf of themselves and all others similarly situated, against defendant XPO Last Mile, Inc. ('XPO'). The plaintiffs are delivery drivers who delivered appliances and other large consumer goods on behalf of XPO, a freight forwarder and logistics services provider, to customers of one of XPO's clients, Lowe's Home Improvement ('Lowes'). The plaintiffs allege that XPO misclassified them as independent contractors in violation of M.G.L.c. 149, §148B (Count I), failed to provide them the wages and benefits to which they were entitled in violation of M.G.L.c. 149, §148 (Count II), failed to pay them a minimum wage in violation of M.G.L.c. 151, §1A (Count III), and was unjustly enriched at their expense (Count IV). As to Counts I and II, the plaintiffs move to certify a class of drivers who performed deliveries in Massachusetts on behalf of XPO to customers of Lowe's within the period of July 20, 2015 to present, excluding helpers and any drivers who signed contracts with XPO. …

"Here, the plaintiffs seek class certification for two claims. The first, Count I, alleges that XPO misclassified the proposed class of drivers as independent contractors, in violation of M.G.L.c. 149, §148B. The second, Count II, alleges that due to the misclassification, the class of drivers did not receive the wages and benefits to which they were entitled, in violation of M.G.L.c. 149, §148. The validity of both claims turns on (1) whether XPO may be held responsible for any misclassification, and (2) whether the drivers should have been classified as XPO's employees. Common evidence among the class will answer those questions. As relevant to any test the Court applies (e.g., joint employer and/or ABC), the record indicates that XPO treated all contract carriers alike, and all drivers alike.

"… Just as other courts have found the commonality requirement met under similar circumstances, … the Court finds the commonality requirement met here. …

"'The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' ... The inquiry requires

Continued on page 14