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Admiralty

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DEVELOPMENTS IN THE LAW, 1982-1983

A Symposium

[*Editor's Note. Developments in the Law* continues to reflect coverage beyond the work of Louisiana's appellate courts and includes coverage of legislative amendments to Louisiana and federal statutes and decisions of interest to the Louisiana lawyer. This year's symposium includes cases reported from August 1, 1982 through July 31, 1983.]

ADMIRALTY

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MARITIME TORTS—JURISDICTION

The traditional wisdom of admiralty for over a century was that "locality alone" was the sole criterion for determining whether a tort fell within the federal admiralty power.[1] A tort was "in admiralty" if it occurred on navigable waters; otherwise, it was not. Since a tort "occurs" when the last act necessary to entitle the plaintiff to sue takes place, and damage is an essential element of a negligence-based action,[2] a tort premised upon negligence was said to occur when force set in motion by the negligent act had an impact upon the person of the victim.[3] The "locality alone" rule was firmly entrenched in admiralty law for more than a century, although there were some scholarly doubts,[4] some judicial dissent,[5] and some statutory modification,[6] all of which undoubtedly were prompted by the absurdities which occasionally resulted from the rule.[7]

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1. The Plymouth, 70 U.S. (3 Wall.) 20, 33 (1865).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971).

3. The Admiral Peoples, 295 U.S. 649 (1934).

4. E. BENEDICT, THE AMERICAN ADMIRALTY 308 (1850); Hough, *Admiralty Jurisdiction of Late Years*, 37 HARV. L. REV. 529 (1924).

5. *See, e.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

6. The Admiralty Extension Act, 46 U.S.C. § 740 (1976); The Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1976 & Supp. V 1981).

7. *Compare In re* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) (the victim standing on a pier was struck by a ship's sling and knocked into the water; no tort jurisdiction, since the tort "occurred" on land) *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (the victim, on a vessel, was struck and knocked onto a pier; tort jurisdiction, since the tort "occurred" on water, *i.e.*, the vessel). *See also* Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (claim of a swimmer struck by a surfboard was held to be in admiralty).

In *Executive Jet Aviation, Inc. v. City of Cleveland*[8] and in *Foremost Insurance Co. v. Richardson*,[9] the United States Supreme Court jettisoned the "locality alone" rule, holding that a tort which occurs on navigable waters does not fall within the maritime jurisdiction unless it has a maritime "nexus" or "flavor," *i.e.*, unless it bears a "significant relation to traditional maritime activity."[10]

Executive Jet and *Richardson* complete only half of the puzzle; the missing piece is whether "locality" is still a requisite for maritime tort jurisdiction. Clearly, locality is not required for those cases falling within the Admiralty Extension Act,[11] since that act extends admiralty jurisdiction to damages caused by a vessel on navigable waters, even though the damage occurs on land. But what about those cases in which the tortious conduct bears a significant relationship to traditional maritime activity, but the wrongful act and the damage both take place on land? Will "flavor" alone, if it is strong enough, make the tort maritime? The United States Fifth Circuit Court of Appeals has concluded[12] that the language in *Executive Jet* and in *Richardson* "lead[s] ineluctably"[13] to the conclusion that in cases governed by the admiralty common law rule, locality is an indispensable element of a maritime tort. This conclusion may be an unfortunate one, since there may be some tort claims for which promotion of maritime commerce demands a uniform national rule,[14] but "locality" is absent and there is no alternate basis for asserting admiralty jurisdiction, such as the Admiralty Extension Act or the existence of a maritime contract.[15] In those cases, one may expect some desertion from the conclusion that "locality" is an essential element of maritime tort jurisdiction.

SEAMAN—STATUS

Helicopters and other small aircraft are used extensively to ferry workers, supplies, and equipment from shoreside installations to fixed platforms and vessels engaged in offshore mineral production. Tort claims arising out of accidents in which these aircraft are involved may fall within

8. 409 U.S. 249 (1972).
9. 457 U.S. 668 (1982).
10. 409 U.S. at 268.
11. 46 U.S.C. § 740 (1976).
12. Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982).
13. *Id.* at 1108.
14. One example is the tort action arising out of the discharge of a seaman or other maritime worker in retaliation for his enforcement of his rights under admiralty law. *See, e.g.*, Smith v. Atlas Off-Shore Boat Serv., 653 F.2d 1057 (5th Cir. 1981); *see also* Note, *Retaliatory Discharge of Seamen: Smith v. Atlas Off-Shore Boat Service, Inc.*, 43 LA. L. REV. 221, 228 (1982).
15. *See, e.g.*, Pino v. Protection Maritime Ins. Co., 599 F.2d 10 (1st Cir. 1979); Carroll v. Protection Maritime Ins. Co., 512 F.2d 4 (1st Cir. 1975).

admiralty jurisdiction, since transporting passengers and cargo over navigable waters is a "traditional maritime activity."[16] Under the prevailing jurisprudence, if the aircraft ferrying passengers or cargo over navigable waters crashes on those waters, the tort is maritime; otherwise, it is not.[17] Thus, in admiralty tort cases, the court ordinarily does not have to determine whether the ferrying aircraft is a "vessel."

When such an aircraft crashes and a claim is brought by the pilot or his beneficiaries against his employer or the operator of the aircraft, the law governing the claim depends upon whether admiralty treats the aircraft as a vessel. If it does, then the pilot ordinarily will meet all of the remaining requisites for "brownwater" seaman status,[18] and will qualify as a seaman. However, the Fifth Circuit has concluded in two recent cases that such craft are not vessels, and, as a consequence, the operators of the aircraft are not seamen.[19]

The correctness of this conclusion is debatable. The aircraft are engaged in transporting goods *over* navigable waters, if not directly *on* such waters.[20] Since the aircraft compete directly with crew boats and other traditional vessels in providing support services for offshore mineral production, the owners should arguably bear the same responsibilities *vis á vis* their employees as do the owners of the traditional vessels.

The obvious counter arguments are that operation of aircraft is not "traditional maritime activity" and that the expertise of admiralty judges is neither needed nor helpful in formulating the rules of conduct. Perhaps of equal importance is the fact that the notion that aircraft owners "escape" from the greater responsibility imposed upon a shipowner may be illusory. If the pilot is not a seaman, he ordinarily will be entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[21] if he is ferrying passengers and cargo to the Outer Continental Shelf, he is engaged in "operations conducted . . . for the

16. *See, e.g.*, Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982).

17. *Id.*

18. Admiralty law treats as seamen both the traditional worker aboard the ocean going vessel who signs "articles" and is "bound" to the vessel for the length of the voyage, and the worker aboard the harbor vessel or the movable oil drilling rig who may eat and sleep and perform many of his duties on land. Some admiralty judges and practitioners call the latter type of worker a "brownwater" seaman as distinguished from the traditional, or "bluewater" seaman.

19. Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (5th Cir. 1982); Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982).

20. 1 U.S.C. § 3 defines a "vessel" as "every description of . . . artificial contrivance used or capable of being used, as a means of transportation *on* water." (Emphasis added). However, some courts and writers define a "vessel" for admiralty purposes as encompassing anything capable of transporting goods or persons "over" water. *See, e.g.*, G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 33 (1975).

21. 33 U.S.C. §§ 901-950 (1976 & Supp. V. 1981).

purpose of . . . developing . . . the natural resources . . . of the Outer Continental Shelf," and is covered by the LHWCA through the provisions of the Outer Continental Shelf Lands Act.[22] If he is operating within territorial waters, his work related accident ordinarily will have both the "situs" and "status" to qualify for LHWCA benefits, at least under prevailing Fifth Circuit jurisprudence.[23] Since LHWCA benefits are generous and are imposed without regard to employer fault, the aircraft owner may not receive a "windfall" because his craft is not treated as a vessel for the purposes of determining the status of his employee.

A worker is a "seaman," and thus entitled to the benefits of the Jones Act, maintenance and cure, and the warranty or duty of seaworthiness (1) if he is assigned permanently to, or performs a substantial part of his work aboard a vessel in navigation and (2) if the capacity in which he is employed or the duties which he performs contribute to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[24] This definition ordinarily excludes longshoremen, who usually work on vessels which are owned by different owners, and shipbuilders, since a ship is not a vessel until it is reasonably fit for its intended use.[25] It also excludes most ship repairers; if the time required for repairs is lengthy, the ship ordinarily will be "out of navigation" during that period,[26] and if the time required is brief, the repairer will lack the "permanent attachment" or "substantial part of his work" requirement.

In recent years, some federal courts have concluded that a worker may meet the "substantial part of his work" requirement for seaman status through the totality of his activities aboard several vessels.[27] This "fleet of vessels" doctrine remains vague. An important issue is whether the vessels in the "fleet" must be under common ownership or control. If they need not be, seaman status could extend to many workers who tradi-

22. 43 U.S.C. §§ 1331-1343 (1976 & Supp. V 1981). The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), provides that the LHWCA applies to "disability or death of an employee resulting from any injury occurring as the result of operations conducted on the [Shelf] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the [Shelf]."

23. Under Herb's Welding v. Gray, 703 F.2d 176 (5th Cir. 1983), he will have the necessary "status," and "situs" will be satisfied since the injury occurs on actual navigable waters. 33 U.S.C. § 903 (1976); Director v. Perini N. River Assocs., 103 S. Ct. 634 (1983); *see infra* text accompanying notes 83-90.

24. Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

25. Thames Towboat Co. v. The Francis McDonald, 254 U.S. 242 (1920).

26. Wixom v. Boland Marine & Mfg. Co., 614 F.2d 956 (5th Cir. 1980).

27. *See, e.g.*, Ardoin v. J. Ray McDermott & Co., 641 F.2d 277 (5th Cir. 1981); Bazile v. Bisso Marine Co., 606 F.2d 101 (5th Cir. 1979).

tionally have been covered by the LHWCA. For example, a longshoreman may spend a "substantial part" of his time loading or unloading, and a ship repairer may spend a "substantial part" of his time repairing a number of vessels which are not under common ownership or control. Unbridled application of the "fleet of vessels" concept could permit either of these traditional nonseamen to qualify for seaman status.

The dangers in expanding the "fleet of vessels" concept may have been a motivation for the trial judge's decision in *Bertrand v. International Mooring & Marine, Inc.*[28] The issue before the court was the status of an "anchor-handling" crew, workers who specialize in the relocation of movable drilling rigs. In *Bertrand*, members of the "anchor-handling" crew had completed a seven-day mission and were returning to their base of operations when they were killed or injured in an automobile accident. The crew's missions lasted anywhere from seven hours to nineteen days; the average was four to five days. In relocating a drilling rig, the crew utilized a smaller vessel which their employer occasionally chartered or borrowed from the owner of the drilling rig. The district court found that the members of the anchor handling crew lacked seaman status: they had no connexity with a single anchor handling vessel, and all of the anchor handling vessels on which they worked did not constitute a "fleet" because there was no common ownership or control.[29] On appeal, the Fifth Circuit reversed,[30] holding that vessels may constitute a "fleet" for purposes of determining seaman status even though they are not under common ownership or control. However, the court's holding may be a narrow one. The opinion emphasizes that:

> [W]hether the different vessels were under common ownership or control was determined by the employer, not the nature of the claimants' work. . . . [W]e will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned.[31]

This expansion of the "fleet of vessels" concept does not open the door to seaman status for longshoremen and ship repairers, since the nature of their work dictates that the vessels on which they work usually are not under common ownership or control.

Most of the contests over seaman status turn upon whether the worker has the requisite "connexity" with a vessel or fleet of vessels, *i.e.*, whether (1) he is more or less permanently assigned to a vessel *or* (2) he performs

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28. 517 F. Supp. 342 (W.D. La. 1981).
29. *Id.* at 347.
30. 700 F.2d 240 (5th Cir. 1983).
31. *Id.* at 245.

a substantial part of his work aboard the vessel.[32] While the test is easy to state, it is not always easy to apply to the various employment situations which arise among harbor workers and those engaged in the production of minerals on navigable waters. In *Bertrand*,[33] the Fifth Circuit was required to apply the test to members of an "anchor-handling" crew. The worker whose status was at issue in *Bertrand* ate and slept and performed ninety percent of his work aboard the "fleet" of anchor-handling vessels, and the remainder of his working time was spent in preparing equipment for offshore vessel assignments. The court first concluded that the worker qualified under the "substantial part of his work" prong of the "connexity" requirement. Judge Ingrahm, the organ of the court, pointed out that the percentage of employment time which a worker spends aboard a vessel is an important factor in determining the "substantiality" of the work done there, but it is not conclusive. In earlier cases, the court had emphasized that a qualitative evaluation is appropriate.[34] If the work done aboard the vessel is "makework" or non-traditional vessel activity, the worker may not satisfy the "substantial part of his work" test, even though the percentage of his work time spent aboard the vessel is not "insubstantial" from a quantitative standpoint. In the instant case, however, all of the victim's work time was spent in the performance of the "vessel's" mission; thus he easily met the "substantial part of his work" prong of the "connexity" requirement.

Although its discussion could be considered dicta, the court then considered whether the claimant also met the requirements of the "permanent assignment" prong of the connexity requirement. It concluded that he did, because: (a) the worker went to sea and ate and slept aboard the vessels, (b) his tour of duty with each vessel was for the duration of that vessel's mission, (c) all of his work was in connection with a vessel, (d) his work aboard the vessel was his "primary duty" (not merely incidental to work on shore on a nonvessel), and (e) he aided in readying the vessel for its mission.[35]

The listing of all five requirements may indicate that the court is experiencing difficulty in formulating a test for the "permanent assignment" prong which will produce a satisfactory result when applied to "brownwater" seamen. This writer suggests that one of the "facts" listed by the court—whether his work aboard the vessel was the worker's "primary" duty—may be the appropriate inquiry, and the remaining facts tend to provide the answer to that inquiry. Under this approach, if the court concludes (from such facts as whether he goes to sea and eats and sleeps aboard the vessel, whether his tour of duty aboard the vessel coin-

32. *See* cases cited *supra* note 24.
33. 700 F.2d 240 (5th Cir. 1983).
34. *See, e.g.*, Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347 (5th Cir. 1980).
35. 700 F.2d at 247-48.

cides with the length of its voyage, and other relevant evidence) that the worker's "primary" duty is aboard the vessel, the "permanent assignment" prong should be satisfied. However, if the court concludes that the worker performs the greater part of his work—qualitatively and quantitatively—at some site off the vessel, then his "primary" or "permanent" assignment is at this site. He then may qualify as a seaman only if he meets the requirements of the "substantial part of his work" test.[36]

DAMAGES

In *American Export Lines v. Alvez*,[37] the Supreme Court ruled that when a person is injured by a maritime tort, his spouse has a cause of action under the general maritime law for the noninjured spouse's loss of society with the victim. In the most authoritative decision on the issue thus far, the Fifth Circuit has ruled that *Alvez* may not be applied retroactively.[38] Thus the spouse of a victim who was injured prior to the *Alvez* decision in 1980 does not have a claim against the tortfeasor under *Alvez* for her loss of society resulting from the injury.

Since *Alvez* states a rule of maritime common law, the spouse of an injured seaman may recover damages for loss of society from the vessel or its operator when the injury is caused by an unseaworthy condition. If the injury is caused by the negligence of the seaman's employer, the result may be different. Prior to *Alvez*, the Fifth Circuit had ruled that the wife of an injured seaman does not have a cause of action under the Jones Act for loss of consortium against a third party responsible for her husband's injury.[39] In the first post-*Alvez* decision on point, *Beltia v. Sidney Torres Marine Transport*,[40] the same court held that the wife of a seaman injured through negligence chargeable to his employer may not recover damages for loss of society against the employer under the maritime common law.

The conclusion that the injured seaman's spouse cannot recover damages for loss of society under the Jones Act appears sound; that statute by its terms affords a remedy only to the seaman when his injury does not result in death. The real issue before the court in *Beltia* was whether the maritime common law rule of the nineteenth century—a seaman's employer is not liable to the seaman for damages caused by negligence—should persist in the waning years of the twentieth century. The policy which supports continuation of the rule is not easily perceived, and its

36. *See supra* text accompanying notes 33-34.
37. 446 U.S. 274 (1980).
38. Stretton v. Penrod Drilling Co., 701 F.2d 441 (5th Cir. 1983).
39. Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976).
40. 701 F.2d 491 (5th Cir. 1983).

precedential support is shaky.[41] There have been other examples of judicial reversal of a maritime common law rule after Congress has modified it; the most notable example is the Supreme Court's decision, *Moragne v. States Marine Lines*,[42] reversing the earlier common law rule that there is no recovery in admiralty for wrongful death. Similar judicial action in the *Beltia* case would have avoided another of the anomalies that continue to plague maritime personal injury law.

In *Jones & Laughlin Steel Corp. v. Pfeifer*,[43] the United States Supreme Court made explicit what it had implied in its earlier decision of *Norfolk & Western Ry. v. Liepelt*:[44] inflation should be considered in determining damages for loss of earning capacity in cases in which federal law furnishes the rule of decision and there is no Congressional direction on the issue. Having reached this conclusion, the Court then provided some guidelines for integration of the inflation factor into the calculation of damages for loss of earning capacity.

The first step in determining the loss of earning capacity, the Court pointed out, is to estimate the income the victim would have earned if he had not been injured. This estimate begins with a determination of the after-tax payments which the victim would have received during the remainder of his expected work life, assuming that his earnings at the time of injury would have remained constant. That figure may be adjusted to reflect the increases *this* victim would have received during his work life through seniority, experience, merit, or promotion raises. In addition to an adjustment for this "individualized factor," the estimate of loss of earnings also may be increased to reflect the "societal factor"—the foreseeable productivity growth of the industry in which the victim was employed. Since the victim (or his beneficiary, in a death action) is awarded future earnings in a lump sum judgment which becomes payable long before most of those earnings would have been received if the accident had not occurred, the resulting estimate of loss of earnings should be discounted to present value, *i.e.*, value at the time of trial or judg-

41. The court in *Beltia* relied upon the earlier decision in Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976). In *Christofferson* the court assumed that a seaman could not recover damages caused by his employer's negligence. *Id.* at 1149. That assumption is not precisely correct. Prior to the adoption of the Jones Act, the seaman did not have a cause of action against his employer under respondeat superior, *i.e.*, for the negligence of a "fellow servant." However, the employer probably was liable to his employee for direct acts of negligence, such as failing to provide a seaworthy vessel. *See, e.g.*, Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519, 528-38 (1973).

42. 398 U.S. 375 (1970). Any subsequent conflict with the Jones Act could be resolved in the same manner as with the *Moragne* remedy. *See, e.g.*, Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

43. 103 S. Ct. 2541 (1983).

44. 444 U.S. 490 (1980).

ment. The discount rate usually is determined by calculating the after-tax rate of return which an unsophisticated investor may obtain on a "risk free" investment, *i.e.*, the "market interest" rate.

Prior to *Liepelt* and *Pfeifer*, the rule in some courts, including the Fifth Circuit,[45] was that inflation was not considered in determining the lump sum loss of future wages, but the lump sum must be "discounted" to present value by using the "market interest" rate. But, as the Supreme Court pointed out in *Pfeifer*,[46] the "market interest" rate is a combination of two factors: (1) the "real interest" rate, *i.e.*, the fee an investor in an inflation-free society would charge for the use of his money, and (2) an additional fee which the investor extracts from the borrower because the money will be repaid in the future in an inflationary economy. Thus a calculation which ignored inflation in calculating the amount of the victim's future income but applied the "market interest" rate to reduce the amount of his award after the calculation was patently unfair to the victim or his beneficiaries. The difficulties which the courts were experiencing in integrating inflation into the calculation of loss of earning capacity in a manner fair to all parties undoubtedly prompted the Supreme Court in *Pfeifer* to examine the method of calculating loss of future earnings and to lay down some guidelines.

One method which the Court deemed acceptable is to make allowance for inflation at both steps—the calculation of loss of earnings, and the discount to present value. This requires evidence of the future inflation rate (from which the trier of fact can infer the wage increases which the worker would have received to compensate for inflation) and of the "market interest" rate (by which the lump sum the claimant will receive is decreased to its present value). However, the Court discouraged the use of this method, since specific forecasts of future price inflation are unreliable and costly.[47]

Another approach suggested by the Court is to ignore inflation both in the calculation of the lump sum and in the discount to present value. One method of implementing this approach is to offset inflationary increases in earnings with the inflationary considerations in the "market interest" rate. While statistical data is suspect, the Court apparently felt comfortable with the general rule that in an inflation-free society an investor will loan his money for one to three per cent per annum; accordingly, this is the "real interest rate," and the difference between this rate and the "market interest rate"—usually about four to six per cent—merely reflects the inflationary considerations in the "market interest" rate. Thus, if the courts ignore both wage increases for inflation and the inflationary

45. Johnson v. Penrod Drilling Co., 510 F.2d 234 (5th Cir. 1975).
46. 103 S. Ct. at 2553.
47. *Id.* at 2556.

aspect of the investment yield and discount the lump sum by the "market interest" rate, the litigants will be treated fairly with respect to inflation. The Supreme Court held that if this method—the "real interest rate" approach—is applied, a trial court should not be reversed if it adopts a rate between one and three per cent and "explains its choice."[48]

Another method of offsetting the inflationary factor in the interest rate and in the discount to present value is sometimes called the "Alaska" or "total offset" method.[49] Under this approach, no adjustment to the worker's after-tax income during his work life is made for inflation, or for the "societal" and "individualized" productivity factors, but no reduction is made in the lump sum which is calculated on that basis. The premise of the "total offset" method is that over the years the "real interest" rate will equal the increases for the productivity factors, both "societal" and "individualized." Thus the parties will be treated fairly if no adjustments are made—neither upward for productivity and inflation nor downward for the interest the victim can earn on that part of the lump sum he will receive before he otherwise would have earned it.

One criticism of the "total offset" method is that it assumes that the "real interest" rate will equal the increases for the productivity factors, an assumpition which may not be valid. However, one variation of the method appears to satisfy the Supreme Court's diligent search for a method of calculating loss of future earnings which is both fair and efficient. This method—dubbed the "Carlson" method for one of its economist-advocates[50]—assumes that in the long run the "societal" productivity factor equals the "real interest" rate. Thus damages may be calculated by determining from a worker's wages at the time of injury the after-tax payments which he would have received during his career, and increasing that figure only by the individualized productivity factor. No other adjustments are needed since the inflation and the "societal" productivity factor offset the "market interest" rate. While stopping short of requiring that method, the Court praises its "simplicity"[51] and the judicial economy it would produce, and encourages parties to use that method by agreement.[52]

The Fifth Circuit held in *Comeaux v. T.L. James & Co.*,[53] that when comparative negligence is applicable in a seaman's case, the seaman's percentage of the total negligence is not automatically the same in his

48. *Id.*

49. *See* State v. Guinn, 555 P.2d 530 (Ala. 1976); Beaulieu v. Elliott, 434 P.2d 665 (Ala. 1967).

50. *See* Carlson, *Economic Analysis v. Courtroom Controversy*, 62 A.B.A.J. 628 (1976), *cited in Pfeifer*, 103 S. Ct. at 2557.

51. 103 S. Ct. at 2557.

52. *Id.*

53. 666 F.2d 294 (5th Cir. 1982), *modified*, 702 F.2d 1023 (5th Cir. 1983).

claim under the Jones Act and in his claim for unseaworthiness, even though both claims arise from a single incident. Thus, where the two claims are joined and contributory negligence is at issue, the jury must make separate findings of the plaintiff's percentage of negligence *vis á vis* the defendant in the Jones Act claim and *vis á vis* the defendant in the unseaworthiness claim. The court's opinions in *Comeaux* are cryptic, and the holding of the case may not have been followed by another panel of the court.[54] The chief difficulty with *Comeaux* is that the court did not elaborate upon whether the seaman's substandard conduct is more likely to generate a higher assessment of his percentage of the total negligence in the Jones Act claim or in the unseaworthiness claim, when they both arise from a single incident. The answer may not be obvious, either. In the Jones Act case, the seaman's duty to take care for his safety is "slight,"[55] but the employer may be cast in judgment if he is guilty of negligence which plays any part, no matter how small, in bringing about harm.[56] However, in an unseaworthiness claim the vessel operator may be liable for an unseaworthy condition although, in the eyes of many, he is morally blameless, such as when the condition could not have been discovered before the accident by a shipowner exercising reasonable care, or when it is caused solely by a third person. In their efforts to understand and apply *Comeaux*, the admiralty bar and the bench below would benefit from further guidance by the Fifth Circuit.

MAINTENANCE AND CURE

May a seaman recover maintenance if he voluntarily returns to work while undergoing treatment for a work-related injury which occurred while he was in the service of his ship? The answer, at least in the Fifth Circuit, may be yes. In *Wood v. Diamond M Drilling Co.*,[57] the employer, relying upon the Supreme Court decision in *Vaughan v. Atkinson*,[58] argued that a seaman is entitled to maintenance and cure during a period of employment only if his return to work was brought about by economic necessity resulting from the shipowner's failure to pay maintenance and cure. The Fifth Circuit rejected that argument, observing that "[w]e see no reason to read *Vaughan* so narrowly."[59]

FOREIGN SEAMEN

The remedies which American admiralty law provides for the injured seaman are among the most liberal in the world. Thus it is not surprising

54. Fontenot v. Teledyne Movible Offshore, Inc., 714 F.2d 17 (5th Cir. 1983).
55. Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975).
56. *See, e.g.*, McIlwain v. Placid Oil Co., 472 F.2d 248 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973).
57. 691 F.2d 1165 (5th Cir. 1982).
58. 369 U.S. 527 (1962).
59. 691 F.2d at 1170.

that many ill or injured foreign seamen whose work-related condition has any connection with the United States will assert their claims in American admiralty courts and will urge that American maritime law should apply. Generally, an American court will accept jurisdiction and apply American law to a seaman's claim (1) if he is a citizen or permanent resident of the United States, (2) if the vessel on which he serves flies the American flag, or (3) if the vessel's owner is an American, or has an American base of operations.[60] If none of these factors is present, the court may take jurisdiction and apply foreign law, or may decline jurisdiction (through application of the doctrine of *forum non conveniens*), depending upon what other "contacts" exist between the litigation and the United States.

Many "brownwater" seamen are foreign nationals engaged in the offshore production of energy resources within or near the territorial waters of their native countries, but the "vessels" on which they are employed—movable drilling rigs—are owned by parties who are United States citizens or who have a base of operations within this country. Since the injured foreign seaman can obtain jurisdiction over the American shipowner in an American admiralty court, he frequently will bring his claim in such a court and will seek application of the favorable American law. The tidal wave of these foreign "brownwater" seaman cases in recent years may have caused some lower federal courts to retreat from the rule that the shipowner with an American base of operations, standing alone, is sufficient to trigger the application of federal law. The jurisprudence on the question presently is in a state of flux.[61]

In 1982, Congress limited the application of American law to these foreign "brownwater" seamen. Section 503 of Public Law 97-389,[62] approved on December 29, 1982, provides:

> No action may be maintained under [the Jones Act] or under any other maritime law of the United States for maintenance and cure for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—
>
> (A) while that person was in the employ of an enterprise engaged in the exploration . . . of offshore . . . energy resources . . .; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions.

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60. *See generally* G. GILMORE & C. BLACK, *supra* note 20, at 475-77.

61. For a thorough discussion of the issue, see Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223 (1983).

62. 97 Stat. 1955, 1955 (1982) (codified as amended at 46 U.S.C.A. § 688(b)(1) (Supp. 1983)).

However, the foreign seaman or maritime worker may maintain an action under American law if he establishes that no remedy is available to him under the laws of either (1) the nation asserting jurisdiction over the area in which the injury-causing incident occurred, or (2) the nation in which, at the time of the incident, the plaintiff (or the victim, in a wrongful death case) maintained citizenship or residency.[63]

This 1982 act bars most foreign "brownwater" seamen from pursuing claims under the Jones Act and the American versions of unseaworthiness and maintenance and cure. It also should cause the transfer to foreign courts (through the doctrine of *forum non conveniens*) of most of the claims filed in American courts by these seamen. Another result is that the act may have eliminated one type of potential surviving *Sieracki* seaman: a nonseaman who is injured while working aboard a vessel in foreign territorial waters.[64] Since such a worker arguably fits the *Sieracki* mold (not a seaman, but aboard a vessel doing the work of a member of the crew) but is not covered by the LHWCA (since that act applies only within American territorial waters and on the American Outer Continental Shelf),[65] his right to bring an unseaworthiness action may have survived the 1972 amendments to the LHWCA.[66] If it did, he nevertheless should be barred by the 1982 act from bringing an unseaworthiness claim under American law.

The 1982 act "does not apply to any action arising out of an incident" occurring before the date of its enactment. The Fifth Circuit has concluded from this language that Congress intended to permit the courts to resolve the pre-act cases under the prior, unsettled jurisprudence.[67]

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Provisions of the LHWCA limit its application to injuries occurring within American territorial waters.[68] A provision of the Outer Continental Shelf Lands Act (OCSLA) makes the LHWCA applicable to workers injured as a result of operations conducted on the Shelf for the production of resources.[69] Since no other statutes extend seaward the coverage

63. 46 U.S.C.A § 688(b)(2) (Supp. 1983).

64. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *see infra* text accompanying note 100.

65. 33 U.S.C. § 903 provides that compensation under the LHWCA is payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States," and 33 U.S.C. § 902(9) provides that the 'term 'United States' when used in a geographical sense means the several States . . . including the territorial waters thereof."

66. *Compare* Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981) *with* Normile v. Maritime Co. of the Philippines, 643 F.2d 1380 (9th Cir. 1981).

67. Pub. L. No. 97-389, § 503(b), 97 Stat. 1955, 1956 (1982); Vaz Borralho v. Keydril Co., 710 F.2d 207 (5th Cir. 1983).

68. *See supra* note 65.

69. *See supra* note 22.

of the LHWCA, a nonseaman who is injured outside American territorial waters and who does not come within the OCSLA provision apparently is not covered by the LHWCA. This could leave the worker without an effective remedy, since he may not be able to recover under the other remaining theories—state workers' compensation or maritime common law (including, perhaps, the *Sieracki* remedy). This kind of worker is uncommon, but one did surface in *Cove Tankers Corp. v. United Ship Repair, Inc.*[70] The claimant was repairing a vessel on a voyage from one American port to another; he was injured in an explosion while the vessel was 135 miles offshore. The Second Circuit held that the employee was covered by the LHWCA, but emphasized that its holding was a narrow one; an employee otherwise covered by the LHWCA should not lose coverage because a vessel, scheduled for a voyage between two ports in the United States, goes onto the high seas for a portion of the voyage.[71]

Prior to 1972, a nonseaman was covered by the LHWCA if (1) one of his employer's employees was engaged in maritime employment, and (2) he was injured on actual navigable waters in the course and scope of his employment.[72] Under the 1972 amendments, coverage exists if (1) the nonseaman is "engaged in maritime employment," (2) he is injured on "navigable waters," and (3) perhaps, if his employer is a covered "employer."[73] The term *navigable waters* as used in the 1972 amendments is not limited to actual navigable waters, but includes adjoining piers, docks, wharves, and other adjoining areas customarily used for the loading, unloading, and repairing of vessels.[74] *Maritime employment* also is a term of art which is not precisely defined in the act; it includes, in addition to certain occupations specified in the statute (such as longshoremen and persons engaged in building or repairing vessels), other activities which have a "realistically significant relationship to traditional maritime activity."[75]

Prior to 1983, the Supreme Court did not provide much guidance for lower courts on the interpretation of the requirements for coverage under the LHWCA. In *Northeast Marine Terminal Co. v. Caputo*,[76] the Court observed that an employee is covered only if he meets both the "maritime employment" ("status") and "injury on navigable waters" ("situs") requirements of the act. But in *P.C. Pfeiffer Co. v. Ford*,[77]

70. 683 F.2d 38 (2d Cir. 1982).
71. *Id.* at 42.
72. *See, e.g.*, Hullinghorst Indus. v. Carroll, 650 F.2d 750 (5th Cir. 1981).
73. *Compare* Hullinghorst Indus. v. Carroll, 650 F.2d 750, 754 (5th Cir. 1981) *with* Director v. Perini N. River Assocs., 103 S. Ct. 634, 651 (1983).
74. 33 U.S.C. § 903 (1976).
75. Weyerhauser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975).
76. 432 U.S. 249 (1977).
77. 444 U.S. 69 (1979).

it held that a worker may have "status" even though he never works on actual navigable waters. The Court's most significant guidance came in the last term, when it reached the conclusion in *Director v. Perini North River Associates*[78] that a worker injured while performing his job upon actual navigable waters (the covered "situs" of the LHWCA under the 1927 act, which does not include the adjoining shoreside areas added by the 1972 amendments) is "engaged in maritime employment" and thus has "status" under the Act. Such a worker necessarily will have been injured on a covered "situs." Thus a worker injured while performing his job on actual navigable waters comes within the coverage of the LHWCA, unless the term "employer" as used in the act connotes something more than the employer of an employee who has both "status" and "situs."[79]

The Court's logic in reaching this conclusion is straightforward: (1) a worker injured while performing his duties on actual navigable waters would have been covered prior to the 1972 amendments; (2) the Congressional purpose in the 1972 amendments was to expand, and not contract coverage; (3) *ergo*, such a worker has "status" after the amendments. Although the Court's rationale is clear, some of its language is puzzling. The opinion states that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement."[80] But in a proximate footnote, the Court observes that "our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in 'maritime employment.' "[81] Thus the Court appears to label injury on actual navigable waters in the course of employment as (1) the sole criterion for determining "status" and (2) an important factor in determining "status." If the footnote is ignored, the Court's decision means that nearly every worker injured on navigable waters in the course and scope of his employment will meet the "status" requirement. The exceptions will be few. As the majority opinion observed in a footnote: "We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters."[82]

In reaching its conclusion in *Perini*, the Supreme Court agreed with the Fifth Circuit, which had ruled, *en banc*, in *Boudreaux v. American Workover, Inc.*[83] that a worker meets the status requirements if he is in-

78. 103 S. Ct. 634 (1983).
79. *See supra* note 73.
80. 103 S. Ct. at 651.
81. 103 S. Ct. at 651 n.34.
82. *Id.*
83. 680 F.2d 1034 (5th Cir. 1982) (en banc).

jured on actual navigable waters in the course of his employment. The Second Circuit had reached the opposite conclusion in the *Perini* case,[84] holding that mere injury on navigable waters in the course of one's duties was not sufficient to confer status. *Boudreaux* is one of several cases in which the Fifth Circuit has expanded the coverage of the LHWCA in the past two years. In *Pippen v. Shell Oil Co.*,[85] the court concluded that offshore mineral production is "maritime commerce." It then ruled that a nonseaman engaged in offshore mineral production aboard a movable drilling rig is covered by the LHWCA, since the activity in which he was engaged provided him with the requisite "status," and the drilling rig—a "vessel" in maritime law—is a covered "situs."

From *Pippen*, the Fifth Circuit's next step in expanding LHWCA coverage was a short but significant one. Workers on fixed platforms within state territorial waters traditionally have been covered by state workers' compensation programs. They were not seamen because they ordinarily lack the requisite "connexity" with a vessel. Until recently, they were not covered by the LHWCA because drilling for oil and gas from fixed platforms was not considered a "traditional maritime activity."[86] Since *Pippen* held that offshore drilling for oil and gas is a maritime activity, workers on fixed platforms also are engaged in maritime employment and have the requisite "status"—at least in the Fifth Circuit. After *Pippen*, all that was needed to provide LHWCA coverage to workers on fixed platforms within state territorial waters was the conclusion that a platform is a covered "situs." That step came in *Herb's Welding, Inc. v. Gray*,[87] in which the court observed that "[b]y its function the platform is a wharf"[88] and "[b]y its location, extending from an island it adjoins navigable waters."[89] Thus, the court found that workers engaged in offshore drilling from a fixed platform in state territorial waters are within the coverage of the LHWCA.

The most recent expansion has come in *Thornton v. Brown & Root, Inc.*,[90] in which the same court held that workers engaged in the construction of platforms and equipment used in offshore drilling are engaged in maritime employment; thus, if their work takes place onshore, but on a covered "situs"—an area adjoining navigable waters within the meaning of 33 U.S.C. § 903—these workers will be covered by the federal act.

The Louisiana Supreme Court has joined the Fifth Circuit in expand-

84. Churchill v. Perini N. River Assocs., 652 F.2d 255 (2d Cir. 1981).

85. 661 F.2d 378 (5th Cir. 1981).

86. Anderson v. McBroom Rig Bldg. Serv., 5 BEN. REV. BD. SERV. (MB) 713 (1977); *see also* Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

87. 703 F.2d 176 (5th Cir. 1983).

88. *Id.* at 179.

89. *Id.*

90. 707 F.2d 149 (5th Cir. 1983).

ing the coverage of worker compensation schemes in maritime law. That court has ruled that a state may apply its workers' compensation laws to (1) workers injured on fixed platforms on the Outer Continental Shelf[91] and (2) workers engaged in the repair of ocean going vessels within the state's territorial waters.[92] At first blush, these decisions would appear compelled by the United States Supreme Court's earlier decision in *Sun Ship v. Pennsylvania*,[93] which held that the state workers' compensation scheme may be applied to workers injured on land in areas falling within the "situs" coverage of the LHWCA, even though such workers also possess LHWCA "status" and are within the coverage of the federal compensation act. There are distinctions, however, which could have produced a different result. In *Sun Ship*, federal law—the LHWCA—was invading an area traditionally reserved solely for state workers' compensation. The demands of comity should have weighed heavily in a determination that the expanded coverage of the federal act did not result in preemption of the previously applicable state law. In contrast, state law applies to worker injuries on actual navigable waters within a state's boundaries only by federal sufferance. When the issue is federal preclusion of state law on actual navigable waters, the demands of comity are less exacting, although there is something of a tradition of permitting dual application of state and federal coverages in that area.

The application of state law to injuries on fixed platforms on the Outer Continental Shelf interjects a totally different consideration. Arguably, state law cannot apply of its own force on the Outer Continental Shelf, which had never been considered as within a state's territorial boundaries. Functionally speaking, the Outer Continental Shelf is an area of exclusive federal sovereignty—territory outside the traditional United States which was acquired by the federal sovereign by executive fiat and subsequent international convention. If state law applies on the Shelf, it does so only because federal law adopts it. Congress has made state law applicable on the Shelf only "[t]o the extent that [it is] applicable and not inconsistent with [federal law]."[94]

In the Louisiana case[95] extending state workers' compensation coverage to the Shelf, the claimants, nondependent parents, sought benefits for the death of their son; in such cases, benefits are payable under state law, but not under the LHWCA. A straightforward answer to the claim is that a state law which permits recovery denied by federal law is patently

91. Thompson v. Teledyne Movible Offshore, Inc., 419 So. 2d 822 (La. 1982), *appeal dismissed*, 104 S. Ct. 48 (1983).

92. Beverly v. Action Marine Serv., 433 So. 2d 139 (La. 1983).

93. 447 U.S. 715 (1980).

94. 43 U.S.C.A. § 1333(a)(2)(A) (Supp. 1983).

95. Thompson v. Teledyne Movible Offshore, Inc., 419 So. 2d 822 (La. 1982), *appeal dismissed*, 104 S. Ct. 48 (1983).

"inconsistent with federal law," and thus Congress did not adopt this state law as "surrogate" federal law for the Outer Continental Shelf. A counter argument is that it is not "inconsistent" to permit recovery where the federal law merely fails to provide recovery, but does not prohibit it. This argument is strengthened by the tenet that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[96] However, in the 1972 amendments Congress struck a bargain with the maritime employer: the employer would be liable, without regard to his fault, for payment of generous compensation benefits to his workers who fall within the coverage of the act, but he would not be liable to the employee in tort (except where there is "vessel negligence" chargeable to the employer) or to third persons for any additional damages arising out of the worker's injury.[97] Applying state law to provide the injured worker or his beneficiaries with additional benefits from the employer is arguably a breach of that bargain. Apparently, the arguments in favor of extending *Sun Ship* seaward have won the day at the United States Supreme Court, since it dismissed the appeal from the Louisiana case applying state workers' compensation to injuries on the Outer Continental Shelf.[98]

LHWCA—Actions Against Third Persons

Prior to 1972, a nonseaman aboard a vessel and doing the work of a seaman was entitled to the same warranty of seaworthiness as that afforded to members of the crew.[99] He was called a "*Sieracki* seaman," after the case[100] which gave birth to his remedy. If the *Sieracki* seaman was employed directly by the vessel (instead of through an independent contractor), he also could maintain the unseaworthiness action against his employer. This latter worker—usually a longshoreman hired directly by a vessel which acted as its own stevedore—came to be known as a *Yaka* seaman, after the Supreme Court decision which held that he was entitled to the unseaworthiness remedy.[101] The 1972 amendments took the unseaworthiness remedy from workers covered by the LHWCA and replaced it with a negligence claim—the 905(b) action—against the vessel on which they are working.[102] That act eliminated most, if not all, of

96. The Sea Gull, 21 F. Cas. 909, 910 (D. Md. 1865) (No. 12,578), *quoted with approval in* Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970).

97. *See, e.g.*, 33 U.S.C. § 905(a)-(b) (1976); *see also* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

98. Teledyne Movible Offshore, Inc. v. Thompson, 104 S. Ct. 48 (1983).

99. *See generally* G. Gilmore & C. Black, *supra* note 20, 436-42.

100. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

101. Reed v. The Yaka, 373 U.S. 410 (1963).

102. 33 U.S.C. § 905(b) provides in part:

In the event of injury to a person covered under this chapter caused by the

the *Sieracki* seamen. But what of the post-1972 maritime worker who would have qualified as a *Yaka* seaman under pre-1972 rules? After 1972, may he maintain a 905(b) action against the vessel operator who directly employs him? The language of 905(b) and the legislative history indicate that he can.[103] In *Jones & Laughlin Steel Corp. v. Pfeifer*,[104] the Supreme Court confirmed that the *Yaka* seaman survives, presumably as a *Pfeifer* seaman, *i.e.*, a worker, covered by the LHWCA but employed directly by a vessel, who may maintain a tort action against his employer for damages caused by the vessel's negligence.

A LHWCA employer who pays or becomes liable for payment of benefits provided by the Act to his employee usually will seek to recoup all or part of the payments from third persons whose wrongful conduct caused or contributed to the employee's injury. If the employee files suit against the third party within six months after acceptance of LHWCA payments from the employer "under an award," the employer must recoup his payments through the traditional remedy of subrogation. The courts have recognized this right of subrogation, although it is not expressly provided in the Act.[105] If the employee fails to bring suit against the third party within the six-month period, his claim automatically is assigned to the employer. The employer may then prosecute the claim and retain out of the proceeds of any judgment the amounts which he has paid, and which he is liable to pay as LHWCA compensation.[106]

Under either of these theories, the employer's recovery will not be reduced by his own contributing fault.[107] However, the injured employee's

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negligence of a vessel, then such person . . . may bring an action against such vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

103. 33 U.S.C. § 905(b) provides in part: "If [a person covered under this chapter] was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." The section also contains a similar provision for persons covered by the LHWCA and employed by the vessel to provide shipbuilding or ship repairing services. The purpose of these provisions is to prevent the application of respondeat superior when one longshoreman or harbor worker employed directly by a vessel owner injures another worker similarly employed, thus placing the workers in the same position, *vis a vis* their employer, as they would be if employed by an independent contractor. If other provisions of the LHWCA barred these workers from bringing any negligence action against their vessel owner-employee, the provisions preventing the application of respondeat superior would have been superfluous. *See also* 1972 U.S. CODE CONG. & AD. NEWS 4705.

104. 103 S. Ct. 2541 (1983).

105. *See, e.g.*, Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975).

106. 33 U.S.C. § 933(b), (d), (e) (1976).

107. When the employee prosecutes his claim, the third-party tortfeasor must pay the full amount of damages not attributable to the negligence of the employee, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), and the subrogated employer may recover from such damages the full amount of his claim, even though nothing remains for the employee or his attorney. Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74 (1980).

contributing negligence will reduce the employer's recovery, since the employer, when proceeding through subrogation or assignment, is merely recovering all or part of the employee's claim against the third party. If the employee's contributory negligence is great in comparison to the third party's fault, the employer's recoupment may be much less than what he has paid the employee in compensation benefits.[108] In that situation, the employer may have an additional theory under which he may achieve full recovery from the third person.

In *Marine Terminals v. Burnside Shipping Co.*,[109] the Supreme Court held that (1) the assignment and subrogation provisions of the pre-1972 LHWCA did not provide the exclusive method of recovery by the employer against a third person and (2) under federal maritime law, a maritime employer has a direct action against a shipowner to recover the amount of compensation payments occasioned by the shipowner's negligence.

The *Burnside* doctrine has seldom been applied in reported cases. It surfaced twice in the past year, however, and in both cases, the defendant argued that the doctrine had been abrogated by the 1972 amendments to the LHWCA.[110] The gist of this argument is that the language of the 1972 amendments makes subrogation and assignment (through 33 U.S.C. § 933) the employer's exclusive remedies against third persons, and thus the language effected a tacit abrogation of *Burnside*. The argument was rejected—in whole or in part—by two prestigious admiralty courts, the Fifth and Ninth Circuits.[111]

When a *Burnside* action is available, the employee's contributory negligence presumably will not reduce the employer's recovery, although apparently there is yet no case directly in point. While such a result might seem unfair, it would not be anomalous. When the employee brings the action against the third-party tortfeasor, the latter is liable for the full amount of the employee's damages, even though the employer was guilty of negligence which contributed to the injury. The Supreme Court has denied the third-party tortfeasor an "equitable credit" for the employer's negligence in such a case,[112] even though the employer's subrogation claim would be satisfied in full from the proceeds of the employee's suit before

108. Where the employee brings his claim against the third-party tortfeasor, recovery is reduced by that percentage of contributory negligence chargeable to the employee. *See, e.g.*, Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 485 (9th Cir. 1979).

109. 394 U.S. 404 (1969).

110. *See* Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp., 696 F.2d 703, 706 (9th Cir. 1983).

111. In Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp., 696 F.2d 703 (9th Cir. 1983), the court concluded that the *Burnside* "independent tort" theory survived the 1972 amendments. In Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir. 1983), the court held that the doctrine survives, at least as to nonvessel third-party tortfeasors.

112. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

the employee or his attorney received any of the proceeds.[113]

33 U.S.C. § 933 provides that acceptance by an employee of LHWCA compensation benefits "under an award" operates as an assignment to the employer of the employee's rights against third persons, unless the employee commences an action against such third persons within six months. The Supreme Court has ruled that the assignment is practically absolute; after it occurs, the worker may not pursue the claim, even though the employer elects not to sue the third party.[114] The LHWCA does not define an "award" for the purposes of this "automatic assignment" provision. Some courts have held that the six-month period begins when the employer commences voluntary payments to the worker and files with the Office of Workers' Compensation Programs the required notice of such payment.[115] During the 1982-1983 term, the Supreme Court rejected that view.[116]

OBSTRUCTION OF NAVIGABLE WATERS

One of the least impressive jurisprudential rules in maritime law is that a tortfeasor who negligently sinks a vessel is not liable for damages resulting from a subsequent collision between the sunken vessel and another vessel.[117] The explanation for the rule is that the subsequent failure of the owner to mark or remove his sunken vessel, a duty imposed by the Wreck Act,[118] becomes the "proximate cause" of the damage to the vessel which collides with the wreck. This issue came before the Fifth Circuit in 1983 in *Nunley v. M/V Dauntless Colocotronis*.[119] That court wisely rejected the rule, holding that the failure of the owner of the sunken vessel to mark the wreck does not relieve the initial tortfeasor from liability for a subsequent collision with the wreck.

The Wreck Act provides that when a vessel is sunk through negligence chargeable to its owner, he must both mark the wreck and remove it. A protection and indemnity (P & I) insurance policy ordinarily obligates the insurer to pay the cost of removal of the wreck of the insured vessel, "when such removal is compulsory by law." Clearly, removal is "compulsory by law" when a court orders the removal, or, perhaps, when the Corps of Engineers or other appropriate agency makes demand upon the owner for removal. However, the wreck may pose a danger to life or

113. Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74 (1980). The result may be different when, as in Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir. 1983), state tort law furnishes the employer's cause of action.

114. Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981).

115. *See* Maraist, *Developments in the Law, 1981-1982—Admiralty*, 43 LA. L. REV. 265, 278 (1982).

116. Pallas Shipping Agency v. Duris, 103 S. Ct. 1191 (1983).

117. *See, e.g.*, Lowery v. The Tug Ellen S. Bouchard, 128 F. Supp. 16 (N.D.N.Y. 1955), *aff'd*, 229 F.2d 436 (2d Cir. 1956).

118. 33 U.S.C. § 409 (1976).

119. 696 F.2d 1141 (5th Cir. 1983).

property, and the owner may be liable to third persons who subsequently are harmed by collision with the wreck. In such cases, the owner may elect to remove the wreck before he is ordered to do so by a court or other authority. When that occurs, the owner frequently ends up in litigation with his insurer over the issue of whether the removal was "compulsory by law." Some courts have concluded that removal is "compulsory by law" only when it is ordered by a governmental or judicial body.[120] The advantage of that rule is ease of application; the obvious disadvantage is that it discourages prompt removal of hazards to life and property. The Fifth Circuit has made the wiser policy choice. It interprets "compulsory by law" as encompassing both removal under judicial or administrative mandate and removal "compelled" by apprehension of civil liability to third persons who may be harmed by the wreck.[121]

Apparently, the Fifth Circuit has had an easier time in making the policy choice than in formulating the standard by which a court must determine if the removal is in fact "compelled" by a desire to avoid civil liability to third persons. In *Progress Marine, Inc. v. Foremost Insurance Co.*,[122] the court adopted a two-tiered "objective/subjective" test: removal is "compulsory by law" if (1) failure to remove reasonably would expose the insured to liability imposed by law sufficiently great to justify the expense of removal *and* (2) the insured removed the wreck because he subjectively believed that removal was reasonably necessary. The two-tiered test was short-lived. In *Continental Oil Co. v. Bonanza Corp.*,[123] the Fifth Circuit sitting *en banc* eliminated the second or "subjective" tier; the majority stated: "We focus on what the reasonable assured would have done, not on the thought processes of the actual assured or his counsel on a given day."[124] The court apparently was unanimous in its decision to jettison the "subjective" requirement, but some of the judges objected to what they interpreted as a relevant rephrasing of the objective test. Judge Rubin, writing for the majority, stated that removal undertaken to minimize possible exposure to legal liability

> must be [under] a compulsion, a legal duty. To be compelling, the duty must be clear and the sanctions for its violation both established and sufficiently severe to be impelling, that is to warrant the cost of removal. But removal occasioned by a reasonable apprehension of slight consequences for inaction or by an unreasonable apprehension even of grave consequences is not compelled.[125]

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120. *See* Beard Shipping Co. v. Jocharanne Tugboat Corp., 461 F.2d 500 (2d Cir. 1972).

121. Progress Marine, Inc. v. Foremost Ins. Co., 642 F.2d 816 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981).

122. *Id.* at 820.

123. 706 F.2d 1365 (5th Cir. 1983) (en banc), *vacating* 677 F.2d 455 (5th Cir. 1982).

124. *Id.* at 1371.

125. *Id.* at 1370.

The dissenters feared that this test would prove to be too severe, since they interpret it as requiring that at the time of removal there be clear judicial precedent imposing liability upon the owner for subsequent damage caused by the wreck. The dissenters were concerned over the plight of an insured—as they viewed the insured in the instant case—who could foresee catastrophic damages resulting from nonremoval, but who would not be liable for those damages under the existing but highly fluid maritime law.[126]

The dissenters may have read too much into the majority's opinion. One interpretation of the majority's test is that the owner is not under a "clear duty" unless he would be liable for the foreseeable damages under prevailing precedent. But the test also may be no more than another alias for the law's chief arbiter—the reasonable man under all of the circumstances. A "reasonable owner" would consider, as a relevant circumstance, the likelihood that the maritime law will move—and how quickly it will move—in the direction of imposing liability upon him. His apprehension of a change in the law, like his assessment of the likelihood and severity of the harm that will occur to third persons and the cost of the removal, must be a reasonable one. Future decisions may disclose that the Fifth Circuit is not as divided on the issue as the *Bonanza* case indicates.

126. *Id.* at 1378-79 (Brown, Johnson, Politz, Tate, Williams, JJ., dissenting).