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ADMIRALTY

*Frank L. Maraist**

ADMIRALTY JURISDICTION

Admiralty law applies to torts which have "locality" and "flavor," *i.e.*, torts which occur on navigable waters and which bear a significant relationship to traditional maritime activity.[1] "Navigable waters" is defined as those which are "used, or . . . susceptible of being used" as highways of commerce between two or more states or between the United States and another country.[2] The Supreme Court's decision in *Foremost Insurance Co. v. Richardson*[3] that a collision between two pleasure boats has "maritime flavor" invites a reassessment of whether the mere "susceptibility" of use of certain waterways for commercial purposes is sufficient to make those waters "navigable." This is so because the Court's reason for classifying pleasure boat collisions as maritime torts is that the operation of pleasure boats in navigation channels utilized by commercial vessels could "affect" maritime shipping and commerce; thus, the regulation of the navigation of pleasure boats has "maritime" flavor.[4] Under this rationale, if the waters are in commercial use, pleasure boating may have a significant effect upon commercial shipping; however, if the waters are not in, but are merely "susceptible" of such use, the requisite impact upon commercial shipping may be absent. The counter-argument is that if actual use is required, then the applicability of state or federal substantive law becomes contingent upon the presence of isolated or sporadic commercial activity. This latter argument swayed the United States Sixth Circuit to join most of the other circuits[5] in holding that waters are "navigable" if they are capable of use as "highways of commerce," even though there is no present commercial use.[6] The issue remains in doubt, however, because of some conflicting lower court jurisprudence.[7]

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1. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654 (1982); see Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493 (1972) (a strong disfavor of "locality alone" rule was expressed).

2. The Daniel Ball, 77 U.S. (10 Wall.) 577 (1870); In re Boyer, 109 U.S. 629, 3 S. Ct. 434 (1884).

3. 457 U.S. 668, 102 S. Ct. 2654 (1982).

4. Id. at 674-77, 102 S. Ct. at 2658-60.

5. See, e.g., United States v. DeFelice, 641 F.2d 1169 (5th Cir.), cert. denied, .454 U.S. 940 (1981); Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982).

6. Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983).

7. See Livingston v. United States, 627 F.2d 165 (8th Cir. 1980).

The courts also have encountered problems in applying the "locality" and "flavor" test to product liability claims. A product liability claim will have "locality" if it arises from damage caused on water, although the product was manufactured and sold on land.[8] This result creates difficulty with the formulation of a test for the requisite "flavor" when a defective product made on land causes injury on water. Since maritime products liability law may differ from state law, fairness may require that the use of the product in a maritime setting must have been foreseeable to the manufacturer/seller.[9] Is foreseeability of use in a maritime setting enough, or must the use also be one which bears a significant relationship to traditional maritime activity? The answer may come from the flood of abestos litigation which has spilled over into maritime law. In those cases the issue has not been foreseeability of use in a maritime setting, but whether there is "maritime flavor" in the activity in which the victim was engaged when he was injured by the product.[10] Asbestos work in a maritime setting usually involves either construction or repair of vessels. Some courts have concluded that exposure to asbestos in either construction or repair is not sufficient to confer maritime jurisdiction.[11] Other courts have indicated that exposure during the repair of vessels may confer admiralty jurisdiction, but exposure during ship construction will not.[12] Both of these approaches may have missed the mark. Maritime law distinguishes between construction and repair of vessels in determining which contracts fall within

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8. Sperry Rand Corp. v. Radio Corp. of Am., 618 F.2d 319 (5th Cir. 1980); Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), cert. denied sub nom., Atlantic Marine, Inc. v. Jig III Corp., 424 U.S. 954 (1976) (negligent design of ship on land).

9. If the manufacturer could not have foreseen that he would be exposed to liability under the products liability law of a particular sovereign, it may be unfair to measure his conduct in placing the product on the market by the laws of that sovereign. This premise may underlie in part the U.S. Supreme Court's decisions on the reach of a state's "long arm" statute. Ordinarily, a state exercising jurisdiction over a non-resident is not prohibited, either by choice of law rules or constitutional guaranties (outside of due process) from applying its own law to the case. Thus the "fairness" of permitting a state to exercise jurisdiction over a non-resident may rest in part upon whether the non-resident could have foreseen that the state's law could apply to his conduct.

10. See, e.g., Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984); Austin v. Unarco Indus., Inc., 705 F.2d 1 (1st Cir. 1983); Zelaskowski v. Johns-Manville Corp., 578 F. Supp. 11 (D.N.J. 1983); Woessner v. Johns-Manville Sales Corp., 576 F. Supp. 596 (E.D. La. 1984).

11. *Austin*, 705 F.2d at 1; Harville v. Johns-Manville Prod. Corp., 731 F.2d 775 (11th Cir. 1984); Francois v. Raybestos-Manhattan, Inc., 577 F. Supp. 434 (N.D. Cal. 1983).

12. See authorities discussed in Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984).

admiralty jurisdiction,[13] but the distinction is primarily historical and can be supported on policy grounds which are foreign to the issue of whether an asbestosis claim by an injured shipyard worker is maritime.[14] The more relevant authority is the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which extends maritime compensation benefits to workers who are engaged in "maritime employment," and lists shipbuilding and ship repair as examples of such activity.[15] The correct policy inquiry is whether there is a need for a uniform national rule governing the right of a maritime worker (or his employer who has paid LHWCA benefits) to recover from the manufacturer of a defective product. The courts appear inclined toward the conclusion that there is not.

TORTS

Courts which have considered the question have been unanimous in their adoption of strict liability,[16] as outlined in section 402A of the *Restatement (Second) of Torts*,[17] into maritime products liability law. Although district courts within its jurisdiction had been applying Section 402-A in maritime claims,[18] the Fifth Circuit did not squarely reach the issue until early in 1984. In *Pavlides v. Galveston Yacht Basin, Inc.*,[19] the court ruled that (1) strict liability is available in maritime products liability actions brought under the Death on the High Seas Act, (2) that

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13. See, e.g., North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 39 S. Ct. 221 (1919); see also Thames Towboat Co. v. The Francis McDonald, 254 U.S. 242, 41 S. Ct. 65 (1920).

14. The distinction dates back to the early case of The People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1857), where a contract for ship construction was regarded as beyond admiralty jurisdiction for the incidental reason that the contract was "made on land, to be performed on land." Id. at 402. Shipbuilding contracts usually are negotiated by parties who possess equal bargaining power and who are aided by skilled counsel. Since the parties may provide or choose the law between them, there is no need for, nor expectation of, a uniform national or international rule. This is not necessarily true in the context of a contract for the repair of what may be a disabled ship. Absent a uniform national rule in the latter case, the commerce in which an individual shipowner might involve a particular vessel could conceivably be limited to those states where state contract law favored the owner.

15. See 33 U.S.C. §§ 902(3), 903 (1983).

16. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972); Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129 (9th Cir. 1977); authorities cited id. at 1134-35.

17. Restatement (Second) of Torts § 402A (1965).

18. See, e.g., Houston-New Orleans, Inc. v. Page Eng'g Co., 353 F. Supp. 890 (E.D. La. 1972); Kirkalady v. Alamo Transp. Chem. Co., 320 F. Supp. 631 (S.D. Tex. 1970); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969).

19. 727 F.2d 330 (5th Cir. 1984).

the test for such liability is that prescribed in section 402-A, (3) that a product is "defective" in maritime products liability law if it is "unreasonably dangerous,"[20] and (4) that strict products liability may include the failure to warn of a foreseeable and unreasonable danger presented by a product, even though there is no manufacturing or design defect in the product. The court set forth guidelines for determining the scope of the duty to warn; those guidelines require a warning which is reasonable in light of all of the circumstances.[21]

Recent Fifth Circuit decisions highlight the defenses which are available in a strict products liability claim governed by maritime law. In *Pavlides*[22] the court ruled that in a "failure to warn" case a manufacturer may assert as an affirmative defense that the user (1) already had actual knowledge of the specific risk, (i.e., the specific hazard and the extent of the harm that would follow) and (2) made an informed choice to "brave" the hazard.[23] Thereafter, in *Lewis v. Timco, Inc.*,[24] the court ruled that comparative negligence applies to reduce recovery against the manufacturer in strict products liability cases governed by maritime law. Then in *National Marine Service, Inc. v. Petroleum Service Corp.*[25] the court ruled that in a maritime strict products liability action, "no distinction should be made between assumption of the risk and contributory negligence, but that the plaintiff's conduct (whether theoretically mere contributory negligence or assumption of the risk) should be analyzed solely under the principles of comparative fault . . . ."[26] One may conclude from these cases that if the condition which makes the product unreasonably dangerous is one which is not discoverable in the excercise of reasonable care by the user, and the user does not in fact discover it, he may recover the full amount of his damages. However, if the "defect" is discoverable by the use of ordinary care, the user's discovery and use,[27] or his failure to discover, will not bar his recovery, but will reduce it on the basis of a comparison of his "fault" with that of the manufacturer.

DAMAGES

The issue of how damages for loss of earning capacity should be

20. Id. at 338 n.13.
21. Id. at 338-39.
22. Id. at 330.
23. Id. at 340.
24. 716 F.2d 1425 (5th Cir. 1983) (reh'g *en banc*).
25. 736 F.2d 272 (5th Cir. 1984).
26. Id. at 277.
27. This presumes that when a user has actual knowledge of the specific risk but makes a voluntary choice to "brave" the hazard, his conduct is functionally indistinguishable from assumption of risk. Since the user's conduct also constitutes contributory negligence, it should reduce but not bar his recovery, under the rationale of *National Marine Service*.

calculated has dominated maritime law in recent years.[28] The current problem area is the manner in which inflation should be considered by the trier of fact in determining how much income the plaintiff (or the plaintiff's decedent, in a wrongful death case) would have earned if the injury had not occurred. In *Jones & Laughlin Steel Corp. v. Pfeifer*,[29] the Supreme Court ruled that courts could use one of the following: (1) the "specific forecast of future inflation" method, (2) the "below market discount rate" method, or (3) a modification of the total "offset" method. However, the Court discouraged use of the "specific forecast" method, which it found to be "unreliable" and "costly."[30] Prior to *Pfeifer*, the former Fifth Circuit had ruled that courts within its jurisdiction could use either the "specific forecast" or "below market discount rate" methods.[31] After *Pfeifer*, however, the former Fifth Circuit reconsidered the matter *en banc*;[32] the decision, which has come to be known as *Culver II*, specified that the "below market discount rate" is the only method which should be used in calculating the effect of inflation upon loss of earning capacity.[33] The court also refined its earlier decision by requiring that the fact finder make an adjustment for the effect of income tax upon the interest which can be earned by the plaintiff from the lump sum of future earnings.[34]

Under *Culver II*, the trier of fact must predict all wage increases which the worker would have received during his work-life, other than those increases resulting from inflation. He then must discount that sum by the "below market discount rate," which is the market interest rate, adjusted for the effect of any income tax and reduced by the estimated rate of general future price inflation. The method by which the "below market discount rate" is determined may result in an inconsistency in the court's rationale. *Culver II* provides that if the parties do not stipulate to the "below market discount rate," they may introduce expert testimony concerning the appropriate rate.[35] However, the "below market discount rate" is calculated by first determining the "market interest rate," and then reducing that by the "specific forecast of future inflation" method.[36] Apparently, the court anticipates that stipulations of the "below market discount rate" will become commonplace.

Culver II is the governing precedent in the new Fifth Circuit. How-

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28. See Maraist, Developments in the Law, 1982-1983—Admiralty, 44 La. L. Rev. 223, 229-32 (1983).

29. 103 S. Ct. 2541 (1983).

30. 103 S. Ct. at 2556.

31. Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) (reh'g *en banc*).

32. Culver v. Slater Boat Co., 722 F.2d 114 (5th Cir.) (reh'g *en banc*), cert. denied sub nom., St. Paul Fire & Marine Ins. Co. v. Culver, 105 S. Ct. 90 (1984).

33. Id. at 117, 122.

34. Id. at 118.

35. Id. at 122.

36. Id. at 118.

ever, six of the judges of the present court dissented in *Culver II*[37] and four others elected not to participate in the decision.[38] *Culver II's* rejection of the "specific forecast of future inflation" may not survive subsequent scrutiny by an *en banc* panel of the present Fifth Circuit. However, the judicial effort and agony which one senses was involved in *Culver I* and *Culver II* might preclude such a reconsideration in the near future.

SEAMEN

Helicopter pilots generally have failed in their efforts to gain seaman status in the Fifth Circuit; the court has ruled that a helicopter is not a "vessel" for the purpose of such status.[39] In *Hebert v. Air Logistics, Inc.*[40] plaintiff contended that he was a seaman because he was permanently assigned to a "fleet" of vessels which he served as a helicopter pilot. The court rejected his contention, but did not rule out the possibility that some helicopter pilots could qualify as seamen under the theory. In *Hebert*, the pilot (1) was not employed or directly controlled by the owner of the "fleet" but by his payroll employer, an independent contractor, (2) performed none of the vessel's "special mission" work (in this case, laying pipeline), and (3) spent little time on any of the vessels and was not permitted to go into the vessels' work areas. The Fifth Circuit may reach a different result if the pilot is employed or controlled directly by the vessel owner and performs some work aboard the vessel.

Workers on fixed platforms ordinarily do not acquire seaman status because they lack the requisite connexity with a vessel. The platform upon which they work is not a vessel.[41] Platform workers sometimes are ferried to and from, and are housed at the platform on vessels, but usually do not perform a significant part of their work aboard those vessels.[42] However, some vessels which transport workers to the platforms are not mere "buses" or "floating hotels," but are specially designed for use by workers in the performance of their duties on the platforms. A vessel may be used to store and carry tools, pipe, or other equipment, and the platform workers may perform some of their platform work while aboard the vessel. In such a case, the vessel's "special mission"

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37. Id. at 123, 125, 126.

38. Id. at 116.

39. Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (5th Cir. 1982), cert. denied, 103 S. Ct. 2430 (1983).

40. 720 F.2d 853 (1983).

41. Myrick v. Teledyne Movible Offshore, Inc., 516 F. Supp. 602 (S.D. Tex. 1981); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1348 n.10 (5th Cir. 1980).

42. See Keener v. Transworld Drilling Co., 468 F.2d 729, 732 (5th Cir. 1972); *Longmire*, 610 F.2d at 1342.

is not merely to carry workers to a platform and house them there, but is also to aid in the performance of the platform work. A platform worker may qualify as a seaman as to this kind of "support vessel," even though he does not perform the traditional seaman's duties aboard the vessel, and even though his primary work assignment is on the fixed platform.[43]

The standard applied to a directed verdict (and a judgment notwithstanding the verdict) in maritime cases is the "reasonable minds could differ" test generally applied in federal courts, and in most state courts: the court must submit the issue to a jury if there is evidence from which reasonable minds could conclude the existence of every fact essential to the plaintiff's claim.[44] In Jones Act cases, the courts generally apply the "scintilla" test: the court must submit the matter to the jury unless there is a complete absence of probative facts as to an essential element of the plaintiff's claim.[45] Where Jones Act and unseaworthiness claims are joined, the different standards should apply to a determination of liability, but it may be illogical to charge a jury that it can find that the plaintiff is a seaman as to one of the claims but not the other. Such a result is possible if the Fifth Circuit adheres to earlier decisions applying the "scintilla" test to the issue of seaman status in a Jones Act case.[46] In *Wallace v. Oceaneering International*,[47] the court may have avoided that problem by ruling that in Jones Act claims the "scintilla" test applies to the issue of employer liability (negligence and cause in fact) and damages, but the "reasonable minds" standard should be used to determine whether the plaintiff is a seaman.

The "scintilla" test can be a sword as well as a shield to the Jones Act seaman. In *Thezan v. Maritime Overseas Corp.*,[48] the Fifth Circuit ruled that a seaman is not entitled to a directed verdict (or judgment notwithstanding the verdict) on the employer's claim of contributory

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43. The Fifth Circuit held that a claimant who was always assigned to either of his employer's two such special purpose vessels was entitled to summary judgment as to seaman's status. Coulter v. Texaco, Inc., 714 F.2d 467 (5th Cir. 1983); see also *Longmire*, 610 F.2d at 1347 n.6.

44. See Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077 (1943).

45. See, e.g., Comeaux v. T. L. James & Co., 666 F.2d 294, 298 (5th Cir. 1982).

46. Indeed, some language in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), supports the conclusion. The court wrote that "there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is *evidence* that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel . . . ." Id. at 779 (emphasis added). The overwhelming majority of Fifth Circuit cases, however, have used the "reasonable minds could differ" test in assessing whether there is a jury issue as to seaman status. See, e.g., Landry v. Amoco Prod. Co., 595 F.2d 1070 (5th Cir. 1979); cases cited id. passim.

47. 727 F.2d 427 (5th Cir. 1984).

48. 708 F.2d 175 (5th Cir. 1983).

negligence unless there is a "complete absence of probative facts" to support the conclusion that the seaman was contributorily negligent.

Traditionally, each federal court of appeal handling maritime cases has established a fixed daily sum for maintenance; a seaman receives that fixed sum for each day he is entitled to maintenance, and is not required to prove the amount of living expenses he actually requires.[49] The modern approach requires the seaman to prove as a fact the amount of maintenance to which he is entitled.[50] Proof may be made either by (1) expert testimony as to the reasonable cost of subsistence in the community in which the seaman is residing, or (2) the seaman's testimony of his own expenditures for maintenance.[51] If the seaman fails to produce any evidence of the amount of maintenance, two approches can be used by the courts. One is to grant him recovery of the traditional fixed sum; the other—which the Fifth Circuit has adopted—is to deny the seaman any award for maintenance.[52]

Collective bargaining agreements between the seaman's union and the shipowner may provide that if the seaman is entitled to maintenance, the amount shall be a sum fixed by the agreement. The courts are divided on the issue of whether the seaman is bound by that amount, or whether he may prove that his subsistence costs are greater.[53] If the shipowner and union agree to a low maintenance sum in exchange for other benefits (pensions, overtime pay and the like), and such an agreement is not against public policy, it would be unfair for a court to deprive the shipowner of the benefit of his bargain. However, a bargaining "tradeoff" may not be expressed in the labor agreement, and the data which would permit the court to make a determination that there was a "tradeoff" may not be available or may be costly to obtain. Unless the labor agreements are for unusually long terms, the seaman's bargaining representative can be expected to correct any miscalculations at the next bargaining session. The better course may be to bind the seaman to the maintenance rate fixed in his union contract.

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49. Incandela v. American Dredging Co., 659 F.2d 11, 14 (2d Cir. 1981). See also G. Gilmore & C. Black, Law of Admiralty § 6-12, at 307 (2d ed. 1975).

50. *Incandela*, 659 F.2d at 14; see Tate v. American Tugs, Inc., 634 F.2d 869 (5th Cir. 1981).

51. See, e.g., Incandela v. American Dredging Co., 659 F.2d 11 (2d Cir. 1981); Morel v. Sabine Towing & Transp. Co., 669 F.2d 345 (5th Cir. 1982); Caulfield v. AC & D Marine, Inc., 633 F.2d 1129 (5th Cir. 1981).

52. Curry v. Fluor Drilling Serv., Inc., 715 F.2d 893 (5th Cir. 1983).

53. Compare Hodges v. Keystone Shipping Co., 578 F. Supp. 620 (S.D. Tex. 1983) (holding that the plaintiff, a union member, is bound by an $8 maintenance rate set forth in the collective bargaining agreement, although the evidence would sustain a $30 *per diem* rate) with Rutherford v. Sea-Land Serv., Inc., 575 F. Supp. 1365 (N.D. Cal. 1983) (holding that an inadequate maintenance rate in a collective barganing agreement is not binding upon a plaintiff seaman).

FORUM *Non Conveniens*

When foreign law applies to a claim pending in an American admiralty court, the court may either retain jurisdiction or dismiss the claim on the theory of forum *non conveniens*. Forum *non conveniens* is appropriate only if there is an alternative forum in which the plaintiff may proceed against the defendant.[54] In *Veba-Chemie A.G. v. M/V Getafix*,[55] the defendant stipulated that it would submit to the jurisdiction of the alternative forum, although it was not subject to jurisdiction in that forum when the plaintiff initially filed his suit in the American court. The Fifth Circuit then ruled that in forum *non conveniens*, the alternative forum need only be available at the time of the dismissal; thus, the defendant's submission to jurisdiction at the alternative forum as a condition of dismissal made the forum "available" for the purposes of the forum *non conveniens* analysis.[56] When forum *non conveniens* is urged in an admiralty proceeding, the balancing analysis prescribed by *Gulf Oil Corp. v. Gilbert*[57] is applicable. The factors to be considered in making the anaylsis include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[58]

However, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[59] When forum *non conveniens* is urged in an admiralty *in rem* proceeding, the interests which support retention of jurisdiction usually outweigh the defendant's interest in a change of forum. One of these interests is the need to provide the plaintiff with jurisdiction over the vessel where it can be found; another is that dismissal will deprive the plaintiff of control over a valuable asset, the property seized or the bond which replaces it. *Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*[60] demonstrates that forum *non conveniens* is not always inappropriate in an *in rem* proceeding. There, the defendant showed both convenience in the alternative forum, and a willingness to submit to the jurisdiction of, and

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54. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839 (1947); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 67 S. Ct. 828 (1947).
55. 711 F.2d 1243 (5th Cir. 1983).
56. Id. at 1248.
57. 330 U.S. 501, 67 S. Ct. 839 (1947).
58. Id. at 508, 67 S. Ct. at 845.
59. Id.
60. 711 F.2d 1231 (5th Cir. 1983).

to post equivalent security in the alternative forum. The Fifth Circuit concluded that those factors may constitute a showing sufficient to overcome the presumption in favor of the plaintiff's choice of forum.[61]

LONGSHOREMAN AND HARBOR WORKERS' COMPENSATION ACT [LHWCA]

Under the prevailing jurisprudence, workers on mineral production platforms constructed over navigable waters may recover worker compensation benefits either under the LHWCA, or under the Louisiana worker compensation laws.[62] Both of these compensation schemes reimburse the worker for only part of his loss—two-thirds of his wages during some or all of his work-life, and medical expenses.[63] Much of the worker's damages, particularly the remaining value of his earning capacity and his pain and suffering, either is not compensated, or is compensated through a tort action against someone other than his employer.

Since a platform is treated as land for purposes of admiralty tort jurisdiction, Louisiana law usually applies to the platform worker's tort claims against third parties.[64] Two primary defendants in these third party claims are the platform owner and the general contractor who has contracted with the worker's employer for performance of part of the general contract with the owner. The general contractor may be liable either becase his employees negligently injure the subcontractor's employee, or because the injury is caused by a "defective thing" under the control of the general contractor.[65] The owner's liability usually is predicated upon his ownership of the platform, a building for whose defects he is strictly liable under Louisiana Civil Code article 2322.[66]

Worker compensation schemes usually provide tort immunity to an injured worker's payroll employer and to the worker's "statutory em-

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61. Id. at 1239.

62. The LHWCA applies to platform workers on the Continental Shelf by virtue of the Outer Continental Shelf Lands Act, 43 U.S.C. § 333 (1982). See Herb's Welding v. Gray, 703 F.2d 176 (5th Cir. 1983) (holding that oil production workers on fixed platforms within territorial waters could recover benefits under the LHWCA), cert. granted, 104 S. Ct. 1589 (1984). Thompson v. Teledyne Movable Offshore, Inc., 419 So.2d 822 (La. 1982), cert. denied, 104 S. Ct. 48 (1984), holds that the Louisiana worker's compensation act may be applied to workers on fixed platforms on the Continental Shelf.

63. 33 U.S.C. § 908 (1983); La. R.S. 23:1221 (Supp. 1984).

64. 43 U.S.C. § 1333(a)(2)(A) (1983); Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 89 S. Ct. 1835 (1969).

65. See, e.g., Olsen v. Shell Oil Co., 365 So. 2d 1285 (La. 1978). In *Olsen* the Louisiana Supreme Court responded to certification of the issue by the Fifth Circuit and held that a platform is a building as that term is used in Civil Code article 2322. Id. at 1290.

66. Id.

ployer," *i.e.* the persons for whom the payroll employer is performing work. The Louisiana worker's compensation law provides "statutory employer" tort immunity to any person whose "trade, business, or occupation"[67] is being performed by a worker, even though the person claiming immunity does not pay or secure compensation benefits for his injured employee.

Prior to the September, 1984 amendments,[68] the provisions of the LHWCA as to "statutory employer" immunity were cryptic. 33 U.S.C. 905(a) provided that "(t)he liability of an *employer*" for LHWCA benefits "shall be exclusive . . . of all other liability of such employer to the employee."[69] Section 904(a) made "[e]very employer" liable for compensation benefits, and "[i]n the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."[70] The prevailing interpretation of the two sections in the lower courts prior to the 1984 amendments was that the LHWCA provided a contractor with "statutory employer" immunity from a tort action by an employee of a subcontractor only when the contractor paid LHWCA benefits to that employee after the subcontractor had failed to pay or secure such benefits.[71] Since the coverages of the LHWCA and the Louisiana worker's compensation law overlap, and the two schemes contain differing rules on "statutory employer" tort immunity, a crucial question is which tort immunity provision should be applied. The issue was first presented to the Fifth Circuit in *Jenkins v. McDermott, Inc.*[72] a case in which the platform owner claimed tort immunity under Louisiana law because the employer was making voluntary payments to the worker under the state compensation scheme. The court, assuming that the owner was not entitled to tort immunity under the LHWCA, ruled that he could not claim immunity under state law, at least until the worker had made a binding election to proceed under the state compensation scheme.[73]

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67. La. R.S. 23:1032 (Supp. 1984); see 1 W. Malone & A. Johnson, Worker's Compensation § 128, in 13 Louisiana Civil Law Treatise (1980).

68. Longshore and Habor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1639 (1984) [hereinafter cited as LHWCA Amendments], signed by the President on September 29, 1984, made a number of amendments to the LHWCA, including a change of its name to the "Longshore and Harbor Workers' Compensation Act."

69. 33 U.S.C. § 905(a) (1983) (emphasis added).

70. Id. § 904(b).

71. See, e.g., Probst v. Southern Stevedoring Co., 379 F.2d 763 (5th Cir. 1967); Thomas v. George Hyman Constr. Co., 173 F. Supp. 381 (D.D.C. 1959).

72. 734 F.2d 229 (5th Cir. 1984).

73. Id. at 234.

The prior jurisprudence, and the court's assumption in *Jenkins*, were undercut by the Supreme Court's decision in the "bombshell" case of *Washington Metropolitan Area Transit Authority v. Johnson (WMATA).*[74] On its face, *WMATA* is a somewhat innocuous decision, obviously oriented toward a desirable result—promotion of opportunities for small businesses in the District of Columbia.[75] However, the import of the decision is that under the pre-1984 LHWCA, the owner of, and the general contractor on oil production platforms are immune to tort suits by employees of subcontractors, and that the owner is immune to tort suits by employees of the general contractor. Although its precedential effect is limited, *WMATA* deserves a closer look.

In *WMATA*, the defendant was engaged as owner and general contractor in the construction of a rapid transit system in the District of Columbia, where the LHWCA applies to non-maritime worker-injury claims.[76] The defendant, for reasons probably unrelated to tort considerations, purchased LHWCA coverage for the employees of its subcontractors.[77] When sued in tort by some of those employees injured while engaged in the construction project, WMATA urged that it was immune from tort liability. The majority of the Supreme Court sustained WMATA's contention, using the following logic: (1) WMATA was a contractor who had secured the payment of LHWCA compensation benefits to the employees of a subcontractor (through the "wrap up" policy insuring all employees of all of its subcontractors), (2) the subcontractor had not secured compensation, (3) WMATA was entitled to secure compensation before the subcontractor defaulted (and was not required to wait until after such default), and (4) the term "employer" in Section 905(a) included a general contractor. Thus WMATA, as a general contractor who had secured LHWCA compensation benefits, was an "employer" entitled to tort immunity, under Section 905(a).

The majority did not confine the language of its opinion to the precise facts before it, but made these sweeping pronouncements:

> [Section 4(a)] simply places on general contractors a contingent obligation to secure compensation whenever a subcontractor has failed to do so. Taken together, §§ 4 (a) and 5(a) would appear to grant a general contractor immunity from tort suits brought by subcontractor employees unless the contractor has neglected

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74. 104 S. Ct. 2827 (1984).

75. One may infer from the majority opinion that the purchase by WMATA of LHWCA coverage for its subcontractors was motivated at least in part by a desire to make such coverage available to small contractors at a rate which would enable them to compete effectively with other contractors for the WMATA project. See id. at 2828-34.

76. D.C. Code Ann. §§ 36-301 to 36-304 (1981).

77. See supra note 75.

> to secure workers' compensation coverage after the subcontractor failed to do so.
>
> . . . .
>
> We conclude, therefore, that §§ 4(a) and 5(a) of the LHWCA render a general contractor immune from tort liability provided the contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation. So long as general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for § 5(a)'s grant of immunity.[78]

The dissent read the majority opinion as providing tort immunity to the general contractor and the subcontractor, so long as one of them secured compensation. Justice Rehnquist, writing for himself and two others, opened his dissent by observing: "The Court today takes a 1927 statute and reads into it the 'modern view' of workers' compensation, whereby both the contractor and the subcontractor receive immunity from tort suits provided somebody secures compensation for injured employees of the subcontractor."[79] Later, the dissent quipped: "Contractors such as WMATA are, thus, cast in the role of backup quarterbacks who get paid for sitting on the bench. They need do nothing; as long as the starting quarterbacks perform, the backups receive equal benefits."[80]

The first application of *WMATA* to platform injuries interpreted the case as the dissent did. In *Doucet v. Atlantic Richfield Co.*[81] the plaintiff was injured while performing work in connection with his employer's contract with the defendant, the owner of a fixed platform. The plaintiff's employer had secured LHWCA compensation; the defendant had not. Nevertheless, the district judge concluded that defendant was entitled to tort immunity under the *WMATA* decision.

WMATA's life may have been as short as it was tumultuous. Congress, which was revising the LHWCA when *WMATA* was decided, added language in the amendments which was intended to overrule *WMATA* retroactively.[82] To the extent *WMATA* has any precedential effect, it may eliminate the most vulnerable defendants in a platform worker's

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78. 104 S. Ct. at 2835-36.

79. Id. at 2836 (footnote omitted).

80. Id. at 2837.

81. No. 83-0351, slip op. (W.D. La. Jan. 30, 1985).

82. Section 905(a), which provides that the liability of an employer prescribed in Section 904(a) "shall be exclusive and in place of all other liability of such employer to the employee," 33 U.S.C. § 905 (a) (1983), is amended to add that "[f]or the purposes

third party action. However, *WMATA* may be read narrowly, in one of these ways:

> 1. Tort immunity extends to the general contractor, but not the platform owner. This argument is tenable because an essential element of the WMATA majority's rationale was the fact that WMATA was a "contractor" under 904(a) who secured compensation for employees of its "subcontractor," and that a "contractor" could be an "employer" under 905(a). In addition, section 904 does not speak in the broad terms of "trade, business, or occupation," so as to encompass within "statutory employer" immunity an owner who is not a general contractor.
>
> 2. Tort immunity extends to the contractor (and perhaps the owner) only where the subcontractor fails to secure compensation.

If *WMATA* is limited in this latter fashion, the decision, even if it has any precedential effect, will have little impact upon cases pending prior to the 1984 amendments since the owner or general contractor usually does not permit the subcontractor to commence work on the platform until the latter has secured LHWCA compensation.

There is no easy answer to the policy decision faced in WMATA and in the 1984 amendments overruling it. The "enterprise"—the oil and gas industry and its customers—already is bearing the cost of LHWCA

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of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4." LHWCA Amendments, 1984 U.S. Code Cong. & Ad. News (98 Stat.) at 1641 (to be codified at 33 U.S.C. § 905(a)). Section 904(a) now provides in relevant part that "[i]n the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. *A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.*" Id. (emphasis added) The report of the Congressional Conference Committee which completed the work on the 1984 amendments states that:

> The Conference substitute also provides a special effective date, so that these amendments apply to pending suits. This will avoid the dismissal, under WMATA, of third-party suits which were pending or on appeal on the date of enactment. (Any suit which has gone to final judgment from which no appeal lies as of the date of the enactment would not be subject to the amendments). WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.

House Conf. Rep. No. 1027, 98th Cong., 2d Sess. 21, 24, reprinted in 1984 U.S. Code Cong. & Ad. News 2771, 2774. The United States Fifth Circuit has construed the amendment as retroactively overruling WMATA. See Martin v. Ingalls Shipbuilding, 746 F.2d 231 (5th Cir. 1984); Doucet v. Atlantic Richfield, No. 84-4536 slip op. (W.D. La. Jan. 30, 1985).

benefits to injured employees because the cost of LHWCA premiums undoubtedly is passed on to the industry through the subcontract price. The employee presumably is bearing the remaining cost—one-third of his earning capacity, and his pain and suffering—but this may be the *quid pro quo* for the high wages his occupation commands. The owner and general contractor should be somewhat stimulated toward platform safety by the fact that they ultimately bear any increased premiums for LHWCA coverage. However, exposure to awards for tort damages may heighten safety consciousness on fixed platforms since (1) the owner or contractor may not be able to pass that cost back to the subcontractor through indemnity provisions, and (2) even if he is able to do so, the cost may be returned to him through increased contract prices. On the other hand, if the platform owner is forced to bear the ultimate cost of the worker's damages which are not compensated through the LHWCA, that cost will be spread among those who use the product—the consumers of oil and gas products—rather than the injured worker and his neighbors. Such a result seems appropriate.

A maritime worker injured in a work-related accident may recover LHWCA benefits from his employer, and may bring a tort action against a third party whose negligence was a cause of the accident.[83] The employer may recover from the third party tortfeasor the LHWCA benefits he has paid the worker, either through subrogation[84] or assignment to the employee's rights,[85] or in an independent tort action against the third party tortfeasor.[86] In most cases, the assignment does not take place, because the employee timely files suit against the third party tortfeasor, and the employee's claim is of such magnitude that the employer need not assert any independent tort claim for the LHWCA benefits he has paid. Thus, subrogation is the normal method by which the employer recoups compensation benefits from third party tortfeasors.

A problem arises when the maritime worker's recovery from the third party is not sufficient to pay the employer's subrogation lien, satisfy the fee of the employee's attorney, and provide the employee with some recovery in addition to the LHWCA benefits he has received from his employer. The landmark case is *Bloomer v. Liberty Mutual Insurance Co.*[87] There, the employee obtained a judgment in the amount of $60,000 from the third party tortfeasor; however, the employer had paid the employee about $17,000 in compensation benefits, and the employee's

83. 33 U.S.C. §§ 933(a), 905(b) (1983).

84. See Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975), cert. denied, 423 U.S. 1078 (1976).

85. 33 U.S.C. § 933(b) (1983).

86. Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 89 S. Ct. 1144 (1969).

87. 445 U.S. 74, 100 S. Ct. 925 (1980).

attorney was entitled to a one-third contingency fee. The employee sought to tax the employer with a share of the attorney's fees; if successful, it would have increased the employee's net recovery from $23,000 to $28,000. The Supreme Court rejected the employee's contention with broad language indicating that the maritime employer should never be required to bear part of the employee's attorney's fees in third party actions. However, that broad language was undercut by a footnote suggesting that the shipowner may be required to bear part of the attorney's fees if the recovery against the third party is less than the sum of the lien and the employee's expenses of the suit, including attorney's fees.[88] The first two appellate courts to consider the issue were divided on whether the maritime employer could be required to bear part of the attorney's fees when the recovery was not sufficent to pay both the lien and the expenses of the suit.[89]

In this setting, the Fifth Circuit entertained *Ochoa v. Employers National Insurance Co.*[90] in which the employer obtained a judgment in the amount of $62,000, the subrogation lien totaled $42,000, and the expenses of the suit, including attorney's fees, amounted to about $31,000. The court first distinguished *Bloomer* as a case in which the judgment was sufficient to pay the subrogation lien and the expenses of the suit and also provide the employee with a meaningful net recovery. In *Ochoa*, however, the employer and the employee's attorney could not recover all of their claims, and the employee would receive nothing from this third party action. The court determined that the funds should be distributed in this manner: (1) out of pocket expenses, (2) the fee of the employee's attorney if the court finds it reasonable, (3) the subrogation lien, and (4) the employee's net recovery.[91] The court also observed that if allocation in that manner did not provide the employee with a significant net recovery, the trial court could make an equitable adjustment of the attorney's fee so that the employee will "share in the recovery." The *Ochoa* approach would appear to encourage more third party actions by employees. It also may encourage the employer to explore his independent claim against the third party tortfeasor. *Ochoa*'s future seems bright in the light of a 1984 amendment to the LHWCA,[92] for the Supreme Court, after earlier granting *certiorari*,

88. Id. at 86-87 n.13, 100 S. Ct. at 932 n.13.

89. Compare Incorvaia v. Hellenic Lines, Ltd., 668 F.2d 650 (2d Cir.), cert. denied, 103 S. Ct. 293 (1982) with Johnson v. Sioux City & New Orleans Barge Lines, Inc., 629 F.2d 1244 (7th Cir.), cert. denied, 449 U.S. 987 (1980).

90. 724 F.2d 1171 (5th Cir.), cert. granted, 105 S. Ct. 321, vacated and remanded, 105 S. Ct. 583 (1984).

91. Id. at 1177.

92. In 1984, § 33(f) of the LHWCA was amended to provide in relevant part that if the employee brings an action against a third person, the employer shall be required

vacated and remanded the case for consideration in light of the LHWCA Amendments of 1984.[93]

DEATH ACTION

When a victim dies as a result of a maritime tort, his personal representative may bring an action for wrongful death, either under special statutes[94] or under the general maritime law.[95] The personal representative also may recover survival damages through the Jones Act, if the victim was a seaman and the claim is based upon an employer's negligence.[96] In all other cases, including those in which the claim is based upon unseaworthiness, the right to recover survival damages is not as certain. The Death on the High Seas Act does not provide for survival benefits, and a provision of the Act arguably precludes recovery of survival benefits under the general maritime law.[97] The Supreme Court has not yet recognized that a cause of action for survival benefits exists under the general maritime law; *Moragne* and its progeny in the Court involved wrongful death benefits. Thus, in cases other than those under the Jones Act, the recovery of survival benefits depends upon the answers to two questions: (1) does the maritime common law encompass a survival action, and (2) if so, does it apply beyond three miles, or does DOHSA preclude recovery of survival damages for deaths occurring outside territorial waters?[98] Sparse jurisprudence thus far has answered the first question in the affirmative;[99] in *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*,[100] a federal district court answered the second question in the affirmative. The court's conclusion required that it reject

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to pay as LHWCA compensation benefits a sum equal to the excess of such benefits over the "net amount" recovered from the third person tortfeasor, and defines the "net amount" as the actual amount recovered less "the expenses reasonably incurred . . . (including reasonable attorney's fees)." LHWCA Amendments, 1984 Code Cong. & Ad. News (98 Stat.) at 1652 (to be codified at 33 U.S.C. § 933(f)).

93. 724 F.2d 1171 (5th Cir.), cert. granted, 105 S. Ct. 321, vacated and remanded, 105 S. Ct. 583 (1984).

94. The Jones Act provides wrongful death benefits for beneficiaries of seamen killed by employer negligence. 46 U.S.C. § 688; 45 U.S.C. § 51 (1983). The Death on the High Seas Act, 46 U.S.C. § 761 (1983), provides wrongful death benefits for beneficiaries of persons who die as a result of an act occurring on the high seas.

95. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772 (1970).

96. 45 U.S.C. § 59 (1983).

97. See 46 U.S.C. § 765 (1983); see also Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620, 625, 98 S. Ct. 2010, 2012, 2015 (1978) (implying that § 765 represents Congress' "considered judgment" on the survival action issue).

98. See supra text accompanying note 92.

99. See, e.g., Law v. Sea Drilling Corp., 523 F.2d 793, 795 (5th Cir. 1975).

100. 573 F. Supp. 1277 (W.D. Pa. 1983), aff'd, 738 F.2d 423, 426 (3d Cir.), cert. denied, 105 S. Ct. 188 (1984).

the argument that section 765 of the DOHSA represents "Congress' considered judgment" that there should be no recovery of survival benefits in death claims beyond territorial waters.[101] Thus, the general maritime law survival remedy (recognized by the lower courts) should apply on such waters.

The court's decision appears sound. Section 765 is not a survival statute, but a combination "nonabatement" and "conversion" statute.[102] It merely provides that if the victim files suit and then dies as a result of the injury, his suit for personal injury damages is converted into a claim by his beneficiaries for wrongful death benefits under DOHSA. Maritime law should not create additional anomalies unless the result is clearly dictated by statute. The personal representative of the victim of a maritime tort should be able to recover survival damages, either under the Jones Act (where the victim is a seaman, the defendant is his employer, and the wrongful conduct is negligence) or under the general maritime law (in all other cases).

LIMITATION OF LIABILITY

Perhaps the most indefensible rule in maritime law is that the owner of a pleasure boat may claim the benefits of limitation of liability.[103] Limitation, designed to coax investors into maritime shipping, serves no useful purpose when the investment is in a personal pleasure vessel. In most pleasure boating accidents, the boat operator's liability insurer, who has accepted a premium for underwriting the risk, will provoke limitation for its insured, and thus limit its own liability to little or nothing.

Although the rule is indefensible, it has been impregnable. However, a district judge recently refused to apply limitation to a pleasure boat, observing that "[t]he history and purpose of the limitation statute make it obvious that it was never meant to apply to pleasure boats, and allowing these small craft to creep under this Act's coverage perverts justice."[104] This view is logical and courageous, but is against the overwhelming weight of authority.[105] Nevertheless, the decision may provide the higher courts with a tool by which the rule may be reevaluated.

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101. Id. at 1284-86.

102. See *Mobil Oil*, 436 U.S. 618, 98 S. Ct. 2010 (1978).

103. See 46 U.S.C. § 188 (1983) (limitation provisions applicable to all vessels); 3 Benedict on Admiralty § 1 at 1-3 n.6 (I. Hall ed. 1980); G. Gilmore & C. Black, supra note 49, § 10-23 at 880.

104. Baldassano v. Larsen, 580 F. Supp. 415, 418 (D. Minn. 1984).

105. A comparison of those authorities cited by the *Baldassano* court indicates as much. See id.

OBSTRUCTION OF NAVIGABLE WATERS

Federal statutes impose upon the owner of a vessel sunk in navigable waters the duty to immediately mark the wreck and to remove it.[106] If the owner was not guilty of any negligence in the sinking, he may abandon the wreck to the United States.[107] Where such abandonment is accomplished, the United States (through the Corps of Engineers) has the duty to remove the wreck,[108] but it may recoup the removal costs from the third party whose tort caused the sinking.[109]

The shipowner whose vessel is sunk in navigable waters faces considerable uncertainties. His right to abandon is premised upon his freedom from fault, but fault is not determined by a litmus paper test, and the United States habitually refuses to admit the shipowner's freedom from fault by accepting the abandonment. A shipowner thus is frequently faced with the unhappy choice of either removing a wreck he is not required by law to remove (and forfeiting his insurance coverage for the cost of such removal[110]), or subsequently paying the United States the costs it incurs in removing the wreck. In *Agri-Trans Corp. v. Gladders Barge Line, Inc.*[111] the shipowner sought to evade the dilemna by seeking a judgment declaring that it was not at fault and was not responsible for removal of the wreck. The Fifth Circuit denied the relief sought. The court first concluded that the Corps of Engineers may not require removal of a wreck which does not pose an obstacle to navigation or navigable capacity.[112] However, the court ruled that the determination of whether a sunken vessel obstructs navigation first must be made by the Corps, as an administrative decision. Until that decision is made, a court may not entertain a suit by the shipowner seeking a declaration that he is not liable to remove the vessel or compensate the United States for the expenses of removal.[113]

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106. The Wreck Act, 33 U.S.C. § 409 (1983), provides:[W]henever a vessel . . . is wrecked and sunk in a navigable channel. . . it shall be the duty of the owner of such sunken craft to immediately mark it and to maintain such marks until the sunken craft is removed or abandoned . . . and . . . to commence the immediate removal of the same . . . .

107. St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., 666 F.2d 932, 940-41 (5th Cir. 1982); Tennessee Valley Sand & Gravel Co. v. M/V Delta, 598 F.2d 930, 934 (5th Cir. 1979).

108. 33 U.S.C. § 414 (1983).

109. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204-05, 88 S. Ct. 379, 387-88 (1967).

110. See, e.g., Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983).

111. 721 F.2d 1005 (5th Cir. 1983).

112. Id. at 1009-10.

113. Id. at 1010-11.

The maritime common law developed the unusual rule that the failure of a shipowner (or the United States, where the duty devolved upon it) to mark a sunken vessel relieved the tortfeasor whose negligence caused the sinking from liability to third persons subsequently damaged by the unmarked wreck.[114] In the dialect of tort law, the failure to mark the wreck becomes the superseding cause which breaks the chain of causation between the tortfeasor who caused the sinking and the third party victim who collides with the sunken vessel. That rule may have encouraged compliance with the Wreck Act,[115] but it also permitted a tortfeasor to escape liability for some of the foreseeable consequences of his wrongful act. In *Nunley v. M/V Dauntless Colocotronis*,[116] the Fifth Circuit refused to follow the rule, and held that the subsequent failure of the owner (or of the United States) to mark or remove the vessel does not, as a matter of law, relieve the tortfeasor whose negligence caused the sinking from liability to third persons damaged by collision with the unmarked wreck. The failure to mark or remove may in some circumstances be a superseding cause, but in other cases the tortfeasor who causes the sinking will bear all or part of the loss sustained by third persons. The court did not offer concrete guidelines as to when the third party tortfeasor will be liable. It would appear, however, that if there is no negligent failure to mark the wreck, the tortfeasor who caused the sinking should bear the whole loss sustained by third persons; the damage is foreseeable and there simply is no intervening negligence which could break the chain of causation. If there is a negligent failure to mark the wreck, the vessel owner and the sinking tortfeasor ordinarily should share the loss. However, as Prosser has remarked, in such cases "there must be a terminus somewhere, short of eternity,"[117] of the initial tortfeasor's liability. The relative abilities of the parties to remove the wreck, the severity of the danger posed by the wreck, and the length of time between the sinking and the third party damage all may be relevant factors to consider in reaching a difficult and elusive decision.

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

115. See 128 F. Supp. at 23.

116. 727 F.2d 455 (5th Cir. 1984) (*en banc*).

117. W. Prosser, Handbook of the Law of Torts § 44, at 289 (4th ed. 1971).