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PUBLIC LAW

ADMIRALTY

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JURISDICTION OVER MARITIME TORTS

Under early American maritime law, a tort did not fall within the admiralty jurisdiction unless it had "locality," *i.e.*, it must have occurred on navigable waters.¹ Under the rule, a tort occurred where the negligence of the defendant took effect upon the person or property of the plaintiff.² One recurring fact situation in which the rule did not work properly was when a vessel collided with a pier; since the pier was an "extension of land," the vessel's tort claim was "in admiralty," but the wharfinger's claim was not.³ To remedy this, Congress in 1948 passed the Admiralty Extension Act, which provides that "the admiralty and maritime jurisdiction . . . shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."⁴ Since the passage of the Act, maritime tort law has evolved to a point at which "locality alone" is not enough to bring a tort into admiralty; the delict now must have both "locality" and "maritime flavor," *i.e.*, it must "bear a significant relationship to traditional maritime activity."⁵ The broad language of the Admiralty Extension Act, and the subsequent development of the "locality plus flavor" test, has raised another problem: if the damage is caused by a vessel on navigable waters, does it fall within admiralty, under the language of the Act, even though it does not have the "maritime flavor" otherwise required for maritime torts? The point is a narrow but important one, because pleasure boats are vessels, and many torts involving pleasure boats arguably do not have maritime flavor.⁶ The Supreme Court has not spoken to the issue, and the lower courts are substan-

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1. *E.g.*, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865).

2. *Id.* See also *T. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

3. *E.g.*, *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908).

4. 46 U.S.C. § 740 (1976).

5. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).

6. See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 1-10, at 30-31 (2d ed. 1975); 2 BENEDICT ON ADMIRALTY § 2, at 1-16 n.26 (7th ed. 1975 & Supp. 1980).

tially divided.⁷ The Fifth Circuit has joined those courts holding that a tort caused by a vessel on navigable waters is not brought within admiralty jurisdiction through the Admiralty Extension Act unless it has the requisite "maritime flavor." Reaching this conclusion in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*,⁸ Senior Judge John Brown, one of admiralty's most articulate spokesmen, observed that the Admiralty Extension Act "was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality—a *la Executive Jet*—imposed on general maritime tort claimants."⁹

Proponents of the position that pleasure boating accidents have "maritime flavor" received support from a number of sources during the recent year. Of most significance to Louisiana lawyers were the Fifth Circuit's decision in *Richardson v. Foremost Insurance Co.*,¹⁰ and the decision of the Louisiana Supreme Court in *McCraine v. Hondo Boats, Inc.*¹¹ In *Richardson*, the court, without elaboration, held that a collision between two pleasure boats has maritime flavor. The more difficult question of whether maritime flavor exists when the accident involves a single passenger vessel was presented in *McCraine*. A passenger in a pleasure boat, injured when it accelerated and struck the wake of another vessel, brought a products liability suit against the manufacturer of the boat. The Louisiana Supreme Court found that the accident was within the maritime jurisdiction, thereby allowing the plaintiff to avoid the ban of the state's one year statute of limitations. There are recent decisions to the contrary, however.¹²

Even if a pleasure boating accident has "maritime flavor," it may not fall within admiralty if the water on which it occurs is "non-navigable." The test for the navigability of waters is ancient and venerable, but its application is sometimes difficult. Waters are "navigable" for the purpose of maritime jurisdiction if they are navigable in fact, and they are navigable in fact

7. For cases holding there is no jurisdiction, see *Jorsch v. LeBeau*, 449 F. Supp. 485 (N.D. Ill. 1978); *Roberts v. Grammer*, 432 F. Supp. 16 (E.D. Tenn. 1977); *Complaint of Cook Transp. Sys., Inc.*, 431 F. Supp. 437 (W.D. Tenn. 1976). *But see Saint Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974): "All that is required for the Act to come into involvement is injury caused by a vessel on navigable waters." *Cf. Gebhard v. Steamship Hawaiian Legislator*, 425 F.2d 1303, 1307 (9th Cir. 1970).

8. 644 F.2d 1132 (5th Cir. 1981).

9. *Id.* at 1136.

10. 641 F.2d 314 (5th Cir. 1981).

11. 399 So. 2d 163 (La. 1981).

12. See *Hall v. Robinson*, 495 F. Supp. 123 (E.D. Tenn. 1980).

[if] they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.¹³

An essential element of the test is commercial use. Some courts have required present commercial use, or capability of such use, while others have concluded that waters once navigable remain as such, even though they no longer are capable of use for commercial purposes.¹⁴ The Fifth Circuit apparently adopted the former, and now majority view, in *Richardson v. Foremost Insurance Co.*¹⁵ The *Richardson* court observed that "[j]urisdiction should be as readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction."¹⁶

SEAMEN'S REMEDIES

To qualify as a seaman, a worker must either be "permanently assigned" to a vessel, or must perform a significant amount of his work aboard a vessel.¹⁷ The tests are alternatives; a worker who is "permanently assigned" to a non-vessel may qualify as a seaman if he performs a significant part of his work on a vessel.¹⁸ One worker who has been most difficult to classify is one who, when injured, was doing most or all of his work aboard a vessel, but whose work by its nature would have been completed in a short period of time. Such a case reached the Fifth Circuit in its last term. In *Roberts v. Williams-McWilliams Co., Inc.*,¹⁹ the plaintiff was hired by a labor

13. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

14. See generally G. GILMORE & C. BLACK, *supra* note 6, at § 1-11; 1 BENEDICT, *supra* note 6, at § 143.

15. 641 F.2d 314 (5th Cir. 1981).

16. *Id.* at 316. For a case holding that Lake Bistineau in north Louisiana is non-navigable, see *Smith v. Hustler, Inc.*, 514 F. Supp. 1265 (W.D. La. 1981). The court there applied the same test as embraced by the Fifth Circuit in *Richardson*.

17. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

18. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980); *Davis v. Hill Eng'r Inc.*, 549 F.2d 314 (5th Cir. 1977); *Keener v. Transworld Drilling Co.*, 468 F.2d 729 (5th Cir. 1972).

19. 648 F.2d 255 (5th Cir. 1981).

service company that supplied welders to drilling companies; some of the drilling companies did offshore work. On the day after he was hired, plaintiff was sent to a drilling barge and sustained injury shortly thereafter (apparently the next day). The Fifth Circuit, reversing the trial court, found that the plaintiff was entitled to seaman's status as a matter of law. The basis of the decision is not clear. The court observed, in successive sentences of its opinion, that plaintiff would have qualified as a seaman either if (1) his assignment aboard the drilling barge was for an indefinite time, or (2) his assignment was to encompass the length of the barge's mission.²⁰ If his assignment was for an indefinite period, he clearly was not permanently assigned elsewhere; the only place which could be his permanent place of assignment was the barge. Similarly, one would not doubt that a "bluewater" seaman who signs on for a voyage of several days would qualify as a seaman. The analogy is obvious; if the work of a "brownwater" seaman encompasses the entire period of the mission of the vessel, he should qualify as a seaman, no matter how brief the mission.

Punitive damages are not unknown to maritime law. Since the Supreme Court's decision in *Vaughan v. Atkinson*,²¹ punitive damages have been available for willful failure to provide maintenance and cure, although some courts have limited such damages to attorney's fees. The Second Circuit has authorized the award of punitive damages for "gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct";²² the Sixth Circuit has sanctioned such damages for unseaworthiness, i.e., "the acts . . . of an unfit master . . . [whose] owner was reckless in employing him."²³ In *In re Merry Shipping*,²⁴ the Fifth Circuit has ruled that punitive damages may be awarded under the general maritime law upon a showing of "willful and wanton misconduct" by a shipowner in creating or maintaining an unseaworthy condition. Counsel for the shipowner argued that punitive damages were not recoverable under the Jones Act, and hence could not be awarded for unseaworthiness where that claim was joined with a Jones Act claim. The court, sidestepping the issue of whether punitive damages would be available under the Jones Act, ruled that even if such damages were not recoverable under the Act, they

20. *Id.* at 262.

21. 369 U.S. 527 (1962).

22. *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir.), cert. denied, 409 U.S. 982 (1972).

23. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

24. 650 F.2d 622 (5th Cir. Unit B 1981).

nevertheless could be awarded in an unseaworthiness claim joined with a Jones Act claim.

MARITIME WORKERS: LSHWCA

A maritime employer owes Longshoremen's and Harbor Workers' Compensation Act benefits only to those of his employees who are within the coverage of the Act. Essential to the application of the Act are both an employment relationship between the claimant and the person from whom benefits are sought, and a work-related injury which meets the jurisdictional requirements of the Act. Prior to 1972, "jurisdiction" hinged in part on whether the employer was a covered employer; a claim fell within the Act if the claimant was injured on navigable waters and either he, or some other employee of his employer, was engaged in maritime employment.²⁵ Under the 1972 amendments, the claimant must himself be engaged in maritime employment.²⁶ If he is so engaged, is there any additional requirement which his employer must meet as a prerequisite to jurisdiction under the Act? Apparently not, if one reads literally the definition of an "employer" provided in section 902(4), i.e., one "any of whose employees are employed in maritime employment . . ." within a covered "situs." The United States Fifth Circuit now rules that there is no longer a separate jurisdictional requirement that the employer be a "maritime employer." In *Hullingshorst Industries, Inc. v. Carroll*,²⁷ the court observed that the "employer" status requirement in the pre-1972 Act has been rendered "largely tautological" by the amendments. The amendments provide that once a determination is made that the claimant is a maritime employee under 33 U.S.C. § 902(3), it "necessarily follows that . . . his employer . . . is a statutory 'employer' within the meaning of the Act."²⁸

33 U.S.C. § 903 makes compensation payable under the LSHWCA only if the injury occurs

upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).²⁹

The "other adjoining area" need not abut navigable waters; it is sufficient if it adjoins a pier, wharf, or similar structure which in turn

25. 33 U.S.C. § 902(4) (1970) (amended 1972).

26. 33 U.S.C. § 902(3) (1976).

27. 650 F.2d 750 (5th Cir. Unit A 1981).

28. *Id.* at 758, 759.

29. 33 U.S.C. § 903(a) (1976).

adjoins navigable waters.³⁰ But, must the area be contiguous to the "adjoining pier, wharf" or similar structure? Some early cases have required contiguity between the two areas. The better view, however, espoused by the Ninth,³¹ Fourth,³² and Third³³ Circuits is that it suffices if the "other adjoining area," although it does not abut an "area adjoining navigable waters," is located as close to the water's edge as is practicable under all of the prevailing conditions. The Fifth Circuit, sitting en banc, has rejected the contiguity requirement.³⁴ Writing for the majority in a substantially divided court (eight dissented among the twenty-three judges participating), Judge Fay observed that "[t]he character of surrounding properties is but one factor to be considered All circumstances must be examined The site must have some nexus with the waterfront, [but] . . . [s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the [LSHWCA]."³⁵ The majority also noted that the statute does not require that the "adjoining area" be used exclusively for maritime work by the claimant's employer, so long as the area is customarily used for significant maritime activity by any statutory employer. The key in these cases, of course, is whether a maritime employer has fair notice that he may be liable to any employee for LSHWCA benefits, so that he may obtain proper insurance coverage and make an informed decision on whether to participate in the activity which may give rise to the application of the Act. If any of his employees work on navigable waters or on an adjoining pier, this "fair notice" requirement ordinarily will be satisfied. As the work area is located farther away from the water's edge, the employer's constructive knowledge may be lessened, depending in part upon the type of work in which his employees are there engaged, and the type of work being carried on by others in the same area. In such a "fair notice" test, contiguity is a factor to be considered, but it obviously should not be conclusive, unless the courts opt for a test which is certain over one which is less certain, but more logical, in the light of the Congressional aim.

Does the acceptance of benefits under a state workers' compensation system bar subsequent recovery of benefits under the Long-

30. *E.g.*, *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

31. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978).

32. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir. 1978).

33. *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976).

34. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980).

35. *Id.* at 513, 514.

shoremens' and Harbor Workers' Compensation Act? Most state worker's compensation laws provide that acceptance of benefits under the Act shall constitute the employee's exclusive remedy against the employer;³⁶ thus one might argue that a subsequent award of benefits under another act, such as the LSHWCA, from the same employer for the same work-related injury may deny the state statute the "full faith and credit" to which it is entitled under the Constitution. The issue has not been an easy one, and has provoked three inconclusive and seemingly conflicting decisions from the Supreme Court.³⁷ In the latest case of significance, the Fifth Circuit, interpreting the Supreme Court decisions, adopts the test in *Industrial Commission of Wisconsin v. McCartin* that "absent unmistakable language" in the state worker's compensation act or the cases construing it, making recovery under the state act a final adjudication of all claims which possibly could arise from the injury, one may recover under the LSHWCA without denying full faith and credit to the state statute.³⁸ Having reached this conclusion, the Fifth Circuit then struck terror in the hearts of defense counsel with this additional observation: where subsequent recovery under the LSHWCA is permitted, the employer or his insurer is entitled to a credit for the prior payments under the state act, but only to the extent that the claimant actually received the funds. Furthermore, that portion of the award under the state act which was allocated to attorney's fees should not be deducted from the claimant's recovery under the federal compensation plan.³⁹

MARITIME WORKERS: THIRD PARTY CLAIMS

In *Seas Shipping Co., Inc. v. Sieracki*,⁴⁰ the United States Supreme Court held that a non-seaman aboard a vessel doing the work of a member of the crew was entitled to the warranty of seaworthiness from the vessel and its operator. The greatest beneficiaries of the *Sieracki* doctrine were the longshoremen, the ship repairer, and other harbor workers whose claims against their employers for work-related injuries fell within the coverage of the LSHWCA. Such workers were entitled to recover LSHWCA benefits from their employers, but also could maintain an action for tort

36. See generally 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 65.00 & 65.10 (1976 & Supp. 1981).

37. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Industrial Comm'n of Wis. v. McCartin*, 330 U.S. 622 (1947); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

38. *Landry v. Carlson Mooring Serv.*, 643 F.2d 1080, 1085 (5th Cir. 1981).

39. *Id.* at 1088.

40. 328 U.S. 85 (1946).

damages against the vessel on which they were injured, if the injury was caused by a condition of the vessel. From 1946 to 1972, suits by "Sieracki seamen" against vessels provided much grist for the maritime judicial mill. In the latter year, Congress, in enacting comprehensive amendments to the LSHWCA, provided that "[i]n the event of injury to a person covered under this chapter . . . [t]he liability of the vessel . . . shall not be based upon the warranty of seaworthiness or a breach thereof . . ."⁴¹ This language has been viewed by some as a Congressional death sentence for the *Sieracki* seaman.⁴² If this was Congress' intent, its language leaves much to be desired; that language only abolishes the warranty of seaworthiness for those workers covered by the LSHWCA, but there are significant groups of workers who fall within the *Sieracki* definition but not within the coverage of the LSHWCA. Some examples are federal and state employees, workers covered by state worker's compensation, and workers whose injuries occur beyond American territorial waters and the Outer Continental Shelf.⁴³ Do these workers retain their claims for unseaworthiness after the 1972 amendments? The verdict is not yet in. A majority of the lower courts which have faced the issue have held that Congress intended total abolition of the *Sieracki* seaman; these courts find support in dicta in a recent Supreme Court decision.⁴⁴ An impressive minority, however, have concluded that section 905 means exactly what it says, and no more.⁴⁵

Since the 1972 amendments, a worker covered by the LSHWCA

41. 33 U.S.C. § 905(b) (1976).

42. *E.g.*, G. GILMORE & C. BLACK, *supra* note 6, at § 6-57, at 449.

43. 33 U.S.C. § 903(a)(1), (2) (1976).

44. *See Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1381 (9th Cir. 1981) ("no longshoreman, whether publicly or privately employed, can bring an unseaworthiness action"); *Grice v. A/S J. Ludwig Mowinckels*, 477 F. Supp. 365 (S.D. Ala. 1979) (longshoreman injured in Saudi Arabia had no unseaworthiness action); *Quinn v. Central Gulf S.S. Corp.*, [1977] Am. Mar. Cases 204 (D. Md.) (no unseaworthiness action for a federal employee). *See also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979), where the Court observed that "Congress acted in 1972 . . . to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words, to overrule *Sieracki* and *Ryan*."

45. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1118 (5th Cir. Unit A 1981) (opinion by Rubin, J.) ("Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LSHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by the *Sieracki-Ryan* doctrine.") (dicta to the holding that a maritime worker covered by FECA has an unseaworthiness action). *See also Pinto v. Vessel "Santa Isabel"*, 492 F. Supp. 689 (D. C.Z. 1980); *Guevara v. Cia Sud Americana de Vapores*, [1977] 2 Am. Mar. Cases 2000 (D. C.Z. 1978).

may maintain a negligence action against the vessel on which he is injured. In substituting this negligence action for the prior *Sieracki* warranty of seaworthiness, Congress did not prescribe the standard of care which is owed by the vessel to the maritime worker; instead, it left to the courts the task of formulating the applicable rules. The legislative history of section 905(b) does reflect Congress' intent that the courts should impose upon the vessel owner a duty similar to that owed by a landowner under prevailing state law.⁴⁶ The difficulty with Congress' approach is that no consensus exists among the state jurisdictions as to the duty which a landowner owes to the employees of an independent contractor who enter the land to do work pursuant to a contract between the landowner and the independent contractor. The lower courts, in applying section 905(b), have espoused different rules, some drawn from the Restatement (Second) of Torts.⁴⁷ After eight years of confusion among the lower courts, the Supreme Court finally has furnished the needed guidance. In *Scindia Steam Navigation Co., Ltd. v. De Los Santos*,⁴⁸ the Court announced that the duty which is owed by the vessel owner to the maritime worker is reasonable care under the circumstances. The Court in *Scindia* also elaborated upon what reasonable care will require under the circumstances normally facing a vessel owner who engages an independent contractor to perform work aboard his vessel. As to conditions existing before the maritime worker and his employer begin their activities aboard the vessel, the vessel owner owes the duty of exercising ordinary care to have the ship and its equipment in such condition that an expert and experienced maritime employer exercising reasonable care will be able to carry on its operations with reasonable safety to persons and property, and to warn the maritime employer of any hazards:

- (1) about which the vessel owner knows or should know,

46. H.R. REP. NO. 1441, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4702.

47. See, e.g., *Sarauw v. Oceanic Navigation Corp.*, 622 F.2d 1168 (3d Cir. 1980) (reasonable care under the circumstances); *Johnson v. A/A Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980) (same); *Bachtel v. Mammoth Bulk Couriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979) (same); *Lawson v. United States*, 605 F.2d 448 (9th Cir. 1979) (same). See also *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977) (applying RESTATEMENT (SECOND) OF TORTS §§ 343, 343(A) (1965)); *Evans v. Transporation Maritime Mexicana S.S. Campecke*, 639 F.2d 848 (2d Cir. 1981) (same). See also *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F.2d 757 (4th Cir. 1976) (applying RESTATEMENT (SECOND) OF TORTS § 343 (1965)). But see *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977) (rejecting applications of RESTATEMENT (SECOND) OF TORTS § 318 (1965)); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977) (rejecting application of RESTATEMENT (SECOND) OF TORTS § 318 (1965), and applying § 409).

48. 101 S. Ct. 1614 (1981).

- (2) which are likely to be encountered by the maritime employer in the course of the latter's operations, and
- (3) which are not known to the maritime employer and would not be obvious to a competent maritime employer.

After the maritime employer commences operations, the vessel owner's duty to exercise reasonable care may be less onerous. He must continue to exercise such care to avoid injury through dangerous conditions on those parts of the vessel over which he maintains active control. Similarly, if he remains actively involved in the maritime employer's operations, he must continue to exercise reasonable care to prevent harm to the maritime workers. If he is not actively involved, however, he owes no duty to supervise the activities of the maritime employer, unless such a duty is otherwise imposed upon him by contract, custom or some provision of positive law. But what if the vessel owner actually discovers that a dangerous condition has arisen in the area within the maritime employer's control after such employer has commenced his operations, or he discovers that the maritime employer has failed to take precautions against injury to his employees from an obviously dangerous condition existing prior to the commencement of the employer's activities? The mere fact that the working conditions are dangerous is not enough to require action on the part of the vessel owner; maritime employment is by nature dangerous. The issue is whether the conditions pose an unreasonable risk of danger to a person engaged in a hazardous occupation, and the maritime employer ordinarily has expertise about reasonably safe ways to do the hazardous work. The majority of the Court would permit the vessel owner to rely upon that expertise and upon the maritime employer's obligation to provide his employees with safe working conditions, and would place upon the vessel owner the duty to interfere only where the maritime employer's decision to continue working under dangerous conditions is "obviously improvident."⁴⁹ Three concurring justices would give the maritime employer less leeway, and would require that the vessel owner intervene and correct the condition, or cause it to be corrected, when he has actual knowledge that the condition is unsafe and a reasonable belief that the maritime employer will not remedy it.⁵⁰

33 U.S.C. § 933(b) provides that acceptance of LSHWCA benefits under an award operates as an assignment by the maritime worker to his employer of the worker's right to recover damages against third persons, unless the worker commences an action against the

49. *Id.* at 1626.

50. *Id.* at 1628 (Brennan, Marshall, and Blackmun, JJ., concurring).

third person within six months after the award of benefits. If the assignment occurs and the employer successfully prosecutes the claim, he is entitled to his subrogation rights for benefits he has paid the worker, together with an additional one-fifth of the worker's recovery as a "bonus." In some instances, the worker will fail to bring the action within the six month period, and the employer thereafter will elect not to seek recovery from the third person. One situation in which the employer may forego the third party action is when the third person is a vessel owner or other maritime enterprise with which the employer does business on a continuing basis. Another is when the employer's LSHWCA insurer is the liability insurer of the third party tortfeasor. In such cases, does the right to sue revert to the the maritime worker? No, says the Supreme Court; the assignment of the cause of action to the employer under section 933(b) is total, the Act does not require the employer to sue the third party, and the claim is not impliedly reassigned to the maritime worker if the employer fails to sue.⁵¹ While the Court rejected the argument that a potential conflict of interest between the employer and the employee might defeat the assignment, it acknowledged that there could be such a conflict which might dictate a different result. It "leaves for another day the question whether an assignment under [section] 33(b) will bar a . . . [maritime worker's] third-party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended [section] 33."⁵²

DAMAGES

The amount of wages which a worker would have earned in the remainder of his life is relevant in an action in which he seeks damages for permanent disability, or in which his beneficiaries seek recovery for the loss of support he would have provided if he had not been fatally injured. Although the income which he would have earned would have been subject to income taxation, the award received by the worker or his beneficiaries in lieu of such income is not taxable. Jurisdictions have differed over whether the jury should be told that the award which they make for loss of future earnings will not be subject to federal income taxation. Also, a difference of opinion existed as to whether the trier of fact may consider, in determining the amount of lost wages sustained by the worker, that the wages which the worker would have earned if he had not been injured would have been in fact subject to income tax-

51. *Rodriguez v. Compass Shipping Co., Ltd.*, 101 S. Ct. 1945 (1981).

52. *Id.* at 1958.

ation. The uncertainty has been removed from maritime law by the Supreme Court's recent decision in *Norfolk & Western Railway Co. v. Liepelt*⁵³ in which the Court ruled that as a matter of federal common law, a jury is to be told that the award for loss of earning capacity or future earnings is not subject to federal income taxation. Furthermore, in determining the actual earnings or support which has been lost, the jury may consider the fact that the worker would have paid taxes on the income he would have earned. That decision apparently has set the pattern for maritime and state law, but it may not prevail everywhere the federal sovereign has jurisdiction. With respect to the Outer Continental Shelf, Congress in 1953 adopted state law as surrogate federal law when no applicable federal law existed.⁵⁴ At that time, arguably no federal common law existed which required the consideration of income tax by the trier of fact in determining loss of earnings. The intriguing question thus presented is whether the Supreme Court can establish a federal common law rule which will supplant state law previously adopted by Congress as the applicable federal law. The Supreme Court alluded to, but did not answer that question, in *Gulf Offshore Co. v. Mobil Oil Corp.*⁵⁵ The Court remanded the case to the Texas state court for a determination of whether that state's law did in fact conflict with the federal common law rule set forth in *Liepelt*.

Another issue of significance in determining loss of earnings or support is whether the trier of fact may consider inflation in computing the total amount of the loss. Louisiana permits such evidence,⁵⁶ but the United States Fifth Circuit Court of Appeals has rejected consideration of inflation for such purposes.⁵⁷ The latter court's position was undercut by this dicta in *Liepelt*:

[F]ederal courts . . . have regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations [citing the Fifth Circuit opinion in *Johnson v. Penrod Drilling Co.*, note 55, *supra*]

Admittedly there are many variables that may affect the amount of a wage earner's future income tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income

53. 444 U.S. 490 (1980).

54. 43 U.S.C. § 1333(a)(2) (1976).

55. 101 S. Ct. 2870, 2880 (1981).

56. See, e.g., *Robinson v. Graves*, 332 So. 2d 303 (La. App. 4th Cir. 1976); *Morgan v. Liberty Mut. Ins. Co.*, 323 So. 2d 855 (La. App. 4th Cir. 1975), *appeal dismissed*, 325 So. 2d 282 (La. 1976); *Edwards v. Sims*, 294 So. 2d 611 (La. App. 4th Cir. 1974).

57. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), *cert. denied*, 423 U.S. 839 (1975).

or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and *future inflation* are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.⁵⁸

After *Liepelt*, panels of the Fifth Circuit initially refused to permit consideration of inflation, maintaining that since the court had reached its position in *Penrod* en banc, that position should not be reversed except by a clear holding of the Supreme Court or an en banc decision by the Fifth Circuit.⁵⁹ En banc rehearings are proceeding at this writing. If inflation evidence becomes generally admissible, as seems certain, *Liepelt* may have produced little gain for the defendant, since increases in projected lifetime earnings due to inflation may offset the decrease resulting from consideration of the income tax impact upon those earnings.

In *American Export Lines, Inc. v. Alvez*,⁶⁰ the United States Supreme Court ruled that the spouse of an injured longshoreman could recover damages for loss of consortium under the general maritime tort law. Recovery for such damages under the Jones Act has been denied, ostensibly on the theory that the Jones Act, except in death actions, gives a right of action to seamen only.⁶¹ In *Cruz v. Hendy International Co.*,⁶² the Fifth Circuit ruled that the wife of a seaman injured through unseaworthiness may recover for her loss of society, even though such damages may not be recoverable under the Jones Act. The court also held that the wife is not required to join her claim for loss of consortium with her husband's personal injury action against the vessel and its owner. The Fifth Circuit's opinion restricts the spouse's damages within narrow limits. Her recovery may not include the value of the home nursing services she renders to her spouse, even if she quits work to provide those services. Her damages are limited to "those . . . positive benefits that would have been rendered by the physically injured spouse,

58. 100 S. Ct. at 757, 758 (emphasis added).

59. *Byrd v. Reederei*, 638 F.2d 1300, 1308 (5th Cir. Unit B 1981). *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. Unit A 1981).

60. 446 U.S. 274 (1980).

61. *Christofferson v. Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976).

62. 638 F.2d 719 (5th Cir. 1981).

specifically delineated in *Gaudet* and there denominated loss of society," and do not encompass loss of consortium "as that term is understood at common law."⁶³ A federal district court has ruled that *Alvez* may not be applied retroactively; if the injury and the wife's suit arose prior to the Supreme Court decision, the wife has no cause of action.⁶⁴

WRONGFUL DEATH

Recent decisions of the United States Supreme Court have clarified the basis of recovery for wrongful death in maritime tort law. If the victim was a seaman killed through employer negligence, the Jones Act governs the recovery by the seaman's beneficiaries against the employer. In all other cases, the applicable law depends upon where the fatal injury occurred. If the injury causing death occurred within territorial waters, recovery is premised upon the maritime common law remedy established in *Moragne v. States Marine Lines, Inc.*,⁶⁵ but if the fatal injury takes place on the "high seas," the wrongful death action is governed by the provisions of the Death on the High Seas Act.⁶⁶

Another question is the case of a fatal injury inflicted within the territorial waters of another sovereign, a not uncommon occurrence in the light of offshore oil development in foreign nations by American-based companies. One logical argument is that these waters do not constitute the "high seas," the Death on the High Seas Act is inapplicable, and the applicable law is a choice between the law of the foreign sovereign and the maritime common law remedy prescribed by *Moragne*. The majority of the lower courts have not seen it that way, however, and have held that DOHSA applies within foreign territorial waters. The Fifth Circuit in 1981 joined the majority in its decision in *Sanchez v. Loffland Brothers Co.*⁶⁷

STATUTE OF LIMITATIONS

Congress has adopted a three year statute of limitations on suits "for recovery of damages for personal injury or death, or both, arising out of a maritime tort."⁶⁸ In the same Act, the legislative body repealed the two year statute of limitations for claims under the

63. *Id.* at 727.

64. *Engle v. A.C. Ellis Corp.*, 509 F. Supp. 630 (S.D. Tex. 1980).

65. 398 U.S. 375 (1970).

66. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

67. 626 F.2d 1228 (5th Cir. Unit A 1980). For a discussion of the issue, see Comment, *The Death on the High Seas Act: Two Remaining Problems*, 41 LA. L. REV. 1214 (1981).

68. Act of Oct. 6, 1980, Pub. L. No. 96-382, 94 Stat. 1525 (repealing 46 U.S.C. § 763 (1976)) (to be codified in 46 U.S.C. § 763(a)).

Death on the High Seas Act, thus making uniform the prescriptive period for all maritime wrongful death actions.⁶⁹

Despite the Act, laches will continue to play an important role in determining whether stale maritime claims are time-barred, since the concept remains applicable in property damage claims and in contract claims. One intriguing question is whether maintenance and cure and unseaworthiness are "claims arising out of a maritime tort," or whether they are incidents of the contract of employment with the shipowner, and thus beyond the reach of the new statute of limitations. The issue of the retroactive application of the new statute of limitations seems less difficult; retroactive application is unlikely, as the first court to reach the issue has held.⁷⁰

PLATFORM INJURIES

Hundreds of Louisiana workers are employed on stationary platforms on the Outer Continental Shelf, beyond the state's territorial waters. Since these workers usually do not qualify as seamen, their compensation claims are governed by the Longshoremen's and Harbor Workers' Compensation Act, pursuant to a special federal statute.⁷¹ Tort claims arising on fixed platforms rarely qualify as maritime, since admiralty law treats the platforms as land; thus a platform worker's tort claim against a third person usually is governed by state law.⁷² Judicial jurisdiction over these third party tort claims arising on fixed platforms on the Shelf is governed by 43 U.S.C. § 1349(b)(1), which provides in relevant part that "the district courts of the United States shall have jurisdiction of cases . . . arising out of, or in connection with (A) any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals of the subsoil and seabed of the Outer Continental Shelf. . . ."⁷³ This language does not expressly convey exclusive jurisdiction to the federal courts. In *Gulf Offshore Co. v. Mobil Oil Corp.*,⁷⁴ the Supreme Court refused to imply exclusive jurisdiction from the "language, structure, legislative history, or underlying policies"⁷⁵ of the Outer Continental Shelf Lands Act. The Court thus ruled that federal and state courts exercise concurrent jurisdiction over actions arising on the Shelf.

69. *Id.* § 2.

70. *Bush v. Sumitomo Bank & Trust Co., Ltd.*, 513 F. Supp. 1051 (E.D. Tex. 1981).

71. 43 U.S.C. § 1333(b) (Supp. II 1978).

72. 43 U.S.C. § 1333(a)(2)(A) (Supp. II 1978).

73. 43 U.S.C. § 1349(b)(1) (Supp. II 1978).

74. 101 S. Ct. at 2870.

75. *Id.* at 2878.