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CONTEMPORARY PROBLEMS IN MARITIME PRODUCTS LIABILITY

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The law of products liability, in its relatively brief existence, has undergone a number of transitions before emerging as the form of strict liability which prevails today. Originally arising from a contractual theory of implied warranty, the action for injuries sustained through a defective product has gradually been transformed into an essentially pure tort action.

In response to the evolution of products liability doctrine on land, maritime courts struggled to incorporate different forms of the doctrine into the body of maritime law. The creation of tort remedies distinct from those available under common law resulted in several substantive and jurisdictional problems in the course of shaping a maritime products liability remedy. This paper will briefly trace the history of maritime products liability, examine the present state of the doctrine, and discuss aspects of the law which are still in transition.

THE ORIGINS OF PRODUCTS LIABILITY

The notion that a manufacturer could be liable for injuries caused by his defective product to anyone other than the party to whom he sold the product was not recognized until 1916 in *MacPherson v. Buick Motor Co.*[1] Previously, courts had followed the rule that in order for a party to recover for injuries caused by a defective or negligently designed product, privity of contract was required.[2] The remedy created in *MacPherson* was an action based on the breach of the manufacturer's duty to make a product carefully—if the manufacturer's negligence made the product dangerous, the manufacturer was liable to subsequent users of the product.[3] By requiring proof of negligence to recover against a manufacturer, *MacPherson* combined the contractual theory of implied warranty with elements of tort law. This curious combination of contract and tort law was destined to create much of the subsequent confusion in products cases as courts were asked to consider which prescriptive

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1. 217 N.Y. 382, 111 N.E. 1050 (1916).
2. Winterbottom v. Wright, 10 M & W 109, 152 Eng. Rep. 402 (Ex. 1842).
3. 217 N.Y. at 389, 111 N.E. at 1053.

period to apply and whether an implied warranty under a contract theory extended as far as a duty under a negligence/tort theory.

Like the common law, maritime law had originally espoused a privity of contract rule in actions on defective products.[4] Similarly, maritime courts eventually followed *MacPherson* and recognized that implied warranties could extend beyond the immediate purchaser. The first step in this direction came with the acknowledgement of implied warranties in the maritime sale of goods. In *Linen Thread Co. v. Shaw*,[5] the agents of a fishing boat bought a seine from the plaintiffs, which turned out to be defective. The plaintiffs brought suit for the purchase price, while the vessel owner filed a claim alleging that the seine was defective. The federal court upheld the vessel owner's claim, recognizing an implied warranty of fitness under the common law and the law of Massachusetts.[6]

The first case which extended *MacPherson* to the maritime setting was *Sieracki v. Seas Shipping Co.*[7] Interestingly, this case primarily involved the extension of the warranty of seaworthiness to dockworkers, granting them the benefits of one of the oldest types of strict liability recognized in maritime law.[8] A longshoreman was injured when a newly installed boom used to load cargo broke and fell on him. The court found that, in addition to being owed a warranty of seaworthiness by the vessel, the longshoreman was entitled to recover from the manufacturer, whom the court concluded was *negligent* in failing to test the boom adequately before selling it. In applying the *MacPherson* implied warranty-negligence standard, the court enunciated guidelines for incorporating common law remedies into the maritime law: A state rule that is so widely accepted as to be construed as part of the general law of torts may be incorporated into admiralty, provided the rule is harmonious with the rest of admiralty law.[9]

As the law of maritime products continued to develop, this theme prevailed: where common law developments did not conflict, maritime courts were inclined to apply them.

Gradually, the *MacPherson* doctrine was extended until a plaintiff filing suit under implied warranty was no longer required to show privity

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4. The Mary Stewart, 10 F. 137 (E.D. Va. 1881).

5. 9 F.2d 17 (1st Cir. 1925).

6. See also The Nimrod, 141 F. 215 (S.D. Ala. 1905), aff'd per curiam, 141 F. 834 (5th Cir. 1906); Moore v. The Charles Morgan, 17 F. Cas. 670 (S.D. Ohio 1878) (No. 9754).

7. 149 F.2d 98 (3d Cir. 1945), aff'd, 328 U.S. 85, 66 S. Ct. 872 (1946).

8. Presumably, in addition to the warranty of seaworthiness, the obligation to provide maintenance and cure may be considered a form of strict or absolute liability, since a vessel owner is absolutely bound to provide for a seaman injured in the service of the ship.

9. 149 F.2d at 99-100.

of contract or actual negligence on the part of the manufacturer. Instead, courts began to find liability for breach of the implied warranty that a product was reasonably suitable for its intended purpose.[10] This type of implied warranty-strict liability was first expressed in maritime law in *Middleton v. United Aircraft Corp.*[11] The District Court of New York held that, given the imposition of liability on a manufacturer for negligence in *Sieracki*, "it is but one logical step forward to allow recovery against a manufacturer on a breach of warranty theory by one not in privity with him."[12] Eliminating the need for a showing of negligence, the court cited the social policy that the burden of injuries caused by defective products be placed on the manufacturer because of the manufacturer's ability to absorb the risk through insurance and higher prices, and the difficulty in many cases of proving negligence even where it may exist.[13]

The elimination of privity of contract in implied warranty cases removed products liability from the realm of strict contractual action and placed it rather uncomfortably in an area somewhere between contractual and delictual liability. To resolve this uncertainty, courts began to articulate a primarily tort law theory of liability—the strict products liability action. The common law case most associated with the creation of this doctrine, *Greenman v. Yuba Power Products*,[14] held that where a manufacturer places a product on the market, knowing that it will be used without further inspection, the manufacturer is strictly liable if the user is injured due to a defect in the product.

The rule of *Greenman* and other state court decisions adopting strict products liability was codified in Section 402A of the *Restatement (Second) of Torts*. Specifically, Section 402A reflects the jurisprudential rejection of privity and manufacturer negligence and requires only that the seller's product be unreasonably dangerous to the user and that the product reach the user without substantial change from the condition in which it was sold.[15] The *Restatement* significantly streamlines the action in products liability, discarding the contract element altogether and providing prospective plaintiffs with a less rigorous burden of proof than under a negligence theory.

In maritime law, the adoption of a strict products liability in tort proceeded somewhat more slowly. In the post-*Sieracki* era, claims against manufacturers could be brought under one of two theories—negligent

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10. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
11. 204 F. Supp. 856 (S.D.N.Y. 1960).
12. Id. at 859.
13. Id. (citing W. Prosser, Handbook of the Law of Torts 506-07 (2d ed. 1955)).
14. 59 Cal. 2d 21, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
15. Restatement Second of Torts § 402A (1965).

manufacturing, or an implied warranty of fitness.[16] In some respects, these theories are not entirely separable—courts tended to apply one or the other, or occasionally both, while citing the same authorities—*MacPherson* and *Sieracki*.[17]

For example, in *The S.S. Samovar* case,[18] which involved a defective cargo lashing ring and which was decided only a year after *Sieracki*, the district court, citing section 395 of the *Restatement of Torts*, the precursor to section 402A, found that the manufacturer of the ring had breached its general duty of care[19] to build a product which would not create an unreasonable risk of harm when used properly. And in *Delta Engineering Corp. v. Scott*,[20] the Fifth Circuit analyzed one defendant's liability for a defective rope in terms of whether the manufacturer knew or ought to have known of the defect[21]—decidedly a negligence analysis.

Noel v. United Aircraft Corp. illustrates some of the confusion resulting from attempts to treat implied warranty and negligent design as utterly distinct theories. The trial court concluded that the theory of implied warranty had never been recognized in admiralty, absent privity of contract, and dismissed plaintiff's implied warranty demands for failure to state a claim upon which relief could be granted.[22] Plaintiff thereupon proceeded solely on the basis of negligent design and recovered from the manufacturer. The Third Circuit affirmed, noting rather curiously that the rule of *MacPherson* (implied warranty) was applicable to the defendant.[23] Apparently, the Court of Appeals recognized that the doctrine of implied warranty had been subsumed into the body of tort law and that both implied warranty and negligent design were methods of stating the same cause of action.

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16. Compare Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970) with Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966).

17. See generally McCune, Maritime Products Liability, 18 Hastings L.J. 831 (1967); Alvey, *MacPherson* Sprouts Fins: Development of Products Liability Theories in Admiralty, 28 Loy. L. Rev. 1071 (1982).

18. 72 F. Supp. 574 (N.D. Cal. 1947).

19. Id. at 584. Section 395 states:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.

Restatement of Torts § 395 (1934).

20. 322 F.2d 11 (5th Cir. 1963).

21. Id. at 19.

22. 204 F. Supp. 929, 941 (D. Del. 1962).

23. 342 F.2d 232, 236 (3d Cir. 1964).

The theory of implied warranty, recognized in *Middleton*, continued to be recognized by admiralty courts, despite the apparent rejection of the theory in *Noel*. In *Krause v. Sud Aviation Societe Nationale de Constructions Aeronautiques*,[24] the Second Circuit held that the doctrine of implied warranty was a part of admiralty law and was applicable to a claim for wrongful death caused by the failure of a part in a helicopter flying in the Gulf of Mexico. Explicit in *Krause* was a rejection of *Noel*—according to the Second Circuit, the doctrine of implied warranty had become so widely accepted as to be cognizable in admiralty.[25]

Despite the similarity of the actions, the question of whether a products liability claim was based on negligent design or implied warranty *was* important, because of the different consequences which could flow from one or the other designation. Since implied warranty originated in contract (despite the removal of the privity requirement), arguably certain features of contract law such as prescriptive periods and burdens of proof were applicable. Another problem unique to maritime law was the issue of subject matter jurisdiction. Traditionally, a contract to build a vessel has been treated as non-maritime. If implied warranty originated from contract, not tort, did a claim for injuries to a vessel-caused breach of an implied warranty express a maritime cause of action?[26] The Fifth Circuit answered the question in the negative in *Jig The Third Corp. v. Puritan Marine Insurance Underwriters Corp.*[27] The plaintiff, who was the corporate owner of a shrimp boat which sank in the Gulf of Mexico, brought suit against the shipbuilder under three theories of recovery—breach of warranty, negligent design, and strict liability. The jury returned a verdict for the plaintiff, finding that the boat had sunk as a result of a defect in the design. The shipbuilder appealed, urging that any liability on their part must be found in the contract itself. In holding that an action in implied warranty is non-maritime, the Fifth Circuit nevertheless upheld the verdict in favor of the plaintiff under the theory of negligent design. The court found nothing in (the implied warranty provision) which would preempt a cause of action in negligence.

The existence of two remedies for what was in essence one cause of action was, as demonstrated in *Jig III*, superfluous and confusing. Clearly, a single theory which would encompass the elements of both warranty and negligent design was needed.

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24. 301 F. Supp. 513 (S.D.N.Y. 1968), aff'd, 413 F.2d 428 (2d Cir. 1969).

25. Id. at 523. See also Sanderlin v. Old Dominion Stevedoring Corp., 385 F.2d 79 (4th Cir. 1967), where the Fourth Circuit held that a stevedore owed a warranty to a shipowner, and stated that it was guided by the recent trend in products liability cases.

26. For a discussion of jurisdiction, see infra text accompanying notes 57-70.

27. 519 F.2d 171 (5th Cir. 1976).

SECTION 402A IN MARITIME LAW

The earliest cases in which Section 402A liability surfaced in maritime law were cases involving the Death on the High Seas Act (DOHSA). In *Soileau v. Nicklos Drilling Co.*,[28] the plaintiff's husband was killed on a platform on the outer continental shelf when a crane toppled from its base. The district court found the manufacturer liable, holding that the beneficiaries could recover under DOHSA "provided the principles expressed in sections 400 and 402A are not inconsistent with admiralty law."[29] By 1972, enough lower courts had recognized one form or another of strict products liability for the Eighth Circuit in *Lindsay v. McDonnell-Douglas Aircraft Corp.*,[30] to declare that strict liability in tort, as expressed in Section 402, "should be embraced by federal maritime law."[31]

To succeed in an action based on Section 402A, a plaintiff must show:

(1) that the defendant sold or manufactured the product,
(2) that the product was in a defective condition when it left the defendant's control, and
(3) that the defect resulted in injury to the plaintiff.

In defining "defective condition," Section 402A adds the phrase "unreasonably dangerous to the user."[32] To show that a product is unreasonably dangerous, courts generally require that a plaintiff demonstrate that the risks inherent in the product were greater than those which a reasonable buyer would expect,[33] and that the likelihood and gravity of harm outweighed the benefit and utility of the product.[34] A product may be unreasonably dangerous if it was defectively designed,[35] or if the manufacturer failed to include warnings on the product which would have apprised the user of potential dangers.

The duty to warn includes those dangers that are known or reasonably foreseeable at the time of marketing.[36] A duty to warn exists

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28. 302 F. Supp. 119 (W.D. La. 1969).

29. Id. at 126. See also Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969).

30. 460 F.2d 631 (8th Cir. 1972).

31. Id. at 637.

32. Restatement (Second) of Torts §402A(1) (1965).

33. Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973).

34. Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980); Brown v. Link Belt Division of FMC Corp., 666 F.2d 110 (5th Cir. 1982).

35. Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44 (5th Cir. 1981).

36. Branch v. Chevron Int'l Oil Co. 681 F.2d 426 (5th Cir. 1982); LeBoeuf v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980); Foster v. Ford Motor Co., 616 F.2d 1304 (5th Cir. 1980).

even where foreseeable misuse of the product may occur.[37] However, the duty to warn may sometimes be tempered by the knowledge or expertise of the user. In *Martinez v. Dixie Carriers, Inc.*, [38] suit was brought against a barge owner and the manufacturer of noxious chemicals for the wrongful death of the plaintiff's husband, who was killed by noxious fumes inhaled while he was stripping a barge. The Court of Appeals held that the adequacy of a warning must be measured by the knowledge of the ordinary consumer who purchases it or is expected to use it. In the case of the noxious chemical, the court concluded that the barge stripping company had sufficient knowledge of the potential danger posed by the product.

The distinction between the duty to warn of potential dangers from an otherwise safe product and negligent design is illustrated in the recent decision of *Pavlides v. Galveston Yacht Basin, Inc.*[39] Four men drowned in the Gulf of Mexico when the motorboat from which they were fishing filled with water and swamped. The water had entered the boat through the bilge hole, filling the bilge and flooding the batteries in the boat's stern which operated both the bilge pump and the radio. Because of the boat's design, the bilge space was enclosed and flooding could not be noticed immediately nor did the boat contain any type of self-bailing system.

The trial court dismissed the plaintiffs' claims, finding that the men lost their lives, not because the boat was defectively designed, but because they failed to replace the bilge plug in time. The Fifth Circuit reversed, concluding that, although the boat was not defectively designed, the manufacturer should have foreseen that the bilge plug could come loose at sea (allowing the bilge to fill unnoticed) and had a duty to warn purchasers of this possibility. The court held that, to be adequate, a warning must:

(1) be designed to reasonably catch the consumer's attention,
(2) be comprehensible and give a fair indication of the specific risk involved,
(3) be of an intensity justified by the magnitude of the risk.[40]

In the case of the boat in *Pavlides*, no warnings were placed on the boat. Further, the type of boat which swamped was superficially quite

37. Lewis v. Timco, Inc., 697 F.2d 1252 (5th Cir.), 716 F.2d 1425 (5th Cir. 1983) (*en banc*), reh'g denied, 744 F.2d 94 (5th Cir. 1984); Harville v. Anchor-Wate Co., 663 F.2d 598 (5th Cir. 1981).

38. 529 F.2d 457 (5th Cir. 1976).

39. 727 F.2d 330 (5th Cir. 1984).

40. Id. at 338 (citing Bituminous Cas. Corp. v. Black & Decker Mfg., 518 S.W. 2d 868 (Tex. Civ. App. 1974)).

similar to another boat, known for its buoyancy, marketed by the same manufacturer.

To summarize, in a maritime products liability action under Section 402A, a plaintiff may succeed if he can show injury from a product which was unreasonably dangerous if, at the time it leaves the defendant's control, it contains a design defect the inclusion of which renders the risks in using the product greater than the expectations of the normal user; or if otherwise safe, is rendered *unsafe* by the failure to include adequate warnings of potential problems with the product's use.

Defenses to Products Liability Claims

Under Section 402A of the Restatement, two defenses have traditionally been available to defendants. Initially, the manufacturer could contravene plaintiff's claim to relief by demonstrating that the product was not unreasonably dangerous when it left the manufacturer[41]—that is, that the defect arose after leaving the manufacturer's control. Additionally, the manufacturer could introduce evidence to show that the product was not being subjected to normal use. Under the product misuse theory, the manufacturer was required to show more than inattentiveness or simple carelessness. Generally he had to show that the product was being used for a purpose for which it was not reasonably intended.[42]

The effect of limiting a manufacturer's defenses to a showing of a non-defective product or product misuse was to place upon the manufacturer a very high burden of proof in order to defeat the plaintiff's claim. Likewise, when a manufacturer could demonstrate product misuse, the plaintiff was absolutely barred from recovery, although the manufacturer may have been to some degree at fault.

With the advent of the doctrine of comparative negligence, many states began to incorporate principles of comparative fault into state strict liability and products liability actions. The reason most often offered for applying comparative negligence was that no equitable result could be achieved otherwise in instances where the manufacturer, other negligent defendants, and the plaintiff were each in part responsible for the injury to the plaintiff.[43]

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41. Scott v. White Trucks, 699 F.2d 714, 717 (5th Cir. 1983); Madden v. Louisiana Power & Light Co., 334 So. 2d 249, 253, 255 (La. App. 4th Cir. 1976).

42. Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977).

43. See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Hawaii 1982).

Although comparative negligence had existed in maritime law for a considerable time, as a defense under the Jones Act and DOHSA, admiralty courts were unwilling to limit the plaintiff's recovery in a strict products liability case by applying comparative negligence until the Ninth Circuit decision in *Pan-Alaska Fisheries, Inc. v. Marine Constructions and Design Co.*[44] In that case, the court cited the growth and prevalence of comparative fault in the common law, as well as the prevalence of comparative fault in maritime law as bases for extending the doctrine to reduce recovery by a plaintiff in a products liability case in proportion to the percentage of his fault.

Pan-Alaska stood alone among appellate court decisions, until the 1983 decision of *Lewis v. Timco.*[45] Alfred Lewis, a crewmember aboard an offshore drilling barge, was injured when the hydraulic tongs he was using failed to shut off, causing a cable attached to the tongs to wrap around his body. The trial court found that the tongs malfunctioned because of a design defect and further found that Lewis was partially negligent in failing to adjust the line properly. The trial court rendered judgment in favor of Lewis, apportioning fifty percent of the fault to the three defendants and fifty percent to Lewis.

The Court of Appeals initially reversed; however, on rehearing *en banc*, the Fifth Circuit affirmed the trial court's application of comparative negligence. The court noted at the outset that comparative fault had a long history as the risk allocating principle under the maritime law.[46] The application of comparative fault in all other aspects of maritime personal injury except products liability would, the court concluded, lead to a number of inequitable consequences. As an example, the court cited the Death on the High Seas Act, where a wrongful death claim based on the defective product might be subject to comparative negligence but an action by a plaintiff who was only injured would not.[47] In addition, the court reviewed state court decisions which applied comparative fault, and concluded that strict liability differed from negligence only insofar as the *knowledge* of the defect was imputed to the manufacturer. Finally, the court undertook a cost analysis and determined

44. 565 F.2d 1129 (9th Cir. 1977).

45. 716 F.2d 1425 (5th Cir. 1983).

46. Id. at 1427.

47. 46 U.S.C. § 766 (1983) states that, in determining the amount of an award under DOHSA, a court must "take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly." 716 F.2d at 1428. The Fifth Circuit construed this statement to require application of comparative negligence to all wrongful death claims under DOHSA, whether based on negligence or products liability. Thus, if comparative negligence were not applied to other products liability claims, the survivors of a deceased worker could have their claims reduced according to fault while a surviving injured worker's claim would not be subject to reduction.

that (1) user behavior would be altered if recovery would be diminished by the proportion of their fault, and (2) the manufacturer would have the correct economic incentive to make a safer product, but would not be unduly burdened.[48]

The application of comparative fault to products liability in *Lewis* was confined to comparative *negligence*. Recently, the Fifth Circuit has expanded the ambit of comparative fault to include voluntary assumption of the risk as well. In *National Marine Service, Inc. v. Petroleum Service Corp.*,[49] a multi-purpose tank barge carrying a cargo of liquid sulfuric acid sank when the liquid shifted towards the stern during unloading. The accident was determined to be the result of faulty design, which had left the center of buoyancy forward of the center of gravity of the cargo. The vessel owner had experienced difficulties with other similar barges from the same manufacturer—nevertheless, he failed to take additional precautionary measures. The trial court concluded that the owner had assumed the risk of the defect and barred the owner from recovering against the manufacturer.

The Fifth Circuit reversed, holding that no distinction should be made between assumption of the risk and contributory negligence, so that all of plaintiff's conduct would be analyzed in terms of comparative fault. The court considered the maritime goal of uniformity and predictability in reaching this result, and observed that the theoretical distinctions between contributory negligence and assumption of the risk "are often lost in the practical application of these defenses."[50]

The *Lewis* and *National Marine Service* decisions have erased many of the distinctions between products liability actions and actions in strict liability and negligence. Evidently, any future claim for damages, whether it is grounded on negligence or products liability, will be dealt with by maritime courts according to percentage of fault. The only practical distinction between the theories of recovery will be the presumption of knowledge imposed on manufacturers in products cases. The change is significant because it represents a rejection of the prior theory of strict liability, which would have relieved plaintiffs from their own carelessness

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48. 716 F.2d at 1432. The notion that user behavior can be altered by diminishing recovery to injured workers is questionable, if one regards injuries on the job as a non-voluntary process. A cost/benefit analysis seems particularly inappropriate where the whole purpose of a products liability theory was to place the burden of the injury upon the party most able to absorb the loss. This is not to belie the argument that a plaintiff should not have his recovery diminished for his part in causation, since all plaintiffs are not equally innocent of fault. However, to describe comparative fault as a deterrent to plaintiff negligence seems insensitive and irrelevant.

49. 736 F.2d 272 (5th Cir. 1984).

50. Id. at 276.

and placed the entire burden of the loss upon the manufacturer. Likewise, where assumption of the risk formerly may have acted as a total bar to plaintiff, a plaintiff may now recover to the extent he was not at fault.[51]

PUNITIVE DAMAGES

This analysis thus far has dealt with the *nature* of the products liability action. Another issue of contemporary interest concerns the availability of punitive damages in maritime personal injury claims. In 1981, the Fifth Circuit held in *Dyer v. Merry Shipping, Inc.*[52] that punitive damages may be awarded under the general maritime law. The plaintiff in *Dyer* brought claims based on both Jones Act negligence and unseaworthiness—however, the court expressly declined to decide the issue of whether punitive damages were recoverable under the Jones Act.[53]

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51. The practicing maritime lawyer in Louisiana must be conversant with both state and federal tort law, given the interplay between maritime and non-maritime localities in the offshore oil industry. In this regard, it is significant to note that the Fifth Circuit recently certified to the Louisiana Supreme Court the question of whether plaintiff's contributory negligence could be advanced by defendant to defeat or mitigate a claim in products liability, in the case of Bell v. Jet Wheel Blast, 717 F.2d 181 (5th Cir. 1983). On original hearing, 709 F.2d 6 (5th Cir. 1983), the Court of Appeals found that contributory negligence did not constitute victim fault for purposes of products liability, but later certified the question in light of the recent trend in Louisiana law that contributory negligence constitutes victim fault in strict liability cases not involving a defective product. See Dorry v. Lafleur, 399 So. 2d 559 (La. 1981); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983); Kent v. Gulf States Utilities, 418 So. 493 (La. 1982); Hyde v. Chevron Inc., 697 F.2d 614 (5th Cir. 1983). The Louisiana Supreme Court, in response to the certified question, determined that contributory negligence does not act as an absolute bar to recovery in strict products liability cases, but that in certain instances the principles of comparative fault contained in La. Civil Code art. 2323 may be applied by analogy to reduce a plaintiff's award of damages. Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985). According to the majority, comparative fault may be applied where plaintiff was negligent and his reduction of recovery may serve as an incentive for careful product use, but not under circumstances where the injury is caused by the defective product and ordinary carelessness or contributory negligence of the employee. Unfortunately, the opinion offers no guidance to trial judges or attorneys as to how the two types of circumstances may be distinguished, but merely suggests that the application of comparative negligence to products liability cases might be made on a case by case basis. Given the opaque reasoning of the majority opinion and the presence of two concurring and two dissenting opinions, the applicability of comparative negligence in Louisiana products liability law to diminish a plaintiff's recovery remains uncertain.

52. 650 F.2d 622 (5th Cir.), reh'g denied, 659 F.2d 1079 (1981).

53. Id at 626. See also Note, Punitive Damages in Maritime Personal Injuries: Dyer v. Merry Shipping Co., 43 La. L. Rev. 823 (1983).

Quite recently, the Ninth Circuit addressed this issue in *Kopczynski v. The Jaqueline*[54] and concluded that the Jones Act does not permit an award for punitive damages. The court noted that prior to the enactment of the Jones Act, a number of cases established that only compensatory damages were available under the Federal Employers Liability Act and that, absent any legislative directive to the contrary, no basis existed to award punitive damages under the Jones Act.[55]

The distinction between actions for unseaworthiness and those under the Jones Act, in determining whether plaintiff may recover punitive damages, poses several interesting questions. If claims under the Jones Act cannot include punitive damages, is such a limitation contained in DOHSA as well? Arguably, a plaintiff claiming under a federal statute will have to base his products liability claim on the general maritime law if he is to recover punitive damages. This is not a significant problem, since most pleadings incorporate several theories of recovery in one claim.

More difficult is the question of whether a conflict now exists between the circuits as to awarding punitive damages at all. The practical distinction of awarding punitive damages in unseaworthiness cases but precluding them in Jones Act cases will be negated where a seaman recovers under both theories, as is often the case. The basis for awarding or not awarding punitive damages for outrageous conduct of the vessel owner would seem to be the same, regardless of whether the claim is based on negligence or unseaworthiness. Further, the clear conflict in approaches in two actions which are generally brought together frustrates the desire for uniformity that pervades the law of admiralty.[56] For the moment, however, at least in the Fifth Circuit, awards in products liability actions brought under the general maritime law may potentially include punitive damages.

JURISDICTIONAL PROBLEMS

Once it became clear that an action in products liability existed in maritime law, courts were confronted with the issue of subject matter jurisdiction. As the decision in *Jig III* pointed out, a claim in warranty that arises from a contract to build a vessel is non-maritime and therefore not cognizable in an admiralty court. Similarly, once claims in strict products liability were acknowledged, the question arose as to which products could be considered maritime. That is, how much of a connection to maritime activity was a product required to have in order

54. 742 F.2d 555 (9th Cir. 1984).
55. Id. at 560.
56. Note, supra note 53, at 830.

for the case to be heard by an admiralty court? A manufacturer of copper coil incorporated into a window unit air conditioner normally used in homes, for example, does not necessarily manufacture his product with the expectation that it will be used on a crewboat. Likewise, the company which manufactures a small microchip which can be used in a number of different electronic devices does not necessarily contemplate that the chip would undergo nautical use. On the other hand, a manufacturer of heavy duty ropes might expect a large amount of his product to be used in a maritime setting. The only guideline available to aid courts in distinguishing maritime from non-maritime activity was the United States Supreme Court's nebulous test in *Executive Jet Aviation, Inc. v. City of Cleveland*.[57] Under *Executive Jet*, a tort is maritime if it occurs on or above navigable waters and the tort involves a significant relationship to traditional maritime activity.

Rather than attempt to delineate between the myriad situations which would inevitably arise if a case by case line drawing were undertaken, the Fifth Circuit held in *Sperry Rand Corp. v. Radio Corporation of America*[58] that the *Executive Jet* test is satisfied when the infliction of damages to a vessel occurs on navigable water, even though the product itself may not have been manufactured exclusively for maritime use and is not automatically associated with traditional maritime activity. In the *Sperry* decision, the product involved was a small piece of electronic equipment installed in the vessel's gyroscope, and used in "virtually every conceivable aspect of electronic equipment."[59] The court, recognizing the need for uniformity in maritime products liability law, and the difficulty involved in attempting to distinguish between traditionally maritime and non-maritime products, determined instead that if a product on board causes damage to a vessel in navigation, the relationship to maritime activity has been established.

Other circuits have split on the issue of whether some *nexus* between the product and traditional maritime activity is required. The First Circuit in *Austin v. Unarco Industries, Inc.*[60] agreed with the *Sperry Rand* holding that no reason existed to distinguish between manufacturers according to whether they designed or intended their products for maritime use—however, the court found that admiralty jurisdiction should not extend to workers installing asbestos on a vessel in drydock because

57. 409 U.S. 249, 93 S. Ct. 493 (1972). The Court held that in order for an action for personal injury to be considered maritime, the accident must occur on or above navigable water and, additionally, the tort must bear a significant relationship to traditional maritime activity.

58. 618 F.2d 319 (5th Cir. 1980).

59. Id. at 321.

60. 705 F.2d 1 (1st Cir.), cert. dismissed, 104 S. Ct. 34 (1983).

the work had no relationship to traditional maritime activity.[61] The Fourth Circuit in *White v. Johns-Manville Corp.*[62] declined to embrace the *Sperry Rand* decision, and limited its holding to a finding of jurisdiction where the product in question was marketed as maritime asbestos.[63] In *Keene Corp. v. United States*,[64] a suit by the manufacturer of the product against a party it claimed was responsible for Keene's exposure to claims for illness caused by asbestosis, the Second Circuit declined to follow *Sperry Rand* and held that, without some connection to traditional maritime activity, the plaintiff's cause of action was not cognizable in admiralty.[65]

In addition to the relationship of the product to maritime activity, courts have had to determine how far inland to extend a maritime products claim. The *Austin* decision focused on the nature of the workers's job in determining jurisdiction over his claim in products liability. The Ninth Circuit has distinguished between ship construction and ship repair in determining whether the worker was engaged in maritime or non-maritime work.[66] Likewise, the Fifth Circuit, when confronted with the question of whether a shipyard employer possessed a maritime cause of action against the manufacturer of asbestos for the compensation paid to employees, held that a complaint's allegations did not establish admiralty jurisdiction because the workers contracted the disease during ship *construction*.[67]

Most recently, in *Harville v. Johns-Manville Products Corp.*,[68] the Eleventh Circuit has applied the four-part test for admiralty jurisdiction set forth in *Kelly v. Smith*.[69] In determining that the plaintiff's work had no more than an attenuated relationship to admiralty, the court looked to: (1) the function or role of the worker, (2) the type of vessel

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61. Id. at 14.

62. 662 F.2d 234 (4th Cir. 1981).

63. Id. at 240.

64. 700 F.2d 836 (2nd Cir. 1983).

65. Id. at 844. The case notably did not involve a suit by a party injured by the asbestosis in a maritime setting; instead, the suit was founded on land based contractual agreements which ultimately resulted in liability to the plaintiff from maritime workers. The court's decision to find no connection to maritime activity in this type of activity does not necessarily mean that it would find no maritime jurisdiction in a *Sperry Rand* situation. Nonetheless, the case does show a willingness on the part of the Second Circuit to undertake a line drawing process.

66. Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983). But see Francois v. Raybestos-Manhattan, Inc., 577 F. Supp. 434 (N.D. Cal 1983) (where district court made no distinction between ship construction and repair), aff'd, 749 F.2d 37 (9th Cir. 1984).

67. Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984).

68. 731 F.2d 775 (11th Cir. 1984).

69. 485 F.2d 520, 525 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974).

or vehicle involved, (3) the causation and type of injury, and (4) the traditional concept of the role of admiralty law. Applying this last requirement, the court observed that the need for uniformity in admiralty jurisdiction did not extend to the shore-based asbestos workers.

Although the issue seems to be foreclosed in the Fifth Circuit,[70] the question of subject matter jurisdiction over products manufactured with no expectation of maritime use remains a problem if one reads *Executive Jet* to require proof of a significant relationship to traditional maritime activity. Clearly, the locality requirement may be satisfied when the accident occurs in a maritime setting, although the product was manufactured on shore. Nevertheless, the activity engaged in by the defendant may often have no relation to maritime activity, and the presence of the product on board a vessel may be purely fortuitous. The Fifth Circuit noted that the defendants in *Sperry Rand* were unable to cite one case "where the requirement of 'significant relationship to traditional maritime activity', added by *Executive Jet*, was not satisfied by the sinking of, or inflicting of damage upon, a marine vessel on navigable waters."[71] In fact, *Executive Jet* may be read simply to require that the vessel on which the product fails be engaged in maritime activity—the boat versus airplane distinction—and nothing more. This approach is arguably sound when it is foreseeable to the manufacturer that the product could be used for a maritime purpose—but what of products which have no function necessary to the operation of the vessel—for example, a personal item of a crewmember which malfunctions and causes injury? The all-inclusive rule of *Sperry Rand* would seemingly include these situations, though no relationship to maritime activity exists. The inequities resulting from requiring non-maritime manufacturers to defend their products in admiralty court may eventually compel refinement of the *Sperry Rand* holding.

CONCLUSION

The recent developments in the law of maritime products liability demonstrate an increased willingness on the part of admiralty courts to fashion a remedy more consistent with the principles of maritime law rather than simply attempting to mirror common law decisions. The application of comparative negligence to products liability cases and, more particularly, the inclusion of assumption of the risk within the term comparative fault show the court's determination that, wherever possible, liability be apportioned according to fault. In this sense, mar-

70. Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981).

71. *Sperry Rand*, 618 F.2d at 321.

itime products liability appears to have departed from the strict liability principles of the *Restatement*. The treatment of voluntary assumption of the risk as a form of comparative fault raises the question of when, if ever, product misuse will act as a total bar to the plaintiff's recovery.

The availability of a strict liability action in tort has obviated the jurisdictional difficulty previously encountered by plaintiffs suing under a theory of implied warranty. Nevertheless, from the standpoint of the non-maritime manufacturer, the question of subject matter jurisdiction remains one of some concern. If the *Sperry Rand* holding is in fact dispositive, the maritime products liability action will have had the effect of extending admiralty jurisdiction—arguably, beyond the limits set forth in *Executive Jet*. Thus, the Fifth Circuit's decision to fashion an all-inclusive rule of subject matter jurisdiction seems ill-advised and warrants reexamination.

The emergence of a strict products liability action in maritime law, however attractive it may be to many plaintiffs, has not eliminated the alternative actions in implied warranty or negligent design. Depending upon his relationship to the manufacturer, a plaintiff may prefer to proceed under one of these alternate theories. Nonetheless, a party is no longer required to set forth an assortment of theories of recovery in his complaint in order to bring a strict products liability action. In this respect, maritime law has finally achieved a straightforward, fairly consistent theory of products liability.