Judge Rubin's Maritime Tort Decisions

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Alvin Rubin became a federal district judge in 1966 and a member of the Fifth Circuit Court of Appeals in 1977. During his twenty-five years of judicial service he published 1079 opinions. Slightly more than 10% of these—approximately 110 opinions—were admiralty cases. Judge Rubin was an acknowledged master of the maritime field. Many of his Fifth Circuit colleagues have issued statements commemorating his contributions and highlighting the importance of his work in admiralty and maritime law. His skill and zeal for clarification were such that he made a positive contribution virtually every time he addressed the subject. In this article I examine a number of Judge Rubin's district court and court of appeals opinions addressing personal injury and other tort subtopics.

I. THE LAW OF SEAMAN STATUS

A. Background

Under American maritime law seamen have generous tort remedies, whereas other maritime workers are generally confined to workers' compensation systems. Particularly in regard to the men and women engaged in the multifarious oil and gas activities of the waters and swamps of the Fifth Circuit, it is often hard to tell who is a seaman and who is not. Judge Griffin Bell put the difficulty succinctly: "[T]he myriad circumstances in which men go upon the water confront courts not with

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4. See Peter Beer, Keeping Up With The Jones Act, 61 Tul. L. Rev. 379, 391 (1986) (describing the many "gruesome, devastating, and bizarre" injuries suffered by workers engaged in maritime mineral operations and referring to this phenomenon as a "litigation gusher") [hereinafter Beer].
discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman."

When a maritime worker is hurt under circumstances in which it is clear that no other person or entity was at fault, the worker will probably be better off if the legal system treats him as a non-seaman. This is because workers' compensation benefits under either the Longshore and Harbor Workers' Compensation Act (LHWCA) or occasionally applicable state law are usually more generous than the maintenance and cure benefits due a seaman hurt through no one's fault. But if there is any chance of establishing employer negligence or vessel unseaworthiness, the injured worker—and, equally importantly, the worker's lawyer—will want the worker to be treated as a seaman. This is because tort damages are almost always greater than workers' compensation benefits. The Jones Act gives injured seamen a negligence remedy against their employers, and the burden of showing employer fault is "featherweight." And if the injured worker was a member of the crew of a vessel that was defective in any significant particular, even momentarily, the strict liability doctrine of unseaworthiness provides an
IN MEMORIAM: ALVIN B. RUBIN

additional route to tort damages against the vessel and/or its operator. Hence the injured worker's lawyer will be quick to claim the worker was a seaman in any case in which there is any significant chance of both showing employer or vessel fault and meeting the criteria for seaman status.

Extensive maritime oil and gas operations began in the Gulf of Mexico area shortly after World War II. Soon thereafter injured maritime and amphibious oil-and-gas workers began queuing up at the courthouse door in substantial numbers seeking seamen's remedies. When judges and lawyers began trying to sort the legitimate seamen from the more land-bound of these workers, they found that the criteria for seaman status laid down in the Supreme Court's decisions were quite confusing. In the period from 1920 (when the Jones Act created the seaman's negligence remedy) to 1958, the Court had decided eight cases bearing on the problem of classifying workers as seamen vel non. (The most significant decision in that series, Swanson v. Marra Brothers, established that the Jones Act and the LHWCA are mutually exclusive in their coverages such that the LHWCA term "master or member of a crew of any vessel" defines the Jones Act term "seaman.") In 1958—just when the new problems of amphibious oil and gas operations brought the uncertainties created by the Court's seaman status decisions into sharp focus—the Court "fell into a long silence" on the seaman status issue. The task of making sense of the law of seaman status was left to the courts of the Fifth Circuit.

Judge John Minor Wisdom, with able assistance from Judge J. Skelly Wright, took the task in hand. In 1958 careful study of the results of the Supreme Court's cases led Judge Wright to the realization

v. M/V Eugenio C, 842 F.2d 815, 817 (5th Cir. 1988), modified, 876 F.2d 38 (5th Cir. 1989) ("The duty to provide a seaworthy vessel is sometimes, erroneously, called a warranty. . . .") (Rubin, J.).

14. An unseaworthiness action may be brought in rem. See Frank L. Maraist, Admiralty In A Nutshell 193, 204 (2d ed. 1988) [hereinafter Maraist]. A Jones Act suit may not. See id. at 217.


16. See Beer, supra note 4, at 390-395.

17. These cases are analyzed in A New Approach, supra note 3, at 85-93. See also Kenneth G. Engerrand and Jeffrey R. Bale, Seaman Status Reconsidered, 24 S. Tex. L.J. 431, 448-55 (1983) [hereinafter Engerrand].

18. 328 U.S. 1, 66 S. Ct. 869 (1946).


that the Court's intermittent statements seeming to make navigational duties a requisite to seaman status were "misleading." Judge Wright also pointed out that the Court's occasional suggestion that it was necessary for a plaintiff seeking seaman status to show that he worked on a vessel "in navigation" was no more than superfluous "loose language." A year later Judge Wisdom elaborated on Judge Wright's theme in his celebrated opinion in *Offshore Co. v. Robison*:

[In the Supreme Court's seaman status cases] words have lost their natural meaning. . . . With due deference to the Supreme Court, we attach less importance to ["navigational"] catch-phrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination it can be said that the claimant had anything to do with navigation. . . .

The *Robison* opinion synthesized the Supreme Court's decisions into a test for seaman status that, with minor modifications, remains the law today:

[T]here 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 (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mis-

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23. Perez v. Marine Transp. Lines, 160 F. Supp. 853, 855 (E.D. La. 1958). The Supreme Court's recent decision in *McDermott*, 111 S. Ct. 807, confirmed Judge Wright's insight by holding that navigational duties are not required for seaman status and explicitly stating that the Court's earlier expressions to the contrary were "befuddling" language that "the time has come to jettison." 111 S. Ct. at 816.


25. 266 F.2d 769 (5th Cir. 1959).

26. Id. at 780.

27. The two significant modifications that have occurred are discussed infra at notes 30-32 and 86-93. In brief, Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523 (5th Cir. 1960), modified *Robison* by adding that a worker can qualify as a seaman by having the described connection with an "identifiable fleet of vessels" as well as with a single vessel. Id. at 528. Much later Barrett v. Chevron, USA, Inc., 781 F.2d 1067 (5th Cir. 1986) (en banc), further modified the *Robison* test by requiring that the described connection with a vessel or fleet have existed during the injured worker's entire period of employment with his current employer.

The most significant modification of the Robison test occurred only a year later, with the issuance of Judge John R. Brown's opinion for a divided panel in *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, upholding seaman status on behalf of a man whose principal work was maintaining and repairing several ferries operated by his employer. The man's work regularly took him aboard ferries in operation on the busy Mississippi River at New Orleans and therefore significantly exposed him to the dangers presented by work on and around vessels in motion on navigable water.Yet he lacked the requisite work connection with a single identifiable vessel. Judge Brown's opinion emphasized those features of the man's work that regularly exposed him to vessel-movement dangers and concluded:

The usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel. But there is nothing about this expanding concept to limit it mechanically to a single ship. If the other [Robison] factors ... are ... present, we see no insurmountable difficulty [in recognizing seaman status on the basis of a work connection with] an identifiable fleet of vessels. ...  

Note that Robison lays down two criteria for seaman status. The second criterion of the Robison test—requiring the worker to show that
his duties or work contributed to the vessel's (or fleet's) function, mission, operation, or welfare—is by its nature rather easily satisfied.\textsuperscript{34} The recurrent question in seaman status cases has been the proper application of Robison's first criterion, requiring a showing of permanent assignment to or substantial work on a vessel or identifiable fleet. Note that permanent assignment and substantial work are alternative grounds; either will satisfy the criterion.\textsuperscript{35} Indeed the courts often collapse the two into a "more or less permanent connection" standard.\textsuperscript{36}

B. Porche, Wallace, "A New Approach," and Wilander

In the three decades since Robison was decided the federal courts, especially those of the Fifth Circuit, have decided hundreds of seaman status cases.\textsuperscript{37} In virtually all of them the contested question has been whether the plaintiff could show the performance of enough work aboard a vessel or identifiable fleet of vessels to satisfy Robison's "more or less permanent connection" standard. Obviously the criterion is not self-enforcing. In close cases the vessel-connection question cannot be answered without reference to the policy underlying the seamen's protections. Judge Wisdom's Robison opinion was careful to explain that fact, eloquently noting the necessity for courts to keep their doctrinal devices aligned with the general policies the doctrine is designed to implement:

Expansion of the terms "seaman" and "vessel" are consistent with the liberal construction of the [Jones] Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the act to indicate that Congress

\textsuperscript{34} See the discussion and authorities in A New Approach, supra note 3, at 96-97.

\textsuperscript{35} See supra note 33.


\textsuperscript{37} See A New Approach, supra note 3; Engerrand, supra note 17.
intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. Many of the Jones Act seamen on these vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling. 38

Later decisions and scholars have reiterated the policy theme: “Exposure to the ‘perils of the sea’ and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman’s work.” 39 “In applying the permanency and substantiality requirement in ambiguous cases, [courts’] analysis again and again has focused on . . . the degree of exposure to the hazards or perils of the sea . . . .” 40 But sometimes courts forget or ignore the policy. 41 When that happens the result is sterile wordplay. 42 Terms like “permanent assignment” and “substantial work” have no intrinsic meaning and no resolving power. To the extent that courts cling to them as a doctrinal substitute for careful thought about the underlying policy of the seamen’s protections, Gilmore and Black’s characterization of the seaman status jurisprudence as “depressing” 43 will remain apt. But when courts do tie the seaman status doctrine laid down in Robison to the appropriate policy, the doctrine does the job it was designed to do. 44

Toward the end of his tenure on the district bench Judge Rubin made a distinctive contribution to the proper policy-based application

38. Offshore Company v. Robison, 266 F.2d 769, 780 (5th Cir. 1959).
41. See, e.g., the Bach decision, discussed infra at notes 126-134. See also A New Approach, supra note 3, at 83-84, 92, 99, 104, 106-07.
42. Engerrand, supra note 17, is critical of the courts for engaging in sterile doctrinal exercises: “[I]n determining whether a worker is a member of a crew, his relation to the vessel is frequently ignored in favor of a numbers game involving time spent by the claimant on the vessel.” 24 S. Tex. L.J. at 483. But elsewhere this article itself seems to engage in similar wordplay: “[T]he permanent assignment element has been reduced to being ‘substantial’ [and] the substantial work element has been modified to incorporate concepts of a permanent assignment.” Id. at 481.
44. Calling for more explicit judicial attention to the policy that underlies the Jones Act and the unseaworthiness doctrine is a central theme of A New Approach, supra note 3. It is also one of the lessons of McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991). See generally Robertson, supra note 3.
of the Robison doctrine. Porche v. Gulf Mississippi Marine Corporation was Rubin's first reported decision examining the seaman status issue. Gerald Porche was hired as a temporary replacement for a welder on an offshore pipelay barge. On what was to have been his first day on the job, Porche was paid an hourly wage while riding a crew boat from the dock out to the barge. But he never got the chance to perform any actual work for his new employer; in a tragic accident he was killed being transferred from the crew boat to the barge. Judge Rubin directed a verdict that Porche was a Jones Act seaman. "Mr. Porche became a seaman before he put his foot on the deck of the barge." Specifically addressing the application of the Robison "more or less permanent connection" criterion to Porche's situation, Judge Rubin emphasized that the young man was assigned to the pipelay barge "for an indefinite period of time—until the regular welder was able to return" and explained that the Robison criteria must be applied in light of the underlying policy they were designed to serve:

The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time.

Judge Rubin's insight has proved a perennially useful antidote to the tendency of many lawyers and some judges to take a woodenly doctrinal approach to the seaman status issue. It has been quoted ap-

46. In Franks v. Land and Marine Applicators, Inc., 347 F. Supp. 243 (E.D. La. 1972), Judge Rubin had granted summary judgment dismissing the Jones Act and unseaworthiness claims of a worker whose only connection with vessels had been helping to build a new one. It has long been settled that new vessels under construction do not qualify as Jones Act vessels. The Franks opinion correctly treated the seaman status issue as completely obvious.
47. The Porche decision is a leading authority for the propriety of directed verdicts in plaintiffs' favor on the seaman status issue in clear cases. See Landry v. Amoco Prod. Co., 595 F.2d 1070, 1072 (5th Cir. 1979) (citing Porche, inter alia, in support of holding that trial judge should have directed a verdict that a female roustabout who spent 70% of her work time in vessel-related activities on a small number of barges operated by her employer was a seaman).
49. Id.
50. Earlier in the opinion Judge Rubin had explained that "navigational" in this context meant "having a connection with the mission or the function of the floatable structure..." Id. (quoting Offshore Co. v. Robison, 266 F.2d 769, 780 (5th Cir. 1959)). See also supra text accompanying notes 23-29.
provingly in a number of decisions by courts in at least three of the federal circuits. In his important opinion in Wallace v. Oceaneering International Judge Brown extolled Judge Rubin's Porche opinion as a leading example of the appropriate use of policy considerations in applying the Jones Act, stating that the passage quoted above "brought to the surface a principle that had been submerged in a large body of murky case law." Judge Brown's phrasing of the principle was this: "In applying the permanency and substantiality requirement in ambiguous cases, our analysis again and again has focused on (1) the degree of [the worker's] exposure to the hazards or perils of the sea, and (2) the maritime or terra firma nature of the worker's duties."

The Supreme Court's recent decision in McDermott International, Inc. v. Wilander—the Court's first look at the seaman status issue since the "long silence" began in 1958—was not directly concerned with the meaning of the "more or less permanent connection" criterion but rather with whether Judge Wisdom had been correct in Robison when he translated the Supreme Court's "aid of navigation" phrases into the requirement that a seaman must contribute to the vessel's purpose, function, or mission. In the course of unanimously approving that aspect of Robison—holding that "the time has come to jettison the aid in navigation language"—the Court gave an important statement of the policy that underlies the seamen's protections:

Traditional seamen's remedies... have been "universally recognized as... growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are

53. 727 F.2d 427 (5th Cir. 1984).
54. Id. at 434.
55. Id.
57. See supra note 21.
58. See Wilander, 111 S. Ct. at 817 ("[Robison] correctly determined that... this Court was no longer requiring that seamen aid in navigation... [W]e believe the requirement that an employee's duties must 'contribute[e] to the function of the vessel or the accomplishment of its mission' captures well an important requirement of seaman status."). See also supra note 28.
59. Id. at 816.
subjected." . . .

. . . All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L.Rev. 79 (1985). 60

To one familiar with the evolution of seaman status law the quoted passage is a strong endorsement of the policy approach exemplified by the work of Judges Rubin and Brown. In brief, the evolution was as follows. First, bringing "to the surface a principle that had been submerged in a large body of murky case law," 61 Judge Rubin's Porche opinion set forth an essential policy guideline for the application of seaman status doctrine: The "more or less permanent connection" doctrine must not be applied literally or woodenly but rather with a sensitive eye to the actual realities of the injured worker's situation. 62 Second, relying centrally on Porche, Judge Brown's Wallace opinion amplified the importance of focusing on the worker's "degree of exposure to the hazards or perils of the sea." 63 Third, building on the Wallace case, the law review article "A New Approach" urged an even more heightened

60. Id. at 817 (citations omitted). The internal quotation is from Chief Justice Stone's dissent in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104, 66 S. Ct. 872, 882 (1946). The closing reference is to A New Approach, supra note 3.
61. Wallace, 727 F.2d at 434.
62. Some of the language in Judge Rubin's later opinion in Munguia v. Chevron Co., USA, Inc., 768 F.2d 649 (5th Cir. 1985), cert. denied, 475 U.S. 1050, 106 S. Ct. 1272 (1986), is facially inconsistent with his approach in Porche. Munguia upheld a judgment n.o.v. denying seaman status to a worker who used small boats to travel to his work on fixed platforms located in navigable water. Judge Rubin stated: "The jury might have found that, as contended by Munguia, his work required the ability to pilot a small boat and 'more than rudimentary' knowledge of the operation and maintenance of the craft; that he had to know about currents in the river to navigate properly; and that he faced the vicissitudes of storm, injury, and death while on the waters he travelled. But these are not the specific criteria by which it is determined that a worker is a member of the crew of a vessel." Id. at 652. The suggestion that exposure to nautical dangers is beside the point is at odds with the philosophy of Porche. But the Munguia result is explicable as part of a line of cases denying seaman status to fixed platform workers whose only connection with boats was riding them to work. See A New Approach, supra note 3, at 105-06. See also Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 295 (5th Cir. 1987) (being "a passenger on his way to and from [fixed] platforms . . . [does] not qualify [a worker] as a Jones Act seaman") (Rubin, J.). In Munguia Judge Rubin went on to characterize any work plaintiff had done on the small boats as incidental: "[H]is primary duties were neither to pilot nor to maintain the boats nor to use them as a place of work. He used them only as a means of getting to and from his work on platforms. . . . [W]ater travel alone does not make a worker a crew member." Munguia, 768 F.2d at 653. For further discussion of the questionable aspects of Munguia, see supra note 33 and infra note 94.
63. Wallace, 727 F.2d at 434.
and explicit judicial focus on the dangers to which particular workers are exposed:

Taking Wallace as a synthesis of the entire Robison line of cases, . . . a worker [should] be a seaman (1) when a substantial part of his duties are performed on vessels, and (2) [when] his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water.  

Finally, the Supreme Court in Wilander spelled out its view that workers who confront the "particular perils" characteristic of seamen's duties should be protected by the seamen's doctrines, citing "A New Approach."  

In deciding to "jettison the aid in navigation language" the Wilander Court agreeably simplified and clarified the law of seaman status. By adding explicit recognition of the important policy of protecting workers who confront the "particular perils" characteristic of seamen's work, the Court both added further clarification and potentially liberalized the application of the seamen's remedies. In light of these features of Wilander it is hard to understand Eileen Madrid's recent claim in the pages of this journal that "the decision represents a different analytical approach to seaman status than the oft-cited maxim that the Jones Act is remedial legislation which should be liberally construed .... [T]he [Wilander] ruling rests entirely on statutory construction and legislative intent rather than on jurisprudential policy considerations." On the contrary, we have just seen that Wilander rests in major part on recognition of the policy viewpoint that "A New Approach" took from Judge Brown's opinion in Wallace and that Judge Brown in turn took from Judge Rubin's decision in Porche.

64. A New Approach, supra note 3, at 120 (footnotes omitted).
66. Id. at 816.
67. See generally Robertson, supra note 3.
69. In addition to its importance in the law of seaman status the Porche decision is also widely cited for its strong stance against blindfolding the jury. (See Leon Green, Blindfolding the Jury, 33 Tex. L. Rev. 273 (1955).) During its deliberations, the Porche jury sent Judge Rubin a written question: "In the event we award the plaintiffs the sum of $100,000[,] [does] that mean they receive this amount or a portion of this value?" Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975). Judge Rubin answered that in light of the finding of 45% contributory fault against Gerald Porche, an award of $100,000 would mean the plaintiffs would receive $55,000. In his Porche opinion Judge Rubin explained why he thought answering the question was proper: "There is some authority that, when a judge requires a jury to return a special verdict ...
C. Barrett, Pizzitolo, Legros, and Gizoni

In the early 1980s a growing number of judges and commentators began urging that the Robison approach was admitting far too many workers to the coveted status of legal seamen. As that viewpoint began colliding with the Robison approach in the cases, four areas of instability developed in the law of seaman status. The first was the resurrected argument that a worker must have navigational duties in order to be a seaman. As we have seen, that specific matter was laid to rest in Wilander. However, some of the Fifth Circuit decisions leading up to Wilander remain relevant on related issues and will be treated in this subsection. Second, some decisions began restricting the categories of “special purpose structures” and “strange-looking specialized watercraft” that can qualify as vessels under the Robison approach to determining seaman status. That story is still unfolding and will not

jury should not be informed of the legal consequences of their answers. But the better view is that a jury is entitled to know what effect its decision will have. The jury is not to be set loose in a maze of factual questions, to be answered without intelligent awareness of the consequences. One of the purposes of the jury system is to temper the strict application of law to facts, and thus bring to the administration of justice a common-sense lay approach, a purpose ill-served by relegating the jury to a role of determining facts in vacuo, ignorant of the significance of their findings.” Id.; citations omitted. This portion of Porche has been widely cited. See, e.g., Turlington v. Phillips Petroleum Co., 795 F.2d 434, 443-44 (5th Cir. 1986); Vinieris v. Byzantine Maritime Corp., 731 F.2d 1061, 1065 (2d Cir. 1984); Martin v. Texaco, Inc., 726 F.2d 207, 216 (5th Cir. 1984); Kaeo v. Davis, 719 P.2d 387, 395 (Haw. 1986); Seppi v. Betty, 579 P.2d 683, 689 (Idaho 1978); Thurston v. Ballou, 505 N.E.2d 888, 891 (Mass. App. 1987); Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980); Schabe v. Hampton Bays Union Free Sch. Dist., 480 N.Y.S.2d 328, 337 (N.Y. App. Div. 1984); Pears v. Home Ass’n of Enola Legion No. 751, 430 A.2d 665, 671 (Pa. Super. 1981); Adkins v. Whitten, 297 S.E.2d 881, 882 (W. Va. 1982).

See, e.g., Johnson v. John F. Beasley Const. Co., 742 F.2d 1054, 1062 (7th Cir. 1984), cert. denied, 469 U.S. 1211, 105 S. Ct. 1180 (1985) (Robison too liberal now that LHWCA coverage has expanded and LHWCA benefits have increased); Barrett v. Chevron, USA, Inc., 781 F.2d 1067, 1076 (5th Cir. 1986) (en banc) (concurring opinion of Judges Gee, Jolly, Hill, and Jones, expressing agreement with Johnson); Barrett v. Chevron, USA, Inc., 752 F.2d 129, 137 (5th Cir. 1985) (panel) (Judge Jolly, dissenting, deploring “stretch[ing] words and logic beyond their reasonable ductility in the name of ‘liberal construction’”); Beer, supra note 4, at 379 n.† (Jones Act jurisprudence so liberal that it has “held the law up to ridicule”); id. at 396 (Robison criticized as a “cosmetic apology”); id. at 398 (Robison “a classic example of . . . eager judicial legislation”); id. at 414 (“current judicial definitions of seaman’s status are a travesty that have tarnished the very forums in which the Jones Act is sought to be enforced”); Engerrand, supra note 17 (passim).

See generally Robertson, supra note 3, at 4-11.

See supra text accompanying notes 18-20.

See Robertson, supra note 3, at 11-16.
be examined here. Third, a movement developed to narrow the "identifiable fleet" concept so as to exclude workers like harbor and river pilots from the seamen's remedies. Fourth, some members of the Fifth Circuit became committed to what has been called "the Pizzitolo heresy." In this subsection we will address the developments that set the stage for Wilander, the recent "fleet" cases, and the rise and fall of Pizzitolo.

1. Rejecting the Aid-of-Navigation Requirement

As indicated above, the language (but not the results) of the Supreme Court's seaman status decisions prior to Wilander supported the argument that a worker must have navigational duties in order to be classified as a seaman. In 1979 the Court of Appeals for the Third Circuit held that to achieve seaman status "a maritime worker who does not actually go to sea . . . must establish that he performed significant navigational functions." Five years later the Seventh Circuit decided that seaman status required a showing that "the person injured made a significant contribution to the . . . transportation function of the vessel." These two decisions provided powerful ammunition for the Fifth Circuit judges and lawyers who were eager to see the aid-of-navigation test adopted in replacement of Robison's "contribution to vessel's function or mission" standard.

After a divided panel awarded seaman status to an offshore welder in Barrett v. Chevron, USA, the Fifth Circuit granted en banc rehearing and specifically directed counsel to brief and argue the aid-of-navigation

76. Judge Rubin wrote two important opinions on the issue of defining "vessels" for Jones Act purposes. Barger v. Petroleum Helicopters, 692 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 958, 103 S. Ct. 2430 (1983), held that a helicopter pilot is not a seaman—i.e., not a "member of a crew of any vessel"—because a helicopter is not a vessel. Ward v. Director, Office of Workers' Comp. Programs, 684 F.2d 1114 (5th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S. Ct. 815 (1983), held that the survivors of the pilot of a fish spotter airplane were entitled to benefits under the LHWCA because an airplane is not a vessel. In his dissent in Barger Judge Brown claimed that Judge Rubin's opinion in Guidry v. South La. Contractors, 614 F.2d 447 (5th Cir. 1980), had treated the "elevated boom of a large dragline" as a vessel. Barger, 692 F.2d at 342 n.3 (Brown, J., dissenting). The claim is fanciful; the vessel that sufficed for seaman status in Guidry was "a barge that carried a large dragline." Guidry, 614 F.2d at 450.
77. See supra text accompanying notes 30-32.
78. See generally Robertson, supra note 3, at 16-22.
79. Id. at 22.
82. 752 F.2d 129 (5th Cir. 1985), rev'd, 781 F.2d 1067 (5th Cir. 1986) (en banc).
The en banc court eventually reversed the panel decision by a vote of eight to six. Four judges who joined in the majority opinion would have adopted the aid-of-navigation requirement. The other four members of the majority approved the basic thrust of Robison but narrowed the coverage of the Jones Act somewhat by requiring most workers seeking seaman status to satisfy the Robison criteria during an entire period of employment with the current employer. Joined by five other judges, Judge Rubin wrote a vigorous dissenting opinion in Barrett. He objected to the en banc majority’s narrowing of Jones Act coverage as a “profound change in the rights of offshore maritime workers,” defended the Robison criteria, and stressed the importance of the affected worker’s exposure “to the perils of the sea” as well as “the nature of his duties during [his assignment to a vessel] and the relationship of those duties to the mission of the vessel.”

Judge Rubin’s Barrett dissent is cut from the same cloth as his opinion in Porche. I should emphasize that in neither opinion was Judge Rubin calling for abandoning doctrinal controls on access to seaman status. When the Robison criteria could not honestly be construed

83. The Fifth Circuit Clerk wrote to Barrett counsel soliciting amicus briefs from the Louisiana Association of Defense Counsel and the Louisiana Trial Lawyers Association and directing specific attention to the following questions: “What, if anything, should be done to reduce the uncertainties that have evolved from the application of some portions of the Offshore v. Robison test? Consider the following areas in addition to any others that you may wish to include: (1) How can ‘permanent’, in the ‘more or less permanent’ attachment to a vessel or fleet of vessels prong of the test, be given more substance? (2) Should we reconsider the definition of ‘fleet of vessels’ in the same prong of the test? (3) Can the definition of ‘substantial portion of his work on the vessel’ prong of the test be given more substance and content?” Letter from G. Ganucheau, Clerk of the Fifth Circuit, to All Counsel of Record, Barrett v. Chevron (April 9, 1985) (copy on file with the author). In response to the court’s solicitation of amicus briefs, I filed one on my own behalf, arguing against the aid-of-navigation requirement.

84. Barrett v. Chevron, USA, Inc., 781 F.2d 1067 (5th Cir. 1986) (en banc).
85. See id. at 1076 (Judges Gee, Jolly, Hill, and Jones concurring).
86. Judges Davis, Clark, Higginbotham, and Randall.
87. The requirement need not be met if “the employee’s permanent job assignment during his term of employment has changed.” Id. at 1075.
88. Id.
89. Judges Reavley, Politz, Tate, Johnson, and Williams. Because Fifth Circuit judges on senior status do not participate in en banc decisions unless they were members of the panel, neither Judge Wisdom nor Judge Brown participated in Barrett. Had they done so, probably Judge Rubin’s dissenting opinion would have been the majority opinion.
90. Id. at 1076-79.
91. Id. at 1076.
92. Id.
93. Id. at 1077.
94. See supra note 45. It makes the troublesome portion of his Munguia opinion even more puzzling. See supra note 62.
to admit a worker to seaman status, Judge Rubin would readily hold that the worker was confined to the LHWCA remedies regardless of exposure to perils of the sea. Thus, he held that neither fish spotter airplane pilots nor the pilots of the helicopters that have replaced crew boats in many places were seamen. Similarly, he would not treat as a seaman a worker who sandblasted and painted a "conglomeration" of vessels and stationary offshore platforms but who could not demonstrate an adequate connection with any one vessel or with anything Judge Rubin could bring himself to call a fleet. What Judge Rubin opposed was not doctrinal controls but "inflexible" doctrinal controls. In his view the Barrett majority's new rule requiring a more or less permanent connection with a vessel or fleet during the worker's entire period of employment with the current employer was both "inflexible and contrary to the rationale underlying Robison." Of course, the aid-of-navigation test favored by some members of the court would have been even more of an inflexible departure from the Robison approach.

As indicated above, only four members of the Barrett en banc court favored the aid-of-navigation test; ten judges (Judge Rubin and the other five dissenters, together with four of the eight judges who made up the Barrett majority) opposed it. But despite the lopsidedness of the vote, Barrett did not put the aid-of-navigation debate to rest. In Barrett itself, Judge Gee—writing for the judges who wanted to adopt the aid-of-navigation requirement—stressed the conflict between the Fifth and Seventh Circuits and the division within the Fifth Circuit in such a way as seemingly to call on the Supreme Court to grant certiorari on the issue. Three years later the Fifth Circuit granted rehearing en banc in Legros v. Panther Services Group—a decision in which the panel had not even remotely touched on the aid-of-navigation issue—and again directed counsel to brief the issue "whether this circuit should adopt a navigational-function test of seaman status in addition to or substitution for the Robison standard." Legros was compromised and settled by the parties before the court issued an en banc decision. Finally, Judge

99. Id. at 1076.
100. Id. at 1076.
101. 863 F.2d 345 (5th Cir. 1988), reh'g granted, (1989) (en banc), appeal dismissed, 874 F.2d 953 (5th Cir. 1989).
102. 863 F.2d at 355. I filed an amicus brief on my own behalf, arguing against the aid-of-navigation test.
Gee wrote the panel opinion in the Wilander case—upholding seaman status—in such a way as to reemphasize the inter-circuit and intra-circuit conflict on the aid-of-navigation issue; he all but explicitly called on the Supreme Court to grant certiorari and reverse his decision.103 As we have seen, the Court heeded the call for certiorari but took a dim view of the Seventh Circuit approach Judge Gee had been extolling. Instead, the Court unanimously affirmed the Robison approach and endorsed the views of judges like Rubin who, in his Barrett dissent as in Porche, had argued for the wisdom of keeping the seaman status doctrine flexible enough to reflect the realities of the affected workers' exposure to nautical dangers.

2. The "Fleet" Cases

The principal function of the body of seaman status doctrine developed by the courts is to draw the "unavoidably" fairly delicate line between Jones Act seamen—vessel workers whose duties expose them to the characteristic seamen's dangers—and LHWCA workers—land-based workers like longshoremen whose duties involve vessels but who do not have a significant exposure to vessel-movement dangers or to the perils of the sea."105 Obviously drawing that line became trickier after the Braniff decision expanded Robison to allow seaman status on the basis of a sufficient work-connection with an "identifiable fleet" of vessels.106 But for more than two decades the courts managed well enough, through insistence that an "identifiable fleet" had to be defined as a finite group of vessels under "common ownership or control."107 The "common ownership or control" requirement served to keep traditional longshoremen and similarly situated workers—workers whose duties typically take them aboard large numbers of vessels for short periods of work—from routinely claiming seaman status.

The identifiable fleet concept became seriously controversial in 1983, when a Fifth Circuit panel handed down its decision in Bertrand v. International Mooring & Marine, Inc.108 The four plaintiffs were an anchor-handling crew, specialists in handling the heavy anchors and facilitating the movement of offshore drilling barges. They performed

104. See supra text accompanying note 5.
105. Robertson, supra note 3, at 17 (footnotes omitted).
106. See supra text accompanying notes 30-32. See also A New Approach, supra note 3, at 97-99, 109-12.
all of their work on specially equipped work boats at sea and were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work." Despite the workers' continual exposure to the characteristic seamen's dangers, the trial judge granted summary judgment denying seaman status because the workers could not show a Robison connection with a single identifiable vessel nor with an identifiable fleet of vessels. The work boats that the anchor handlers always used to do their work were not under "common ownership or control" because the handlers' employer did not own or charter any workboats; instead their employer required the operator of each drilling barge it contracted with to furnish a properly equipped work boat for the particular job. The plaintiffs had worked on approximately twenty-five different vessels during the year before the accident.

Reversing and holding that a jury could properly find that the Bertrand plaintiffs were seamen, the Fifth Circuit repeatedly emphasized that the workers were "continuously subjected to the perils of the sea like blue water seamen." In light of that overwhelmingly powerful fact, the "Bertrand result seems unassailable." But the court's reasoning created problems. No one was quite sure what the Bertrand decision had done to the "identifiable fleet" concept. Three years after Bertrand was handed down the en banc Fifth Circuit convened in Barrett to consider "[w]hat, if anything, should be done to reduce the uncertainties that have evolved from the application of some portions of the Offshore [Co.] v. Robison test." Bertrand was easily the most controversial of the recent liberal applications of Robison, so that it was quite surprising that the Barrett majority ultimately decided to sidestep the Bertrand problem. The Barrett majority reiterated the significance of the old "common ownership or control" requirement:

By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the

110. See the explanation in A New Approach, supra note 3, at 109 & n.170.
111. See Bertrand, 517 F. Supp. at 346.
112. Bertrand, 700 F.2d at 240, 245 (quoting the trial judge, 517 F. Supp. at 348).
113. A New Approach, supra note 3, at 110. It should be acknowledged that the author of A New Approach had earlier been lead appellate counsel for the Bertrand plaintiffs.
114. Compare A New Approach, supra note 3, at 107-12, with Engerrand, supra note 17, at 489-90. See also Robertson, supra note 3, at 18-19.
115. See supra note 83.
116. See supra note 114. See also Buras v. Commercial Testing & Eng’g Co., 736 F.2d 307, 311 n.4 (5th Cir. 1984).
fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.\textsuperscript{117}

Of course, Bertrand was causing a problem precisely because it seemed to have based seaman status on the anchor handlers’ connection with a “fleet” that was not “acting together or under one control.” The Barrett majority alluded to that problem but did nothing to solve it:

We do not decide whether the same principle governs the crew-member status of the maritime worker who spends virtually all of his time performing traditional seaman’s duties—work closely related to the movement of vessels—but does his work on short voyages aboard a large number of vessels. [Citing Bertrand.] Bertrand and his fellow anchor handlers are good examples of this type worker.\textsuperscript{118}

Judge Rubin’s dissenting opinion in Barrett did not sidestep the Bertrand problem. Judge Rubin began by reiterating the theme he had sounded in Porche:\textsuperscript{119} The vessel-connection or fleet-connection requirement must be applied flexibly, taking into account the particular worker’s exposure to the “perils of the sea”\textsuperscript{120} as well as “the transitory duration or fixed term of the [worker’s] assignment [to a vessel], the nature of his duties during it, and the relationship of those duties to the mission of the vessel.”\textsuperscript{121} In his view an appropriate balancing of those considerations validated the Bertrand decision and indicated the correct result in similar cases:

Thus a fact finder might find that an anchor handler who is assigned to work on a specific vessel for a period of days is a crew member during that assignment. A worker may also be assigned to work as a crew member for a series of voyages of limited duration. A fact finder might, therefore, find that a person working as a pilot on a series of short voyages is a crew member on one or more voyages. An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the Robison test is applicable in deciding the worker’s status during any such employment.\textsuperscript{122}

We have seen that the Supreme Court’s Wilander decision endorses a similar policy-oriented approach to applying seaman status doctrine.\textsuperscript{123}

\textsuperscript{117}. Barrett v. Chevron, USA, Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc).
\textsuperscript{118}. Id. at 1075 n.13.
\textsuperscript{119}. See supra note 45.
\textsuperscript{120}. Barrett, 781 F.2d at 1076.
\textsuperscript{121}. Id. at 1077.
\textsuperscript{122}. Id.
\textsuperscript{123}. See supra text accompanying notes 56-69.
The portion of the *Wilander* opinion identifying exposure to "the special hazards" and "particular perils" characteristic of seamen's work as the policy touchstone of "the protection of maritime law, statutory as well as decisional"[124] implies agreement with the policy views of Judge Rubin. That portion of *Wilander* also suggests that the Court would agree with Judge Rubin that the *Bertrand* anchor handlers—"continuously subjected to the perils of the sea like blue water seamen and ... engaged in classical seaman's work"[125]—were properly characterized as Jones Act seamen.

The *Wilander* Court's statement of Jones Act policy also suggests that Judge Rubin's *Barrett* dissent was right in stating that pilots should be treated as seamen. On that view the recent Fifth Circuit decision in *Bach v. Trident Steamship Co.*[126] is a startling phenomenon. In *Bach* a divided panel—Judge Brown vigorously dissenting—held that a Mississippi River pilot lacked seaman status because the many vessels he piloted were not an "identifiable group of vessels acting together or under one control."[127] The original panel opinion in *Bach*—issued before the Supreme Court's *Wilander* decision—does not explicitly mention *Bertrand*,[128] but the effect of *Bach* is to overrule *Bertrand* or at least to limit it narrowly to its particular facts.[129] Even more surprising was the *Bach* court's casual treatment of the dangerous nautical realities of a pilot's work. The court began by acknowledging that a marine pilot regularly confronts the characteristic seamen's dangers:

Bach's case for seaman status has considerable intuitive appeal for two reasons: (i) his entire job was to perform an archetypical seaman function, the steering of an oceangoing vessel through navigable waters; and (ii) in performing his job, Bach regularly

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127. *Bach*, 920 F.2d at 324 (quoting *Barrett* v. Chevron, USA, Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc)).
128. The *Bach* opinion quotes the first sentence of the *Barrett* footnote that explicitly questions whether the *Barrett* "principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties—work closely related to the movement of vessels—but does his work on short voyages aboard a large number of vessels." 920 F.2d at 324 (quoting *Barrett*, 781 F.2d at 1075 n.13). The second sentence of the *Barrett* footnote had identified *Bertrand* as the source of the puzzle. Note that Judge Eugene Davis authored both the majority *Barrett* opinion and the opinion in *Bach*.
faced many of the hazards of life on the sea and the risks created by moving vessels through navigable waters.\footnote{Bach, 920 F.2d at 324.} But, said the court, that was not good enough: “Although some of our seaman status cases discuss the perils of the sea that the worker faces, we have never held that seaman status is coextensive with exposure to seamen’s risks.”\footnote{Id. at 325.} In the aftermath of \textit{Wilander}, the Supreme Court summarily vacated the original \textit{Bach} decision and remanded the case for further consideration in light of its \textit{Wilander} decision. But the Fifth Circuit panel—Judge Brown again dissenting—reaffirmed its earlier view, stating that “the rule announced by the Supreme Court in \textit{Wilander} has no effect on our earlier conclusion.”\footnote{\textit{Bach}, 947 F.2d at 1291. The Supreme Court has denied certiorari. 112 S. Ct. 1996 (1992).}

\textit{Bach} seems a deplorable example of doctrinal rigidity. The court’s dismissal of the relevance of \textit{Wilander} entails a remarkably narrow reading of that decision. Even more telling is the court’s “intuitive appeal” language. The implication, of course, is that legal doctrine is substantial and solid whereas human intuition is not to be trusted.\footnote{Leon Green and many of the other American legal realists must be spinning in their graves. See generally David Robertson, The Legal Philosophy of Leon Green, 56 Tex. L. Rev. 393 (1978).} But what the \textit{Bach} opinion seeks to denigrate as “intuitive appeal” is in fact the obvious appeal of clear national policy: the doctrines designed by Congress and the courts to protect seamen against the dangers characteristic of seamen’s work ought to be construed to cover workers who regularly confront those dangers. This was the view of Judge Rubin; it is the view of Judges Brown and Wisdom; and it seems to be the current view of the Supreme Court.\footnote{But see supra note 132.}

\textbf{3. The Rise and Fall of Pizzitolo}

As indicated above, the judges in the Fifth Circuit who came to deplore the breadth of Jones Act coverage under \textit{Robison} developed a number of doctrinal responses. The strangest thus far was the short-lived doctrine of \textit{Pizzitolo v. Electro-Coal Transfer Corp.}\footnote{812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1959, 108 S. Ct. 1013 (1988). Judge Davis, the author of the \textit{Barrett} en banc majority opinion and of \textit{Bach}, also wrote \textit{Pizzitolo}.} \textit{Pizzitolo} has been extensively discussed elsewhere;\footnote{See Robertson, supra note 3, at 22-26; Note, The Jones Act Seaman—An Endangered Species, 12 Tul. Mar. L.J. 385 (1988). See also infra note 139.} for present purposes it is
enough to know that it held that any worker whose occupation is “enumerated” among the list of covered occupations in the LHWCA is ipso facto “ineligible” for Jones Act coverage. Some defense-minded law review writers found ways to praise Pizzitolo, but its reasoning was wrong in a very obvious way: The LHWCA list of covered occupations is qualified by the explicit exclusion of a “master or member of a crew of any vessel.” Therefore, before one can conclude that a worker is covered by the LHWCA (and therefore not the Jones Act), one must not only determine that his occupation is “enumerated” but also that the nature of his work did not qualify him a “master or member of a crew of any vessel.” Making the latter determination requires applying the Robison (or some newly devised) set of criteria for determining when a worker qualifies as a member of a crew of a vessel. Pizzitolo did not devise new criteria for making that determination; instead it purported to deal with the troublesome “master or member of a crew of any vessel” language simply by ignoring it.

The Supreme Court’s brand-new unanimous decision in Southwest Marine, Inc. v. Gizoni has flatly disapproved the Pizzitolo doctrine, concluding:

[The term “employee”, as defined in the LHWCA, does not include “a master or member of a crew of any vessel. . . . [It is] therefore plainly wrong [to hold] that, as a matter of law, the LHWCA provide[s] the exclusive remedy for all harbor workers. That cannot be the case if the LHWCA and its exclusionary provision do not apply to a harbor worker who is also a “member of a crew of any vessel” . . . .]

[It is argued] in line with Fifth Circuit precedent, that [seaman

137. The Pizzitolo decision is limited to workers injured within the geographical coverage of the LHWCA. See Pizzitolo, 812 F.2d at 983.
138. “In sum, we hold that because longshoremen, shipbuilders, and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they meet the Act’s situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act.” Id.
141. See supra text accompanying notes 18-20.
142. Justice Thomas did not participate.
144. Id. at 491 (citations and footnote omitted) (emphasis in original).
145. As is discussed below, Judge Rubin’s opinion in the Legros case demolished any persuasiveness Pizzitolo might have had. But that opinion was vacated by the grant of
status] may always be [denied] as a matter of law if the claimant’s job fits within one of the enumerated occupations defining the term “employee” covered by the LHWCA. However, this argument ignores the fact that some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA. . . . While in some cases a ship repairman [or other worker holding one of the LHWCA enumerated occupations] may lack the requisite connection to a vessel in navigation to qualify for seaman status, not all ship repairmen lack the requisite connection as a matter of law. This is so because “[i]t is not the employee’s particular job that is determinative, but the employee’s connection to a vessel.” [citing Wilander] By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard [or hold one of the other enumerated occupations]. A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.146

Judge Rubin would have been gratified by the Supreme Court’s Gizoni decision. Shortly after Pizzitolo was handed down he suggested that the Pizzitolo reasoning was questionable inasmuch as the LHWCA provision setting forth the “enumerated” covered occupations also contains the language expressly “excluding a master or member of a crew of any vessel.”147 About a year later he took dead aim at the Pizzitolo reasoning. The worker seeking seaman status in Legros v. Panther Services Group, Inc.148 did odd jobs—“chipping, painting, repairing, inspecting, and on occasion moving”149 a group of construction barges operated by his employer. For a divided panel150 Judge Rubin decisively rejected the argument that, as a “ship repairman,” Legros was automatically excluded from seaman status under Pizzitolo:

146. Id. at 492 (some citations omitted).
149. Id. at 346.
150. Judge Wisdom joined Judge Rubin’s opinion in Legros. Judge Edith Jones, who had been a member of the Pizzitolo panel, filed a bitter dissent charging Judge Rubin with an “extraordinary [breach of] the integrity of our circuit’s law.” Id. at 353.
Before Pizzitolo, when faced with the question whether an employee was covered under the LHWCA or the Jones Act, our analysis, like that of other circuits, did not focus on the occupations listed in the LHWCA, but on the language of the exception—"member of a crew of a vessel"—and we applied the Robison test to determine coverage under the Jones Act or general maritime law.

... The method of analysis utilized in Pizzitolo cannot be reconciled with the method used in our earlier Robison line of cases.

... Neither the text nor the legislative history of the . . . LHWCA requires this circuit to reconsider its application of the Robison test to determine the status of workers who might arguably be either seamen or shore-bound. If the classification of a worker as a shipbuilder, longshoreman, or ship repairman automatically precluded his having seaman's status, it would have been unnecessary for the LHWCA to except . . . crew members.151

Presumably because of the conflict152 between the panel decisions in Pizzitolo and Legros,153 the Fifth Circuit granted rehearing en banc in Legros, but the case was settled before an en banc decision could issue. The grant of rehearing en banc had the effect of vacating Judge Rubin's opinion for the panel. Nevertheless, experienced district judges were ready to follow Legros, considering that it had "implicitly overruled" Pizzitolo.154 The Supreme Court's Gizoni decision has now put the matter to rest. On reasoning virtually identical to Judge Rubin's Legros opinion the Court has dubbed the Pizzitolo theory "plainly wrong."155 After a thirty-three year silence on the seaman status debate,156 the supposedly ultra-conservative Supreme Court of the 1990s has thus rung in the decade with two unanimous decisions upholding broad Jones Act coverage and substantially reflecting the views so ably upheld for so many years by Judges Wisdom, Brown, and Rubin.

151. Id. at 349-50 (footnotes omitted) (emphasis supplied).
152. But see supra text accompanying note 102.
153. To avoid the Fifth Circuit rule that one panel opinion cannot overrule another, Judge Rubin was careful to say in Legros that the Pizzitolo result was correct. Nevertheless, Judge Jones (dissenting in Legros) took him heavily to task for having violated the spirit of that rule. Legros, 863 F.2d at 353-54. Judge Rubin responded that "the precept . . . applies more aptly to Pizzitolo [in its conflict with Robison] than to this opinion." Id. at 349.
156. See supra text accompanying note 21.
II. SOME PROBLEMS WITH THE LHWCA

A. Coverage

As indicated throughout Part I of this article, an injured worker seeking compensation under the LHWCA must establish that he was not a seaman, i.e., not "a master or member of a crew of any vessel." As the Act stood immediately before the extensive revision that occurred in 1972, the only other significant coverage restriction was a provision limiting LHWCA relief to injuries occurring on the "navigable waters of the United States (including any dry dock)."

Under the Act as amended in 1972, the crew member exclusion is retained, and there are two other principal coverage requirements. First, the injury must have occurred "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, dismantling, or building a vessel)." Second, the injured worker must have been a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. . . ." The foregoing two requirements—generally known as the "situs" and "status" requirements—are necessary for the application of the LHWCA of its own force. In addition, some workers have access to LHWCA benefits through the operation of the Outer Continental Shelf Lands Act (OCSLA), which provides:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for,
IN MEMORIAM: ALVIN B. RUBIN

developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers’ Compensation Act.164

Judge Rubin’s opinions made important contributions to the development and clarification of two issues raised by the quoted provisions.165 The first involved whether a worker injured on “actual navigable waters”166 under circumstances that would have given rise to coverage under the pre-1972 version of the LHWCA must meet the new Act’s “status” requirements, i.e., show that he was a “person engaged in maritime employment” under the definition quoted above. In its en banc decision in Boudreaux v. American Workover, Inc.167 the Fifth Circuit gave a negative indication. Boudreaux held that a worker hurt while engaged in his regular duties on a barge afloat in navigable water met the LHWCA’s situs and status tests; the court reasoned that Congress did not intend to remove such persons from coverage when it amended the Act to add the “maritime employment” requirement in 1972. Following up on Boudreaux, Judge Rubin’s decision in Ward v. Director, Office of Workers’ Compensation Programs168 held that the pilot of a fish spotter airplane that crashed in navigable waters was covered by the LHWCA. Judge Rubin succinctly explained the meaning of Boudreaux: “[A]n employee injured in the regular course of his employment on the navigable waters of the United States automatically meets both the status and situs tests.”169 Shortly thereafter the Supreme Court’s decision in Director, Office of Workers’ Compensation Programs v. Perini North River Associates170 proclaimed the identical proposition.

165. The dictum in Aparicio v. Swan Lake, 643 F.2d 1109, 1117 n.14 (5th Cir. Unit A Apr. 1981), to the effect that the LHWCA term “navigable waters of the United States” is confined to territorial waters, might be cited as a third contribution by Judge Rubin to questions of LHWCA coverage. However, the better view on that specific question seems to be otherwise. See Reynolds v. Ingalls Shipbuilding Div., 788 F.2d 264, 268-72 (5th Cir. 1986); Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38 (2d Cir. 1982). (The more important aspect of Aparicio is discussed infra at notes 189-98.).
166. See Director, Office of Workers’ Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 299 & n.2, 103 S. Ct. 634, 637 & n.2 (1983) (using the expression “actual navigable waters” to “describe the covered situs as it existed in the 1927 LHWCA: ‘Navigable waters of the United States (including any dry dock).’”).
169. Id. at 1116.
The other coverage issue in which Judge Rubin played a significant role involved the Outer Continental Shelf Lands Act (OCSLA) extension of the LHWCA. By its terms that provision extends the benefits of the LHWCA to workers injured "as the result of [oil and gas] operations conducted on the outer Continental Shelf." Note that it does not state that the injury must occur on the shelf. In light of the provision's clear language Judge Rubin joined Judge Duhe's panel opinion in Mills v. Director, Office of Workers' Compensation Programs, upholding coverage for a worker hurt ashore while building a platform destined for outer continental shelf operations. When the en banc Fifth Circuit determined (by a margin of nine to five) to reverse and hold that—despite its language—the OCSLA provision does require that the injury occur on the shelf, Judge Rubin joined the dissent, stating that he adhered to the views expressed in Judge Duhe's panel opinion. The essence of that opinion was that the OCSLA provision means what it says. Under the en banc holding in Mills, it no longer does.

B. Tort Actions On Behalf of LHWCA Workers

By its terms the original LHWCA made workers' compensation benefits the covered workers' exclusive remedy against their employers. The Act was silent as to these workers' tort rights against non-employer entities. In the two decades following World War II a series of Supreme Court decisions created a structure of remedies and obligations that seemed quite different from that contemplated by the Act.

First, Seas Shipping Co. v. Sieracki held that some longshore and harbor workers—who were not seamen but who were considered to be engaged in work historically done by seamen—could sue non-employer vessels for unseaworthiness. (The relevant law defines "vessel" to include the vessel and its "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." In the remainder of this discussion, I will use the term vessel in the same broad way.)

The second major development occurred in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., in which the Court held that when the

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171. See supra text accompanying note 164.
172. 846 F.2d 1013 (5th Cir. 1988), rev'd, 877 F.2d 356 (5th Cir. 1989) (en banc).
173. Judge Duhe wrote a two-page dissenting opinion, joined by Judges Politz and Williams. Mills, 877 F.2d at 362-64. In a separate one-sentence dissenting opinion Judges Rubin and Johnson merely said they agreed with the panel opinion. Id. at 364.
175. 328 U.S. 85, 66 S. Ct. 872 (1946).
unseaworthy condition giving rise to the non-employer vessel's liability to the longshore worker was caused, created, or brought into play by the injured worker's employer, the vessel was entitled to full indemnity from the employer for breaching an express or implied warranty to perform the longshoring operations in a reasonably safe manner. Of course, Ryan meant that the LHWCA provision making workers' compensation benefits the workers' exclusive remedy against their employers was effectively negated. The recurrent waterfront situation whereby the injured longshore worker recovered in tort from the vessel on the basis of unseaworthiness and the vessel in turn recovered over against the employer on the basis of the warranty of workmanlike performance came to be known as the "Ryan triangle."

Finally, Reed v. The Yaka\textsuperscript{178} held that a LHWCA worker who was directly employed by the vessel could sue the employer/vessel for unseaworthiness. Reed in effect demonstrated that the Court was committed to the Sieracki-Ryan structure and could stare the LHWCA's exclusive remedy provision in the face without flinching. "The effect of the Yaka rule was to place the maritime worker hired directly by the vessel in the same position, insofar as his claim against the vessel was concerned, as the maritime worker who was engaged indirectly, through an independent contractor."\textsuperscript{179}

In 1972 Congress swept away most of the Sieracki-Ryan-Yaka structure. One finds the three key provisions scattered throughout section 905(b) of the new Act. First, section 905(b) provides that covered workers have no cause of action for unseaworthiness but can sue non-employer vessels for negligence.\textsuperscript{180} Second, it states that vessels held liable to covered workers for negligence cannot recover over against the workers' employers.\textsuperscript{181} Finally, it includes two troublesome sentences designed to deal with the Yaka situation, i.e., LHWCA workers who are directly employed by a vessel. Of course, these workers—like those in the more typical situation of employment by an independent contractor—can no longer sue for unseaworthiness. But inasmuch as a LHWCA worker can sue a non-employer vessel for negligence, should an otherwise identically

\textsuperscript{178} 373 U.S. 410, 83 S. Ct. 1349 (1963).
\textsuperscript{179} Maraist, supra note 14, at 255.
\textsuperscript{180} "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel . . . ." 33 U.S.C. § 905(b) (1988).
\textsuperscript{181} "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." Id.
situated worker who is directly employed by the vessel not also have a negligence remedy against the vessel/employer? Section 905(b) answers as follows:

If such person [a person covered under the LHWCA] was [directly] employed by the vessel to perform stevedoring services, no such action [for vessel negligence] shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.182

The 1972 (and subsequent183) amendments to the LHWCA have presented the courts with many interesting questions. In the remainder of this section we will discuss four issues as to which Judge Rubin's decisions have played a major role: (a) Which maritime workers retain the right to sue vessels for unseaworthiness? (b) What are the contours and limits of the new184 negligence remedy? (This issue has both a substantive component, treated below in subsection II-B-2, and a jurisdictional component, discussed in subsection II-B-3.) (c) When a LHWCA worker is injured through a combination of the vessel's and his employer's negligence, how does the employer's negligence affect the worker's rights against the vessel? (d) When can LHWCA workers who are directly employed by vessels succeed in tort against the employer/vessel?

1. Who Can Sue for Unseaworthiness?

Before Sieracki, only seamen could sue for personal injuries caused by unseaworthiness. The Sieracki decision extended the unseaworthiness

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182. Id. Note that the first quoted sentence deals with longshoremen and the second with shipyard workers. As originally enacted in 1972 these two sentences of § 905(b) treated directly employed longshoremen and directly employed shipyard workers alike. The second sentence quoted in the text was added by 1984 amendment. Before the amendment that sentence read as follows: "If such person was [directly] employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel." 33 U.S.C. § 905(b) (1972) (amended 1984).

183. Further major changes were made in 1984. See, e.g., supra note 182.

184. Before 1972 workers entitled under Sieracki, supra note 175, to sue vessels for unseaworthiness could also have sued for negligence. But the strict liability action for unseaworthiness was so broad and powerful that the courts never had occasion to discuss the nature of vessel negligence in this context.
cause of action to all maritime workers aboard the vessel doing work that had historically been done by members of the vessel’s crew. Such workers came to be called “Sieracki seamen.” Section 905(b) of the 1972 LHWCA takes the unseaworthiness action away from “any person covered under” the LHWCA. A problem arises because the class of Sieracki seamen was broader than the class of workers covered by the LHWCA. Do Sieracki seamen who are not covered by the LHWCA retain the cause of action for unseaworthiness?

Some courts outside the Fifth Circuit have held no, taking the bold view that, despite the restrictive language of the new section 905(b), the 1972 Congress plainly “intended to eliminate the longshoremen’s action for unseaworthiness not only with respect to those longshoremen covered by the Act, but for other longshoremen whose rights were judicially created.” A distinguished scholarly commentator describes this result as “[t]he majority, and perhaps the better view.” But the better view is rather plainly to the contrary, as Judge Rubin explained in Aparicio v. Swan Lake.

The workers seeking to maintain unseaworthiness actions in Aparicio were four Panama Canal linehandlers. Because their work was of the sort historically done by crew members, they easily qualified as Sieracki seamen. As a vessel negotiating the canal would approach a lock, “[t]he linehandlers [would] board the vessel . . . and fasten a cable to the vessel attached to the electric locomotives called ‘mules’ which tow the vessel through the lock.” These men were not “true” seamen, because they were “not more or less permanently assigned to a particular vessel or to a specific fleet of vessels but instead perform[ed] duties aboard any vessel that happen[ed] to be navigating the Canal.” Nor were they covered by the LHWCA; they worked for the Panama Canal Company, an agency of the United States, and were thereby excluded from LHWCA coverage. Judge Rubin concluded that the LHWCA should be read the way Congress wrote it:

186. See Maraist, supra note 14, at 249-50.
187. Normile v. Maritime Co. of the Phil., 643 F.2d 1380, 1383 (9th Cir. 1981) (citing legislative history).
188. Maraist, supra note 14, at 250.
189. 643 F.2d 1109 (5th Cir. 1981). In addition to its importance as an admiralty case, Aparicio has also been widely cited on an arcane point of federal appellate procedure. See, e.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147, 160, 104 S. Ct. 1723, 1730 (1984) (Stevens, J., dissenting).
190. Aparicio, 643 F.2d at 1114 n.7.
191. Id.
192. “No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof. . . .” 33 U.S.C. § 903(b)
Literally read, Section 905(b), which Congress enacted to abolish the Sieracki remedy, does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the coverage of the LHWCA. We refuse to read into it the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA. . . .

Thus, Judge Rubin held: ""[I]f the harbor worker is not covered by the LHWCA, the Sieracki cause of action and the concomitant indemnification action afforded the vessel owner [under Ryan] are both still seaworthy."" 194

The narrow holding of Aparicio was limited to federally employed longshore and harbor workers, but its reasoning extended to all workers covered by Sieracki but not by the LHWCA. Unfortunately, three subsequent panel decisions of the Fifth Circuit have rejected much of Judge Rubin's Aparicio reasoning by holding that a true seaman—a member of the crew of vessel A—who is hurt while temporarily working aboard vessel B cannot sue vessel B for unseaworthiness. 195 These departures from the straightforward approach of Aparicio are unfortunate. From the beginning Congress has specifically excluded "a member of a crew of any vessel" 196 from LHWCA coverage, and the provision restricting the unseaworthiness remedy by its terms applies only to covered workers. 197 None of the questionable decisions offers any satisfactory explanation for concluding that a worker who is concededly "a member of a crew of any vessel"—vessel A—has lost his right to sue vessel B for unseaworthiness because of a statutory provision that by its plain terms does not cover him.

In light of the three panel decisions discussed above, Aparicio presumably now stands for the proposition that workers excluded from LHWCA coverage on any basis other than seamen status still have whatever unseaworthiness rights they had before the 1972 amendments to the LHWCA. Seamen, though, have lost some rights by reason of

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193. Aparicio, 643 F.2d at 1116.
194. Id. at 1110.
197. See supra text accompanying notes 185 and 193.
a statute that purports to exclude them. This is a strange state of affairs. One cannot help regretting that the court did not grant en banc rehearing in one of those cases while Judge Rubin was here to help straighten it out.\textsuperscript{198}

2. \textit{The Vessel's Duties Under Section 905(b)}

Section 905(b) limits vessels\textsuperscript{199} tort exposure to LHWCA workers to "negligence" liability without defining the term.\textsuperscript{200} In early decisions under the 1972 Act courts therefore looked to the legislative history,\textsuperscript{201} where they found conflicting indications. One set of indications\textsuperscript{202} pointed toward giving LHWCA workers the broad, simple negligence remedy described as part of the general maritime law by the well-known Supreme Court decision in \textit{Kermarec v. Compagnie Generale Transatlantique}.\textsuperscript{203} Under that approach the vessel would owe the LHWCA worker a general duty of reasonable care under the circumstances, with no particularized doctrinal limitations. The conflicting indications in the legislative history pointed toward limiting the vessel's duty by analogy to limitations that had developed in the tort law of some states to control the responsibility of a landowner to the employees of an independent contractor engaged to do work on the land.\textsuperscript{204}

\textsuperscript{198} Cf. Barger v. Petroleum Helicopters, Inc., 692 F.2d 337, 340 (5th Cir. 1982), cert. denied, 461 U.S. 958, 103 S. Ct. 2430 (1983) ("We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results") (Rubin, J.) (footnote omitted).

\textsuperscript{199} Recall the broad LHWCA definition of "vessel" being used in this discussion. See supra text accompanying note 176.

\textsuperscript{200} 33 U.S.C. § 905(b) (1988).

\textsuperscript{201} See supra note 184, for an explanation of why no jurisprudence on the meaning of vessel negligence in this context had developed before 1972.

\textsuperscript{202} "[T]he Committee does not intend that the negligence remedy authorized in this bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule of contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." H.R. Rep. No. 1441, 92nd Cong., 2d sess. 8, Serial Set 12974-6 (1972), reprinted in 1972 U.C.C.A.N. at 4705. The Senate Committee Report, S. Rep. No. 1125 (1972), was "in all relevant respects identical." Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 165 n.13, 101 S. Ct. 1614, 1621 n.13 (1981).


\textsuperscript{204} Several times in the House and Senate Committee reports the following thought appears: "[D]isputes as to whether the vessel was negligent in a particular case ... can only be resolved through the application of accepted principles of tort law and the ordinary
The differences between these two broad approaches are many and nuanced, but the single most important difference involves the recurrent situation of an injury on a vessel caused by a dangerous condition that was open and obvious or otherwise known to the injured worker. Under the Kermarec approach, denying recovery because the condition was open and obvious or otherwise known to the worker would be regarded as a de facto application of the assumption of risk defense and therefore inappropriate under general maritime law. But under the land-based approach, courts are led to certain provisions in the Restatement (Second) of Torts stating that recovery for open and obvious dangers should be denied unless the worker can show that the defendant "should [have] anticipate[d] the harm despite such knowledge or obviousness."

The early section 905(b) jurisprudence was murky, with the federal circuits tending to split between the two broad approaches described. Courts in the First, Third, and Ninth Circuits took the Kermarec approach, more or less. Courts in the Second, Fourth, and Fifth Circuits inclined toward the land-based approach. The Fifth Circuit decision

205. The two approaches differ at their core. Kermarec rejected the invitee-licensee distinction as well as the entire land-based law of occupier's liability as "foreign to [admiralty's] traditions of simplicity and practicality." Kermarec, 358 U.S. at 631, 79 S. Ct. at 410. The approach suggested by the land-based analogy embraces the invitee-licensee distinction and the rather complex body of limitations on land occupier liability associated with that distinction. See generally David W. Robertson et al., Cases and Materials on Torts 274-98 (1989).

206. See supra note 202.

207. When a federal court starts looking around for a nationally uniform land-based tort law, it can research the law of the fifty states or it can resort to a summary. Naturally it resorts to a summary, which leads inexorably to the Restatement (Second) of Torts. This is a scholarly treatise, the work of an American Law Institute "reporter" and his advisers, but its format is that of a statute book. Because of the prestige of the American Law Institute and because the treatises it publishes are called restatements and masquerade as volumes of statutes, courts routinely treat them as far more authoritative than any scholarly work (other than the work of the present author) should be treated. The courts thus fail to do their own thinking.

208. Restatement (Second) of Torts § 343A(1) (1985). The full Restatement treatment of this matter appears in §§ 342, 343, and 343A.


210. Id.
in *Gay v. Ocean Transport & Trading, Ltd.*,\textsuperscript{211} taking the land-based road, seemed to long for a middle ground between the two approaches. After quoting the key passages of the legislative history\textsuperscript{212} the court stated:

From these passages and section 905(b) itself we distill the following conclusions:

(1) Congress intends for the federal courts to develop a uniform federal common law to control LHWCA suits against vessels.
(2) That LHWCA federal common law is to be based on negligence concepts; the unseaworthiness of a vessel is not an acceptable ground for relief.
(3) LHWCA negligence law is to be guided primarily by analogy to land-based concepts. The stevedore is to be viewed generally as an independent contractor and its employees as invitees of the vessel owner.
(4) However, certain common land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumption of risk may not be utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied.\textsuperscript{213}

The *Gay* court decided to be "guided primarily by analogy to land-based concepts" but was troubled by the conflict between admiralty's disapproval of the assumed risk defense and the land-based law's sympathy to the "open and obvious" defensive doctrine. Attempting a reconciliation, the court stated that "the obviousness or knowledge of a dangerous condition on certain property does not necessarily relieve the owner of his obligation"\textsuperscript{214} and that it disapproved of "the traditional rule that if a hazard is open and obvious that fact alone absolves the owner of his negligence."\textsuperscript{215} Nevertheless, the court ultimately affirmed a lower court decision denying recovery to an injured longshoreman in major part because of the obviousness of the danger,\textsuperscript{216} and the opinion explicitly states that "we have adopted the formulation of the Restatement (Second) of Torts. . . ."\textsuperscript{217}

Judge Rubin's opinion in *Samuels v. Empresa Lineas Maritimas Argentinas*\textsuperscript{218} began by stating that in *Gay* the Fifth Circuit had "adopted

\textsuperscript{211} 546 F.2d 1233 (5th Cir. 1977).
\textsuperscript{212} See supra notes 202 and 204.
\textsuperscript{213} *Gay*, 546 F.2d at 1237-38.
\textsuperscript{214} Id. at 1241.
\textsuperscript{215} Id. at 1242.
\textsuperscript{216} See id. at 1240.
\textsuperscript{217} Id. at 1242.
\textsuperscript{218} 573 F.2d 884 (5th Cir.), cert. denied, 443 U.S. 915, 99 S. Ct. 3106 (1978).
the rules set forth in the Restatement (Second) of Torts for determining what is negligence under § 905(b)." But he went on to affirm recovery on behalf of a longshoreman who had fallen into a dimly lighted open space behind a ladder leading into a cargo hold. The Samuels opinion states that the danger "would have been open and obvious had the area been well lighted," which it was not, and that while plaintiff's employer and some of the other longshoremen knew of the danger "there was evidence that the plaintiff himself did not know of it, and that it had never been called to his attention." Most important, probably, was the observation that the defendant "withdrew his requested instruction with respect to liability for open and obvious dangers, and the issue [was] not raised on appeal."

When the conflict among the circuits as to the proper approach to determining section 905(b) negligence finally reached the Supreme Court in Scindia Steam Navigation Co. v. De Los Santos, the resulting decision greatly disappointed everyone who had hoped for clarification. Eight members of the Court participated. Justice White's majority opinion, fully joined by only two other justices, sidesteps the much-debated Torts Restatement issue, stating only that the Restatement's provisions, "while not irrelevant, do not furnish sure guidance in cases such as this." The Scindia opinion discusses the vessel's obligations under section 905(b) at some length and is difficult to summarize. (The excellent Admiralty "Nutshell" devotes four full pages to parsing Scindia.) It is sufficiently equivocal that three justices specially concurred on the general view that the Court had adopted a slightly modified Kermarec approach while two others specially concurred on the opposing view that the Court had upheld the land-based limitations crystallized in the Torts Restatement. Here is what the Court seems to have held:

(1) The shipowner has a duty to avoid negligent conduct associated with any active involvement in cargo or related operations.

219. Id. at 885.
220. Id. at 886.
221. Id.
222. Id.
225. Id. at 168 n.14, 101 S. Ct. at 1622 n.14.
228. See id. at 180-81, 101 S. Ct. at 1628-29 (Powell and Rehnquist, J.J., concurring).
229. See id. at 167, 101 S. Ct. at 1622.
(2) When the shipowner turns the ship over to the stevedoring contractor (or other independent contractor engaged to perform loading, unloading, or similar operations on the vessel), the shipowner must have either remedied dangerous conditions or he must warn the stevedoring contractor of dangers (a) that the shipowner knows about or should know about from reasonable inspection, (b) that the contractor will probably encounter during the operations, and (c) that a reasonably competent contractor would not discover for itself.\textsuperscript{230}

(3) Respecting dangers that develop during the contractor's operations on the vessel, the shipowner may have a duty of reasonable care if such a duty is imposed by "contract provision, positive law, or custom."\textsuperscript{231} Otherwise, the shipowner has no duty unless he (a) actually knew of the danger and (b) should have realized that the contractor's safety practices and "judgment [were] so obviously improvident"\textsuperscript{232} as to necessitate some corrective action.

The \textit{Scindia} opinion tried to straddle the two conflicting approaches to determining section 905(b) liability suggested by the legislative history. The effort did not clarify the law as much as was needed. Still, it seems evident that the Court came down in general favor of the land-based restrictions on vessel liability. In that general way, at least, it can be said that the Court has validated the Fifth Circuit approach illustrated by Judge Rubin's opinion in \textit{Samuels}.

\textbf{3. Section 905(b)'s Jurisdictional Limitation}

As amended in 1972 the LHWCA covers injuries occurring on navigable waters as well as on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling,\textsuperscript{233} or building a vessel."\textsuperscript{234} There is no indication that the geographical coverage of section 905(b) is any less extensive. Therefore workers hurt on the landward areas covered by the Act can be expected to bring tort actions based on section 905(b).

The Fifth Circuit early held that when a section 905(b) action is sought to be maintained in federal court on the basis of admiralty

\begin{footnotes}
\item[230] Id.
\item[231] Id. at 172, 101 S. Ct. at 1624.
\item[232] Id. at 175, 101 S. Ct. at 1625.
\item[234] Id.
\end{footnotes}
jurisdiction, the plaintiff must make the normal jurisdictional showing.\textsuperscript{235} Admiralty jurisdiction in tort entails: (a) a “locality” requirement—the injury must have occurred on navigable water or have been caused by a vessel on navigable water\textsuperscript{236}—and (b) a “maritime nexus” requirement—the circumstances of the injury must bear a significant relationship to traditional maritime activity.\textsuperscript{237} (In this jurisdictional formula “vessel” does not take the broad meaning given it by the LHWCA\textsuperscript{238} but means an actual completed and operational vessel afloat on navigable water.) When a LHWCA worker is hurt under circumstances covered by section 905(b) it is difficult to understand how the case could fail to satisfy the nexus requirement.\textsuperscript{239} But obviously a worker hurt on the landward area covered by section 905(b) has potential trouble with the locality requirement; the worker can satisfy that requirement only by showing that the injury was caused by an actual completed vessel on navigable water. If the worker cannot do that, an action in admiralty must be dismissed for lack of subject matter jurisdiction.

Judge Rubin’s opinion in \textit{May v. Transworld Drilling Co.}\textsuperscript{240} undertook to sort out a metaphysical muddle that had arisen in connection with the foregoing requirement:

Our opinions interpreting the applicability of § 905(b) to injuries that are allegedly caused by the negligence of a vessel under construction, whether on water or on dry land, contain statements that are not fully consistent. The inconsistency has arisen, perhaps in part, because we have not always distinguished jurisdiction from the sufficiency of the plaintiff’s evidence to establish a claim under § 905(b).\textsuperscript{241}

As it presented itself to the Fifth Circuit the \textit{May} case illustrated the muddle. A worker hurt on land building new ships—not yet “vessels” for admiralty jurisdiction purposes—brought a section 905(b) action in


\textsuperscript{236} The Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. § 740 (1988), states that admiralty jurisdiction “shall extend to and include all cases” of injury caused by a vessel on navigable water. Despite that language, it seems reasonably clear that admiralty jurisdiction does not exist in such cases absent the “significant relationship with maritime activity” showing. See, e.g., Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132, 1135 (5th Cir.), cert. denied, 454 U.S. 1081, 102 S. Ct. 635 (1981).

\textsuperscript{237} See generally Maraist, supra note 14, at 30-42.

\textsuperscript{238} See supra text accompanying note 176.

\textsuperscript{239} But see Dean v. State, 542 So. 2d 742 (La. App. 4th Cir.), writ ref., 544 So. 2d 410 (La. 1989).

\textsuperscript{240} 786 F.2d 1261 (5th Cir.), cert. denied, 479 U.S. 854, 107 S. Ct. 190 (1986).

\textsuperscript{241} Id. at 1264.
federal court on the basis of diversity jurisdiction. The trial judge dismissed the action. On appeal the defendant argued that the trial judge was correct in dismissing the action for lack of subject matter jurisdiction. Judge Rubin pointed out that the argument was ill-conceived: The court below had jurisdiction on the basis of diversity; it had dismissed the action on the merits, for failure to state "a negligence claim cognizable under § 905(b)."

Judge Rubin then upheld the correctness of the trial judge's dismissal of the action on the merits and sought to dispel the confusion: "[W]e here explicitly hold that § 905(b) permits only the assertion of a claim for a maritime tort. . . . The test to determine the existence of a cause of action in maritime tort is identical with that applied to determine jurisdiction in admiralty." Because the May plaintiff could not show that his injury occurred on navigable water or was caused by a vessel on navigable water, he had no cause of action under section 905(b).

Subsequently the en banc Fifth Circuit confirmed the correctness of Judge Rubin's May reasoning. It is now clear that when a section 905(b) action is sought to be maintained on the basis of admiralty jurisdiction, the federal court must dismiss for lack of subject matter jurisdiction if the plaintiff cannot make the required "locality" and "nexus" showings. On the other hand, when the federal court has subject matter jurisdiction on some basis other than admiralty, a section 905(b) plaintiff who cannot make the "locality" and "nexus" showings is subject to dismissal on the merits. Similarly, a state court must dismiss a section 905(b) action on the merits when it determines that the plaintiff cannot make the same "locality" and "nexus" showings that are necessary for establishing admiralty jurisdiction.

242. Id. at 1263.
243. Id. at 1264-65 (footnote omitted).
246. In Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), a worker hurt while repairing a vessel pulled up onto the land brought a Jones Act claim and a § 905(b) claim in the alternative. Asserting a colorable Jones Act claim suffices for subject matter jurisdiction. See Romero v. International Terminal Operating Co., 358 U.S. 354, 381, 79 S. Ct. 468, 485 (1958). See also infra text accompanying note 338. Nevertheless the Leonard trial judge dismissed the § 905(b) claim "for lack of subject matter jurisdiction." Leonard, 828 F.2d at 293. This seems questionable; surely the better resolution would have been to maintain jurisdiction over the § 905(b) claim as a pendent claim and to dismiss it on the merits. Because the dismissal of the § 905(b) claim was not appealed, Judge Rubin did not address the matter in his Leonard opinion. See Leonard, 828 F.2d at 293.
Finally, while none of the decisions has explicitly addressed the point, it seems to follow from the courts' reasoning that a plaintiff whose injury falls within the coverage of the LHWCA—but who cannot make the "locality" and "nexus" showings—will not be able to maintain a state-law tort action against an entity covered by the broad LHWCA definition of "vessel." Section 905(b) states that "the remedy provided in this subsection is exclusive of all other remedies against the vessel. . . ." May does not mean that section 905(b) does not cover injuries to workers who cannot meet the "locality" and "nexus" tests; on the contrary, it seems to mean that section 905(b) does cover those workers but operates to deny them a negligence remedy as a matter of substantive law. Thus it is a strange feature of this line of cases that the maritime law denies certain workers a tort remedy under circumstances in which an admiralty court lacks jurisdiction to decree the denial. This conclusion is perhaps explicable on the well-accepted view that the boundaries of the constitutional concept of admiralty and maritime jurisdiction (and therefore of the potential reach of the federal maritime law) are broader than the boundaries of the admiralty jurisdiction that has been granted to the federal courts by 28 U.S.C. section 1333. But surely it would have produced a simpler and more attractive conceptual structure had the courts held that the "locality" showing is not required for admiralty jurisdiction in cases covered by section 905(b). This would have left the courts free to conclude, as did Judge Rubin in May, that the "locality" showing is required to establish a section 905(b) cause of action. As matters now stand, the substantive federal maritime law rule established by May binds the state courts but can actually be applied by a federal court only if (fortuitously) its subject matter jurisdiction has been invoked on some basis other than admiralty.

4. The Effect of Employer Fault

Under well settled general maritime law an injured maritime worker's negligence has always reduced his tort recovery on a percentage-fault basis. Nothing in the 1972 amendments to the LHWCA has affected

248. See supra text accompanying note 176.
250. See also infra text at notes 334-41.
that feature of the law. But the 1972 amendments generated several potential new questions respecting the effect of any negligence on the part of the injured worker’s employer. Of course, it is clear that the employer is responsible to the worker for compensation payments only and cannot be sued in tort. The questions involve the effect of employer negligence on the worker’s tort action against the non-employer vessel.

Before the 1972 amendments to the LHWCA, neither the negligence of the vessel nor the negligence of the injured worker’s employer was particularly relevant. Regardless of employer or vessel negligence, Sieracki allowed the worker to recover from the vessel whenever any feature of the vessel, appurtenances, or operational methods made it “unseaworthy,” i.e., less than reasonably fit for the ongoing operation. Nor was the employer’s negligence centrally important to the vessel’s right to recover over against the employer under Ryan. The question was not whether the employer was negligent, but whether it had breached the implied warranty of workmanlike performance.

Under the 1972 amendments, what happens when the vessel and the employer are both negligent in such a way as to cause the LHWCA worker’s injuries? Scindia contemplates that in some situations of that sort the vessel will be liable to the injured worker. In such a case three questions might arise. (a) Does the vessel have any right to contribution from the employer? Unequivocally the statute says no: “[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.”

(b) Since its inception the LHWCA has contemplated that an employer held responsible for compensation payments can come into the injured worker’s tort action as a subrogee or lienholder to recoup the compensation payments. In the Sieracki-Ryan era this subrogation right or compensation lien was practically meaningless respecting workers’ tort actions against vessels, because typically the vessel would ultimately recover over fully from the employer. But now that recovery over from the employer has been cut off, the question frequently arises whether employer negligence should reduce the compensation lien. (c) Should the employer’s percentage of negligence reduce the worker’s recovery from the vessel?

Whether the employer’s negligence should reduce the employer’s compensation lien and/or the worker’s recovery from the vessel are interrelated questions that produced a large amount of scholarly debate after the 1972 legislation went into effect, and the courts took a variety of positions. Judge Rubin addressed these “res nova” questions in

Samuels v. Empresa Lineas Maritimas Argentinas and quickly found the straightest and simplest solution. First he held that the compensation lien should not be reduced because doing so would amount to allowing contribution against the employer, a result forbidden by the clear terms of section 905(b). Then he turned to the more critical question, whether the worker’s recovery should be reduced to reflect the employer’s percentage of fault. A key to Judge Rubin’s thinking here is the realization that, absent some alteration worked by the provisions of the LHWCA, the general law would regard the vessel and employer whose negligence has combined to injure the worker as joint tortfeasors subject to joint and several liability:

Under the present law, if the employer is found negligent, it (or most likely its insurer) would nonetheless be made whole via the compensation lien. To permit the employer’s negligence to reduce the joint tortfeasor vessel’s liability would reduce the award of plaintiff, the one person who is blameless. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf of compensation for the full loaf of joint and several liability.

Absent a specific direction from Congress to reduce the worker’s recovery to reflect employer fault, Judge Rubin believed the better result was to hold the shipowner to the full “consequence[s] . . . of its own negligence.”

One year later the Supreme Court’s decision in Edmonds v. Compagnie Generale Transatlantique fully agreed with Judge Rubin as to both propositions. Reducing the compensation lien to reflect employer fault should not be allowed because this “would be the substantial equivalent of contribution” which Congress has expressly forbidden. Reducing the worker’s recovery to reflect employer fault should not be allowed because, while “[s]ome inequity appears inevitable in the present statutory scheme, . . . we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.”

256. Samuels, 573 F.2d at 887.
257. Id. at 888. Recall that § 905(b) denounces allowing employer liability “directly or indirectly.” See supra text at note 253.
258. Samuels, 573 F.2d at 889 (citation omitted).
259. Id. at 888.
261. Id. at 270 n.28, 99 S. Ct. at 2761 n.28 (quoting Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412, 74 S. Ct. 202, 206 (1953)).
262. Id. at 270, 99 S. Ct. at 2761.
5. **LHWCA Workers Directly Employed by Vessels**

Most longshore workers are employed by independent contractors engaged to do work on and for the vessel. In this "typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer, he may also recover tort damages [under section 905(b)] if he can prove negligence by the vessel." The second sentence of section 905(b) provides as follows: "If [the LHWCA worker] was [directly] employed by the vessel to perform stevedoring services, no [negligence action against the vessel] shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." The Supreme Court has held that the quoted sentence means that a negligence "action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner." The directly employed worker can recover in tort if he can meet the requirements of *Scindia* and *May*, and if he can persuade the court that the negligence of the defendant, who is both employer and vessel, occurred in its vessel rather than its employer capacity.

The foregoing discussion relates to workers involved in longshoring operations. Until amendment in 1984, a third sentence of section 905(b) made identical provision for shipyard workers who were directly employed by vessels. The 1984 amendment substituted the following provision: "If [the LHWCA worker] was employed to provide ship-building, repairing, or breaking services and such person's [direct] employer was the [vessel], no [negligence] action shall be permitted ...." The quoted provision has spawned a line of jurisprudence addressing whether particular workers were engaged in "repairing" and the like so as to be precluded from the negligence remedy. Judge Rubin authored two such decisions. In both he reversed trial court holdings that the affected workers were, as a matter of law, engaged in ship repair work and therefore barred from suing in negligence. The worker in *New v. Associated Painting Services* spent much of his time sandblasting and painting both semi-submersible drilling rigs (vessels) and stationary oil platforms. He was hurt doing such work on a semi-submersible rig.

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265. Jones & Laughlin, 462 U.S. at 530, 103 S. Ct. at 2547.
266. See Gay v. Barge 266, 915 F.2d 1007, 1011-13 (5th Cir. 1990) (reversing directed verdict for defendant and holding that evidence raised a fact issue whether the employer/vessel, in its capacity as vessel, was negligent) (Rubin, J.).
267. See supra note 182.
269. 863 F.2d 1205 (5th Cir. 1989).
trial judge was wrong to grant summary judgment that the worker was a ship repairer, Judge Rubin explained, because the issue is by its nature closely fact-bound: ‘‘[If the worker] is hired to restore a vessel to safe operating condition, he has been hired to perform ‘‘repairing . . . services’’ under § 905(b). If, however, he is hired to preserve the vessel’s current condition, he is performing routine maintenance not covered by the section.’’ In Gay v. Barge 266, the trial judge focused narrowly on the work the plaintiff was doing at the time of the injury in order to conclude that, as a matter of law, the ‘‘ship repairing’’ provision ruled out a negligence action. Reversing, Judge Rubin spelled out a methodology that is very similar to that used in determining seaman status:

When classifying an employee for purposes of determining whether a suit under § 905(b) is barred, we look not only at what the employee was doing at the moment he was injured. We also look at whether the employee ‘‘regularly performs some portion of what is indisputably [ship-repair] work,’’ or has been assigned for an appreciable period of time to do ‘‘substantial [ship-repair] work, even though his assignment to it is not ‘permanent,’’’ just as we do in determining whether he is a longshoreman or, in Jones Act cases, a member of the crew of a vessel. If the employee’s permanent duties, or his interim duties over an appreciable period, are such that he would be a covered ship repairer within the meaning of [the employee-coverage provision] of the LHWCA, then he is barred from bringing suit against his employer under § 905(b).

In the very recent decisions the italicized portion of Judge Rubin’s formulation seems to be gaining favor as a short-hand indication of the necessary inquiry in these cases.

III. SOME PROBLEMS IN THE GENERAL LAW PROTECTING MARITIME WORKERS

A. The Two Faces of the Course-Of-Employment Concept

A seaman who gets hurt or falls ill while in the ‘‘service of the ship’’ is entitled to maintenance and cure from the employer. The

270. Id. at 1210.
271. 915 F.2d 1007 (5th Cir. 1990).
272. Id. at 1010 (citations omitted) (emphasis added).
273. See Easley v. Southern Shipbuilding Corp., 936 F.2d 839, 842 (5th Cir. 1991), vacated and remanded, 112 S. Ct. 1463, opinion after remand, 965 F.2d 1 (5th Cir. 1992) (quoting the indicated language in support of upholding summary judgment for defendant).
Supreme Court has defined “service of the ship” very broadly; it includes all of the seaman’s work activities and duties as well as authorized shore leave and the like.\textsuperscript{275} A seaman who is hurt “in the course of his employment” can sue his employer for negligence under the Jones Act.\textsuperscript{276} The Supreme Court has held that “the term ‘course of employment’ under the [Jones] Act . . . is the equivalent of the ‘service of the ship’ formula used in maintenance and cure cases.”\textsuperscript{277} The course-of-employment vocabulary thus takes a very broad meaning when used to describe the required relationship between the employer and the Jones Act plaintiff at the time of the injury. For example, a seaman hurt on shore leave who could establish that the injury resulted from his employer’s negligence would be entitled to recovery.

An analytical problem arises because the identical term, “course of the employment,” is also routinely used in a quite different sense, to describe the required relationship between the employer and an employee whose negligence is asserted as the basis for vicarious liability. Courts sometimes seem to assume that this vicarious liability course-of-employment concept in Jones Act cases necessarily takes the same broad definition as the course of employment/service of ship concept discussed in the preceding paragraph.\textsuperscript{278} The assumption is unfortunate. Consider the case of two blue water sailors ashore in a port city on authorized leave. They go upon a dance hall balcony overlooking a sharp dropoff to rocks below. One negligently trips, causing the other to fall from the balcony. Under binding Supreme Court authority, the injured worker was in the service of the ship\textsuperscript{279} and therefore in the course of his employment.\textsuperscript{280} Should these conclusions automatically entail the conclusion that the negligent sailor was in the course of his employment so as to make the employer vicariously liable for his negligence under the Jones Act? Surely the better answer is no. The injured sailor should have maintenance and cure, but there is no tenable basis for holding the employer vicariously liable for employee negligence in these circumstances.

\textsuperscript{275} See Warren, 340 U.S. 523, 71 S. Ct. 432.
\textsuperscript{279} See Warren, 340 U.S. 523, 71 S. Ct. 432.
\textsuperscript{280} See Braen, 361 U.S. 129, 80 S. Ct. 247.
A related problem has arisen with some frequency in the Fifth Circuit. Consider the case of two offshore drilling barge workers travelling in the same automobile while returning to work after a few days off. From one point of view they are returning from shore leave. Suppose the driver's negligence causes injury to the passenger, who then seeks maintenance and cure and Jones Act damages from the employer. The court must first determine if the plaintiff/passenger was in the service of the ship/course of the employment. Would an affirmative answer automatically mean that the driver was also in the course of his employment so as to make the employer vicariously liable for his negligent driving? Some of the judges who have considered this problem have assumed yes, and it may well be that this assumption was one of the reasons the Fifth Circuit eventually held in *Daughdrill v. Diamond M. Drilling Co.* that such workers are not to be regarded as in the service of the ship. The conclusion is debatable. A fairer and more humane response to the situation would seemingly have been to allow the injured passenger maintenance and cure but to deny Jones Act recovery. Recognition that the course-of-employment concept has two faces would have made that response easy to achieve. The court could have held that in their status as victims or potential victims, the two workers were in the service of the ship/course of the employment, but that they were not in the course of the employment in the sense necessary to make their actions count as those of the employer for purposes of vicarious liability.

Judge Rubin addressed the two faces of the course-of-employment concept in a related context in *Guidry v. South Louisiana Contractors, Inc.* Pointing out that the district judge in that case had evidently assumed that the plaintiff-employer relationship issue and the vicarious liability issue were "governed by the same criteria," Judge Rubin explained the conceptual mistake and set forth a useful guide for the vicarious liability determination. To determine whether the worker was in the course of the employment in the sense necessary for vicarious liability, one should ask whether "at the moment he was doing the work that led to [the] injury [the allegedly negligent employee] was acting in the business of and under the control of [the employer]." If the lawyers or judges who handled the *Daughdrill* case had had the benefit of Judge Rubin's *Guidry* insight and analysis, arguably a better resolution would have emerged.

282. Id.
283. 614 F.2d 447 (5th Cir. 1980).
284. Id. at 455.
285. Id.
B. The Unseaworthiness of Vessels Under Demise Charter

On the traditional view, when a shipowner relinquishes control of the vessel by demise or bareboat chartering it to another, the owner's responsibility for maintaining its seaworthiness is terminated. The owner remains responsible for unseaworthy conditions that existed when the vessel was turned over to the charterer, and the vessel is liable in rem for damages caused by unseaworthy conditions (whether arising before or after the charter). In the case of a seaman personally injured by a defective condition on a vessel under bareboat charter, unless it can be established with certainty when the defective condition arose, the traditional structure may force the plaintiff to sue all three entities. If the defect existed before the charter was made, both the owner and the bareboat charterer should be liable. But if the defect arose after the charter, the owner will not be liable. Cautious counsel may fear the structure has enough loopholes to require adding the vessel as an in rem defendant wherever possible.

In one of his finest opinions Judge Rubin took aim at the traditional structure in *Baker v. Raymond International, Inc.*286 Observing that the feature whereby the owner escapes personal liability for injuries caused by unseaworthy conditions arising after a demise charter often functions "as a pleading trap for the unwary and as a purely fortuitous means whereby an owner may escape liability if his vessel is beyond the court's jurisdiction,"287 Judge Rubin for a unanimous panel held that the owner's liability should not depend on when the defective condition arose: "[A] seaman may have recourse in personam against the owner of an unseaworthy vessel, without regard to whether owner or bareboat charterer is responsible for the vessel's condition."288 In reaching this innovative conclusion Judge Rubin explained that the traditional view was based on 19th century perceptions of the "political and economic need to encourage enterprise."289 He also stressed the functional tension involved in holding a vessel liable in rem for matters outside the owner's in personam liability.

Unfortunately the *Baker* innovation is not faring especially well in the jurisprudence to date. Presumably in a technical sense it is the current law of the Fifth Circuit,290 and several Fifth Circuit judges have

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287. Id. at 184.
288. Id.
289. Id. at 183.
290. But see *Deal v. A. P. Bell Fish Co.*, 674 F.2d 438, 440 n.2 (5th Cir. 1982) ("question of an owner's liability for unseaworthy conditions arising after the commencement of a charter is unsettled in this Circuit. . . .")
paid lip service to it in cases in which it was not decisive. 291  But the Louisiana Supreme Court has expressly said that it “is contrary to the great weight of federal case law, and we decline to follow it.” 292  And courts in other circuits have continued to state the traditional view, often without indicating any awareness of Baker. 293  It is perhaps too early to tell what the upshot will be. It is hoped that, once awareness of Judge Rubin’s Baker opinion spreads, the plausibility of the views expressed there will come to be accepted.

C.  Damages For Failure to Provide Maintenance and Cure

The Supreme Court’s decision in Vaughan v. Atkinson 294  reaffirmed 295  that a seaman’s employer who fails to furnish maintenance and cure can be liable for damages, including such items as medical and related expenses and pain and suffering. Vaughan also made some new law, holding that such damages can include attorney’s fees when the employer’s failure to meet the maintenance and cure obligation was “callous,” “willful,” and “persistent.” 296

The Vaughan opinion was cryptic; it left many questions unanswered and for more than two decades caused a great deal of confusion. 297  The jurisprudence following Vaughan did not achieve clarity as to the standard of blameworthiness necessary to support an award of compensatory damages nor as to whether punitive damages in addition to attorney’s fees may be awarded on an appropriate showing. In 1987 Judge Rubin turned the laser beam of his analytical power on the confusion and, at least for the Fifth Circuit, cut it away. His opinion in Morales v. Garijak, Inc. 298  sets forth a clear conceptual structure that is consistent with the apparent meaning of Vaughan and that completely rationalizes the entire matter: (1) When the employer fails to furnish maintenance and cure and the seaman must go to court to compel payment, main-

293. See, e.g., Dante & Russell, Inc. v. Dillingham Tug & Barge Corp., 877 F.2d 1404, 1406, superseded on other grounds, 895 F.2d 507 (9th Cir. 1989) (“Once the demise charter is perfected, the owner is relieved of its obligations for the term of the charter; liability for the contracts and torts of the master, crew, and vessel falls upon the charterer and upon the vessel in rem...”).
296. Vaughan, 369 U.S. at 530-31, 82 S. Ct. at 999.
298. 829 F.2d 1355 (5th Cir. 1987).
tenance and cure will be awarded on a showing that it was due. But on that showing alone nothing more is due from the employer. "[A] shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure."\textsuperscript{299} (2) If the employee makes the further showing that the employer’s failure to pay was negligent or unreasonable—"[i]f the shipowner has refused to pay without a reasonable defense"\textsuperscript{300}—the employer owes compensatory damages. "These are the damages that have resulted from the failure to pay, such as the aggravation of the seaman’s condition, determined by the usual principles applied in tort cases to measure compensatory damages."\textsuperscript{301} (3) "If the shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault, he will be liable for punitive damages \textit{and} attorney’s fees. We have described this higher degree of fault in such terms as callous and recalcitrant, arbitrary and capricious, or willful, callous, and persistent."\textsuperscript{302}

\section*{D. Retaliatory Firing}

A seaman who signs on for a particular voyage or for a specific term of employment has some traditional maritime law protections against wrongful discharge.\textsuperscript{303} But a seaman hired without any contractual arrangement as to the term of employment has traditionally been subject to being fired at will. In \textit{Smith v. Atlas Off-Shore Boat Service}\textsuperscript{304} Judge Rubin sought to modify that situation by establishing a maritime tort action on behalf of a seaman fired in retaliation for filing a Jones Act claim. Finding no guidance in the maritime law precedents, Judge Rubin looked to "the nonmaritime common law"\textsuperscript{305} for assistance. There he found a large body of precedent and controversy centering on what has come to be known as the employment-at-will doctrine, whereby an employer can generally fire an employee with no contractual right to continued employment for "good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."\textsuperscript{306} Judge

\textsuperscript{299} Id. at 1358.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id. (emphasis supplied).
\textsuperscript{304} 653 F.2d 1057 (5th Cir. Unit A Aug. 1981).
\textsuperscript{305} Id. at 1060.
Rubin pointed out that this harsh doctrine "was not inherited from the English common law, but originated in this country. It can be traced to an 1877 American treatise on master-servant relations." He found that the better-reasoned modern cases recognize a public policy exception to the at-will doctrine; it is "an abuse of the employer's absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy."

"In light of the admiralty court’s protective attitude toward the seaman," Judge Rubin concluded that the public policy exception should certainly be extended to prohibit firing a worker for filing a Jones Act claim. "The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrines to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional [employment-at-will] rule." Judge Rubin was careful to indicate the boundaries of the newly-created maritime tort:

The maritime employer may discharge the seaman for good cause, for no cause, or even, in most circumstances, for a morally reprehensible cause. We conclude, however, that a discharge in retaliation for the seaman's exercise of his legal right to file a personal injury action against the employer constitutes a maritime tort...

In order to prevail on the retaliatory discharge claim, the seaman must affirmatively establish that the employer's decision was motivated in substantial part by the knowledge that the seaman either intends to file, or has already filed, a personal injury action against the employer.

He went on to hold that an employee who succeeds in meeting that burden can recover compensatory damages, including the expenses of finding a new job, lost earnings, and damages for mental anguish, but that punitive damages should not be allowed.

Smith has been cited as part of a "broadside attack in recent years made upon the idea of at will termination of employment contracts," but to date the Smith cause of action has been fairly narrowly confined

307. Id. at 1060 n.3 (citations omitted).
308. Id. at 1062.
309. Id. at 1063.
310. Id. (footnotes omitted).
311. Id. at 1063-64 (footnotes omitted).
312. Smith has been cited with some frequency in support of emotional distress damages in successful retaliatory discharge cases. See, e.g., Harless v. First Nat'l Bank, 289 S.E.2d 692, 700 (W. Va. 1982).
by the courts. Smith has been held to furnish no support for a general federal-law "whistleblower" cause of action. In cases in which railroad workers allege they have been fired for instituting FELA suits, the influence of Smith has been limited by the view that the Railway Labor Act may preclude tort-law remedies for retaliatory firings of railroad workers. In the maritime realm, some courts have held that the Smith cause of action is confined to seamen; on this view other maritime workers seeking relief for retaliatory firings must look to the provisions of the LHWCA or to state law. Nor does Smith establish a general negligence action for any wrongful discharge of a seaman. For example, the courts have read Smith as furnishing no support for a seaman's assertion of a maritime tort claim for age discrimination, pointing out that the Smith cause of action is "specifically limited to situations in which a seaman is discharged in retaliation for seeking to enforce an already existing right under maritime law."

On the other hand, grudging readings of Smith—such as one district judge's "hair-line distinction... between firing someone for filing a personal injury suit and firing him for the allegations of his complaint"—have been rejected. And the Sixth Circuit has potentially broadened Smith by holding that a worker whose collective bargaining contract protects him from causeless dismissal may choose to forgo the grievance procedures set forth in the contract and go directly to court with a tort

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320. Buchanan, 741 F.2d at 752 & n.2.
action. The common law has recognized for centuries that a plaintiff may waive a tort and sue in assumpsit, and admiralty law, which has always shown particular solicitude for the seaman, presumably would not bar the converse procedure without some good reason for doing so. In reaching that decision, the Sixth Circuit concluded that federal labor law does not preempt the seaman’s maritime tort action under Smith.

The most serious and debatable restriction on the reach of the Smith cause of action occurred in the Fifth Circuit’s recent decision in Feemster v. BJ-Titan Services Co./Titan Services, Inc., in which the court concluded that “the Smith court expressly limited its holding to its own facts.” The seaman/plaintiff in Feemster was a tugboat captain who was fired for refusing to take an eighteen-hour nonstop trip that would have violated a federal safety statute limiting vessel operations to twelve hours in a twenty-four hour period. Upholding summary judgment dismissing his retaliatory firing suit, the Fifth Circuit panel took the view that the seaman had no right to resist violating the safety statute and could therefore be fired for doing so. The opinion suggests that the seaman should have either complained to the Coast Guard about the proposed trip or perhaps started on the trip and then refused to continue past the twelve-hour point. Being fired for either of these actions, the court suggested, would have strengthened his “argument that his discharge contravened public policy.”

In addition to the substantive difficulty involved in the foregoing cases, the retaliatory discharge tort action also entails some jurisdictional difficulties. Judge Rubin resolved one potential difficulty in Smith: “The

325. Id. at 207 (footnotes omitted).
326. See id. at 204, 207-08 (discussing provisions of § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988)).
327. 873 F.2d 91 (5th Cir. 1989).
328. Id. at 92.
331. Feemster, 873 F.2d at 93-94.
332. “[T]his dispute never ripened to the extent that it can support a claim of retaliatory discharge for his refusal to commit an unlawful act. Feemster simply interposed his judgment against that of management that a safety violation would occur if he made the trip and he refused the assignment. He was discharged for that refusal. Feemster never embarked on his journey and there was no violation of law. Whether the law would have been violated is speculative. Thus, because the discharge arose in the absence of a clear requirement by management that Feemster violate the statute, it is difficult to characterize this as a retaliation that offends public policy.” Id. at 94.
333. Id.
claim for retaliatory discharge may be joined with the seaman's personal injury action [on the law side of federal court] under the Jones Act and, like the general maritime law cause of action for unseaworthiness, may be tried to the jury along with the Jones Act claim even in the absence of diversity.\(^{334}\) But can the retaliatory discharge claims be brought to federal court on the basis of admiralty jurisdiction? Generally speaking, admiralty jurisdiction in tort requires both "locality"—the injury must occur on navigable water or be caused by a vessel on navigable water—and a "maritime nexus"—the circumstances of the tort must bear a significant relationship to traditional maritime activity.\(^{335}\) Obviously the retaliatory firing cases cannot satisfy the locality requirement. Equally obviously, a way should be found to permit federal admiralty courts to hear them; surely it is undeniable that admiralty courts should be the ones to work out the contours of the maritime substantive law’s protection of seamen who have been subjected to retaliatory firing.\(^{336}\) One way to accomplish the desired result would be to conclude that some torts have so much "maritime nexus" or "maritime flavor" that locality is not required.\(^{337}\) Another would be to build on the doctrine of *O’Donnell v. Great Lakes Dredge & Dock Co.*\(^ {338}\) whereby the Jones Act furnishes an independent basis for admiralty jurisdiction; it could be held that other actions by seamen against their employers asserting violations of the employer-employee relationship come under the *O’Donnell* jurisdictionary umbrella. The matter requires attention. In several of the above-discussed cases the courts evidently assumed the existence of admiralty jurisdiction without thinking about the matter.\(^{339}\) In one of them the court said there was no admiralty jurisdiction but then proceeded to apply its view of the substantive maritime tort law (in interpreting the controlling Louisiana statute) as if there were no jurisdictional difficulty.\(^{340}\) And in one case the court dismissed for lack of


\(^{335}\) See supra text accompanying notes 234-237.


\(^{337}\) This excellent suggestion is made (and unfortunately then apparently rejected) in Marais, supra note 14, at 38. See also Roberie v. Gulf Oil Corp., 545 F. Supp. 298, 300 (W.D. La. 1982) ("Retaliatory discharge of a maritime employee should be viewed as a maritime tort, regardless of where the employee receives his proverbial 'pink slip'.")\(^ {338}\)

\(^{338}\) 318 U.S. 36, 63 S. Ct. 488 (1943).


of subject matter jurisdiction on "locality" grounds when a decision on the merits would clearly have been preferable. 341

E. Fatal Injuries

When a maritime worker is fatally injured his survivors may maintain a wrongful death action seeking to recover their own losses. The worker's estate may maintain a survival action seeking to recover the losses the worker himself sustained and could have asserted had he lived. The American maritime law has had no end of trouble with both types of actions. The Supreme Court's recent decision in Miles v. Apex Marine Corporation 342-affirming Judge Rubin's decision in Miles v. Melrose 343-brings a great deal of needed clarification. It does so by significantly narrowing maritime workers' tort rights.

I. Survival Actions

"In a survival action, the estate or successors of a deceased person are allowed to prosecute a claim for personal injury that the deceased himself would have had but for his death." 344 Such an action was not permitted at common law or early American maritime law, both of which "followed the rule that personal tort actions died with the plaintiff." 345 Virtually everywhere the old common law rule has been abrogated by survival statutes. But for maritime fatalities the statutory coverage is incomplete. The Jones Act's survival provision is limited to negligence actions against the employers of deceased seamen. 346 No gen-

343. 882 F.2d 976 (5th Cir. 1989), aff'd sub nom. Miles v. Apex Marine Corp., 111 S. Ct. 317 (1990). Judge Rubin's Miles decision is important for several reasons in addition to those discussed in the text. It held: (1) A seaman who stabbed a fellow crew member 62 times in a frenzied attack was violent beyond the ordinary standards of the calling, making the vessel unseaworthy as a matter of law. See Miles, 882 F.2d at 981-83. (2) The chief steward's tolerating the attacker's drinking, "while perhaps negligent, is not the type of outrageous conduct that justifies imposing punitive damages" under the general maritime law. Id. at 989. (3) A claim that the union knew the man had a violent history and supplied him to the ship without warning states a cause of action in maritime tort that is not preempted by § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1988). See Miles, 882 F.2d at 989-93.
344. Miles, 882 F.2d at 985.
345. Id. Early common law and early maritime law also took the view that the death of the tortfeasor abated any remedy. In one of his last opinions as a district judge, Judge Rubin explained that the modern maritime law has implicitly rejected the abatement rule and explicitly held that personal injury and fatal injury claims survive the death of the tortfeasor. McKeithen v. M/T Frosta, 435 F. Supp. 584 (E.D. La. 1977). This decision is generally regarded as indisputably correct. See Maraist, supra note 14, at 286-87.
346. See Maraist, supra note 14, at 278.
eral statute addresses maritime fatalities occurring within a marine league from shore. The Death on the High Seas Act347 covers all maritime fatalities occurring beyond a marine league from shore but does not include a survival provision.348 Thus, as to fatal injury situations not encompassed by the Jones Act, early maritime courts wishing to allow survival actions had to look to state survival statutes.

The Supreme Court’s 1970 decision in *Moragne v. States Marine Lines*349 established a general maritime law action for wrongful death but did not address the question of survival actions. Nevertheless, as Judge Rubin explained in *Miles v. Melrose*:

After *Moragne*, . . . numerous decisions of this and other circuits have recognized that, under the principles announced in that decision, the general maritime law includes a survival action permitting recovery for a victim’s pre-death pain and suffering. Following the rationale of *Moragne*, which looked to the proliferation of state wrongful death acts to find that such an action had become part of our general law, courts reasoned that a survival action for pain and suffering should be recognized as well, since the Jones Act and almost all states allow such survival actions.350

Affirming Judge Rubin’s decision, the Supreme Court in its *Miles* opinion engaged in an excess of caution by stating that it would “decline to address the issue”351 whether the general maritime law includes a survival remedy. However, the overwhelming weight of the lower court jurisprudence—taken together with the tenor of the Supreme Court’s *Miles* opinion—makes it apparent that the general maritime law recognizes survival actions. It is regrettable that the Court did not come right out and say so, but any remaining debate on the matter will seem highly academic.

The difficult survival issue in *Miles v. Melrose*—an issue of first impression for the Fifth Circuit352—was whether recovery at general maritime law on behalf of the estate of a deceased seaman can include the seaman’s lost future earnings. Had the lawsuit been based entirely on allegations of employer negligence, the Jones Act survival provision would clearly have precluded the future earnings claim. But the *Miles* plaintiff also had a claim based on the unseaworthiness of the vessel and governed by general maritime law. The Ninth Circuit had held that

348. See Maraist, supra note 14, at 284-85.
351. *Miles*, 111 S. Ct. at 327.
352. *Miles*, 882 F.2d at 983.
the general maritime law survival action will allow recovery for lost future earnings. Judge Rubin disagreed, pointing out that the general understanding of survival actions limits them to losses sustained by the decedent himself up to the moment of death and that neither the Jones Act survival provision nor most state survival statutes allows recovery for lost future earnings. Unanimously affirming, the Supreme Court laid down a broad rule: "We . . . hold that a general maritime survival action cannot include recovery for decedent's lost future earnings." The Court's reasoning makes it fairly clear that all maritime fatalities—not just those involving seamen—are covered by its ruling.

2. Wrongful Death Actions

The early general maritime law followed the early common law in refusing to recognize a cause of action for wrongful death. Maritime courts therefore looked to wrongful death statutes—the Jones Act, the Death on the High Seas Act, and state statutes—as a basis for allowing some recovery to the survivors of deceased maritime workers. The Supreme Court greatly simplified matters in the 1970 Moragne decision by recognizing a general maritime law—i.e., non-statutory—cause of action for wrongful death. Since the Moragne decision it has become reasonably clear that resort to state death statutes is no longer appropriate in maritime cases. This leaves the Jones Act, the Death on the High Seas Act, and the general maritime law remedy recognized in Moragne as the only potential sources of recovery in maritime wrongful death actions.

There is significant variety among legal systems as to the categories of losses for which wrongful death recovery should be awarded. Typically the plaintiffs are entitled to recover their pecuniary losses—loss of support, loss of services, and often funeral expenses—but there is great disagreement over the propriety of allowing recovery for what is variously called loss of consortium, loss of companionship, and loss of society. The Moragne opinion discussed this question and stated that its resolution

354. Miles, 882 F.2d at 986-87.
355. Justice Souter did not participate.
356. Miles, 111 S. Ct. at 328.
357. See The Harrisburg, 119 U.S. 199, 7 S. Ct. 140 (1886).
361. See Maraist, supra note 14, at 285-86.
should be left to later decisions. Four years later in *Sea-Land Services, Inc. v. Gaudet* a closely divided Court announced that the wrongful death action under general maritime law allows recovery for loss of society.

Neither the Jones Act nor the Death on the High Seas Act permits recovery for loss of society. The jurisprudence since *Gaudet* has been struggling to accommodate the disparity between these statutes' restriction to pecuniary loss and the *Gaudet* Court's allowance of loss of society recovery as a matter of general maritime law. Case by case, the *Gaudet* principle has been eroding. First the Supreme Court held that no maritime death occurring within the coverage of the Death on the High Seas Act—i.e., beyond a marine league from shore—gives rise to a cause of action for loss of society. Next, in Judge Rubin's decision in *Ivy v. Security Barge Lines*, the Fifth Circuit held that loss of society recovery is unavailable in negligence actions against the employers of deceased seamen. The Supreme Court has stated that the *Ivy* holding was correct. Finally, the Supreme Court's recent decision in *Miles v. Apex Corporation* holds that loss of society recovery is unavailable in all actions based on the death of seamen.

If the foregoing discussion is correct, loss of society damages are unavailable in all actions for death beyond a marine league from shore and in all actions for the death of seamen. In what kinds of maritime wrongful death actions, then, may loss of society be compensated? On the basis of the principles discussed above and the *Miles* holding, one could say that loss of society recovery remains available in actions based on the death of a nonseaman occurring within a marine league from shore. However, there is language in the Supreme Court's *Miles* opinion indicating an even narrower answer: "The holding of *Gaudet* ... applies

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365. 585 F.2d 732 (5th Cir. 1979) (Rubin, J.), aff'd, 606 F.2d 524 (5th Cir. 1979) (en banc) (Rubin, J.), cert. denied, 446 U.S. 956, 100 S. Ct. 2927 (1980).
366. "There is no recovery for loss of society in a Jones Act wrongful death action."
368. Judge Rubin's denial of loss of society recovery was limited to nondependent relatives of seamen. See *Miles*, 882 F.2d at 989. The Supreme Court's holding is broader, covering all actions for the death of seamen: "We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society." *Miles*, 111 S. Ct. at 328.
only to longshoremen.\textsuperscript{369} On that view, loss of society recovery will be rare. It will be restricted to surviving relatives (probably only those who were financially dependent on the deceased) of LHWCA workers killed in territorial waters (i.e., within a marine league) under circumstances giving rise to recovery under the limitations imposed by the \textit{Scindia}\textsuperscript{370} and \textit{May}\textsuperscript{371} lines of cases. Given the narrowness of what remains of \textit{Gaudet}, it seems likely that in the next few years loss of society recovery will be eliminated altogether from the law governing maritime fatalities.

\textbf{F. Loss of Society Damages In Non-Fatal Cases}

In \textit{American Export Lines v. Alvez}\textsuperscript{372} the Supreme Court held that the wife of an LHWCA worker injured nonfatally in state territorial waters could maintain an action for damages for loss of her husband's society. Judge Rubin thereafter wrote three opinions working out the implications of \textit{Alvez}. In \textit{Cruz v. Hendy International Co.}\textsuperscript{373} he held that the wife of a seaman hurt by unseaworthiness in territorial waters had a similar right. But, he made clear, no such right would exist for the wife of a seaman hurt by Jones Act negligence; the Jones Act rules out non-pecuniary recoveries.\textsuperscript{374} In \textit{Overstreet v. Water Vessel Norkong}\textsuperscript{375} Judge Rubin discussed without deciding whether the children of a seaman hurt by unseaworthiness can sue for loss of society.\textsuperscript{376} And in \textit{Madore v. Ingram Tank Ships, Inc.}\textsuperscript{377} he held that a seaman's children have no cause of action for loss of society in non-fatal cases and intimated a broader principle, that children cannot recover for losing the society of a living parent.\textsuperscript{378}

It seems almost certain that recovery for loss of society in non-fatal injury cases will prove to be no more extensive than in fatality cases.\textsuperscript{379} In light of the current restrictions on such recovery in death cases, probably injuries beyond a marine league cannot give rise to a right to recover for lost society, and probably neither can injuries to a seaman.

\begin{footnotesize}
\textsuperscript{369} Miles, 111 S. Ct. at 325.
\textsuperscript{370} See supra text accompanying notes 223-232.
\textsuperscript{371} See supra text accompanying notes 240-244.
\textsuperscript{372} 446 U.S. 274, 100 S. Ct. 1673 (1980).
\textsuperscript{373} 638 F.2d 719 (5th Cir. 1981).
\textsuperscript{374} Id. at 723. See also Madore v. Ingram Tank Ships, Inc., 732 F.2d 475, 479 (5th Cir. 1984) (Rubin, J.).
\textsuperscript{375} 706 F.2d 641 (5th Cir. 1983).
\textsuperscript{376} Id. at 645.
\textsuperscript{377} 732 F.2d 475 (5th Cir. 1984).
\textsuperscript{378} Id. at 479.
\textsuperscript{379} The \textit{Alvez} Court derived the right to recover for lost society in non-fatality cases from \textit{Gaudet}'s recognition of it in fatality cases. See American Export Lines v. Alvez, 446 U.S. 274, 281, 100 S. Ct. 1673, 1677 (1980).
\end{footnotesize}
On this view Judge Rubin's decision in *Cruz* was implicitly overruled by *Miles*. In other words, decisions allowing such recovery in non-fatality cases beyond the narrow confines of *Alvez* itself are probably no longer good law. *Alvez* involved the wife of an LHWCA worker hurt in territorial water. The tiny remnant of the *Gaudet* principle that clings to life after *Miles* is also confined to the families of LHWCA workers and to territorial water. And if Judge Rubin was right in *Madore*, only spouses, and no other family members, would be allowed to sue for lost society in non-fatality cases. Giving the right to recover for lost society to this smallish group of plaintiffs while denying it to all other maritime plaintiffs, including the "wards of the admiralty" and their families, is too strange a distinction to subsist for long. Thus, it seems probable that loss of society damages will disappear from the maritime law in the relatively near future.

**IV. CONCLUSION**

Judge Rubin's contributions to maritime law are so extensive and pervasive that any selection of subtopics is virtually guaranteed to omit some important matters. Knowledgeable readers will doubtless remark the omission of *Culver v. Slater Boat Co.* as well as other important Rubin opinions dealing with damages issues. Many Louisiana lawyers will wonder how I managed to ignore District Judge Rubin's herculean efforts in the massive *McKeithen v. M/T Frosta* litigation. Lawyers with international outlooks will note my failure to treat important opinions by Judge Rubin on transnational choice-of-law and *forum non

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380. As this article was going to press decisions stating that *Miles* implicitly overruled *Cruz* began to appear. See, e.g., Murray v. Anthony J. Bertucci Constr. Co., 958 F.2d 127 (5th Cir.) petition for cert. filed, 61 U.S.L.W. 3170 (U.S. July 15, 1992) (No. 92-103); Michel v. Total Transportation, 957 F.2d 186 (5th Cir. 1992).


385. See Fogelman v. Aramco (Arabian American Oil Co.), 920 F.2d 278 (5th Cir. 1991) (holding that Saudi Arabian law governed suit by American worker injured on platform off the the shore of Saudi Arabia).
questions. Students of comparative fault systems may regret my decision not to analyze *Loose v. Offshore Navigation, Inc.* in which Judge Rubin explained why old rules of tort indemnity between co-tortfeasors on the basis of concepts of active and passive negligence cannot survive in a modern thoroughgoing comparative fault system. And everyone with litigation experience in the field is likely to note that I have not discussed Judge Rubin’s significant treatments of issues such as the borrowed servant doctrine, the applicability of the Louisiana direct action statute, and a host of important procedural issues.

In response to these real and imagined critics I can only say that I have tried to use the time and space available for this undertaking to the best advantage as I conscientiously see it. Perhaps it is best to consider this article a beginning installment. In all likelihood all of us who work with the maritime law in practical operation will be talking and writing about Judge Rubin’s contributions for many years to come.

386. See Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140 (5th Cir. 1984) (reversing forum non conveniens dismissal of action by relatives of Taiwanese sailors who died in a collision between Liberian and Greek vessels in Mediterranean).

387. 670 F.2d 493 (5th Cir. 1982).


389. See Koesler v. Harvey Applicators, Inc., 416 F. Supp. 872 (E.D. La. 1976) (reluctantly bowing to 5th Circuit precedent and concluding that the direct action statute did not apply to a case involving a fixed platform on the Outer Continental Shelf even though the cause of action was based on the Jones Act).

390. See, e.g., Tate v. American Tugs, Inc., 634 F.2d 869 (5th Cir. 1981) (tackling “novel question” whether an injured seaman awaiting trial can get a preliminary injunction to increase maintenance payments and answering no in absence of unusual circumstances).