

Louisiana Law Review

Volume 59 | Number 2
Winter 1999

Papai: An International Perspective

Wiley Richmond Beevers

Repository Citation

Wiley Richmond Beevers, *Papai: An International Perspective*, 59 La. L. Rev. (1999)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol59/iss2/11>

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NOTES

Papai: An International Perspective

Jonathan Kitchen remarked in *The Employment of Merchant Seamen*, "Although factories . . . sometimes explode, mines collapse and trains collide, few places of work are as constant a source of risk to employees as ships. Accidents are frequent and often spectacular. Rarely do the crew escape entirely unscathed."¹

I. THE FACTS

On March 13, 1989, John Papai went to work, just as he had done for the previous two and one quarter years. He went to the Inland Boatman's Union hiring hall in San Francisco, California. Through the services of the union hiring hall, Papai and a coworker were hired for a one-day job by Harbor Tug and Barge Company (HT&B).² They reported to the HT&B dock in Alameda, California. There, HT&B's Port Captain, Papai's supervisor for the day, assigned him to the tug *Pt. Barrow*. His job title was "deckhand." Papai's duty assignment for the day was to paint the deckhouse of the *Pt. Barrow*. At the time, the *Pt. Barrow* was tied to the pier with no operational crew aboard and the engines were not running. As instructed, Papai got a bucket of paint, a brush, a portable ladder, and went to work painting the deckhouse of the *Pt. Barrow*. Around 3:30 p.m., as Papai was climbing down the portable ladder, the ladder shifted, causing him to fall, and he injured his knee. John Papai filed suit against HT&B in the United States District Court for the Northern District of California as a seaman under the Jones Act, 46 U.S.C. § 688.³

II. MODERN DEVELOPMENT OF AMERICAN SEAMAN-STATUS JURISPRUDENCE

To understand the holding of *Papai*, an understanding of recent developments in seaman status opinions is essential. In *McDermott International, Inc., v. Wilander*, Justice O'Connor, writing for the majority, held "[t]he key to seaman status is employment-related connection to a vessel in navigation."⁴ Justice O'Connor further held, ". . . that a necessary element of the connection is that a seaman perform the work of a vessel."⁵ In so doing, the Supreme Court abandoned earlier jurisprudence limiting seaman status to those who actively aided in the navigation of the vessel or "hand, reef, and steer"

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1. Jonathan S. Kitchen, *The Employment of Merchant Seamen* 453 (1980).
2. No attempt is made here to examine employment law-related issues. The subject matter of this discussion is strictly limited to an examination of seaman status questions in an international context.
3. Petitioner's Brief at 2-5, *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 117 S. Ct. 1535 (1997) (No. 95-1621).
4. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355, 111 S. Ct. 807, 817 (1991).
5. *Wilander*, 498 U.S. at 355, 111 S. Ct. at 817.

requirements. Noting the extensive precedent in pre-Jones Act general maritime cases, as well as Jones Act cases, to extend seaman status to maritime employees whose duties bore little relationship to navigation, the majority held that there was ample authority in American law to adopt the broader standard.⁶

In *Chandris, Inc. v. Latsis*, the court expanded the *Wilander* analysis, adding a durational element. The *Chandris* seaman-status test is two-pronged: first, the "employee's duties must contribut[e] to the function of the vessel or the accomplishment of its mission," and second, the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."⁷ The durational requirement is that the employee must spend at least thirty percent of his time aboard ship to qualify for seaman status.⁸

III. THE CASE

Harbor Tug and Barge Company, Papai's employer, argued that he did not satisfy the *Chandris* test for seaman status. HT&B did not dispute that Papai's work aboard the *Pt. Barrow* contributed to the function of the vessel or the accomplishment of its mission. Nor did HT&B dispute that the *Pt. Barrow* was a vessel in navigation. Rather, Harbor Tug and Barge contended that John Papai's connection to the *Pt. Barrow* and its fleet of tugs was insufficiently substantial in terms of both its duration and nature to satisfy the *Chandris* test.⁹

When Mr. Papai's case came before the United States Supreme Court, Justice Kennedy, writing for the majority, announced a new test, based on his understanding of the underlying purposes of *Chandris*. Rather than decide the case based on Harbor Tug and Barge Company's argument that Papai did not meet the *Chandris* durational requirement, Justice Kennedy asserted that the proper test to determine John Papai's status as a seaman was a "perils of the sea test."¹⁰ Justice Kennedy held that the purpose of the *Chandris* test was to identify and protect those persons whose duties take them to sea and expose them to its perils. According to him, John Papai was not a seaman and not entitled to the protections which United States law extends to seamen, because his duties on the day he was injured working aboard the *Pt. Barrow* did not take him to sea that day and expose him to its perils.¹¹

6. *Wilander*, 498 U.S. at 343, 111 S. Ct. at 811-13.

7. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S. Ct. 2172, 2190 (1995).

8. *Chandris*, 515 U.S. at 367, 115 S. Ct. at 2189.

9. *Papai*, 117 S. Ct. at 1540.

10. *Id.* at 1542.

11. *Id.*

The interplay of benefits between the Longshore and Harbor Workers Compensation Act and Jones Act seaman status does not form a significant part of this inquiry. The availability of benefits under the LHWCA does not form part of the seaman status inquiry. In addition, the availability of LHWCA benefits to an injured maritime worker should not inform a policy decision to limit seaman status. Each of the other nations considered here have social welfare programs and benefits equal

IV. ARGUMENT

In announcing his “perils of the sea” test, Justice Kennedy, and the other members of the High Bench who voted with him, adopted a standard which is at variance with the admiralty traditions of the rest of the English-speaking world. Admiralty jurisprudence around the world establishes that the proper test to determine seaman status in cases like *Papai* is the “service of the ship” rule alone. This language closely tracks that of *Wilander*, without accretions found in *Chandris* or *Papai*. Under this test, an employee is considered to be a seaman belonging to the ship if the services which he performs are connected with the ship as a seagoing instrument of navigation.

In *The Paquete Habana*, Mr. Justice Gray, writing for the majority, commented on the role of international law in admiralty and asserted, “International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination. . . . resort must be had to the customs and usages of civilized nations;”¹² Given the uniquely international nature of admiralty law and the easy reference which American admiralty law makes to the holdings of other nations’ admiralty courts, an examination of the law of other nations having a substantial admiralty tradition provides additional insight into *Papai*. A careful reading of the laws of other nations possessing similar traditions at admiralty to our own clearly demonstrates that Justice Kennedy’s opinion in *Papai* is at variance with the practice of the international admiralty community.

V. THE BRITISH ADMIRALTY TRADITION

Great Britain has a long standing tradition of Admiralty law which was transmitted throughout the world by the British Empire. Many nations possessing their own distinct admiralty traditions built their law on the foundation of British admiralty law. As such, Great Britain’s maritime law regarding the tug and her crew is the most appropriate place to begin an examination of the international jurisprudence in cases similar to *Papai*.

The tug as a distinct type of vessel recognized in Admiralty is a product of the steam engine and, ironically, the needs of the early nineteenth century sailing merchant marine. The competition between American and English clipper ship owners during this period brought them to the realization that their voyages were really from warehouse to warehouse and not port to port. Adverse conditions of wind and sea could conspire to keep a sailing merchantman in harbor for days

or superior to those available under the LHWCA, yet do not prohibit injured brown-water workers from claiming seaman status remedies. The most exhaustive treatment of this subject can be found in Kitchen, *supra* note 1, a detailed examination of British law, social welfare policy, and procedure, with useful comparisons to other major maritime nations.

12. *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900).

or even weeks on end after it had cleared the pier. The harbor tug evolved as a method to reduce the time lost on the ends of voyages.¹³

The first tug appeared on the River Clyde, near Glasgow, Scotland, in 1819, where it was used to tow lighters, and on the River Tyne, near Newcastle shortly afterwards. The *Lady Dundas* was the first tug to appear in the River Thames, in approximately 1832. The first tug to appear in America was probably a steam paddlewheeler which worked on the Hudson River sometime around 1825.¹⁴

As is the nature of all human affairs, Admiralty cases involving tugs appeared shortly thereafter. The first recorded British decision regarding a tug and tow was apparently *The Betsey*.¹⁵ The United States seems to have beaten the British to the punch with its first tugboat case in 1830, *Smith v. Pierce*.¹⁶

As early as 1849, British admiralty courts had decided that a tug was a vessel, albeit of an unusual type. In *The Princess Alice*,¹⁷ the court pronounced: "[A] towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating [sic] her progress."¹⁸

British statutory law regulates the crewmen working aboard tugs as merchant mariners. In this respect they are regulated in the same manner as the officers and ratings employed aboard the larger vessels, generally thought of as "blue water" vessels. The most significant statutes in this respect are the Merchant Shipping Acts of 1894 and 1970. These Acts of Parliament provide for the certification of the members of ships' crews, notably masters, mates, and engineers. Other provisions of the various merchant Shipping Acts which are applicable generally to both tugs and merchant ships include measurement and registration of tonnage, inspection requirements, seamen's documents, crew accommodations, and disciplinary requirements.¹⁹

It is important to note that tugs also occupy their own special place in the British mercantile marine statutory scheme. A specialized mariner's certification for a Tugmaster exists. The presence of a licensed tugmaster aboard a seagoing tug permits the vessel to dispense with the requirement of a certified navigating officer under the Merchant Shipping Act of 1906. British statutory law also makes a distinction between home-going and foreign-going tugs. This distinction extends to different crew requirements and periods of service required for certification. Also, special vessel inspection and registration schemes exist for tugs, including the provision for special load lines.²⁰

13. Alex L. Parks and Edward V. Cattell, Jr., *The Law of Tug, Tow, and Pilotage* 3 (1994).

14. *Id.* at 3-4.

15. 166 Eng. Rep. 717 (Adm. 1843).

16. 1 La. 349 (1830); Parks and Cattell, *supra* note 13, at 6.

17. 166 Eng. Rep. 914 (1849).

18. *The Princess Alice*, 166 Eng. Rep. 914, 915 (1849).

19. Parks and Cattell, *supra* note 13, at 429-32.

20. *Id.* at 429-35.

The *Pt. Barrow*, the tug upon which Mr. Papai was employed, was not in active service on the day when he was injured. Rather it was laid up alongside the HT&B pier for maintenance which Mr. Papai was to perform. This fact seems to have been accorded great weight in Justice Kennedy's opinion.²¹

British Admiralty law resolved the question of the right of workers employed aboard laid up vessels to claim seaman status and remedies before the turn of the current century. The first British case to examine the right of a person employed on a vessel laid up in harbor to claim seaman's remedies was *The Jane and Matilda*, in 1823.²² It was this case which announced the service of the ship rule in such instances. There, a woman employed aboard the ship *Jane and Matilda* was permitted to pursue an in rem action for wages due her for services as a shipkeeper performed while the vessel was laid up in harbor following the bankruptcy of the owner. In pronouncing judgment in favor of the claimant, Lord Stowell held that the work of keeping and maintaining a ship while laid up in port was the work of a seaman, entitling the performer to a seaman's remedies. In holding that the duties of a shipkeeper were those of a seaman, the court held, "It may be said, and has been said, that the person acting aboard, acts (and is expected to do so) as a mariner likewise."²³ In awarding the woman keeper of the ship *Jane and Matilda* £64, 14s for back pay (a truly large sum of money in 1823), the court remarked: "Here are duties performed, which must be performed by somebody on board the ship."²⁴

The "service of the ship" principle, especially as it relates to maritime workers aboard ships in harbor, next surfaces in British jurisprudence with *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan*.²⁵ In that case, the mate of the *S.S. Michigan* was permitted to maintain an in rem claim against the vessel for wages due him. The services which he performed to merit compensation were the oversight of maintenance and repair work to the ship while she was in dry-dock.²⁶

In granting a maritime lien for wages against the vessel, the traditional seaman's remedy, Justice Wills extended the holding of *The Jane and Matilda*, saying, "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea."²⁷ He also went on to hold that

21. Harbor Tug and Barge Co. v. Papai, 117 S. Ct. 1535, 1542 (1997).

22. *The Jane and Matilda*, 166 Eng. Rep. 67 (1823).

23. *The Jane and Matilda*, 166 Eng. Rep. at 68.

24. *The Jane and Matilda*, 166 Eng. Rep. at 69.

25. 25 Q.B.D. 339 (1890).

26. *R. v. Judge of City of London Court and Owners of S.S. Michigan*, 25 Q.B.D. 339, 340 (1890).

27. *Id.* at 342-43.

plaintiff's services were maritime services, even though the ship was actually in harbor at the time.²⁸

A review of British statutory law and jurisprudence indicates that John Papai would have been considered a seaman at the time of his injuries aboard the *Pt. Barrow*, had it been in British waters or jurisdiction. *The Princess Alice* held that a tug was clearly a vessel. Further, the extensive regulation of tugs such as the *Pt. Barrow* as merchant vessels and their crews as merchant seamen under the various Merchant Shipping Acts and the accompanying regulations places both vessels and those working aboard squarely within the ambit of the merchant marine. Finally, the jurisprudence of *The Jane and Matilda* and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* shows that the service status of the vessel is immaterial. Long ago, British courts decided that maintenance of a vessel while laid up was equally the work of the ship and equally deserving of seaman status protection and seaman's remedies.

VI. THE BRITISH TRADITION AT ADMIRALTY RECEIVED

The Colonial Courts of Admiralty Act of 1890 transferred the admiralty practice, procedure, jurisdiction, and jurisprudence possessed and exercised by the English High Court of Justice to the courts of the British colonies. This statute abolished the Imperial Vice-Admiralty courts then sitting in each of Her Majesty's colonies and constituted the Admiralty jurisdiction in the High Court of each colony. It also allowed each colony to vest limited Admiralty jurisdiction in such inferior colonial courts as the colony desired in a manner similar to the jurisdiction of the County Courts in England. One of the primary purposes of the act was to eliminate confusion. British Vice-Admiralty courts and colonial courts previously sat side by side and exercised concurrent jurisdiction.²⁹

This issue of concurrent jurisdiction had the potential to create significant conflict of laws problems. Similar causes of action could be brought before colonial courts and the admiralty courts, which would apply different rules of law. This conflict could result in different results in the cases and different rankings of claims. This problem was particularly acute in South Africa, where the colonial courts were applying the Roman-Dutch law as received there and the Vice-Admiralty courts were applying English admiralty law.³⁰

VII. AUSTRALIA

Australian admiralty law is strongly founded on the British tradition, with modifications specific to Australian conditions and statutory alterations made since that nation gained its independence. The definition of a tug and towage is

28. *Id.* at 343.

29. D.J. Shaw, Q.C., *Admiralty Jurisdiction and Practice in South Africa* 2-3 (1987).

30. *Id.* at 3-4.

drawn from the same source as in Great Britain, *The Princess Alice* of 1849. This case's definition of towage as the employment of one vessel to expedite the voyage of another has been received in Australian jurisprudence approvingly in a line of cases beginning in 1875 and extending to 1982.³¹

Statutory amendment to the received British precedents have considerably broadened to definition of a vessel. The Navigation Act of 1912 and the Admiralty Act of 1988, define a ship as any "vessel used in navigation by water, however propelled or moved."³² Other Australian Commonwealth statutes, including the Lighthouses Act of 1911 and the Seamen's Compensation Act of 1911 only restrict from the statutory definition of vessels conveyances ordinarily propelled by oars. Statutes in the various Australian states and territories similarly exempt oar-propelled conveyances from the statutory definition of vessels.³³

Statutory and case law in all Australian jurisdictions contains a navigational element in the vessel status test. Drawing from British case law, the navigation requirement contains an intent element. Whether or not any vessel is "in navigation," may not depend so much on whether the structure can or will be navigated as whether it was intended to be navigated. Following this line of reasoning, a flying boat was held not to be a vessel in navigation, but a ship recently launched and not yet fitted out was.³⁴

Seaman status is equally broad in Australian jurisprudence drawn directly from the language of *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan*. A seaman is any person "who is connected with the ship as a ship."³⁵ Accordingly, the term is extremely broad, including every member of a ship's complement, other than the captain, and anyone otherwise employed in service on the ship. Jurisprudence has held the term to include pursers, ship's carpenters, and cooks.³⁶

Australian jurisprudence has adopted the reasoning found in *The Jane and Matilda* and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan*. In *The "Collaroy": Harris v. Robertson*,³⁷ the Vice-Admiralty Court of New South Wales was held to have jurisdiction to entertain a claim for wages of a person who had the charge of a vessel while in harbor as its caretaker.³⁸ Davies and Dickey also cite *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* as an authority creating

31. Martin Davies and Anthony Dickey, Shipping Law 364 n.94 (1990).

32. *Id.* at 1-2.

33. *Id.* at 2-4.

34. *Id.* at 8.

35. *R. v. Judge of the City of London Court and the Owners of the S. S. Michigan*, 25 Q.B.D. 339, 343 (1890), cited in Davies and Dickey, *supra* note 31, at 97.

36. Davies and Dickey, *supra* note 31, at 97 nn. 38 & 39.

37. (1887) 3 N.S.W.W.N. 97.

38. *Id.*

Australian precedent for the proposition that the term seaman includes the caretakers of ships and even stevedores.³⁹

The most recent Australian consideration of the line of reasoning which began with *The Jane and Matilda*, is found in *Liosatos v. Australian National Line*.⁴⁰ In *Liosatos*, Chief Justice Barwick of the High Court of Australia applied the "belonging to the ship" reasoning of *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* to the case of a seaman incapacitated by an illness which was not contracted during the currency of his articles. Rather, his illness was contracted during earlier service aboard his ship. Chief Justice Barwick held that it is the service of the ship which creates the relationship expressed as "belonging to the ship," which gives rise to the seaman's duties and rights as embodied in case of the mate of the *S.S. Michigan*.⁴¹ Chief Justice Barwick also drew support from Lord Stowell's opinion in *The Jane and Matilda*, regarding the nature of the work itself as giving rise to seamen's claims, "Supposing the informality in the mode of hiring, still if the work has been done, and properly done, it entitles the performer to the common remuneration."⁴²

A review of Australian jurisprudence demonstrates that John Papai would have been considered a seaman at the time of his injuries aboard the *Pt. Barrow*, had the accident occurred under Australian jurisdiction and law. The Australian Admiralty tradition draws its authority, precedent, and jurisdiction from Britain through the Colonial Courts of Admiralty Act. Therefore, the jurisprudence of *The Princess Alice*, *The Jane and Matilda*, and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* regarding vessel status and service status is highly persuasive in the Australian Commonwealth. There could be no clearer demonstration of the continuity of this reasoning than the extension of this line of thought through *The "Collaroy"*: *Harris v. Robertson* and *Liosatos v. Australian National Line*. Accordingly, the work of Mr. Papai aboard the *Pt. Barrow* while alongside her pier would be considered the work of the ship and he, therefore, a seaman and entitled to seaman's remedies, had the accident occurred in Sydney Harbour.

VIII. CANADA

Canadian Admiralty jurisdiction is also based on the Colonial Courts of Admiralty Act of 1890, as enlarged and clarified by the Statute of Westminster, 1931. The Statute of Westminster accorded to Canada the complete power to establish its own admiralty courts, fix their jurisdictions and regulate their practice and procedure. The Canadian Admiralty Act of 1934 implemented this

39. Davies and Dickey, *supra* note 31, at 97 n.41.

40. 111 C.L.R. 282 (1964).

41. *Id.* at 287-88.

42. *Id.* at 288 (citing *The Jane and Matilda*, 166 Eng. Rep. at 69).

power one year later. While, like the United States, concurrent jurisdiction in admiralty exists between the federal and provincial courts, only the federal courts sitting in admiralty can exercise in-rem jurisdiction.⁴³

Canadian statutory law treats tugs as merchant vessels and their crews as merchant seamen. The Canada Shipping Act grants authority to regulate tugs to the Ministry of Transport under the Canada Shipping Act of 1985. These areas of regulation include safe manning regulations, design of hulls and accommodations, and safe working practices. A combination of regulation and various sections of the Act establish manning and training requirements for the crews of tugs.⁴⁴

The Canada Shipping Act of 1985, Sections 109 and 110, Safe Manning Regulations, and Ships' Deck Watch Regulations regulate the composition of Canadian tug crews. Compliance with the manning regulations for seamen aboard tugs is ensured by the provision for determination of the adequacy of the complement as part of the vessel inspection and licensure process. The marine surveyor who inspects the tug is required to satisfy himself as to the competency and make-up of the crew before a license is issued. As with any other vessel, a Canadian-flag tug must be inspected every four years or whenever it has undergone structural damage or major alterations.⁴⁵

Canadian tug crew members, with the exception of independent tug operators, are unionized and have the right to bargain collectively with their employers. The hours of work and wages are determined by collective bargaining. However, the duties of masters and members of the crew are governed by the Ships' Deck Watch Regulations. Seamen continue to be entitled to a maritime lien for wages and Section 212 of the Canada Shipping Act extends the same rights, liens, and remedies which are traditional to seamen to the masters of tugs as well. Interestingly, the Canada Shipping Act still retains the ancient prohibition on the attachment garnishment of seamen's wages due or owing.⁴⁶

In *Jorgensen v. "The Chasina,"*⁴⁷ the court cites both *The Jane and Matilda* and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* as the proper Canadian precedent in the case of a watchman/caretaker aboard ship. In denying Jorgensen's claim, the court distinguishes the facts from those in the above cases. Jorgensen's position as part owner of the vessel and the fact that the vessel was actually in the hands of a dockyard for repair sufficiently distinguish the case from the facts of *Jane and Matilda* and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* to require the court to deny his claim.⁴⁸

43. Parks and Cattell, *supra* note 13, at 11-12.

44. *Id.* at 435-38.

45. *Id.* at 436.

46. *Id.* at 436-37.

47. [1926] 1 D.L.R. 1193.

48. *Jorgensen v. "The Chasina"* [1926] 1 D.L.R. 1193, 1196.

Two cases from the 1898 session of the Exchequer Court of Canada regarding the ship *Flora* demonstrate the continuity of British jurisprudence in Canada. In *Connor v. The "Flora"*, the court interpreted the Merchant Shipping Act of 1854 (Great Britain) and the Inland Water Seamen's Act (Canada) to define a seaman as "every person employed or engaged in any capacity on board any ship, except masters and pilots."⁴⁹ Accordingly, the court allowed Miss Mattie Connor, employed aboard the *Flora* to tend a candy stand, a seaman's maritime lien against the vessel for her wages.⁵⁰

In *Brown v. The "Flora"*,⁵¹ the same court examined the case of a watchman employed to tend the vessel while laid up for the winter. The court disallowed Mr. Brown's claim for a maritime lien against the vessel, not because the work was not seaman's work, but rather because the vessel was not in commission. Throughout the time when Mr. Brown was tending to the vessel, it was dismantled with machinery removed, and was "little better than a hulk."⁵²

An examination of Canadian statutory law, regulation, and jurisprudence shows that John Papai would have been considered a seaman at the time of his injuries aboard the *Pt. Barrow*. The Canadian Admiralty tradition similarly draws its authority, precedent, and jurisdiction from Britain through the Colonial Courts of Admiralty Act as enlarged by the Statute of Westminster. Accordingly, the jurisprudence of *The Princess Alice*, *The Jane and Matilda*, and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* regarding vessel status and service status is equally sound in Canada. The Canada Shipping Act, Safe Manning Regulations, and Ships' Deck Watch Regulations clearly bring tugs such as the *Pt. Barrow* and those employed aboard them within the definition of merchant vessels and merchant seamen. John Papai's work aboard the *Pt. Barrow* while alongside her pier would have been considered the work of the ship and he, therefore, a seaman entitled to seaman's remedies, had the accident occurred in Canada.

IX. NEW ZEALAND

Much like Canada and Australia, the Dominion of New Zealand includes the regulation of tugs within its overall merchant shipping regulation scheme. As in Australia, the basis of Admiralty jurisdiction in New Zealand is based on the Colonial Courts of Admiralty Act of 1890.⁵³ The primary statutory regulation is the Shipping and Seamen Act of 1952. The regulations promulgated under the authority of this act govern the construction manning, and survey of tugs. The act itself also contains specific provisions regarding the employment of crew and carriage of dangerous goods. This regulatory scheme establishes various classes

49. *Connor v. The "Flora"* [1898] 6 Ex. C. R. 131, 132.

50. *Id.* at 132.

51. *Brown v. The "Flora"* [1898] 6 Ex. C.R. 133.

52. *Id.* at 134.

53. Parks and Cattell, *supra* note 13, at 14.

of ships depending on size, motive power, and intended area of operation. This scheme subjects tugs to the same requirements as all other vessels. Tugs must comply with the Shipping (Cargo Ships) Construction and Survey Rules and Shipping (Lifesaving Appliances) Rules, as well as specific requirements regarding radio, radar, and echo-sounding equipment.⁵⁴

Since most New Zealand tugs are harbor tugs which generally do not go beyond the confines of their home ports, they are considered restricted limit ships under section 250 of the act. As such, they are governed as restricted-limits vessels subject to the Shipping Restricted Limits Notice of 1964, Shipping (Manning of Restricted-Limit Ships) Rules of 1976. Tugs are defined in these regulatory provisions as ships engaged in towing, pushing, or otherwise propelling barges, bulks, or other ships. The regulations also control the qualifications of the master and engineer of such vessels and their minimum crewing requirements.⁵⁵

Tugs which do trade outside the restricted limits of their home ports, operating only on the east coast of the North Island between North Cape and East Cape, with a register length of less than ninety feet are governed as to officers, by the Shipping (Manning of Towboats) Notice of 1963. The Shipping (Manning of Restricted-Limits Ships) Rules governs the minimum total complement of such vessels. Tugs trading beyond the restricted limits area are governed by the act itself, which prescribes qualifications and minimum numbers of deck and engineering officers, seamen, and engine room staff by the size of the vessel. It is important to note that statutory and regulatory provisions only set a minimum standard. Negotiated industrial awards between the employers and unions may set a substantially higher standard than statutes and regulations.⁵⁶

The Supreme Court of New Zealand commented on the binding nature of British Admiralty jurisdiction through the Colonial Courts of Admiralty Act and of British precedent in *The "Queen Eleanor"*.⁵⁷ In asserting that the applicable law was prescribed by the terms of the Act, the court held itself to be bound by applicable British precedent. Accordingly, the court declined to entertain arguments based on American cases and considered British precedent alone as dispositive of the case.⁵⁸

New Zealand includes seamen in its statutory workers' compensation scheme. The Workers' Compensation Act 1956 contains provisions which apply exclusively to seamen. O. E. Smuts-Kennedy, editor of *MacDonald's Law Relating to Workers' Compensation in New Zealand*, cites a number of cases which, although not decided specifically under the act, are illustrative of who are seamen under New Zealand Law and who are not. These include *The Jane and*

54. *Id.* at 438-39.

55. *Id.* at 439.

56. *Id.* at 439-40.

57. [1899] 18 N.Z.L.R. 78.

58. *Id.* at 84.

*Matilda, R. v. Judge of City of London Court and Owners of S.S. Michigan, and The "Collaroy": Harris v. Robertson.*⁵⁹ Smuts-Kennedy also cites a number of other British cases which illustrate seaman status under New Zealand Law: *Chislett v. Macbeth & Co.*;⁶⁰ *In the Goods of Hale*;⁶¹ *"The Hanna"*;⁶² and *Corbett v. Pearce*.⁶³

A review of New Zealand statutory law, regulation, and jurisprudence indicates that John Papai would have been considered a seaman at the time of his injuries aboard the *Pt. Barrow*, had the accident occurred in New Zealand waters. The New Zealand Admiralty tradition also draws its authority, precedent, and jurisdiction from Britain through the Colonial Courts of Admiralty Act. The jurisprudence of *The Princess Alice*, *The Jane and Matilda*, and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* regarding vessel status and service status can be considered as equally valid in New Zealand. New Zealand's extensive regulatory control of tugs clearly brings them and those employed aboard them within the definition of merchant vessels and merchant seamen. The Shipping and Seamen Act of 1952, Shipping (Cargo Ships) Construction and Survey Rules, Shipping (Lifesaving Appliances) Rules, Shipping Restricted Limits Notice of 1964, and Shipping (Manning of Restricted-Limit Ships) Rules of 1976 all serve to define those employed aboard tugs most clearly as merchant seamen.

X. SOUTH AFRICA

Admiralty law in the Republic of South Africa is a hybrid of civilian and British practice. The Admiralty Jurisdiction Regulation Act 105 of 1983 effected significant codification and reform of South African admiralty practice. However, by its terms, the act incorporates the British Colonial Courts of Admiralty Act of 1890. For example, a maritime claim includes any claim which fell within the ambit of the Colonial Courts of Admiralty Act. The South African act also provides that the law applicable to any matters which fell within the jurisdiction of the Colonial Courts of Admiralty is the law which the High Court of Justice of the United Kingdom would have applied in exercising its Admiralty jurisdiction. This was the opinion taken by South African courts in *Peca Enterprises Ltd. v. Registrar of the Supreme Court of Natal*.⁶⁴

*Oriental Commercial and Shipping Co. v. MV Fidias*⁶⁵ demonstrates the interplay between South African statutory law and British Admiralty precedent.

59. Macdonald's Law Relating to Workers' Compensation in New Zealand 112-15 (O. E. Smuts-Kennedy ed., 3d ed. 1958).

60. 2 K.B. 36 (1909).

61. 2 I.R. 362 (1915).

62. 1 L.R.-Adm. & Eccl. 283 (1866).

63. 2 K.B. 422 (1904).

64. 1977 (1) SA 76 (N) 83. Shaw, *supra* note 29, at 1-2.

65. 1986 (1) S.A.L.R. 714.

The issue at bar revolved around the definition of a maritime lien. While the South African Admiralty Jurisdiction Regulation Act 105 of 1983 provides that a maritime claim may be enforced in rem if the claimant has a maritime lien, it provides no definition of what a maritime lien is. Because this act incorporates by its terms the jurisdiction and law of British Admiralty courts as contained in the Colonial Courts of Admiralty Act of 1890, British law fills the lacuna.⁶⁶

In holding that the claim of a "necessaries man" was not a maritime lien, giving rise to an in-rem claim against the vessel, the court held itself to be bound by the terms of the act which incorporated the Colonial Courts of Admiralty Act. Accordingly, the six categories of maritime lien known to English admiralty were applied to the case. As the claim of a "necessaries man" was not among these, the court felt itself bound to deny the claim and refused to broaden the definition of a maritime lien beyond the scope provided by English tradition. In a number of places in the opinion, the court holds British admiralty precedent as binding upon it.⁶⁷

In *Wm. Brandt's Sons & Co. v Waikiwi Shipping Co.*,⁶⁸ the court granted a lien over the vessel for the wages of the crew who were required to remain aboard and maintain it while the ship was laid up. The *Waikiwi Pioneer* was laid up in the port of Durban, South Africa under a writ of arrest. The nature of its cargo required that the ship's equipment be run in order to prevent the ruin of the cargo. A crew was required to remain on board to do so. If the cargo spoiled, it would render the vessel itself practically worthless. The court held that the salaries of the crew employed to superintend and maintain the *Waikiwi Pioneer* gave rise to a claim against the ship in rem. Further the court allowed the mortgagee who paid the crew to be subrogated to their seamen's rights due to the extraordinary circumstances.⁶⁹

A review of South African jurisprudence and statutes demonstrate that John Papai would have been considered a seaman at the time of his injuries aboard the *Pt. Barrow*, had the accident occurred under South African law. South African courts sitting in Admiralty draw their authority, precedent, and jurisdiction from the Colonial Courts of Admiralty Act through the Admiralty Jurisdiction Regulation Act 105 of 1983. Therefore, the reasoning of *The Princess Alice*, *The Jane and Matilda*, and *The Queen v. Judge of the City of London Court and the Owners of the S.S. Michigan* regarding vessel status and service status is equally valid and binding in the Republic of South Africa. *Wm. Brandt's Sons & Co. Ltd. v Waikiwi Shipping Co. Ltd.* and *Oriental Commercial and Shipping Co. Ltd. v MV Fidias* stand as clear demonstration of the continuity of the reasoning which began with *The Jane and Matilda*. Accordingly, the work of Mr. Papai aboard the *Pt. Barrow* while alongside her pier would be considered the work of

66. *Id.* at 714-16.

67. *Id.* at 717.

68. 1973 (4) S.A.L.R. 358 (N).

69. *Wm. Brandt's Sons & Co. v. Waikiwi Shipping Co.*, 1973 (4) S.A.L.R. 358, 358-60 (N).

the ship and he, therefore, a seaman and entitled to seaman's remedies, had the accident occurred in South Africa.

XI. CONCLUSION

Careful examination of the statutory law and jurisprudence of the major admiralty jurisdictions of the English-speaking world demonstrates conclusively that a uniform practice exists regarding seamen employed aboard vessels in harbor. The jurisprudence universally establishes that the proper test to determine seaman status in cases like *Papai* is the "service of the ship" rule, not Justice Kennedy's "perils of the sea" test. In American jurisprudence, the "service of the ship" rule closely tracks the "work of the vessel" language of *Wilander*, without the *Chandris* or *Papai* expansions. Had the *Pt. Barrow* been flying the flag of Great Britain, Canada, Australia, New Zealand, or South Africa and in her registered harbor on March 13, 1989, when John Papai was injured in her service, he would have been considered a seaman and received seaman's benefits. Justice Kennedy, in articulating a previously unheard-of extension to the test in *Chandris, Inc. v. Latsis*, derogates from the experience and wisdom of the rest of the English speaking-world and takes a major step in the divorcement of American admiralty jurisprudence from its previously international roots.

Wiley Richmond Beevers