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Admiralty

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DEVELOPMENTS IN THE LAW, 1981-1982

A Symposium

[*Editor's Note. Developments in the Law* continues to reflect coverage beyond the work of Louisiana's appellate courts and includes coverage of legislative amendments to Louisiana and federal statutes and decisions of interest to the Louisiana lawyer. This year's symposium includes cases reported from April 1, 1981 through July 31, 1982.]

ADMIRALTY

*Frank L. Maraist**

THE JURISDICTION OF ADMIRALTY

Until 1970, the generally accepted rule was that if a tort occurred on navigable waters, it was maritime. In the oft-quoted language of *The Plymouth*,[1] "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."[2] In 1970 the Supreme Court, in the celebrated *Executive Jet*[3] case, soundly criticized the "locality alone" test and repudiated it in cases involving aircraft crashes; those cases, the Court concluded, did not fall within admiralty jurisdiction in the absence of a "significant relationship to traditional maritime activity."[4] The Court stopped short of a general repudiation of the "locality alone" test, but lower courts have been unanimous in their post-*Executive Jet* view that no tort falls within admiralty jurisdiction unless it has the requisite "maritime flavor."[5]

Recently, in *Foremost Insurance Co. v. Richardson*,[6] the Supreme Court was presented with the issue of whether a collision between two pleasure boats on navigable waters fell within maritime jurisdiction. In concluding that it did, the Court expressly confirmed what it had implied in *Executive Jet*: the requirement that the wrong have

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1. 70 U.S. (3 Wall.) 20 (1865).
2. *Id.* at 36.
3. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).
4. *Id.* at 268.
5. *See, e.g.*, Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981); Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975).
6. 102 S. Ct. 2654 (1982).

a significant connection with traditional maritime activity is not limited to the aviation context, but applies to all torts.

After confirming the broad reach of *Executive Jet*, the *Richardson* Court addressed an issue spawned by the confirmation: whether "traditional maritime activity" means "commercial activity." The lower court's findings of fact left no room for an inconclusive decision; the district court had found that there was "no evidence to indicate that any 'commercial activity,' even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question" and "[t]here was no other instrumentality involved . . . that had even a minor relationship to 'admiralty' or 'commerce.' "[7] The Supreme Court rejected the argument that commercial activity is essential to a finding of "maritime flavor," observing that "[t]he federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct."[8] This need for adherence to uniform sailing rules, coupled with the "potential disruptive impact" of a collision on navigable waters, produces a sufficient nexus with traditional maritime activity to sustain admiralty jurisdiction.

Foremost thus answers one of the questions about maritime tort jurisdiction that frequently arises. The decision also suggests the answer to another question: what happens when there is a collision between a pleasure boat and a non-vessel, such as a swimmer, a dock, or a piling? The Court hints that both it and Congress (through that body's broad definition of a "vessel" which must comply with shipping laws and with the "rules of the road") adhere to the view that "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities."[9] Thus any collision or allision on navigable waters apparently will be governed by maritime tort law. This may mean, as the dissenters suggest,[10] that most torts occurring on navigable waters will have a sufficient nexus with traditional maritime activity. Thus the "locality alone" test, jettisoned in *Executive Jet*, may have surfaced again as the "locality plus nexus" test, leaving behind only a few "swimmer-surfboarder" type cases and those claims arising out of crashes of land-based planes on territorial waters while on flights between two points within the continental United States.

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7. *Id.* at 2657.
8. *Id.* at 2659 (emphasis by the court).
9. *Id.*
10. *Id.* at 2663 (Powell, J., dissenting).

After *Executive Jet* and *Foremost*, "maritime flavor" is an essential element of a maritime tort. Must the tort also occur on navigable waters or is "maritime flavor" alone sufficient in some cases? The conventional wisdom (and the better reading) of *Executive Jet* and *Foremost*[11] is that both "flavor" and "locality" are required unless, of course, the tort falls within the reach of the Admiralty Extension Act.[12]

Where tortious conduct prevents a seaman's employment, there arguably is no "locality" and thus no maritime tort. Arguably, the tort has its "impact" on navigable waters and thus there is "locality," but such an expansive interpretation of "locality" would make a shambles of this requirement. For example, it would bring into maritime law claims for inland damage to goods destined for ocean shipment. A seaman's employment, however, is the "stuff" of which admiralty is made and is much too important to be left to the vagaries of state law.

Some lower court decisions have held that tortious interference with a seaman's contract of employment is a maritime tort.[13] The latest such decision is *Smith v. Atlas Off-Shore Boat Service, Inc.*[14] In *Smith*, the court held that an employer's discharge of a seaman in retaliation for the latter's pursuit of his compensation remedies constituted a maritime tort. The seaman's remedy for retaliatory discharge that is sanctioned in *Smith* is narrowly circumscribed. He must establish that the employer's decision was motivated in substantial part by the knowledge that the seaman has filed or intends to file the personal injury action against the employer. Punitive damages are not recoverable. The compensatory damages to which the seaman is entitled include mental anguish, the expense of securing new employment, lost earnings while seeking the new position, and any lost future earnings if the new employment provides less compensation than that earned while in the employ of the discharging employer.

The jurisdictional issue perhaps could be handled better by treating retaliatory discharge as a breach of the seaman's contract of employment, thus preserving inviolate the dual requirements of "locality" and "flavor." However, none should quarrel with the net result—maritime law now governs the imposition of sanctions against an employer for the retaliatory discharge of a seaman.

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11. *See, e.g.*, Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982).

12. 46 U.S.C. § 740 (1976). The Act applies if the damages are "caused by a vessel on navigable water," although the damages may occur on land.

13. *See, e.g.*, Carroll v. Protection Maritime Ins. Co., 512 F.2d 4 (1st Cir. 1975).

14. 653 F.2d 1057 (5th Cir. 1981). *See also* Note, *Retaliatory Discharge of Seamen: Smith v. Atlas Off-Shore Boat Service, Inc.*, 43 LA. L. REV. 221 (1982).

INDEMNITY

Maritime law generally enforces contractual indemnity, even where the indemnitor agrees to indemnify the indemnitee against the latter's negligence.[15] One important exception is that a vessel owner may not enforce contractual indemnity against a maritime employer for damages sustained by the latter's employee. Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act provides that "[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel . . . the employer shall not be liable to the vessel for such damages . . . and any agreements or warranties to the contrary shall be void."[16] If the party who obtains the contractual indemnity from the maritime employer is not a vessel, section 905(b) is inapplicable. Section 905(a), however, provides that "[t]he liability of an employer [for compensation benefits to the worker] shall be exclusive and in place of all other liability of such employer to . . . anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death . . . ."[17] This language arguably prohibits any contractual indemnification by a maritime employer for injuries to his employee, as the indemnification would be "on account of" the injury to the employee. The Fifth Circuit, however, has taken the position that in such a case the indemnification is "on account of" the contract and not the employee's injury, and thus it would not be barred by section 905(a).[18]

Under the doctrine announced in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,[19] a maritime employer owes to the vessel for which it is providing maritime services the implied warranty that it will perform those services in a workmanlike manner. This warranty of workmanlike performance was created by judicial fiat to remedy an obvious injustice. Under the *Sieracki*[20] doctrine, a vessel owner owed the warranty of seaworthiness to the employees of a maritime employer performing services aboard the vessel. The warranty extended to temporary unseaworthy conditions created solely by the negligence of the maritime employer. Since the maritime employer was immune to a claim for contribution[21] and there frequently was no written contract between the vessel and the employer, imposition of the implied warranty achieved substantial justice.

15. *See, e.g.*, Wedlock v. Gulf Miss. Marine Corp., 554 F.2d 240 (5th Cir. 1977). *See also* Note, *Contractual Indemnity Under Maritime and Louisiana Law*, 43 LA. L. REV. 189 (1982).

16. 33 U.S.C. § 905(b) (1976).

17. 33 U.S.C. § 905(a) (1976).

18. Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981).

19. 350 U.S. 124 (1956).

20. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

21. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

In the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, the vessel owner shed the *Sieracki* yoke and the maritime employer was freed from the *Ryan* doctrine.[22] The amendments did not specifically overrule *Sieracki* and *Ryan*, however, but merely provided that those doctrines did not apply in suits between vessel owner, maritime employer, and maritime employee.[23] However, in the interim between the *Ryan* decision and the 1972 amendments, lower courts had applied the warranty of workmanlike performance to contracts for maritime services other than those between vessel owner and maritime employer.[24] An unanswered question is whether the warranty has survived the demise of the unique situation from which it sprang.

In *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*,[25] the Fifth Circuit was asked to apply the warranty to an indemnity action between a vessel and a marine service contractor who was not the employer of the injured claimant. The court, noting that there was "little logical appeal in [the] proposed extension of a doctrine so withered,"[26] concluded that the dispute would be "best accommodated by a straightforward application of the usual maritime comparative fault system."[27] The same court reached a similar result in a subsequent case.[28]

The advent of comparative contribution[29] also has led the Fifth Circuit to scuttle another indemnity doctrine, that based on the "active fault" of one tortfeasor and the "passive fault" of the other.[30] The "active/passive" rule had been applied frequently by the lower federal courts during the period in which contribution among joint tortfeasors in admiralty was either disallowed or was permitted only on a per

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22. 33 U.S.C. § 901 (1976).

23. 33 U.S.C. § 905(b) (1976):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel . . . the 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 . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness.

24. *See, e.g.*, Parfait v. Jahncke Serv., Inc., 484 F.2d 296 (5th Cir. 1973) (diesel engine repair service contractor); Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394 (5th Cir. 1971) (drill pipe contractor); Lusich v. Bloomfield S.S. Co., 355 F.2d 770 (5th Cir. 1966) (ship repair contractor).

25. 651 F.2d 1096 (5th Cir. 1981).

26. *Id.* at 1100.

27. *Id.*

28. Agrico Chem. Co. v. M/V Ben W. Martin, 664 F.2d 85 (5th Cir. 1981).

29. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

30. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 312 (4th ed. 1971).

capita basis.[31] Supreme Court and lower court decisions in recent years, however, have established firmly the rule of comparative contribution on the basis of percentage of fault. Since the "active/passive" theory is simply a way of equitably shifting the loss from the lesser wrongdoer to the greater wrongdoer when the loss can not be prorated on the basis of comparative fault, the adoption of comparative contribution makes this doctrine superfluous. The Fifth Circuit, in *Loose v. Offshore Navigation, Inc.*,[32] ruled that the doctrine of "active/passive fault" indemnification no longer applies in admiralty. The *Loose* ruling most likely will be generally accepted in maritime law.

SEAMEN

Seaman Status

A worker achieves seaman status only if he is more or less permanently connected to or performs a significant amount of his work aboard a "vessel."[33] Seaman status usually hinges upon the connexity between the worker and the vessel, but occasionally the key issue is whether the structure with which the worker is connected is in fact a vessel. One common problem is the status of the helicopter pilot who ferries workers and supplies from shore-based installations to movable rigs or fixed platforms. Usually, he will not qualify as a seaman because the structure with which he is connected—the helicopter—is not a "vessel."[34] This result is anomalous, since a helicopter ferrying men and supplies to the Outer Continental Shelf is performing the same function as a vessel and is subject to most of the same "perils of the sea." The first breakthrough came in *Barger v. Petroleum Helicopters, Inc.*,[35] in which the court treated a helicopter as a "vessel" for the purpose of qualifying its pilot as a seaman. The facts of the case were strong, however; the helicopter was equipped with permanently affixed pontoons, the pilot underwent extensive training on how to land, taxi, and take-off from water, and the

31. *E.g.*, Cotten v. Two "R" Drilling Co., 508 F.2d 669, 671 (5th Cir. 1975); Kelloch v. S & H Subwater Salvage, Inc., 473 F.2d 767, 769 (5th Cir. 1973) ("The passively negligent tortfeasor is clearly entitled to total indemnity from the actively negligent party."); Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178, 181 (5th Cir. 1969) ("the right of indemnity exists between parties, one of whom is guilty of active or affirmative negligence, while the other's fault is only technical or passive").

32. 670 F.2d 493 (5th Cir. 1982).

33. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-21 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]; 1B A. SANN, S. BELLMAN, N. GOLDEN, & B. CHASE, BENEDICT ON ADMIRALTY § 11a (7th ed. 1981) [hereinafter cited as BENEDICT ON ADMIRALTY].

34. *See* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D.V.I. 1977).

35. 514 F. Supp. 1199 (E.D. Tex. 1981).

helicopter was used almost exclusively in transporting personnel to and from oil drilling platforms on navigable waters.

Any hope that *Barger* might signal recognition of aircraft as "vessels" for the purpose of determining seaman status was dashed by the Fifth Circuit's subsequent decision in *Smith v. Pan Air Corp.*[36] In that case, the court held that a plane equipped to take off from either land or water and which was engaged in ferrying workers from Louisiana to locations offshore was not a vessel for purposes of the Jones Act.[37]

In the Fifth Circuit, a worker, at the same point in time, can have seaman status as to one defendant but not as to another. In *Dupre v. Otis Engineering Corp.*,[38] the court held that a seaman loaned by his employer to the defendant to act as a temporary substitute performing non-seaman's work on dry land was not a seaman as to the defendant, regardless of the plaintiff's status as to his employer.

Even more recently, in *Burks v. American River Transportation Co.*,[39] the Fifth Circuit reached the same basic conclusion. In *Burks*, the plaintiff performed most of his work on his employer's barge, which was specially equipped to discharge bulk cargo from other barges directly into oceangoing vessels. In performing his duties, the plaintiff went aboard the defendant's barge, which was being unloaded, and was injured when a hatch cover collapsed. Plaintiff logically argued that since he was a seaman on his *employer*'s barge, he was not covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA); thus, under *Aparicio v. Swan Lake*,[40] the *Sieracki* unseaworthiness remedy remained available to him. The Fifth Circuit disagreed. As to the *defendant*'s barge, the plaintiff was not a seaman, as he lacked the required permanent connection. Consequently, as to the defendant, he was engaged in maritime employment within the meaning of the LHWCA and was limited to a negligence action under section 905(b). Plaintiff's relationship to his employer's barge was "immaterial,"[41] since whatever rights he may have had against his employer, "the 'member of a crew' language in section 905(b) clearly [referred] to the vessel that [was] charged with negligence—here, [defendant's barge]."[42]

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36. 684 F.2d 1103 (5th Cir. 1982); *see also* Ward v. Director, 684 F.2d 1114 (5th Cir. 1982).

37. 46 U.S.C. § 688 (1976).

38. 641 F.2d 229 (5th Cir. 1981).

39. 679 F.2d 69 (5th Cir. 1982).

40. 643 F.2d 1109 (5th Cir. 1981).

41. *Burks*, 679 F.2d at 76.

42. *Id.*

Putting aside, for the moment, the wisdom of the decision, the court's rationale is perplexing. Section 905(b) contains no "member of the crew" language. That section refers to a "vessel," to "a person covered under this chapter" (the LHWCA), and to other persons "employed by the vessel." Section 902(21)[43] defines a "vessel" as including the members of the crew of a vessel on which a person covered by the LHWCA sustains injury. Neither of these sections furnishes a statutory answer to the question: does a worker who is a seaman on a vessel acquire LHWCA status, so as to prevent an unseaworthiness action, when he is working temporarily aboard the vessel of another? The issue is an important one because if the seaman is considered a maritime worker vis-a-vis the second vessel, his negligence action against it may be barred by the second and third sentences of section 905(b), a result which would not occur if the worker retained seaman's status while temporarily working aboard the vessel of another.

Seaman's Wages

46 U.S.C. § 596 obligates the master or owner of any vessel making coasting or foreign voyages to pay a seaman the balance of his unpaid wages within specified periods after he is discharged. Additionally, it provides that "[e]very master or owner who refuses or neglects to make [such] payment . . . without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed . . . ."[44] This penalty provision for failure to pay wages upon discharge is a common one. Many states which have adopted such a statute, however, have placed a ceiling on the amount of penalty wages which the seaman may recover.[45] Although the maritime statute does not contain a limit on the amount of penalty wages, lower federal courts consistently had assumed they had judicial discretion to limit the penalty to a reasonable amount.[46] This was the approach taken by both the district court and the court of

43. 33 U.S.C. § 902(21) (1976).

44. 46 U.S.C. § 596 (1976).

45. CAL. LAB. CODE § 203 (West 1971 & Supp. 1982); IDAHO CODE § 45-606 (1977 & Supp. 1982); KAN. STAT. ANN. § 44-315 (1981); LA. R.S. 23:632 (1950 & Supp. 1964); MICH. COMP. LAWS ANN. § 408.488 (West Supp. 1982-83); MINN. STAT. ANN. § 181.13 (West 1966); OR. REV. STAT. § 652.150 (1981); PA. CONS. STAT. ANN. § 260.10 (Purdon 1977); S.C. CODE ANN. § 41-11-170 (Law. Co-op. 1976 & Supp. 1981); WASH. REV. CODE ANN. § 49.52.070 (1962).

46. *E.g.*, McConville v. Florida Towing Corp., 321 F.2d 162 (5th Cir. 1963); Caribbean Federation Lines v. Dahl, 315 F.2d 370 (5th Cir.), *cert. denied*, 375 U.S. 831 (1963); Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir.), *cert. denied*, 365 U.S. 869 (1960); Prindes v. Steamship African Pilgrim, 266 F.2d 125 (4th Cir. 1959); Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310 (1st Cir. 1950); Forster v. Oro Navigation Co., 128 F. Supp. 113 (S.D.N.Y. 1954), *aff'd* 228 F.2d 319 (2d Cir. 1955).

appeals in *Griffin v. Oceanic Contractors, Inc.*,[47] a case in which the seaman obtained employment with another shipowner about a month after his discharge and did not bring his action for wages until two years later. Although only $412.50 in wages were withheld, calculation of the double wages to the date of payment or the date of the district court's judgment would have produced a penalty in excess of $300,000. The Supreme Court granted writs and reversed the lower courts, concluding that "[u]nder the plain language of the statute . . . [the] decision to limit the penalty period was error."[48] While the Court acknowledged that interpretation of a statute in a manner which would produce an absurd result should be avoided if there is an alternative interpretation consistent with the legislative purpose, it found that Congress's purpose in enacting this statute—punishment of the recalcitrant employer—would best be served by a literal application.

Like most important decisions, the Court's answer did not come easily. One could have urged strong arguments for the employer, such as that Congress had not looked at the statute in more than a half-century. During that period, lower courts consistently had interpreted the statute as permitting judicial discretion to tailor the punishment to fit the crime. The congressional inaction, the judicial gloss on the statute, and the trend in state law may have produced a justified reliance by employers that if they lacked sufficient cause, the penalty would be tailored to fit the crime. Perhaps a more important argument was that the congressional purpose could actually be thwarted by literal application of the statute. The penalty is not due if there is "sufficient cause" for withholding payment. Therefore, a trier of fact faced with the option either of imposing an exorbitant penalty or no penalty at all is more likely to choose the latter path, thus allowing the employer to escape any punishment. On the other hand, a shipowner should not be permitted to use his vast economic superiority to deprive the seaman of basic essentials, such as accrued wages and maintenance and cure. The decision in *Griffin* removed much of the temptation to do so.

Seaworthiness

In maritime law, the term "seaworthiness" connotes that a vessel is reasonably fit for its intended use. The vessel's operator owes a duty to provide a seaworthy vessel at certain times to various interests, such as the seaman, the insurer, and the shipper of cargo on the vessel.[49] He must furnish the seaman with a seaworthy vessel

47. 664 F.2d 36 (5th Cir. 1981).

48. Griffin v. Oceanic Contractors, Inc., 102 S. Ct. 3245, 3253 (1982).

49. A vessel owner owes to a member of the crew the absolute duty to provide

at all times. If the seaman is injured by some condition of the vessel that makes it unseaworthy, the operator is liable, even though he was free from negligence and even though the condition arose on a voyage or while the vessel was otherwise beyond the operator's personal control.[50]

The owner of a vessel who lets it to another for the latter's use may attempt to avoid the responsibility of providing a perpetually seaworthy vessel to the crew by effecting a demise charter with the user. Such a charter makes the charterer the operator of the vessel and, consequently, imposes on him the duty of providing the crew with a seaworthy vessel.[51] Where the vessel is unseaworthy when the demise charter commences, the owner may remain liable to third persons injured by the condition, at least for some time thereafter.[52] However, it generally has been accepted that the confection of a valid demise charter relieves the owner of liability for any unseaworthy condition arising after the charter commences.[53] The Fifth Circuit has concluded otherwise. In *Baker v. Raymond International, Inc.*,[54] the court held that a seaman may recover *in personam* against the owner of an unseaworthy vessel, although the vessel is subject to a valid demise charter to a third person and the unseaworthy condition arises after the charterer took possession.

The decision, although surprising, may not have far-reaching consequences. Where a demise charter is perfected, the vessel remains liable *in rem* for any unseaworthy condition causing harm to a seaman.[55] Thus a prudent owner ordinarily should secure insurance protection against seamen's claims for unseaworthiness, at least in an amount equal to the value of the vessel. Except for the unwary shipowner, *Baker* may mean little more than additional clauses in, and increased costs for, marine insurance policies.

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a seaworthy vessel at all times. However, he owes to the shipper of cargo only the lesser duty of using due diligence to send out a seaworthy vessel at the commencement of the voyage. 46 U.S.C § 1303(1) (1976).

50. *See generally* 1B BENEDICT ON ADMIRALTY, *supra* note 33, § 23.

51. *See generally* GILMORE & BLACK, *supra* note 33, § 4-20 at 239.

52. *See* Nat G. Harrison Overseas Corp. v. American Tug Titan, 516 F.2d 89, 96 (5th Cir.), *modified per curiam*, 520 F.2d 1104 (1975); Hamilton v. Canal Barge Co., 395 F. Supp. 978, 988 (E.D. La. 1975); Solet v. M/V Capt. H. V. Dufrene, 303 F. Supp. 980, 984 (E.D. La. 1969).

53. Reed v. Steamship Yaka, 373 U.S. 410 (1963); Cannella v. United States, 179 F.2d 491 (2d Cir. 1950); *see also* Vitozi v. Balboa Shipping Co., 163 F.2d 286 (1st Cir. 1947); Muscelli v. Frederick Starr Contracting Co., 296 N.Y. 330, 73 N.E.2d 536 (1947).

54. 656 F.2d 173 (5th Cir. 1981).

55. *See generally* GILMORE & BLACK, *supra* note 33, § 4-24 at 242.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Coverage

Prior to the 1972 amendments, a worker could fall within the coverage of the LHWCA even though he was not engaged in maritime employment at the time of injury. He was entitled to LHWCA benefits if: (1) his employer had at least one employee who was engaged in maritime employment and was therefore qualified as a maritime employer and (2) the claimant-employee was injured on navigable waters.[56] The 1972 amendments expanded the covered "situs" from navigable waters to adjoining piers, wharfs, docks, and other adjoining areas,[57] but added the requirement that the worker must be engaged in maritime employment at the time of injury.[58] As the Supreme Court pointed out in *Northeast Marine Terminal Co. v. Caputo*,[59] an employee is covered under the new Act only if he has both "status" as a maritime employee and is injured on a covered "situs."

The statutory definition of an "employer"—"an employer any of whose employees are employed in maritime employment"[60]—was not changed in 1972, but the new requirement that the claimant must himself be engaged in maritime employment makes superfluous any further inquiry into whether the employer has any employee who is engaged in maritime employment. Reaching the issue in *Hullinghorst Industries, Inc. v. Carroll*,[61] the Fifth Circuit correctly observed that the "employer" requirement under the old act has been rendered "largely tautological"[62] by the 1972 amendments. If a claimant is engaged in maritime employment upon navigable waters at the time of his injury, "it necessarily follows that . . . his employer . . . is a statutory 'employer' within the meaning of the Act."[63]

Caputo and its progeny[64] provide that if a worker spends "at least some of [his] time in indisputable longshoring operations,"[65] he acquires the "status" of a covered employee and retains that status even if

56. *E.g., Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 344, 339 (1953).
57. 33 U.S.C. § 903(a) (1976).
58. 33 U.S.C. § 902(3) (1976).
59. 432 U.S. 249 (1977).
60. 33 U.S.C. § 902(4) (1976).
61. 650 F.2d 750 (5th Cir. 1981).
62. *Id.* at 758.
63. *Id.* at 759.
64. *See, e.g.*, P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Howard v. Rebel Well Serv., 632 F.2d 1348 (5th Cir. 1980); Boudloche v. Howard Trucking Co., 632 F.2d 1346 (5th Cir. 1980); Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978).
65. *Caputo*, 432 U.S. at 273.

he is engaged in nonmaritime employment at the time of injury. The other side of the *Caputo* coin is that if a worker is engaged in maritime employment at the time of injury, he is covered under the LHWCA, even though his overall duties are nonmaritime. The Fifth Circuit reached this conclusion during the 1981-82 term.[66]

Does drilling for oil and gas over navigable waters constitute "maritime employment" within the meaning of the Act? The answer to this question is irrelevant to two groups of offshore workers—those who qualify as seamen and those engaged in offshore petroleum production on the Outer Continental Shelf. The former group is entitled to the seamen's remedies and is ineligible for LHWCA benefits, while the latter group falls within the coverage of the LHWCA by virtue of a special provision in the Outer Continental Shelf Lands Act.[67] However, the answer is important to two other classes of workers—those who are employed on submersible drilling rigs within state waters but who lack seaman status and those working on fixed drilling platforms within state waters. If these workers are not engaged in maritime employment within the meaning of the LHWCA, their claims against their employers for work-related injuries are governed by state workers' compensation.

The Fifth Circuit apparently has settled the issue for one of these classes, "non-seamen" aboard movable drilling units. In *Boudreaux v. American Workover, Inc.*,[68] the court, sitting *en banc*, concluded that such workers are covered by the Act for either of two reasons. One is that the injury occurs on navigable waters and that fact, without more, constitutes "maritime employment." The other reason is that the work in which they are engaged (marine petroleum and extraction work aboard a drilling vessel in navigable waters) is sufficiently related to maritime navigation and commerce to qualify as "maritime employment." The *Boudreaux* court used simple logic to reach its conclusion that any injury occurring on navigable waters meets the "status" requirement. The court reasoned that prior to 1972, any injuries on navigable waters were covered and the amendments adopted in that year were intended to expand, not to contract, coverage. *A fortiori*, injury on navigable waters is sufficient for coverage. The logic, however, does not speak to the question which underlies every issue of maritime jurisdiction: does this particular injury or type of injury affect maritime shipping and commerce sufficiently to justify the application of federal law and the resulting displacement of state law? While most work-related injuries on navigable waters would provoke

66. *See* Gilliam v. Wiley N. Jackson Co., 659 F.2d 54 (5th Cir. 1981).
67. 43 U.S.C § 1331 (1976).
68. 664 F.2d 463 (5th Cir. 1982) (reh'g en banc).

an affirmative answer, a rigid rule of inclusion may not be advisable. The approach adopted in *Boudreaux* has been rejected by at least one other court,[69] and the final decision may soon come from the Supreme Court or Congress.

The Fifth Circuit's rationale probably would not aid the platform worker within territorial waters. Such a worker usually lacks the requisite connexity with a vessel and thus does not qualify as a seaman. He also is not affected by the special statute extending LHWCA benefits to platform workers on the Continental Shelf. If he is to fall within the coverage of the LHWCA, he must have both "status" and "situs." Although arguably he may be injured on a covered "situs," which is defined as an "area adjoining navigable waters," the jurisprudence holds that the platform worker in territorial waters lacks "status."[70] *Boudreaux* and an earlier, similar decision[71] by the Fifth Circuit apparently are limited to workers on movable drilling units. In neither case did the court indicate that it would be willing to extend the concept of "maritime employment" to all offshore petroleum production. In fact, such an extension arguably would be barred by the Supreme Court's language in *Rodrigue v. Aetna Casualty & Surety Co.*[72]

Disability

The courts consistently hold that a claimant establishes a prima facie case of disability if he shows that he cannot perform his former job because of his work-related injury.[73] At that point, the burden shifts to the employer to prove that there are other jobs which the claimant could perform and thus he is not "disabled." Must the employer show that a specific job awaits the claimant or is it sufficient to show that there are jobs in the community which the claimant realistically can perform and secure? The Fifth Circuit takes the latter approach in *New Orleans (Gulfwide) Stevedores v. Turner.*[74] The court observes that the employer, in rebuttal of the claimant's prima

69. Churchill v. Perini North River Assocs., 652 F.2d 255 (2d Cir. 1981), *cert. granted sub nom.* Director v. Perini North River Assocs., 102 S. Ct. 1425 (1982).

70. Anderson v. McBroom Rig Bldg. Serv., Inc., 5 BEN. REV. BD. SERV. (MB) 713, No. 75-198 (Apr. 7, 1977); Toups v. Chevron Oil Co., 7 BEN. REV. BD. SERV. (MB) 261, No. 76-453 (Dec. 29, 1977).

71. Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981).

72. 395 U.S. 352 (1969).

73. Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110 (5th Cir. 1980); Base Billeting Fund, Laughlin Air Force Base v. Hernandez, 588 F.2d 173 (5th Cir. 1979); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979); Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs, 592 F.2d 762 (4th Cir. 1979).

74. 661 F.2d 1031 (5th Cir. 1981).

facie case, may establish the types of jobs which the claimant is capable of performing or is capable of being trained to perform, considering his age, background, and other relevant factors. The employer then may show that within that category of jobs, there is employment reasonably available for which the claimant is able to compete and which he realistically would be likely to secure. If it makes these showings, the Fifth Circuit concludes, the employer has successfully rebutted the presumption of disability.

Third Party Actions

A worker receiving benefits under the Longshoremen's and Harbor Workers' Compensation Act may maintain a tort action against any tortfeasor who does not come within the umbrella of employer tort immunity granted by the Act.[75] However, if the worker fails to bring an action against a third party within six months after acceptance of LHWCA benefits under an "award," the claim automatically is assigned to his employer.[76] Under *Rodriguez v. Compass Shipping Co.*,[77] the assignment is total and permanent and the right to sue the third party does not revert to the worker if the employer does not pursue the claim. Understandably, the tolling of this six-month period has become a matter of immense importance to injured workers and their counsel.

The issue which has attracted the most judicial fodder is the meaning of an "award." Undoubtedly, an award made by an administrative law judge, after formal claim and hearing, should satisfy the requirement. Conversely, acceptance of voluntary payments without the intervention or participation of the Office of Worker Compensation Programs (OWCP) clearly should not qualify as an "award."[78] However, between these extremes there is a broad middle ground, including: (1) payment after filing of a claim,[79] (2) payment under a compromise agreement filed with the OWCP,[80] and (3) payment after a conciliatory conference provoked by the OWCP.[81] Do any of these constitute ac-

75. 33 U.S.C. § 933(i) (1976). *See generally* 1 E. JHIRAD & A. SANN, BENEDICT ON ADMIRALTY § 28 (7th ed. 1981).

76. 33 U.S.C. § 933(b) (1976).

77. 451 U.S. 596 (1981).

78. *See* Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982); Klitznsky v. Pakistan Shipping Corp., 530 F. Supp. 326 (E.D. Pa. 1981). *But see* Simmons v. Sea-land Serv., Inc., 676 F.2d 106 (4th Cir. 1982); Duris v. Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982).

79. *See* Larson v. Associated Container Transp. (Australia) Ltd., 459 F. Supp. (E.D. Va. 1978). *But see* Dunbar v. Retla S.S. Co., 484 F. Supp. 1308 (E.D. Pa. 1980).

80. *See* Perez v. Costa Armartori, S.P.A., 465 F. Supp. 1211 (S.D.N.Y. 1979).

81. *See* Panzella v. Skou, 471 F. Supp. 303 (S.D.N.Y. 1979). *But see* Sea Quest Marine, Inc. v. Cove Shipping, Inc., 474 F. Supp. 164 (W.D. Wash. 1979).

ceptance of benefits under an "award" and thus trigger the running of the six-month period? The Supreme Court avoided a pronouncement on this question in *Rodriguez*, and the decisions of lower courts have been totally unsatisfactory. The matter is so unsettled that a cautious claimant will file suit within six months of any payment where the OWCP has been informed of, or has participated in, the processing of the claim.

Limitation of Liability

46 U.S.C. § 185 provides that a person may assert limitation of liability by filing a petition within six months of written notification of a possible claim and must either deed the vessel to the United States marshal or post a bond in the amount of the value of the vessel at the conclusion of the voyage for which limitation is sought. Upon compliance with these requirements, the court ordinarily will enjoin the prosecution elsewhere of claims subject to the limitation,[82] thus effectively compelling the assertion of those claims in the limitation proceeding.

The six-month period is jurisdictional. If the shipowner fails to seek this remedy within the requisite time frame, he loses his right to compel the litigation of all claims in one maritime forum.[83] An unanswered question is whether a shipowner loses his right to urge limitation as a defense in some other proceeding if he fails to provoke the concursus proceeding under section 185 within the six-month period. Arguably, limitation can be urged only in federal court on the admiralty "side"; thus once the six-month period has elapsed, limitation may not be raised in any other manner or in any other court and thus is lost.[84] However, some cases hold that a shipowner may assert limitation as a defense in any court. Under this view, the only thing lost by the expiration of the six-month period is the right to concursus, *i.e.*, to compel litigation of all of the claims in one proceeding. The Fifth Circuit reached this conclusion during the past year in *Signal Oil & Gas Co. v. Barge W-701*.[85]

The *Signal* court also addressed some questions which arise when limitation is permitted as a defense in individual actions by claimants. One such question is the time frame within which limitation must be

82. *See generally* GILMORE & BLACK, *supra* note 33, § 10-17 n.67, at 863.

83. *See In re* Goulandris, 140 F.2d 780 (2d Cir.), *cert. denied*, 322 U.S. 755 (1944); *In re* A/S J. Ludwig Mowinckels Rederi, 268 F. Supp. 682 (S.D.N.Y. 1967); Grasselli Chem. Co. No. 4, 20 F. Supp. 394 (S.D.N.Y. 1937). *But see* Hudgins v. Gregory, 219 F.2d 255 (4th Cir. 1955).

84. Thede, *Statutory Limitations (Other than Harter and COGSA) of Carrier's Liability to Cargo—Limitation of Liability and the Fire Statute*, 45 TUL. L. REV. 959, 976 (1971).

85. 654 F.2d 1164 (5th Cir. 1981).

raised as a defense outside of the concursus proceeding. In *Signal*, limitation was sought as a defense in federal court and the court concluded that in such a case, the plea is timely if filed within the time limit allowed for answers in the Federal Rules of Civil Procedure, even though that occurs more than six months after the shipowner has received notice in writing of the claim.

Another issue is whether the shipowner who pleads limitation as a defense outside of a concursus proceeding is required to post a separate bond in the amount of the value of the vessel in each proceeding in which he asserts limitation as a defense. In *Signal*, multiple claims were advanced against the shipowner in a single proceeding, and the court of appeals concluded that in those circumstances a single bond in the amount of the value of the vessel was sufficient. The court thus did not reach the more difficult issue of whether a shipowner must post separate bonds in each separate proceeding by individual claimants. If such a conclusion is reached, then a shipowner whose vessel has significant value after the accident or occurrence for which limitation is sought could lose any effective limitation defense where, as is often the case, each claimant files a separate suit.

PROCEDURE

Ancillary Jurisdiction

The doctrine of ancillary (or pendent) jurisdiction frequently is applied to permit a federal court which lacks subject matter jurisdiction to adjudicate a state law claim where the claim is properly joined with a claim under federal law.[86] Where the only basis of jurisdiction over the federal law claim is 28 U.S.C. § 1333, application of ancillary jurisdiction over a joined state claim has been questioned.[87] This hesitation may stem from the fact that if ancillary jurisdiction is applied, a defendant will not be entitled to trial by jury on the state law claim, since a federal court whose jurisdiction over subject matter is premised solely upon the admiralty power may not provide a jury trial. Since the state-claim defendant ordinarily would be entitled to a jury trial in state court, application of ancillary jurisdiction would deprive the litigant of the trial by jury to which he otherwise would be entitled. The courts, however, have applied ancillary jurisdiction without regard to the jury trial problem.[88] In a significant decision,[89]

86. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 9, at 21 (3d ed. 1976).

87. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1627, 1663 (1976).

88. *See, e.g.*, Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A., Panama, 437 F.2d 301 (9th Cir. 1971); Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863 (W.D. Pa. 1971).

89. Joiner v. Diamond M Drilling Co., 677 F.2d 1035 (5th Cir. 1982).

the Fifth Circuit upholds the application of ancillary jurisdiction, observing that "a third-party claim lacking independent grounds of jurisdiction may be appended to an admiralty action and is cognizable in federal court under the doctrine of ancillary jurisdiction so long as the ancillary claim arises out of the same core of operative facts as the main admiralty action."[90] The court also spoke of the procedure to be applied where the maritime claim is dismissed prior to trial. In such a case, the court observes, there is a strong presumption in favor of dismissing the ancillary state law claims and dismissal is particularly warranted where the adjudication of the state law claim would involve the federal court in "a complex and unsettled quadrant of . . . state law."[91]

90. *Id.* at 1041.
91. *Id.* at 1044.