Current Problems in Seamen's Remedies: Seaman Status, Relationship Between Jones Act and LHWCA, and Unseaworthiness Actions by Workers Not Covered by LHWCA

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CURRENT PROBLEMS IN SEAMEN'S REMEDIES: SEAMAN STATUS, RELATIONSHIP BETWEEN JONES ACT AND LHWCA, AND UNSEAWORTHINESS ACTIONS BY WORKERS NOT COVERED BY LHWCA*

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INTRODUCTION

This article does not purport to be comprehensive in its coverage of current problems in seamen's remedies. A number of important issues presented by the recent jurisprudence are not treated here, including the measure of damages, punitive damages issues, damages in wrongful death claims, retaliatory discharge, and choice of law and forum non conveniens problems in foreign seamen's cases. The subtopics indicated in the title were selected on the basis of their complexity or the frequency with which decisions involving the problems have arisen.

SEAMAN STATUS

If an injured maritime worker is a seaman, he is entitled to sue his employer on the basis of the Jones Act, for unseaworthiness, and for maintenance and cure. In certain circumstances, he may also sue non-employing shipowners on the basis of unseaworthiness, and may have an action under general maritime tort law against other tortfeasors. On

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* The research for this article was completed in September, 1984.
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3. See infra text accompanying notes 177-204.
4. Access to maritime law remedies, aside from the Longshore and Harbor Workers' Compensation Act (LHWCA), requires establishing that the injury occurred within the admiralty jurisdiction. LHWCA coverage is limited by the constitutional concept of admiralty jurisdiction. See Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982). But LHWCA coverage is broader than the courts' current view of the reach of admiralty jurisdiction under 28 U.S.C. § 1333. See, e.g., Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976). Seamen's actions against employers under the Jones Act are a fortiori within admiralty jurisdiction. See O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S. Ct. 488 (1943). Unseaworthiness actions for injuries aboard ship are within the admiralty jurisdiction by virtue of locality and a significant relationship to traditional maritime activity. See generally Executive Jet Aviation,
the other hand, an injured maritime worker who is not a seaman generally is confined to workers’ compensation against his employer,\(^5\) to a limited form of negligence against non-employer shipowners,\(^6\) and to an action under general maritime tort law or state law\(^7\) against other non-employer entities who may injure him.

Because the seaman is accorded special legal protections in American law, determining seaman status is a matter of significance in many cases,

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5. See LHWCA, 33 U.S.C. § 901-905 (1983). Some maritime workers are neither seamen nor covered by LHWCA. See infra notes 167-76 and accompanying text. Some workers who may claim to be maritime are beyond the coverage of LHWCA and therefore confined to state workers’ compensation systems; others may be covered by both LHWCA and state workers’ compensation systems. The 1984 amendments to LHWCA, Pub. L. No. 98-426, 1984 U.S. Cong. Cong. & Ad. News (98 Stat.) 1639 (1984) (to be codified at 33 U.S.C. §§ 902(3), 903) [hereinafter cited as LHWCA Amendments], signed into law on Sept. 28, 1984, change the coverage of LHWCA by eliminating certain workers theretofore covered, provided such workers are covered by a State workers’ compensation system.

6. The 1972 amendments to LHWCA abolished the unseaworthiness action for workers covered by LHWCA. 33 U.S.C. § 905(b) (1983). The negligence action left to LHWCA employees against vessels by § 905(b) has been limited by the infusion of some common-law duty limits. See generally Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 164 (1981). Typically a LHWCA worker is employed by an independent contractor who contracts with the vessel owner for cargo-handling, repair or other services. In the atypical situation in which a longshoreman is directly employed by the vessel, 33 U.S.C. § 905(b) provides for a negligence action against the vessel owner, provided the negligence is in the defendant’s capacity as vessel owner, and not in its capacity as employer of other workers engaged in the same kinds of duties as plaintiff. See Jones & Laughlin Steel Co. v. Pfeifer, 103 S. Ct. 2541 (1983). The 1984 amendments to LHWCA retain the directly-employed longshoreman’s right to a tort action against the vessel or employer, but eliminate that right for employees of shipyards. LHWCA Amendments, supra note 5, at 1640 (to be codified at 33 U.S.C. § 905(b)).

7. See supra note 4. Because the lower courts read Executive Jet to require both locality and a significant relationship to traditional maritime activity, actions by non-seaman maritime workers against shipowners and other tortfeasors will sometimes fall under state law, even though the injured worker’s rights against the employer are covered by LHWCA. See, e.g., Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976). There is a strong argument that the lower courts are in error in insisting on locality in all non-seamen’s cases not governed by the Admiralty Extension Act, 46 U.S.C.
and the courts have struggled with the task of defining seamen for at least sixty years. A recent article in another journal indicates that the result of that struggle has been chaos. The present article concedes that the various tests or formulae used by the courts for determining seaman status lack full consistency, but argues that acceptable criteria for making the status determination can be gleaned from the jurisprudence.

The Supreme Court's Contribution

The Jones Act provides for a very liberal form of negligence action against the employer of "any seaman" hurt in the course of his employment but does not define the term "seaman." The decisions working out the definition of that term have generally involved access to the Jones Act, but the same criteria also govern the injured worker's access to the maintenance and cure remedy. The unseaworthiness remedy has a different history.

For several years after the Jones Act was passed, the Supreme Court used a very inclusive concept of seaman status, holding that the Act covered longshoremen hurt while loading or unloading vessels on navigable water. But the enactment of the 1927 Longshoremen's and Harbor Workers' Compensation Act (LHWCA) caused a change of course. The LHWCA set up a workers' compensation system that excluded from its coverage "a master or member of a crew of any vessel." For a time the Court wavered as to whether there was overlap between the two statutes—i.e., as to whether there existed a category of workers who were both Jones Act "seamen" and not excluded from LHWCA by the "member of a crew" language—but eventually decided in Swan-
son v. Marra Brothers, Inc.\textsuperscript{16} that the statutes are mutually exclusive.\textsuperscript{17} The logic of this decision is that a worker is a Jones Act seaman if and only if he is a "master or member of a crew of any vessel" and that the same criteria govern the status issue whether the worker is seeking Jones Act coverage or LHWCA coverage.\textsuperscript{18}

There are only seven Supreme Court decisions that bear in any useful way on the criteria for determining when a worker is a "member of a crew of any vessel."\textsuperscript{19} Two were decided before Swanson v. Marra Brothers had established the mutual exclusivity of the Jones Act and LHWCA. South Chicago Coal & Dock Co. v. Bassett\textsuperscript{20} held that a worker, regularly assigned to cargo-handling duties aboard a lighter used for fueling steamboats on a navigable river, was not excluded from LHWCA coverage as a crew member, reasoning that crew members are "those employees on the vessel who are naturally and primarily on board to aid in her navigation."\textsuperscript{21} The Court stressed a policy of deference to the trier-of-fact's findings on issues of crew member status,\textsuperscript{22} and expressly indicated that it was concerned with LHWCA coverage, not Jones Act coverage.\textsuperscript{23} Norton v. Warner Co.,\textsuperscript{24} also involving a worker seeking LHWCA coverage, held that a general handyman who lived and worked on a barge, performing work connected with its maintenance and movement, and who had no cargo-handling or shore-side duties, was excluded from LHWCA coverage because workers who "aid in navigation . . . at all times contribute to the labors about the operation and welfare of the ship when she is upon a voyage."\textsuperscript{25} The Court stressed the worker's permanent attachment to the barge\textsuperscript{26} and indicated its belief that a worker such as plaintiff should seek recovery under the Jones Act.\textsuperscript{27}

\textsuperscript{16} 328 U.S. 1, 66 S. Ct. 869 (1946).
\textsuperscript{17} The theoretical mutual exclusivity of the Jones Act and LHWCA had not meant full mutual exclusivity in practice. See infra text accompanying notes 125-51.
\textsuperscript{18} But see infra text accompanying notes 125-51.
\textsuperscript{19} Once Warner v. Goltra, 293 U.S. 155, 55 S. Ct. 46 (1934), had established that masters are covered by the Jones Act, master status has not presented problems.
\textsuperscript{20} 309 U.S. 251, 60 S. Ct. 544 (1940).
\textsuperscript{21} Id. at 255, 60 S. Ct. at 545.
\textsuperscript{22} Id. at 257-58, 60 S. Ct. at 548.
\textsuperscript{23} Id. at 259-60, 60 S. Ct. at 549. But see Engerrand & Bale, supra note 8, at 450, stating that Bassett meant the injured worker "was excluded from the Jones Act."
\textsuperscript{24} 321 U.S. 565, 64 S. Ct. 747 (1943).
\textsuperscript{25} Id. at 572, 64 S. Ct. at 751.
\textsuperscript{26} Id. at 573, 64 S. Ct. at 751.
\textsuperscript{27} Id.
The remaining Supreme Court decisions involved workers seeking Jones Act coverage. The decision in *Desper v. Starved Rock Ferry Co.* denied seaman status to a worker engaged in readying a fleet of small sightseeing motorboats for the upcoming summer season. While the plaintiff was scheduled to operate a boat during the season, the boats were not yet in the water; the work the plaintiff was doing when he was injured was seasonal repair (of the sort traditionally done for larger vessels by shorebased personnel) and the vessels were out of navigation, i.e., "laid up for the winter."

Both *Bassett* and *Desper* stressed that questions of seaman status are almost always for the trier of fact. All three of the foregoing decisions were attempts to delimit a narrow category of cases in which the tribunal of first instance should decide the status issue as a matter of law. The criteria for making that determination that emerge from *Bassett, Norton,* and *Desper* can be summarized as follows: A worker is a member of a crew of a vessel if he has a permanent attachment to a vessel in navigation and his work contributes to the operation

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28. These cases were decided after *Swanson v. Marra Brothers* had established the mutual exclusivity of the Jones Act and LHWCA. Hence, they are authoritative on the "member of a crew" exclusion from LHWCA coverage, as well as on Jones Act coverage.


30. The actual plaintiff was the personal representative, seeking wrongful death recovery.

31. The plaintiff had also operated a boat during the previous summer season, but his employment was terminated after that, and he was rehired in the early spring of the year in question. The Court indicated that had the worker been hurt in the course of operating a boat, he would have been covered by the Jones Act. 342 U.S. at 190-91, 72 S. Ct. at 218.

32. The Court stated that the Jones Act "does not cover probable or expectant seamen but seamen in being." Id. at 191, 72 S. Ct. at 218.

33. Id. at 191, 72 S. Ct. at 218. The "vessel in navigation" criterion, derived in large part from *Desper,* has been construed in a number of subsequent decisions. See, e.g., Roper v. United States, 368 U.S. 20, 82 S. Ct. 5 (1961); Butler v. Whiteman, 356 U.S. 271, 78 S. Ct. 734 (1958), discussed infra text accompanying note 45; McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455-56 (5th Cir. 1982), discussed at notes 110-11; Abshire v. Seacoast Products, Inc., 668 F.2d 832 (5th Cir. 1982); Wixom v. Boland Marine & Mfg. Co., 614 F.2d 956 (5th Cir. 1980). A vessel remains in navigation even though it is stationary for a lengthy period, drilling for oil, supporting a crane, engaging in construction activities and the like. It is not out of navigation while working. See generally Johnson v. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984). A vessel is taken out of navigation only when removed from service for extensive repairs or reconstruction. The "out of navigation" question is one of fact, turning largely on the extent of the repair operations and who controls those operations. See *Abshire,* 668 F.2d at 836.

34. *Bassett,* 309 U.S. at 257-59, 60 S. Ct. at 547-48; *Desper,* 342 U.S. at 190, 72 S. Ct. at 218.

35. *Norton,* 321 U.S. at 573, 64 S. Ct. at 751.

and welfare of the vessel when it is on a voyage.\textsuperscript{37}

The subsequent Supreme Court decisions expanded those criteria. \textit{Senko v. LaCrosse Dredging Corp.}\textsuperscript{38} held that a worker who was permanently assigned to a dredge that had never moved during his entire period of employment, and that moved quite infrequently, was entitled to reach the jury on the seaman status issue, stressing that status issues are almost always questions of fact,\textsuperscript{39} that the worker performed general maintenance on the dredge while it was stationary, and that he would have navigational duties if and when the dredge moved.\textsuperscript{40} The \textit{Senko} decision plainly means that a worker need not be aboard "naturally and primarily in aid of navigation" in order to be a seaman, unless the term "navigation" is to be translated into "maintenance during an indefinitely extended anchorage." It also shows that a vessel can be immobile for a lengthy period and still be "in navigation," so long as it is working. Most importantly, it expresses great deference for the jury's role in determining seaman status.\textsuperscript{41}

The remaining Supreme Court decisions were \textit{per curiam} reversals of Court of Appeals denials of seaman status, containing no meaningful explanation of the results. \textit{Gianfala v. Texas Co.}\textsuperscript{42} established that a member of a drilling crew aboard a submersible barge could be classified as a seaman by a jury though the barge was submerged and firmly secured to the bottom when the injury occurred, ordinarily moved about once a year, and the plaintiff had no duties in connection with its movement.\textsuperscript{43} \textit{Grimes v. Raymond Concrete Piling Co.}\textsuperscript{44} conferred the right to reach the jury on the status issue upon a worker whose principal assignment was to an offshore radar installation, permanently attached to the ocean's floor; the worker was injured at the conclusion of a six-hour stint aboard a nearby construction barge. \textit{Butler v. Whiteman}\textsuperscript{45} held that a worker, assigned to assist in the rehabilitation of a tug that had been laid up at anchorage for at least ten months, could be a

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39. Id. at 373-74, 77 S. Ct. at 417.
40. Id. at 374, 77 S. Ct. at 417. The \textit{Senko} opinion ignores the Desper Court's statement that the Jones Act does not cover prospective seamen. See supra note 32.
41. \textit{The Senko} opinion states that "juries have the same discretion [in determining seaman status] they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." 352 U.S. at 374, 77 S. Ct. at 417.
43. The facts are set forth in the Court of Appeals decision, Texas Co. v. Gianfala, 222 F.2d 382 (5th Cir. 1955).
seaman if the jury found that the tug was in navigation and plaintiff was a member of its crew.

When the results of the per curiam decisions are added to the Bassett-Norton-Desper-Senko series, it appears that the Supreme Court's seaman status approach emphasizes that it is proper to submit the issue to the jury in almost all cases, and that a worker should not be excluded from such status as a matter of law if he had a permanent connection with or performed a significant amount of work aboard a vessel in navigation and his duties contributed to the vessel's operation, maintenance, or mission. The Court's decisions also show that special-purpose structures not usually thought of as vessels but designed to float and move from time to time on navigable water are Jones Act vessels, and that a vessel can still be "in navigation" although inoperable for a lengthy period undergoing major rehabilitation.

Emergence of the Robison Test

The Supreme Court issued no further guidance after the 1958 Butler decision, and the task of working out a full set of criteria for determining seaman status has been left to the lower courts. A substantial majority of the cases have arisen in the courts of the Fifth Circuit because of the developed offshore oil and gas industry. A consistent theme in all of the circuits has been emphasis that status issues are usually questions for the trier of fact. For a time the Fifth and most of the other circuits worked with a test for seaman status that stated a worker is a seaman if he has a more or less permanent connection with a vessel in navigation and was aboard primarily in aid of navigation. But that test was not an accurate synthesis of the Supreme Court decisions unless "aboard in aid of navigation" was translated into "aboard in aid of the vessel's welfare, mission, or function," and the "more or less permanent connection" element had to be read with corresponding liberality.

Accordingly, the Fifth Circuit's notable decision in Offshore Co. v. Robison articulated a different test, one more in keeping with the Supreme Court decisions and the relevant lower court jurisprudence. Stressing that no bright-line definition of seamen was possible, that

46. Id.
47. See generally Johnson v. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984); McKie v. Diamond Marine Co., 204 F.2d 132, 136 (5th Cir. 1953); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 388 (6th Cir. 1953).
48. See, e.g., Wilkes, 202 F.2d at 388.
49. 266 F.2d 769 (5th Cir. 1959).
50. "Attempts to fix unvarying meanings have [sic] a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts. These
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status issues are almost always for the jury,\textsuperscript{51} that the meaning of the term seaman should "develop naturally" as technology changes the nature of maritime work,\textsuperscript{52} and that the policy touchstone is the worker's exposure to marine risks,\textsuperscript{53} the Robison court stated that there is an evidentiary basis for a Jones Act case to go to the jury on the status issue:

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 the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.\textsuperscript{54}

The foregoing statement quickly became the test for seaman status determinations in the Fifth\textsuperscript{55} and most of the other circuits.\textsuperscript{56} While the Robison formulation was originally addressed to the question of the sufficiency of the evidence on seaman status to reach the jury, (\textit{i.e.}, to the evidence necessary to defeat defendant's motion for summary judgment or directed verdict), the recent cases indicate that Robison is also an appropriate source of jury instructions on seaman status.\textsuperscript{57}

\begin{footnotes}
\footnotetext[51]{1. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. The Jones Act cases involving coverage are similar in this respect to many negligence and contributory negligence cases. Id. at 780 (footnotes omitted).}
\footnotetext[52]{2. Id.}
\footnotetext[53]{3. "Many of the Jones Act seamen on these [offshore drilling] 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." Id.}
\footnotetext[54]{4. Id. at 779.}
\footnotetext[55]{5. See, e.g., cases cited infra notes 59-60.}
\footnotetext[57]{7. See Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 244 (5th Cir. 1983), cert. denied, 104 S. Ct. 974 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 457 (5th Cir. 1982). Engerrand & Bale, supra note 8, at 470-71, states that the Fifth Circuit cases have left it doubtful whether juries should be instructed in Robison terms, as opposed to the earlier and more restrictive McKie formulation. It is difficult to agree}
\end{footnotes}
more, a plaintiff may so clearly satisfy the Robison elements as to be entitled to summary judgment or directed verdict that he is a seaman. 58

The Robison formulation has been quoted, interpreted, and discussed in literally hundreds of cases, so that its treatment has come to resemble that of an often-construed general statute. 59 Courts ritualistically quote Robison, ritualistically state that it is not an all-purpose formula but merely an analytical starting point, 60 and then proceed to decide whether the case at bar satisfies each of the Robison elements. As technology 61 and the ingenuity of counsel for marine employers 62 have changed the nature of marine work and the relationship between marine workers and vessels, new cases with a strong appeal to classification of the worker as a seaman have arisen, and the Robison criteria have been construed, explained, and expanded in order to accommodate those cases. The result of this process, over time, has been the addition of a number of "amendments" to Robison, such that a complete and accurate statement of the current meaning of the case would probably occupy several pages of print. Recent decisions indicate that rather cumbersome structure is becoming strained and that it may be time for the court to set aside Robison-as-amended and start anew. A quarter of a century of technological and jurisprudential development has intervened since the Robison court so ably synthesized the jurisprudence, and the time may have come for another such benchmark. The most dramatic demonstration of the strains to which the Robison formulation of seaman status criteria is being subjected has occurred in the Fifth Circuit's "fleet" cases.

The "Fleet" Cases

Robison stated the criteria for seaman status in terms of plaintiff's connection with a single vessel. The "fleet" "amendment" to Robison began in Braniff v. Jackson Ave.-Gretna Ferry, Inc., 63 in which the

that Bertrand and McDermott leave the matter in doubt; the indications are plain that Robison is the proper formulation.

58. See, e.g., Colomb v. Texaco, 736 F.2d 218, 220-21 (5th Cir. 1984); Coulter v. Texaco, 714 F.2d 467, 468-69 (5th Cir. 1983); Cf. McDermott, Inc. v. Boudreaux, 679 F.2d 452, 457-58 (5th Cir. 1982).

59. See, e.g., Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983), explaining three "different" but "essentially equivalent" formulations of "the test for seaman status."


61. See, e.g., Robison, 266 F.2d at 780.

62. See, e.g., Bertrand, 700 F.2d at 245, 248.

63. 280 F.2d 523 (5th Cir. 1960).
deceased workers were responsible for maintenance and repair work on several ferries operated by the employer in the Port of New Orleans. Their work frequently took them aboard ferries afloat and in operation. The court stated that nothing in Robison precluded seaman status by virtue of the requisite attachment to "several specified vessels." Subsequent decisions used Braniff as the basis for extending seamen’s protections to: a company pilot assigned to two tugs; a worker assigned to several submersible offshore rigs; a roustabout who spent 70 percent of her time on one or another of about half a dozen work barges; a shore-based handyman who spent 80-90 percent of his time doing general maintenance and clerical work on one or the other of six towboats; a structural welder who performed periodic work aboard and on those occasions ate and slept aboard one of half a dozen derrick barges; a shore-based mechanic, assigned to a fleet of 21 menhaden fishing vessels; a worker who serviced fixed platforms using several 16-20 foot "Jo-Boats", and who spent 90 percent of his work time piloting or doing maintenance work on the boats; and a pipeline welder, assigned to the employer’s fleet of offshore pipeline barges, killed while engaged in extensive repairs of one of the barges moored in a slip at the employer’s yard.

In all of these cases the plaintiff showed some kind of assignment to a "specified" or identifiable group of vessels. Seaman status was denied to workers who could not characterize the facts as involving an "identifiable group of vessels." Insistence that there be an "identifiable fleet" kept traditional longshoremen and other harbor workers (who may spend all day every day aboard vessels but who have no connection with an identifiable fleet) from being classified as seamen, and thus maintained a line of demarcation between the Jones Act and LHWCA.

Some commentators have contended that the recent decision in Bertrand v. International Mooring & Marine, Inc., obliterated that line

64. Id. at 528.
65. Magnolia Towing Co. v. Pace, 378 F.2d 12 (5th Cir. 1967) (jury question).
70. Abshire v. Seacoast Prods., Inc., 668 F.2d 832 (5th Cir. 1982) (jury question).
73. See, e.g., Guidry, 640 F.2d at 529.
74. See, e.g., Burns v. Anchor-Wate Co., 469 F.2d 730, 733 (5th Cir. 1972).
of demarcation. That characterization is erroneous, but Bertrand does call for a new way of drawing the line.

The Bertrand plaintiffs were members of an anchorhandling crew who spent virtually all of their time at sea aboard vessels, performing actual navigational work. They were specialists in handling the heavy anchors and otherwise assisting in the relocation of offshore drilling barges and performed all of that work aboard specially-equipped workboats. But these workboats did not constitute an identifiable fleet, because the employer neither owned nor chartered them; instead, a suitable workboat would be furnished for the particular job by the owner of the drilling barge being moved. Plaintiffs thus went to sea frequently, aboard a wide variety of workboats, always remaining with the workboat until the rig-moving job was completed. These rig-moving jobs lasted from several hours to several days. The district court determined that "this anchor-handling crew was continuously subjected to the perils of the sea like blue water seamen and was engaged in classical seamen's work," but granted summary judgment that they were not seamen, reasoning that there was no identifiable fleet. "[O]ne cannot be a member of a crew of numerous vessels which have no common ownership or control." Reversing, the Fifth Circuit Court of Appeals held that the law does not require common ownership or control, and that the number of vessels on which plaintiff works is just one of

76. See Engerrand & Bale, supra note 8, at 489-90.
77. See Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307, 311 n.4 (5th Cir. 1984) (partially explaining the error).
78. Some of the plaintiffs were survivors of the crew members seeking wrongful death damages and others were injured crew members. For convenience, the workers are referred to in this discussion as plaintiffs.
79. The plaintiffs were hurt in an automobile accident returning in transportation furnished by the employer from the dock where they had landed after completing a seven-day job aboard the Aquamarine 503, relocating a Tenneco drilling barge. The fact that plaintiffs were hurt during land transportation did not weaken their claims to status as Jones Act seamen hurt in the course of their employment. See Vincent v. Harvey Well Service, 441 F.2d 146 (5th Cir. 1971).
80. The anchorhandling crew members who had done the seven-day job aboard Aquamarine 503 (see note 79 supra) could probably have established seaman status on the basis of their connection with that vessel, without reference to the fleet concept. See Porche v. Gulf Mississippi Marine Corp., 390 F. Supp. 624, 631 (E.D. La. 1975). But plaintiffs were determined to achieve seaman status as a group, and one of the plaintiffs had not been to sea on the last job; he was a regular member of the anchorhandling crew who had been on stand-by status during the last job and had been sent with the van to return the other members to the main base. Hence, status by way of the connection with Aquamarine 503 was not an available argument.
82. Id. at 347.
the many factors to consider in making the status determination. The factors that most influenced the court's conclusion that the plaintiffs were entitled to reach the jury on seaman status were their continuous exposure to the perils of the sea, "like blue water seamen," and their "classical seamen's work." The court also emphasized that it was the employer's contractual arrangements, not the nature of plaintiffs' work, that determined whether the vessels were under common ownership or control.

*Bertrand* is correct in its result, but the change it made in the *Robison* doctrine has caused problems for the court in subsequent cases. The identifiable fleet requirement, which the district court in *Bertrand* translated into "identifiable by common ownership or control," had been the principal basis for excluding traditional longshoremen and similarly situated workers from Jones Act coverage. *Bertrand* clearly will not be taken to mean that such workers are now entitled to seaman status; several post-*Bertrand* decisions in which such workers have asserted seaman status have resulted in summary judgment for the defendant, just as they would have before the *Bertrand* "amendment" to the *Braniff* "amendment" to *Robison*. The commentators who claimed that *Bertrand* obliterated the Jones/LHWCA line of demarcation are wrong. But the court has had to strain for reasons, stating that *Bertrand* does not dispense with the "identifiable fleet" requirement, except perhaps in cases in which the lack of an identifiable fleet is the product of the employer's contractual arrangements rather than the nature of the plaintiffs' work. With the decision in *Bertrand*, an additional doctrinal complexity, further burdening the already cumbersome *Robison*-as-amended structure, has been introduced.

83. 700 F.2d at 246.
84. Id. at 243, 245.
85. Id. at 245, 248.
87. 517 F. Supp. at 347.
88. See supra notes 73-74 and accompanying text.
89. See supra note 77.
90. See Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307 (5th Cir. 1984); White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984); Bouvier v. Krenz, 702 F.2d 89 (5th Cir. 1983). See also the following cases, to the same effect, decided shortly before *Bertrand*: Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108 (5th Cir.), cert. denied, 104 S. Ct. 175 (1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983).
91. See supra note 77.
92. See *Buras*, 736 F.2d at 311-12; *White*, 736 F.2d at 307.
The Wallace Case

It is possible to read Judge Brown's opinion in Wallace v. Oceaneering International as setting forth the ingredients of a new approach to seaman status issues. The plaintiff was a deep-sea diver, seriously hurt during a dive in 155 feet deep waters. The facts presented several bases on which seaman status could have been sustained under traditional Robison-as-amended reasoning, but the court chose another approach:

[T]he total circumstances of an individual's employment must be weighed to determine whether he had sufficient relation to the navigation of vessels and the perils attendant thereon. . . . In ambiguous cases, our analysis again and again has focused on (1) the degree of exposure to the hazards or perils of the sea, and (2) the maritime or terra firma nature of the worker's duties. . . . [T]he seaman status of Wallace is established by his exposure to maritime perils with regularity and continuity, and the maritime nature of his primary duties. . . . We hold that a commercial diver, who embodies the traditional and inevitably maritime task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes Wallace a seaman.

Wallace does not proclaim that it is announcing a new set of criteria for seaman status determinations, but the ingredients are plainly present. As a substitute for the basic Robison formulation, this statement can be extrapolated from Wallace: A worker shows an evidentiary basis to reach the jury on the issue of his status as a seaman if there is evidence (1) that a substantial part of his duties are performed on vessels, and (2) that his work regularly or significantly exposes him to the dangers of the sea or to dangers associated with the movement of vessels.

93. 727 F.2d 427 (5th Cir. 1984).
94. (1) For more than nine years immediately prior to the job on which he was hurt the plaintiff had been permanently assigned to three vessels controlled by his employer. Id. at 430. Seaman status on that basis alone could have been sustained under Higgins-botham, 545 F.2d at 432-33 (seaman as matter of law). (2) Respecting the diving job on which he was hurt, the plaintiff was assigned to a particular vessel for an indefinite time. 727 F.2d at 430. Seaman status on that basis alone could have been sustained under Roberts, 648 F.2d at 262 (seaman as matter of law). (3) The plaintiff had taken his present employment on the promise that he would be permanently assigned to a particular vessel owned by the employer as soon as it returned to the Gulf. 727 F.2d at 430. See the Supreme Court's Senko decision, 352 U.S. at 370, 77 S. Ct. at 416. See also Porche, 390 F. Supp. at 631.
95. 727 F.2d at 432-36.
At this writing the courts continue to operate under the Robison-as-amended approach. The following survey of the significant recent status decisions will briefly indicate how the suggested Wallace criteria might have simplified or otherwise improved the status inquiry.

**Cases Turning on Whether Particular Structures Are Vessels**

Several recent cases have refused to classify seaplanes, helicopters with pontoons, and other aircraft as Jones Act vessels despite plaintiffs' arguments that these aircraft are doing work formerly done by vessels and that their crews are subjected to many of the perils of the sea.\(^96\) Four members of the court have indicated their disagreement with the court's exclusion of aircraft.\(^97\) To the extent that, as compared with Robison, the proposed Wallace approach deemphasizes plaintiff's connection with vessels and stresses the degree of exposure to marine dangers, Wallace might suggest a different inquiry in these cases.

The court continues to classify fixed platforms as non-vessels; fixed platform workers are subject to summary judgment that they are not seamen. Most of these cases would clearly turn out the same way under Wallace as under the traditional Robison approach. For example, the plaintiff in *Prinzi v. Keydril Co.*\(^98\) lived and worked on the drilling rig for three weeks while it was positioned aboard two barges in a shipyard, awaiting placement on a new platform. Upholding summary judgment that the worker was not a seaman, the court cited the fixed platform rule and stated that the plaintiff's connection with the barges was "tangential."\(^99\) Under the Wallace approach, summary judgment would have been explained on the basis that the plaintiff did not perform a substantial part of his work on vessels.

Some platform workers may show a sufficient connection with a vessel used in connection with the platform operations to qualify under Robison. For example, the plaintiff in *Parks v. Dowell Division of Dow Chemical Co.*\(^100\) was a seaman because he had his office and performed most of his duties aboard a drilling tender anchored adjacent to the

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97. See Barger, 692 F.2d at 345 (Brown, Johnson, Politz, & Tate, JJ., dissenting from denial of rehearing en banc).


99. 738 F.2d at 710.

100. 712 F.2d 154 (5th Cir. 1983).
platform. The Wallace approach would probably have reached the same outcome, focusing on the plaintiff's work aboard "vessels" and his exposure to the dangers of the sea.

Submersible and other floatable drilling rigs are clearly vessels. Colomb v. Texaco, Inc.,101 upheld summary judgment for a worker permanently attached to an inland submersible spud drilling barge, holding that such a structure is a vessel as a matter of law. Wallace would necessitate an additional inquiry in a case like Colomb, addressed to the nature of the hazards to which workers on such inland rigs are exposed.

Aside from the aircraft cases, the only significantly difficult "vessel" issue recently addressed by the court involved a pile-driving barge built to carry a 150-ton crane. Reversing summary judgment for defendant, the court held that a jury could find the barge to be a vessel in light of its design and purpose.102 "The barge by necessity is designed to transport a pile-driving crane across navigable waters to jobsites that cannot be reached by land-based pile drivers."103 Wallace, like Robison, would result in submission of this case to the jury, but with the additional inquiry into the nature and extent of the hazards confronted by plaintiff in the course of his regular work.104

Other Recent Status Cases

Five recent Fifth Circuit decisions upheld summary judgment against shore-based workers who serviced a large number of vessels on a daily basis in their capacity as longshoremen, repairmen, or maintenance workers.105 All of these cases used the first prong of Robison—the requirement of a more or less permanent connection with or substantial

101. 736 F.2d 218 (5th Cir. 1984).
102. Brunet v. Boh Bros. Constr. Co., 715 F.2d 196 (5th Cir. 1983). This case reviews the recent "vessel" cases, as does Judge Brown's dissent in Barger, 692 F.2d at 342-46. See also Fox, 694 F.2d at 1354 (holding that a device known as a SPAR (submarine pipe alignment rig) is "a tool, not...a vessel," and stating that the test for "vessel" status is that the structure must be designed for navigation and commerce or in such use at the time of the injury).
103. 715 F.2d at 198.
104. See McSweeney v. M.J. Rudolph Corp., 575 F. Supp. 746 (E.D.N.Y. 1983) (reaching the opposite conclusion from Brunet, on very similar facts). The McSweeney court noted that the plaintiff had no duties on the barge while it was in motion and stated that it "ceased to be a 'barge' in the true sense of the word" when stationary. Id. at 749.
work aboard a vessel or an identifiable fleet—as a principal basis for
denial of seaman status. In order to use that reasoning after Bertrand
the opinions had to insist that Bertrand does not dispense with the
requirement of an identifiable fleet.106 Wallace would have offered a
better explanation for summary judgment in that none of these workers
regularly or significantly confronted the perils of the sea or dangers
associated with vessel movement in the course of their normal duties.

The plaintiff in Fredieu v. Rowan Companies, Inc.107 went to work
for the defendant while the jack-up rig to which he was assigned was
still under construction. Judgment for the defendant was upheld on the
view that the rig was not yet a vessel in navigation. Wallace reasoning
would probably have reached the same result. The rig was partly built
at Vicksburg and then towed down-river to Belle Chasse for completion
of construction. The plaintiff joined it at Belle Chasse; it did not move
during his period of employment; and his duties consisted of loading
and unloading materials from barges tied to the rig in its floating position
on the river. Thus, the plaintiff was probably not regularly or signifi-
cantly exposed to the dangers of the sea or to dangers associated with
the movement of vessels. However, had the plaintiff moved with the
rig downriver, or otherwise been significantly subjected to dangers as-
associated with vessel movement, the case might have turned out differently
under Wallace. By shifting the emphasis away from connection with
vessels to exposure to dangers, Wallace makes it more difficult to deny
seaman status solely on the basis that a vessel afloat and under con-
struction is technically not yet a vessel.108

Wallace would sometimes mean workers currently classified as sea-
men as a matter of law would be subjected to a jury's determination
of their status. In Coulter v. Texaco, Inc.,109 the court upheld summary
judgment of seaman status for a roustabout whose work at a water-
surrounded oil field in the Louisiana marshland necessitated daily contact
with two work boats. The court found that one of the two boats always
transported plaintiff to the work site, and that some of his daily work
was often performed on the deck of the vessels. These facts supported

106. Buras, 736 F.2d at 311; White, 736 F.2d at 307.
107. 738 F.2d 651 (5th Cir. 1984).
108. For other cases in which Wallace reasoning might yield a different inquiry than
Robison, see the following decisions in which workers who were seamen by virtue of
their connection with Vessel “A” were held to be “passengers” or “longshoremen”
respecting their connection with Vessel “B” and hence precluded from suing Vessel “B”
on the basis of unseaworthiness. Dove v. Belcher Oil Co., 686 F.2d 329 (5th Cir. 1982);
Burks v. Am. River Transp. Co., 679 F.2d 69 (5th Cir. 1982); Roberts v. Williams-
McWilliams Co., 648 F.2d 255 (5th Cir. 1981); Garrett v. United States Lines, 574 F.2d
997 (9th Cir. 1978).
109. 714 F.2d 467 (5th Cir. 1983).
a Robison connection with this small “fleet,” which ended the court’s analysis. Judge Williams, dissenting, insisted that the status issue was for the jury. The Wallace approach would support that view: while there seemed no dispute that plaintiff performed a substantial part of his work on vessels, whether his work regularly or significantly exposed him to the hazards of the sea or to dangers associated with the movement of vessels would seem to have been an issue of fact. 

McDermott, Inc. v. Boudreaux110 seems to have been wrongly decided under Robison, and it is not clear that application of the Wallace approach would have prevented the error. The plaintiff worked for nine or ten years as a welder assigned to the defendant’s fleet of offshore pipe-lay barges. At the time of his injury he had been working for three months in extensive repairs to one of those barges—a barge to which he had never been assigned—in a shipyard. Concluding that his regular work with the barge fleet showed a Robison connection with the vessels and that temporary shoreside work does not defeat seaman status, the court reversed the Benefits Review Board’s determination that the worker was entitled to LHWCA benefits and characterized him as a seaman as a matter of law. Judge Garwood, dissenting, argued that the case should be remanded for fact-findings by the administrative law judge. Whether the Wallace approach would have led to a different outcome in McDermott is debatable. While Wallace would have focused on whether plaintiff’s work on vessels regularly or significantly exposed him to the dangers of the sea or to dangers associated with the movement of vessels—whereas Robison focused on whether plaintiff’s connection with the vessels contributed to their function or mission—the controlling issue in McDermott was whether the extensive shore-side assignment should have entitled the plaintiff to the LHWCA coverage he sought.111 To the extent that Wallace is more forthrightly policy-oriented than Robison, it might have suggested a different outcome.

The foregoing discussion suggests that Wallace explains the “clear” cases as well or better than Robison-as-amended.112 In certain more debatable cases, Wallace suggests different inquiries from Robison. In some cases in which Robison raises jury issues, Wallace might support summary judgment for the defendant and occasionally for plaintiff on the status issue.113 On the other hand, the Wallace approach seems to raise jury issues in certain recent cases in which Robison was used to

110. 679 F.2d 452 (5th Cir. 1982).
112. The “clear” cases include Bertrand, the fixed-platform cases, see supra notes 98-100 and accompanying text, and the line of “basic harbor worker” cases, see supra notes 105-06 and accompanying text.
113. See, e.g., Bertrand, 700 F.2d at 240.
support summary judgment for the defendant\textsuperscript{114} or the plaintiff.\textsuperscript{115} In any particular case in which \textit{Robison} supports, and \textit{Wallace} precludes, summary judgment or directed verdict, \textit{Wallace} is of course more expensive to operate. But over the long haul, \textit{Wallace} generates more predictability and clarity in the seaman status jurisprudence than \textit{Robison}, the gains of shifting from the \textit{Robison}-as-amended approach to the simpler \textit{Wallace} approach will outweigh the losses.\textsuperscript{116} And there is independent merit in an articulation that emphasizes the underlying reasons for the seamen's protections and the policy of submitting debatable claims to those protections to the trier of fact.

\textit{Jury Instructions}

As indicated above, the \textit{Robison} formulation was originally addressed to the question of the sufficiency of evidence of seaman status necessary to enable the plaintiff to survive the defendant's motion for summary judgment or directed verdict. The current cases hold that the \textit{Robison} language also delimits the fact-finder's role, indicating it is an appropriate source of jury instructions on seaman status.\textsuperscript{117} Whether a jury could sensibly be instructed in \textit{Wallace} terms should now be considered.

It seems clear that judges, whether judicial or administrative, should be able to work with \textit{Wallace}. When an injured worker seeks LHWCA benefits the administrative law judge will inevitably decide the seaman status issue,\textsuperscript{118} which may be appealed to the Benefits Review Board\textsuperscript{119} and then to the court of appeals.\textsuperscript{120} When the worker seeks Jones Act coverage, the trial judge in a bench trial will decide the status issue, which may be appealed to the court of appeals. In a Jones Act jury trial the trial judge will decide whether to submit the status issue to the jury, which determination may be appealed. Respecting all of the

\begin{footnotes}
\item[114] See, e.g., \textit{Hebert}, 720 F.2d at 853.
\item[115] See, e.g., \textit{Colomb}, 736 F.2d at 219; \textit{Coulter}, 714 F.2d at 467.
\item[116] If it is clear that the plaintiff performed a substantial part of his work on vessels and in his normal work was regularly or significantly exposed to the dangers of the sea or to dangers associated with the movement of vessels, \textit{Wallace} will facilitate settlement or stipulation on the status issue. If it is clear that the worker, (e.g., a "typical" shore-based service worker) cannot meet the second element of \textit{Wallace}, conscientious counsel for the worker can pursue his LHWCA rights without being forced to deal with the range of problems involved in trying to protect the worker's rights under both systems. See generally infra text accompanying notes 125-51.
\item[117] See supra notes 56-58 and accompanying text.
\item[118] \textbullet{} 33 U.S.C. § 919(d) (1983) makes the administrative law judge the tribunal of first instance. Sections 902(3) and 903(a) make the "member of a crew of any vessel" inquiry a necessary ingredient in every coverage determination.
\item[120] See 33 U.S.C. § 921(c) (1983).
\end{footnotes}
foregoing "judicial" determinations, Wallace seems to offer more real guidance than Robison-as-amended, because Wallace steers closer to the policy that underlies the special protections for seamen.

Whether juries should be instructed in Wallace terms is only somewhat more debatable. The Robison decision itself explained that seaman status is almost always a jury question, even when the facts are not in dispute, "because of conflicting inferences that may lead to different conclusions among reasonable men." It makes sense for the jury's "inferences" and "conclusions" to be made with reference to the policy of the seamen's protections, i.e., the nature and extent of the worker's exposure to the dangers of the sea or to dangers associated with the movement of vessels. Whether a plaintiff's work regularly or significantly exposed him to such dangers is the kind of issue with which juries are typically entrusted. Both Robison and Senko analogized the jury's role in finding seaman status to its role in finding negligence. This comparison indicated great scope for jury responsiveness to the total circumstances of the particular case. A typical negligence instruction is considerably more general and open-ended than the suggested Wallace instruction on seaman status. Therefore, the trial judge should not only apply the Wallace criteria to decide whether to submit the status issue to the jury. Having decided to submit it, he would charge the jury that they should find that the plaintiff was a seaman after determining that a substantial part of his duties were performed on vessels, and that his work regularly or significantly exposed him to the dangers of the sea or to dangers associated with the movement of vessels.

THE RELATIONSHIP BETWEEN THE JONES ACT AND LHWCA: ELECTION OF REMEDIES, COLLATERAL ESTOPPEL, RES JUDICATA

Swanson v. Marra Brothers, Inc. established that the injury-protection regimes of the Jones Act and LHWCA are intended to be mutually exclusive in their spheres of coverage. The logic of this holding is that the Jones Act term "any seaman" is equivalent to the LHWCA

121. 266 F.2d at 780.
122. Id.
123. 352 U.S. at 374, 77S. Ct. at 417.
124. See, e.g., Texas Pattern Jury Charge 2.01:
"Ordinary care" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances.
"Negligence" means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.
125. 328 U.S. 1, 66 S. Ct. 869 (1946).
term "master of member of a crew of any vessel." If the worker pursues Jones Act rights, he must show crew member status. If he pursues LHWCA rights, he must show the absence of crew member status. The courts have frequently stated that the criteria for determining crew member status are the same in Jones Act and LHWCA cases.

But theoretical mutual exclusivity does not mean full mutual exclusivity in practice. "[T]he Longshoremen's Act, like the Jones Act, requires a liberal interpretation in favor of claimants to effect its purposes." In borderline situations, a finding of fact that the worker is covered by the system he invokes will be sustained, despite the realization that the same worker might have been able to sustain coverage under the other system. "[I]n a practical sense, a 'zone of uncertainty' inevitably connects the two Acts."

The administrative tribunals in which LHWCA claims are heard have often resorted to the "liberal interpretation" view in order to hold the worker entitled to LHWCA benefits despite indications that the Jones Act courts would have found him to be a seaman. In McDermott, Inc. v. Boudreaux the Fifth Circuit questioned that attitude. Reversing the Benefits Review Board's finding that the worker was covered by LHWCA, the court acknowledged the existence of the "zone of uncertainty" and the tradition of liberal interpretation of both statutes, but concluded that the administrative tribunals had erred as a matter of law in concluding the worker was not a seaman on the ground that he was not aboard the vessel primarily in aid of navigation. The court held that Robison replaced the "aid of navigation" element with the much more inclusive element of contribution "to the function, mission, or maintenance of a vessel in navigation." On the McDermott

126. See, e.g., Ward v. Department of Labor, Office of Workers' Compensation Programs, 684 F.2d 1114 (5th Cir. 1982), (reversing the Benefits Review Board's denial of LHWCA coverage), cert. denied, 103 S. Ct. 815 (1983); McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982) (reversing the Benefits Review Board's grant of LHWCA coverage).


128. McDermott, 679 F.2d at 459.
129. Id.
130. Id.
131. Id.
133. McDermott, 679 F.2d 452 (5th Cir. 1982).
134. Id. at 459.
135. Id. at 458.
majority's view, the Robison criteria meant that the worker was a seaman as a matter of law, and hence was excluded from LHWCA coverage; the court stated that it was "at a loss to understand the total disregard of Robison and its progeny in the proceedings below." Judge Garwood's dissent made a persuasive case that seaman status was a question of fact and urged remand to the administrative law judge for findings in accordance with the correct legal standards.

McDermott means that a worker who can be classified as a seaman as a matter of law will be excluded from LHWCA coverage as a matter of law. But some workers are ambiguously enough situated that a claim under either statute might well be sustained. Counsel for a worker who may be covered under one or the other (or, as a practical matter, both) the Jones Act and LHWCA systems will have to try to protect the worker's rights under both systems. As is indicated by the following summary of the current jurisprudence, only a few of the potential problems have been clearly answered. Full treatment of this matter is beyond the scope of the present article, but possibly some general guidance can be suggested.

Broadly speaking, the difficult questions are the proper application of the doctrines of election of remedies, collateral estoppel, and res judicata. In very general and somewhat simplistic terms, a binding election of remedies may be made when a litigant is confronted with a choice of two mutually exclusive avenues and opts for one of them.
Collateral estoppel (often called issue preclusion) works to prevent the relitigation of issues settled in earlier proceedings. Res judicata (often called claim preclusion) subdivides into the concepts of bar, whereby a judgment against the plaintiff concludes his rights on that cause of action, and merger, whereby a judgment in the plaintiff's favor exhausts his rights on that cause of action.

The application of the foregoing doctrines to the worker seeking to protect or pursue potential rights under both the Jones Act and LHWCA is presently unclear. The following summary presents a range of situations that can occur and indicates the apparent effect of the relevant jurisprudence to date. (It should be noted that this discussion does not address the separate range of problems raised by full or partial releases or waivers that an employer or insurer might secure or attempt to secure in the course of these proceedings.)

Effect of LHWCA Proceedings on the Jones Act Suit

Merely accepting voluntarily-paid LHWCA benefits without filing a LHWCA claim will not adversely affect the Jones Act suit. If the Jones Act suit is ultimately successful, the employer will be entitled to a credit for LHWCA benefits paid.

Filing a LHWCA claim probably does not constitute a binding election of remedies or otherwise estop the worker from bringing a Jones Act suit. But counsel should probably include with the LHWCA filing an appropriate statement that attempts to reserve rights to proceed under the Jones Act.

An unsuccessful LHWCA proceeding will not bar a subsequent Jones Act suit on res judicata grounds. Nor, in all probability, will the res

142. Tipton v. Socony Mobile Oil Co., 375 U.S. 34, 84 S. Ct. 1 (1963), held that it was reversible error in petitioner's Jones Act suit to admit evidence that he had accepted LHWCA benefits. The Fifth Circuit court has frequently indicated that merely accepting voluntarily-paid LHWCA benefits will not estop plaintiff from pursuing his Jones Act remedy. See Simms v. Valley Line Co., 709 F.2d at 412; Young & Co. v. Shea, 397 F.2d 185, 187 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982) (declaring plaintiff's acceptance of LHWCA benefits to be part of its reasoning leading to the conclusion that he was covered by LHWCA).
143. See Boatel, 379 F.2d at 856 n.3).
144. In Boatel, 379 F.2d at 854-56, the court held that filing a LHWCA claim does not prevent the plaintiff from bringing a seaman's suit. But it should be noted that McDermott, 679 F.2d at 459 n.7, states that "even the ambiguous employee must elect a remedy," citing Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv., 377 F.2d 511, 514 (5th Cir. 1967), cert. denied, 389 U.S. 849 (1967). Ocean Drilling has no apparent application on the election of remedies point.
145. See Boatel, 379 F.2d at 856.
judicata doctrine of merger preclude a subsequent Jones Act suit following a successful LHWCA proceeding.\(^{146}\)

However, regardless of the outcome of the LHWCA proceeding, it may produce findings of fact that create collateral estoppel problems in the subsequent Jones Act proceeding. Before the recent decision in \textit{Simms v. Valley Line Co.}\(^{147}\) the cases seemed to indicate that a LHWCA finding will collaterally estop relitigation of the same issue in the Jones Act proceeding if and only if the issue was in fact fully litigated in the LHWCA proceeding,\(^{148}\) and the party invoking collateral estoppel was not the beneficiary of an evidentiary or procedural advantage in the LHWCA proceeding that does not obtain in the Jones Act proceeding.\(^{149}\) \textit{Simms}, however, suggests that collateral estoppel may be wholly inappropriate in the Jones Act suit,\(^{150}\) and that these issues are “a matter

\begin{itemize}
\item[146.] See Mike Hooks, Inc. v. Pena, 313 F.2d 696 (5th Cir. 1963). While the pre-Jones Act proceeding in \textit{Mike Hooks} was a state workers’ compensation proceeding, the result should be the same in LHWCA proceedings, for it is clear that Jones Act seamen are precluded from access to state workers’ compensation remedies, just as is true of the LHWCA remedy. See, e.g., Dupre v. Otis Eng’g Corp., 641 F.2d 229 (5th Cir. 1981); Bearden v. Leon C. Breaux Towing Co., 365 So. 2d 1192 (La. App. 3d Cir. 1978), cert. denied, 366 So. 2d 915 (1979). \textit{Mike Hooks}, which involved both collateral estoppel and res judicata arguments, was actually decided on the narrow ground that the employer, defendant in the Jones Act suit, was not “really a party” to the workers’ compensation proceeding, which was against the compensation insurer. 313 F.2d at 700-02. But, at least on the res judicata point, the case can probably support the proposition in the text.
\item[147.] \textit{Simms}, 709 F.2d 409 (5th Cir. 1983).
\item[148.] The LHWCA proceeding may achieve explicit or implicit factual determinations on issues that are controlling in the Jones Act suit. For example, an award of LHWCA compensation entails a finding that the plaintiff was not a seaman. One case holds that if the lack of seaman status was fully litigated in the LHWCA proceeding, that finding precludes relitigating the status issue in the Jones Act suit. See Welch v. Elevating Boats, 516 F. Supp. 1245, 1248 (E.D. La. 1981). But if the status finding was not achieved after full litigation, it will not collaterally estop plaintiff from seeking to establish seaman status in the Jones Act suit. See \textit{Mike Hooks}, 313 F.2d at 696. Cf. \textit{Boatel}, 379 F.2d at 854-56.
\item[149.] Several cases have involved a worker’s pursuit of LHWCA rights following a Jones Act proceeding in which the trier of fact concluded there was no actionable injury. The court has refused to give collateral estoppel effect to such findings on the ground that LHWCA gives the worker a lesser burden of establishing injury. See Strachan Shipping Co. v. Shea, 406 F.2d 521, 522 (5th Cir.), cert. denied, 395 U.S. 921 (1969); \textit{Young & Co.}, 397 F.2d at 188-89. Cf. Teichman v. Lofland Bros. Co., 294 F.2d 175 (5th Cir.), cert. denied, 368 U.S. 948 (1961). The same reasoning should preclude plaintiff from relying on collateral estoppel in a Jones Act proceeding as to any determination made in the LHWCA proceeding on a standard of proof more favorable to plaintiff than is true in Jones Act cases.
\item[150.] In \textit{Simms}, the status issue was fully litigated in the LHWCA proceeding, which concluded that the worker was not a seaman. 709 F.2d at 410. Yet the court indicated, without discussion, that it might well be proper for the Jones Act court to “refuse to give collateral effect to the status determination.” Id. at 413 n.6.
\end{itemize}
of first impression . . . and . . . uncertainty" in the Fifth Circuit.151

**Effect of Jones Act or Maintenance and Cure Proceedings on the Worker's LHWCA Rights**

Merely accepting maintenance and cure benefits should have no effect on the LHWCA proceeding.152 Neither should filing a seaman’s suit; this should not constitute a binding election of remedies or otherwise estop the worker from pursuing LHWCA rights.153 However, counsel should include in the complaint an attempted reservation of the worker’s LHWCA rights.154

An unsuccessful seaman’s suit will not bar a subsequent LHWCA proceeding on res judicata grounds.155 It is not clear whether a successful seaman’s suit would preclude subsequent LHWCA proceedings on res judicata (merger) grounds.156

Regardless of its outcome, the Jones Act suit is likely to produce findings of fact that generate collateral estoppel arguments in the subsequent LHWCA proceeding. Several cases have refused to use collateral estoppel against the worker when the Jones Act findings are made under procedural and evidentiary standards that are less generous to the worker than the LHWCA standards.157 Presumably that reasoning suggests that collateral estoppel would apply whenever the issue was fully litigated in the Jones Act suit and the party invoking collateral estoppel did not enjoy a procedural or evidentiary advantage in the Jones Act suit that would not be available in the LHWCA proceeding. But there is no help in the jurisprudence on that question.

All of the foregoing matters demand clarification by the court. *Simms v. Valley Line Co.*158 shows the difficulty of the ambiguous worker’s position. Uncertain as to his status, Simms filed both a Jones Act suit and LHWCA claim. He tried to have the LHWCA proceeding

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151. Id. at 412.
152. The cases holding that accepting LHWCA payments does not affect the worker’s right to pursue seamen’s remedies should entail this conclusion. See supra notes 142-43 and accompanying text.
153. See generally Simms, 709 F.2d 409 (5th Cir. 1983).
154. Id.
155. See *Strachan Shipping Co.*, 406 F.2d at 521; *Young & Co.*, 397 F.2d at 185.
156. See *Teichman*, 294 F.2d at 175.
157. The 1984 amendments to LHWCA add a new subsection (e) to § 903, providing that a LHWCA employer is entitled to a credit for any benefits previously paid under the Jones Act. LHWCA Amendments, supra note 5, at 1640 (to be codified at 33 U.S.C § 903(e)). This implies that a successful Jones Act suit would not bar a subsequent LHWCA proceeding on res judicata grounds. But cf. Jones v. Baton Rouge Marine Contractors, 127 So. 2d 58 (La. App. 1st Cir. 1961), cert. denied.
158. See the *Strachan, Young, and Teichman* cases, cited supra note 149.
stayed pending the outcome of the Jones Act suit, but the administrative
dlaw judge denied that motion. In the LHWCA hearing, the employer
contended that Simms was not a seaman, the workers’ compensation
insurer contended that he was a seaman, and Simms tried to occupy a
middle ground by urging that he not be “in any way prejudiced” in
his pursuit of LHWCA and Jones Act rights. The administrative law
judge determined that Simms was not a seaman, and made an award.
The workers’ compensation insurer appealed to the Benefits Review
Board, and Simms sought to join the appeal, contending that the ad-
ministrative law judge had erred in denying the stay, again requesting
that he not be “in any way prejudiced” in his LHWCA and Jones Act
claims. The Benefits Review Board dismissed Simms’ appeal on the
ground that he was not a party adversely affected by the administrative
law judge’s determinations inasmuch as he had been awarded the LHWCA
benefits for which he filed. Simms then sought to appeal to the Fifth
Circuit, but the appeal was dismissed as premature. The court discussed
the difficulties of a worker in Simms’ position, indicated that most of
the important election of remedies, collateral estoppel, and res judicata
issues are unsettled, and expressed its apparent hope that the determi-
nations of which Simms complained would be mooted by the Jones Act
judge’s refusal to give collateral estoppel effect to the administrative
law judge’s status determination.159

One may hope that Simms is a signal from the court that, when
an appropriate case presents itself, the court may be ready to clarify
the situation. Pending that clarification, counsel for both injured workers
and employers must be alert to the potential application of the doctrines
discussed. If claimant’s counsel finds it necessary to file under both the
Jones Act and LHWCA, each filing should be accompanied by an
attempted reservation of rights under the other system. If possible, the
claimant should seek to delay the LHWCA proceeding until the Jones
Act suit is determined. Both claimants and employers should be aware
that findings of fact in either proceeding may be binding in the sub-
sequent proceeding, particularly if the matter is fully litigated under
procedural and evidentiary standards that give no advantage not available
in the subsequent proceeding to the party invoking collateral estoppel.
And once the first proceeding is concluded, the employer’s counsel should
probably urge res judicata (bar or merger) in the second.

UNSEAWORTHINESS ACTIONS BY WORKERS
NOT COVERED BY LHWCA

The typical unseaworthiness action is brought by a seaman, a member
of the crew of the vessel on which injury is sustained, against the vessel’s

159. 709 F.2d at 413 n.6.
owner or operator, who is the plaintiff's employer. The 1946 Supreme Court decision in *Seas Shipping Co. v. Sieracki* expanded the unseaworthiness remedy in two ways, holding that longshoremen can sue shipowners on the basis of unseaworthiness, and that unseaworthiness liability can be imposed although the defendant shipowner is not the employer of the injured worker. Subsequently, the Court decided that the non-employer shipowner, held liable on the basis of unseaworthiness created by the injured longshoreman's employer, was entitled to indemnity from the employer on the basis of a warranty of workmanlike performance of the stevedoring operations (*Ryan* indemnity).

The result of the foregoing decisions was to expose the employer of workers covered by LHWCA to full tort liability in most cases in which unseaworthiness could be shown, despite the Act's provision for workers' compensation as the employer's exclusive liability. Congress determined to change that situation in 1972. As part of an extensive revision of LHWCA, Congress added a new section 905(b) to the Act, the major effect of which is to provide that no employee covered by LHWCA may maintain litigation based on unseaworthiness. The new section effectively eliminates the *Sieracki* action and the corresponding *Ryan* indemnity respecting injuries to any employee covered by LHWCA.

The effects of the 1972 amendment remain somewhat unclear on two fronts. First, there has been debate as to whether longshoremen

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160. To be liable for unseaworthiness, the defendant need not be the vessel's owner. It is enough that he own, operate, or be in control of the vessel. See, e.g., Baker v. Raymond Int'l, Inc., 656 F.2d 173, 181 (5th Cir. 1981), cert. denied, 456 U.S. 983 (1982). Furthermore, unseaworthiness liability carries a maritime lien, so that the vessel can be sued in rem by a plaintiff entitled to the remedy. In this section of the article, the term "shipowner" refers to the vessel, its owner, or its operator. Distinctions among those entities are not relevant to the matters treated here.


162. 328 U.S. 85, 66 S. Ct. 872 (1946).

163. The pre-*Sieracki* cases were unclear as to whether an employment relationship between the plaintiff and the unseaworthiness defendant was a requisite. See the cases and commentators cited 328 U.S. at 88 nn.3-4, 66 S. Ct. at 874 nn.3-4.

164. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 272 (1956). Once *Ryan* was decided, the immunity from tort liability ostensibly conferred on the LHWCA employer by the Act was defeated, and it was a fairly easy step for the Court next to conclude that a longshoreman in the direct employ of the shipowner could sue the employer/shipowner on the basis of unseaworthiness. See Reed v. The S.S. Yaka, 373 U.S. 410, 83 S. Ct. 1349 (1963). See also supra note 6.

165. Both before and after the 1972 amendments, 33 U.S.C. § 905 provided that the employer's liability for worker's compensation "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

and harbor workers who are not covered by LHWCA have lost the unseaworthiness remedy. Courts in the Third, Fourth, Sixth, and Ninth Circuits have suggested with varying degrees of clarity and conviction that all such workers, whether or not covered by LHWCA, are precluded from suing on the basis of unseaworthiness. The Fifth Circuit Court has firmly reached the opposite conclusion. In *Aparicio v. Swan Lake* the court held that workers who are not covered by LHWCA because they are beyond its territorial coverage or because they are excluded from LHWCA coverage as federally-employed longshoremen or otherwise not within the LHWCA's coverage retain the right to sue the owners of ships on which they are injured on the basis of unseaworthiness. *Aparicio* clearly states the present law in the Fifth Circuit.

167. See Lynn v. Heyl and Patterson, Inc., 483 F. Supp. 1247 (W.D. Pa. 1980), aff'd, 636 F.2d 1209 (3d Cir. 1981), in which the court denied plaintiff's unseaworthiness action on the basis of 33 U.S.C. § 905(b) but also held that plaintiff was not within the coverage of LHWCA.

168. See United States Lines, Inc. v. United States, 593 F.2d 570 (4th Cir. 1979), in which the court held that the 1972 amendment to LHWCA had no "direct effect" on federally-employed longshoremen (who are excluded from LHWCA coverage by the terms of 33 U.S.C. § 903(a)(2) because they are covered by the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq.), but that the Ryan indemnity against the federal employer was nevertheless cut off as an "indirect effect" of the LHWCA amendment. See also Quinn v. Central Gulf S.S. Corp., 1977 A.M.C. 204 (D. Md. 1977).


170. See Normile v. Maritime Co. of the Philippines, 643 F.2d 1380 (9th Cir. 1981) (holding that *Sieracki* has been entirely overruled).

171. See supra notes 167-70.


175. See Miller v. Central Dispatch, Inc., 673 F.2d 773, 784 (5th Cir. 1982) (noting that a waterfront worker covered only by state workers' compensation would presumably be entitled to sue on the basis of unseaworthiness).

176. See *Cormier v. Oceanic Contractors*, Inc., 696 F.2d at 1112.
The second question is whether a seaman can sue a non-employing shipowner for unseaworthiness. Before Sieracki it had not been clear whether an employment relationship between the plaintiff and the defendant shipowner was a requisite to recovery for unseaworthiness. But once Sieracki was decided, the courts routinely held that seamen were entitled to the unseaworthiness remedy although not employed by the defendant shipowner. In many of these cases, the plaintiff was a


178. See supra note 163.

179. See Davis v. Hill Eng’g, Inc., 549 F.2d 314, 326-28, 329-30 (5th Cir. 1977) (The plaintiff, a member of the crew of the vessel on which he was injured, was a fortiori entitled to sue the non-employer shipowner for unseaworthiness.); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 169, 170 (2d Cir. 1973) (A hairdresser on a passenger vessel, employed by House of Albert, was a seaman who could sue Albert under the Jones Act and obtain maintenance and cure and AmEx, the non-employer shipowner, for unseaworthiness.); Clark v. Symonette Shipyards Ltd., 330 F.2d 554, 556-57 (5th Cir. 1964), cert. denied, 387 U.S. 908 (1967) (Workers injured on the defendant’s vessel were held entitled to the unseaworthiness action whether or not they were classified as seamen or as members of the vessel’s crew); Reilly v. B No. 100 Corp., 424 F. Supp. 935, 936-37 (E.D.N.Y. 1977) (Seaman by virtue of his connection with a barge, and who was injured on the barge, was held entitled to maintain an unseaworthiness action against the non-employing owner of the tug); Evans v. J. Ray McDermott, Inc., 342 F. Supp. 1390, 1391, 1393 (E.D. La. 1972) (same); Welch v. J. Ray McDermott & Co., 336 F. Supp. 383, 384, 385 (W.D. La. 1972) (The plaintiff, who worked for a welding inspection contractor aboard the non-employing shipowner’s pipelay barge, was a seaman, entitled to sue the shipowner for unseaworthiness of the living quarters on the barge.); Case v. St. Paul Fire & Marine Ins. Co., 324 F. Supp. 352, 353 (E.D. La. 1971) (A roughneck assigned to a submersible barge operated and controlled by the non-employer defendant had an unseaworthiness action); Smith v. Brown & Root Marine Operators, Inc., 243 F. Supp. 130, 132, 136 (W.D. La. 1965) (The plaintiff, who was diving from the non-employer defendant’s barge, was a seaman, entitled to the unseaworthiness remedy.); Farmer v. The O/S Fluffy D, 220 F. Supp. 917, 921 (S.D. Tex. 1963) (The captain of shrimp boat “A”, killed in a fight during a drinking bout aboard shrimp boat “B”, was entitled to sue the owner of “B” for unseaworthiness.); Bradshaw v. The Carol Ann, 163 F. Supp. 366, 369-70 (S.D. Tex. 1956) (A crew member of shrimp boat “A”, which was moored in such a way as to require crew members to cross the deck of boat “B” to get to and from shore, had an unseaworthiness action against boat “B.”); Capadona v. The Lake Atlin, 101 F. Supp.
member of the crew of the vessel whose unseaworthiness caused the injury. Yet a significant number of the decisions permitted unseaworthiness actions by seamen who were aboard the offending vessel only transiently, in the course of cargo operations or for other purposes.

The post-amendment decisions in which seamen sued non-employing shipowners on the basis of unseaworthiness are not fully consistent with the above pattern. Apparently workers who are crew members of the vessel on which injury occurs are still entitled to sue non-employing shipowners for the unseaworthiness of that vessel. But Burks v. American River Transportation Co. holds that a worker, arguendo a seaman by virtue of his connection to Vessel "A", who was injured while temporarily aboard Vessel "B" engaged in unloading operations, was prevented by the 1972 amendment to LHWCA from suing the owner of Vessel "B" for its unseaworthiness. The court held that, as to Vessel "B", plaintiff was doing the work of a longshoreman and was therefore a covered employee under LHWCA. The core of the decision is the notion that a worker is excluded from LHWCA coverage as a "member of a crew of any vessel" only if he is a member of the crew of the vessel he is suing. Burks represents a very strained construction of the language of LHWCA; it holds that with respect to the availability


851. See the Davis, Mahramas, Evans, Welch, Case, and Smith cases cited supra note 180.

852. See the Reilly, Clark, Farmer, Bradshaw, and Capadona cases cited supra note 180.

853. Several decisions so hold, without discussion of LHWCA. See Baker v. Raymond Int'l, 656 F.2d at 181-85 (injury in Persian Gulf, so beyond reach of LHWCA); Kwak Hyung Rok v. Continental Seafoods, Inc., 462 F. Supp. 894, 896, 898 (S.D. Ala. 1978), aff'd, 614 F.2d 292 (5th Cir. 1980) (The captain of a vessel would have an unseaworthiness action against a non-employer entity responsible for readying the vessel for a voyage if that entity operated, managed, or controlled the vessel.); Hamilton v. Canal Barge Co., 395 F. Supp. 978, 982, 988 (E.D. La. 1975) (A member of the crew of an unseaworthy barge was entitled to recover against an owner who chartered it to the worker's employer.).

854. 679 F.2d 69 (5th Cir. 1982).

855. Id. at 75.


857. Id. at 76. The court stated that "the 'member of a crew' language in § 905(b) clearly refers to the vessel that is charged with negligence." There is no such language in § 905(b), which is addressed to "a person covered under this chapter." The relevant language is in §§ 902(3) and 903(a)(1). And of course there is nothing "clear" about the court's leap; "member of a crew of any vessel" is not the same as "member of a crew of the vessel being sued."

858. See supra note 187.
of the unseaworthiness remedy—but clearly not with respect to other features of the Act—"any vessel" means "the vessel whose owner is being sued." Burks is inconsistent with a number of the pre-1972 decisions. It seems to take the 1972 amendments to LHWCA beyond their intended compass. Further, it is a strange policy that holds shore-based workers and other harbor workers who happen to be beyond the reach of LHWCA because of federal employment or LHWCA's territorial reach entitled to the unseaworthiness remedy while denying it to a seaman. If longshoremen need not be members of the crew of the defective vessel in order to sue for its unseaworthiness, why should such status be required of seamen?

Several other recent decisions also involved the worker, clearly a seaman by virtue of his connection to one vessel, who sustains injury while temporarily involved with another vessel not owned or operated by the employer. Three such cases, without overt reliance on LHWCA, denied the unseaworthiness action on the theory that, as to the vessel where injury occurred, plaintiff was merely a passenger. These decisions are inconsistent with several of the pre-1972 cases. Further, there is some strain at the level of policy between these cases and the Aparicio line of decisions, in which some shore-based and other harbor workers have been permitted the unseaworthiness remedy against non-employers.

Easily the most puzzling decision bearing on the questions under discussion is Bridges v. Penrod Drilling Co. Plaintiff was a roustabout employed by Penrod and assigned to Penrod's submersible drilling barge, the Penrod 72. He was a seaman by virtue of that connection. His injuries occurred aboard a supply vessel that he was assigned to unload. The court held that such a plaintiff has no unseaworthiness action against the owner of the supply vessel. In its result, Bridges is thus identical to Burks. But the reasoning process is wholly different. The court

189. See Robertson, supra note 7, at 989.
190. See supra note 182 and accompanying text.
191. See Miller, 673 F.2d at 773.
192. See Aparicio, 643 F.2d at 1149; Cormier, 696 F.2d at 1112.
194. See supra note 182 and accompanying text.
195. See supra notes 172-76 and accompanying text.
196. 740 F.2d 361 (5th Cir. 1984).
197. Id. at 362.
198. The issue before the Bridges court was Ryan indemnity, but the court reasoned that the answer to that question depended on whether there was a Sieracki action. Id. at 363-64.
199. 679 F.2d at 69.
began its discussion by stating that the LHWCA did not apply, apparently on territorial grounds. On that premise, plaintiff should certainly have been entitled to sue the non-employer shipowner on the basis of unseaworthiness, on the authority of Aparicio and the other cases so holding. But the court seemed to believe, contrary to a lengthy line of jurisprudence, that seamen had never been afforded the benefits of the Sieracki action:

The issue presented on this appeal is not "whether landlubbers who do sailor's work aboard ships were dislodged from their Sieracki seaman status by the wake of the 1972 amendments" to the LHWCA, Aparicio, 643 F.2d at 1110, but whether a seaman whose duties include doing the unloading work of a longshoreman, in a setting not subject to the LHWCA, by some act of legal legerdemain leaves his regular seaman status and joins a "pocket of Sieracki seamen." We are persuaded that no such transformation occurs. None need occur.

Without citing any authority, the court went on to state something that is contrary to dozens and perhaps hundreds of cases:

200. The Penrod 72 was situated on the outer continental shelf, where LHWCA applies, not of its own force, but by virtue of its extension via the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b) (1983). See supra note 173. The Bridges court stated that the OCSLA extension did not cover "rigs such as the semi-submersible PENROD 72" until the 1978 amendments to that Act. 740 F.2d at 362. But the portion of OCSLA that makes LHWCA applicable to Shelf injuries did not change in any relevant way in 1978. Compare the former 43 U.S.C. § 1333(c) (1976) with the present 43 U.S.C. § 1333(b) (1983). The court's statement must therefore have been based on a 1978 change to the general OCSLA provision extending United States law to the Shelf, 43 U.S.C. § 1333 (a)(1) (1983). Before 1978, that section read in pertinent part:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon.

43 U.S.C. § 1333(a)(1) (1976). After the 1978 amendment, the section read in pertinent part:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon.

43 U.S.C. § 1333(a)(1) (1983). The Bridges court apparently reasoned that the pre-1978 absence of the language referring to temporary structures meant that none of OCSLA, including the section making LHWCA applicable, applied to submersible barges before 1978. But the pre-1978 jurisprudence was to the contrary. See Robertson, supra note 7, at 985-86. The pre-1978 cases simply did not take the language of the general section as delimiting the coverage of the LHWCA-extension section.

201. See supra notes 172-76 and accompanying text.
202. See, e.g., cases cited supra note 180.
203. 740 F.2d at 364.
One with seaman status does not become additionally a Sieracki seaman by doing stevedoring work which might be styled traditional seaman’s duties.\(^{204}\)

*Burks* seems wrong as a matter of policy and in its torturing of the language of LHWCA. *Bridges* is just as wrong on the policy and wronger yet in its understanding of the predecessor jurisprudence. If the unseaworthiness remedy is to be available in any circumstances other than the paradigm, seaman plaintiff against his employer/shipowner, then it should have been available in *Burks* and *Bridges*. For no apparent reason, the court has taken a giant step backward.

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204. Id. at 364.