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Admiralty

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ADMIRALTY

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Cases decided by the Fifth Circuit Court of Appeals during calendar year 1975 which involved admiralty and maritime claims embrace a colorful variety of fact situations but establish few benchmark principles of marine law. One very important case was decided by the U.S. Supreme Court during the survey period, *United States v. Reliable Transfer Co.*,[1] in which was laid to rest one of the unique doctrines of American admiralty law, the rule of dividend damages. Surprisingly, the Fifth Circuit handed down no decisions which provided any meaningful guidance to the proper interpretation of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.[2]

As has been the practice in past survey articles, an effort has been made to restrict the scope of this review to those cases which deal primarily with the proper interpretation and application of principles of admiralty law. Cases which are concerned largely with reviewing the fact findings of trial courts and juries are not included in this commentary.

I. JURISDICTION

Whatever one might think of the strict locality test of admiralty tort jurisdiction[3]—most commentators consider it indefensibly arbitrary[4]—it nevertheless possessed the virtue of certainty of application. There were few occasions when a litigant had reason to doubt whether his claim fell within or without the boundaries of admiralty jurisdiction. With its decision in *Executive Jet Aviation, Inc. v. City of Cleveland*,[5] the U.S. Supreme Court effectively abandoned locality as the sole factor to be considered in determining tort jurisdiction in admiralty and substituted instead a subject matter test—whether the tort bears a relationship to "traditional maritime activity."[6]

Evidence that disagreement among the judges of the Fifth Circuit as to the proper interpretation of *Executive Jet* still lingers three years and numerous lower court decisions later is found in Chief Judge Brown's dis-

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1. 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975).
2. 33 U.S.C.A. §§901-50 (Rev. 1970).
3. The strict locality test is reviewed in detail in Victory Carriers, Inc. v. Law, 404 U.S. 202, 205-07, 92 S.Ct. 418, 421-22, 30 L.Ed. 2d 383, 387-89 (1971).
4. I. Hall, et al., 2 BENEDICT ON ADMIRALTY §2, at 1-8 (7th ed. 1975); 7A J. MOORE, FEDERAL PRACTICE ¶ .325[3], at 3528-41 (2d ed. 1972).
5. 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).
6. *Id.* at 261, 93 S.Ct. at 501, 34 L.Ed.2d at 454.

senting opinion from an en banc denial of rehearing in *In Re Dearborn Marine Service, Inc.*[7] A panel of the court which did not include Judge Brown had ruled in a 1974 decision[8] in this case that the death claim of an offshore oil worker against the decedent's employer was controlled by the Outer Continental Shelf Lands Act[9] [hereinafter "OCSL Act"]. The Act requires the application of state law as surrogate federal law rather than admiralty law to death and injury claims occurring on fixed drilling platforms,[10] even though the worker died in a flash fire aboard a crewboat afloat in the Gulf of Mexico. The panel's decision turned upon the facts that the decedent was permanently assigned to a drilling platform and was only temporarily aboard the crewboat to perform clerical work relating solely to his employment on the platform.

In his dissent Judge Brown argues that the court's opinion failed to accord proper weight to the maritime situs of the fatality in deciding the issue of jurisdiction. The fact that the decedent was engaged in platform work and made no contribution to the navigation of the crewboat is not of controlling significance. The crewboat's mission was to support the work of the drilling platform; therefore, the decedent was contributing to the accomplishment of the vessel's mission by using its facilities to carry out platform work.

Dearborn is easily misread as supportive of the proposition that admiralty jurisdiction over a death or injury claim the situs of which is a vessel on navigable waters depends upon the injured party's contribution to the navigation of the vessel or his status as some type of seaman. Such is not the case in *Dearborn*. Both Judge Brown and the decisional panel agreed that admiralty jurisdiction embraces vessel related injuries to all persons aboard for purposes not inimical to the legitimate interests of the shipowner.[11] The panel and Judge Brown parted company only on the issue of whether a death claim against the worker's employer, which would be governed exclusively by the OCSL Act when the injury occurred on the drilling platform, could be brought in admiralty when the fatality took place aboard a vessel with the decedent then engaged in drilling platform work unrelated to the vessel's navigation. In its opinion, the panel sought to analogize *Dearborn* to *Executive Jet* in order to extend the reach of the OCSL Act beyond the boundaries of the drilling platform in instances where the accident and the decedent's activities were related to the drilling platform operations but the situs of the accident was elsewhere.[12]

In its opinion in *Rodrique v. Aetna Casualty & Surety Co.*,[13] the Su-

7. 512 F.2d 1061 (5th Cir. 1975).
8. *In Re* Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974).
9. 43 U.S.C.A. §§1331-43 (Rev. 1964).
10. 43 U.S.C.A. §1333 (a)(2) (Rev. 1964).
11. 499 F.2d at 277.
12. *Id.* at 276.
13. 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

preme Court took some pains to explain that drilling platforms were to be treated as artificial islands and that accidents occurring on these structures were to be governed by the OCSL Act rather than by admiralty law. Conversely, it follows that the OCSL Act should not be applicable to accidents not having a platform situs. Judge Brown's view that the panel in *Dearborn* had misread both *Rodrique* and *Executive Jet* seems to be entirely correct.

A case involving artifacts recovered by salvors from the wreckage of several 16th century Spanish vessels discovered off the Texas coast raised an interesting jurisdictional question.[14] The artifacts were removed to Indiana but later were surrendered to Texas authorities when the State obtained a temporary restraining order prohibiting further salvage operations. The salvors initiated an in rem action in admiralty in a federal district court to establish title to the articles or, in the alternative, to obtain a salvage award. The action was dismissed by the Fifth Circuit on the ground that the recovered articles were not located within the judicial district where the in rem proceeding was filed. The court observed that the res must be present in the forum district at time of filing or during the pendency of the action to establish in rem jurisdiction.[15]

In *Hollister v. Luke Construction Co.*,[16] a shipyard worker had been injured aboard a barge undergoing conversion to enable it to operate as a drilling platform. When the accident occurred the barge was afloat in navigable waters, but the construction work was incomplete. Plaintiff sought to escape the snares of the Longshoremen's and Harbor Workers' Compensation Act by claiming to be a seaman.[17] The court found that the barge was still under construction and was not yet "an instrument of commerce and transportation on navigable waters" and, for this reason, that plaintiff was not a Jones Act seaman.[18] Finally, the court observed that a tort arising out of the work of constructing a vessel "lacks maritime flavor" and presumably is not within the admiralty jurisdiction.[19]

This final observation is both gratuitous and misleading. Having decided that plaintiff was not a Jones Act seaman, it necessarily follows that any claim against his employer is controlled by the Longshoremen's Act. It was not necessary for the court to decide whether there was admiralty jurisdiction over the claim since plaintiff had no claim against his employer under the general maritime law.

14. Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975).

15. *Id.* at 1115.

16. 517 F.2d 920 (5th Cir. 1975).

17. The Longshoremen's and Harbor Workers' Compensation Act expressly excludes from coverage "a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C.A. §902(3) (Supp. 1976) *amending* 33 U.S.C.A. §902(3) (Rev. 1970).

18. 517 F.2d at 921.

19. *Id.*

Under the strict locality test of admiralty jurisdiction,[20] plaintiff Hollister could bring a negligence action in admiralty against any third party tortfeasor simply by showing that the accident had a navigable water situs. Since *Executive Jet*, however, an argument could be made that a personal injury claim which arises out of shipbuilding activities lacks a relationship to "traditional maritime activities," the rationale being the longstanding maxim of admiralty law that a contract to construct a ship is non-maritime.[21] There is, however, no logical basis for denying admiralty jurisdiction to a marine worker who is injured aboard a ship afloat in navigable waters simply because the shipbuilding work is technically incomplete and the ship is not enrolled or licensed by the Coast Guard.[22] It is just such a "mechanical application" of a jurisdictional test that *Executive Jet* disparages.[23]

II. PRACTICE AND PROCEDURE

Romero v. Bethlehem Steel Corp.[24] provides good basic instruction in pleading under the unified federal admiralty and civil rules of procedure.[25] A shipyard worker injured aboard a vessel undergoing repairs filed suit against the shipowner seeking damages for his personal injuries. As is frequently the case, facts sustaining both admiralty and diversity jurisdiction were alleged, and the prayer to the complaint included a demand for jury trial. The complaint also contained a statement that the action was brought "in accord with Rule 9(h) of the Federal Rules of Civil Procedure." Subsequently, a controversy arose between plaintiff and defendant as to whether plaintiff was entitled to a jury trial under his pleading. The Fifth Circuit correctly ruled that plaintiff's invocation of Rule 9(h) constituted an election to proceed in admiralty without a jury.

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20. *See* note 3, *supra*.

21. E. JHIRAD AND A. SANN, 1 BENEDICT ON ADMIRALTY §188, at 11-34-36 (7th ed. 1974); G. GILMORE AND E. BLACK, LAW OF ADMIRALTY §1-10, at 26 (2d ed.1975); Jig The Third Corp. v. Putnam Marine Ins. Underwriters Corp., 519 F.2d 171, 177 (5th Cir. 1975).

22. The character of a floating object as a "vessel" in navigation is frequently important in determining whether the persons aboard are seamen and whether they are entitled to the warranty of seaworthiness. *See, e.g.*, Hicks v. Ocean Drilling and Exploration Co., 512 F.2d 817 (5th Cir. 1975).

23. The Court in *Executive Jet*, 409 U.S. 249, 255-56, 93 S.Ct. 493, 498, 34 L.Ed.2d 454, 460 (1972), said:

> [S]ome courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation.

24. 515 F.2d 1249 (5th Cir. 1975).

25. The admiralty rules and the rules of civil procedure were "unified" effective July 1, 1966 in order "to merge the civil and admiralty practices in general, under a single form of action, while preserving certain features of practice peculiar to admiralty. . . ." FED. R. CIV. P. 9(h), Advisory Committee's Note of 1970.

When the federal admiralty and civil rules were unified in 1966,[26] the advisory committee was confronted with the problem of how to distinguish between traditional suits in admiralty without jury trial and actions based on diversity of citizenship where the complaint reflected a foundation for both types of federal jurisdiction. The committee settled upon Rule 9(h) as the device by which a plaintiff could specially plead his election to proceed under traditional admiralty procedure which, among other things, involves a trial before the court sitting without a jury.[27] Plaintiff Romero inadvertently invoked this special rule and thus denied himself the privilege of having his case tried by a jury which is available in a civil action based on diversity of citizenship.

Robertson v. N.V. STOOMVAART MAATSCHAPPIJ[28] illustrates the supremacy of federal maritime law over state law in cases which fall within the admiralty jurisdiction.[29] A longshoreman who was injured aboard a ship at New Orleans filed a suit against the shipowner; however, the plaintiff died during the pendency of the action. Citing a Louisiana statute, the district court eventually dismissed the complaint for failure to make a proper substitution of parties within one year of death. The Fifth Circuit reversed on the ground that a state law limitation cannot bar an action on a maritime claim simply because the situs of the accident which is the foundation of the claim is the territorial waters of the state whose laws are invoked.

III. COLLISION

Division of damages in mutual fault collision cases has been the accepted American admiralty rule at least since 1855 when it was formally adopted by the U.S. Supreme Court in *The Schooner CATHERINE v.*

26. For a review of the history of unification, see 7A J. MOORE, FEDERAL PRACTICE 153-61 (2d ed. 1972).

27. Historically, the judge of the court of admiralty has served as the trier of fact. Blake v. Farrell Lines, Inc., 417 F.2d 264, 265 (3d Cir. 1969). The seventh amendment does not require jury trials in admiralty cases. Fitzgerald v. United States Lines Co., 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed. 720, 724 (1963).

28. 507 F.2d 994 (5th Cir. 1975).

29. Although admiralty suits are governed by federal substantive and procedural law, the admiralty court may nonetheless apply state law "by express or implied reference or when the federal law of admiralty is incomplete." St. Hilaire Moye v. Henderson, 496 F.2d 973, 980 (8th Cir. 1974). State statutes of limitation are not applicable to claims within the admiralty jurisdiction; however, under the admiralty doctrine of laches, the court may make reference to the "analogous statute of limitations" to determine which party has the burden of proving that the defendant has or has not been prejudiced by the delay. KG. Gilmore and C. Black, Law of Admiralty §9-80 at, 771-76 (2d ed. 1975). The doctrine of laches applies to maritime claims with equal force in federal and state courts and is not affected by the circumstance that a right of trial by jury is exercised. King v. Alaska Steamship Co., 431 F.2d 994, 996 (9th Cir. 1970).

Dickinson.[30] Since then the high court has seldom missed an opportunity to praise the doctrine as furthering the ends of both safety and justice.[31] Elsewhere the rule has been generally castigated as the archaic relic of another age and out of harmony with modern international marine law.[32] As recently as May 28, 1974, the Supreme Court had respectfully tipped its hat to the divided damages doctrine;[33] thus the unanimous opinion of the court in *United States v. Reliable Transfer Co.*[34] renouncing the doctrine came as a pleasant surprise to many.

In a suit by a shipowner against the U.S. Coast Guard for the stranding of a vessel, allegedly due to the failure of the government to maintain a breakwater light, the trial court apportioned fault at 25% to the Coast Guard and 75% to the vessel.[35] Nevertheless, the trial court divided the vessel's damages equally between the two parties, stating that it was compelled to follow higher authority which required application of the doctrine under the facts of the case.[36] The Second Circuit affirmed[37] and the Supreme Court granted certiorari "to consider the continued validity of the divided damages rule."[38]

Although it had stated less than a year earlier that the rule promoted "a more equal distribution of justice,"[39] in *Reliable Transfer* the high court unblushingly made a 180-degree course change and observed:

> It is no longer apparent, if it ever was, that this solomonic division of damages serves to achieve even rough justice.[40]

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30. 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1854).

31. See discussion of authorities in Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 110-11, 94 S.Ct. 2174, 2176-77, 40 L.Ed.2d 694, 699-700 (1974).

32. G. GILMORE AND C. BLACK, LAW OF ADMIRALTY §7-30, 528-31 (2d ed. 1975); Bue, *Admiralty Law in the Fifth Circuit—A Compendium For Practitioners: II*, 5 HOUSTON L. REV. 767, 778-79 (1968). Under the text of the Brussels Convention of 1910, "if two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed." A. SANN, *et al.*, 6 BENEDICT ON ADMIRALTY 39 (7th ed. 1969). Although adopted as law by most maritime nations, the Convention was never ratified by the United states and was withdrawn by the President in 1947. *Id.* at 38.

33. In Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 110-11, 94 S.Ct. 2174, 2176-77, 40 L.Ed.2d 694, 699-700 (1974), the Court said:

> Indeed, it is fair to say that application of the rule of division of damages between joint tort feasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." . . . And a "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

34. 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

35. Reliable Transfer Co. v. United States, 1972 A.M.C. 1757, 1763 (E.D.N.Y. 1972).

36. *Id.* at 1764-66.

37. Reliable Transfer Co. v. United States, 497 F.2d 1036 (2d Cir. 1974).

38. United States v. Reliable Transfer Co., 421 U.S. 397, 401, 95 S.Ct. 1708, 1711, 44 L.Ed.2d 251, 256 (1975).

39. *See* note 33, *supra*.

40. 421 U.S. at 405, 95 S.Ct. at 1713, 44 L.Ed.2d at 259.

Acknowledging that division of damages among wrongdoers in collision cases may still be "an equitable solution" where the evidence makes a fair allocation of fault impossible, the Court confesses that in the great majority of cases it is possible to apportion fault fairly and equitably among the parties. Under these circumstances, liability "is to be allocated among the parties proportionately to the comparative degree of their fault. . . ."[41]

For those proctors who have found themselves on the short end of a collision case representing a party guilty of grievous faults, the demise of divided damages must be accompanied by some sadness. As a lever for promoting the advantageous settlement of a bad case, the doctrine was an invaluable boon and source of encouragement to embattled defense counsel. When the smoke and dust of battle had settled, however, not even its most partisan champion could maintain with candor that the cause of justice was ever advanced by dividing damages between tortseasors guilty of unequal faults.

The heavy obligation resting upon vessels to obey strictly all statutes and regulations designed to prevent collisions is highlighted in *United States v. Tug COLETTE MALLOY*.[42] Any violation of such statutes or regulations in a collision setting places upon the noncomplying vessel the burden of establishing that her statutory fault in no respect contributed to the collision.[43]

The COLETTE MALLOY struck and damaged a floodgate owned and maintained by the government. The district court paradoxically found the tug solely liable while concurrently finding the government's gatekeeper's failure to open the floodgates to be the sole cause of the collision. This extraordinary result was based on the lower court's assumption that strict liability was imposed by statute on vessels which for any reason cause damage to government structures intended "for the preservation and improvement of any of its navigable waters or to prevent floods."[44]

Predictably, the Fifth Circuit refused to countenance the theory that 100% government fault could not be asserted as a defense to a strict liability claim by the government against an innocent tug.[45] Unfortunately for the COLETTE MALLOY, the circuit court also refused to accept the finding that the tug was free from fault. Observing that the tug was guilty of statutory violations in failing to sound fog signals, failing to give sound

41. *Id.* at 411, 95 S.Ct. at 1716, 44 L.Ed.2d at 262.

42. 507 F.2d 1019 (5th Cir. 1975).

43. This principle is commonly referred to as "the Pennsylvania Rule" after the U.S. Supreme Court's decision in The PENNSYLVANIA, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), the famous statement of the rule being found at 136.

44. 33 U.S.C.A. §408 (Rev. 1970).

45. "Defenses to the strict liability imposed by these statutes are not well-developed; however, we have no doubt that if the tug had shown the gateman to be solely at fault in causing the accident a defense would have been established." United States v. Tug COLETTE MALLOY, 507 F.2d 1019, 1022 (5th Cir. 1975).

signals while approaching the floodgate, etc., the circuit court affirmed the decision of the court below.

IV. JONES ACT SEAMEN

It has long been recognized by the courts that the shipowner's obligation to provide maintenance and cure to seamen who become ill or are injured in the service of the ship ceases when the seaman becomes fit for duty or when he reaches maximum cure.[46] But suppose a seaman sustains an injury which is immediately permanent and cannot be cured by treatment, and yet the medical diagnosis of that fact is not made until nearly four years later. Is the seaman entitled to maintenance and cure during the four-year interim?

This was the question considered by the U.S. Supreme Court in *Vella v. Ford Motor Co.*,[47] and the answer was predictably in the affirmative. The high court observed that the well-being of seamen is fostered by insuring that the seaman's entitlement to maintenance and cure is certain and indisputable. If the shipowner could defer these maintenance payments pending decision as to the permanent effects of an injury, this "essential certainty of protection" would be destroyed.[48] Also, the seaman might be faced with a claim by the shipowner to recover payments made during the interim between injury and diagnosis.[49]

The sympathy which the courts have traditionally shown for seamen in maintenance and cure cases is demonstrated in a case decided by the Fifth Circuit involving an obese pipe layer who failed to follow the dietary regimen prescribed by his physician following an accident aboard a barge.[50] The claimant, who was convalescing from severe rib injuries, had been placed on a diet and exercise program considered essential to speeding his recovery which had been complicated by the fact that he weighed about 350 pounds. Upon his assurances that he would keep up the program, the employer's physician released him from the hospital to return home where he promptly fell off the dietary wagon. When the barge owner learned of this, the maintenance payments were stopped on the ground that the claimant had rejected the recommended medical treatment.

A divided panel of the Fifth Circuit concluded that there were extenuating circumstances which had made the claimant's failure to stick to his diet something less than the willful rejection of medical treatment which would result in a forfeiture of maintenance and cure. In effect, the majority

46. Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949).

47. 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682 (1975).

48. *Id.* at 4, 95 S.Ct. at 1383, 43 L.Ed.2d at 685. Ideally, maintenance and cure liability should be so certain and the penalty for delay in payment so severe that it will be self-administered by the shipowner without the necessity of court intervention.

49. *Id.*

50. Coulter v. Ingram Pipeline, Inc., 511 F.2d 735 (5th Cir. 1975).

felt that the claimant's problem was akin to that of an alcoholic who is left alone with his bottle and reasoned that the treatment should have been more closely supervised by the physician.[51] The dissent argued that the rejection of the diet was comparable to rejection of medicine and the equivalent of willful rejection of treatment.[52]

Spinks v. Chevron Oil Company[53] is a Jones Act case of particular interest in that it is as an expression of the court's preference for the "legal cause" doctrine as being more appropriate for application in admiralty cases than the better-known doctrine of proximate cause.[54] It also illustrates the fact that a Jones Act employer need not be the owner of the vessel on which the seaman works and is injured.[55]

Plaintiff Spinks lived and worked aboard a jack-up drilling barge as an employee of a contractor which had contracted with Chevron, the barge owner, to do year around maintenance work on the barge. He was seriously injured aboard the barge when he slipped on detergent which he had helped to apply and was supposed to help clean up. The trial court found Spinks' negligence to be the "sole proximate cause" of his injury even though a co-worker and a supervisor knew of the dangerous condition and shared responsibility with Spinks for cleaning up the slippery liquid.[56]

Without passing judgment on the degree of comparative fault, the Fifth Circuit found that the evidence did not support the lower court's conclusion that spinks, "the lowest member of the hierarchy" of workers, was solely responsible for correcting the dangerous condition which resulted in his injury.[57] The court observed that the Jones Act adopts Federal Employers Liability Act standards of causation[58] and that "proximate cause is not destroyed merely because the plaintiff may also have contributed to his own injury."[59]

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51. "Common sense and personal experience tell us how emotionally and physically difficult it would be for a person of this size to maintain an exercise program and a daily diet of 1500 calories without supervision and medical advice." *Id.* at 738.

52. *Id.* at 739-40 (Gee, J., dissenting).

53. 507 F.2d 216 (5th Cir. 1975).

54. *Id.* at 222-23. The court has reference to "legal cause," as defined in RESTATEMENT (SECOND) TORTS §9, which it distills to mean "that some responsibility for the effect must accompany the cause." 507 F.2d at 223. Since subsequent decisions of the court in maritime cases continue to use "proximate cause" terminology, it would appear that what the court is actually adopting is not the modern terminology but the Restatement's "legal cause analysis." *Id.* Professor Prosser has long argued that "legal cause" is a more appropriate term than "proximate cause" to describe the type of causation which gives rise to tort liability. PROSSER, LAW OF TORTS §42 at 244 (4th ed. 1971).

55. Spinks v. Chevron Oil Co., 507 F.2d 216, 224 (5th Cir. 1975).

56. *Id.* at 220-21.

57. *Id.* at 223.

58. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing injury or death for which damages are sought." Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, 499 (1956).

59. 507 F.2d at 221.

The court emphasized that Spinks was not required to guess at his peril whether the barge owner, Chevron or his immediate employer was the correct party to be sued under the Jones Act. He could have sued both jointly and alleged Jones Act employer status in the alternative.[60]

In remanding the case for additional findings, the court also pointed out that it was possible for Spinks to be the borrowed servant of Chevron and simultaneously to be the servant of his immediate employer the maintenance contractor.[61]

V. De Facto Seamen

Although the volume of cases decided in this category was large, with a single exception they involved claims which arose prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act [hereinafter "1972 Amendments"].[62] As such they are concerned largely with the *Sieracki-Ryan* concepts[63] which were for the most part abolished by the 1972 Amendments as to all claims arising on or after November 26, 1972.[64] As applied to harbor worker litigation, these concepts now have little more than historical value although a few of the old cases are still marinating in the courts. Consequently, the pre-1972 Amendment cases will be touched upon only briefly in this survey.

The only post-amendment case decided by the Fifth Circuit during this survey period was *Slaughter v. S.S. RONDE*,[65] a case out of the Southern District of Georgia. Unfortunately for its value as a precedent, this appeal was essentially a review of factual issues and was affirmed on the basis of the "clearly erroneous" rule.[66] The appellate court's opinion is silent with regard to the proper interpretation of the 1972 Amendments except for its concurrence with the action of the trial court in striking all allegations of unseaworthiness from the complaint.[67] Without considering the subject in depth, the trial judge expressed his agreement with those few decisions

60. The Court did not decide the question of suit against two employers under the Jones Act because Spinks sued only one employer.

61. *Id.* at 224.

62. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C.A. §§902, 903, 905-10, 912-14, 917, 919, 921, 921a, 923, 927, 928, 933, 935, 939, 940, 944, and 948a (Supp. 1976), *amending* 33 U.S.C.A. §§901-50 (Rev. 1970). The history of the legislation which culminated in the amendments is reviewed in Landon v. Lief Hoegh & Co., 521 F.2d 756, 761-63 (2d Cir. 1975).

63. Referring to the decisional progeny of Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

64. *See* 33 U.S.C.A. §905(b) (Supp. 1976) which denies the warranty of seaworthiness to covered employees bringing actions against shipowners, and denies to the shipowner any right to claim over against the covered employer.

65. 509 F.2d 973 (5th Cir. 1975).

66. McAllister v. United States, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954).

67. 509 F.2d at 974.

then extant holding that land-based principles of negligence law must be applied in post-amendment cases in lieu of the elaborate maritime standards which evolved prior to the 1972 Amendments.[68]

McCawley v. Ozeanosun Compania, Maritime S.A.[69] is a *Ryan* Doctrine case which deals with "conduct sufficient to preclude indemnity."[70] The question was whether a ship which arrived in port with slippery sugar residue on deck, subsequently resulting in injury to a longshoreman, thereby prevented a workmanlike performance by the stevedoring contractor. The court concluded that the crew's knowledge of this unsafe condition and its failure to take corrective measures before the longshoremen arrived aboard was not conduct sufficient to preclude indemnity under the *Ryan* Doctrine. The evidence revealed that the stevedore "had actual notice of the danger and ample opportunity to prevent the accident before it happened."[71]

Bonura v. Sea Land Service, Inc.[72] represents a dangerous case for shipowners, since it confirms that a violation of the Safety and Health Regulations for Longshoring[73] renders a ship unseaworthy as a matter of law and sanctions summary judgment against the shipowner where "reasonable men could not disagree that a violation existed."[74] These regulations are promulgated by the U.S. Department of Labor and require compliance by the stevedore employer rather than the shipowner over whom the Department has no jurisdiction.[75] Therefore, a violation by the stevedore of these regulations which results in the unseaworthiness of the vessel and liability of the shipowner must necessarily constitute a breach of the stevedore's warranty entitling the shipowner to full indemnity.[76]

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68. Slaughter v. S.S. RONDE, 390 F. Supp. 637, 645 (S.D. Ga. 1974). For a more detailed analysis of the 1972 Amendments by a district court, see Anuszewski v. Dynamic Mariners Corp. Panama, 391 F. Supp. 1143 (D. Md. 1975). Circuit court opinions dealing with the Amendments in the context of harbor worker litigation (but not in depth) are Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975), and Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975).

69. 505 F.2d 26 (5th Cir. 1974).

70. "A shipowner's recovery from a stevedore for breach of warranty is not affected even by the ship's own negligence, unless the ship prevented or seriously hampered the stevedore in performing its warranty of workmanlike service. . ." Hartnett v. Reiss Steamship Co., 421 F. 2d 1011, 1017 (2d Cir. 1970). See also Villareal, Fourteen Years With Conduct Sufficient to Preclude Indemnity, 4 J. MARITIME L. & COMM. 309 (1973).

71. 505 F.2d at 30.

72. 505 F.2d 665 (5th Cir. 1974).

73. 29 C.F.R. §1918 (1975).

74. 505 F.2d at 667.

75. 29 C.F.R. §§1918.2(a), 1918.3(c) (1975).

76. While these regulations, by their terms, do not govern the conduct of the shipowner, we have previously held that their breach by a stevedore can impose liability on the ship for injury to a longshoreman, . . . and this in turn leads to indemnity from the stevedore.

Frasca v. S/S SAFINA E. ISMAIL, 413 F.2d 259, 261 (4th Cir. 1969). *See also* Delaneuville v. Simonsen, 437 F.2d 597, 602 (5th Cir. 1971).

In fulfilling his Ryan Doctrine obligations to the shipowner, the stevedore must not only supply the longshoremen with suitable equipment, but must also take affirmative action to minimize hazardous conditions which he finds upon boarding the vessel to be worked.[77] While he is not required to carry out an "intensive inspection of the vessel," he cannot ignore dangerous conditions and then later point his finger at the shipowner when one of his men is hurt.[78]

VI. CARGO

Cargo damage cases are seldom tried on good evidence;[79] therefore, burden of proof issues assume a greater degree of importance than in other types of marine litigation. *United States v. Lykes Bros. Steamship Co.*[80] contains excellent instruction on the relative evidentiary burdens assumed by cargo and vessel in the typical cargo damage case.

A shipment of bagged flour arrived via railway at the Port of Houston and was found to have weevil infestation. Following fumigation in the rail cars and certification, the flour was loaded aboard ship. Subsequently, the ship was delayed nearly three months at Beaumont by a strike. During the latter stages of the strike, a cargo inspector found new infestation in the flour. The shipper was notified and the cargo fumigated. When the vessel arrived in Poland, the flour was found unfit for human consumption.[81]

In his action against the vessel, the shipper relied upon clean bills of lading to establish that the flour was in good order and condition when delivered to the vessel. The Fifth Circuit observed, however, that the clean bills merely represented that the cargo received was in *apparent* good order, based on external inspection.[82] The court also noted that flour is very susceptible to insect infestation, and the shipper knew in fact that infestation had taken place prior to loading. Under these circumstances,

> where because of the perishable or intrinsic nature of the commodity, the internal condition is not adequately revealed by external appearances, cargo may have a considerable burden of going further to prove actual condition.[83]

While agreeing with the lower court that clean bills of lading did not satisfy cargo's burden of showing the good condition of the flour when

77. Johnson v. Warrior & Gulf Navigation Co., 516 F.2d 73 (5th Cir. 1975).

78. *Id.* at 76.

79. Loading surveys are seldom made, and it is very difficult to reconstruct conditions which existed at loading after receipt of the claim notice when the vessel is frequently inaccessible or the crew has been changed. The average cargo case does not involve a loss sufficiently great to justify the expense of bringing witnesses from overseas.

80. 511 F.2d 218 (5th Cir. 1975).

81. *Id.* at 221-22.

82. *Id.* at 223.

83. *Id.*

loaded, the Fifth Circuit went on to point out that the shipowner has a statutory duty to "care for" the cargo while aboard the vessel.[84] This duty would require inspections of the flour by a competent inspector during the period of the strike delay. The appellate court was careful not to imply that the carrier's duty to "care for" the flour cargo required expensive onboard fumigation, instead reserving this issue for trial court determination.[85] In view of the fact that "strikes or lockouts or stoppage or restraint of labor from whatever cause" is one of the exceptions to carrier liability under the Carriage Of Goods By Sea Act,[86] it would appear that the shipowner will ultimately be successful in avoiding liability in this case.

VII. WRONGFUL DEATH

The fallout from the U.S. Supreme Court's bench mark decisions in *Moragne*[87] and *Gaudet*[88] continue to absorb the attention of the Fifth Circuit.

A defendant argued that damages for conscious pain and suffering and for loss of society, never allowed under the Death On The High Seas Act[89] [hereinafter DOHSA], should not be permitted under the *Moragne-Gaudet* Doctrine where the claim arises in DOHSA territorial waters. The Fifth Circuit demurred, holding instead that *Moragne* pecuniary loss standards applied with the same force in high seas cases as they did in territorial waters cases.[90] The court strongly suggests that *Moragne* has for all intents and purposes replaced DOHSA as well as Jones Act death provisions.[91] The opinion in Chief Judge Brown's memorable language concludes:

> No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a Court, or DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters—any navigable waters—and it can be enforced in any court.[92]

84. Carriage of Goods by Sea Act §3(2), 46 U.S.C.A. §1303(2) (Rev. 1975).

85. 511 F.2d at 224-25.

86. 46 U.S.C.A. §1304(2)(j) (Rev. 1975).

87. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). In this case the Supreme Court for the first time recognized a right of action for wrongful death under the general maritime law.

88. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

89. 46 U.S.C.A. §761 et seq. (Rev. 1975).

90. Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975).

91. "That the *Moragne* remedy has replaced—or at least augmented—DOHSA seems even more correct to us when the alternative is examined." *Id.* at 796. In Landry v. Two R. Drilling Co., 517 F.2d 675 (5th Cir. 1975), the court squarely held that a *Moragne* death claim may be joined with a Jones Act death claim in order to take advantage of the broader scope of recovery allowed by *Gaudet*.

92. 523 F.2d at 798.

Although damages for loss of consortium have generally not been allowed in admiralty cases,[93] the Fifth Circuit reads *Gaudet* as "implicitly" recognizing such a recovery in maritime wrongful death actions.[94]

93. *See, e.g.*, Simpson v. Knutsen, 444 F.2d 523, 525 n. 1 (9th Cir. 1971).
94. Skidmore v. Grueninger, 506 F.2d 716, 727-28 (5th Cir. 1975).