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APPLICABLE LAW IN SUITS BY FOREIGN OFFSHORE OIL WORKERS

Harold K. Watson*

INTRODUCTION

The development of offshore mineral resources is a relatively new industry that has grown at a breathtaking pace. The first offshore operations¹ were conducted from small barges operating in shallow waters off the coast of Louisiana and Texas. Now, drilling and production facilities are located worldwide. Once a predominantly American domain, the industry is now truly international in scope. Multinational operating companies, drilling and service contractors, and service boat operators abound, and offshore workers are drawn from all corners of the globe.

One factor has remained constant in offshore petroleum operations—the work has many hazards combining the dangers inherent in marine employment with those of the oil field.² Workers continue to be injured and killed, and claims arising out of such incidents must be resolved. The law governing the rights and liabilities of such workers arising out of injuries offshore is complex even when all of the parties are American, the injury takes place in United States territorial waters or on the United States Outer Continental Shelf, and there is no question but that American law will be applied.³ The international character of the industry and the increasing tendency of foreign workers to seek recoveries in United States courts have added new and complex problems. This article will discuss the conflict of laws problems that arise in litigation of injury

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1. The terms "offshore operations," "offshore industry," etc. will be used throughout this article to refer to the business of exploring for and producing mineral resources, particularly hydrocarbons, in areas that are under water. Thus, the term "offshore" will refer equally to activities conducted in inland waters, territorial waters and the waters superadjacent to the Continental Shelf. It will be used in contradistinction to "bluewater" activities, a term generally used to connote traditional carriage of goods and persons by sea. It should be noted that there are activities, such as trans-ocean towage of drilling rigs, that might be characterized as both "offshore" and "bluewater" activities.

2. See *Offshore Co. v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959).

3. For a detailed discussion of the rights of offshore workers in the United States, see Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L. REV. 973 (1977).

and death claims arising from overseas offshore operations; and, it will focus on the question of whether the law of the United States will be applied by an American court to determine the rights of an injured foreign worker or his survivors.

RELATIONSHIP OF CHOICE OF LAW TO OTHER PROBLEMS

The choice-of-law problem has been greatly complicated by the interrelationship of related jurisdictional and procedural problems. The tendency of defense counsel to throw in every conceivable defense, together with a failure at times by the bench and bar to carefully delineate discrete concepts, has led to a great deal of confusion in the jurisprudence over the nature of the problem.⁴ Before discussing the choice-of-law problem, it may be helpful to carefully set forth the related issues.

First, questions of subject matter jurisdiction are almost never involved in these cases, despite the repeated references to this issue in the reports.⁵ Usually, admiralty jurisdiction is unquestionably present. If an occurrence takes place on navigable waters and bears a "significant relationship to traditional maritime activity,"⁶ admiralty tort jurisdiction is present, and no lack of contacts with the United States will defeat that jurisdiction.⁷ Moreover, if the plaintiff pleads a Jones Act count, federal question jurisdiction will lie under 28 U.S.C. § 1331.⁸ If the foreign connections are such that the Jones Act⁹ is inapplicable, the appropriate remedy is to dismiss for failure to state a claim upon which relief can be granted, not to dismiss for

4. See, e.g., *Grevas v. M/V Olympic Pegasus*, 1978 A.M.C. 1442 (E.D. Va. 1978); *Hoidas v. Orion & Global Chartering Co., Inc.*, 440 F. Supp. 53 (S.D.N.Y. 1977).

5. See, e.g., *Dassigienis v. Cosmos Carriers & Trading Corp.*, 1971 A.M.C. 1104, 1105 (2d Cir. 1971): "[T]he test of subject matter jurisdiction involves an analysis of various connecting factors which might justify the application of United States law to a particular claim." See also *Sanchez v. Caribbean Carriers, Ltd.*, 552 F.2d 70 (2d Cir. 1977); *Frangiskatos v. Konkar Maritime Enterprises, S.A.*, 1973 A.M.C. 333 (2d Cir. 1972).

6. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).

7. *The Belgenland*, 114 U.S. 355 (1885).

8. In both *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Supreme Court made it quite clear that the invocation of jurisdiction by a colorable claim that the Jones Act applied was sufficient to vest the court with subject matter jurisdiction:

As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

Lauritzen v. Larsen, 345 U.S. 571, 575 (1953).

9. 46 U.S.C. § 688 (1976).

lack of jurisdiction.¹⁰ Finally, diversity or alienage jurisdiction is often present.¹¹

While subject matter jurisdiction is seldom a relevant question, questions of personal jurisdiction are often present. Confusion is common in these matters because of the related nature of the arguments. One of the developments in the choice-of-law jurisprudence has been the attempt to apply United States law because of the beneficial ownership of a defendant vessel or corporation by American interests.¹² Similarly, attempts are often made to assert jurisdiction over a party in this country because of a party's American parent or subsidiary corporations. The argument may focus on the due process question: Does *ABC Corporation* have minimum contacts with the forum because of the activities of its parent or subsidiary *XYZ Corporation* within the jurisdiction?¹³ Or, the argument may focus on the exercise of jurisdiction through service of process: Can service of process on *ABC Corporation* be obtained through service on its parent or subsidiary corporation, *XYZ Corporation*?¹⁴ Because the answers to these questions will often vary because of the different state procedures for obtaining service of process,¹⁵ no attempt will be made here to thoroughly explore this problem. Suffice it to say that jurisdiction is a separate and distinct problem from the question of choice-of-law.

Finally, the question of applicable law is inextricably tied to the doctrine of forum non conveniens. This doctrine permits a court to exercise its discretion to refuse to entertain an action within its jurisdiction. In the principal case on the subject, *Gulf Oil Corp. v. Gilbert*,¹⁶ the Supreme Court listed as one pertinent factor in exercising this discretion the desire of a court to obviate having to "untangle problems in conflict of laws, and in law foreign to itself."¹⁷

10. Of course, often the lack of domestic contacts will not appear on the face of the pleadings and will have to be established by affidavit. In such cases, the appropriate procedural device is a motion for summary judgment. *See, e.g., Merren v. A/S Borgestad*, 519 F.2d 82 (5th Cir. 1975).

11. 28 U.S.C. § 1332 (1976).

12. *See* notes 77-105, *infra*.

13. *See, e.g., Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976); *Castanho v. Jackson Marine, Inc.*, 484 F. Supp. 201 (E.D. Tex. 1980); *Edwards v. Gulf Mississippi Marine Corp.*, 449 F. Supp. 1363 (S.D. Tex. 1978).

14. *See, e.g., Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976); *Grammenos v. Lemos*, 457 F.2d 1067 (2d Cir. 1972); *Edwards v. Gulf Mississippi Marine Corp.*, 449 F. Supp. 1363 (S.D. Tex. 1978).

15. *See* FED. R. Civ. P. 4(d)(7) & 4(e).

16. 330 U.S. 501 (1947).

17. *Id.* at 509.

Thus, the decision of a court to apply foreign law is often the first step in a decision to dismiss on the basis of forum non conveniens. Indeed, some courts have indicated that in the area of seamen's personal injury actions, it is a necessary first step and that a court may not dismiss an action to which American law is applicable.¹⁸

The interrelationship of the doctrine of forum non conveniens with choice-of-law problems had led to a great deal of confusion. Many courts have failed to recognize that two separate doctrines are involved, and one court has even referred to *Lauritzen v. Larsen*, the landmark decision on choice-of-law, as "an exhaustive opinion . . . on the question of determining whether to exercise jurisdiction by discretion."¹⁹ Even courts that have recognized that two discrete concepts are involved have often assumed that the same criteria should be used to determine both the applicable law and whether the court should exercise or decline jurisdiction under the doctrine of forum non conveniens.²⁰

The better reasoned decisions, on the other hand, distinguish between the questions of applicable law and appropriate forum and recognize that different criteria and different burdens of proof and standards of review apply to the two doctrines.²¹ First, different criteria have different significance in analyzing the two problems, and some factors relevant to one question are irrelevant to the others. For example, the Supreme Court has stated that the availability of an alternative forum, while a significant factor in determining whether to retain jurisdiction or dismiss on the basis of forum non conveniens, is of almost no consequence in determination of choice-of-law issues.²² And while the plaintiff's choice of forum is of no consequence whatsoever in the determination of the law to be

18. See, e.g., *Antypas v. Cia. Maritima San Basilio S.A.*, 541 F.2d 307 (2d Cir. 1976); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959); *Ying Shiue Jye Fen v. Sanko Kisen (USA) Corp.*, 1977 A.M.C. 1224 (S.D.N.Y. 1977). It might be argued that this rule may be questionable after the recent decision in *Alcoa S.S. Co. v. M/V Nordic Regent*, ___ F.2d ___ (2d Cir. 1980), which held that an action brought by an American citizen can be dismissed on the basis of forum non conveniens.

19. *Grevas v. M/V Olympic Pegasus*, 1978 A.M.C. 1442, 1445 (E.D. Va. 1978).

20. *Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965); *Kearney v. Savannah Foods & Industries, Inc.*, 350 F. Supp. 85 (S.D. Ga. 1972). See *Gkiasis v. S.S. Yiosonas*, 1967 A.M.C. 2568 (4th Cir. 1967) (same factors applicable, but are to be given different weight).

21. *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), contains an excellent discussion of the interrelationship of the choice-of-law and forum non conveniens doctrines. For the reasons expressed below, this author feels that the court's determination of the choice-of-law question in that case is totally unsupportable.

22. *Lauritzen v. Larsen*, 345 U.S. 571, 589-90 (1953).

applied, it is a very significant factor in determining whether to dismiss on the basis of forum non conveniens.²³

Secondly, while the determination of applicable law is a question of law, the application of the doctrine of forum non conveniens, on the other hand, rests in the sound discretion of the trial court,²⁴ and thus the scope of review is somewhat limited.²⁵ Moreover, the defendant must show that an injustice will result by the retention of jurisdiction and not merely that the plaintiff would not suffer an injustice by dismissal.²⁶

The doctrine of forum non conveniens assumes the availability of an alternative forum.²⁷ The idea of an alternative forum requires an alternative neutral forum, but the courts generally are unwilling to assume that a foreign court will not dispense justice evenhandedly, and they usually require the plaintiff opposing dismissal to affirmatively show the nature of the judicial bias in the alternative forum.²⁸ Assuming that an alternative forum is available, the relevant factors in determining a forum non conveniens question are the "private interest" factors of accessibility of proof and witnesses, enforceability of any resulting judgment, the ability to join additional parties in the various alternative fora, and the ease and expense of litigation in the forum, and the "public interest" factors such as the burden created for local court calendars and local juries by trials having no connection with the forum.²⁹ One factor that has generally been considered to be irrelevant is whether one party will be more likely to prevail or be entitled to a greater or lesser recovery in one of the fora.³⁰

THE RIGHTS OF OFFSHORE WORKERS IN THE UNITED STATES

A discussion of when American law will govern the rights of off-

23. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

24. *Id.*

25. *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 312-15 (5th Cir. 1980).

26. This is the standard applied in maritime cases generally. *Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno*, 474 F.2d 203 (5th Cir. 1973). Because of the commingling of choice-of-law factors with forum non conveniens factors in personal injury cases, it is sometimes difficult to tell what standard has been applied. In *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 314 (5th Cir. 1980), the court stated that the general rule was applicable in personal injury litigation as well.

27. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

28. *Allianz Versicherungs-Aktiengesellschaft Munich Reinsurance Co. v. S.S. Eskisehir*, 1972 A.M.C. 2231 (S.D.N.Y. 1972).

29. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 312 (5th Cir. 1980).

30. See, e.g., *Kearney v. Savannah Foods & Industries, Inc.*, 350 F. Supp. 85 (S.D. Ga. 1972).

shore workers injured overseas is somewhat meaningless without some understanding of the rights of those workers in a purely American setting. The factual settings in which claims can arise are almost innumerable, and any attempt to thoroughly discuss the development of the American law governing offshore injuries would be well beyond the scope of this article. However, the following encapsulation may be helpful.³¹

Exploratory drilling is usually conducted from special purpose vessels that can be moved from place to place. Drilling rigs may be mounted on ship-shape drilling vessels, jack-up drilling rigs, submersible barges or semi-submersible vessels.³² For the purposes of personal injury litigation, all of these structures are treated as vessels in United States maritime personal injury law.³³ Offshore production operations also frequently call for the use of special purpose vessels, such as dredges, pipelay barges, and derrick barges. These are all considered to be vessels for the purposes of United States maritime personal injury law.³⁴ Both exploration and production offshore also call for use of a number of more traditional vessels, including crew-boats, supply boats, seismographic research vessels, tugs, and deck barges used to transport cargo. Finally, production operations usually require the construction of fixed structures permanently attached to the ocean bottom. The rights of offshore workers in the United States turn largely upon the type of structure on which the injury occurs and where the structure is located at the time of injury.³⁵

Seamen

Since floating drilling rigs, other special purpose vessels, and of course, more traditional craft are considered "vessels" for the purposes of the Jones Act and the general maritime law, employees "more or less permanently" assigned to work on such structures are considered "seamen."³⁶ As such, they have a cause of action under the Jones Act against their employer for negligence and actions under the general maritime law for maintenance and cure and unseaworthiness. Claims against third parties (*i.e.*, non-employers) are

31. See Robertson, *supra* note 3.

32. See M. SUMMERSKILL, *OIL RIGS: LAW AND INSURANCE* (1979).

33. See Annot., 75 A.L.R.2d 1312, 1318 (1961).

34. *Hamilton v. Canal Barge Co., Inc.*, 395 F. Supp. 978 (E.D. La. 1975); *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624 (E.D. La. 1975).

35. Robertson, *supra* note 3, at 982.

36. Robertson, *supra* note 3, at 982; *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

also usually within the admiralty jurisdiction of the federal courts and are governed by the general maritime law.³⁷

Non-Seamen Injured on Vessels

The rights of injured workers who cannot show a sufficiently permanent relationship to a vessel to be classified as "seamen" depend upon whether the injury takes place on a vessel or a fixed platform, and whether the injury takes place in United States territorial waters or waters superadjacent to the Outer Continental Shelf. Prior to 1972, all such workers injured aboard vessels on the "navigable waters of the United States" were covered under the Longshoremen's and Harbor Workers' Compensation Act.³⁸ However, the 1972 amendments to the LHWCA introduced a requirement that a worker be engaged in "maritime employment" before coverage would be available.³⁹ Since much offshore work is not necessarily considered "maritime employment,"⁴⁰ the amendments have severely limited the scope of the Longshoremen's Act as applied to offshore workers within United States territorial waters. While it appears that the survivors of such workers killed in territorial waters can maintain an action for wrongful death against the

37. Claims by seamen against third parties for injuries occurring on a vessel have almost uniformly been held to be within the admiralty jurisdiction and governed by maritime law. *See, e.g., In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974). In some limited circumstances, state law may govern some claims by seamen, even though the claim is within the jurisdiction. *Baggett v. Richardson*, 473 F.2d 863, 864 (5th Cir. 1973).

38. 33 U.S.C.A. §§ 901-50 (1978). In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), the Supreme Court held that any worker injured on navigable waters was covered under this Act.

39. The 1972 amendments to the LHWCA define the term "employee" as

Any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker, but such term does not include 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) (1978). Some courts and writers have taken the position that since the 1972 amendments were meant to expand, not limit, coverage under the LHWCA, any work done on actual navigable waters should thus be considered "maritime employment." *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated*, 100 S. Ct. (1980); *St. Julien v. Diamond M. Drilling*, 403 F. Supp. 1256 (E.D. La. 1975); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6 (2d ed. 1975); Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683 (1973). This view has been rejected by the Court of Appeals for the Fifth and Ninth circuits. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975).

40. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 845 (5th Cir. 1978).

decedent's employer,⁴¹ it is thus far unsettled whether a worker who is merely injured has a similar tort remedy against his employer, is restricted to a state workers' compensation remedy, or simply has no remedy whatsoever.⁴²

Injuries to non-seaman workers aboard vessels beyond territorial waters and above the Outer Continental Shelf are covered under the LHWCA. The Outer Continental Shelf Lands Act provides, in pertinent part:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

41. *Id.* at 847

42. In *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), a worker met his death by drowning when a small boat transporting him and other oil field workers sank. The Fifth Circuit held that the decedent was not engaged in "maritime employment" and was not covered by the LHWCA. Thus, the exclusive liability provisions of the LHWCA did not preclude a wrongful death action against the decedent's employer. The court then held that the wrongful death action under the general maritime law created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), was not precluded by the exclusive liability provisions of the Louisiana workmen's compensation statute.

The decision is troubling in that at least four decisions of the United States Supreme Court directly on point were completely ignored. In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926), *Sultan Ry. v. Dept. of Labor*, 277 U.S. 135 (1928), and *Alaska Packers Assoc. v. Industrial Accident Comm'n*, 276 U.S. 467 (1928), the Supreme Court had held that state compensation remedies could constitutionally apply to workers killed or injured on navigable waters if engaged in "maritime but local" work and were not preempted by the general maritime law. See Comment, *supra* note 39. The court in *Thibodaux* made no attempt to distinguish these decisions, apparently on the theory that they had been overruled *sub silentio* by *Moragne*.

The implications of *Thibodaux* have not yet been considered by the courts. If the rule as to wrongful death is to be expanded to personal injuries, non-maritime workers injured on navigable waters might have a remedy analogous to the Jones Act: a cause of action for negligence, untrammelled by such doctrines as contributory negligence. On the other hand, it could be argued that such workers are restricted to the remedy they had against their employers prior to the line of decisions which allowed the application of state compensation acts. Perhaps the best approach would be to limit this unfortunate decision strictly to its facts.

(1) the term "employee" does not include a master or member of a crew of any vessel⁴³

The broad description of "operations conducted on the Outer Continental Shelf" would seem broad enough to include all workers engaged in what is generally referred to as the "offshore" industry. Of course, if a worker can show that he is a seaman, he comes within the exclusion to LHWCA coverage and has the traditional seaman's remedies.

Claims against non-employers for injuries to non-seamen occurring on vessels are, in general, within the admiralty jurisdiction and governed by maritime law.⁴⁴ No distinction should exist between injuries occurring in state waters and those occurring in waters of the Outer Continental Shelf. It is important to distinguish, however, between vessel-based acts of negligence and platform-based negligence, since claims arising out of negligent acts on platforms are usually non-maritime, even though the effect of the negligence may occur on a vessel.⁴⁵

Injuries on Platforms

Injuries occurring on fixed platforms are in general beyond the scope of maritime law. However, if a seaman is injured on a platform, he still has rights under the Jones Act and for maintenance and cure against his employer, since these actions are viewed as arising out of the seaman/employer relationship and thus are significantly maritime even though the injury did not occur on navigable waters.⁴⁶ Non-seamen injured on platforms have only compensation remedies against their employers. If the platform is located in state territorial waters, state compensation law usually applies.⁴⁷ If the injury takes place on a platform on the Outer Continental Shelf, the

43. 43 U.S.C. § 1333(b) (1976).

44. *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974).

45. *Id.*

46. *Koesler v. Harvey Applicators, Inc.*, 416 F. Supp. 872 (E.D. La. 1976).

47. A platform in state waters might be considered "navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, other adjoining area customarily used by an employer in loading, unloading, repair or building a vessel)," within the meaning of 33 U.S.C. § 903, in that supply vessels are customarily tied alongside such platforms to discharge, thus satisfying the situs test of LHWCA coverage. See *Neal v. Wilson Wireline Service*, 2 Bev. Rev. Bd. Serv. (MB) 88 (1975); *Henning v. Vacco Wireline Service*, 2 Bev. Rev. Bd. Serv. (MB) 87 (1975); *Wiley v. Wilson Wireline Service*, 2 Bev. Rev. Bd. Serv. (MB) 86 (1975); *Robertson*, *supra* note 3, at 994 n.146. However, offshore work is generally not considered "maritime employment" so as to satisfy the "status" requirement of the Act. *Id.*

LHWCA is the exclusive compensation law by virtue of the Outer Continental Shelf Lands Act.⁴⁸ Where injuries occur either on platforms in state waters or on the Outer Continental Shelf, claims against third parties (*i.e.*, non-employers) are governed by state law. In the case of platforms in state waters, state law is applicable *ex proprio vigore*. On the Outer Continental Shelf, state law is made applicable by the terms of the Outer Continental Shelf Lands Act.⁴⁹

Of course, all of these generalizations must be finetuned depending on the facts and circumstances of each case. Nevertheless, this general outline of federal admiralty jurisdiction and the remedies of offshore workers injured in the United States should provide a starting point in discussing cases which also include foreign factors.

FOREIGN MARITIME CLAIMS AND CHOICE OF LAW: DEVELOPMENT IN THE "BLUEWATER" SETTING

As noted in the previous discussion, many offshore workers are classified as "seamen" for Jones Act purposes. Roughnecks on mobile drilling rigs, welders on pipelay barges, oilers on dredges, and of course crewmen on service vessels are all Jones Act seamen in instances in which American law is applicable.

Moreover, the same criteria that determine whether the Jones Act is applicable have been held to apply to determine maritime choice-of-law issues generally.⁵⁰ Thus, for example, the same analysis is appropriate to determine whether a seaman may assert claims under American law for unseaworthiness or maintenance and cure as determines the applicability of the Jones Act,⁵¹ and the same analysis governs whether a claim may be asserted under the Death on the High Seas Act⁵² or whether the claimant must resort to

48. See text at note 43, *supra*.

49. 43 U.S.C. § 1333(a)(2)(A) (1976); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969).

50. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

51. *Id.*

52. 46 U.S.C. §§ 761-68 (1976). Section 761 provides as follows:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Since the purpose of the Act was to provide a remedy where state law was incompetent to do so, the Act has been interpreted to apply to foreign territorial waters, even

foreign law.⁵³ Similarly, these criteria should also apply to determine whether a platform worker injured on a crewboat en route to the platform can assert a cause of action based on United States general maritime law against a third party crew boat operator.⁵⁴ Thus, the determination of the rights of workers in a foreign offshore setting under American maritime law must begin with a consideration of the development of the law governing the applicability of the Jones Act.

The fountainhead of modern jurisprudence in this area is the decision of the United States Supreme Court in *Lauritzen v. Larsen*.⁵⁵ *Lauritzen* arose out of an injury to a Danish seaman aboard a Danish flag vessel in Havana harbor. The vessel was owned by a Danish subject, and the seaman had signed articles providing that the rights of crew members would be governed by Danish law and by the collective bargaining agreement entered into

though such waters are not technically "high seas." *Cormier v. Williams/Sedco/Horn Constr.*, 460 F. Supp. 1010 (E.D. La. 1978); *First & Merchants Nat'l Bank v. Adams*, 1979 A.M.C. 2860 (E.D. Va. 1979). However, while the Act may have broad territorial application, its applicability is still subject to the same choice-of-law criteria as other maritime claims. See note 53, *infra*.

53. *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966); *Fitzgerald v. Zim Israel Navigation Co.*, 1975 A.M.C. 1425 (S.D.N.Y. 1975). *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), might indicate that the factors used to determine the applicability of the Jones Act or general maritime law to a claim by a seaman against his employer are to be applied somewhat differently when one is determining whether the Death on the High Seas Act governs a wrongful death claim against a non-employer. In that case, the S/T *Texaco Caribbean* was in a collision with the M/V *Paracas* in the English Channel. The *Texaco Caribbean*, a Panamanian vessel owned by a Panamanian subsidiary of *Texaco*, sank, and the next day the derelict was struck by the M/V *Brandenburg*. Suit was filed by the administrator of the estates of twelve German crewmen of the *Brandenburg*. The district court dismissed on the basis of forum non conveniens. The Second Circuit affirmed, holding that the Death on the High Seas Act was in applicable for want of significant contacts of the United States with the incident.

The decision raises some interesting questions. Prior to the *Fitzgerald* opinion, the Second Circuit had generally taken the position that beneficial ownership by American interests was in and of itself a significant contact with the United States so as to warrant the application of our law to seamen's claims against employers. See *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir. 1974); *Bartholomew v. Universe Tankships, Inc.*, 163 F.2d 437 (2d Cir. 1959). In *Fitzgerald*, the beneficial ownership of the vessel undoubtedly lay largely in the United States, yet the court did not even mention this line of authority, which was reaffirmed a year later in *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (1976). *Fitzgerald* might be viewed as simply a healthy aberration in the Second Circuit's expansive view of the purview of American law. On the other hand, it may indicate that "substantial contacts" cannot be found in mere beneficial ownership, but must also include an employment relationship. Finally, the decision may indicate that a slightly different analysis applies to wrongful death claims.

54. See note 53, *supra*.

55. 345 U.S. 571 (1953).

between the Danish Seamen's Union, of which the seaman was a member, and the employer. The only connections with the United States were that the seaman had signed articles and joined the ship while temporarily in New York and had managed to obtain personal jurisdiction over the defendant in the Southern District of New York. The lower courts held that the Jones Act applied.

Mr. Justice Jackson framed the issue as "whether statutes of the United States should be applied to this claim of maritime tort."⁵⁶ Thus, the opinion in one sense could be viewed as simply an exercise in statutory construction. In determining the reach of the Jones Act, however, the Court turned to a "usage as old as the Nation"⁵⁷ that our statutory law should be "construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."⁵⁸ This language alone would certainly support reading the opinion to call for application of traditional choice-of-law methodology. Moreover, the opinion is replete with references that leave little doubt that the Court felt that it was not just attempting to discuss the reach of a statute, but rather was balancing the competing interests of diverse jurisdictions.⁵⁹

To aid in the analysis, the Court enumerated the "seven immortal pillars,"⁶⁰ the factors "generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim,"⁶¹ and discussed the weight to be accorded each one generally and under the specific facts of that case.

56. *Id.* at 573.

57. *Id.* at 577.

58. *Id.*

59. The Court referred to judicial development of the maritime law by courts "long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations," *id.* at 577, and quoted Lord Russell to the effect that "one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Id.* at 578. The methodology was described as follows:

Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

Id. at 582.

60. *Hellenic Lines Ltd. v. Rhoditis*, 412 F.2d 919, 922 (5th Cir. 1969).

61. 345 U.S. at 583.

Place of the Wrongful Act

The traditional rule of *lex loci delecti commissi* was said to be of "limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate

[T]he territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag"⁶²

The Court recognized, however, that *lex loci delecti* might have some application in certain instances in which the public policy of the state where the injury occurred was particularly strong.⁶³ Recognizing that in *Lauritzen* a "false conflict" existed, since Cuba had no interest whatsoever in applying its law to the transaction, no weight was given to this factor.⁶⁴

Law of the Flag

The law of the flag was said to be of "cardinal importance."⁶⁵ Both tradition and necessity led to the conclusion that the law of the flag "must prevail unless some heavy counterweight appears."⁶⁶

Allegiance or Domicile of the Injured

The allegiance or domicile of the injured party was stated to be a factor that could give rise to a strong national interest.⁶⁷ Since, however, the plaintiff was a Danish subject, this factor did not weigh in favor of the application of United States law.

Allegiance of the Defendant Shipowner

In discussing the effect to be given the allegiance of the defendant shipowner, the Court gave recognition to the practice of registering vessels under flags of convenience, and indicated that it might be appropriate to go "beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them."⁶⁸ In *Lauritzen*, however, the shipowner's Danish nationality pointed to the application of Danish law.

Place of Contract

The Court also minimized the importance of the fact that the seaman's articles had been signed in New York. Not only did the ac-

62. *Id.* at 583-84.

63. *Id.* at 584.

64. *Id.*

65. *Id.*

66. *Id.* at 586.

67. *Id.*

68. *Id.* at 587.

tion sound in tort, but the place of contracting was generally quite fortuitous, and would result in different members of the same crew of the vessel having widely varied rights.⁶⁹ The Court indicated that if the contract were to be considered at all, it would point to the application of Danish law.⁷⁰

Inaccessibility of Foreign Forum.

The fact that a foreign forum might be inaccessible was viewed by the Court to be a factor in determining whether to retain jurisdiction and apply foreign law, but was of almost no importance in determining what law should be applied.⁷¹

The Law of the Forum

The Court summarily rejected the argument that American law should apply simply because the action had been brought in the United States, indicating that the due process clause of the fifth amendment limits the cases to which the United States can apply its law.⁷² Moreover, "[t]he purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."⁷³

After considering these factors, the Court held that Danish law rather than American law should apply.

The Supreme Court next considered the problem in *Romero v. International Terminal Operating Company*.⁷⁴ Romero was a Spanish crewman serving aboard the S.S. Guadalupe, a Spanish flag ship owned by a Spanish corporation. He was injured aboard ship in the port of Hoboken, New Jersey, and filed suit against his employer under the Jones Act and under the general maritime law for unseaworthiness and maintenance and cure. He also filed suit against certain American corporations that had been engaged in stevedoring and related operations aboard the ship for a maritime tort.

The Court first held that the same criteria used to determine the application of American statutory law "were intended to guide courts in the application of maritime law generally."⁷⁵ Thus, the applicability of American law of unseaworthiness and maintenance and cure was to be determined in the same manner as Jones Act ap-

69. *Id.* at 588.

70. *Id.* at 589.

71. *Id.* at 589-90.

72. *Id.* at 590-91.

73. *Id.* at 591.

74. 358 U.S. 354 (1959).

75. *Id.* at 382.

plicability. The Court then rejected the argument that the fact of injury in the United States was sufficient to call for the application of American law and affirmed the dismissal of the claims against the shipowner.

Romero thus appears to be in accord with both the letter and the spirit of *Lauritzen*. Of course, *Lauritzen* and *Romero* were the easy cases. Only the purely fortuitous fact of the signing of articles (*Lauritzen*) or place of injury (*Romero*) gave any tie at all to this country. To reverse the old adage, it appeared that easy cases were making good law.⁷⁶

A little more than a month before the *Romero* decision was handed down, however, the second circuit had had to face a far more difficult problem, and unfortunately, may have sown the seeds of the disorder that is still being reaped. In *Bartholomew v. Universe Tankships, Inc.*,⁷⁷ a citizen of the British West Indies was injured aboard a Liberian flag vessel owned and operated by a Liberian corporation. The injury occurred in United States territorial waters. Moreover, while the stock of the Liberian corporation was held by a Panamanian corporation, all the stock of the Panamanian corporation was owned by citizens of the United States. All the corporate officers of the ship-owning Liberian corporation were American citizens, and its principal place of business was in New York City. Finally, the plaintiff was a permanent resident of this country, albeit an alien.

Based on these facts, the court held that the Jones Act was applicable, a result that can well be justified. The *Lauritzen* decision expressly stated that a state has a considerable interest in the protection of its injured citizens and domiciliaries, as do its taxpayers, who must support the disabled.⁷⁸ The relationship of the defendant to Liberia was purely formal. Thus, the United States' interest in applying its law to assure the protection of one of its residents would appear to be far greater than any Liberian interest in asserting its authority over a ship owned and operated by Americans. This was precisely the case that Justice Jackson had envisioned in *Lauritzen* in which a flag of convenience should be ignored so that an essentially American relationship can be governed by American law.

While the result in *Bartholomew* is certainly justifiable, the modus operandi was questionable. *Lauritzen* had fairly clearly re-

76. See G. GILMORE & C. BLACK, *supra* note 39, at §§ 6-63.

77. 263 F.2d 437 (2d Cir. 1959).

78. See text at note 67, *supra*.

quired a traditional conflicts approach.⁷⁹ Nevertheless, the court viewed its role as simply one of statutory construction and stated that "traditional choice of law techniques may be more misleading than helpful";⁸⁰ and, it rejected a "center of gravity" or "place of most vital connection"⁸¹ approach:

Hence it must be said that in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus we conclude that the test is that "substantial" contacts are necessary. And while . . . one contact such as the fact that the vessel flies the American flag may alone be sufficient, this is no more than to say that in such a case the contact is so obviously substantial as to render unnecessary a further probing into the facts.⁸²

The court felt it was inappropriate "to consider and 'weigh' the contacts that do not exist . . ."⁸³ The court then went on to state that American ownership alone was sufficient to warrant application of the Jones Act.⁸⁴

The court's holding that it is unnecessary to attempt to determine whether some other jurisdiction might have a more compelling interest in the transaction than the United States and that our law applied if "substantial" contacts existed, without regard to whether other contacts were more "substantial," was clearly contrary to the spirit if not the letter of *Lauritzen*. Moreover, the statement that American beneficial ownership was in and of itself sufficient was pure dictum. Nonetheless, the court's opinion has in large part shaped the development of the law in this field.

The *Bartholomew* approach received a stamp of approval from the Supreme Court in *Hellenic Lines Limited v. Rhoditis*.⁸⁵ Rhoditis was a Greek seaman injured aboard a Greek flag ship in the port of New Orleans. The ship was owned and managed by a Greek corporation that had its largest office in New York. Almost all of the stock of the Greek Corporation was owned by a Greek subject who had lived in the United States for almost 25 years. The vessel and its sister ship were frequent visitors to United States ports. On these facts, the Court held that the Jones Act was applicable.

79. See text at notes 44-45, *supra*.

80. 263 F.2d at 439.

81. *Id.* at 440.

82. *Id.* at 440-41.

83. *Id.* at 441.

84. *Id.* at 443 n.4.

85. 398 U.S. 306 (1970).

The Court first stated that the *Lauritzen* test was not a mechanical one⁸⁶ and that the seven factors were not exhaustive.⁸⁷ The shipowner's "base of operations" was another factor which, among possibly others, could call for the application of American law.⁸⁸ Using an approach very similar to that adopted by the second circuit in *Bartholomew* and expressly relying on language in that decision, the Court stated the objective as being to effectuate "the liberal purposes of the Jones Act."⁸⁹ Then, relying on the assumption that had the defendant been an American citizen the Jones Act would have applied without further question, the Court reasoned that a resident alien should not be given a competitive advantage over American citizens through avoidance of Jones Act responsibility.⁹⁰

Justice Harlan, joined by Chief Justice Burger and Justice Stewart, entered a well-reasoned dissent that hearkened back to the spirit of *Lauritzen*: "[T]he primary purpose of *Lauritzen* . . . was to reconcile the all-embracing language of the Jones Act with those principles of comity embodied in international and maritime law that are designed to foster amicable and workable commercial relations"⁹¹ Justice Harlan questioned what interest the United States had in recompensing foreign seamen employed on foreign flag vessels and attacked on both economic and philosophical grounds the majority's professed desire to enhance the competitiveness of the American merchant marine.

Justice Douglas' *Rhoditis* opinion contains a serious internal contradiction. While decrying a "mechanical" test, the simple weighing of contacts with the United States to determine whether those contacts are in sum "substantial" without placing in the balance the interests other nations may have in the transaction is nothing if not "mechanical." Similarly, the assumption that any one factor, such as beneficial ownership, is alone sufficient to tip the scales, with no regard for countervailing interests, is somewhat simplistic.

Needless to say, the Court's adoption of the methodology of *Bartholomew* significantly devalued the law of the flag. *Lauritzen*, in attempting to balance competing national interests, had relied on the traditional interest of the state of documentation in governing affairs connected with vessels flying its colors and had held that the

86. *Id.* at 308.

87. *Id.* at 309.

88. *Id.*

89. *Id.* at 310.

90. *Id.*

91. 398 U.S. at 318 (Harlan, J., dissenting).

law of the flag was presumptively applicable. In the wake of *Rhoditis*, which apparently approved an approach that looked only to the United States' interest in a transaction, the law of the flag became a relatively insignificant basis for decision. If some "substantial contact" was found, such as beneficial ownership or operation by American interests, the flag was simply disregarded. In most cases in which no substantial contact was found, and American law was hence inapplicable, the court usually declined jurisdiction under the theory of forum non conveniens and thus never reached the question of whether the law of the flag or the law of the "base of operations" or yet some other law applied. Accordingly, the principle of "cardinal importance" was at times not even mentioned in the decisions.⁹²

The principal questions to be resolved after *Rhoditis* were what factors were to be used to determine whether a "base of operations" had been shown, and the validity of the dictum in *Bartholomew* (and assumption in *Rhoditis*) that American beneficial interest was in and of itself sufficient. The answers given to these questions by the courts have been utterly irreconcilable.⁹³

92. See, e.g., *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir. 1974).

93. None of the other factors enumerated in *Lauritzen* has ever been given great consideration. *Lauritzen* and even *Rhoditis* placed little value on the fact that the injury may have occurred in the United States. Until the recent cases involving offshore operations, the place of injury has been viewed as fortuitous and has been relatively unimportant in deciding choice-of-law cases. But see *Fisher v. Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980).

The place where the contract of employment was made and stipulations for application of foreign law have been accorded almost no value. *Lauritzen* itself had suggested that stipulations for application of the law of a foreign country might be honored where there are no substantial contacts with the United States so as to call for the application of the United States law, but that the parties may not oust the application of the Jones Act and the general maritime law of the United States by a stipulation in the contract of employment. The lower courts have followed this approach. *Pandazopoulos v. Universal Cruise Line, Inc.*, 365 F. Supp. 208 (S.D.N.Y. 1973). In *Voyatzis v. National Shipping & Trading Corp.*, 199 F. Supp. 920 (S.D.N.Y. 1961), the court expressly referred to the reluctance to enforce such provisions between parties of unequal bargaining power and the express prohibition against such agreements in the Federal Employers Liability Act. 45 U.S.C. § 55 (1976).

Justice Jackson in *Lauritzen* specifically stated that the availability of an alternative forum should be afforded slight weight in determining choice of law, although it could be a pertinent factor in determining whether to dismiss on the basis of forum non conveniens. The lower courts have been generally faithful to this approach. And while the argument has been put forward on occasion that the listing of the "law of the forum" in *Lauritzen* indicates that if recovery under foreign law would be so low as to be unjust, American law should be applied, the courts have fairly uniformly rejected this argument. See, e.g., *de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980).

The fact that an injured seaman was a citizen or domiciliary of the United States

The second circuit has taken an expansive view of the notion of a "base of operations" and has indicated that almost any beneficial ownership is sufficient. In *Moncada v. Lemuria Shipping Corp.*,⁹⁴ the plaintiff filed suit for the wrongful death of her decedent, a Honduran seaman who had died aboard a vessel owned and operated by the defendant. The court's opinion is indicative of the low esteem now given the law of the flag; the court does not even mention what standard the vessel flew. Rather, the court looked principally to the beneficial ownership of the vessel (which was American) and cited its *Bartholomew* opinion for the proposition that this alone was sufficient.⁹⁵ The court then went on to list other factors it deemed significant in terms of a "base of operations": the location of managing and chartering agents in the United States, the American citizenship of the officers of the defendant, and the fact that 40% of the vessel's voyages began or ended in American ports.⁹⁶ These factors, together with beneficial ownership, established an American "base of operations" and American law applied.

Moncada was followed by *Antypas v. Compania Maritima San Basilio, S.A.*,⁹⁷ in which the second circuit further expanded the notion of "base of operations." The court found that "at least some of the stockholders of the shipowner . . . are American citizens,"⁹⁸ and stated that now *any* beneficial ownership was enough "to support jurisdiction under the Jones Act [sic]."⁹⁹ The court also placed reliance on the fact that the defendant was but part of a single shipping empire, and the empire itself was run from New York. Since the shipowner was thus under the "direct control" of the New York operation,¹⁰⁰ and earnings "appear to be collected in New York and

had been given conclusive weight before and after the Supreme Court's decision in *Lauritzen. Urvic v. F. Jarka Co., Inc.*, 282 U.S. 234 (1931); *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966). The courts, however, have tended to scrutinize fairly carefully claims that American law should apply because of American residence. For the obvious reason that a party should not be able to obtain the benefits of our law simply by moving here, the establishment of residence in the United States after the fact of injury has been accorded little weight. *Frangiskatos v. Konkar Maritime Enterprises, S.A.*, 1973 A.M.C. 333 (2d Cir. 1972); *Helu v. Nauru Pacific Line*, 1978 A.M.C. 1996 (N.D. Cal. 1978); *Rivadeneira v. Skibs A/S Snefonn*, 1973 A.M.C. 485 (S.D.N.Y. 1973). Nor has the fact of a personal injury plaintiff's marriage to an American been afforded much weight. *Camarias v. M/V Lady Era*, 1970 A.M.C. 74 (E.D. Va. 1969).

94. 491 F.2d 470 (2d Cir. 1974).

95. *Id.* at 473.

96. *Id.*

97. 541 F.2d 307 (2d Cir. 1976).

98. *Id.* at 310.

99. *Id.*

100. *Id.*

the expenses of the vessel paid from New York,"¹⁰¹ the Jones Act was held to be applicable.

The *Antypas* opinion must have left counsel for the defendant in a state of shock. Apparently, the only evidence to support *any* beneficial ownership by American citizens or domiciliaries was a deposition taken in another action some fifteen years before, and there were substantial indications that the facts had changed in the interim.¹⁰² Moreover, while the shipowner may have been part of a larger shipping consortium based in New York, the opinion does not indicate the extent of operational decisions made in New York. In *Rhoditis*, the opinions of the various courts indicated that the defendant had offices *only* in the United States, and all landbased operational decisions were made here. Thus, that opinion merely had indicated that where virtually complete beneficial ownership and operational control of a vessel lay in the United States, the operation would be viewed as American and the obligations imposed on Americans could not be avoided. This is a far cry from the implication in *Antypas* that any beneficial ownership or right of control in this country is a sufficient "substantial contact" for our law to be applied.

The implications of the *Antypas* decision bore fruit in *Mattes v. National Hellenic American Line, S.A.*¹⁰³ In *Mattes*, the vessel was apparently beneficially owned in toto by foreign nationals and domiciliaries. The vessel did make voyages to the United States and received substantial revenue from this country, and the "management and operation" of the vessel was "centered *in part* in New York."¹⁰⁴ On these facts, the court found the Jones Act applicable.¹⁰⁵

The second circuit has not been alone in carrying the reasoning of *Bartholomew* to the extreme. In *Fisher v. Agios Nicolaos V.*¹⁰⁶ the fifth circuit has given American law an incredibly expansive purview.¹⁰⁷

101. *Id.*

102. See 541 F.2d at 310 (Van Graafeiland, J., dissenting).

103. 427 F. Supp. 619 (S.D.N.Y. 1971).

104. *Id.* at 624 (emphasis added).

105. While the Second Circuit has indicated that mere United States financing of a vessel is not enough to require the application of American law, *Sanchez v. Caribbean Carriers, Ltd.*, 1977 A.M.C. 1584 (2d Cir. 1977), in *Pandazopoulos v. Universal Cruise Line, Inc.*, 365 F. Supp. 208 (S.D.N.Y. 1973), it appears that actual ownership was placed in an American corporation as a financing device, and the American financiers held positions on the board of the owning and operating corporations. American law was held applicable.

106. 628 F.2d 308 (5th Cir. 1980).

107. The Fifth Circuit has not always been so liberal in the application of American law. In *Anastasiadis v. S.S. Little John*, 1965 A.M.C. 1405 (5th Cir. 1965), the court

The M/V Agios Nicolaos V was a Greek flag vessel owned by a Liberian corporation and operated by a Panamanian corporation. Both the owner and operator were wholly owned and operated by Greek nationals and domiciliaries. It was the only ship owned by the Liberian corporation and had only recently been purchased. Immediately after purchasing the vessel, it had been sent to Beaumont, Texas, for refitting to carry its first cargo, a shipment of grain consigned to the Soviet Union. The Plaintiff's decedent, a Greek national and domiciliary, had been flown to Beaumont to meet the ship; he met his death as a result of an engine room fire. The district court held that American law was applicable, and the fifth circuit affirmed.

While the fifth circuit did make a pretense of weighing whether the application of American or Greek law was more appropriate,¹⁰⁸ the analysis really used was fairly clearly a search for any contact whatsoever to justify the application of American law. In holding that the district court had not erred in finding a "base of operations" in the United States, the fifth circuit reasoned that since the vessel had been on her maiden voyage under the defendant's ownership and management, her "entire business activity prior to the accident had been in the United States."¹⁰⁹ Relying on *An-typas* and *Moncada* for the proposition that a "base of operations" can be shown simply on the basis of substantial revenue deriving from American sources or a substantial number of voyages originating or terminating here, the court held American law applicable.

The opinion of the fifth circuit is irreconcilable with even the requirement of "substantial contacts"¹¹⁰ and is a mockery of *Lauritzen*. To rely on the mere fact of a percentage of revenue or number of voyages originating from this country is to adopt a simple "minimum contacts" test for the application of American law and to extend the reach of our substantive law to the reach of due process. In view of this country's volume of trade, and the fact that many shipowning nations such as Greece operate many ships that

held that United States law was inapplicable, even though the vessel was beneficially owned by Americans.

108. 628 F.2d at 308.

109. *Id.* at 318.

110. Even the Second Circuit has rejected the idea that merely having a subsidiary corporation in the United States that acted as agent for the ship's operations here was "substantial contact." *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976); *Manlugon v. A/S Facto*, 1976 A.M.C. 2471 (S.D.N.Y. 1976). The courts in the Second Circuit have also rejected the idea that mere volume of voyages to United States ports is sufficient. *Hazell v. Boothe S.S. Co., Ltd.*, 436 F. Supp. 561 (S.D.N.Y. 1977).

undoubtedly spend much of their careers carrying cargoes to or from our ports, adoption of the *Fisher* standard could well impose *lex Americana* on much of the seafaring world. This is what *Lauritzen* very explicitly set out to avoid.

While the Court of Appeals for the second and fifth circuits were limiting *Lauritzen* to nothing more than an obligatory preface to an opinion on choice of law, the third circuit in *DeMateos v. Texaco, Inc.*¹¹¹ was treating *Rhoditis* as an unfortunate aberration.

Theodore Reyes was a Panamanian seaman aboard the S.S. *Texaco Kenya*. Reyes became ill on a voyage between Honduras and Costa Rica and died shortly after being hospitalized in Costa Rica. His mother, Ms. DeMateos, filed suit in the United States District Court for the Eastern District of Pennsylvania under the Jones Act, the Death on High Seas Act, and the general maritime law, claiming that her son's death was the result of negligence and unseaworthiness of the vessel.

The *Texaco Kenya* was owned by *Texaco Panama, Inc.* [Texpan], a Panamanian corporation, and was registered in Liberia. The vessel was managed by *Texaco Overseas Tankship United* [TOT], a British corporation with its principal place of business in London. TOT was a wholly owned subsidiary of *Texaco Operations (Europe) Ltd.* [TOEL], a Delaware corporation. *Texaco, Inc.* owned all of *Texpan* and *TOEL*.

On these facts, the third circuit affirmed the district court's holding that United States law was inapplicable. First, the court rejected the idea set forth in *Rhoditis* that the purpose of the analysis is to effectuate "the liberal purposes of the Jones Act"¹¹² as "social jingoism."¹¹³ Rather, the purpose of the analysis was whether the American law *should* be applied, considering "conventions of international law."¹¹⁴ The second circuit's position that beneficial ownership alone was sufficient was expressly rejected,¹¹⁵ with the court even questioning the constitutionality of this doctrine.¹¹⁶ The distinct corporate existence of *Texpan* and *TOT* was respected, with the court stating that *Texpan* and *TOEL* had separate boards of directors and maintained separate books of account.¹¹⁷

It is extraordinarily difficult to reconcile *DeMateos* with the

111. 562 F.2d 895 (3d Cir. 1977).

112. 398 U.S. at 310.

113. 562 F.2d at 902.

114. *Id.* at 901.

115. *Id.* at 902.

116. *Id.*

117. *Id.*

cases emanating from the second and fifth circuits in view of the third circuit's express rejection of the notion that beneficial ownership is alone a "substantial contact." The reason for the conflict is fairly obvious; these courts are not even asking the same questions. The second circuit's analysis, like that of the majority in *Rhoditis*, aims at determining whether the contacts with the United States are "substantial" enough to allow the court to "effectuate the liberal purposes" of American law. The third circuit, like the *Lauritzen* majority, seeks to determine which forum has the most significant contact with the transaction, so as to determine whether American law or the law of some other forum would be more appropriate. With such different questions being asked, it is little wonder that the answers have been so widely divergent.

THE OFFSHORE SETTING

With the history of the choice-of-law question in bluewater seaman's personal injury actions in mind, we can now turn to the development of the law in the offshore setting. At the outset, it should be noted that inherent differences exist in the two types of operations. Traditional shipping is a truly transnational enterprise. The tramp freighter or liner that is in a United States port this week may be in South America or Europe or Africa next week and in the interim will be beyond the territorial jurisdiction of any sovereign. Moreover, while many nations require vessels flying their own flag to have a crew composed of a certain percentage of their own nationals, many other vessels, particularly those flying flags of convenience, set sail with polyglot crews made up of citizens of various nations who may have joined the vessel at any one of a number of ports.

Conversely, offshore operations are by their very nature centered in one spot for a relatively long period of time. A drilling rig may be immobile at one drilling site for months or even years. Moreover, these locations are always within an area claimed by some sovereign, since the Continental Shelf Convention of 1958 has internationalized the position taken earlier by the United States and other countries in asserting jurisdiction over the Outer Continental Shelf.¹¹⁸ Also, many nations require that some component of the offshore work force be drawn from the local populace. These distinctions have at times weighed heavily on the minds of the courts deciding cases in this area.

118. Geneva Convention on the Territorial Sea and the Contiguous Zone, 450 U.N.T.S. 206.

The first case to consider the applicability of the Jones Act in a typical offshore setting was *Farmer v. Standard Dredging Corp.*¹¹⁹ In *Farmer*, the plaintiff, a United States citizen, was employed aboard a United States flag dredge; he was injured while the dredge was operating in the territorial waters of Venezuela. He filed suit under the Jones Act, and the defendant claimed that the claim was barred by certain provisions of Venezuelan law which had been incorporated in the employment contract. In view of the fact that the plaintiff was an American citizen, and the vessel was a United States flag vessel, it should not be surprising that the court held that United States law was applicable. The case is important, however, in that the court was troubled by the distinction between offshore operations and traditional bluewater activities. The court stated that there would be little doubt that the Jones Act would apply regardless of any provisions of Venezuelan law "if the vessel traversed the seas and called at ports of different nations during the plaintiff's employment";¹²⁰ but, the court was concerned with the fact that the plaintiff's employment on the dredge was "localized in the territorial waters of Venezuela."¹²¹

The distinction that troubled the court in *Farmer* has not always been given much weight. In *Rode v. Sedco, Inc.*,¹²² a German citizen who had established permanent residence in the United States was held to be entitled to invoke the protection of the Jones Act in a suit against a Canadian subsidiary of a Texas corporation. Not only would a plaintiff's permanent residence in the United States probably have been sufficient to establish the applicability of American law, but a strong showing was made that the Canadian operation was actually run from the United States and was Canadian in name only. The Canadian subsidiary's employment contract with the plaintiff was in fact signed by one of the American parent's corporate officers, who also authorized expenditures for the vessel. Other officials considered themselves "joint employees" of the parent and subsidiary.¹²³

Based on these facts, the court's analysis of the *Lauritzen* criteria would appear to be fairly routine. The case is notable, however, because of the relative insignificance given the fact that the vessel was a semi-submersible rig drilling off the coast of Scotland in an area over which Great Britain asserted jurisdiction. Perhaps because defense counsel apparently argued solely for the

119. 167 F. Supp. 381 (D. Del. 1958).

120. *Id.* at 383.

121. *Id.*

122. 394 F. Supp. 206 (E.D. Tex. 1975).

123. *Id.* at 209.

application of Canadian, rather than British, law, the court simply cited the language in *Lauritzen* to the effect that the mobility of vessels makes *lex loci delicti* an inappropriate standard.

Similarly, in *Castanho v. Jackson Marine, Inc.*,¹²⁴ the court held that there was "jurisdiction" to entertain a Jones Act claim by a Portuguese seaman injured in Great Britain aboard a Panamanian flag vessel beneficially owned by American interests. Again, there was no consideration of the distinct nature of offshore operations.

The first decision actually to turn in part on the unique nature of offshore operations was *House v. Santa Fe International Corp.*¹²⁵ In *House*, the plaintiff's decedent, a British subject and Italian domiciliary, met his death while employed by a British company as a diver on a semi-submersible drilling rig operating off the coast of England. The rig was owned and operated by American corporations, flew the United States flag, and was operating under contract to another American company.

In considering the applicability of American law, the court paid attention to the fact that the casualty had occurred "in an area subject to British jurisdiction."¹²⁶ Then, noting that the "day-to-day operation of the . . . [vessel] was out of the Aberdeen [Scotland] office,"¹²⁷ the court held that American law was inapplicable and dismissed on the basis of *forum non conveniens*.

Even more explicit recognition to the unique nature of offshore activity was given by the third circuit in *de Alvarez v. Creole Petroleum Corp.*¹²⁸ In that case, wrongful death suits were filed as a result of an explosion aboard a vessel owned by Creole Petroleum Corp. [Creole]; the accident occurred while the vessel was located in Lake Maracaibo, Venezuela. The decedents were all Venezuelan citizens, and Creole was found to have its corporate headquarters in Caracas, although it was Delaware corporation. Creole was a wholly owned subsidiary of Exxon. The vessel was documented in Venezuela and had never left the internal waters of Venezuela.

On these facts, the court held that American law was inapplicable. Weighing the interests of Venezuela against those of the United States, and emphasizing that Creole's contacts with its parent corporation did not involve the operations which had led to

124. 484 F. Supp. 201 (E.D. Tex. 1980).

125. 1978 A.M.C. 1899 (S.D. Tex. 1978).

126. *Id.* at 1904.

127. *Id.* at 1900.

128. 613 F.2d 1240 (3d Cir. 1980).

this lawsuit,¹²⁹ the court held that the Venezuelan interest was superior to that of the United States.

Perhaps the most dramatic decision was recently handed down by the ninth circuit in *Phillips v. Amoco Trinidad Oil Company*.¹³⁰ In *Phillips*, a number of Trinidadian employees were injured or killed as the result of a blowout and fire aboard the drilling rig Mariner I, a United States flag vessel. The rig was owned by Santa Fe Drilling Co., a United States corporation, and was operating under contract to Amoco Trinidad, a Delaware corporation with its principal offices in Trinidad. The Mariner I had been operating in Trinidadian waters for almost four years, and the government of Trinidad and Tobago controlled the makeup of the crew by limiting the number of work permits for non-Trinidadian nationals.

In analyzing the question of applicable law, the court spent considerable effort in analyzing the nature of the test. The court expressly rejected as an "unrealistic interpretation"¹³¹ the second circuit test of merely finding a substantial connection with the United States. Rather, the court returned to the language of *Lauritzen*, which required a valuing of "points of contact between the transaction and the states or governments whose competing laws are involved."¹³² Thus, the court held that the analysis was a "comparative, and not an absolute, evaluation."¹³³

Applying this approach, the court found that the interests of Trinidad predominated. *Lex loci delicti*, while inapplicable in the setting of bluewater shipping, had more force: "Here the locus is unchanging and the logic of local experience can profitably be applied to the claims of these Trinidad nationals. That these workers were injured immediately offshore of Trinidad is no fortuity" ¹³⁴

Moreover, greater weight was placed on the allegiance and domicile of the workers, since the employment of these workers had never taken them beyond the territorial boundaries of Trinidad. This also gave additional weight to the place of contracting.¹³⁵

The court's discussion of the base of operation criterion was directly in line with the approach taken in *de Alvarez*. Admitting that Santa Fe's corporate headquarters was in California and that

129. *Id.* at 1247.

130. 632 F.2d 82 (9th Cir. 1980).

131. *Id.* at 86.

132. *Id.* at 84 (emphasis added).

133. *Id.* at 86.

134. *Id.* at 87.

135. *Id.* at 87.

this office kept in contact with the operations of the *Mariner I*, the court thought that it was the "base of operations of the relevant business venture rather than of the corporate owner of the vessel"¹³⁶ that was important. The place of day-to-day operations, rather than corporate headquarters, was determinative.

The implication of *Phillips, de Alvarez, House*, and numerous other lower court cases is patent. At least in the field of offshore operations, there appears to be developing a strong return to the choice-of-law analysis of *Lauritzen* that allows consideration of the interests of other countries which can be so predominant in offshore operations and advocates rejection of the statutory construction approach of *Rhoditis* and of the simple mechanistic search for some United States involvement upon which to base applicability of the Jones Act. Moreover, these courts have defined the "base of operations" criterion in terms of operational control of day-to-day activity, rather than a simple link of ownership or right to control by United States nationals.

While there are no decisions from the second and fifth circuits dealing with choice of law in the area of offshore operations, the methodology used in *Moncada*, *Antypas*, and *Fisher* would indicate that these courts are on a direct collision course with the third and ninth circuits. The conflict might be partially resolved by the fifth or ninth circuits on rehearing in *Fisher* or *Phillips*, but it appears that ultimately review by the Supreme Court or a legislative solution will be needed to resolve the conflict.

THE PROPOSED LEGISLATIVE SOLUTION

A possible alternative to resolution by the Supreme Court would be a legislative solution, and a bill was introduced in the House of Representatives last year that would amend the Jones Act by adding the following subsection:

(b)(1) Except as provided under paragraph (2), no action may be maintained under subsection (a) of this section or under any other maritime law of the United States for damages for the injury of death of any person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred—

(A) in connection with the operation of any special purpose vessel designed for utilization in connection with activities relating to the offshore exploration for, or production of, oil,

136. *Id.* at 88.

gas, or other minerals, including drilling, provision of supplies, surveying, diving, pipelaying, or other construction activities; and

(B) in any area other than an area within (i) the United States, (ii) the territorial waters of the United States, or (iii) the Outer Continental Shelf of the United States as defined under section 2(a) of the Outer Continental Shelf Lands Act.

As used in subparagraph (B)(i) of this paragraph, the term "United States" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(2) Any action for damages to which paragraph (1) applies may be maintained only if the person bringing such action establishes that no remedy is available for such damages (or was available at any time after the incident giving rise to the action) under the laws of any country—

(A) asserting jurisdiction over the area in which the incident occurred; or

(B) in which, at the time of the incident, the person for whose injury or death damages are sought maintained citizenship or residency.¹³⁷

This proposed legislation would closely approximate the result of the *Phillips* decision. The applicability of American law would turn on the citizenship or residence of the plaintiff within the United States and the situs of the accident. The flag of the vessel would not be a pertinent factor.

As with any legislation, the bill poses certain problems of construction. The bill refers only to incidents occurring "in connection with the operation of any special purpose vessel." This would certainly include drilling vessels such as semi-submersible rigs and other vessels such as pipelay barges. Beyond that, all is conjecture. Would a deck barge used in pipelaying activities be a "special purpose vessel"? Certainly an argument could be made that such traditional craft as service vessels and supply vessels were not included within the purview of the bill, although the foreign workers aboard these vessels are more akin to workers on drilling vessels than to seamen on traditional oceangoing cargo ships with regard to the

137. H.R. 6705 96th Cong., 20 Sess., 126 CONG. REC. 35 (1980).

localization of their work and their constant contact with one jurisdiction.

Moreover, there have been some constitutional objections raised to the proposed legislation. The argument has been advanced that the singling out of one class of seaman constitutes invidious discrimination prohibited by the due process clause of the fifth amendment.¹³⁸ In view of the broad discretion given to Congress to legislate in economic matters and the traditional delineation of categories or workers in the maritime field with different remedies (e.g., longshoremen, seamen, etc.), the constitutional objections would seem to be tenuous at best.

Far more serious questions can be raised as to the political viability of the legislation. After one day of hearings, opponents to the bill, principally the plaintiff's personal injury bar and certain unions, stated that they had objections to the proposed legislation and asked for more time to prepare their opposition. The Merchant Marine Subcommittee of the House Committee on Merchant Marine and Fisheries yielded to this request, and no further hearings have been scheduled to date. Accordingly, the bill is certainly dead for the 96th Congress. Whether or not it will be reintroduced in the 97th Congress may in part depend on whether some judicial resolution of the problem is forthcoming.

NON-SEAMEN AND NON-MARITIME INJURIES

In view of the great bulk of litigation in the area of foreign seaman claims, it is somewhat anomalous that there has been so little litigation in this country regarding the rights of non-seamen arising out of injuries on fixed platforms in foreign waters.¹³⁹ There are clearly certain practical reasons for the lack of litigation insofar as foreign nationals are concerned. With regard to claims against an employer, the LHWCA is by its own terms inapplicable, since such injuries do not occur on navigable waters of the United States or on the Outer Continental Shelf.¹⁴⁰ State compensation remedies are thus the only conceivable American remedies available against an employer, and the difference between domestic law of the place of injury and state systems is probably not so great as to justify suit in the United States. Moreover, there are significant jurisdictional

138. The statements of Robert A. Jenkins in respect of H.R. 6705 to the Merchant Marine Subcommittee of the Merchant Marine and Fisheries Committee, United States House of Representatives treat this question.

139. This writer was unable to find any decided cases involving platform injuries.

140. See notes 38-39, *supra*, and accompanying text.

hurdles to claims against third parties. Since such claims are not within the admiralty jurisdiction of the federal court,¹⁴¹ do not involve a federal statute and often involve only foreign entities, thus depriving the court of diversity of alienage jurisdiction,¹⁴² litigation in federal court is not available. Moreover, the conflict of laws doctrines of most states would apply to foreign law anyway.¹⁴³

American workers employed abroad often have choice-of-law clauses in their employment contracts calling for the application of the workers' compensation law of a particular state, or provisions calling for the employer to pay the employee in the event of injury a scale of benefits incorporated into the contract by reference to the compensation act of some states. While the former provisions are of questionable value, the latter type of provision has been judicially enforced.¹⁴⁵

CONCLUSION

The law governing the rights of foreign seamen and other off-shore workers is obviously at a critical juncture in its development. The divergent trend of the circuits leads not only to general confusion as to the state of the law, but adds the problem of intranational as well as international forum shopping. Hopefully, a reasoned resolution will be forthcoming from the courts or Congress.

141. See note 48, *supra*, and accompanying text.

142. 28 U.S.C. § 1332 (1976).

143. Under either the traditional *lex loci delicti* or the modern approach of the Restatement, such injuries would probably be governed by foreign law.