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# CONFUSED SEAS,\* THE WATERS WE SAIL ON IN 1980

Peter T. Fay\*\*

## INTRODUCTION

In recent years significant developments have occurred in the law governing maritime personal injury. While maritime employment has long been recognized as unusually hazardous, with the concomitant need for immediate and certain relief,<sup>1</sup> relief provisions historically have been subject to inconsistent or arbitrary application. This survey briefly discusses the background of this confusion, in specific areas, in an effort to put into context recent currents that indicate the development of new approaches to compensation for maritime personal injuries. Future courses may be more difficult to predict than the shifting tides.

## WRONGFUL DEATH TODAY

Persons engaged in maritime employment may be divided functionally and legally into two broad categories: crew members or seamen and shore-based or waterfront workers.<sup>2</sup> Benefits to survivors of these groups, as well as compensation for personal injury, are governed by general maritime law and several mutually exclusive statutes. This multifarious coverage of law often gives rise to inconsistent remedies, a result which is at odds with the quest for uniformity in maritime law.<sup>3</sup> Thus, the confused seas of 1980.

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\*"Confused seas are defined as a highly disturbed water surface without a single, well defined direction of wave travel. A series of waves or swells causing another wave system at an angle is also called a cross sea." NAVIGATION DICTIONARY 55 (1969).

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1. For example, during fiscal year 1971 there were 68,464 reported longshoremen injuries alone, 29,006 of which occurred in the fifth circuit. Note, *The Docking of the Longshoremen's and Harbor Workers' Compensation Act: How Far Can It Come Ashore?*, 29 U. FLA. L. REV. 681, 681 (1977). Statistics for seamen injuries, no doubt, are as appalling.

2. 1A. BENEDICT ON ADMIRALTY, § 1 (7th ed. 1977).

3. See generally Day, *Maritime Wrongful Death & Survival Recovery: The Need For Legislative Reform*, 64 COLUM. L. REV. 648 (1964); Note, *Maritime Wrongful Death: Higginbotham and The Search for Uniformity*, 3 MAR. LAW. 289 (1979).

Consider the following hypothetical: A passenger (Mrs. Skidmore) of vessel #1 (a "seaworthy" vessel) falls overboard in the navigable territorial waters of Louisiana and drowns. The accident is the result of negligent operation of the vessel. A seaman (Ivy) drowns in a rescue attempt; another seaman (Christofferson) is injured; and a longshoreman (Alvez), employed on the vessel, loses an eye when a lifeline being tossed from the ship hits him. Vessel #2 ("unseaworthy" by virtue of improper rescue equipment) is close by. A seaman (Hlodan) and a longshoreman (Gaudet), following the captain's negligent orders, also jump in to save Mrs. Skidmore. Hlodan drowns at the scene. Gaudet is pulled from the water alive but ultimately dies from complications. Prior to his death, Gaudet is successful in an individual claim for injuries. A second seaman (Cruz) is injured in the attempt but rescued. In the confusion, another passenger (Higginbotham), boards a lifeboat to help but is taken by the current beyond the territorial waters of the United States where the boat overturns and he drowns.

Under present case law recovery might be as follows: *Vessel #1* (seaworthy but negligent):

a) Deceased passenger Skidmore's husband and children in a general maritime law wrongful death action may recover pecuniary damages and non-pecuniary damages such as the husband's loss of consortium, loss of society, and loss of nurture and guidance to the minor children;

b) Deceased seaman Ivy's next-of-kin would be limited to only pecuniary damages in an action for negligence against his employer under the Jones Act;

c) Injured seaman Christofferson's spouse would be denied any action for non-pecuniary loss of consortium under either the Jones Act or general maritime law;

d) The spouse of injured longshoreman Alvez may recover damages for non-pecuniary loss of society, under general maritime law, in addition to the pecuniary damages recovered by her husband.

*Vessel #2* (unseaworthy and negligent):

e) Deceased seaman Hlodan's next-of-kin under a joint Jones Act and unseaworthiness claim may recover non-pecuniary damages for the decedent's conscious pain and suffering before death;

f) Deceased longshoreman Gaudet's widow in a general maritime law wrongful death action based upon unseaworthiness may recover non-pecuniary damages for loss of support, services,

and society in addition to funeral expenses, even though Gaudet recovered damages for his personal injuries before he died;

g) Injured seaman Cruz's spouse would be denied any action for non-pecuniary loss of consortium under either the Jones Act or general maritime law;

h) Deceased passenger Higginbotham's widow in a general maritime wrongful death action, when the death has occurred on the high seas, is precluded from recovering loss of society and is limited to pecuniary damages as dictated by the Death on the High Seas Act.<sup>4</sup>

Such confusion, while untenable in the abstract, is perhaps more understandable given the origins and haphazard development of the law in this area.

#### HISTORY

In its seminal decision, *The Harrisburg*,<sup>5</sup> the Supreme Court concluded that, based upon English admiralty law and the common law, no right of action existed under general maritime law for the wrongful death of seamen. The *Harrisburg* court specifically left open the use of state statutes for supplemental relief,<sup>6</sup> and in *The Hamilton*<sup>7</sup> a unanimous court permitted the use of the Delaware wrongful death statute for such recovery.<sup>8</sup> This application of state law was extended later to wrongful deaths occurring within territorial navigable waters.<sup>9</sup> However, due to the absence of survival

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4. The reader probably will recognize the hypothetical parties from the following cases:

- Ship # 1: a) *Skidmore v. Greuninger*, 506 F.2d 716 (5th Cir. 1975).  
 b) *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 2927 (1980).  
 c) *Christofferson v. Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976).  
 d) *American Export Lines, Inc. v. Alvez*, 100 S. Ct. 1673 (1980).  
 Ship # 2: e) *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980).  
 f) *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).  
 g) *Cruz v. Hendy Int'l Co.*, No. 77-2700 (5th Cir. 1980). Subsequent to the writing of this paper but prior to its publication, the court reconsidered its holding in *Cruz* and has now recognized the claim for loss of society by Cruz's spouse. This opinion is expected to be published shortly in the *Federal Reporter*.  
 h) *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

5. 119 U.S. 199 (1886).

6. *Id.* at 214.

7. 207 U.S. 398 (1907).

8. The Court utilized a fiction finding that the maritime law adopted the state statute. *Id.* at 404-05. See Fallon, *Rights, Remedies and Recovery for Wrongful Death Under Maritime Law*, 1 MAR. LAW. 32, 33-34 (1975).

9. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

statutes in some states, coverage was sporadic or, if allowed, the theories utilized were inconsistent.<sup>10</sup> Ostensibly to meet this situation, Congress enacted in 1920 both the Jones Act<sup>11</sup> and the Death on the High Seas Act (DOHSA).<sup>12</sup>

The Jones Act provided a cause of action to a seaman and his survivors for injury or death due to his employer's negligence. The statute was upheld as a permissible extension of maritime law which allowed an injured seaman to assert his right of action either on the admiralty side of the court or on the common law side where he would have a right of trial by jury.<sup>13</sup> This Act was patterned after the Federal Employer's Liability Act (FELA), and those provisions applicable to railway employees were incorporated into the Jones Act.<sup>14</sup> Thus, in the instance of a seaman's death, the Act provided for a survival<sup>15</sup> as well as a wrongful death action,<sup>16</sup> but recovery was limited judicially to mere pecuniary damages.<sup>17</sup> The Supreme Court construed this incorporation to mean that, although the provisions of FELA applied to Jones Act actions when the application was reasonable, the "very words of the FELA must not be lifted bodily from their context and applied mechanically to the specific facts of maritime events."<sup>18</sup> Therefore, the courts exercised a

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10. See Fallon, *supra* note 8, at 34.

11. 38 Stat. 1164 (1920) (current version at 46 U.S.C. § 688 (1976)) provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . . .

12. 41 Stat. 537 (1920) (current version at 46 U.S.C. § 761 (1976)) provides:

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.

13. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924).

14. See 45 U.S.C. §§ 51-60 (1976).

15. *Id.* § 59.

16. *Id.* § 51.

17. See *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913). The wording of the statute does not contain a measure of damages, therefore this limitation is judicially created.

18. *Cox v. Roth*, 348 U.S. 207, 209 (1955).

measure of flexibility in awarding damages.<sup>19</sup> Significantly, the Jones Act plaintiff has to be either a seaman who has suffered personal injury in the course of his employment or the personal representative of any seaman who has died as a result of such personal injury.

DOHSA, on the other hand, provided a wrongful death action for any "wrongful act, neglect, or default" resulting in death beyond territorial waters.<sup>20</sup> This action was extended collectively to the surviving spouse, parent, child, and dependent relatives of the deceased.<sup>21</sup> Although limited to pecuniary loss, DOHSA has generally been held to cover (1) loss of support, which includes all financial contributions the decedent would have made during his lifetime to the beneficiaries; (2) loss of services the decedent would have rendered to the beneficiaries; (3) loss of the nurture, guidance, and education a parent would have given his minor children; and (4) loss of inheritable estate.<sup>22</sup>

When a DOHSA action was combined with a Jones Act claim, recovery for the decedent's pain and suffering could be awarded under the Jones Act. When the beneficiaries of a non-seaman brought a DOHSA action, the courts allowed recovery for the dependents' pecuniary loss to be supplemented by a recovery for the decedent's pain and suffering before death under the survival provision of a relevant state statute.<sup>23</sup> This state of inconsistent statutory law, as related to both the nature of recovery and the classes of beneficiaries, persisted until 1970, despite the federal courts' attempt to impose some degree of order on the "statutory chaos."<sup>24</sup> Unfortunately, during this time period another confusing dimension was added.

#### THE TERRITORIAL WATERS ANOMALY

Prior to the Jones Act and DOHSA, the Supreme Court, in *The Osceola*,<sup>25</sup> recognized a seaman's right under general maritime law to indemnity from the shipowner for injuries received as a consequence of the "unseaworthiness" of the vessel, but barred an action

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19. In this vein, no doubt, pecuniary damages have not been limited to the portion of the decedent's wages due the survivor but have included loss of nurture to a child, pain and suffering, medical expenses, and impairment of earning capacity. See 2 M. NORRIS, *THE LAW OF SEAMEN* § 697 (3d ed. 1970).

20. See note 12, *supra*.

21. *Id.*

22. See generally S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.1 (2d ed. 1975).

23. See G. GILMORE & C. BLACK, JR., *THE LAW OF ADMIRALTY* 362-67 (2d ed. 1975).

24. *Id.* at 359.

25. 189 U.S. 158 (1903).

for the negligence of the master or crew member.<sup>26</sup> Therefore, after passage of the remedial acts and until 1970, a seaman was entitled to 1) a wrongful death action under DOHSA, if death occurred on the high seas; 2) recovery for injury, if a death was caused by the negligence of his employer under the Jones Act; and 3) recovery for injuries for a breach of the warranty of seaworthiness under *Osceola* (which, by the 1940's, was developing into a doctrine of absolute liability with no regard to negligence).<sup>27</sup> However, if the injuries, sustained in territorial waters by virtue of unseaworthiness without negligence on the part of his employer, resulted in death, the Jones Act wrongful death provision was exclusive.

In *Lindgren v. United States*<sup>28</sup> a unanimous Supreme Court said that, with the Jones Act, Congress had preempted the field so that recovery for a seaman's wrongful death within territorial waters could be had only under FELA death provisions, and that Jones Act recovery "precludes the right of recovery for indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the state in which the injury is received."<sup>29</sup> Thirty-four years later the Court reaffirmed *Lindgren* in *Gillespie v. United States Steel Corp.*,<sup>30</sup> and held that the FELA death provision also could not be supplemented by a state statute either in a Jones Act action or in a claim for unseaworthiness.

The position of the seaman was exacerbated further by the decision in *Seas Shipping Company v. Sieracki*,<sup>31</sup> which extended the warranty of unseaworthiness to a harbor worker who was injured loading and unloading a ship. In light of the lack of federal coverage afforded a harbor worker over navigable waters and the inadequacy of state remedies, the Court extended coverage to those whom it considered were "doing a seaman's work and incurring a seaman's hazards."<sup>32</sup> Thus, as of 1970, before the Supreme Court decided *Moragne v. States Marine Lines, Inc.*,<sup>33</sup> the state of the law in the event of death was:

1. If death occurred on the high seas, DOHSA provided an ac-

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26. *Id.* at 175.

27. *Mahnick v. Southern S.S. Co.*, 321 U.S. 96, 100-102 (1944). See Chamless, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519 (1973).

28. 281 U.S. 38 (1930).

29. *Id.* at 48.

30. 379 U.S. 148 (1964).

31. 328 U.S. 85 (1946).

32. *Id.* at 99. See *id.* at 100-02.

33. 398 U.S. 375 (1970).

tion for certain beneficiaries for the death of any "person" caused by "wrongful act, neglect, or default occurring on the high seas." In the case of a non-seaman this action was restricted to one for a maritime tort with recovery based on negligence. In the case of a seaman this action could be based on negligence or non-negligent unseaworthiness, and the recovery in the action brought by his personal representative came to include both recovery for pecuniary loss suffered by his dependents under DOHSA as well as for the decedent's pain and suffering before death under the survival provision of FELA incorporated into the Jones Act.

2. If death occurred in territorial waters the status of the plaintiff dictated the remedy.

a) In the case of a non-seaman, recovery for wrongful death fell under the relevant statute of the state in whose territorial waters the death occurred, under a theory of negligence.

b) Furthermore, if the decedent was a "*Sieracki* seaman" entitled to recover under the doctrine of unseaworthiness, and he was unable to prove negligence, his recovery depended upon the relevant state wrongful death statute encompassing death caused by unseaworthiness.<sup>34</sup>

c) If the decedent was a Jones Act seaman, his beneficiaries could not look to state statutes or to the unseaworthiness doctrine.

This disparity in treatment has been characterized by the federal courts as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand."<sup>35</sup>

#### *Moragne* AND PROGENY

Seeking to calm the seas in this area, the Supreme Court in *Moragne* overruled *The Harrisburg* and held that an action lies under general maritime law for death in territorial waters.<sup>36</sup> The

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34. See *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

35. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 159 (1964).

36. *Moragne*, a longshoreman, was killed while working on a vessel in navigable waters in Florida. His widow brought an action, both individually and as representative of her husband's estate, based upon both the negligence of the shipowner and the unseaworthiness of the vessel to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. 398 U.S. at 376. Following the Florida Supreme Court's holding that no action for unseaworthiness would lie under Florida law, see *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968), the fifth circuit affirmed the district court's dismissal of the death claim based on unseaworthiness, declaring itself bound by the United States Supreme Court decision in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). See 398 U.S. at 376-78.



Court, through Justice Harlan, reasoned that no present policy prohibited recovery for wrongful death, as evidenced by the passage of state statutes providing a remedy,<sup>37</sup> and that "the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law."<sup>38</sup> Further, recognizing that general maritime law principles historically "included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages,"<sup>39</sup> "'it better [became] the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"<sup>40</sup>

Justice Harlan addressed three "anomalies" in the law in order to further "uniformity in the exercise of admiralty jurisdiction."<sup>41</sup> The first was the absence of a general maritime wrongful death action arising from the breach of the maritime duty to provide a seaworthy vessel. Justice Harlan appears to have been referring to seamen limited to Jones Act wrongful death actions under *Lindgren* and *Gillespie*, as compared to *Sieracki*-seamen who were not so limited.

The second anomaly was that identical breaches of the duty to provide a seaworthy ship that resulted in death produced liability outside the three-mile limit under DOHSA, but not within state territorial waters for a non-seaman if the state statute for wrongful death did not encompass the unseaworthiness doctrine.

"The third, and assertedly the 'strangest' anomaly [was] that a true seaman—that is, a member of a ship's company, covered by the Jones Act—[was] provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of unseaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute."<sup>42</sup> This comment was a direct criticism of *Gillespie* and *Lindgren*, cases implicitly overruled by *Moragne*.<sup>43</sup>

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37. 398 U.S. at 390.

38. *Id.* at 387.

39. *Id.*

40. *Id.* at 387, quoting *The Sea Gull*, 21 F. Cas. 909, 910 (Md. 1865).

41. 398 U.S. at 395.

42. *Id.*

43. See *id.* at 396 n.12:

A joint contributor to this last situation, in conjunction with the rule of *The Harrisburg*, is the decision in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), where the Court held that the Jones Act, by providing a claim for wrongful death based on negligence, precludes any state remedy for wrongful

As to the determination of which beneficiaries will be entitled to recover under the new action, Justice Harlan did not adopt the United States' contention, as *amicus curiae*, that only the provisions of DOHSA should apply without borrowing from relevant state law. Rather he left the action's final resolution to "further shifting through the lower courts in future litigation."<sup>44</sup> As to the measure of damages, the Court noted the persuasive analogy found both in DOHSA and in the numerous state wrongful death acts. Justice Harlan concluded that *Moragne*, in its recognition of a remedy for wrongful death under general maritime law, could be expected to bring more "placid waters."<sup>45</sup> However, the *Moragne* opinion seems to have raised as many questions and problems for further litigation as it expressly solved.

For example, one might ask: Can the new maritime wrongful death action be based upon negligence as well as unseaworthiness? If so, is the seaman precluded from a negligence claim by *The Osceola*? After the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, denying the warranty of seaworthiness to a longshoreman, will the basis for liability in his claim for wrongful death be limited to negligence even though the seaman's claim is limited to unseaworthiness? Did the Court intend the new action to apply to deaths on the high seas, and what will be the interrelationship of the new action with DOHSA in terms of liability, beneficiaries, and damages? The lack of definitive answers as to

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death of a seaman in territorial waters—whether based on negligence or unseaworthiness. The Court's ruling in *Gillespie* was only that the Jones Act, which was "intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, . . . necessarily supersedes the application of the death statutes of the several States." *Id.*, at 155. The ruling thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, see *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), or for death on the high seas caused by unseaworthiness, see *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958); *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465 (C.A.2d Cir. 1966); cf. *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406 (1953). Likewise, the remedy under general maritime law that will be made available by our overruling today of *The Harrisburg* seems to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, "uniformity in the exercise of admiralty jurisdiction"; and, of course, no question of preclusion of a federal remedy was before the Court in *Gillespie* or its predecessor, *Lindgren v. United States*, 281 U.S. 38 (1930), since no such remedy was thought to exist at the time those cases were decided. See Gilmore & Black, *supra*, at 304; but cf. *Kernan v. American Dredging Co.*, 355 U.S., at 429-30.

44. *Id.* at 408.

45. *Id.*

status, situs, beneficiaries, and damages has contributed to a line of cases that appear to have spun anomalies and inconsistencies in maritime law equal to those problems that *Moragne* attempted to resolve.

#### POST-MORAGNE DEVELOPMENTS

The *Moragne* Court left two areas, the schedule of beneficiaries and the measure of damages under the new general maritime wrongful death action, to "further sifting."<sup>46</sup> This further sifting has led to both a divergence of opinion and a resurrection of anomalous recoveries depending upon both the situs of the injury from the shore and the status of the decedent.<sup>47</sup>

In *Sea-Land Services, Inc. v. Gaudet*<sup>48</sup> the Supreme Court reached two significant conclusions in the instance of a longshoreman whose injuries, which occurred on state navigable waters, did not result in his death until after he had recovered damages, including loss of future earnings, on an unseaworthiness claim. First, the Court held that the widow's maritime wrongful death action was not barred by the decedent's recovery during his lifetime. Second, the Court rejected the contention that DOHSA provided the applicable standard for damages and aligned itself with a clear "majority of state wrongful-death acts" by allowing the decedent's dependents damages for loss of support, services, and society, as well as for funeral expenses.<sup>49</sup>

In seeking to shape the remedy to comport with the policy of special solicitude for maritime injury, the Court defined "society" as embracing a "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection"<sup>50</sup> not to be confused with mental anguish or grief which were not compensable under the maritime wrongful death remedy.<sup>51</sup> "Loss of services" was defined as the monetary value of services the decedent provided and would have provided but for his wrongful death, and included the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed, as well as services the decedent would have performed at home or for

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46. *Id.*

47. *See generally* Note, *supra* note 3.

48. 414 U.S. 573 (1974).

49. *Id.* at 585.

50. *Id.*

51. *Id.* at n.17.

his spouse.<sup>52</sup> Thus the stage was set for glaring inconsistencies in the law.<sup>53</sup>

Four years after *Gaudet*, the Supreme Court held in *Mobil Oil Corp. v. Higginbotham*<sup>54</sup> that, when a death occurs on the high seas, the statutory pecuniary remedy of DOHSA is controlling. Justice Stevens, writing for the majority, stated:

We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful death recoveries on the high seas poses only a minor threat to the uniformity of maritime law . . . . It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves insignificant, a desire for uniformity cannot override the statute.<sup>55</sup>

*Higginbotham* can be contrasted with *Skidmore v. Grueninger*,<sup>56</sup> a fifth circuit decision following the lead of *Gaudet*, which allowed the husband of a passenger killed in territorial waters to recover for loss of consortium and loss of society under the general maritime wrongful death cause of action. The *Higginbotham* and *Skidmore* results appear further at odds when contrasted with the decision in *Christofferson v. Halliburton*.<sup>57</sup>

In *Christofferson*, the fifth circuit denied the spouse of an injured seaman an action for loss of consortium under both the Jones Act and general maritime law. The court noted that the Jones Act specifically provided that an injured seaman, but not his wife, could maintain an action for damages at law, and further, that FELA cases applicable to Jones Act actions have held that the wife of an injured employee has no claim for loss of consortium. This decision, to some degree, resurrected the disparity of recovery to beneficiaries for the same loss based upon the status of the injured party or whether the party was only injured or killed.<sup>58</sup>

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52. *Id.* at 585.

53. *See* 414 U.S. at 605 (Powell, J. dissenting).

54. 436 U.S. 618 (1978).

55. *Id.* at 624. *See also* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT, 227 (3d ed. 1980).

56. 506 F.2d 716 (5th Cir. 1975).

57. 534 F.2d 1147 (5th Cir. 1976). *See* Maraist, *Maritime Wrongful Death—Higginbotham Reverses Trend and Creates New Questions*, 39 LA. L. REV. 81 (1978).

58. The *Christofferson* court also relied upon *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir.), *cert. denied*, 376 U.S. 949 (1963), an early New York case in which the second circuit held that the wife of an injured longshoreman did not have a cause of action for loss of consortium based upon a warranty of seaworthiness.

Recently, in *Doca v. Marina Merc. Nicaraguense*, 634 F.2d 30 (2d Cir. 1980), the second circuit granted the wife of an injured maritime worker a consortium claim, concluding that, since *Gaudet*, *Igneri* no longer can be controlling.

*Ivy, Hlodan and Alvez*

Turning to the most recent decisions in this area, the seas become more confused. In *Ivy v. Security Barge Lines, Inc.*<sup>59</sup> a fifth circuit panel held that damages for non-pecuniary loss may not be recovered in an action premised solely upon the Jones Act for the death of a seaman in territorial waters. John Ivy, a seaman, was lost and presumably drowned as he attempted to aid a fellow crewman who had fallen overboard. The decedent's father instituted a suit under the Jones Act for negligence and under general maritime law for unseaworthiness. The jury found the vessel seaworthy, but found the defendant negligent, and awarded Ivy's parents \$50,000 each for loss of support, services, and society.

Judge Rubin, for the panel, noted that *Gaudet*-type damages would have been proper if the defendant had been found liable under both the Jones Act claim and a general maritime claim for unseaworthiness.<sup>60</sup> However, the court, feeling compelled by the facts and policy underlying *Higginbotham*, denied loss of society damages.

Upon rehearing *en banc*, the fifth circuit again affirmed, this time compelled by "the settled Jones Act jurisprudence denying recovery for non-pecuniary loss."<sup>61</sup> Judge Rubin for the majority stated:

The Jones Act remedy for negligence remains unaffected by either the rules governing damages recoverable for unseaworthiness in general maritime law or by changes in those rules. The Jones Act applies in equal force to the death of seamen on the high seas, in domestic territorial waters, in foreign territorial waters and on land if suffered in the course of employment as a seaman.<sup>62</sup>

He also noted:

We do not here reach the issue of whether after *Higginbotham* nonpecuniary damages may be recovered in such an action if unseaworthiness is found. . . . General maritime law does not provide a cause of action for negligence to a seaman against his employer supplemental to that created by the Jones Act; *The Osceola has never been overruled.*<sup>63</sup>

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59. 585 F.2d 732 (5th Cir. 1978), *aff'd on rehearing*, 606 F.2d 524 (5th Cir. 1979) (*en banc*).

60. 585 F.2d at 737 n.6.

61. *Ivy v. Security Barge Lines*, 606 F.2d 524 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 2927 (1980).

62. 606 F.2d at 528.

63. *Id.* at n.8 (emphasis added).

Chief Judge Brown and Judge Kravitch, in a lengthy and carefully reasoned dissent, criticized the majority for draining *Moragne* and *Gaudet* of their vitality and making much ado of *Higinbotham's* silence. They asserted that the court's desire for uniformity had barred a remedy that would comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction. The dissenters would "choose a disparity in recovery due to location of the accident over the anomaly of allowing representatives of a *Sieracki* seaman to recover damages disallowed representatives of a Blue Water Jones Act seaman."<sup>64</sup> These points are not without merit!

Following *Ivy*, the fifth circuit addressed the issue of whether non-pecuniary damages would be proper for a seaman's death occurring in inland waters when the Jones Act claim was joined with a valid general maritime claim for unseaworthiness. In *Hlodan v. Ohio Barge Lines, Inc.*<sup>65</sup> the court affirmed an award for a deckhand's conscious pain and suffering before death, basing the decision upon *Gaudet*, irrespective of the Jones Act claim. Hlodan, on almost identical facts to those in *Ivy*, drowned while attempting to rescue a fellow deckhand who had fallen overboard. The two cases differ only in that the *Ivy* jury found the ship seaworthy and the *Hlodan* jury did not, results that may be limited to the facts of the cases.<sup>66</sup> The Supreme Court's decision in *American Export Lines, Inc. v. Alvez*<sup>67</sup> came next. In light of the denial of certiorari in *Ivy*, *Alvez* adds one more cross current to our confused seas. The Court held that general maritime law authorized the plaintiff, the wife of a harbor worker injured non-fatally aboard a vessel in state territorial waters, to maintain an action for damages for loss of her husband's society. *Alvez's* wife had brought an action under general maritime law on the grounds of negligence and unseaworthiness, seeking damages for loss of society after her husband, a longshoreman, lost an eye in an accident aboard ship.<sup>68</sup>

Justice Brennan, in a 4-3 decision, criticized the fifth circuit opinion in *Christofferson* for inferring from a passage in *Gaudet* that non-pecuniary damages were limited in the wrongful death context

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64. *Id.* at 534.

65. 611 F.2d 71 (5th Cir. 1980).

66. See also *Allen v. Seacoasts Prod.*, \_\_\_ F.2d \_\_\_ (5th Cir. 1980) (review of applicable standards for determining unseaworthiness and negligence in context of directed verdict).

67. 100 S. Ct. 1673 (1980).

68. This injury occurred prior to the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1970), which barred future actions for unseaworthiness by *Sieracki*-seamen.

and denying such loss of consortium to the wife of an injured seaman. He asserted that "[w]ithin this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society."<sup>69</sup> Such criticism would be equally applicable to *Ivy*. Yet the Supreme Court refused to review the *en banc* opinion of the fifth circuit in *Ivy*. Scholars, lawyers and judges are totally perplexed by this refusal to consider *Ivy* in view of the holding in *Alvez*.<sup>70</sup> Blue water seamen have historically been "wards" of the courts; some must question the reasoning of their guardians.

#### LONGSHOREMEN'S AND HARBOR WORKERS' BENEFITS-TODAY

##### *Pre-1972 History*

Historically, shore-based workers were not entitled to the special protections of admiralty law afforded to seamen.<sup>71</sup> In the early 1900's though, the states adopted workmen's compensation laws which provided some benefits for longshoremen and harbor workers. Voluntary compliance with these state procedures, however, was terminated by the decision in *Southern Pacific Company v. Jensen*.<sup>72</sup> This case declared the New York workmen's compensation statute unconstitutional as applied to a longshoreman fatally injured on a gangway over navigable waters. This result was based primarily upon the need for the uniform operation of maritime law,<sup>73</sup> and this policy has remained a profound influence upon the development of maritime law up to the present day.

After various unsuccessful attempts to apply state laws to shore-based workers, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) in 1927.<sup>74</sup> The original provisions of section 903(a) contained two limitations upon its

69. 100 S. Ct. at 1677 n.8. Specifically the Court criticized the opinion in *Christofferson*.

70. This denial is more enigmatic given the Supreme Court's citation of *Ivy* in the *Alvez* decision for the proposition that the Jones Act bars damages for loss of consortium "solely by virtue of judicial interpretation of the Federal Employers' Liability Act. . . ." *Id.* at 1678.

71. See 1A BENEDICT, *supra* note 2. For example, the right of seamen to maintenance and cure was recognized during the Middle Ages. See G. GILMORE & C. BLACK, JR., *supra* note 23, at 281. Anglo-American seamen also had the right to continued wages until the end of the voyage and transportation from any foreign place back to shipping port. *The Osceola*, 189 U.S. 158, 175 (1903).

72. 244 U.S. 205 (1917).

73. *Id.* at 215, 218.

74. 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901-950 (1976)). See generally 1A BENEDICT, *supra* note 2, at § 3; Note, *supra* note 1, at 682-83.

coverage. First, the Act was limited to non-seamen employees whose injuries occurred upon navigable waters; second, compensation would be paid only if recovery could not be obtained validly under state law.<sup>75</sup> These provisions at once created an arbitrary line of demarcation—the shoreline—and great confusion and controversy regarding the jurisdiction of state and federal courts.

The simple navigable waters test<sup>76</sup> created a situation whereby the shore-based worker would pass in and out of coverage of the Act each time he crossed the shoreline while performing his work. Therefore, benefits depended upon the fortuity of the place where injury occurred without regard to the type of work performed nor to the attendant risk of injury.<sup>77</sup> The unjustness of this result was the subject of commentary,<sup>78</sup> but it remained with Congress, rather than the courts,<sup>79</sup> to rectify the situation.

Perhaps the most confusing aspect of the 1927 LHWCA provisions was the language limiting recovery to instances in which recovery could not be obtained validly under state law. While this language was initially perceived as incorporating into the Act the

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75. The original § 903(a) read:

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

33 U.S.C. § 903(a) (1927).

76. The concept appears based upon the mandate of *Jensen* that the national character of maritime law required exclusive federal jurisdiction over all navigable waters, 244 U.S. at 214-18, and that under *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924), the broad principles of uniformity did not preclude application of state compensation laws to longshoremen injured on piers or other extensions of land. See 1A BENEDICT, *supra* note 2, at § 7; *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 216-20 (1969).

77. Compare *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928) (state compensation allowed for longshoreman standing on dock struck by crane operated aboard ship and knocked into water) with *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) (no state compensation for workman struck by pier-side crane while aboard ship and knocked onto land). See 4 A. LARSON, WORKMEN'S COMPENSATION LAW, § 89.23(a) (1976 & Supp. 1977).

78. See Note, *supra* note 1, at 683. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess. 10-11 (1972); S. REP. NO. 92-1125, 92d Cong., 2d Sess. 12-13 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4707-08.

79. See *Nacirema Op. Co. v. Johnson*, 396 U.S. 212, 224 (1969).



"maritime but local" rule,<sup>80</sup> the courts developed conflicting and confusing interpretations.<sup>81</sup> Some courts precluded recovery if the state could have provided a remedy although it did not do so, others only if the state actually provided a remedy.<sup>82</sup>

With the practical consequences of a doctrine that made state and federal jurisdictions mutually exclusive obviously intolerable, the Supreme Court in *Davis v. Department of Labor and Industries*<sup>83</sup> suggested that there existed an area of overlapping jurisdiction, "a twilight zone."<sup>84</sup> This phase in the conflict of laws problem was based on two propositions. First, when a case came before a tribunal, whether state or federal, coverage was presumed in that forum unless a clear showing otherwise was made. Second, in this area the court would not reverse for lack of jurisdiction and thus clear appellate court dockets of much litigation.<sup>85</sup>

While this notion of overlapping jurisdiction appeared to settle the law for a period, the state and federal courts once again started to fix the boundaries of the new "twilight zone" in areas of employment.<sup>86</sup> Therefore, in *Calbeck v. Travelers Insurance Company*<sup>87</sup> the Court refused to extend the "twilight zone" doctrine and interpreted the Act to cover all injuries to shore-based workers occurring on navigable waters.<sup>88</sup> Thus, the shoreline was established as the sole line of demarcation for recovery under the Act until the 1972 Amendments.<sup>89</sup>

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80. See G. GILMORE & C. BLACK, JR., *supra* note 23, § 6-49, at 419; Note, *On The Waterfront: The Fourth Circuit Draws The Line at The Point of Rest In A Narrow Interpretation Of The LHWCA Amendments of 1972*, 54 N.C. L. REV. 925, 934 (1976). See also *Grant Smith-Porter Ship. Co. v. Rohde*, 257 U.S. 469 (1922).

81. Compare *Continental Cas. Co. v. Lawson*, 64 F.2d 802, 805 (5th Cir. 1933) with *United States Cas. Co. v. Taylor*, 64 F.2d 521, 525 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933).

82. *Id.*

83. 317 U.S. 249 (1942).

84. *Id.* at 256. Too many litigants had gone through one court system only to find that recovery should have been sought in the other. Usually this revelation came too late to file the proper action. See Larson, *The Conflict of Laws Problem Between The Longshoremen's Act and State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699, 702-03 (1972).

85. See Larson, *supra* note 84, at 704.

86. See, e.g., *Moore's Case*, 323 Mass. 462, 80 N.E.2d 478, *aff'd sub nom.*, *Bethlehem Steel Co. v. Modres*, 335 U.S. 874 (1948); *Baskin v. Indus. Acc. Comm'n*, 89 Cal. App. 2d 632, 201 P.2d 549 (1949), *rev'd*, 338 U.S. 854 (1949). See also Larson, *supra* note 84, at 705-06.

87. 370 U.S. 114 (1962).

88. See Note, *supra* note 1, at 685.

89. See *Nacirema Op. Co. v. Johnson*, 396 U.S. 212 (1969) (LHWCA never applies unless injury occurs upon navigable waters); Larson, *supra* note 84, at 710-12.

The 1972 Amendments cannot be placed fully in context without a brief discussion of the circular liability problem that developed under the 1927 enactments. Although LHWCA limited the employee's action against his stevedore-employer, his remedies against third parties responsible for his injury were preserved. Thus, the longshoreman could receive compensation, plus damages in an action against the shipowner.<sup>90</sup> Double recovery was prevented by imposing a lien on the longshoreman's recovery in favor of the stevedore-employer up to the amount of compensation.<sup>91</sup>

This equilibrium was tipped in 1946 by the decision of *Seas Shipping Company v. Sieracki*,<sup>92</sup> which extended the maritime doctrine of seaworthiness to longshoremen injured while engaged in traditional seamen's work.<sup>93</sup> Shipowners attempted to shift the burden of liability to the stevedore-employer first by seeking contribution, and when that failed,<sup>94</sup> by an action for indemnity on the stevedore's breach of the warranty of workmanlike performance. The latter approach was upheld in *Ryan Stevedoring Company v. Pan-Atlantic S.S. Corp.*<sup>95</sup> on the theory that this warranty was the essence of the contract with the shipowner.<sup>96</sup>

Thus a pattern of circular liability and litigation became the norm in longshoremen's personal injury actions, resulting in the courts being swamped by repetitious suits and stevedore-employers usually being held liable for damages far in excess of that contemplated by LHWCA. Various reasons have been advanced for this development,<sup>97</sup> but the low level of benefits provided to injured longshoremen and the need for increased safety consciousness in this employment area appear to have provided the best incentives. Nonetheless, the situation had become virtually intolerable when Congress finally acted.

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90. See Hazen & Toriello, *Longshoremen's Personal Injury Actions Under The 1972 Amendments To the Longshoremen's And Harbor Workers' Compensation Act*, 53 ST. JOHN'S L. REV. 1, 2-3 (1978).

91. *Id.*

92. 328 U.S. 85 (1946).

93. *Id.* at 95.

94. See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) (doctrine of loss sharing will not be extended to non-collision cases).

95. 350 U.S. 124 (1956).

96. See Hazen & Toriello, *supra* note 90, at 4-5; Comment, *The Longshoremen's And Harbor Workers' Compensation Act Amendments of 1972: An End To the Circular Liability And Seaworthiness In Return For Modern Benefits*, 27 U. MIAMI L. REV. 94, 100-02 (1972).

97. See Hazen & Toriello, *supra* note 90, at 6 n.17.

### 1972 Amendments

In drafting the 1972 Amendments, Congress was primarily concerned with two particular modifications. First, it sought to increase the inadequate benefits accorded injured shore-based workers,<sup>98</sup> and second, it reduced the problem of circular liability by eliminating the longshoreman's remedy of seaworthiness under *Sieracki*.<sup>99</sup> Congress also extended the coverage of the Act to all who could pass a two-pronged status-situs test. Since movement in this area is most pronounced, and resolution of the stevedore-shipowner controversies appears relatively in hand, this article focuses on the statutory status-situs test.

With the 1972 Amendments, Congress expanded the definition of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."<sup>101</sup> Congress also decreased the classes of eligible

98. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess. 2, 3 (1972); S. REP. NO. 92-1125, 92d Cong., 2d Sess. 5 (1972), reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4700-01.

99. *Id.* See Hazen & Toriello, *supra* note 90, at 7-10.

100. Third-party actions brought by LHWCA-covered workers no longer can be predicated on variations of the non-delegable duty to provide a safe work place. See, e.g., *Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir*, 570 F.2d 449 (2d Cir. 1978); *Wescott v. Impresas Arm., S.A. Panama*, 564 F.2d 875 (9th Cir. 1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977). See also Hazen & Toriello, *supra* note 90, at 11 n.33; Sommers, *Admiralty, Fifth Circuit Symposium: Dispensing Justice in the Fifth Circuit*, 23 LOY. L. REV. 795 (1977); Note, *Admiralty, Fifth Circuit Survey*, 9 TEX. TECH. L. REV. 837, 847-51 (1978).

When the shipowner's negligence is combined with that of the stevedore to produce injury to the harbor worker, the shipowner is responsible for the full damages. See *Edmonds v. Compagnie Generale Trans.*, 443 U.S. 256 (1979). See also Sipple, *Admiralty, Annual Fifth Circuit Survey*, 31 MERCER L. REV. 825, 843-47 (1980); Note, *The Shipowner's Limited Liability Under the Longshoremen's and Harbor Workers' Compensation Act*, 16 HOUS. L. REV., 536 (1979).

101. Section 903(a) now reads:

Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of—(1) 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; or (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

33 U.S.C. § 903(a) (1976) (emphasis indicating change added). The Amendments also changed the definition of "employer" to correspond with this broadened situs test. 33 U.S.C. § 902(4) (1976).

persons. Under the original Act an employee was covered unless specifically excluded; but the Amendments added a specific definition of employee which the injured party must satisfy in order to be eligible for relief.<sup>102</sup> Furthermore, the troublesome phrase excluding cases covered under state compensation laws was eliminated.<sup>103</sup>

The status test was designed to prevent the expanded coverage of LHWCA from "over-shooting the mark" and being applicable to any worker injured on navigable waters or adjoining areas. Only those persons engaged in "maritime employment" are covered. While various theories were spawned to provide a methodology for deciding whether a given party was engaged in maritime employment,<sup>104</sup> recently the parameters of the test have been set out fairly clearly by the Supreme Court.

In *Northeast Marine Terminal Company v. Caputo*,<sup>105</sup> the Court found that two workers, a checker of cargo removed from a container and a worker rolling a loaded dolly to the consignee's truck, were engaged in tasks essential to the loading and unloading of a vessel.<sup>106</sup> They were found to be engaged in maritime employment under the Act. This finding was predicated, in part, on the broad remedial nature of the statute<sup>107</sup> rather than on manipulative objective criteria such as union membership or the terminology used in the industry.<sup>108</sup> Upon this remedial premise the Court noted the role "containerization" technology had played in the industry and concluded that container checkers were doubtless engaged in maritime

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102. Section 902(3) now reads:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, 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. § 902(3) (1976).

103. See Note, *supra* note 1, at 686.

104. Compare *I.T.O. Corp. of Baltimore v. Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), *modifying*, 529 F.2d 1080 (4th Cir. 1975) (point of rest theory) with *Sea-Land Serv., Inc. v. Director, Office of Workers' Comp. Programs*, 540 F.2d 629 (3d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *cert. denied sub. nom.*, *Halter Marine Fabr., Inc. v. Nulty*, 433 U.S. 908 (1977), *reaff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *aff'd sub. nom.*, *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). See also Larson, *The Conflicts Problem Between The Longshoremen's Act and State Workmen's Compensation Acts, under the 1972 Amendments*, 14 HOUS. L. REV. 287, 306-28 (1977).

105. 432 U.S. 249 (1977).

106. *Id.* at 267.

107. *Id.* at 268.

108. *Id.* at 268 n.30.

employment.<sup>109</sup> In the instance of dolly operators, the Court did not look to technology but to the occupation. The Court concluded that coverage was intended if the person's "employment [was] such that they spend at least some of their time" engaged in enumerated maritime activity.<sup>110</sup> In this determination the Court rejected the point-of-rest theory, *i.e.*, the point the stevedoring operation ends and the terminal operation function begins, in favor of covering "longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation'".<sup>111</sup> Thus dolly operators between containers and consignees were covered.

In *P. C. Pfeiffer Company v. Ford*<sup>112</sup> the Court went a step further. Since "Congress wanted to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act,"<sup>113</sup> the Court concluded that the geographical situs of injury had no bearing on a claimant's status. Rather, the majority interpreted the statute to cover all those land-based occupations engaged in loading and unloading cargo between ship and land transportation with any "worker responsible for some portion of that activity as much an integral part of the process . . . as a person who participates in the entire process."<sup>114</sup> This construction should provide guidelines for the courts in future applications.<sup>115</sup>

Turning to the situs test contained in the 1972 Act the law is somewhat more confused than under the status test. However, recent developments have identified the important decisional indicia for determinations under this test. In *Caputo* the Supreme Court briefly discussed this aspect of the 1972 Amendments without grappling with its thornier problems. Factually the case was easy: One employee was injured in a terminal area which his employer conceded was a maritime situs. The other was injured on one of two "finger piers" at a fenced-in facility on the water. One pier was used specifically for loading and unloading ships; the other, where the injury took place, was utilized only for stripping and stuffing containers.<sup>116</sup> The Court began by expressing doubt that the phrase "customarily used" in the LHWCA modified the word "pier" as well

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109. *Id.* at 271.

110. *Id.* at 273. *See also* Odom Const. Co. v. United States Dept. of Labor, \_\_\_ F.2d \_\_\_ (5th Cir. 1980).

111. *Id.* at 276. *See* Annot., 41 A.L.R. FED. 685 (1979).

112. 444 U.S. 69 (1979).

113. *Id.* at 75. *See id.* at 77-78.

114. *Id.* at 83.

115. *See, e.g.*, Price v. Norfolk and Western R. Co., 618 F.2d 1059, 1061 (4th Cir. 1980); Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037, 1049-50 (4th Cir. 1980).

116. 432 U.S. at 279-80.

as "other adjoining areas", but held that even if it did the pier was part of "an adjoining . . . terminal . . . customarily used . . . in loading [and] unloading."<sup>117</sup> Thus, the employee satisfied the situs test.

This broad approach to the definition of "terminal" is in keeping with both the common meaning of the word and the remedial nature of the Act. However, in the instance of injury in an area that is not one of the seven specific places listed in section 903(a)—navigable waters, adjoining pier, wharf, dry dock, terminal, building way, or marine railway—the Court left undefined how great a part of the marine terminal must be used for loading and other operations and how remote that portion may be from the place of injury and still satisfy the test.<sup>118</sup>

The fifth circuit has had occasion to interpret the situs test in such difficult situations. In *Jacksonville Shipyards v. Perdue*,<sup>119</sup> five claims were consolidated for review. The panel began its opinion by stating that it would look past the nomenclature of an employer or local custom to examine the facts to determine whether a situs is actually "customarily used by an employer in loading, unloading, repairing, or building a vessel."<sup>120</sup> Upon the facts of the case, Judge Tjoflat found that three of the claimants were injured at a situs satisfying section 903(a) while two were not. In the instance of the first claimant, who had been injured while securing a military vehicle to a flat car for transportation inland at the Port of Beaumont, Texas, the parties had conceded situs and the court did not look further.<sup>121</sup> The second claimant was a shipbuilder injured in a fabrication shop, 300 feet from the vessel for which the claimant was designing a part, which the court deemed an adjoining area.<sup>122</sup> The third successful claimant was a cotton header injured at a pier-side warehouse used for temporary storage of cargo before loading for shipment inland.<sup>123</sup> That panel had no problem concluding that a ship repairer assigned to dismantle a building at an abandoned marine

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117. *Id.* at 281.

118. *See* Note, *supra* note 1, at 694.

119. 539 F.2d 533 (5th Cir. 1976), *cert. denied sub. nom.*, Halter Marine Fabr., Inc. v. Nulty, 433 U.S. 908 (1977), *reaff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *aff'd sub. nom. on other grounds*, P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979).

120. *Id.* at 541. *See* Odom Const. Co. v. United States Dept. of Labor, \_\_\_ F.2d \_\_\_ (site must be used by a statutory maritime employer but not necessarily the claimant's employer).

121. *Id.* at 543.

122. *Id.* at 543-44. *See also* Ifgalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977).

123. 539 F.2d at 544.

shipbuilding facility was not injured at a maritime situs since the entire facility was no longer in use.<sup>124</sup>

The *Perdue* court's most extended discussion of situs involved a claimant who injured his knee when he fell while leaving a bus supplied by his employer to take employees to the office for checking out on the time clock. The court stated:

There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel upon which *Perdue* was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding. [The parties have stipulated that the nearest body of water was 500 yards away from the office.] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that *Perdue* is entitled to compensation under the new Act.<sup>125</sup>

*Perdue* then should be viewed as setting out several indicia for determining whether the scene of an injury qualifies as a "situs." These are, first, the use to which an area is put by employers; second, the character of the surrounding facilities; and third, the distance that the point of injury is from navigable waters without an absolute set limit.

The Court's second decision in this area, *Alabama Dry Dock & Shipbuilding Company v. Kininess*,<sup>126</sup> reinforced the *Perdue* criteria. In this action an employee fractured his pelvis while sandblasting a disassembled gantry crane stored in a backlot of the company's shipyard for eventual use hauling fabricated ship sections to the water's edge. The court, through Judge Roney, stated:

Alabama Dry Dock cites language in the statute which defines the situs as one "adjoining" navigable waters. The company

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124. *Id.* at 542.

125. *Id.* at 541-42 (footnote added to text).

126. 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

argues that because the back lot in which the crane was stored did not abut the water, it is not a maritime situs. The record does not disclose the position of the lot, and the estimates in the briefs place it from 150 to 2,000 feet from the water's edge. In any event, the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding. See *Perdue, supra*, 539 F.2d at 542. Furthermore, the lot itself was "customarily used" for the maintenance and repair work engaged in by Kininess. It was an area in which work directly related to shipbuilding was taking place. Cf. *Stewart v. Brown & Root, Inc.*, 5 B.R.B.S. 37 (ALJ) (Sept. 30, 1976) (worker in shipyard under construction not covered).

While based upon these two decisions, giving great weight to the presence or absence of non-maritime buildings in the area is questionable. This factor should not be regarded as an absolute test.

In *Texports Stevedore Company v. Winchester*<sup>128</sup> an employee assigned to maintain, repair, and supply gear used in the loading and unloading of ships was injured at his employer's gear room. The court stated:

Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room which, though five blocks away, adjoined the docks and associated buildings. See *Alabama Dry Dock and Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir. 1977).

Bearing in mind the test expounded by Judge Tjoflat in *Perdue*, it is clear that the N Avenue gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes as provided by the statute. Acknowledging the distance from the gear room to the water, we cannot, after giving the Act a liberal construction, reverse respondent's coverage just because the harbor area provided inadequate facilities for Texports to house their equipment.<sup>129</sup>

This case apparently suggests that the proper focus is upon the

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127. *Id.* at 178.

128. 554 F.2d 245 (5th Cir.), as modified, 561 F.2d 1213 (5th Cir. 1977), petition for rehearing en banc granted, 569 F.2d 428 (5th Cir. 1978). Oral arguments were heard, en banc, in June of 1980. 632 F.2d 504 (5th Cir. 1980).

129. 554 F.2d at 247, as modified by, 561 F.2d at 1213.



use to which the area is put as well as on the nature of the surrounding facilities. Further, this decision probably indicates that the disposition of these issues in the future will be on a case-by-case basis.

While the *Texports* decision is currently on rehearing *en banc*, the writer speculates that the court will not restrict "situs" to facilities strictly contiguous to navigable waters nor resort to some arbitrary fence line or railway track as an absolute outer limit of coverage.<sup>130</sup> Such an approach would appear to be linguistically supportable as well as in keeping with the expansive spirit of Congress.<sup>131</sup>

#### CONCLUSION

While confused seas certainly still exist in regard to injury and wrongful death under *Gaudet*, the Jones Act, and DOHSA, judicial gap-filling has proceeded apace to provide a greater degree of uniformity in the area. Due to the inherently inconsistent nature of the above authorities, calm is not likely to result without a complete congressional revamping. Such revamping of LHWCA has reduced significantly the problems of shore-based workers.<sup>132</sup> Hopefully, the courts' case-by-case development of the status-situs test soon will establish sufficient decisional criteria which will reduce the uncertainty that persists in this area to more manageable proportions.

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130. See *Handcor Inc. v. Director, Office of Workers' Comp.*, 568 F.2d 143 (9th Cir. 1978); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977); *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

131. See generally G. GILMORE & C. BLACK, JR., *supra* note 23, § 6-50, at 424.

132. The Supreme Court, in *Sun Ship, Inc. v. Pennsylvania*, 100 S. Ct. 2432 (1980), recently held that a state may apply its workers' compensation scheme to land-based injuries under LHWCA, thus avoiding the problems of the "maritime but local" rule and the "twilight zone" doctrines being grafted onto the 1972 Amendments.