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# Recent United States Supreme Court Developments in Admiralty

Thomas C. Galligan, Jr.\*  
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## I. INTRODUCTION

In the United States, maritime law *is* federal law. Although state courts hear admiralty cases and sometimes both state and federal courts apply state law in maritime cases, admiralty is still federal law. Consequently, the United States Supreme Court has the last word on admiralty matters in the United States—either through the development of federal common law or through the interpretation of applicable legislation.<sup>1</sup>

Along the Gulf of Mexico, and particularly in Louisiana, admiralty's most significant effect is as federal tort law. In no other part of the country is maritime personal injury law as significant as it is in the great state of Louisiana. This is due not only to Louisiana's abundant navigable waters or to New Orleans' unparalleled importance as an American port, but also to the extensive oil and gas production on or near the state's waters.

Given the importance of maritime personal injury law to the Louisiana bench and bar, as well as the United States Supreme Court's critical role in the development of that law, we will analyze four of the most significant United States Supreme Court decisions of 1994 affecting maritime tort law. First, this article analyzes *American Dredging Co. v. Miller*,<sup>2</sup> which held Louisiana's doctrine of forum non conveniens applies in a "saving to suitors" clause case filed in state court. Next, we will review *Consolidated Rail Corp. v. Gottshall*.<sup>3</sup> In *Gottshall*, the Court authorized recovery for negligent infliction of emotional distress by a Federal Employers Liability Act (FELA)<sup>4</sup> worker, and therefore also a Jones Act seaman, provided the plaintiff was in the "zone of danger." Third, we will discuss *Howlett v. Birkdale Shipping Co., S.A.*<sup>5</sup> and a vessel's now limited duty to a longshore worker in a "turnover" case. Lastly, this article analyzes *McDermott, Inc. v. Am Clyde*,<sup>6</sup> in which the Court held a non-settling

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1. Of course, Congress may "speak back."
2. 114 S. Ct. 981 (1994).
3. 114 S. Ct. 2396 (1994).
4. 45 U.S.C. §§ 51-60 (1988).
5. 114 S. Ct. 2057 (1994).
6. 114 S. Ct. 1461 (1994).

joint tortfeasor is entitled to a proportionate credit against its liability when the plaintiff has already settled with another maritime, joint tortfeasor.

## II. *AMERICAN DREDGING CO. V. MILLER*: WHOSE LAW APPLIES IN A STATE COURT SAVING CLAUSE CASE?

### A. *Some Preliminary Points*

Let us begin with some non-controversial statements. Federal courts have the power to hear admiralty cases.<sup>7</sup> State courts<sup>8</sup> also have the power to hear most admiralty cases under the "saving to suitors" clause (saving clause).<sup>9</sup> However, state courts do not have subject matter jurisdiction over certain cases in which federal admiralty jurisdiction is "exclusive."<sup>10</sup>

Nevertheless, in the vast range of maritime cases (where admiralty jurisdiction is not exclusively vested in the federal courts), the courts of the great state of Louisiana may decide admiralty cases. Generally, a state court hearing a

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7. 28 U.S.C. § 1333(1) (1988). Cases tried in admiralty are tried without a jury. *See* Fed. R. Civ. P. 9(h). However, some maritime cases are tried in federal court "at law," under the § 1333(1) "saving to suitors" clause, if there is an independent basis of jurisdiction, such as diversity or the presence of a federal question, and/or if there is some other statutory basis for jurisdiction, such as the Jones Act, 46 U.S.C. app. § 688 (1988). In such cases, a jury trial may be available by right, U.S. Const. amend. VII, or by statute (for example, pursuant to the Jones Act). A jury trial may also be available if what would otherwise be a purely maritime matter, such as an unseaworthiness claim, is joined with a claim on which a jury trial is available, such as a Jones Act claim. *See* *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 83 S. Ct. 1646 (1963). Basically, where a jury trial is available the plaintiff has the option to treat the case as one at law and try it to a jury, or to designate the case as one in admiralty (under Fed. R. Civ. P. 9(h)) and try it to the court.

8. If there is a Jones Act claim (or a basis for federal jurisdiction other than 28 U.S.C. § 1333), the plaintiff has the further choice of proceeding either in admiralty in federal court without a jury, at law in federal court with a jury (or without, although a defendant presumably could demand one), or in state court with or without a jury.

9. *See* 28 U.S.C. § 1333(1) (1988). In a state court admiralty action the case may be tried to a jury. But, in Louisiana, under Louisiana Code of Civil Procedure article 1732(6), if the plaintiff designates the case as an admiralty action it must be tried to the court. In this regard Article 1732(6) is analogous to Fed. R. Civ. P. 9(h). Article 1732(6) applies in general maritime cases and Jones Act cases. *Parker v. Rowan Cos.*, 599 So. 2d 296 (La.), *cert. denied*, 113 S. Ct. 203 (1992). Moreover, an Article 1732(6) designation does not make the case removable, *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir.), *cert. denied*, 113 S. Ct. 467 (1992), or otherwise divest the state court of jurisdiction. *Cantrelle v. Kiva Constr. & Eng'g, Inc.*, 630 So. 2d 265 (La. App. 1st Cir. 1993). Thus in a state court action, as in a federal court action, the plaintiff may choose whether the case will be tried to a jury or the court.

10. Professor David Robertson of the University of Texas has listed the following areas as within the federal courts' "exclusive" admiralty jurisdiction: actions "in rem" against vessels or other maritime property, petitions to limit liability under 46 U.S.C. app. § 183-194 (1988 & Supp. V 1993), and suits against the United States under the Suits in Admiralty Act, 46 U.S.C. app. § 741-752 (1988), and the Public Vessels Act, 46 U.S.C. § 781-790 (1988). *See* David W. Robertson, *Selected Problems Presented by Admiralty and Maritime Litigation in State Courts*, Paper Presented to the Louisiana Judicial College 3 (June 8, 1994).

maritime case must apply maritime law, as set forth in federal statutes or as developed by the United States Supreme Court.<sup>11</sup> This is the so-called "reverse-*Erie*" doctrine,<sup>12</sup> born of the United States Supreme Court's famous decision in *Southern Pacific Co. v. Jensen*.<sup>13</sup> In a normal *Erie* case, a federal district court hearing a diversity case must apply state substantive law. In a reverse-*Erie* admiralty case, a state court generally applies federal substantive law. However, state law may "supplement" substantive maritime law where there is no direct conflict with "federal" law and no need for uniformity. In such a case, a court might apply state substantive law in a maritime case. This permissive substantive supplementing may be called, albeit a somewhat inaccurate label, the "maritime but local" doctrine.<sup>14</sup>

Under the "maritime but local" doctrine the Louisiana Supreme Court held, in *Green v. Industrial Helicopters, Inc.*,<sup>15</sup> that Louisiana Civil Code article 2317's civilian brand of strict liability applied in a maritime case.<sup>16</sup> The "maritime but local" doctrine is unclear, potentially unconfined, and often not raised in actual cases. For instance, if Article 2317 applies in a maritime matter, what about the Louisiana Product Liability Act (LPLA)?<sup>17</sup> Should a court look to the LPLA to define what makes a product unreasonably dangerous? Or, is substantive product liability law in maritime tort cases purely a matter of "federal" maritime law? The United States Supreme Court has held product liability is a part of maritime law,<sup>18</sup> but whose product liability law? In one recent case, *Mayo v. Nissan Motor Corp.*,<sup>19</sup> the Louisiana Third Circuit Court

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11. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917). See also David W. Robertson, *Admiralty and Federalism: History and Analysis of Problems of Federal-State Relations in the Maritime Law of the United States* (1970). State courts must apply entrenched federal precedent. See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955).

12. A state court hearing an admiralty case is bound to follow United States Supreme Court jurisprudence but is *not* bound by other inferior court decisions, including those of the federal district courts or courts of appeals.

13. 244 U.S. 205, 37 S. Ct. 524 (1917).

14. See, e.g., *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955).

15. 593 So. 2d 634 (La.), *cert. denied*, 113 S. Ct. 65 (1992).

16. *Id.* at 636. Cf. *Rodrigue v. Legros*, 563 So. 2d 248 (La. 1990). Presumably, in an arguably "maritime but local" matter a federal court would *not* be bound by a state court decision, including a state supreme court decision, that local law applied. Thus, the United States Fifth Circuit Court of Appeals, or even a federal district court, might go its own way if presented with the issue raised in *Green*.

17. La. R.S. 9:2800.52-.59 (1991).

18. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295 (1986) (holding purely economic loss is *not* recoverable in a maritime product liability action).

19. 639 So. 2d 773 (La. App. 3d Cir. 1994). The Louisiana Supreme Court granted writs and remanded the case to the third circuit to consider the defendant's third party demand against the plaintiff's husband. *Mayo v. Nissan Motor Corp.*, 644 So. 2d 661 (La. 1994). On remand, the third circuit recognized the third party demand because admiralty law does not recognize interspousal immunity. Even though Louisiana Revised Statutes 9:291 does provide for interspousal immunity, the immunity is personal and does not extend to third party contribution claims. *Mayo v. Nissan Motor Corp.*, No. 93-852, 1994 WL 698597 (La. App. 3d Cir. Dec. 14, 1994).

of Appeal applied the LPLA in a maritime tort case, stating that, as long as no federal policy would be impeded by application of state law, a state court hearing a maritime case should apply state law.<sup>20</sup> The court, in *Mayo*, also applied Louisiana law relating to the imputation of a husband's fault to his wife, refusing to reduce the wife's recovery by the husband's fault under local law.<sup>21</sup> However, the court refused to apply Louisiana Civil Code article 2324(B), Louisiana's truncated solidarity in tort provision, reasoning full joint and several liability was part and parcel of maritime law, which could not be "supplemented" by state law on the same subject.<sup>22</sup> The third circuit, in *Mayo*, felt that, in a saving clause case in state court, *state* substantive law should be applied *unless* there is some important federal maritime policy that would be implicated and affected by the application of state law. Thus, under *Mayo*, state law arguably would be applicable by default in state saving clause cases *unless* a party established the *need* to apply federal maritime law. That is, whoever wants to apply "federal" law in a maritime case must establish that maritime law preempted (displaced) the state law that would otherwise apply (even in a maritime case) by default. One may anticipate the increasing frequency with which "maritime but local" questions will arise given the reappearance of the gambling vessel on Louisiana's waters.<sup>23</sup>

Switching gears from substance to procedure, one must ask whose procedure applies in a maritime case? Normally, one assumes federal procedure would apply in federal court and state procedure would apply in state court.<sup>24</sup> But is this the case when the state court is hearing an admiralty claim? What about forum non conveniens? Whose forum non conveniens rules apply in what types of cases? Let us begin in federal court.

#### B. Forum Non Conveniens and Miller: Whose Law?

A federal court may transfer venue to a more appropriate forum within the federal system.<sup>25</sup> In fact, under the current version of the federal venue statute, a court probably has greater discretion to transfer a case to another federal court than it formerly had to dismiss under forum non conveniens.<sup>26</sup> Thus, in an admiralty suit in federal court, a defendant may move to transfer venue if there

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20. *Mayo*, 639 So. 2d at 784.

21. *Id.* at 786-88. Cf. La. Civ. Code art. 2344.

22. *Mayo*, 639 So. 2d at 788-89. What about the standard for determining a shipowner's liability in a slip and fall case? Is Louisiana Revised Statutes 9:2800.6 applicable or is a maritime slip and fall case purely a question of maritime law? See *Kermarec v. Compagnie Gen. Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959).

23. See, e.g., Frank L. Maraist & Thomas C. Galligan, Jr., *Maritime Roulette*, 42 La. B.J. 127 (1994).

24. See Robertson, *supra* note 10, at 5.

25. See 28 U.S.C. § 1404 (1988).

26. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253, 102 S. Ct. 252, 265 (1981). See also *American Dredging Co. v. Miller*, 114 S. Ct. 981, 986 n.2 (1994).

is a more convenient domestic federal forum. In a transnational suit, a federal court cannot transfer venue to another country but still could dismiss a case on the basis of forum non conveniens. That is, the court, as a matter of discretion, may decide it would be more convenient to the parties and preferable to the administration of justice if the suit went forward in some other jurisdiction (some other sovereign's jurisdiction).<sup>27</sup>

What happens in a saving clause case prosecuted in state court? Is forum non conveniens available in a state court admiralty action? Not in Louisiana. Under Louisiana Code of Civil Procedure article 123(C), forum non conveniens is not available in a Jones Act or maritime case filed in state court. But is Article 123(C) valid? Put differently, must a state court hearing a maritime matter apply federal forum non conveniens rules despite the prohibition in Article 123(C)? The United States Fifth Circuit Court of Appeals said state courts *must* follow federal forum non conveniens rules in reverse-*Erie*, saving clause cases filed in state court.<sup>28</sup> The Louisiana Supreme Court, however, refused to follow the federal courts' decisions on this point, preferring to dance to its own beat in *Miller v. American Dredging Co.*<sup>29</sup>

In *Miller*, a Mississippi resident moved to Pennsylvania where he found work with defendant, a Pennsylvania corporation with its principal place of business in New Jersey. Miller was injured while working on the Delaware River (less successful in that venue than George Washington had been). Miller returned to Mississippi, later filing a Jones Act and general maritime claim in state court in New Orleans. The district court dismissed the claims, relying on federal forum non conveniens rules.<sup>30</sup> The Louisiana Fourth Circuit Court of Appeal affirmed.<sup>31</sup> The Louisiana Supreme Court, in an opinion authored by Justice Marcus, unanimously reversed.<sup>32</sup>

In a 7-2 decision, the United States Supreme Court affirmed the Louisiana Supreme Court.<sup>33</sup> Justice Scalia wrote the majority opinion, stating a state may adopt such remedies in admiralty cases as it sees fit "so long as it does not

27. Of course a federal court can condition its forum non conveniens "dismissal" on such things as the availability of an alternative forum and the defendant's willingness to waive the statute of limitations (the prescriptive period) or the applicability of laches in that other forum. As to transnational Jones Act cases, see 46 U.S.C. app. § 688(b) (1988). See also David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 Tex. Int'l L.J. 353 (1994).

28. See, e.g., *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). See also the cases cited in Robertson, *supra* note 10, at 12 n.43.

29. 595 So. 2d 615 (La. 1992), *aff'd*, 114 S. Ct. 981 (1994).

30. *Id.* at 616.

31. *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991).

32. *Miller*, 595 So. 2d at 619. *But see Exxon Corp. v. Chick Kam Choo*, 881 S.W.2d 301 (Tex. 1994) (holding a state court must entertain a motion to dismiss based on forum non conveniens despite a state open forum statute).

33. *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994).

attempt to make changes in the 'substantive maritime law.'<sup>34</sup> The opinion further stated: "That proviso is violated when the state remedy 'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.'<sup>35</sup> This is the famous *Jensen* preemption test, used to determine when federal maritime law occupies the field, thereby excluding state law.

Given these generalities, the Court in *Miller* examined forum non conveniens to decide whether that doctrine was a "characteristic feature" of admiralty law and concluded it was not. The doctrine of forum non conveniens originated in Scottish estate cases, not admiralty cases. Additionally, in the United States, courts have often applied forum non conveniens outside the admiralty sphere.<sup>36</sup> Although allowing Louisiana to refuse to apply forum non conveniens in admiralty cases would produce "disuniformity,"<sup>37</sup> it still would not impermissibly interfere with the proper harmony and uniformity of maritime law. The Court noted the value of uniformity in admiralty is not absolute.<sup>38</sup> The need for uniformity may, and here did, take a back seat to state autonomy for two important reasons that made forum non conveniens "quite dissimilar from any other matter . . . [the Court had] held to be governed by federal admiralty law: [1] it is procedural rather than substantive, and [2] it is most unlikely to produce uniform results."<sup>39</sup>

Let us take the second of the Court's reasons—even if federal forum non conveniens rules were mandatory, there still would not be "uniformity." The Court pointed out that people do not rely on federal forum non conveniens rules in deciding where to sue or in considering where they might be exposed to suit. This is because forum non conveniens is a discretionary doctrine and forum non conveniens decisions are based on multifarious factors, making forum non conveniens decisions very fact sensitive. This combination "make[s] uniformity and predictability of outcome almost impossible."<sup>40</sup>

As to the first factor—dissimilarity from prior cases in which federal law applied—the Court noted forum non conveniens was essentially a "supervening venue provision."<sup>41</sup> It stated: "[u]niformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world."<sup>42</sup> The

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34. *Id.* at 985 (quoting *Madruga v. Superior Court*, 346 U.S. 556, 561, 74 S. Ct. 298, 301 (1954)).

35. *Id.* (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917)).

36. *Id.* at 986.

37. *Id.* at 987.

38. *Id.*

39. *Id.* at 988.

40. *Id.* at 989.

41. *Id.* at 988.

42. *Id.*

Court distinguished decisions requiring state courts hearing admiralty cases to apply federal law on the burden of proof and affirmative defenses. "[F]orum non conveniens does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take."<sup>43</sup>

The Court also noted state courts deciding cases under the FELA (the statute on which the Jones Act is based and which the Jones Act incorporates) determine the availability of forum non conveniens under state, not federal, law because forum non conveniens is a matter of "local policy."<sup>44</sup> Additionally, the Court expressly refused to hold federal forum non conveniens rules were inapplicable in Jones Act cases but applicable (mandatory) in a general maritime action.<sup>45</sup>

Finally, the Court refused the Solicitor General's request to limit its holding to cases involving domestic entities. Limiting the decision would have explicitly left open the door to later hold federal forum non conveniens rules were binding in transnational cases. As Justice Scalia wrote when dismissing the Solicitor General's request: "We think it unnecessary to do that. Since the parties to this suit are domestic entities it is quite impossible for our holding to be any broader."<sup>46</sup>

Justice Souter concurred in *Miller*, pointing out that the characterization of a rule as substantive or procedural should usually be determinative of whether state or federal law applies in an admiralty case. But, when the substance/procedure distinction is obscure, federal preemption "will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce."<sup>47</sup> This is a variation on the traditional *Jensen* preemption theme.

Justice Stevens concurred in part and concurred in the judgment.<sup>48</sup> Justice Stevens would generally jettison the *Jensen* preemption doctrine, relying instead on general notions of federal preemption to decide if federal or state law applied in admiralty cases. Of course, Justice Stevens' position may have meaning in *any* admiralty action, *not* just one filed in state court. Justice Stevens also noted that forum non conveniens is a procedural matter.<sup>49</sup>

Justice Kennedy, joined by Justice Thomas, dissented. Justice Kennedy pointed to the need in admiralty cases for "uniformity and the elimination of unfair forum selection rules."<sup>50</sup> He concluded forum non conveniens in

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43. *Id.* at 988-89.

44. *Id.* at 989 (quoting *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4, 71 S. Ct. 1, 2 (1950)).

45. *Id.* at 990.

46. *Id.*

47. *Id.* (Souter, J., concurring).

48. Justice Stevens concurred in part II.C of the majority opinion.

49. *American Dredging Co. v. Miller*, 114 S. Ct. 981, 991-92 (Stevens, J., concurring in part).

50. *Id.* at 993 (Kennedy, J., dissenting).



admiralty cases was "an essential and salutary feature of admiralty law,"<sup>51</sup> serving "objectives that go to the vital center of the admiralty pre-emption doctrine,"<sup>52</sup> such as comity among nations and avoiding obstructions to maritime commerce. Justice Kennedy concluded Louisiana's anti-forum non conveniens (open forum) article improperly affected those values.

C. *Implications of Miller: Is It Limited to Forum Non Conveniens?*

The clear holding in *Miller* is: when a domestic maritime suit is filed in state court, the state court may follow its own forum non conveniens rules. But what about the transnational case, especially given the final part of Justice Scalia's majority opinion? Since *Miller* was a domestic case, the holding does not apply to transnational cases. Might federal forum non conveniens rules be applicable, i.e., mandatory, in a transnational case? Justice Kennedy saw nothing in the Court's reasoning to so limit the decision.<sup>53</sup> Likewise, Professor David Robertson does not believe *Miller* should be limited to domestic cases.<sup>54</sup> To hold forum non conveniens is not mandatory in state domestic cases makes sense because now federal "domestic" cases are transfer of venue cases, *not* forum non conveniens cases.<sup>55</sup> Thus it would have been at least somewhat anomalous to require forum non conveniens in state admiralty cases where *no* such doctrine (at least not by that name) is applicable in federal cases. Consequently, the place forum non conveniens now matters most in federal cases is in transnational cases, and *Miller* was not such a case. Perhaps then the issue whether federal forum non conveniens rules must apply in transnational state saving clause cases really is open. But, if so, why all the general discussion of forum non conveniens in *Miller*? Justice Kennedy and Professor Robertson are right. There is nothing in *Miller* to indicate its holding is limited to the purely domestic case. So what does *Miller* mean? Will all states follow Louisiana's lead and enact admiralty open forum statutes? Or, will only a few significant maritime states so provide, thereby taking a more meaningful role in the development of the American law of admiralty?

Even more generally, does *Miller* signal that the *Jensen* evaluative preemption test lives on and is applicable to *both* state procedural and state substantive rules? The majority opinion, on its face, Justice Souter's concurrence, and the dissent would indicate this is the case. However, perhaps the spirit of the majority opinion, the main drift of Justice Souter's concurrence, and the express point of Justice Stevens' concurrence are that the Supreme Court is willing, by analogy, to tolerate what happens in real *Erie* cases? That is, is the Court willing to allow the states in reverse-*Erie* cases to apply their own

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51. *Id.* (Kennedy, J., dissenting).

52. *Id.* at 995 (Kennedy, J., dissenting).

53. *Id.* at 996 (Kennedy, J., dissenting).

54. Robertson, *supra* note 10, at 16-18.

55. See 28 U.S.C. § 1404(a) (1988); Charles Alan Wright, *Law of Federal Courts* § 44, at 278 (5th ed. 1994).

procedural rules, while applying federal substantive admiralty rules (except where the "maritime but local" doctrine allows the state court to apply state substantive law)? Remember, the fact that forum non conveniens was a procedural rule was critical to Justice Scalia in the majority opinion and to both Justices Souter and Stevens in their concurrences. Professor Robertson emphasizes the procedural versus substantive aspects of the decision.<sup>56</sup> Assuming the substance/procedure distinction is now critical in reverse-*Erie* cases, the task at the margin will be to decide which rules are substantive and which rules are procedural.<sup>57</sup>

But, if Justice Scalia's opinion in *Miller* is taken literally, the *Jensen* preemption doctrine lives on, alongside the "maritime but local" doctrine, in matters both substantive and procedural. If that is the case, does *Miller's* tolerance for state autonomy signal not only an expanded role for state courts in developing their own procedures in maritime cases but perhaps also greater power to develop and apply their own substantive rules as well? After all, the Court did defer to state procedures. Was the test laid out by the Louisiana Third Circuit Court of Appeal for application of Louisiana substantive law to a maritime case in *Mayo* correct? Recall that court would apply state law in a maritime case as long as there was *not* some important federal maritime policy that would be implicated and affected by the application of state law. Further, in *Mayo*, state law seemed applicable in a maritime case by default.

Naturally, uniformity is affected whenever states are free to apply their own law to maritime matters. Indeed, the development of the "maritime connection"

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56. Robertson, *supra* note 10, at 37-45.

57. For instance, is the question of prejudgment interest, for which La. R.S. 13:4203 provides, procedural? *See id.* at 23-34. Robertson has noted the "federal courts have developed a potentially confusing body of rules dealing with awards of prejudgment interest." *Id.* at 23. If these rules are potentially confusing even to Professor Robertson, it is time to return to dry land. In the wake of *Miller*, Professor Robertson has opined:

[A] matter as plausibly "procedural" as prejudgment interest could be governed by state-law rules without offending the [C]onstitution's supremacy clause or any other applicable preemption doctrine. It would be far clearer (and in many senses fairer) if state courts followed their normal approach to prejudgment interest in saving clause cases [in Louisiana, by awarding interest from the date of judicial demand].

*Id.* What about the standards of appellate review? *See generally id.* at 34-38. As with prejudgment interest, the word "confusing" comes to mind. *See id.* As of the writing of this paper, the most recent case we found was Judge Yelverton's excellent opinion in *Cormier v. Cliff's Drilling Co.*, 640 So. 2d 552 (La. App. 3d Cir. 1994). In *Cormier*, a Jones Act/unseaworthiness case, the court held the proper standard of review of a liability determination is the state "manifest error standard." *Id.* at 555 (citing *Daigle v. Coastal Marine, Inc.*, 488 So. 2d 679 (La. 1986)). In reviewing the jury's findings, the court followed the federal Jones Act jurisprudence dealing with substance/burden of proof regarding the "slightest" negligence and the plaintiff's featherweight burden of proof. The *Cormier* court also reviewed the jury's damage award using normal state appellate standards of review. *Id.* at 558. *See also* Robertson, *supra* note 10, at 38. Of course state courts are increasingly deferential to jury and trial court damage awards, especially general damage awards. *See Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257 (La. 1993). Following *Miller* one would hazard to guess state courts *are* free to apply state standards of appellate review in saving clause cases.

test for maritime jurisdiction in tort cases reflects the need for uniformity as one of the underlying bases of the existence of maritime jurisdiction.<sup>58</sup> It is true that in *Miller* the Court noted that, since *forum non conveniens* is a fact sensitive, discretionary inquiry, uniformity of result is not particularly threatened by application of state law. However, although not "discretionary," many tort "standards" rely on the word "reasonable" for their content. Thus, they are fact sensitive and, arguably, unlikely to produce uniform results, at least in particular cases. What one fact-finder considers unreasonable conduct another may decide is reasonable. One wonders whether federal maritime law is less unpredictable when based upon the amorphous concept of "reasonableness"? Does that mean state courts are freer, after *Miller*, to apply state tort principles in maritime cases?

Alternatively, perhaps maritime actors rely on federal *substantive* law in planning both their primary activities (what to do and how, where, when, and how much to do it) and their secondary activities (where and whom to sue), therefore making federal substantive law more generally applicable in maritime cases. Perhaps (federal) maritime law is shaped by decision makers (when juries do not hear and decide the cases) who are more experienced in the ways of maritime law, thus adding a measure of uniformity and predictability.<sup>59</sup> But if this is the case, then it would seem that the Louisiana Supreme Court's decision in *Green*, allowing a state court hearing an admiralty case to supplement maritime law with state strict liability, is wrong because such practice produces nonuniformity and uncertainty. Likewise, *Mayo*, insofar as it applies state product liability law, is potentially wrong. Finally, one might conclude even the leading "maritime but local" case, *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,<sup>60</sup> which allowed state insurance law to apply to a maritime dispute, is wrong. (One notes that, under a substance/procedure handling of these cases, they are all wrong because each involved substantive law.) But, until reversed, *Wilburn Boat Co.* is not wrong. There is a "maritime but local" doctrine and *Miller* arguably represents its expansion. At least it signifies the doctrine is not dead.

Interestingly, two cases out of the United States First Circuit Court of Appeals support this contention regarding the possible post-*Miller* expansion of the "maritime but local" doctrine. In one, *Favorito v. Pannell*,<sup>61</sup> the court considered a claim alleging negligent retention of a maritime employee and negligent entrustment, apparently applying Rhode Island tort law. In a footnote, the court stated:

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58. See, e.g., *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654 (1982).

59. One notes the weakness of the argument whenever juries hear admiralty cases in federal court, unless one accepts the theory the federal jury, as controlled by the judge, may be more attune to national needs.

60. 348 U.S. 310, 75 S. Ct. 368 (1955).

61. 27 F.3d 716 (1st Cir. 1994).

Absent a federal liability scheme, the governing substantive law in an admiralty action is drawn from common law tort principles which comport with the tenets of maritime tort law. Rhode Island provides the principal source of tort law relating to an accident within its coastal waters. Ultimately, of course, federal common law supersedes a particular state law formulation with which it conflicts.<sup>62</sup>

The first two sentences sound remarkably like the third circuit's test for application of state law in *Mayo*—i.e., absent a federal scheme (rule), state law is applied by default. One might be tempted to dismiss the third sentence as mere truism. But, revealingly, after *Favorito* the First Circuit itself deviated from this so-called truism.

In *In re Ballard Shipping Co. v. Beach Shellfish*<sup>63</sup> the First Circuit applied state law in a maritime case even though state law conflicted with federal maritime common law. In *In re Ballard Shipping Co.*, the court allowed shellfish dealers to pursue a claim for purely economic losses arising out of oil pollution.<sup>64</sup> The district court had held the economic loss claims were preempted by the rule of *Robins Dry Dock & Repair Co. v. Flint*.<sup>65</sup> In reversing, the First Circuit pointed to *Miller*, noting: (1) there was no applicable federal statute; (2) the *Robins Dry Dock* rule was not a characteristic feature of admiralty because it neither originated in admiralty nor was exclusively applied in admiralty; and, (3) the application of state law did not interfere "with the proper harmony and uniformity" of maritime law because "familiar tort limitations of foreseeability and proximate cause"<sup>66</sup> would inhibit undue extension of liability. *In re Ballard Shipping Co.* goes further than *Miller*. Like *Miller*, it tolerates application of state law in a maritime case even where that law conflicts with applicable federal law. However, in *In re Ballard Shipping Co.*, the conflict tolerated is between substantive, not procedural, rules.<sup>67</sup>

*Miller*, like any case worth its salt, means further litigation. To the extent *Miller* can be interpreted as an invitation to state courts to more freely apply state law (both substantive and procedural) in saving clause cases, one can anticipate petitions for certiorari asking the United States Supreme Court to clarify the circumstances in which local law may apply in a maritime case. Interestingly, in the three other cases discussed below, the Court decided

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62. *Id.* at 719 n.2 (citations omitted).

63. 32 F.3d 623 (1st Cir. 1994).

64. The dealers filed suit seeking recovery both for negligence under the general maritime law and the common law of Rhode Island, as well as for economic loss under the Rhode Island Environmental Injury Compensation Act. The statutory claims were the focus of the appeal. *Id.* at 624-26.

65. 275 U.S. 303, 48 S. Ct. 134 (1927).

66. *Ballard Shipping Co.*, 32 F.3d at 630.

67. See also *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622 (3d Cir. 1994) (holding state survival and wrongful death statutes apply in a case involving a non-seaman's death in territorial waters while using a jet ski).

questions of federal maritime *tort* law without a peep about the fact, or possibility, of supplemental local law.

III. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA AND THE JONES ACT: *CONSOLIDATED RAIL CORP. V. GOTTSBALL*<sup>68</sup>

Congress passed the FELA to address on the job injuries suffered by railroad workers. The FELA provides railroad workers with a tort remedy against their employers when they suffer "injury"<sup>69</sup> caused by negligence for which the employer is responsible.<sup>70</sup> While the FELA provided the worker with a tort remedy and not workers' compensation benefits, it still did away with various defenses prevalent in negligence actions, such as contributory negligence as a bar to recovery,<sup>71</sup> assumption of the risk,<sup>72</sup> and the fellow servant doctrine.<sup>73</sup> Moreover, the plaintiff worker establishes causation in a FELA case if the defendant's negligence "played any part, no matter how small, in bringing about or actually causing the injury or damage."<sup>74</sup> Finally, for now, the courts have made clear that although the FELA is based on common-law tort principles, "courts should liberally grant relief."<sup>75</sup> Given the breadth of the language used in the FELA and its reliance on common-law terms like "negligence" and "injury," the United States Supreme Court has determined the FELA has built in malleability allowing it to respond to changes in the common-law tort world.<sup>76</sup> But, while the FELA is based, in part, on common-law concepts, those must be developed and applied in light of the FELA's "broad remedial scope."<sup>77</sup>

In 1920, Congress turned its attention to injured seamen and passed the Jones Act,<sup>78</sup> granting a seaman who suffered "personal injury"<sup>79</sup> an action against his or her employer. Apparently happy with its FELA work, Congress

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68. 114 S. Ct. 2396 (1994).

69. 45 U.S.C. § 51 (1988).

70. *Id.*

71. *Id.* § 53.

72. *Id.* § 54.

73. *Id.*

74. Pattern Jury Instructions (Civil Cases) § 5.1, at 64 (West 1993). See *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 507-08, 77 S. Ct. 443, 449-50 (1957). The same relaxed burden of proving causation applies in the Jones Act. See Pattern Jury Instructions, *supra*, § 4.4, at 41.

75. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 367 (3d Cir. 1993), *rev'd*, 114 S. Ct. 2396 (1994).

76. In regard to the general issue of the FELA's and the Jones Act's expanding coverage, the United States Supreme Court has said: "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398 (1958).

77. *Gottshall*, 988 F.2d at 369.

78. See 46 U.S.C. app. § 688 (1988).

79. *Id.* § 688(a).

provided that, in the seaman's action, "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."<sup>80</sup> Thus the Jones Act incorporated the substantive standards of the FELA. Consequently, the Jones Act provides the injured seaman with a negligence action against his or her employer. Logically, in Jones Act cases the courts have looked to judicial interpretations of the FELA. Therefore, any major decision interpreting the FELA's substantive meaning is directly relevant to the maritime personal injury lawyer seeking to divine the meaning of the Jones Act. Just such a case is discussed next.

With the rise in claims for negligent infliction of emotional distress over the past thirty or forty years, the issue arose whether "injury" in the FELA and "personal injury" in the Jones Act included an injured railway worker's or seaman's claim for emotional distress caused by his employer's negligence. In non-FELA and non-Jones Act negligent infliction cases, various common-law tests developed: impact, zone of danger, physical impact, and bystander.

Under the impact test a mental injury plaintiff<sup>81</sup> is entitled to recover in negligence for purely emotional distress, provided there was some impact, however slight, with the person of the plaintiff. The zone of danger rule restricts recovery to only those mental injury victims who were in the zone of physical injury created by defendant's negligence.<sup>82</sup> The physical manifestation rule requires the mental injury plaintiff to establish that his negligently inflicted mental injury is accompanied by some physical manifestation, although courts following this rule have been liberal in finding physical manifestation.<sup>83</sup> The various bystander rules originated, for the most part, in the California Supreme Court's decision in *Dillon v. Legg*.<sup>84</sup> The bystander rules authorize recovery of emotional injury to certain people who watch or come upon the scene of an accident and witness the plight of the direct trauma victim. Usually, in order to recover, the bystander must suffer foreseeable and serious emotional distress and the bystander must have a close relationship to the direct trauma victim.<sup>85</sup>

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80. *Id.* By providing the injured seaman with a negligence action against his or her employer, usually the vessel owner or charterer, Congress filled what appeared to be a gap in the law. See *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903).

81. In a negligent infliction case, the plaintiff has suffered only emotional distress. If there is physical injury accompanying the emotional distress, then the mental distress is recoverable because it is parasitic to the personal injury claim. Likewise, in some states emotional injury is recoverable for property damage. In Louisiana, even watching the destruction of property can give rise to an emotional distress claim. See, e.g., *Turgeon v. Pan Am. World Airways, Inc.*, 764 F.2d 1084 (5th Cir. 1985).

82. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2406 (1994).

83. See the cases cited in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 373-74 (3d Cir. 1993), *rev'd*, 114 S. Ct. 2396 (1994).

84. 441 P.2d 912 (Cal. 1968).

85. See, e.g., La. Civ. Code art. 2315.6. See also Martha Chamallis & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990).

In yet another type of emotional distress case, an active participant in an accident sues to recover for emotional distress caused by being in the accident.<sup>86</sup> In the paradigm case, the defendant places a person, the trauma victim, in a position of risk. The mental distress plaintiff then becomes the instrumentality through which the risk to the trauma victim materializes. The mental distress plaintiff physically injures the trauma victim and suffers emotional injury as a result. For instance, a school bus negligently lets a child off in the middle of the road. The plaintiff, a driver, hits and injures, or kills, the trauma victim, thereafter sustaining severe emotional distress.<sup>87</sup>

Given the confusion among the common-law authorities, it was not surprising to find division among the federal courts on what circumstances would justify recovery for negligent infliction of emotional distress under the FELA and the Jones Act. While most courts had concluded emotional injury was actionable as "injury" under the FELA and as "personal injury" under the Jones Act, there was no consensus on what test should apply to determine one's right to recover.<sup>88</sup> The United States Fifth Circuit Court of Appeals had not clearly adopted a rule, although it had indicated a willingness to allow recovery.<sup>89</sup> Louisiana state courts sitting in admiralty had applied the zone of danger rule.<sup>90</sup> Last year the United States Supreme Court granted certiorari in two negligent infliction FELA cases. Both had been decided by the United States Third Circuit

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86. See *Althoff v. Consolidated Rail Corp.*, No. CIV-A-87-4385, 1988 WL 61734, at \*1 (E.D. Pa. June 13, 1988).

87. The reader will recognize that these are the facts of *Clomon v. Monroe Sch. Bd.*, 572 So. 2d 571 (La. 1990). See also *Guillory v. Arceneux*, 580 So. 2d 990 (La. App. 3d Cir. 1991).

88. See *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 365 (3d Cir. 1993), *rev'd*, 114 S. Ct. 2396 (1994). The Third Circuit in *Gottshall* noted there was some authority for the proposition that emotional injury should only be recoverable in a FELA case if the defendant's conduct was outrageous. *Id.* at 363 (citing *Elliott v. Norfolk & W. Ry.*, 910 F.2d 1224, 1229 (4th Cir. 1990)). The Third Circuit also noted the proposition that emotional injury should only be recoverable if the defendant's conduct constituted "unconscionable abuse." *Id.* at 362 (citing *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 540 (6th Cir. 1990)). The logic of both *Elliott* and *Adams* is "flawed," *id.* n.3, because their tests are more akin to the test for recovery of intentional infliction of emotional distress, not negligent infliction.

89. See *Gough v. Natural Gas Pipeline Co. of Am.*, 996 F.2d 763 (5th Cir. 1993) (recognizing recovery under the "impact" rule); *Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir. 1992) (denying recovery under the "impact" rule because plaintiff suffered no physical contact); *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (en banc) (refusing to decide under what circumstances recovery of damages for emotional injuries is permitted because plaintiffs failed to establish their claim); *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989) (denying recovery to plaintiff who alleged he was in the zone of danger but who did not allege he was in fear for his own safety); *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986) (refusing to foreclose recovery for cancerphobia).

90. *Gibbs v. Petroleum Helicopters, Inc.*, 629 So. 2d 437 (La. App. 3d Cir. 1993). *Cf. Evans v. Central Marine Serv., Inc.*, 626 So. 2d 428 (La. App. 4th Cir. 1993) (holding a seaman not in the zone of danger may not recover for emotional distress).

Court of Appeals: *Gottshall v. Consolidated Rail Corp.*<sup>91</sup> and *Carlisle v. Consolidated Rail Corp.*<sup>92</sup>

In *Consolidated Rail Corp. v. Gottshall*,<sup>93</sup> the Supreme Court reversed both cases, remanding one, *Gottshall*, for reconsideration in light of the Court's holding and remanding the other, *Carlisle*, for dismissal.<sup>94</sup> Importantly, the Supreme Court held "injury" in the FELA includes purely emotional injury, but it limited recovery in such cases to those who were in the zone of danger.<sup>95</sup> Presumably, the same standard would be applicable in Jones Act negligent infliction cases. Before examining and discussing the Supreme Court's decision in *Gottshall*, one should consider the facts and holdings of each case as well as the Third Circuit's decisions.

In *Gottshall*, a worker, Johns, suffered a heart attack while working without breaks in terrible heat for an extended period. Johns, who was fifty-six years old, stood five feet, seven and one-half inches tall and weighed 187 pounds. Previously, a Conrail doctor had examined Johns and knew the following facts: Johns suffered from high blood pressure; he suffered from athero or arthiosclerotic cardiovascular disease; and he was on medication.<sup>96</sup> Like Johns, most of the rest of the work crew were in their fifties and overweight.<sup>97</sup> Nonetheless, Conrail sent the men out to replace rail, under time pressure, in a remote, uncovered area in ninety-seven degree, humid weather. Because of the time pressure, the men were not allowed to take breaks but were allowed to get water on an as-needed basis. After two and one-half hours of continuous work, Johns collapsed. The other workers stopped and assisted Johns, who regained consciousness. The supervisor, Norvick, ordered the men, other than Johns, back to work.<sup>98</sup> Five minutes later Johns stood up and collapsed again. Johns' friend of fifteen years, Gottshall, rushed to his aid. The Third Circuit's description of the scene is chilling:

Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth. Gottshall realized Johns was suffering a heart attack and began cardiopulmonary resuscitation. At one point Gottshall managed to restart Johns' heart, but only briefly. Although Gottshall was emotionally perturbed, and at times crying, he continued the cardiac procedure for about forty minutes while waiting for medical help.<sup>99</sup>

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91. 988 F.2d 355 (3d Cir. 1993).

92. 990 F.2d 90 (3d Cir. 1993).

93. 114 S. Ct. 2396 (1994).

94. *Id.* at 2411.

95. *Id.* at 2410-11.

96. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 376 (3d Cir. 1993).

97. *Id.* at 358.

98. *Id.*

99. *Id.* The next day Gottshall was reprimanded for providing CPR to Johns. Interestingly,



When Norvick realized Johns needed medical attention Norvick had to leave the job site because Conrail had taken the nearest radio base station off the air for repairs. By the time medical help arrived, Johns was dead.<sup>100</sup>

Johns' corpse was covered and laid "in the open, under the hot sun and in full view of the men until the coroner arrived, some three hours later."<sup>101</sup> The coroner pronounced Johns dead of a heart attack brought on by the heat, humidity, and heavy physical exertion. The coroner concluded prompt medical attention would have significantly improved Johns' chance of survival. After the coroner completed his examination, Gottshall and some others carried Johns' corpse to the ambulance.<sup>102</sup>

Over the next few days, Gottshall was forced to work under similar hot, humid working conditions without breaks. He became preoccupied with what had happened to his friend Johns, worrying the same thing might happen to him. A few days after Johns' funeral Gottshall left work, feeling ill. He was later admitted to a psychiatric hospital where he spent three weeks suffering from a major depression and post traumatic stress syndrome. Gottshall lost forty pounds during the ordeal.<sup>103</sup>

Gottshall sued Conrail for his emotional distress. The federal district court granted Conrail's motion for summary judgment holding the FELA did not provide Gottshall with a remedy.<sup>104</sup> The Third Circuit, in an excellent opinion by Judge Nygaard, reversed. The court of appeals expressly refused to bind itself to any one of the common-law negligent infliction of emotional distress tests. Instead, the court synthesized the jurisprudence, setting forth a test under which "[t]he issue is whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious emotional injury."<sup>105</sup> The Third Circuit derived its test from what it determined to be the ultimate aim of the various common-law emotional distress tests: "to glean the meritorious [claims] from the feigned and frivolous."<sup>106</sup> The Third Circuit's threshold test was a totality of the factors test which included a consideration of the various

Conrail had earlier scheduled a CPR training class for the crew but then canceled it because of liability concerns. Regarding Gottshall's emotional state, the court said:

From the outset, the incident hit Gottshall hard. Other workers noticed he was emotional and upset during the ordeal. While he was giving CPR to Johns, he kept repeating, "Come on Dick, breathe, breathe." Even as the work crew returned from the worksite hours after Johns had died, a worker noticed Gottshall was still crying.

*Id.* at 359.

100. *Id.*

101. *Id.*

102. *Id.*

103. "Gottshall was having suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving home." *Id.* at 360.

104. *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa. 1991).

105. *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 371 (3d Cir. 1993).

106. *Id.* at 369.

common-law negligent infliction tests.<sup>107</sup> After the plaintiff met the threshold test, the Third Circuit would then have had courts analyze emotional distress claims under the traditional elements of negligence, focusing particularly on the foreseeability of the plaintiff's emotional injury. In the case before it, the Third Circuit thought Gottshall had crossed the threshold; there were sufficient indicia that his claim was genuine. Moreover, the Third Circuit believed there were jury questions concerning duty, breach, and cause.<sup>108</sup>

In essence, the Third Circuit, in *Gottshall*, analyzed the purposes of the various emotional distress rules in light of the underlying, remedial purpose of the FELA, and inductively arrived at a new, coherent test for negligent infliction in FELA cases. The new test consisted of a genuineness threshold which would include consideration of the other, more traditional tests as well as application of the general concepts of negligence. One might conclude the Third Circuit's *Gottshall* opinion represents common-law judging at the highest level.

In *Carlisle*, the plaintiff was a train dispatcher at Conrail's South Philadelphia yards. Carlisle also worked as a supervisor and dispatcher. It was Carlisle's job to troubleshoot and see that passengers and cargo moved safely and timely through the system.<sup>109</sup> Dispatchers in Conrail's Philadelphia yards frequently complained about stress and poor working conditions. Other dispatchers and supervisors in the Philadelphia offices had suffered "cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia."<sup>110</sup> Indeed, the Federal Railway Administration had criticized Conrail's outdated equipment and hazardous working conditions.<sup>111</sup>

Carlisle worked long and erratic hours under what he alleged was an "abusive, alcoholic supervisor."<sup>112</sup> Carlisle began to experience "insomnia . . . headaches, depression, . . . and . . . weight loss."<sup>113</sup> After an extended period during which he was required to work twelve- to fifteen-hour shifts for weeks at a time, Carlisle suffered a nervous breakdown.<sup>114</sup> He sued Conrail, alleging his employer's negligent failure to provide a safe work place caused his emotional distress. The district court submitted the case to a jury which returned a \$386,500 verdict for Carlisle.<sup>115</sup> The Third Circuit affirmed in light of *Gottshall* stating:

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107. In *Gottshall* itself the Third Circuit considered Gottshall's claims under the bystander, participant, and physical manifestation rules. *Id.* at 370-74.

108. *Id.* at 374-79. Judge Roth, who later wrote the majority opinion in *Carlisle*, concurred in part. Judge Roth agreed that under certain situations emotional distress might be recoverable under the FELA, *id.* at 383 (Roth, J., concurring in part), but dissented from the conclusion Gottshall had a valid claim. *Id.* (Roth, J., dissenting in part). Rehearing in *Gottshall* was denied. *Id.* at 386.

109. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92 (3d Cir. 1993).

110. *Id.*

111. *Id.* at 93.

112. *Id.* at 92.

113. *Id.*

114. *Id.*

115. *Carlisle v. Consolidated Rail Corp.*, 790 F. Supp. 521 (E.D. Pa. 1992).

In this case, we uphold for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress. We reaffirm our holding in *Gottshall* that this Court adopts no single common law standard for weighing the genuineness of emotional injury claims. Rather, courts of this circuit should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim.<sup>116</sup>

The United States Supreme Court, in an opinion by Justice Thomas, reversed both cases. Initially, the Supreme Court set forth its logical framework, expressly noting that, although the FELA is to be liberally construed, it is not a workers' compensation statute.<sup>117</sup> In determining whether negligently inflicted emotional distress was recoverable and if so under what conditions, the Court stated:

[A]lthough common-law principles are not necessarily dispositive of questions arising under the FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.<sup>118</sup>

Thus, the Supreme Court was more deferential to the common law's treatment of the relevant subject than the Third Circuit had been.

In considering the common law, the Supreme Court noted not only the common law's concern with fraudulent claims,<sup>119</sup> but also its concern with "nearly infinite and unpredictable liability for defendants."<sup>120</sup> Noting the substantial limits the common law has consequently placed on recovery for emotional distress, the Court stated there were "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress."<sup>121</sup> The three the Court listed were: impact, zone of danger, and bystander.<sup>122</sup> Interestingly, the Court only mentioned the physical manifestation rule in a footnote, treating it as an additional requirement in danger and bystander cases.<sup>123</sup> The Court never mentioned actual participant cases.

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116. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 97-98 (3d Cir. 1993).

117. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2404 (1994).

118. *Id.* (citation omitted).

119. *Id.* at 2405.

120. *Id.*

121. *Id.* at 2406.

122. *Id.* at 2406-07.

123. *Id.* at 2407.

After its short review of the common law, the Court turned to the first analytic issue it faced: did "injury" in the FELA (and the Jones Act) include mental or emotional injury?<sup>124</sup> For several reasons the Court said yes. First, many jurisdictions recognized such a claim at the time the FELA was passed and it is "nearly universally recognized" today.<sup>125</sup> Second, the word "injury" has and should be interpreted broadly given the remedial purpose of the FELA and the foreseeable, severe, and potentially debilitating effects of emotional distress.<sup>126</sup> Thus, the Court recognized a railway worker's (and therefore a seaman's) right to recover for negligent infliction of emotional distress.

But under what circumstances would negligently inflicted emotional distress be actionable? The Court rejected the impact test because of its inherent arbitrariness and its lack of modern support.<sup>127</sup> The Court also refused to adopt a bystander rule because: (1) it was not developed until almost sixty years after the adoption of the FELA, and (2) the FELA's primary emphasis is on protecting employees from physical harm so there is "no basis to extend recovery to bystanders outside the zone of danger."<sup>128</sup> There is some logical inconsistency with both of the Court's reasons for rejecting a bystander rule. The first reason relies on the common law as it existed at the time the FELA was passed. This is inconsistent with the FELA's broad language and built-in capacity to change. It is also inconsistent with the Court's earlier reliance on the "near universal" prevalence of some recovery for negligent infliction today. Which temporal frame should be used to gauge the "common law"? Now or then? The second reason for rejecting a bystander rule is also problematic; in the course of its opinion the Court held FELA "injury" included mental anguish. Yet, in rejecting the bystander test, it pointed to the FELA's "primary" focus on physical injury to limit recovery for the very mental anguish it had earlier said was recoverable.

The Supreme Court adopted the "zone of danger test." Under this test:

[A] worker within the zone of danger of physical impact will be able to recover for emotional injury for himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries—physical and emotional—caused by the negligent conduct of their employers that threatens them imminently with physical impact.<sup>129</sup>

The Court indicated the zone of danger test, while marked with the common law's "historical pedigree,"<sup>130</sup> was currently followed in fourteen states, and was consistent with the FELA's (and so the Jones Act's) "central focus on

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124. *Id.*

125. *Id.*

126. *Id.* at 2407-08.

127. *Id.* at 2411.

128. *Id.* (citing *Gaston v. Flowers Transp.*, 866 F.2d 816, 820-21 (5th Cir. 1989)).

129. *Id.* at 2410-11.

130. *Id.* at 2410.

physical perils."<sup>131</sup> The zone of danger test also had the benefit of placing some predictable limit on unlimited liability.

The Supreme Court rejected the Third Circuit's test, concluding it was "fatally flawed in a number of respects":<sup>132</sup> (1) it did not solve the problems posed by unpredictable and nearly infinite liability; (2) the "genuineness" test would not "appreciably diminish the possibility of infinite liability . . . [and] would be bound to lead to haphazard results"; and (3) reliance on foreseeability was not a meaningful limit on liability.<sup>133</sup>

In *Gottshall*, the Court reversed and remanded for further proceedings, *i.e.*, to determine if *Gottshall* could recover under a zone of danger test. In *Carlisle*, the Court reversed and remanded with instructions to enter judgment for defendant. It stated: "Without any support in the common law for such a claim, we will not take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment."<sup>134</sup>

Justice Souter concurred.<sup>135</sup> Justices Ginsburg, Blackmun, and Stevens dissented. The dissenters approved of the Third Circuit's purposeful analysis and its test.<sup>136</sup>

The majority's objection to the Third Circuit's approach may be reduced to the first concern the Court expressed—limiting unpredictable and infinite liability. All tort rules are somewhat unpredictable in an uncertain world. Predictability is an epistemic concept. It is based on knowledge of potential risks. Knowledge and risks change over time. To wind our legal rules too tightly around the desire for predictability is to freeze our vision of the world. Overemphasizing predictability reduces tort law to a series of snapshots in a motion picture world. The great advantage of flexible standards, like reasonable care, is their ability to adjust to changing circumstances.

But even if one agrees that the more predictable our legal rules are the better off we are, the zone of danger test does not realistically match up predictable risk with recovery. One must ask the question this way: would the reasonable person believe that mental anguish was more likely to follow (more predictable) from placing one in danger of physical injury (without injuring them) or from the kind of conduct alleged in *Gottshall* and proven in *Carlisle*? To the extent our rules authorize recovery in cases where mental distress is less likely to occur than in cases where recovery is denied, our rules are not only out of step with reality but heartless as well.

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131. *Id.*

132. *Id.* at 2408.

133. *Id.* at 2408-09. The Court was also critical of the Third Circuit's test because in one of the cases before the court, *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993), the Third Circuit imposed "unprecedented" liability for "emotional distress arising from work-related stress." *Id.* at 97-98.

134. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2412 (1994).

135. *Id.* (Souter, J., concurring).

136. *Id.* at 2412-19 (Ginsburg, J., dissenting).

As to the Court's second concern—unlimited liability—this is another perennial concern in tort litigation. It was the rallying cry of the tort reform movement. Indeed, it has been a common theme since the Industrial Revolution kicked into full gear. The potential and effect of unlimited liability is a subject worthy of attention. Is the fear real? Has Chicken Little finally reached the King, convincing him to build braces to hold up the sky? One need not dally over such large questions here. In FELA and Jones Act cases, there is little risk of unlimited liability. Why? Because the universe of railway workers and seamen is both small and known. The universe of such workers seeking recovery from their employers for negligently inflicted emotional distress (absent physical injury) is even smaller.

In conclusion, the Court in *Gottshall* tied the law to one of the arbitrary, common-law tests for recovery of negligent infliction of emotional distress. It rejected a more flexible, modern test adopted by the Third Circuit. The Third Circuit's test also was more consistent with the remedial purposes of the FELA and the Jones Act.

What else may one say about *Gottshall*? First, one might ask whether "injury" in the FELA will be equated with "personal injury" in the Jones Act? Is there room for an argument that "personal injury" should be more narrowly construed and limited to physical injury? The contention is doubtful as the distinction has not previously been meaningfully drawn. Second, will the zone of danger test be the test in general maritime law as well?<sup>137</sup> *Gottshall* does not answer the question, but if the experience after *Miles v. Apex Marine Corp.*,<sup>138</sup> regarding the recovery of nonpecuniary damages in maritime cases, is any indication, one may anticipate at least some lower courts will adopt the zone of danger test in non-Jones Act cases. Of course, *Gottshall*'s holding is limited to FELA (and Jones Act) cases. Thus, it does not compel the application of the zone of danger test in a general maritime tort action.

#### IV. THE VESSEL OWNER'S OBLIGATION TO THE LONGSHORE WORKER: *HOWLETT V. BIRKDALE SHIPPING CO., S.A.*<sup>139</sup>

##### A. Background

Albert Howlett (Howlett) was a longshoreman employed by stevedore Northern Shipping Co. (Northern) in Philadelphia, Pennsylvania. Howlett was injured while discharging a cargo of bagged cocoa beans from a cargo hold on the *M/V Presidente Ibanez*, a ship owned and operated by Birkdale Shipping Co., S.A. (Birkdale). Howlett and three members of his longshoring crew had hooked

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137. See *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (raising the issue but not deciding it).

138. 498 U.S. 19, 111 S. Ct. 317 (1990).

139. 114 S. Ct. 2057 (1994).

up a load of bagged cocoa to the ship's crane which had then lifted the load from the 'tween deck of the hold, thereby exposing an eight-square-foot area of the deck's floor. Howlett, who had been standing on bags surrounding the hole, then jumped down about three feet to the floor of the 'tween deck. Landing, Howlett slipped and fell on a sheet of clear plastic which was lining the floor of the deck beneath the bagged cocoa. Howlett suffered serious injuries which disabled him from returning to work as a longshoreman.<sup>140</sup>

An independent stevedore engaged by Birkdale to load the cocoa in Guayaquil, Ecuador, had placed the plastic on the floor of the 'tween deck. Birkdale had supplied the plastic sheeting—together with paper, plywood, and dunnage—to the Guayaquil stevedore to be used to stow the cocoa.<sup>141</sup> Howlett brought suit against Birkdale under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA).<sup>142</sup> He claimed he was unable to see the plastic sheeting on the floor of the deck because the sheeting was covered with dirt and debris. Howlett maintained Birkdale was negligent for failing to warn Northern and its longshoremen of the dangerous condition created by the clear plastic sheeting.<sup>143</sup>

## B. Legal Framework

### 1. The LHWCA and Its 1972 Amendments

"An injured longshoreman must navigate the channels of the LHWCA before he can drop anchor in the vessel owner's pocketbook and claim his booty."<sup>144</sup> Prior to 1972, a longshoreman injured during the loading or unloading of a vessel could receive compensation payments from his stevedore employer, and also obtain a judgment against the shipowner if the injury was a result of the vessel's unseaworthiness or negligence.<sup>145</sup> The shipowner was absolutely liable for the unseaworthiness of the vessel,<sup>146</sup> established by proving the existence of "an unsafe, injury-causing condition on the vessel."<sup>147</sup> Liability for unseaworthiness was imposed even though the condition may have been brought into existence by the stevedore or its employees.<sup>148</sup> When the stevedore or its

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140. *Id.* at 2061.

141. *Id.*

142. 33 U.S.C. § 905(b) (1988).

143. *Howlett*, 114 S. Ct. at 2061.

144. *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 113 (5th Cir. 1981).

145. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 164, 101 S. Ct. 1614, 1620 (1981); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 66 S. Ct. 872, 877 (1946); *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, 492 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007, 108 S. Ct. 1733 (1988).

146. *Scindia Steam Navigation Co.*, 451 U.S. at 164, 101 S. Ct. at 1620; *Sieracki*, 328 U.S. at 94, 66 S. Ct. at 877.

147. *Scindia Steam Navigation Co.*, 451 U.S. at 164, 101 S. Ct. at 1620.

148. *Id.* at 164-65, 101 S. Ct. at 1620-21; *Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1565 (11th Cir. 1986).

employees created the condition, however, the shipowner was entitled to indemnification from the stevedore, under a breach of contract theory, for the stevedore's failure to perform its obligations in a workmanlike manner.<sup>149</sup> Consequently, until the amendments to the LHWCA in 1972, "a tortured liability triangle was played out on the wharves and piers of America."<sup>150</sup>

In 1972, Congress amended the LHWCA ostensibly to bring it into conformity with the practical realities of the maritime industry.<sup>151</sup> Hence it added Subsection (b) to Section 5 of the LHWCA to abolish both the shipowner's absolute liability for unseaworthiness of the vessel and the shipowner's right to obtain indemnification from the stevedore if the shipowner was found to be liable to the longshoreman.<sup>152</sup> The legislation also increased the longshore worker's compensation benefits.<sup>153</sup> Additionally, and perhaps most importantly for present purposes, Congress preserved<sup>154</sup> the longshore worker's cause of action for the "negligence of the vessel."<sup>155</sup> Congress failed to specify, however, which acts or omissions of the vessel would constitute negligence and "while the pages of tort law provide some general standards for admiralty suits, once they become wet with brine they do not contain all the answers."<sup>156</sup> Before *Howlett*, the best guidance concerning vessel negligence came from the

149. *Scindia Steam Navigation Co.*, 451 U.S. at 165, 101 S. Ct. at 1621; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130-31, 76 S. Ct. 232, 236-38 (1956).

150. *Derr*, 835 F.2d at 492.

151. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4702-04.

152. Section 905(b) of the LHWCA provides, in pertinent part:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1988).

153. *Scindia Steam Navigation Co.*, 451 U.S. at 165, 101 S. Ct. at 1621; H.R. Rep. No. 1441, *supra* note 151.

154. Note in this article we have used the terms "vessel" and "shipowner" interchangeably. Section 905(b) allows an injured party to sue for the "vessel's" negligence. Vessel, however, is defined to include more than just the ship. Therefore, the duty is potentially owed by all individuals included in the definition of "vessel" in § 902(21) of the LHWCA. See *infra* note 155.

155. "Vessel" is defined to include the vessel's "owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21) (1988). Additionally, it has been held time charterers are included within the definition of "vessel" and consequently amenable to suit under § 905(b). See *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987).

156. *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 113 (5th Cir. 1981).



United States Supreme Court's opinion in *Scindia Steam Navigation Co. v. De Los Santos*.<sup>157</sup>

## 2. *Scindia Steam Navigation Co. Establishes the Duties*

In *Scindia Steam Navigation Co.*, the longshoreman, De Los Santos, was injured when several sacks of wheat fell from a pallet and struck him upon the neck and shoulder.<sup>158</sup> The pallet of wheat was being lifted from the ship's hold by part of the ship's gear, a winch.<sup>159</sup> The failure of the winch's braking mechanism led to the fall of the wheat from the pallet.<sup>160</sup> Although the braking mechanism of the winch had been malfunctioning during the two days preceding the accident,<sup>161</sup> it was not repaired before De Los Santos' injury. Though the *Scindia Steam Navigation Co.* case primarily focused on dangerous conditions that develop within the "confines of cargo operations after the stevedore takes control,"<sup>162</sup> *Scindia Steam Navigation Co.* delineated three general duties shipowners owe to longshore workers.<sup>163</sup>

Courts now call the first of these duties the "turnover duty." The turnover duty relates to the condition of the vessel and its equipment prior to<sup>164</sup> and "upon the commencement of stevedoring operations."<sup>165</sup> The second duty applies once stevedoring operations have begun and provides that the shipowner must exercise reasonable care to prevent injury to longshoremen in areas, or from equipment, which remain under "the active control of the vessel."<sup>166</sup> The third duty is the "duty to intervene" subsequent to the commencement of stevedoring operations, i.e., the vessel's obligation to act when it has knowledge of a dangerous condition present in an area under the principal control of the stevedore.<sup>167</sup> The issue in *Howlett* involved the turnover duty.<sup>168</sup>

157. 451 U.S. 156, 101 S. Ct. 1614 (1981).

158. *Id.* at 160, 101 S. Ct. at 1618.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298 (5th Cir. 1984). *See also Kirsch v. Plovdivba*, 971 F.2d 1026, 1029 (3d Cir. 1992).

163. *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2063 (1994); *Hodges v. Evisca Maritime Co., S.A.*, 801 F.2d 678, 683 (4th Cir. 1986), *cert. denied*, 480 U.S. 933, 107 S. Ct. 1572 (1987); *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983); *Thomas J. Schoenbaum, Admiralty and Maritime Law* § 6-10, at 222 (1987).

164. *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442, 1444-45 (9th Cir. 1993), *vacated*, 114 S. Ct. 2701 (1994); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986); *Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1565 (11th Cir. 1986); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981).

165. *Howlett*, 114 S. Ct. at 2063 (citing *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622 (1981)).

166. *Id.* at 2063 (quoting *Scindia Steam Navigation Co.*, 451 U.S. at 167, 101 S. Ct. at 1622).

167. *Id.*; *Scindia Steam Navigation Co.*, 451 U.S. at 172-75, 101 S. Ct. at 1624-26.

168. *Howlett*, 114 S. Ct. at 2063.

### 3. The Turnover Duty

The *Scindia Steam Navigation Co.* Court began its explanation of the vessel's duties to a stevedore and its longshore workers by referring<sup>169</sup> to its earlier decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*<sup>170</sup> In that case, the Court held a vessel owed "the duty of exercising due care 'under the circumstances.'"<sup>171</sup> The *Scindia Steam Navigation Co.* Court then went on to provide—in regards to what has come to be termed the "turnover duty":

[t]his duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.<sup>172</sup>

After *Scindia Steam Navigation Co.*, the federal circuit courts disagreed over whether the turnover duty required a shipowner to supervise or inspect cargo unloaded by a foreign stevedore to protect an off-loading longshoreman from latent defects therein, which were created by the foreign stevedore's improper stowage.<sup>173</sup> The United States Supreme Court granted certiorari in *Howlett* in part to resolve the conflict among the circuit courts,<sup>174</sup> and in so doing specifically cited *Derr v. Kawasaki Kisen K.K.*,<sup>175</sup> decided by the Third Circuit, and *Turner v. Japan Lines, Ltd.*,<sup>176</sup> decided by the Ninth Circuit.

169. *Scindia Steam Navigation Co.*, 451 U.S. at 166, 101 S. Ct. at 1622.

170. 394 U.S. 404, 89 S. Ct. 1144 (1969).

171. *Id.* at 415, 89 S. Ct. at 1150.

172. *Scindia Steam Navigation Co.*, 451 U.S. at 166-67, 101 S. Ct. at 1621-22.

173. For an overview of the federal courts' split on the question of when a shipowner is liable to off-loading longshoremen injured by improperly stowed cargo, see Russell R. Williams, *Shipowner Liability for Improperly Stowed Cargo: Federal Courts at Sea on the Standard of Care Owed to Off-Loading Longshoremen*, 17 Tul. Mar. L.J. 185 (1993).

174. *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2062 (1994).

175. 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007, 108 S. Ct. 1732 (1988).

176. 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S. Ct. 294 (1982).

a. *Derr v. Kawasaki Kisen K.K.*

The *Derr* decision involved the consolidated cases of William Derr and Thomas Robertson, longshoremen injured in separate but similar incidents when cargo fell upon them during the unloading of different vessels.<sup>177</sup> In both cases, foreign stevedores had loaded the cargo.<sup>178</sup> After reviewing the Supreme Court's opinion in *Scindia Steam Navigation Co.*,<sup>179</sup> the *Derr* court held: "*Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform his job properly."<sup>180</sup> In so holding, the *Derr* court was principally relying upon the *Scindia Steam Navigation Co.* court's statement that "absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations."<sup>181</sup>

The injured longshoremen in *Derr* had read the just quoted passage from *Scindia Steam Navigation Co.* narrowly, arguing that although the shipowner may not have a duty to inspect and discover dangerous conditions that develop *within* the confines of the cargo operations, he does have a duty to inspect and discover dangerous conditions that exist *prior to the start* of cargo operations and is charged with the knowledge of conditions that do exist.<sup>182</sup> The Third Circuit rejected this reading of *Scindia Steam Navigation Co.*, stating, "[the] creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b),"<sup>183</sup> and "[t]he scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores."<sup>184</sup> The Third Circuit's final holding was that, "[b]ecause the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, if at all, when the ship has both actual knowledge and the danger was not open and obvious."<sup>185</sup> The Ninth Circuit, however, took a different view in *Turner*.

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177. *Derr*, 835 F.2d at 491.

178. *Id.*

179. *Id.* at 492-93.

180. *Id.* at 493.

181. *Id.* (quoting *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 172, 101 S. Ct. 1614, 1624 (1981)).

182. *Id.* at 494.

183. *Id.* at 495 (quoting *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir.), *cert. denied*, 434 U.S. 861, 98 S. Ct. 188 (1977)).

184. *Id.*

185. *Id.* at 496.

b. *Turner v. Japan Lines, Ltd.*

In *Turner*, longshoreman James Turner was injured when a stack of plywood, on-loaded by a foreign stevedore, collapsed beneath him during unloading.<sup>186</sup> At trial, expert testimony established the on-loading stevedore had improperly stowed the plywood.<sup>187</sup> The Ninth Circuit reviewed the goals Congress sought to achieve in enacting the 1972 amendments to the LHWCA. One of these goals was to place loss upon the entity most able to prevent it, thereby providing that entity with an incentive to increase the safety of the longshoreman's work environment.<sup>188</sup> So noting, the Ninth Circuit upheld a jury's verdict that the shipowner in *Turner* was negligent,<sup>189</sup> stating the vessel "had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of."<sup>190</sup> The holding implicitly required the shipowner to supervise and inspect the loading operations of a foreign stevedore.

The *Turner* holding rested upon a conclusion that its liability rule would further the congressional goal of safety that underlies the LHWCA.<sup>191</sup> The Court stated that when the loading of the vessel is done by a foreign stevedore, neither the off-loading longshoreman nor his stevedore-employer is in a position to exercise any control over the loading operations.<sup>192</sup> Rather, only the vessel by choosing a reliable stevedore, supervising its work when necessary, and correcting hidden dangers or warning the off-loading stevedore of their existence could exercise such control.<sup>193</sup> An additional reason for liability in *Turner* was that holding otherwise would, in many instances, leave the injured longshoreman with no practical remedy because the truly responsible party, the foreign stevedore, would be outside the reach of the federal district court's processes.<sup>194</sup>

Upon this stormy and divergent sea of judicial interpretation, the *M/V Presidente Ibanez* sailed for the Port of Philadelphia, laden with a cargo of cocoa beans stowed by a foreign stevedore in a foreign land. Submersed and hidden beneath her cargo flowed a river of plastic, concealed by the cocoa and a mist of dirt and debris. On that concealed river, Howlett fell.

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186. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1301 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S. Ct. 294 (1988).

187. *Id.* at 1301-02.

188. *Id.* at 1304.

189. *Id.* at 1305.

190. *Id.* at 1304.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

### C. Howlett's Pronouncements

#### 1. Background and Holding

The United States District Court for the Eastern District of Pennsylvania granted the vessel owner's motion for summary judgment in *Howlett*. The District Court held, for Howlett to prevail on a failure-to-warn (turnover) claim, he had to demonstrate the shipowner had actual knowledge of the dangerous condition and that the condition was not open and obvious. The Third Circuit affirmed without opinion. Justice Kennedy, writing for a unanimous Supreme Court, stated certiorari had been granted "to resolve a conflict among the Circuits regarding the scope of the shipowners' duty to warn of latent hazards in the cargo stow, an inquiry that depends in large part upon the nature of the shipowners' duty to inspect for such defects,"<sup>195</sup> and, as noted, he specifically referred to the *Derr* and *Turner* decisions.<sup>196</sup>

After reviewing the general duties outlined in *Scindia Steam Navigation Co.*, Justice Kennedy stated: "[t]he allegations of Howlett's complaint, and the facts adduced during pretrial proceedings, implicate only the vessel's turnover duty."<sup>197</sup> He further provided, though most turnover cases concern the condition of the vessel or its equipment, the duty might also "extend to certain latent hazards in the cargo stow . . . because an improper stow can cause injuries to longshoremen, and thus is among the 'hazards on the ship' to which the duty to warn attaches."<sup>198</sup> However, Justice Kennedy cautioned that "[t]he precise contours of the duty to warn of latent hazards in the cargo stow must be defined with due regard to the concurrent duties of the stevedore and to the statutory scheme as a whole."<sup>199</sup>

The Supreme Court then explained that the duty to warn attaches only to latent hazards,<sup>200</sup> defined as those "hazards that would be neither obvious to nor anticipated by a competent stevedore in the ordinary course of cargo operations."<sup>201</sup> Further, the owner/operator of the vessel only has an obligation to warn of such hazards (1) when it has actual knowledge of their existence, or (2) when the exercise of reasonable care would require the shipowner "to inspect for or discover the hazard's existence."<sup>202</sup> But, held the Court, "the exercise of reasonable care does not require the shipowner to supervise the ongoing operations of the loading stevedore . . . or to inspect the completed stow."<sup>203</sup>

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195. *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2062 (1994).

196. *Id.*

197. *Id.* at 2063.

198. *Id.* at 2064 (quoting *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622 (1981)) (citations omitted).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (citing *Kirsch v. Plovdiva*, 971 F.2d 1026, 1029 (3d Cir. 1992)).

203. *Id.* at 2067.

## 2. *The Court's Reasoning*

Howlett had cited Restatement (Second) of Torts section 412 in an effort to define the scope of the shipowner's obligations.<sup>204</sup> Section 412 requires an owner of land or chattels, who has hired an independent contractor to work thereon, to take reasonable steps to "ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed."<sup>205</sup> Howlett maintained the shipowner who hires an independent contractor stevedore to load the vessel incurs an obligation to make reasonable inspections, both during and after cargo operations, to discover dangerous conditions in the stow.<sup>206</sup> The Supreme Court rejected Howlett's contentions, reiterating its now classic caveat: "the Restatement's land-based principles, 'while not irrelevant, do not furnish sure guidance' in maritime cases."<sup>207</sup>

Rather than follow the Restatement (Second), the Supreme Court turned to its discussion of the duty to intervene (the third duty) in *Scindia Steam Navigation Co.* As noted, the plaintiff longshoreman in *Scindia Steam Navigation Co.* had been injured when sacks of wheat fell from a pallet because of a defect in the winch being used to lift the pallet.<sup>208</sup> The longshoreman maintained the shipowner should have intervened in the cargo operations and repaired the winch before allowing the stevedore to continue.<sup>209</sup>

In *Howlett*, the Supreme Court stated that its decision in *Scindia Steam Navigation Co.*

held that the duty to intervene, in the event the vessel has no knowledge of the hazardous condition, is limited: "[A]bsent contract provision, positive law, or custom to the contrary," a vessel "has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore."<sup>210</sup>

This rule, proclaimed the *Howlett* Court, "rests upon 'the justifiable expectations of the owner/operator of the vessel that the stevedore [will] perform with reasonable competence and see to the safety of the cargo operations.'"<sup>211</sup> The expectations themselves are derived, at least partially, from Section 41 of the

204. *Id.* at 2064.

205. Restatement (Second) of Torts § 412 (1965).

206. *Howlett*, 114 S. Ct. at 2064.

207. *Id.* (quoting *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 168 n.14, 101 S. Ct. 1614, 1622-23 n.14 (1981)).

208. See *supra* notes 158-161 and accompanying text.

209. *Howlett*, 114 S. Ct. at 2064.

210. *Id.* at 2064-65 (quoting *Scindia Steam Navigation Co.*, 451 U.S. at 172, 101 S. Ct. at 1624-25).

211. *Id.* at 2065.

LHWCA,<sup>212</sup> which mandates that the stevedore-employer provide the longshore workers with a reasonably safe place to work and take the necessary precautions to prevent injury to them.<sup>213</sup> Lastly, the *Howlett* Court explained, the conclusions drawn in *Scindia Steam Navigation Co.* were based upon the legal and practical realities of the maritime industry, which dictated that imposing

a duty upon vessels to supervise and inspect cargo operations for the benefit of longshoremen then on board would undermine Congress' intent in [section] 5(b) to terminate the vessel's "automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore," and to foreclose liability "based on a theory of unseaworthiness or nondelegable duty."<sup>214</sup>

The Supreme Court in *Howlett* then declared that the foregoing principles, though taken from *Scindia Steam Navigation Co.*'s explanation of the vessel's duty to intervene, "bear as well on the nature of the vessel's turnover duty."<sup>215</sup> By applying duty to intervene logic to a turnover case, the Supreme Court was easily able to dispose of *Howlett*'s proposition that the shipowner had an obligation to make reasonable inspections during and after the cargo operations to discover dangerous conditions in the stow.<sup>216</sup> Unloading longshoreman would be the beneficiaries of a duty requiring the owner/operator of the vessel to make reasonable inspections during the stevedoring operations for the purpose of ensuring a proper stow, and to detect hazards or defects before they become hidden.<sup>217</sup> According to the Court, such a duty would place inconsistent standards on shipowners as to different groups of longshoremen, and render much of its holding in *Scindia Steam Navigation Co.* an "empty gesture."<sup>218</sup> Because if "as we held in *Scindia Steam*, a vessel need not supervise or inspect ongoing cargo operations for the benefit of longshoremen then on board, it would make little sense to impose the same obligation for the benefit of longshoremen at subsequent ports."<sup>219</sup> Consequently, the Supreme Court felt compelled to reject *Howlett*'s contention, even when the cargo was loaded in a foreign port by a foreign stevedore.<sup>220</sup>

Regarding *Howlett*'s contentions that the vessel owner/operator must make reasonable inspections subsequent to the stevedore's loading operations to discover hazards within the stow, the Supreme Court stated "[t]here is good

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212. 33 U.S.C. § 941 (1988).

213. *Howlett*, 114 S. Ct. at 2065 (citing *Scindia Steam Navigation Co.*, 451 U.S. at 170, 101 S. Ct. at 1623).

214. *Id.* (citing *Scindia Steam Navigation Co.*, 451 U.S. at 168, 172, 101 S. Ct. at 1624).

215. *Id.*

216. *Id.* at 2064.

217. *Id.* at 2065.

218. *Id.* at 2065-66.

219. *Id.* at 2065.

220. *Id.* at 2066.

reason to doubt that adopting this rule would have much practical import."<sup>221</sup> This was because any hazard an inspecting shipowner discovered would, "as a matter of course, be discovered in a subsequent port by a stevedore 'reasonably competent in the performance of his work.'"<sup>222</sup> In short, after the completion of the cargo loading operations, any dangers created by an improper stow apparent to the shipowner would be just as apparent to the stevedore.<sup>223</sup> Consequently, there would be nothing gained by requiring a shipowner to inspect the stow after the completion of cargo operations because there can be no recovery under Section 5(b) of the LHWCA for the owner/operator's failure to warn of an apparent danger.<sup>224</sup>

### 3. Recap

The Supreme Court began its opinion in *Howlett* by declaring it was required to define the "circumstances under which a shipowner must warn of latent hazards."<sup>225</sup> The Court went on to define latent hazards as those hazards of which a competent stevedore does not know, would not anticipate, and would not find obvious.<sup>226</sup> Additionally, the Court held the vessel owner/operator must only warn of those hazards of which it actually knew or of which it should have known through the exercise of reasonable care.<sup>227</sup> Reasonable care, however, does not require the vessel to supervise or inspect ongoing or completed cargo operations.<sup>228</sup> Unfortunately, unless *Howlett's* holdings and conclusions are limited to "latent hazards in cargo" cases, the Supreme Court's method and language might be used to eviscerate Fifth and Ninth Circuit jurisprudence unrelated to "latent hazards."

### D. Potential Impact of *Howlett*

In reaching its conclusions in *Howlett*, the Supreme Court reviewed the reasons for its holding in *Scindia Steam Navigation Co.* and deductively announced several *Scindia Steam Navigation Co.* "principles."<sup>229</sup> Though *Scindia Steam Navigation Co.* was primarily concerned with the vessel's duty to intervene and correct a defect that developed during cargo operations, the Supreme Court stated the *Scindia Steam Navigation Co.* "principles . . . bear as

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221. *Id.*

222. *Id.* (quoting *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622 (1981)).

223. *Id.*

224. *Id.* (quoting *Scindia Steam Navigation Co.*, 451 U.S. at 167, 101 S. Ct. at 1622).

225. *Id.* at 2061.

226. *Id.* at 2064.

227. *Id.*

228. *Id.*

229. *Id.* at 2065.



well on the nature of the vessel's turnover duty."<sup>230</sup> Thus, the Supreme Court took the policies and purposes utilized to analyze the scope of the "third" *Scindia Steam Navigation Co.* duty (the duty to intervene), and employed them to analyze the scope of the "duty to warn of latent hazards" aspect of the "first" *Scindia Steam Navigation Co.* duty (the turnover duty). Arguably, a court might utilize this same approach when interpreting *all* aspects of the turnover duty. Doing so may undermine, if not overrule, Fifth and Ninth Circuit jurisprudence discussing the turnover duty in "non-latent hazard" contexts.

Both the Fifth and Ninth Circuit Courts of Appeals had recognized that the *Scindia Steam Navigation Co.* turnover duty is not limited to warning of latent hazards in the cargo stow. The *Scindia Steam Navigation Co.* turnover duty also requires the shipowner to exercise reasonable care to turn over the vessel in a safe condition, including providing the longshore worker with a reasonably safe "work space."<sup>231</sup> This duty is not earth-shattering on its own because *Scindia Steam Navigation Co.* requires as much. The *Scindia Steam Navigation Co.* Court stated: "The shipowner . . . has a duty with respect to the condition of the ship's gear, equipment, tools, and *work space* to be used in the stevedoring operations."<sup>232</sup> However, the Fifth and Ninth Circuits have defined "work space" to include the cargo, not simply the ship and its equipment.<sup>233</sup> Consequently, the shipowner can be held liable for injuries resulting from its failure to provide a safe work space by failing to correct obvious dangers in the cargo stow before turning over the vessel.<sup>234</sup>

In *Howlett*, however, the Supreme Court applied its duty to intervene reasoning from *Scindia Steam Navigation Co.* to the turnover duty. In so doing, the Court in *Howlett* reiterated its duty to intervene statement from *Scindia Steam Navigation Co.*: "[A]bsent contract provision, positive law, or custom to the contrary, a vessel 'has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.'"<sup>235</sup> Based on this statement, the Court held the exercise of reasonable care to discover latent hazards did not require the shipowner to supervise or inspect cargo operations during or after their completion. Since the duty to discover latent

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230. *Id.*

231. *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442, 1445, 1447-48 (9th Cir. 1993), *vacated*, 114 S. Ct. 2701 (1994); *Woods v. Sammisa Co.*, 873 F.2d 842, 848-51 & n.9 (5th Cir. 1989), *cert. denied sub nom. Sammiline Co. v. Woods*, 493 U.S. 1050, 110 S. Ct. 853 (1990) (citing *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984)); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 112, 116 (5th Cir. 1981).

232. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167, 101 S. Ct. 1614, 1622 (1981) (emphasis added).

233. *Riggs*, 8 F.3d at 1445 & n.5; *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986). *Contra Kirsch v. Plovdiva*, 971 F.2d 1026, 1031 n.7 (3d Cir. 1992).

234. *Riggs*, 8 F.3d at 1448; *Woods*, 873 F.2d at 850-51.

235. *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2064-65 (1994) (quoting *Scindia Steam Navigation Co.*, 451 U.S. at 172, 101 S. Ct. at 1624).

hazards and the duty to provide a safe work space are concurrent elements of the shipowner's turnover duty, it is questionable whether the Fifth and Ninth Circuit's work space analyses can survive *Howlett*.

When confronted with a lawsuit alleging failure to provide a safe work space because of improperly stowed cargo, a shipowner could simply quote the preceding passage from *Scindia Steam Navigation Co.*, point to its application in *Howlett*, and maintain the shipowner has no obligation to inspect the cargo for any purpose. Consequently, absent its failure to warn of a condition of which it has actual knowledge, or to inspect when a reasonable shipowner would, the shipowner could not be held liable for an injury arising from a dangerous condition in the cargo, regardless of whether that condition is termed a "latent hazard" or an "unsafe work space." To hold otherwise would require the shipowner to inspect the cargo prior to turnover to determine if it presents a safe place to work, but not to determine the existence of any latent hazards. That would cause the issue to then become whether a reasonable shipowner, performing a reasonable "pret turnover safe work space" inspection, would have discovered the injury causing condition. The shipowner would argue the condition was latent, and the longshore worker would declare the shipowner was a negligent inspector. Unfortunately, this argument still would not be beneficial to the longshore worker. For if the condition is not latent, it must be apparent, and there can be no recovery under Section 5(b) of the LHWCA for the shipowner's failure to warn of an apparent danger.<sup>236</sup> Consequently, it follows, in light of *Howlett*, the Fifth and Ninth Circuit's jurisprudence that the duty to provide a safe work space requires the shipowner to correct dangerous conditions in the cargo stow prior to turnover is suspect. Indeed, such may have occurred in the Ninth Circuit already.<sup>237</sup>

#### V. THE SUPREME COURT ADDRESSES THE ISSUE OF CREDIT FOR A SETTLING TORTFEASOR: *MCDERMOTT, INC. V. AMCLYDE*<sup>238</sup>

##### A. *Setting the Stage*

"It is generally agreed that, when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement.

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236. See *supra* text accompanying notes 94 and 98.

237. Subsequent to its decision in *Howlett*, the Supreme Court vacated the Ninth Circuit's opinion in *Riggs v. Scindia Steam Navigation Co.* and remanded *Riggs* to the Ninth Circuit for consideration in light of the Supreme Court's holding in *Howlett*. *Scindia Steam Navigation Co. v. Riggs*, 114 S. Ct. 2701 (1994). On remand, the Ninth Circuit Court of Appeals, without opinion, affirmed the district court's original grant of summary judgment to the vessel "consistent with the *Howlett* decision." *Riggs v. Scindia Steam Navigation Co.*, 35 F.3d 1466 (9th Cir. 1994). The district court in *Riggs* had originally granted summary judgment to the vessel on the basis the vessel owed no duty to prevent or alleviate unsafe conditions in the cargo hold because the dangers were open and obvious to the longshore workers. *Riggs*, 8 F.3d at 1443.

238. 114 S. Ct. 1461 (1994).

There is, however, a divergence among respected scholars and judges about how that credit should be determined[.]”<sup>239</sup> so sayeth the United States Supreme Court. In *McDermott, Inc. v. AmClyde*, the United States Supreme Court decided “whether the liability of . . . nonsettling defendants should be calculated with reference to the jury’s allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the dollar amount of the settlement.”<sup>240</sup> Nonsettling defendants normally receive a credit against their liability representing the “share” of the liability of the settling tortfeasor. But how much should the credit be? Should it be the proportionate share<sup>241</sup> of the settling tortfeasor—the percentage of fault of the settling tortfeasor times the ultimate damage award? Or, should it be for the dollar amount of the settlement? And, if the latter amount is chosen, what possible contribution actions might the settling and non-settling tortfeasors have against one another, if any? These were the issues for the court in *AmClyde* and a companion case, *Boca Grande Club, Inc. v. Florida Power & Light Co.*<sup>242</sup> A short hypothetical will help set the stage.

Suppose the negligence of *A* and *B* combines to cause injury to *C*. *C* then files a lawsuit against both *A* and *B*. A judge finds *A* 75% responsible and *B* 25% responsible for *C*’s injuries. She sets *C*’s total damages at \$100. If neither *A* nor *B* had settled, judgment would be entered against *A* and *B*, who would be jointly and severally (solidarily on land in Louisiana) liable. *C* could make either pay the \$100; however, if *A* paid *C* \$100, *A* would have a contribution claim against *B* for *B*’s share, or \$25. Thus, if both *A* and *B* are fully solvent, *A* ultimately pays \$75 (75% of \$100), and *B* pays \$25 (25% of \$100).

However, now suppose after protracted discovery, much bantering, and lengthy negotiations, *A* settles with *C* on the morning of trial on the courthouse steps for \$50. Given *A*’s settlement of \$50, how much should *B* pay when the judge makes the same findings she hypothetically made above? In other words, should *B* (the non-settling defendant) get some credit against liability because of the settlement? Should *B* pay his proportionate share of *C*’s damages, \$25 (25% of \$100), which is to give *B* a credit against the judgment equivalent to *A*’s percentage of fault (\$100 - [75% of \$100] = \$25)? This solution gives *B* a pro rata, or proportionate, credit. Alternatively, should the judgment be reduced by the amount of *A*’s settlement, \$50, thereby leaving *B*, as a joint tortfeasor, liable for the remainder, \$50 (\$100 judgment - \$50 settlement). The latter result gives *B* a credit against the judgment equivalent to the amount of *A*’s settlement.<sup>243</sup>

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239. *Id.* at 1465.

240. *Id.* at 1463.

241. Note the Supreme Court stated it was deliberately using the phrase “proportionate share” instead of “pro rata” because the term *pro rata* “is also used to describe an equal allocation among all defendants without regard to their relative responsibility for the loss.” *Id.* at 1466 n.9.

242. 114 S. Ct. 1472 (1994).

243. A third scenario is to give *B* a credit against the judgment equivalent to the amount of *A*’s settlement, and then allow *B* to have a right of contribution against *A* for any amount *B* paid which

This solution gives *B* a pro tanto, or dollar-for-dollar, credit. Moreover, after settlement does *B* have any contribution claims against *A*? The Supreme Court granted certiorari in *McDermott, Inc. v. AmClyde*<sup>244</sup> and in *Boca Grande Club, Inc. v. Florida Power & Light Co.*<sup>245</sup> to address these issues.

### B. Factual History

McDermott, Inc. (McDermott) contracted to purchase a crane designed and manufactured by AmClyde. The hook of the crane was manufactured by River Don Castings, Ltd. (River Don), and the supporting slings of the crane were supplied by three separate companies (the "sling defendants"). McDermott purchased the crane to move a deck on an offshore oil and gas drilling platform to a structural steel base affixed to the floor of the Gulf of Mexico. When first attempting to lift the deck a prong on the crane's hook and one of the slings holding the deck broke. The deck fell, causing extensive damage to the crane and deck.<sup>246</sup>

McDermott brought suit against AmClyde, River Don, and the sling defendants, seeking recovery in admiralty for the damages to the crane and deck. Prior to trial, McDermott settled with the sling defendants for \$1 million. In exchange for the \$1 million, McDermott released the sling defendants from all liability and agreed to indemnify them against any contribution claims.<sup>247</sup> Relying on *East River Steamship Corp. v. Transamerica Delaval Inc.*,<sup>248</sup> the magistrate held McDermott could not recover in tort for damage to the crane, but could recover in tort for damage to the deck.<sup>249</sup> The jury allocated fault: 32% to AmClyde, 38% to River Don, and 30% to the sling defendants and McDermott (McDermott "accepted"<sup>250</sup> the sling defendant's responsibility).<sup>251</sup> Additionally, the jury determined total damages to the deck amounted to \$2.1 million.<sup>252</sup>

The defendants sought to have the judgment reduced ("credited") by the \$1 million settlement with the sling defendants. The district court refused to reduce

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exceeds *B*'s proportionate share of responsibility. It is really just a variation of the dollar-for-dollar scenario. See *infra* note 258.

244. 114 S. Ct. 1461 (1994).

245. 114 S. Ct. 1472 (1994).

246. *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1070 (5th Cir. 1992), *rev'd in part sub nom. McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994). The term "sling defendants" was used by the Supreme Court to identify the three companies. *AmClyde*, 114 S. Ct. at 1463.

247. *Clyde Iron*, 979 F.2d at 1070.

248. 476 U.S. 858, 106 S. Ct. 2295 (1986). In *East River S.S. Corp.*, the Court recognized strict product liability in tort as part of admiralty law but refused to allow recovery in tort for injury to the product itself.

249. *Clyde Iron*, 979 F.2d at 1071.

250. *Id.* at 1070.

251. *Id.* at 1071.

252. *Id.*

the judgment pro tanto (dollar-for-dollar) by the \$1 million settlement amount, and entered judgment against AmClyde for \$672,000 (32% of \$2.1 million) and against River Don for \$798,000 (38% of \$2.1 million).<sup>253</sup> On appeal, the Fifth Circuit Court of Appeals held the terms of the contract between McDermott and AmClyde precluded any recovery against AmClyde. More importantly, the court held the trial judge had improperly refused to grant River Don a pro tanto credit.<sup>254</sup> Consequently, the judgment against AmClyde was vacated and the judgment against River Don was reduced to \$470,000. The Fifth Circuit reached this figure by first reducing the \$2.1 million "total damages" jury verdict by 30% (the amount of McDermott's and the sling defendant's liability) to \$1.47 million.<sup>255</sup> The court of appeals then deducted ("credited") the "\$1 million received in settlement to reach \$470,000,"<sup>256</sup> and entered judgment against River Don in that amount.<sup>257</sup>

### C. The Supreme Court Adopts a Rule

McDermott applied for a writ of certiorari to the United States Supreme Court, which was granted. In reversing, Justice Stevens, writing for a unanimous Court, stated "[b]ecause we have not previously considered how a settlement with less than all of the defendants in an admiralty case should affect the liability of non-settling defendants, and because the courts of appeals have adopted different approaches to this important question, we granted certiorari."<sup>258</sup>

After first noting that Congress had not addressed this particular area of maritime law, Justice Stevens comfortably and gallantly stated "[w]e are, nevertheless, in familiar waters because 'the Judiciary has traditionally taken the

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253. *Id.*

254. *Id.* at 1070.

255. *Id.* at 1081.

256. *Id.*

257. *Id.*

258. *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1464 (1994). The Supreme Court did not identify the circuit court split. Arguably, however, the Fifth and Eleventh Circuits were handling this situation differently. The Eleventh Circuit, in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied sub nom. Chevron Transp. Corp. v. Great Lakes Dredge & Dock Co.*, 113 S. Ct. 484 (1992), decided non-settling defendants were entitled to a dollar-for-dollar credit in the amount of any settlement. *Id.* at 1580. Further, the Eleventh Circuit allowed a non-settling joint tortfeasor who had paid more than her proportionate share of responsibility to have a right of contribution against a settling joint tortfeasor. *Id.* at 1581. In *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068 (5th Cir. 1992), the Fifth Circuit likewise applied a pro tanto (dollar-for-dollar) approach. *Id.* at 1079. The issue of contribution against a settling joint tortfeasor, however, was not addressed. For a discussion of the Fifth and Eleventh Circuit approaches, and the Maritime Law Association's proposal for addressing this issue, see Dewey R. Villareal, Jr., *Contribution and Indemnity—Settling Tortfeasors: The Fifth and Eleventh Circuits Consider the Allocation of Liability Among Settling and Non-Settling Defendants in a Joint Tortfeasor Case, and the Supreme Court Grants Certiorari*, 24 J. Mar. L. & Com. 743 (1993).

lead in formulating flexible and fair remedies in the law maritime."<sup>259</sup> Then, the Court turned to its decision in *United States v. Reliable Transfer Co.*<sup>260</sup>

In *Reliable Transfer Co.*, the Supreme Court abandoned the divided damages rule. Prior to 1975, the law of the United States in "both-to-blame" collisions was that any damages were divided equally among the faulty parties involved. Division was the result regardless of either vessel's comparative responsibility for the incident. The divided damages rule had been in place for more than a century before *Reliable Transfer Co.*,<sup>261</sup> and has since been described as a "limited right to contribution."<sup>262</sup> In *Reliable Transfer Co.*, the Supreme Court jettisoned the divided damages rule as being "unnecessarily crude and inequitable,"<sup>263</sup> in favor of a pure comparative fault regime.<sup>264</sup>

In *AmClyde* the Supreme Court stated that while its decision in *Reliable Transfer Co.* had been supported by a consensus of the world's maritime nations and the views of scholars and judges no similar consensus had developed with respect to the issue before it.<sup>265</sup> It noted although it is generally agreed that a non-settling joint tortfeasor is entitled to a credit when the plaintiff settles with another joint tortfeasor, there is "a divergence among respected scholars and judges about how that credit should be determined."<sup>266</sup> The Court referenced the American Law Institute's three principal alternatives:

(1) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation.

(2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution. (As in Alternative (1), the amount of the injured party's claim against the other tortfeasors is calculated by subtracting the amount of the settlement from the plaintiff's damages.)

259. *AmClyde*, 114 S. Ct. at 1465 (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S. Ct. 1708, 1715 (1975)).

260. 421 U.S. 397, 95 S. Ct. 1708 (1975).

261. See *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170, 177-78 (1855).

262. *Great Lakes Dredge & Dock Co.*, 957 F.2d at 1578. The divided damages rule was unique to admiralty; historically, common law did not recognize contribution among joint tortfeasors. *Id.*

263. *Reliable Transfer Co.*, 421 U.S. at 407, 95 S. Ct. at 1714.

264. It is worth noting comparative negligence is also the international law rule pursuant to Articles 4 and 6 of The International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Sept. 23, 1910. Unfortunately, the United States, though perfectly consistent with its attitude towards other international maritime conventions, never ratified this convention.

265. *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1465 (1994).

266. *Id.*

(3) The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor.<sup>267</sup>

The first two alternatives provide for pro tanto credits, with the first alternative also granting the non-settling joint tortfeasor a right of contribution against a settling joint tortfeasor.<sup>268</sup> The third alternative involves a credit for the settling joint tortfeasor's "proportionate share" of responsibility for the total obligation.<sup>269</sup> Moreover, under the proportionate share approach, "no suits for contribution from the settling defendants are permitted, nor are they necessary, because the non-settling defendants pay no more than their share of the judgment."<sup>270</sup> While this statement was dicta in *AmClyde*, it was the basis for the holding in *Boca Grande Club, Inc.* Justice Stevens' opinion for the court in *Boca Grande Club, Inc.* was one paragraph long, citing *AmClyde* as determinative.<sup>271</sup>

In choosing an alternative, the Supreme Court in *AmClyde* identified three paramount considerations: consistency with the proportionate fault approach of *Reliable Transfer Co.*, promotion of settlement, and judicial economy.<sup>272</sup> The Court dismissed the first alternative, pro tanto credit with a right of contribution against the settling defendants, because it discourages settlement and does not serve the interest of judicial economy. Settlement is discouraged because a settling defendant has nothing to gain if he can be subjected to a contribution action at a later date, while the contribution action itself puts a further burden upon judicial resources.<sup>273</sup> The choice between the pro tanto without a right of contribution alternative, and the proportionate share alternative, however, was less apparent.

The Supreme Court found, while the pro tanto rule might be more effective in promoting settlement, the added incentive came at "too high a price in unfairness."<sup>274</sup> Further, when it came to judicial economy, the Court stated "[t]he pro tanto rule . . . has no clear advantage with respect to judicial economy."<sup>275</sup> In the end, the Supreme Court decided the proportionate share approach was the best alternative, especially since it was the choice most consistent with the Court's previous adoption of pure comparative fault principles

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267. *Id.* (quoting Restatement (Second) of Torts § 886A, at 343-44 (1977)) (citations omitted).

268. *Id.* at 1466.

269. *Id.*

270. *Id.* Nor should a settling tortfeasor have any contribution claim against a non-settling tortfeasor. The non-settling tortfeasor paid *only* his proportionate share, no more. This is true *no* matter how much was actually paid.

271. *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 114 S. Ct. 1472, 1472 (1994).

272. *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1466-67 (1994).

273. *Id.* at 1467.

274. *Id.* at 1468-69.

275. *Id.* at 1470.

in *Reliable Transfer Co.*<sup>276</sup> Consequently, the Supreme Court reversed the decision of the Fifth Circuit Court of Appeals, and remanded the case for further proceedings consistent with its opinion.<sup>277</sup> Under the proportionate share rule, the nonsettling defendants receive a credit against their liability in an amount equal to the proportionate share of the settling defendant. Moreover, the settling tortfeasor neither has nor is exposed to any contribution claims. *AmClyde* will result in a more rational approach to the settlement problem. It provides settlements with finality and means at least a partial end to piecemeal litigation.

## VI. CONCLUSION

One of the cases discussed, *AmClyde*, provides much needed clarification in a confusing area. Like *AmClyde*, *Gottshall* clarifies but in a rather parsimonious manner which will frustrate recovery by truly injured (mentally) seaman and FELA workers. Like *Gottshall*, *Howlett* both clarifies the law and limits recovery. Moreover, *Howlett* may set the stage for further limitation of recovery in non-latent hazard turnover cases. Finally, *Miller* allows states to apply their own rules relating to forum non conveniens in state maritime cases. What else it does remains to be seen, potentially providing something to write about next year.

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276. *Id.*

277. *Id.* at 1472. For a Fifth Circuit case applying *AmClyde*, see *Brown v. Forest Oil Corp.*, 29 F.3d 966 (5th Cir. 1994).



