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Sieracki Lives: A Portrait of the Interplay Between Legislation and the Judicially Created General Maritime Law

Thomas C. Galligan, Jr.[1]

Abstract

In American maritime law, the interplay between the courts and Congress is complex and iterative. A significant body of American admiralty law, the general maritime law, has been judicially created and developed. But Congress has also enacted a number of important statutes governing maritime commerce and the rights of maritime workers, such as the Longshore and Harbor Worker's Compensation Act ("LHWCA"). The back and forth between the courts and Congress in interpreting those statutes and gauging their impact on and consistency with the general maritime law is ongoing. One important area where the courts development of the general maritime law intersects with statutory regulation involves so-called "Sieracki" seamen, workers who are not seamen per se of the vessel on which they are injured but who nevertheless may sue that vessel for a breach of the warranty of unseaworthiness because they are doing the ship's work. In 1972, Congress amended the LHWCA to deprive workers covered by that Act from availing themselves of "Sieracki" seamen status and recovering for injuries caused by unseaworthiness. But, what about workers who are not covered by the LHWCA; may they still recover from the vessel for breach of the warranty of seaworthiness? The courts are split and the analysis of the problem presents a paradigm example of the back-and-forth that occurs in

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admiralty between the courts and Congress. That analytical undertaking reveals that the courts holding that "Sieracki" lives have the better side of the argument.

I. Introduction

Imagine two painters, Charles and Louise, working on the same canvas, painting a seascape. But they do not work at the same time; they only communicate through their work. Charles and Louise may have different ideas of the best way to create their art, but they are cognizant that, as they work, it is better for their styles not to openly clash. Charles begins and Louise follows. She must decide if and how to fill the gaps Charles leaves on the canvas. Louise must also decide if, when, and how to rework or even cover parts of Charles work. Louise will make these decisions well aware that Charles will follow her as she has followed him; and the process has the theoretical capacity to infinitely repeat itself with one important caveat. While Louise may paint over or cover Charles' work, Charles may not paint over or cover Louise's work. Charles is limited to filling gaps and painting around Louise's work.

Now, consider that courts in a common law system and the legislature are in a remarkably similar position to Charles and Louise as they work through and around a legal subject. I have had Charles begin because in a common law jurisdiction, that is essentially what happened. The courts defined a good body of private law and the legislature followed and acted. Sometimes, it codified an entire area of law, thereby painting over the work of the courts.[2] Sometimes it legislated more narrowly, dealing with only one discreet aspect of the common law.[3] And the process continues. What the legislature leaves of the court's work and what it

[2] The Uniform Commercial Code is perhaps the perfect example.
[3] In such cases, courts might say that statutes in derogation of the common law should be narrowly construed. Scarpelli v. Marshall, 92 Misc. 2d 244, 247, 399 N.Y.S. 1001 (1977) (said in reference to a no fault insurance law).

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keeps is like what parts of Charles' initial landscape Louise keeps and which parts she modifies or totally paints over. And then, when Louise stops work; Charles starts again, as do the courts in interpreting the acts of the legislature.

The creation process is most intriguing where neither artist paints large portions of the landscape at any one time but both paint and repaint portions of the canvas and one another's work. On the legal side, where the courts work in spots and the legislature responds in and around those spots but does not comprehensively codify, the interpretive enterprise can be most challenging and may require the interpreter of the work to engage in painstaking care to properly define boundaries and intentions.

Nowhere is the creative process more intriguing than in American maritime personal injury law. There, neither the courts nor the legislature have consistently painted with a broad or comprehensive brush. From the nation's beginning, the federal courts were trusted with the power to develop substantive maritime law and they did, building a body of judge made law. I hesitate for historical reasons to call it common law[4] but American maritime law for much of the nation's history was predominantly judge-made law. Sticking with the artistic allegory, Charles painted alone for a long-time.

Then, Congress began to take a more active legislative role, particularly in the early part of the 20th century with the passage of the Jones Act and the Death on the High Seas Act. But it did not comprehensively codify the American personal injury law of admiralty. Like Louise, it left a lot of blank space on the canvas. And its legislation incorporated general maritime law

[4] In England, there were admiralty courts separate from the common law courts. Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, §1-4 at 8-11 (2d ed. 1975). And, in the United States, until 1966, federal district courts had an "admiralty" side with distinct procedural rules. *Id.* § 1-1 at 1-2 and §1-9 at 18-21.

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concepts. For instance, in providing a seaman a negligence action against their employer, Congress did not define seaman.[5] It seemingly adopted the court's general maritime law solution and concomitantly, left the evolution of the definition to the courts.[6]

In 1927, Congress, like Louise, painted on another portion of the canvas when it enacted the LHWCA, an extensive worker's compensation scheme for workers injured on the navigable waters of the United States.[7] But, like any statute, the LHWCA required interpretation and, in interpreting it, the courts considered its interrelationship with general maritime law. Like Charles responding in paint to Louise, the courts painted around the edges of the LHWCA. And, in that painting, they were very much acting as common law courts responding to a statute. In response to some of the courts' decisions, Congress took up the brush again and significantly amended the LHWCA in 1972.

This article is about the courts' painting around the edges of the LHWCA and Congress' 1972 response. It is about a discrete issue of maritime personal injury law that presents a paradigmatic study and analysis of the process that occurs when Congress legislates against the backdrop of the pre-existing general maritime law and how the court can best respond. It is an area where the parable of the two painters—Charles and Louise—is most telling.

The precise subject of the piece is the doctrine of unseaworthiness. In 1903, in *The Osceola*,[8] the United States Supreme Court for the first time clearly stated that a seaman could recover for injuries caused by an unseaworthy condition on the vessel they served. As the law

[5] *See*, 46 U.S.C. §30104.
[6] Chandris, Inc. v. Latsis, 515 U.S. 347, 355 (1995) ("The Jones Act…does not define the term 'seaman' and therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection.").
[7] 33 U.S.C. §901 *et seq.*
[8] 189 U.S. 158 (1903).

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relating to unseaworthiness developed, it became apparent that the unseaworthiness claim was a strict liability claim.[9] Then, significantly in 1946, in S*ea Shipping Co., Inc. v. Sieracki* ("*Sieracki*"),[10] the U.S. Supreme Court held that a longshore worker covered by the LHWCA could recover from a vessel owner for unseaworthiness when the worker was doing the work of the vessel, as a seaman would have traditionally done, including, loading and unloading. Thus, was born the term *Sieracki* seaman. Subsequently, the Court held that the vessel owner could seek indemnity from the *Sieracki* seaman's stevedore employer if the employer had breached its implied warranty of workmanlike performance and that breach had caused the worker's injury.[11] In the meantime, the lower courts had extended the *Sieracki* seaman's right to recover from the vessel for unseaworthiness to workers who were not covered by the LHWCA.

Congress returned to the easel in 1972 with LHWCA amendments which, in part, took away the rights of "a person covered under this chapter" to recover for unseaworthiness. Thus, for someone covered by the LHWCA *Sieracki* was dead. But, what about those who were not covered by the LHWCA? Could they still avail themselves of *Sieracki* seaman status and recover for a breach of the vessel owner's warranty of seaworthiness when they were injured doing the work of the ship? The Fifth Circuit has said yes; the Ninth Circuit has said no; the Fourth Circuit has avoided the problem by interpreting LHWCA coverage broadly. State courts in Alaska and California have agreed with the Fifth Circuit. The decisions are not legion but the issue continues to arise.[12]

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[9] *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).
[10] 328 U.S. 85 (1946).
[11] *Ryan Stevedoring, Inc. v. Pan-Atlantic Steamship Corporation ("Ryan"),* 350 U.S. 124 (1956)
[12] Indeed, one of the issues for the Judge John R. Brown Admiralty Moot Court competition this year was whether there were still pockets of *Sieracki* seamen. In preparing this piece, I have benefited greatly from having participated in a practice round for the LSU teams in the competition and by reviewing several of the submitted briefs. Students continue to inspire us. For helpful earlier treatments of some of the issues discussed herein, *see,* Aaron K. Rives, The Sieracki Seamen: An Update, 6 Loyola Maritime L. J. 93 (2008); Comment--Kristin A. Field, Seamen

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But what is the answer? And what should it be? Has Congress painted over *Sieracki* entirely? Or has it merely painted over a large part of it, leaving some of the courts' artwork visible at the edges? The problem is typical of what lawyers must wrestle with in maritime personal injury law where Congress has not spoken clearly or comprehensively, and courts and lawyers are faced with a previously articulated general maritime law rule potentially butting up against, but not clearly conflicting with, an act of Congress.

Section II presents the most significant recent case considering the issue and then goes back and discusses *Sieracki* and other important pre-1972 jurisprudence. Section III sets forth the relevant 1972 amendments to the LHWCA. In section IV, I discuss the post-1972 jurisprudence dealing with the continued viability of *Sieracki.* Section V, the longest part of the article includes and analyzes the arguments suggesting that *Sieracki* should still live for workers not covered by the LHWCA. Section VI, which is predictably and logically shorter, analyzes the counter-arguments. Section VII sets forth a brief conclusion, siding with those courts who have decided that *Sieracki* lives for various workers not covered by the LHWCA .

II. The Jurisprudence—Part 1

A. *Rivera v. Kirby Offshore Marine, L.L.C.*[13]

Jay Rivera was a state-commissioned Branch Pilot for the Port Aransas Bar and Corpus Christi Bay. Rivera was a member of the Aransas-Corpus Christi Pilots Association, The Association collects earned pilotage fees, uses the fees in a common fund, and makes pro rata distributions to its members. Rivera was also the sole owner of Riben Marine, Inc., an S-

Forgotten By Congress: The General Maritime Doctrine of Seaworthiness As a Means of Bridging a Statutory Gap, 73 Tul. L. Rev. 2095 (1999); F. Nash Bilisoly, The Relationship of Status and Damages in Maritime Personal Injury Cases, 72 Tul. L. Rev. 493 (1997); Warren B. Daly, Contribution and Indemnity: The Quest for Uniformity, 68 Tul. L. Rev. 501 (1994); Note—Michell M. O'Daniels, Does Sieracki Still Rule the Seas: Coats v. Penrod Drilling Corp. 17 Tul. Mar. J. 101 (1992).

[13] 983 F. 3d 811 (5th Cir. 2020).

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corporation created to receive various forms of his revenue: pilot's earnings, expert witness fees, and charter service fees.

On August 19, 2016, Rivera was dispatched to pilot the M/V TARPON, a 120-foot seagoing vessel, indirectly owned and operated by Kirby Offshore Marine, Inc. ("Kirby"). The Tarpon was attached to a tug and barge unit and Rivera could not board it without first boarding the barge.[14]

Hudgins, a Kirby employee, greeted Rivera when Rivera boarded the Tarpon and began to escort Rivera to the wheelhouse. Hudgins had been on the vessel for two days and his employer had not yet trained him on how to escort pilots. Rivera and Hudgins went to the stern of the barge and climbed down onto the deck of the Tarpon. As the duo neared the wheelhouse, Rivera slowed down and lost sight of Hudgins. Thus, Rivera continued his journey without his escort. And Rivera continued to wear his sunglasses while on board the Tarpon.[15]

To get to the wheelhouse, Rivera had to climb over a two-foot high bulkhead and pass through a watertight door. After going through that door Rivera had to use another step inside the engine-room hatch access door to step down to the interior deck area. This area was not well-lit, and Rivera still had his sunglasses on. Reaching the inside step, Rivera stepped down toward the deck with his left foot. He landed on the hatch cover, rolled his ankle, and fell. He laid on the deck; Hudgins eventually found him and helped him the rest of the way to the wheelhouse. While there, Rivera requested ice and ibuprofen and reported his injury to the Tarpon's captain. Rivera then successfully piloted the Tarpon to its destination.[16]

[14] *Id.* 815.
[15] *Id.*
[16] *Id.*

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Upon leaving the vessel, Rivera went to the doctor who found that Rivera had a fracture of the fifth metatarsal of his left foot and placed the foot in an air cast. Unfortunately, Rivera experienced lingering injures during his recovery and developed Complex Regional Pain Syndrome. The injures rendered him medically unfit for his mariner's certification and his commission was revoked, at which point he also lost his Association membership.[17]

Rivera sued Kirby under multiple theories, including a breach of the vessel owner's duty to provide him, as a *Sieracki* seaman,[18] with a seaworthy vessel and for vessel negligence under §905(b) of the Longshore and Harbor Worker's Compensations Act ("LHWCA").[19] The district court, after a bench trial, found that the vessel was unseaworthy and, alternatively held, that Kirby negligently maintained the vessel under §905(b). The court found that Rivera was not contributorily negligent for wearing his sunglasses on board; that the injuries prevented him from working as a harbor pilot; and it awarded him $11,696,136 for his past and future harbor pilot wages. [20]

Kirby appealed, raising several issues including, most notably for our present purposes, Rivera's right to recover for breach of the vessel owner's warranty of unseaworthiness. Kirby argued that Rivera was "covered under"[21] the LHWCA and, thus, he was not entitled to recover for the unseaworthiness of the vessel because § 905(b) grants the covered worker a negligence action against the vessel and expressly provides that liability under § 905(b) "shall not be based upon any warranty of seaworthiness."[22]

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[17] *Id. at 815-16.*
[18] *Sieracki*, 328 U.S. 85 (1946).
[19] 33 U.S.C. § 905(b). *See generally,* Thomas C. Galligan, Jr. and Brian C. Colomb, LHWCA § 905(b) and *Scindia*: The Confused Tale of a Legal Pendulum, 80 La. L. Rev. 305 (2020).

[20] *Rivera*, 983 F. 3d at 816.
[21] 33 U.S. C. § 905(b).
[22] 328 U.S. 85 (1946).

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Kirby argued that Rivera was an employee of Riben; was working for Riben at the time of the injury; was engaged in maritime employment; and was, thereby, covered by the LHWCA.[23] The court rejected that argument because Rivera had been requested, hired, and paid through the Association. As the court said, "[w]e consider harbor pilots akin to independent contractors."[24] As an independent contractor, rather than an employee, Rivera was not covered by the LHWCA[25] and was entitled to proceed on his unseaworthiness claim under *Sieracki.* For that latter proposition, the court cited *Aparicio v. Swan Lake*,[26] which I will discuss below. As for the substance of the unseaworthiness claim, the court found that a tripping hazard can render a vessel unseaworthy and the trial court was not clearly wrong in holding that the unmarked hatch door was a tripping hazard.[27]

In citing and relying upon *Aparicio,* the court clearly signaled that *Sieracki* lives, at least in the Fifth Circuit, for maritime workers who are doing traditional seaman's work, who are not covered by the LHWCA, and who are injured as a result of the vessel owner's breach of its duty to provide a seaworthy vessel. But how can that be, given the 1972 Congressional amendments to the LHWCA, particularly the enactment of §905(b), as quoted above? And should *Sieracki* survive? As noted, answering those questions will require consideration of *Sieracki*, its pre-1972 progeny, the words of the LHWCA, the judicial response to § 905(b)'s treatment of *Sieracki*, and

[23] *Rivera,* 983 F. 3d at 817.
[24] The court cited *Manuel v. Cameron Offshore Boats, Inc.*, 103 F. 3d 31, 32-33 (5th Cir. 1997).

[25] *But see, Ghotra v. Bandila Shipping, Inc.*, 113 F. 3d 1050, 1059 (9th Cir. 1997) ("In so holding, the district court rejected the Ghotras' argument that Captain Ghotra's self-employed status places him outside the scope of the LHWCA.".
[26] 643 F. 2d 1109 (5th Cir. Unity A 1981).
[27] *Rivera,* 983 F. 3d at 818. The court also found that Rivera wearing his sunglasses inside was not contributory negligence, that the condition was not open and obvious, and even if he had not been wearing them it was not clear he could have seen the hatch and avoided injury. *Id.* at 818-19. Nor did the district court err in admitting evidence of subsequent remedial measure or in assessing Rivera's damages. *Id.* at 819-20. *See also,* Blancq v. Hapag-Lloyd A.G., 986 F. Supp. 376 (E.D. La. 1997).

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a more general consideration of various approaches to the analysis of the interplay between maritime statutes and the general maritime law. And it will involve a dialogue between Congress and the courts, reminiscent of the parable of the painters with which I began.

B. *Sieracki* and Its Scions

In *Sieracki,* the United States Supreme Court held that a vessel owner warranted the seaworthiness of the vessel to those working on the vessel doing traditional seaman's work, including a stevedore or longshoreman. The warranty extended to the relevant longshore worker even though the worker was covered by the pre-1972 version of the LHWCA. Sieracki worked for an independent contractor and was on the deck of the S.S. Robin Sherwood loading cargo when he was injured. The shackle supporting the boom he was using in the loading process broke causing the boom and tackle to fall on him.[28]

The district court found that the builder of the ship was negligent but that the vessel owner was not. The court of appeals reversed as to the vessel owner, finding that it should be held liable for the unseaworthiness of the vessel. That court noted that the issue was "novel." The United States Supreme Court agreed as to novelty[29] and granted *certiorari.*[30] Justice Rutledge, writing for the Court, said:

> The nub of real controversy lies in the question whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but

[28] *Sieracki*, 328 U.S. at 87.
[29] *Id.* at 88.
[30] *Seas Shipping Co. v. Sieracki*, 326 U.S. 700 (1945).

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> employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship.[31]

There was no question that if Sieracki had been the vessel owner's employee and had been a seaman he could have recovered for breach of the warranty of seaworthiness and that would have been true whether the ship was at sea or at the dock.

But, the vessel owner argued, the right to recover for unseaworthiness arose out of the vessel owner's contract with its seamen and here there was no contract.[32] Contrariwise, Sieracki argued that a vessel owner should not be able to avoid its obligation to provide a seaworthy vessel by hiring another entity to perform its work and to thereby avoid its legal obligation to the employees of that entity doing the vessel owner's work. Sieracki claimed that:

> the liability is an incident of the maritime service rendered, not merely of the immediate contractual relation of employment, and has its roots in the risks that service places upon maritime workers and in the policy of the law to secure them indemnity against such hazards.[33]

While, pointing out that the standard unseaworthiness case involved an injured seaman, the Court said that the liability did not exclusively arise from that contract and it was not confined to cases where there was such a contract.[34] "[C]ontract alone is neither the sole source of the liability nor its ultimate boundary."[35]

It was true that in most unseaworthiness cases there was a contract between the vessel

[31] *Sieracki*, 328 U.S. at 89.
[32] *Id.* at 90.
[33] *Id.*
[34] *Id.* at 90.
[35] *Id.* at 92.

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owner and the injured seaman but that did not mean that a contract was required and that the warranty of seaworthiness did not extend to others doing the work of the ship who were not the employees of the vessel owner.[36] The Court, essentially accepting Sieracki's claim indicated that the crux of the concept of liability for unseaworthiness was the special nature of the risks those who do seaman's work face and that the vessel owner "is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost."[37]

Liability for unseaworthiness was a form of strict liability which was neither defined by nor confined by concepts of negligence or contract.[38] And the owner could not avoid that liability by hiring independent contractors to do the work of the ship and hide behind that device when the employees of the independent contractor were injured by an unseaworthy condition while doing that work.[39] To do so would strip them of the historic protections the warranty of seaworthiness would provide. Justice Rutledge continued:

> It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights.... For injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."[40]

[36] *Id.* at 93.
[37] *Id.* at 94.
[38] *Id.*
[39] *Id.* at 95.
[40] *Id.* at 97-99.

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But what about the fact that Sieracki was covered by the LHWCA and the LHWCA was his exclusive remedy against his employer? That Sieracki had rights against his employer did not mean that he gave up his rights against the vessel owner. The vessel owner was able to avail itself of the benefits of specialization through the division of labor but could not rid itself of the obligation to provide those who did the work of the vessel with a seaworthy ship.[41] The LHWCA's exclusive remedy provision applied only against the employer; it did not deprive the longshore worker of other rights; in fact it preserved the right of the worker to file claims against third-parties.[42] Justice Rutledge's opinion is a paradigmatic example of what would become standard analysis in personal injury cases as tort liability, in general, expanded through the post-World War II era through the 1970s. The Court ignored limitations on liability imposed by concepts of privity of contract; it expanded the category of plaintiffs who could recover for strict liability; and it relied upon concepts like risk spreading and deterrence.

Eight years later, in *Pope & Talbot v. Hawn.*[43] the Court considered the case of Charles Hawn. Hawn was a carpenter, who suffered injury while on board the defendant's vessel when he fell through an open hatch cover. Hawn was on board to make some repairs to the ship's grain loading equipment. Hawn sued, claiming, in part that he was injured as a result of an unseaworthy condition. The lower court found the vessel unseaworthy. In the Supreme Court, the defendant contended that the Court should overrule *Sieracki.*[44] Justice Black, writing for the Court said:

[41] *Id.* at 100-01.
[42] *Id.* at 102. The Court concluded by stating that the worker's employer could have recovery over against the vessel owner because the injury from the unseaworthy condition is what triggered the employer's liability for LHWCA compensation. *Id.* at 103. Justice Jackson took no part in the decision and Chief Justice Stone, joined by Justices Frankfurter and Burton dissented. *Id.* at 103 (Stone, C.J., dissenting). Chief Justice Stone did not believe that longshore workers were subject to the perils of the sea and thus not entitled to the benefit of the warranty of seaworthiness. He also wrote that distribution of losses did not justify the decision because Congress had decided that the stevedore's employer was in the best position to distribute the losses from injuries to longshore workers.
[43] 346 U.S. 406 (1953).
[44] *Id.* at 412.

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"we…adhere to *Sieracki.*"[45] Defendant also asked the Court to distinguish *Sieracki* because Hawn was not a stevedore. What was important was the work being done, not the job title. Hawn was on board to do work to facilitate the loading of the ship.

> His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law.[46]

Thus, *Sieracki* was extended to workers other than stevedores doing the work of the ship. Predictably, *Sieracki* and its scions led to a veritable explosion of unseaworthiness claims brought by longshore workers. Not only did the number of claims grow but there was some conundrum-ish mischief afoot for ship owners.

In some instances, the stevedore's co-workers were the ones who, in fact, caused the unseaworthy condition which injured the plaintiff. That is, they or some other stevedore created the very risk which rendered the vessel unseaworthy and which caused the injury. For instance, in *Ryan,*[47] Pan-Atlantic entered into an agreement with Ryan to provide it stevedoring services for all its coastwise trade. Pursuant to that arrangement, Ryan loaded pulpboard on one of Pan-Atlantic's ships in Georgetown, South Carolina. When the vessel arrived in Brooklyn, Frank Palazzo, a longshore worker employed by Ryan, was engaged in unloading the vessel when one

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[45] *Id.*

[46] *Id.* at 413. Justice Frankfurter concurred, agreeing with the result because the ship was unseaworthy. *Id.* (Frankfurter, J., concurring). But he would not have allowed recovery based on negligence, Hawn's alternative theory, because of the fourth point of *The Osceola*, 189 U.S. 158 (1903), that a crew member (before the Jones Act which did not cover Hawn) could not recover in negligence against the ship owner. *See,* Thomas C. Galligan, Jr., *The Dreadful Remnants of the Osceola's Fourth Point,* 34 Rutgers L. J. 729 (2003). Justice Jackson, joined by Justices Reed and Burton dissented. 346 U.S. at 419 (Jackson, J., dissenting).

[47] 350 U.S. 124 (1956).

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of the rolls of pulpboard came loose, struck him, and violently injured his leg. It appeared that the stevedores in South Carolina had not properly secured the pulpboard. Palazzo sued Pan-Atlantic, claiming, in part, that the vessel was unseaworthy. Ironically, perhaps to Pan-Atlantic, Ryan, Palazzo's employer, was responsible for the failure to secure the cargo which created the unseaworthy condition which injured Palazzo, a Ryan employee. Perhaps not reveling in that irony, Pan-Atlantic third-partied Ryan, seeking indemnity.

The jury which heard the case found in Palazzo's favor.[48] The judge, by stipulation, considered the third-party demand against Ryan and dismissed that claim. The Court of Appeals reversed and entered judgment on the third-party claim in favor of Pan-Atlantic.[49] Interestingly, between the decision in *Sieracki* and the decision in *Pope & Talbot*, the court in *Halcyon Line v. Haenn Ship Sealing & Refitting Corp.*,[50] had held that a vessel owner, liable to a ship repairer for unseaworthiness, could not recover contribution from the injured worker's employer because of the exclusive remedy provision of the LHWCA.

Should the result be the same in *Ryan*, where the vessel owner sought indemnity? Up went *Ryan* to the Supreme Court. Justice Burton, writing the majority opinion in a 5-4 decision, turned to the first issue: Whether the LHWCA barred the ship owner's action against the stevedore where the stevedore was the employer of the injured worker?[51] No was the answer. A shipowner could purchase insurance to indemnify against such a loss. It was no different if the stevedore's employer breached a warranty to do the stevedoring work in a reasonably safe manner and its failure to do

[48] *Id.* at 127.
[49] *Id.* at 128.
[50] 342 U.S. 282 (1952).
[51] *Ryan* 350 U.S. at 128.

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so caused injury.[52] "The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle."

But was there such a warranty here? Justice Burton considered the second issue: Whether, in the absence of an express agreement, "a stevedoring contractor is obligated to reimburse a shipowner for damages caused it by the stevedore's improper storage of cargo?"[53] Yes, the stevedore's "warranty of workmanlike service"[54] is the essence of the stevedore's contract. The Court analogized to what we now call the seller's warranty of merchantability concerning its wares.[55]

Justice Black, the author of *Halcyon*, joined by Chief Justice Warren and Justices Douglas and Clark dissented.[56] Justice Black argued that the employer should not be required to pay damages on account of injuries to its employee given the exclusive remedy provisions of the LHWCA. And there was no express undertaking to indemnify the vessel owner. In essence, the employer, whom the LHWCA granted immunity from employee tort actions, was being "mulcted" for damages for injuries suffered by its employees.[57] A liability, from which the dissent contended Congress had protected it.[58]

Before moving to the 1972 amendments to the LHWCA, we have one additional, important

[52] *Id.* at 130-31. Of course, the employer would only be liable to its own employee for LHWCA benefits. But the injury to the employee also caused injury (liability) to the ship owner and for that the stevedore could be liable.
[53] *Id.* at 132.
[54] *Id.* at 133.
[55] U.C.C. art. 2-314.
[56] *Ryan*, 350 U.S. at 135 (Black, J., dissenting).
[57] *Id.* at 142.
[58] Later, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963), the Court, in an opinion by Justice Black, allowed an injured longshoreman to recover for unseaworthiness from his employer, Pan-Atlantic again, for an unseaworthy condition on a vessel which the employer had bareboat chartered from the vessel owner. The exclusive remedy provision of the LHWCA did not preclude that result. Under *Sieracki*, if the shipowner had hired an independent stevedore, it would have been liable for unseaworthiness to an employee of that stevedore, the result s no different when its own employee was injured. The demise charterer cannot avoid its nondelegable duty to provide a seaworthy vessel to those doing the work of the ship. Justice Harlan, joined by Justice Stewart, dissented. *Id.* at 416.

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piece of jurisprudence to consider: *Sandoval v. Mitsui Sempaku K.K. Tokyo.*[59] Sandoval was a linehandler, who worked for the Panama Canal Company. As such, he was covered by the Federal Employer's Compensation Act ("FECA"), not the LHWCA;[60] Sandoval was injured aboard defendant's vessel. He sued the vessel owner for unseaworthiness and the jury awarded him damages. Defendant sought indemnity from the Panama Canal Company. On appeal, among other issues, the court considered whether Sandoval was a *Sieracki* seaman. The court, rather summarily, but clearly, held that he was.[61] Thus, *Sieracki* applied to a federal employee covered by FECA.

III. The 1972 LHWCA Amendments, Including § 905(b)

That was the state of the law concerning unseaworthiness, *Sieracki* seamen, their employers, and the vessels on which they were injured in 1972 when Congress undertook a comprehensive revision of the LHWCA. At the time, shipowners wanted relief from the strict liability S*ieracki* had extended to longshore workers and others doing the work of the ship; the employers of longshore workers wanted relief from *Ryan* indemnity; covered longshore workers (who were about to lose the benefits of *Sieracki*) wanted increased benefits and extension of coverage to injuries occurring on piers, docks, and other harbor areas.[62] In the 1972 revisions to the LHWCA, Congress accomplished all those things. For present purposes, the most significant part of that legislation is § 905(b), which provides, after a subsequent amendment in 1984:

> 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

[59] 460 F. 2d 1163 (5th Cir. 1972). In Grigsby v. Coastal Marine Service of Tex., 412 F. 2d 1011 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033 (1970), the Fifth Circuit extended the *Sieracki* to a rescuer at sea.
[60] 5 U.S.C. § 8101 et seq
[61] *Sandoval*, 460 F. 2d at 1167.
[62] Frank L. Maraist, Thomas C. Galligan, Jr., Dean A. Sutherland, and Sara B. Kuebel, Admiralty in a Nutshell, 292 (8th ed. West Academic Publishing 2022).

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> 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. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. 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. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[63]

So, what does § 905(b) do? The first part of the first sentence gives a "person covered" by the LHWCA[64] a negligence claim against a vessel (the vessel negligence claim), including a vessel owned or operated by its employer. The second sentence states that the vessel negligence claim is not available if the plaintiff is a stevedore and the negligence arises out of the fault of persons engaged in stevedoring services.[65] The third sentence provides that ship builders, ship repairers, and ship breakers (added in 1984) may not maintain vessel negligence actions against their

[63] 33 U.S.C. §905(b).
[64] Per the 1988 amendment, ship breakers were added to ship builders and ship repairers who could not sue their employer for vessel negligence.
[65] The clause would seem to apply to either third-party stevedores or co-employees of the injured worker.

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employers. The fourth sentence provides that the vessel's liability "shall not be based" upon unseaworthiness. Thus, the fourth sentence effectively kills *Sieracki* for "persons covered" by the LHWCA. The fifth sentence makes the vessel negligence claim exclusive of all other claims against the vessel—hammering a nail in the coffin of *Sieracki* for "persons covered."[66] And, finally, the end of the first sentence, states that the covered person's employer is not liable to the vessel for any vessel negligence damages the covered worker recovers either directly or indirectly "and any agreements or warranties to the contrary shall be void."[67] Thus, the end of the first sentence does away with the employer having to provide *Ryan* indemnity in the vessel liability context. And it goes even further by barring any express agreements requiring employer indemnity of a vessel owner on covered employee vessel negligence claims.[68]

Of course, that is not the end of the story. As I have noted, §905(b) literally applies to "persons covered" by the LHWCA. What about others? What rights do they have or retain? Did Congress intend to deprive those persons of the right to maintain an unseaworthiness action against a vessel if the facts warranted it? Did Congress paint over their rights on the admiralty canvas or is that part of the painting still extant? And just who are those people? We will turn to those inquiries in the next section.

A. Persons Not Covered

Put simply? Did Congress mean what it said in §905(b)?[69] Because if it did then *Sieracki* continues to hold sway for those who are not covered by the act. There is language in several

[66] My continued emphasis of that phrase is intentional and critical.
[67] *Id.* 33 U.S.C. §905(c) authorizing reciprocal indemnity agreements where the injured worker is covered by the LHWCA via the Outer Continental Shelf Lands Act, 43 U.S.C. §1333.
[68] See also,
[69] *See*, Gorman, The Longshoremen's and Harbor Workers' Compensation Act-After the 1972 Amendments, 6 J.Mar.L. & Com. 1, 15 (1974). See also Robertson, Negligence Actions by Longshoremen Against Shipowners

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Supreme Court opinions stating that Congress effectively overruled *Sieracki,*[70] but the language is dicta and unrelated to the holdings in those cases and, even then, a case is overruled on its facts and facts in *Sieracki* were that he was covered by the LHWCA, unlike the subjects of the current inquiry. There is also arguably language in the legislative history indicating that some may have wanted to eliminate the unseaworthiness claim for all non-seaman[71] but there is also language that the 1972 amendments were limited to those covered by the LHWCA.[72] Like much legislative history, it is indeterminate. The noted maritime scholars Professors Gilmore and Black arguably read §905(b) as entirely doing away with *Sieracki* and wondered "whether the Sieracki-Ryan construct, although abolished, would continue to rule us from the grave."[73] But the statute is literally more limited in its scope. It only deals with "persons covered" by the LHWCA. What have the courts done?

IV. The Jurisprudence—Part 2—Post-1972

A. The Fifth Circuit

The Fifth Circuit has considered the issue several times, first in *Aparicio v. Swan Lake,* decided in 1981.[74] Aparicio was employed by the Panama Canal Company, like Sandoval, whose case we discussed above. Aparicio and three other Panama Canal Company employees filed suit against three different vessels claiming, in part, that they were injured as a result of the vessels' unseaworthiness. The vessels, in turn, filed claims against the Panama Canal Company claiming that it breached the warranty of workmanlike performance and that the vessels were

Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 7 J.Mar.L. & Com. 447, 448 (1976).

[70] *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 119 (1996); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6, 1974 A.M.C. 537, n.6 (1974).

[71] H.R. Rep. 92-1441, at 4703 (1972) (the remedy should be eliminated for longshoremen and other non-seamen).

[72] H.R. REP. 98-570(I).

[73] G. Gilmore & C. Black, The Law of Admiralty 438 (2d ed. 1975).

[74] 643 F. 2d 1109 (5th Cir. Unit A 1981).

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consequently entitled to indemnity for any liability to the plaintiff workers. The district court held that the 1972 amendments did away with *Sieracki* and with *Ryan*-indemnity.

The Fifth Circuit, in an opinion by Judge Alvin B. Rubin, reversed. Judge Rubin reviewed the relevant jurisprudence and pointed out that the plaintiffs were not covered by the LHWCA but rather by the Federal Employer's Compensation Act ("FECA").[75] Prior to the 1972 amendments, in *Sandoval,* the court had held that Panama Canal linehandlers were *Sieracki* seamen, entitled to sue for unseaworthiness when doing the work of the vessel and that the vessel owner could seek *Ryan* indemnity.[76] Noting that Congress in 1972 amended the LHWCA "to abolish" *Sieracki* and *Ryan,*[77] Judge Rubin continued:

> Both the express language of Section 905(b) and the legislative history of the 1972 amendments support the proposition that the congressional action was aimed at longshoremen and harbor workers covered by the LHWCA. The statute itself must be our polestar, for it is black letter law that we do not search for latent intention if a legislative act is clear. Literally read, Section 905(b), which Congress enacted to abolish the Sieracki remedy, does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the coverage of the LHWCA. We refuse to read into it the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA, including not only FECA-covered employees but those amphibious workers who may be covered only by a state compensation law or who may have no compensation law

[75] 5 U.S.C. §8101 et seq. As noted, after *Sieracki*, the Fifth Circuit had held that its scope included a federally employed longshore worker. *Sandoval v. Mitsui Sempaku K.K. Tokyo,* 460 F. 2d 1163 (5th Cir. 1972).
[76] *Aparicio,* 643 F. 2d at 114-15.
[77] *Id.* at 1116.

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> coverage at all. Had Congress intended to affect the substantive rights of persons not covered by the LHWCA, it could readily have manifested that intention. If we misread the statute and Congress wishes to abolish the Sieracki remedy as it applies to FECA workers, an employee group for which Congress might be expected to have particular regard, or for any other group of maritime workers, it is free to do so.[78]

According to Judge Rubin, a search of the legislative history for evidence that Congress meant to have effect beyond the covered longshore worker revealed nothing. It did not appear any Congressional representatives even considered the question. As for Gilmore and Black, Judge Rubin, noting their "from the grave" comment quoted above, said that Gilmore & Black were assuming the answer to the §905(b) impact question.[79] Congress had not provided that answer.

When considering the 1972 amendments and the quid pro quo of increased benefits for LHWCA workers while taking away their *Sieracki* seaman status, Judge Rubin said Congress did not consider the difference between the benefits payable to FECA works as opposed to LHWCA workers. To Judge Rubin that meant:

> Congress simply did not consider the possibility that maritime workers not covered by the LHWCA qualified for Sieracki seaman status under the existing case-law. It was not unnatural for Congress to focus its effort to abolish the Sieracki-Ryan construct on the maritime workers covered by the LHWCA, the workers who constituted the bulk of those to whom the Sieracki doctrine is applicable, without considering the fate of those relatively few Sieracki seamen not covered by that statute.[80]

[78] *Id.*
[79] *Id.* at 1116-17.
[80] *Id.* 1118.

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But the failure of the FECA workers to receive increased benefits as part of the 1972 quid pro quo was not itself dispositive. Instead, Judge Rubin said that *Sieracki* and *Ryan* were remedies fashioned to:

> deal with the peculiar perils faced by maritime workers based on policy considerations … determined to be controlling given [the]… conditions of maritime work. Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by the Sieracki-Ryan doctrine.[81]

Thus, the statute meant what it said. Persons covered meant persons covered. Persons not covered by the LHWCA who were doing the work of a ship could still bring *Sieracki* seaman claims and vessel owners in such cases could bring *Ryan* indemnity claims.

The Fifth Circuit considered a variation on *Aparicio* in *Burks v. American River Transportation Company.*[82] There, plaintiff was a longshore worker, covered by the LHWCA, who worked loading and unloading vessels mid-stream in the Mississippi from his employer's vessel. He suffered injury while on board a vessel he was unloading and sued the owner of that vessel for unseaworthiness. The court, in an opinion by Judge John R. Brown, held that plaintiff

[81] *Id*. *Accord:* Willis v. McDonough Marine Services, 2015 WL 3824366 (E.D. La. 2015); Bergeron v. Atlantic Pacific Marine, 899 F. Supp. 1544, 1547 (W.D. La. 1993) ("It is clear that the Fifth Circuit has adopted the position that the 1972 amendments to the LHWCA did not completely abolish *Sieracki* relief for 'seamen' not covered by the LHWCA."); Laakso v. Mitsui & Co. USA, Inc., 1989 WL 149186 (E.D. La. 1989). Of course, even under Aparicio, the worker must be doing the work of the ship. Thus, in Broussard v. Great Creation Shipping, Limited, 410 F. Supp. 2d 498 (E.D. La. 2005), a security guard injured while disembarking a vessel while detaining crew members was not engaged in any type of maritime mission. For a discussion of *Aparicio*, *see,* Arthur Larson, Third-Party Action Over Against Workers' Compensation Employer, 1982 Duke L.J. 483, 524-26; David W. Robertson, Judge Rubin's Maritime Tort Decisions, 52 La. L. Rev. 1527, 1554-58 (1992); Marie R. Yeates, Philip B. Dye, Jr., and Roland Garcia, Contribuition and Indemnity in maritime Litigation, 30 So. Tex. L. Rev. 215, 234-36 (1989); Debra F. Gambrill, The Sieracki-Ryan Construct Continues to Rule From the Grave—Aparicio v. Swan Lake, 6 Mar. Lawyer 302 (1981).

[82] 679 F. 2d 69 (5th Cir. Unit A 1982).

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could not avail himself of any warranty of seaworthiness against the vessel he was unloading. He was a person covered by the LHWCA and thus §905(b) literally applied to him; the vessel reference in §905(b) was to the vessel on which he was injured and which he claimed was unseaworthy. Consequently §905(b) barred his unseaworthiness claim.[83]

The Fifth Circuit next considered the so-called demise of the *Sieracki* doctrine in *Cormier v. Oceanic Contractors, Inc.*[84] There, a harbor worker in Dubai was injured and sued for breach of the warranty of seaworthiness. Because he was in a foreign county, the plaintiff was not covered by the LHWCA. The court held that the case was squarely within the *Aparcio* principle and allowed plaintiff to recovery.

Clearly, after 1972, in the Fifth Circuit there were still pockets of *Sieracki* seamen. But how deep were those pockets? In *Bridges v. Penrod Drilling Company.*,[85] the court considered the scope of *Sieracki's* survival. Bridges was a seaman aboard the semi-submersible drilling rig, the PENROD 72, in the Gulf of Mexico. Offshore Logistics Services Inc.'s vessel the M/V THOMAS DRAYTON was delivering drilling mud, water, and various cargo, including twenty 55-gallon drums, to the PENROD 72. When the THOMAS DRAYTON arrived at the PENROD 72, the seas were rough. Somehow, some of the drums broke free of their lashings and were rolling around on the deck. Penrod personnel were anxious to begin drilling and wanted to unload the THOMAS DRAYTON. A roustabout, more experienced than Bridges, refused to take part in unloading the THOMAS DRAYTON, given the dangerous conditions. The Penrod supervisor ordered Bridges and an equally inexperienced roustabout to climb down onto the THOMAS DRAYTON and unload it. Bridges obeyed the directives and, within moments of

[83] *Id.* at 76.
[84] 696 F. 2d 1112 (5th Cir. 1983).
[85] 740 F. 2d 361 (5th Cir. 1984).

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being on deck, sustained injuries when one of the runaway drums crashed into him and pinned him against a piece of heavy equipment.[86]

Bridges sued Penrod and Offshore and settled with them. The district court then considered the issues of indemnity and contribution; it rejected all claims of indemnity and allocated the fault 2/3 to Penrod and 1/3 to Offshore. Offshore appealed claiming, in part, that it was entitled to indemnity because Penrod had breached its implied warranty of workmanlike performance when it ordered Bridges to unload the THOMAS DRAYTON under dangerous circumstances. Offshore argued that it was only through Penrod's order (the alleged breach of the warranty) that the existing unseaworthy condition of its vessel came into play (a rather novel claim, if I do say so). Of course, in order for any implied warranty of workmanlike performance to kick in on the facts Bridges would have to be a *Sieracki* seaman. Judge Tate, the author of the decision, rejected Offshore's claim:

> As a member of the crew of the special purpose vessel PENROD 72, Bridges was possessed of the full range of traditional seaman's rights and remedies: maintenance and cure and a Jones Act negligence claim against his employer as employer, an unseaworthiness, strict liability claim against his employer as vessel owner for any injury on the PENROD 72, and a negligence claim in maritime tort for Offshore's breach of the duty of reasonable care under the circumstances. In order to achieve adequate protection it was not necessary that Bridges be characterized as a remnant *Sieracki* seaman of the THOMAS DRAYTON. … One with seaman status does not become additionally a *Sieracki* seaman by doing stevedoring work which might be styled traditional seaman's

[86] *Id.* 362-63.

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duties.[87]

Subsequently, the Fifth Circuit has reaffirmed *Bridges* in a number of decisions.[88] A seaman cannot be a *Sieracki* seaman as to another vessel in the Fifth Circuit. According to the court, the seaman is adequately protected without that additional remedy. Courts in the Ninth Circuit have agreed.[89]

It is not entirely clear why the protections available to a seaman arising from the worker's employment on one vessel should deprive the worker of the right to *Sieracki* status on another vessel. After all, the seaman is not a "person covered" by the LHWCA. Predictably, other courts have declined to follow the Fifth and Ninth Circuits and have allowed a seaman on one vessel to bring a *Sieracki* unseaworthiness claim against another vessel. As the court said in *Jenkins v. Fitzgerald Marine & Repair*: "Although Congress invalidated the holding in *Sieracki* as it applies to longshoremen, nothing in the LHWCA amendments implies that an unseaworthiness claim cannot be brought by crew members of other vessels."[90] That logic is sound.

But the Fifth Circuit has also continued to reaffirm *Aparicio* where the plaintiff is not a seaman and not covered by the LHWCA. In *Green v. Vermillion Corp.*,[91] Green worked as a cook, watchman, and maintenance person at a duck camp for defendant, Vermillion Corporation.

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[87] *Id.* at 364.

[88] *See, e.g.*, Smith v. Harbor Towing & Fleeting, Inc., 910 F. 2d 312 (5th Cir. 1990); Coakley v. Seariver Maritime, Inc., 319 F. Supp. 2d 712, 714 (E.D. La. 2004); Speer v. Taira Lynn Marine, Ltd., 116 F. Supp. 2d 826, 830 n.3 (S.D. Tex. 2000); Jones v. United States, 1996 WL 75583 (E.D. La. 1996). *Cf.* David W. Robertson, Current Problems in Seamen's Remedies: Seaman Status, Relationship Between the Jones Act and the LHWCA, and Unseaworthiness Actions By Those Not Covered By LHWCA, 902-06 (1985) ("For no apparent reason, the court has taken a giant step backward.").

[89] Corrigan v. Harvey, 951 F. Supp. 948, 952 (D, Haw. 1996); Baker v. Hasbrouck, 1991 WL 240740 at *3 (D. Ore. 1991).

[90] 2007 WL 4290705 (E.D. Mo. 2007). *See also*, Turner v. Midland Enterprises, Inc., 2006 WL 527006 (E.D. Ky. 2006).

[91] 144 F. 3d 332 (5th Cir. 1998). *See*, Casenote—Edward C. Gleason, Green v. Vermillion Corporation: A Green Light for General Maritime Negligence Suits, 45 Loyola L. Rev. 345 (1999).

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He also sometimes helped moor and unload supply vessels at the camp. The duck camp was, as described, a duck camp during duck season but it also served as company headquarters for Vermillion's various operations in the area, including harvesting and selling alligator eggs, trapping and selling alligators, fur trapping, shrimping and rice farming. One day, while assisting with mooring and unloading a vessel, Green slipped on board and sustained injuries to his neck and back.[92]

Green sued Vermillion under the LHWCA and under the general maritime law for unseaworthiness and general maritime law negligence. On the LHWCA claims, the court, in an opinion by Judge Higginbotham, found that Green was not covered by the act because he fell within a 1984 exception from coverage for individuals employed by a club or camp who were also covered by a state worker's compensation scheme.[93] Thus, Green was not covered by the LHWCA but was covered by state worker's compensation. What about his general maritime law *tort* claims?

Did the exclusive remedy provision of the Louisiana Worker's Compensation Act[94] bar his recovery on those claims? The court pointed out that in a previous decision, *Thibodaux v. Atlantic Richfield Co.,*[95] it had held that a state worker's compensation exclusive remedy provision did not insulate a statutory employer from a maritime tort claim. And, it noted that in *King v. Universal Elec. Construction.,*[96] it had extended *Thibodaux* to a maritime claim against the plaintiff's actual employer. The court said that to have held otherwise, in either case, would

[92] *Green,* 144 F. 3d. at 334.
[93] 33 U.S.C. § 902(3)(B). Green was also not otherwise engaged in maritime employment.
[94] La. R.S. § 23:1032.
[95] 580 F.2d 841, 846 n. 14 (5th Cir.1978), *cert. denied,* 442 U.S. 909 (1979). *Accord:* Flying Boat, Inc. v. Alberto, 723 So. 866, 868-69 (Fla. Ct. App., 4th Dist. 1998).
[96] 799 F.2d 1073, 1075 (5th Cir.1986). *Accord: Mississippi RiverboatAmusement, Ltd.*, 867 F. Supp. 1260 (S.D. Miss. 1994) and *Valcan v. Harvey's Casino,* 2000 WL 3367327 (S.S. Iowa June 15, 2000).

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have conflicted with maritime policy and would have undermined rights provided by maritime law.[97] The *Green* court noted[98] that the Eleventh Circuit in *Brockington v. Certified Elec., Inc.,*[99] had limited *Thibodeaux* and *King* to wrongful death cases, but the Fifth Circuit did not similarly limit the scope of its precedent, holding that its prior decisions applied beyond the maritime wrongful death context. Notably, for purposes of this paper, *Brockington* did not involve claims that the plaintiff was a *Sieracki* seaman.

Turning to the issue we are considering, Judge Higginbotham reiterated: "We have held, however, that longshoremen who are not entitled to LHWCA benefits may still pursue their general maritime claims against the vessel owner because they did not receive the benefits of the bargain of the 1972 Amendments."[100] Thus, Green was a *Sieracki* seaman and had an unseaworthiness claim. The availability of state worker's compensation benefits did not change that fact. "Where the LHWCA does not apply, we refuse to expose maritime workers to the variegated state workers' compensation schemes, especially where Congress has expressly found"[101] them inadequate. The court also held that Green had a general maritime law negligence action against his employer and that the exclusive remedy provision of the state worker's compensation act also did not foreclose that claim.[102]

The *Green* court continued to adhere to the spirit of *Aparicio* in *Rivera,* the case with which we began. Congress had painted expensively with the 1972 amendments to the LHWCA but it had not painted over the jurisprudence allowing those (other than seamen) who were not

[97] *Green,* 144 F. 3d at 336.
[98] *Green,* 144 F. 3d at 336-37.
[99] 903 F.2d 1523, 1533 (11th Cir.1990), *cert. denied,* 498 U.S. 1026 (1991).
[100] *Green,* 144 F. 3d at 337.
[101] *Id.* at 338. The court also held that Green could maintain a general maritime law negligence action against his employer but the question was closer. *See, id.* at 338-41.
[102] *Id.* at 341.

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covered by the LHWCA to pursue unseaworthiness claims when they were injured doing the work of the ship.

B. The Ninth Circuit

Five days after the Fifth Circuit decided *Aparicio,* the Ninth Circuit decided *Normile v. Maritime Company of the Phillipines.*[103] If *Aparicio* turned to the starboard side on the *Sieracki* issue, *Normile* turned to the port side. Normile was a federally employed longshore worker covered by FECA (like Aparicio), who was injured while unloading defendant's vessel. He sued, claiming that the relevant vessel was unseaworthy. The Court held that after 1972, neither a privately employed nor a publicly employed longshore worker could sue for unseaworthiness. *Sieracki* had provided the right to a privately employed longshore worker. It was the root of the liability. The courts had extended *Sieracki* to publicly employed longshore workers.[104] Those public longshore worker cases were branches on the tree which grew from *Sieracki's* root. When Congress eliminated the unseaworthiness claim of the *Sieracki* seaman covered by the LHWCA, it took away all that the Court had given in *Sieracki*. There was no viable precedent to which the court plaintiff could analogize. Without the root, the branch could not live on.[105]

But the court continued; even if some part of *Sieracki* survived, the overwhelming number of *Sieracki* seaman claims had involved private longshore workers. In 1972 Congress had addressed the "cases likely to occur to the mind."[106] But that did not mean that the precedent "which those amendments attacked, although technically still standing, should be followed."[107]

[103] 643 F. 3d 1380 (5th Cir. 1981).
[104] And others, as noted herein
[105] *Id.* at 1382.
[106] *Id., citing,* United States v. Hutcheson, 312 U.S. 219, 235 (1941),
[107] 643 F. 2d 1382.

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Because the 1972 eviscerated *Sieracki*, the court declined to follow it.[108] But, I ask, given the express language of §905(b), could it really be said that Congress had attacked anything other than the holding of *Sieracki* as it applied to those covered by the act. Precision has value, expressly in legal language.

Noting that courts had not uniformly applied *Sieracki* to public longshore workers,[109] the Ninth Circuit cited 1972 legislative history, which Judge Rubin in *Aparicio* had found unpersuasive, and concluded that it manifested an intent to abolish the unseaworthiness claim for all longshore workers, including those whose rights to recover for unseaworthiness were judicially created.[110] Of course, that reading of the statute did not expressly deal with workers other than longshore workers who might have availed themselves of *Sieracki*. Green and possibly Hawn come to mind.[111]

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[108] *Id*.

[109] The court here cited *Aparicio. Id.*

[110] *Id.* The court said:

> The primary evidence of Congress' will is found in H.R.Rep.No.1441, 92d Cong., 2d Sess. (1972), reproduced in 3 U.S. Code Cong. & Admin.News 4698 (1972). Part of that report reads:
>
> > Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, for gear or equipment of stevedores or employees of stevedores subject to this Act ..., or for other categories of unseaworthiness which have been judicially established.

Id. at 4703-04. *Accord:* Milligan v. Crux Subsurface, Inc., 2012 WL 4478664 (D. Alaska 2012) ("This Court is bound by the precedents [Normile] of the Ninth Circuit, which explicitly state that a *Sieracki* seaman cannot bring an unseaworthiness claim."); Belcher v. Sundad, Inc., 2008 WL 2937258 (D. Ore. 2008); Knight v. Longaker, 2007 WL 1864870 (N.D. Cal. 2007); Baker v. Hasbrouck, 1991 WL 240740 (D. Ore. 1991). *See also,* Griffith v. Martech International, Inc., 754 F. Supp. 166, 170 n.1 (C.D. Cal. 1989) (The court said in *dicta, citing Normile*: "In the Ninth Circuit, then, any attempt to expand the doctrine of "*Sieracki* seaman" must be viewed as questionable.").

[111] *Cf.* Complaint of Boy Scouts of America, 875 F. Supp. 1391, 1398n. 4 (N.D. Cal. 1994) (reading *Normile* as abolishing *Sieracki* "altogether" may "overstate the Ninth Circuit's holding"), *reversed on other grounds sub nom,* Boy Scouts of America v. Graham, 76 F. 3d 1045 (9th Cir.), *amended on denial of rehearing and rehearing en banc,* 86 F. 3d 861 (9th Cir. 1996).

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C. The Fourth Circuit

In *Harwood v. Partredereit,*[112] the Fourth Circuit Court of Appeals considered the continued viability of *Sieracki* in the case of a pilot, injured aboard a vessel on which he was not a crewman. Plaintiff was a member of a pilot's association, much like Rivera. Avoiding a head-on collision with *Aparicio,* the Fourth Circuit held that the pilot was covered by the LHWCA because he was injured on the actual navigable waters of the United States and was engaged in maritime employment under the Supreme Court's decision in *Director, Office of Worker's Compensation Programs v. Perini N. River Associates.*[113] Thus, the plaintiff pilot was a person covered by the act and §905(b) applied to deny the pilot an unseaworthiness claim. The continued survival of *Sieracki* was thus not an issue the court needed to decide.

The decision sparked a dissent from Judge Ervin.[114] He did not think that the pilot was covered by the LHWCA and therefore the pilot should have been able to avail himself of the warranty of seaworthiness from the vessel owner. He would have found that the pilot was a "member of the crew" and thus excluded from coverage. Judge Ervin did not think that "member of the crew" necessarily meant a seaman, as the Jones Act uses the term.[115] To Judge Ervin because the plaintiff was a member of the crew who actually engaged in navigation, he was not covered by the LHWCA and was entitled to recover for unseaworthiness. Concerning the survival of *Sieracki* point he said:

> The majority claims that Congress overruled *Sieracki* by means of the 1972 amendments to the Act, so that the *Sieracki* cause of action for warranty of seaworthiness no longer

[112] 944 F. 2d 1187.
[113] 459 U.S. 297 (1983).
[114] *See, Harwood,* 944 F. 2d 1192 (Ervin, J., dissenting).
[115] He believed that his reading of the statute survived *McDermott Int'l., Inc. v. Willander,* 498 U.S. 337 (1991).

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exists. On the contrary, the legislative history and case law cited by the majority affirm that, for workers such as Harwood who are excluded from the coverage of the Act, *Sieracki* remains very much alive.[116] He pointed out that Congress was attempting to avoid the *Sieracki/Ryan* end run around the LWHCA employer's limited liability, which combination was exposing the LHWCA employer to liability for full tort damages despite the exclusive remedy provisions of the LHWCA. Nowhere did the legislative history reveal a desire to absolutely overrule *Sieracki* and deny the unseaworthiness claim to employees not covered by the act.[117]

And the relationship between the vessel owner or master and the injured worker is not the basis of the vessel owner's liability for unseaworthiness. "The liability arises, not as an incident merely of the seaman's contract, but of performing the ship's service—doing a seaman's work and incurring a seaman's hazards—with the owner's consent or by his arrangement."[118] Moreover, the master, under the relevant Virginia scheme could reject a particular pilot and, under general maritime law retained command of the vessel.

D. The District of Columbia Court of Appeals

In *Eagle-Pitcher Industries, Inc. v. United States,*[119] the United States Court of Appeals for the District of Columbia considered a case in which asbestos manufacturers, brought claims for contribution and indemnity against the United States for damages the manufacturers had paid to publicly employed shipyard workers. In the course of analyzing the problems before it, which were complex, it stated and recognized, citing *Aparicio*, that the 1972 amendments to the LHWCA only abrogated *Siearcki* and *Ryan* as to workers covered by the LHWCA, which included claims against

[116] *See*, *Harwood*, 944 F. 2d at 1197 (Ervin, J., dissenting).
[117] *Id.* at 1198 (Ervin, J., dissenting).
[118] *Id.*
[119] 937 F. 2d 625 (D.C. Cir. 1991).

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the United States.[120]

E. Other Jurisdictions

1. *Federal District Courts*

District courts in the Eleventh Circuit have adhered to *Aparicio* as binding because it was decided before the creation of the Eleventh Circuit.[121] Likewise, several district courts in New York, part of the Second Circuit, have, over the years, recognized that pockets of *Sieracki* seamen still exist.[122] A district court in Pennsylvania, part of the Third Circuit, has agreed.[123]

2. *Alaska*

In *Cavin v. State, Fish and Wildlife Protection Division of Department of Public Safety.*[124] Cavin worked as a state trooper in Alaska where he patrolled on both land and sea. He suffered back injuries caused, in part, by his work on vessels. He sued his employer, the State, alleging he was a Jones Act seaman and/or entitled to recover as a *Sieracki* seaman for unseaworthiness and

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[120] *Id.* at 632.

[121] Wilson v. Butler, 2009 WL 111685 (M.D. Fla. 2009); Isbell v. Canal Barge Company, Inc., 2007 WL 9711491 (N.D. Ala. 2007) (Tennessee Valley authority employee entitled to bring a *Sieracki* seaman unseaworthiness claim); Complaint of Garda Marine, Inc., 1992 WL 321213 (S.D. Fla. 1992).

[122] Radut v. State St. Bank & Trust Co., 2004 WL 2480467 at *3 n. 36 (S.D. N.Y. 2004) (The LHWCA left a class of *Sieracki* seamen who "fall into the crack between seamen and longshore workers," who may assert a claim for unseaworthiness though they are not covered by the Jones Act".); Marroquin v. American Trading transportation Company, Inc., 711 F. Supp. 1165 (E.D. NY. 1988) (worker injured on the high seas and thus was not covered by the LHWCA and could maintain unseaworthiness claims); Clark v. Solomon Navigation, Ltd., 631 F. Supp. 1275, 1283 (S.D. N.Y. 1986) ("Accordingly, this court sees no basis for finding that a river pilot such as plaintiff is included within the revised coverage of the LHWCA under the 1972 amendments. Plaintiff not being an LHWCA-covered employee, there is no reason to deny plaintiff the seaman's traditional remedy for unseaworthiness that is clearly his due as a '*Sieracki* seaman.').

[123] Purnell v. Norned Shipping, B.V., 1985 WL 71277251, at *1, n. 1 (E.D. Pa. 1985) ("I note that there is a split among the circuits as to the resolution of this issue. See Normile v. Maritime Company of the Phillipines, F.2d 1380 (9 Cir. 1981). However, I am persuaded by the reasoning of Judge Rubin's opinion in *Aparicio. Moreover, a plain reading of the LHWCA cuts against the argument of the City.*"). It would actually seem that the Third Circuit itself would agree. *See, e,g.,* Purnell v. Norned Shipping B.V., 801 F. 2d 152, 154 n. 1 (3d Cir. 1986), *cert. denied,* 480 U.S. 934 (1987); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F. 2d 31 (3d Cir. 1975) (indemnity)(following *Thibodeaux* and stating "The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act overruled *Ryan* as it applies to covered employees. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 40 (3d Cir.1975). But the 1972 amendments do not limit *Ryan's* applicability to employees, like plaintiffs' decedents, who are not covered by that Act.").

[124] 3 P. 3d 323 (Ak. 2000).

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maintenance and cure. The trial court held that he was not a seaman and that he had no general maritime law claim.

The Alaska Supreme Court reversed.[125] On the seaman status issue, the Court held that the trial court needed to consider evidence of Cavin's work history beyond the period on which it had focused and whether plaintiff was what the Court called a "seasonal seaman" based on seasonal reassignments.[126] More critically, for present purposes, the Court turned to Cavin's unseaworthiness and maintenance and cure claims. Cavin contended that if he was not a Jones Act seaman, he was a *Sieracki* seaman. The trial court denied that claim relying on the Ninth Circuit's decision in *Normile, supra.*

The Alaska Supreme Court stated that the "controversy here centers not on whether Cavin fits into the category of a '*Sieracki* seaman' but on whether the category continues to exist."[127] The Court held that the category did continue to exist. The Court, relying on the legislative history, noted that the purpose of the 1972 LHWCA amendments was, in part, to place the injured LHWCA worker in the same position the worker would be in on land and not endow the LHWCA worker with any special maritime theory of recovery.[128]

> This purpose suggests that in cases where fault would remain uncompensated under the LHWCA—that is, in cases of non-covered land-based workers who sustain injuries while working aboard a vessel—other remedies would be available. If Congress allowed workers covered under the LHWCA to recover against vessel owners for negligence in addition to recovering benefits under the act, why should it strand workers not covered by the act with

[125] *Id.*
[126] *Id.* at 328-30.
[127] *Id.* at 330.
[128] *Id.* at 331.

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no coverage at all, or leave them to the hazards of existing state remedies?[129]

The Court limited *Normile* to cases involving public longshore workers who were covered by FECA. The Court also stated that *Normile* had not been "widely followed" and then discussed, and quoted, *Aparicio,* calling it "better reasoned."[130] It said:

> We find *Aparicio* persuasive in its basic point that the quid pro quo nature of the 1972 amendments, which provide a compensation regime under the LHWCA in exchange for a bar to unseaworthiness claims, counsels against their extension to those who receive no remedy under the act.[131]

3. *California*

In *Freeze v. Lost Isle Partners,*[132] Plaintiff, Freeze, worked as a laborer at a summer seasonal bar and restaurant. As part of her job, she operated and rode on a barge between the mainland and an island. Freeze's hand was crushed as she was mooring the barge. Freeze sued her employer, claiming to be a Jones Act seaman, or alternatively under general maritime law for unseaworthiness and negligence. The trial judge refused to submit her general maritime law claims to the jury if they found she was not a seaman. The jury held that Freeze was not a seaman and she appealed, contending that her general maritime law claims did not depend upon her being a seaman. The Court of Appeal agreed.[133]

The appellate court held that the trial court should have instructed the jury on unseaworthiness. The jury could have found that at the time of her injury, she was acting as a crew member of the barge. The court held that the 1972 amendments to the LHWCA did not deprive

[129] *Id.*
[130] *Id.* at 331-32.
[131] *Id.* at 332.
[132] 96 Cal. App. 4th 45, 116 Cal. Rptr. 520 (Cal. App. 1st Dist., Division 3 2002).
[133] 96 Cal. App. 4th at 50, 116 Cal. Rptr. at 523.

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her of the right to pursue her *Sieracki* unseaworthiness claim, citing the Fifth Circuit's decision in G*reen, supra.* "To the extent [*Normile*] can be read to hold that the 1972 Amendments to the LWHCA eliminated the *Sieracki* seaworthiness claim for workers not covered by either the Jones Act or the LHWCA, we decline to follow it."[134] Like the Fifth Circuit in *Green,* the court also held that Freeze could pursue her general maritime law negligence claim and that the exclusivity provision of the California Workers Compensation Act[135] did not bar her claim.[136]

V. And So? Some Thoughts On What Seems Right and What I Think

Thus, after our short jurisprudential journey, we are left with the question: What is the best resolution of the question whether *Sieracki* seaman status and the accompanying right to recover for a breach of the vessel owner's warranty of seaworthiness should continue to exist after 1972 for non-LHWCA workers? Did Congress entirely paint over it or not? I will begin with the arguments in favor of *Sieracki's* continued existence for those not covered by the LHWCA and follow with the fewer, and, what I believe, weaker arguments that it should not.

A. Pro-*Sieracki* Lives Points

1. *The Express Words of §905(b)*

As Judge Rubin noted in *Aparicio,* the best and first place to begin when trying to interpret a statute is with the words themselves. And the words of §905(b) are clear. It eliminated the right to recover for unseaworthiness and replaced that right with a vessel negligence claim

[134] 96 Cal. App. 4th at 51-52, 116 Cal. Rptr. At 524. Here, the court cited *Cavin, Cormier,* and *Aparicio*.
[135] Cal. Labor Code § 3601.
[136] *Freeze*, 96. Call. App. 4th at 52, 116 Cal. Rptr. at 525. Louisiana also seems to recognize that pockets of *Sieracki* seaman remain. Griffin v. LeCompte, 471 So. 2d 1382, 1385 (La. 1985) ("There are "pockets of Sieracki seamen remaining after the 1972 amendments [to the LHWCA].'"); Richard v Apache, 111 So. 3d 1156 (La. App. 3d Cir. 2013).

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for "person[s] covered by this chapter."[137] The chapter of course is the LHWCA. Thus, the statute on its face only eliminates the right of LHWCA covered workers to recover for unseaworthiness. It does not speak of others. Even if Congress did not consider those others in its deliberations, it said what it said and it must ultimately mean what it says. Additionally, one will note that there is nothing ambiguous in the words chosen. There is no mystery in "person[s] covered by this chapter." The reader does not need a dictionary; the grammatical construction is straightforward; there are no dependent clauses; there are no conditionals. It is right there for all to see. All one who is not familiar with the area may have to do is determine what "chapter" it is.

Moreover, as the U.S. Supreme Court has said: when Congress passes legislation, Congress is presumed to know the existing law.[138] In 1972, that existing law included *Sandoval*, which the reader will recall had held that a FECA worker, not covered by the LHWCA, was a *Sieracki* seaman who could recover for unseaworthiness. If Congress really meant to overrule cases like Sandoval's, as the ninth circuit contended, one would think it would have clearly said so and the words it chose in §905(b) do not, read literally, accomplish that result.

2. *Another Chance*

Likewise, sometimes legislative inaction speaks loudly. Since 1972, Congress has not taken any action to change the introductory language of §905(b). It has remained "a person covered by this chapter" for 50 years. While it was possible for Congress to change that language at any time it had a particular opportunity to do so in 1984 when it made significant additional amendments to the LHWCA's coverage provisions.

[137] 33 U.S.C. §905(b).
[138] *Director, Office of Worker's Compensation Programs v. Perini N. River Associates,* 459 U.S. 297, 319 (1983) (We may presume "that our elected representatives, like other citizens, know the law… .").

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In 1984, Congress excluded from coverage workers who are covered by state worker's compensation and who are employed: exclusively to perform office, clerical secretarial, security or data processing work; by a club camp or recreational operation (as in *Green*); by a marina and not engaged in construction, replacement or expansion of the marina; by suppliers, transporters, or vendors if they are temporarily on a covered situs and not engaged in work customarily done by the covered employer; or as aquaculture workers.[139] Additionally, Congress excluded from LHWCA coverage those who are employed at a facility certified by the Secretary of Labor as exclusively involved in building and repairing small vessels, as defined in the act, unless the injury occurs on navigable waters or at a defined adjacent area or the worker is not covered by state worker's compensation.[140]

Thus, in 1984 Congress created some significant exclusions from LHWCA coverage and, presumably aware of the continued existence of pockets of *Sieracki* seamen—*Aparico* was decided in 1981--it did nothing to §905(b)'s first sentence. Nothing. In excluding workers from coverage, Congress was, per my reading of § 905(b), increasing the number of potential *Sieracki* seamen. Green was a perfect example. He was excluded from coverage because he worked at a camp and was covered by worker's compensation and, thus, he was a *Sieracki* seman when doing the work of a vessel. Congress' omission speaks volumes. It manifests a willingness to preserve the status quo or at least a lack of legislative will to disturb it. Now, let me turn from the language of the statute and the by-passed opportunities for change to the equities involved.

3. The Equities Involved

[139] 33 U.S.C. § 902(3)(A)-(F).
[140] 33 U.S.C. § 903. The 1972 amendments already excluded workers who were employed to load, unload, or repair any small vessel under 18-tons. 33 U.S.C. § 902(3). Now, that provision is at 33 U.S.C. § 902(3)(H).

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a. *Sieracki* Seamen Were Not Part of the Bargain

If one pushed further, even if the literalist believes such a trek is unnecessary, one is struck with the equities involved in the 1972 amendments. As noted,[141] a part of the motivation for the amendments to the LHWCA in 1972 was to eliminate the LHWCA worker's right to recover for unseaworthiness under the holding of *Sieracki.* As a quid pro quo for injured workers, Congress moved coverage landward for those engaged in maritime employment and injured on a dock, pier, terminal, or other adjacent area customarily used during the loading and unloading of vessels. It also raised LHWCA benefits and, in §905(b), expressly provided certain LHWCA covered workers a vessel negligence claim, including against the worker's employer if the employer owned the relevant allegedly negligent vessel.[142]

Critically, non-LHWCA workers who might be doing the work of the vessel and who would qualify for *Sieracki* seaman status were not parties to the bargain just described. Those workers did not benefit from the expansion of LHWCA coverage, from the increase in LHWCA benefits, or from the creation of the vessel negligence action. Eliminating the unseaworthiness claim for them would deprive them of a pre-existing right with no accompanying benefit. And, at the time of the amendments, the maximum benefits available to a FECA longshore worker were lower than the benefits available to an LHWCA worker.[143] And, state worker's compensation benefits generally were, and still are, lower than LHWCA benefits.[144] Even if the failure to be a part of the quid pro quo is not determinative, it is a relevant factor in the interpretation of the statutory phrase-: "a person covered under this chapter."

[141] See text accompanying notes through *supra.*
[142] Notably, the employer is only liable for negligence in its vessel capacity, not its pure employer capacity. *See, e.g., Morehead v. Atkinson-Kiewit, J/V,* 97 F.3d 603 (1st Cir. 1990).
[143] *Aparicion,* 643 F. 2d at 1118.
[144]

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b. Taking Aim at Stevedore Caused Unseaworthiness and *Ryan*

It was also manifest in 1972 that Congress was concerned with the ironic and arguably unjust situation that *Sieracki*, and *Ryan* could trigger. First, let us examine the troublesome impact of *Sieracki,* at least in some cases. Imagine, a stevedore who came on a ship and created an unseaworthy condition. Then, an employee of that stevedore suffered injury caused by that unseaworthy condition and the employee sued the vessel owner. Because liability for unseaworthiness was strict and nondelegable, the vessel owner, who had not created the risk, was still responsible for it. Thus, the vessel owner was responsible for a risk it did not create to the employee of the entity which created the risk—a clear imbalance in the allocation of moral fault.

Responding to that inequity, the Court in *Ryan,* provided the vessel owner with a right to indemnity from the stevedore employer if the cause of the unseaworthy condition which brought about the worker's injury was a breach of the stevedore's implied warranty of workmanlike performance. This made the risk creator responsible under the factual scenario set out in the previous paragraph, but it did so at a cost. The cost was that the stevedore, an LHWCA employer, was circuitously made financially responsible for full tort damages suffered by its employee, despite the fact that the LHWCA provided that its employee's right to recover worker's compensation from it was the employee's sole remedy.[145] That financial responsibility or liability, albeit, via indemnity, seemed inconsistent with Congress' provision of benefits as the worker's exclusive remedy.[146]

[145] 33 U.S.C. §905(a).

[146] *Yaka* of course completed the ironic circle by allowing the stevedore employee of the vessel owner to recover for unseaworthiness even if the stevedore's co-workers might have created the unseaworthy condition and even though the 33 U.S.C. §905(a) purported to make LHWCA benefits the employee's exclusive remedy against its employer.

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§905(b) does away with the arguably unfair consequences described in the prior two paragraphs for "person[s] covered by this chapter."[147] The covered worker cannot sue the vessel for unseaworthiness and the vessel cannot seek indemnity from the stevedore employer. Congress hit the bull's eye of that target. But the non-covered worker doing the ship's work is not in that target and does not always present the same problems.

c. The Surviving Pockets of *Sieracki* Seamen Were Not in Congress' Target

Green proves the point. Green did not create the risk from which he was injured. His employer created that risk and that is who he sued. There was nothing unfair about holding the risk creator responsible. Nor, according to the court, was the result in conflict with any applicable exclusive remedy provision.[148] Likewise, in *Rivera,* the plaintiff was a pilot who was not covered by the LHWCA.[149] He did not create the unseaworthy condition which caused his injury and he was not employed so there was no question of *Ryan* indemnity or conflict with any exclusive remedy provision.

Aparicio and *Cormier* did both involve harbor workers so the *Sieracki/Ryan* conundrum in their situation is perhaps most pronounced. But whether their employer, or their co-workers case played any role in causing the unseaworthy conditions was not clear. And, if they did not cause the unseaworthy condition then there would be no breach of the implied warranty of workmanlike performance which caused their injury so those *Sieracki/Ryan* concerns were not

[147] 33 U.S. C. §905(b). And, see text accompanying note through *supra.* Interestingly, while doing away with *Sieracki* liability and *Ryan* indemnity for the covered worker, §905(b) does, as noted in text, provide the employee a vessel negligence action (rather than a strict liability action the employer). Thus, the LHWCA remains much better off than most workers covered by state worker's compensation who can only recover in tort against their employer's if the employer's tort occurred outside the normal course and scope of employment, somehow was not covered by the relevant worker's compensation statute, or where the employer's fault was worse than negligence.
[148] Recall that the court held that the general maritime law preempted the application of Louisiana's worker's compensation exclusive remedy provision.
[149] *But see, Harwood,* discussed at text accompanying note through *supra.*

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implicated. It is true that their employer might be responsible for their injuries via indemnity if it did cause the risk despite an exclusive remedy provision so that concern would remain. But today, workers like Aparicio are still not covered by the LHWCA.

d. The §905(b) Vessel Negligence Action: Another Observation on the Post-1972 Equities of *Sieracki* "Pockets."

> Congress in enacting § 905(b) said that it intended to:
>
> > place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called… .[150]

Be that as it may, Congress actually did more. While its report referred to an employee's third-party action, §905(b) not only gives the covered worker a vessel negligence action against a third-party vessel owner, it also gives the worker a vessel negligence action against the worker's own employer.[151] Of course, that action is against the employer in its vessel capacity.[152] The vessel negligence claim against the employer is a type of dual capacity claim. That is, the worker's exclusive remedy against its employer is worker's compensation—the LHWCA.[153] But the employee is able to sue the employer in another capacity—as vessel owner. While the land-based worker in some jurisdictions, in some circumstances, may be able to sue the employer

[150] H.R.Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 3 U.S.Code Cong. & Ad.News, pp. 4698, 4702-04 (1972) (hereinafter cited as House Report).
[151] Jones & Laughlin Steel Corp. v. Pfeiffer, 426 U.S. 523 (1983).
[152] Morehead v. Atkinson-Kiewit, J/V, 97 F.3d 603 (1st Cir. 1990).
[153] 33 U.S.C. §905(a).

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under some capacity other than as employer,[154] "[r]ecognition of the [dual capacity] doctrine has…been the exception, with most states holding all actions against the employer barred by the exclusive remedy provision. Even in those states where the doctrine is accepted, its applicability is limited[.]"[155]

Thus, the recognition that an LHWCA covered worker may sue their employer for vessel negligence is a significant right. As noted, most land-based workers do not enjoy a similar right. By definition, a plaintiff who is not covered by the LHWCA cannot avail themselves of the §905(b) vessel negligence action. One may justifiably conclude that the express provision of the §905(b) vessel negligence action, including against the employer, was part of the 1972 quid pro quo. Once again, the non-LHWCA worker was not a beneficiary of that quid pro quo. And if the 1972 LHWCA amendments are interpreted to deprive the non-LHWCA worker of the right to sue for unseaworthiness and that worker simultaneously does not have the right to sue for §905(b) vessel negligence that worker is in a worse situation than they were before 1972 and has received nothing in return.

But would that non-LHWCA worker have a general maritime law negligence action against a tortfeasor vessel, even if it is not specifically a §905(b) vessel negligence action? The answer, subject to the discussion in the next section is yes, at least against a third- party vessel owner. But not against the employer in jurisdictions which follow *Brockington* and hold that a state worker's compensation exclusive remedy provision applies to bar even a general

[154] Jimmie E. Tinsley, *Employer's Torts Liability Under Dual Capacity Doctrine*, 40 Am. Jur. Proof of Facts 2d 603 (2022) at https://1.next.westlaw.com/Document/Id7839a3bab8011d98870f5816ad77317/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)

[155] *Id.* (citations omitted).

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maritime law negligence action. Thus, in jurisdictions which follow *Brockington* the non-LHWCA worker would be in a worse position than the LHWCA worker in terms of being able to bring a vessel negligence action against the employer without having received any of the benefits of the 1972 amendments.

What about in jurisdictions that do not follow *Brockington*, like the U.S. Fifth Circuit? There, per *Green*, the employee would have a general maritime law negligence action against the employer. But, that said, a rather abstruse aspect of a very old decision, *The Osceola*,[156] merits consideration and raises at least academic concern with the *Sieracki* seaman's right to avail themselves of a general maritime law negligence against a vessel whose work they are doing and which causes them injury.

e. The Fourth Point of "The Osceola" and the Sieracki Seaman

Another reason to preserve *Sieracki* protection for those not covered by the LHWCA arises out of a rather arcane aspect of maritime law which I have called "dreadful."[157] It arises out of the fourth point of *The Osceola*, the first modern United States Supreme Court catalogue of seamen's remedies.[158] The fourth point stated what the seaman did not have: the right to sue the master or fellow crew member for negligence.[159] Of course, that rule would also insulate the employer from any vicarious liability claims. Happily, the Jones Act dealt a death knell to the

[156] 189 U.S. 158 (1903).
[157] Thomas C. Galligan, Jr., *The Dreadful Remnants of the Osceola's Fourth Point,* 34 Rutgers L. J. 729 (2003).
[158] 189 U.S. 158 (1903).
[159] *Id.* at 175 ("4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."). *See also,* Thomas C. Galligan, Jr., *The Dreadful Remnants of the Osceola's Fourth Point,* 34 Rutgers L. J. 729 (2003).

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fourth point for seamen by giving them a negligence action against their employer. But what about others, who were not seamen but were doing the work of the ship?

Prior to *Pope & Talbot*, courts had held that longshore workers could recover in a negligence action against a vessel on which they were working.[160] But, after *Sieracki*, Justice Frankfurter wondered in his *Pope & Talbot* concurrence whether longshore workers who were treated as seamen for purposes of recovering for unseaworthiness should likewise be treated as seamen for purposes of negligence actions, and because the Jones Act did not apply to them, they might be subject to *The Osceola's* fourth point. And not able to sue in negligence.[161] Consequently, he would not have addressed the negligence issue at all but raised it only because Justice Black, as discussed below, had mentioned the negligence claim in his opinion.

The lower court in *Pope & Talbot,* had recognized Hawn's right to recover in negligence but that issue was not before the Supreme Court; however, Justice Black had said:

> A concurring opinion [by Justice Frankfurter] here raises a question concerning the right of Hawn to recover for negligence—a question neither presented nor urged by Pope & Talbot. It argues that the Sieracki case, by sustaining the right of persons like Hawn to sue for unseaworthiness, placed them in the category of 'seamen' who cannot, under The Osceola, maintain a negligence action against the shipowner. The Osceola held that a crew member employed by the ship could not recover from his employer for negligence of the master or the crew member's 'fellow servants.' Recoveries of crew members were limited to actions for unseaworthiness and maintenance and cure. But Hawn was not a crew member. He was not employed by the ship. The ship's crew were not his fellow

[160] *The Max Morris v. Curry,* 137 U.S. 1 (1890).
[161] *Pope & Talbot,* 346 U.S. at 417-18 (Frankfurther, J., concurring).

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> servants. Having no contract of employment with the shipowner, he was not entitled to maintenance and cure. The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence. Neither the holding nor what was said in Sieracki could support such a contention. In fact, the dissent in Sieracki appears to have been predicated on an objection to adding unseaworthiness to the existing right to recover for negligence. It would be strange indeed to hold now that a decision which over the dissent recognized unseaworthiness as an additional right of persons injured on shipboard had unwittingly deprived them of all right to maintain actions for negligence.[162]

Clearly, the majority felt that the negligence action was still available to Hawn and other longshore workers[163] I applaud that sentiment and think it is correct. But, as Justice Black said, that issue was neither "presented nor urged" so arguably the just quoted paragraph is dicta and Justice Frankfurter's concern remains, lurking in the intellectual background. If, in fact, the non-longshore worker doing the work of the ship does not have an unseaworthiness claim after 1972, one would at least hope that if the worker lost their negligence claim with *Sieracki* that that negligence claim would be resuscitated if it was ever lost. Otherwise, the worker would be deprived of both the unseaworthiness claim and a general maritime law negligence action. Of course, the longshore worker who is covered by the LHWCA has a vessel negligence action under LHWCA §905(b)[164] but that remedy is not expressly available to a person who is not

[162] 346 U.S. at 413-14.
[163] The Fifth Circuit in *Green, supra,* clearly agreed.
[164] *See generally, Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001) (recognizing dock worker's survivors right to recover for wrongful death caused by negligence but the worker was a true LHWCA worker, not a *Sieracki* seaman, and the defendant was not a vessel).

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covered by the act but who is a *Sieracki* seaman (the subject of Justice frankfurter's concern).[165] And, the reader will recall the previous section stating that in jurisdiction that followed *Brockington* a worker covered by some alternative worker's compensation scheme would not be able to recover for vessel negligence under the general maritime law even if the claim still exists because of the applicable exclusive remedy provision in the applicable worker's compensation scheme.

4. "*Perini" and How The Supreme Court Has Interpreted the 1972 LHWCA Amendments When Considering Pre-Existing Rights*

Another persuasive reason to interpret the *Sieracki* effects of the 1972 amendments to the LHWCA like the Fifth Circuit is the United States Supreme Court's holding and method of analysis in *Director, Office of Worker's Compensation Programs v. Perini N. River Associates.*[166] Prior to 1972, a worker was not covered by the LHWCA unless the worker was injured on the navigable waters of the United States. In extending coverage landward to areas adjacent to navigable waters and used in the loading and unloading of cargo or for other maritime purposes, Congress for the first time added a status requirement for coverage. A worker had to be "engaged in maritime employment."[167] What would that mean for workers who were not engaged in traditional maritime employment but who were injured on the *actual* navigable waters of the United States and who would have been covered by the LHWCA before 1972?

Churchill was an employee of Perini, engaged in building a sewage treatment plant that extended 700 feet into the Hudson River. The work involved the use of cargo barges and supply

[165] Those troublesome words again.
[166] 459 U.S. 297 (1983).
[167] *Id.* at 299 *citing* 33 U.S.C. § 902(3).

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barges. Churchill was in charge of the work on one of the cargo barges. While Churchill was on the barge's deck, a line snapped and struck him causing injuries to his head, leg, and thumb. Churchill sought benefits under the LHWCA.[168]

Perini contested his claim and the Administrative Law judge who heard the matter agreed with Perini, concluding that Churchill was not "engaged in marine employment" because his work had no relationship to navigation or commerce on the navigable waters. The Benefits Review Board affirmed holding that marine construction workers who were not building a structure that would be used for navigation or maritime commerce were not engaged in maritime employment and did not satisfy the new status requirement.[169] The Second Circuit followed suit and affirmed, once again because Churchill's employment did not have a "significant relationship to navigation or to commerce on navigable waters."[170]

The Supreme Court granted *certiorari*, and in an opinion by Justice O'Connor, reversed. She began her analysis by noting that there was no question Churchill would have been covered prior to 1972 because he was injured on the navigable waters of the United States.[171] And, it was clear that before 1972 a worker injured on the navigable waters was covered by the LHWCA without any inquiry into what he was doing at the time he was injured.[172] Justice O'Connor then turned to the 1972 amendments and considered Congress' intentions.[173] In adding the language "engaged in maritime employment" did Congress mean to impact both landward and seaward coverage?[174]

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[168] *Id.* at 300-01.
[169] *Id.* at 301-02.
[170] *Churchill v. Perini North River Associates,* 652 F.2d 255, 256 n. 1 (CA2 1981).
[171] *Perini*, 459 U.S. at 305
[172] *Id.* at 311, *citing,* G. Gilmore & C. Black, *The Law of Admiralty*, 429-30.
[173] *Perini*, 459 U.S. at 313.
[174] *Id.* at 315.

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The Court did not believe that Congress intended to make any change in the law regarding LHWCA coverage for those injured on the *actual* navigable waters: "We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972."[175] It was the landward extension of the situs requirement that necessitated some consideration and definition of who was covered: "those engaged in maritime employment."[176] What about a worker, like Churchill, injured on the navigable waters? "Congress … assumed that injuries occurring on the actual navigable waters were covered, and would remain covered."[177]

Justice O'Connor then said: "Surely, if Congress wished to repeal *Calbeck* [holding that all workers injured on the navigable waters were covered by the LHWCA before 1972] and other cases legislatively, it would do so by clear language… ."[178] That phrase applies as well to the argument that the passage of §905(b) did away with all *Sieracki* seaman, including those not covered by the LHWCA.[179]

Finally, perhaps out of caution, Justice O'Connor wrote that the Court did not mean to say that after 1972 those injured on navigable waters only had to satisfy the situs test without having to satisfy the status test. But then to explain how the worker injured on the actual navigable waters satisfied the status test, Justice O'Connor said:

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[175] *Id.*
[176] *Id.* at 317-18.
[177] *Id.* at 319.
[178] *Id.* at 321.
[179] The Court did note that Congress was explicit in mentioning *Sieracki* and *Ryan* and wanting to eliminate the strict liability unseaworthiness action for "longshoremen" and the indemnity claim against the "stevedore." *Id.* at 321-22. Of course that says nothing about the non-longshore worker/*Sieracki* deaman.

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> We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act.[180]

Thus, the worker, in addition to satisfying the situs test, must be in the course of employment at the time of the injury, which is generally consistent with coverage requirements in all worker's compensation schemes.[181] Justice Rehnquist concurred, noting that at the time of his injury Churchill was unloading material, which was traditional longshore work.[182] Justice Stevens dissented, arguing for a literal reading of the statute, which is actually consistent with my arguments above about literalism in defining a "person covered by the act."[183]

Perini shows how the Court has interpreted the 1972 amendments to the LHWCA when the question was the extent to which the amendments limited pre-existing worker's rights. In *Perini*, the Court interpreted the amendments' impact on the rights of workers who would have been covered by the act prior to 1972 very narrowly. Absent a clear intent to limit the pre-existing LHWCA coverage of worker's injured on the navigable waters, the Court found that as long as those workers were injured during the course of their employment on the navigable waters, they would remain covered workers after 1972.

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[180] *Id.* at 324.
[181] The Fifth Circuit has held that as long as a worker's presence on the navigable water at the time of injury is not transient or fortuitous the worker may be covered. But the presence on the water must be more than a modicum of time. *Bienvenu v. Texaco, Inc.*, 164 F. 3d 910 (5th Cir. 1999).
[182] *Perini*, 459 U.S. at 325 (Rehnquist, J. concurring).
[183] *Id.* (Stevens, J., dissenting). Interestingly, in the course of his dissent, urging a literal reading of the statute, Justice Stevens noted Congress' emphatic concern with and emphasis on longshore workers and harbor workers. *Id.* at 327-29. Again, that emphasis is not inconsistent with my argument that Congress was not concerned with others and its chosen and very precise language in the first sentence of §905(b) is evidence thereof.

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Likewise, in 1972, many workers, including those covered by the LHWCA, were *Sieracki* seamen who could recover or unseaworthiness. Clearly, with the enactment of §905(b), Congress eliminated that right for those persons covered by the LHWCA. But those who are not covered by the LHWCA are like Churchill in *Perini*; they had a right—the right to recover for unseaworthiness against the vessel owner when doing the work of the ship—and the language Congress chose to limit the unseaworthiness remedy for LHWCA covered workers does not evince an intent to change their rights. *Perini* teaches that in the context of the 1972 LHWCA amendments, Congress gaveth land-based coverage but it did not taketh away water-based coverage because there was not a clear intent to do so. Similarly, even though Congress took away the rights of the LHWCA covered worker to recover for unseaworthiness; it did not clearly take away that right for persons not covered by the act. To return to painting, the *Perini* Court held that Congress, when it painted in 1972, did not mean to cover up the Court's prior work that had held that all those workers injured on the actual navigable waters in the course of their employment remained covered by the Act even after 1972. That part of the painting remained.

5. *Pro-Sieracki Lives Recap*

To summarize this section, the arguments favoring the survival of *Sieracki* seaman status for those not covered by the LHWCA are strong. First, and most important, is the express language of the statute. §905(b) in its first sentence applies to "a person covered under this chapter." Persons not covered by the LHWCA are not included in the subsection and it is §905(b) that takes away the covered worker's right to recover for unseaworthiness from the vessel owner. Thus, those who are not covered by the LHWCA literally still have the general maritime law right to recover for unseaworthiness when they are injured doing the work of the ship. Congress chose those words in 1972, aware that courts had held that workers not covered

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by the LHWCA were *Sieracki* seamen. Moreover, Congress did not change the relevant language in 1984 when it excluded several different groups of workers from LHWCA coverage.

Additionally, non-LHWCA *Sieracki* semen were not part of the quid pro quo that took place in 1972 when Congress moved LHWCA coverage landward, increased benefits of LHWCA workers, and did away with unseaworthiness liability and *Ryan* indemnity for covered workers. Congress also did not expressly provide non-LHWCA workers with a vessel negligence action against their employer or a third-person and some jurisdictions hold that state worker's compensation exclusive remedy provisions would ban vessel negligence actions against the worker's employer. Moreover, the fourth point of *The Osceola* may be a longarm from the grave that limits vessel negligence actions by non-Jones Act workers doing the traditional work of a seaman.

And the Court in *Perini* interpreted the post-1972 LHWCA amendments as not disturbing pre-existing coverage for those injured on the navigable water who would have been covered before 1972. That is, absent clear Congressional intent to do so, the Court did not take away rights to recover for benefits. The Court should show similar solace for the non-LHWCA *Sieracki* seaman. Absent clear Congressional intent to deprive that worker of the right to recover for unseaworthiness the courts should not do so. And there is no such clear intent; indeed, the express language used evinces a clear intent to preserve the non-LHWCA worker's right to recover for unseaworthiness when doing the work of the defendant vessel. Now, let us turn to the more meager arguments that any pockets of *Sueracki* seamen should be sewn shut.

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B. The Anti-*Sieracki* Lives Points A/K/A *Sieracki* Is or Should Be Dead

1. *The Root and the Branch*

The reader will recall the Ninth Circuit's decision in *Normile,* concluding that *Sieracki* did not survive 1972 for anyone at all. The court's argument was that *Sieracki* had been the root of the liability for unseaworthiness and courts had extended the root to workers not covered by the LHWCA, i.e., workers outside the precise facts of *Sieracki.* According to the Ninth Circuit,, those non-LHWCA worker's unseaworthiness claims could not survive the elimination of the root. It is, as I wrote above, as if cases like *Sandoval* were branches off the tree which grew from the *Sieracki* root and without the root the branches could not live. The Ninth Circuit's image has an appeal to it, but it does not persuade.

A root is one way to think of it but imagine the tree in the metaphor was a maple tree. Maple trees spread their seeds by wind dispersal. So do cottonwood trees.[184] That is, their seeds blow away and grow elsewhere. New trees sprout up. The seed grows even if the original tree is uprooted; the continued life of the seed and the new tree does not depend upon the continued life of the older tree. Using the maple tree metaphor, the *Sandoval* seed could live without the *Sieracki* root. After all, one metaphor is as good as another.

§905(b) does not manifest an intent to get rid of unseaworthiness recovery for all, but only for persons covered by the act. And Congress, despite having the chance for the last 50 years, has not changed that language. Most notably it did not change it in 1984, after *Aparicio* was decided, when it amended the LHWCA again to exclude coverage for certain workers,

[184] Science Learning Hub Pokapu Akoranga Putaloa—Seed Dispersal https://www.sciencelearn.org.nz/resources/103-seed-dispersal#:~:text=The%20most%20common%20methods%20are,%2C%20animals%2C%20explosion%20and%20fire.&text=Dandelion%20seeds%20float%20away%20in,to%20produce%20lots%20of%20seeds.
So do dandelions and fungus but they did not seem as attractive a symbol.

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thereby arguably adding *Sieracki* pockets. In doing so, it did not acknowledge any problem with decisions like *Aparicio,* which recognized the limited survival of *Sieracki* recovery. It would seem that if Congress had been concerned about the holding in *Aparicio*, it would have done something about it, especially when what it did do expanded *Aparicio's* scope.

2. *Tort Expansion Has Generally Stopped*

As noted, Justice Rutledge's opinion in *Sieracki* was a paradigm example of what would follow during the expansion of tort liability through the late-70s or so. Justice Rutledge rejected notions of privity as a limit on the ship owner's liability to the employee of a third-person stevedore, i.e., there was not contractual relationship between the vessel owner and the injured worker but that did not mean there was no liability.[185] Like other developments of the period, it expanded the categories of injury victims who could recover for strict liability.[186] The Court also relied upon notions of deterrence[187] and risk spreading.[188]

But the critic of *Sieracki* might say: "Unlike the universe, tort liability is generally not still expanding." Conceding the point, the fact that tort liability may not be expanding, certainly at the rate that it was in the years after *Sieracki,* there is no clear indication that Congress in 1972 meant for it to contract as far as total elimination of the right to recover for unseaworthiness by those not covered by the LHWCA. But the argument that tort law is not expanding as quickly as it was, if at all, leads to another argument for denying *Sieracki* status to all: uniformity.

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[185] *Sieracki,* 328 U.S. at 88-96. On the general tendency to reject privity as a defense in tort actions, *see, e.g., Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A. 2d 69 (1960).
[186] *Sieracki,* 328 U.S. at 93. For the general trend, s*ee, e.g.,* Restatement (Second) of Torts § 402A (1965).
[187] *Sieracki,* 328 U.S. at 94 ("Those risks are avoidable by the owner to the extent that they may result from negligence."). For the general trend, *see,* A. Popper, *In Defense of Deterrence*, 75 Albany L. Rev. 181 (2011).
[188] *Sieracki,* 328 U.S. at 94. *See generally,* F. James, *Social Insurance and Tort Liability,* 25 N.Y.U. 537 (1952).

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3. *Uniformity*

In its simplest form, the uniformity argument is that in 1972 Congress did away with the right of LHWCA workers to recover for unseaworthiness from a vessel owner. By far, the vast majority of *Sieracki* seamen were workers covered by the LHWCA. So perhaps, even if it is true that Congress did not literally abolish the theoretical possibility of some limited *Sieracki*-type liability for those not covered by the LHWCA, perhaps the language it chose was an oversight and underinclusive by mistake. Congress was attempting to do away with *Sieracki* and did so, using language that would substantially eliminate recovery under the precise facts out of which the doctrine arose. While a literal interpretation of §905(b) would leave pockets of remaining *Sieracki* seamen, uniformity demands their elimination even if it means deviating from a literal interpretation of §905(b). Otherwise, the law will be an inconsistent patchwork—a quilt, not a painting--with a very small number of outlier plaintiffs. Consistency, clarity, and logical elegance demand the elimination of all *Sieracki* claims. To support this argument, the anti-*Sieracki* survival advocate might point to United States Supreme Court jurisprudence on wrongful death recovery in maritime law.

In its wrongful death decisions of the last 45 years or so, the Court has articulated what it apparently considers a desirable need for uniformity.[189] And, it has counselled that in continuing to develop the general maritime law, the Court must be increasingly cognizant that:

> Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.

[189] *Miles v. Apex Marine,* 498 U.S. 19, 33 (1990); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 624 (1978). On maritime wrongful death in general, Thomas C. Galligan, Jr., *Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk*, 71 La. L. Rev. 787 (2011).

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> We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.[190]

Thus, we are called back to the parable of the painters. Where Louise, the legislature, has painted or spoken, Charles, the courts, cannot cover or even change that work in a way which would somehow essentially alter its character. Where Congress has spoken the courts must operate in the interstices and try as they might to preserve uniformity, i.e., the inherent character of Congress' work. The courts should fill the space in a manner which is true to the character of Congress' work.

Thus, in *Mobil Oil Corp. v. Higginbotham,*[191] the Court held that a plaintiff could not recover loss of society damages in a wrongful death claim governed by the Death on the High Seas Act ("DOHSA"). The DOHSA expressly limits wrongful death recovery to pecuniary loss.[192] Plaintiff had sought to supplement the DOHSA recovery via the general maritime law wrongful death action which the Court had created in *Moragne v. States Marine Lines, Inc*..[193] The Court's painting could not alter Congress' work.

[190] *Miles,* 498 U.S. at 27.
[191] 436 U.S. 618 (1978). *See also, Offshore Logistics v. Tallentire,* 477 U.S. 207 (1986) (where DOHSA applies, plaintiff cannot supplement with state law to recover loss of society damages in a wrongful death action).
[192] 46 U.S.C. § 762.
[193] 436 U.S. 618 (1970).

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And, in *Miles v. Apex Marine*[194] the Court refused to allow the mother of seaman, killed in territorial waters to recover loss of society damages under *Moragne* where the death was caused by an unseaworthy condition of the vessel—a bellicose fellow crew member. The reason was because the mother's recovery under the Jones Act was limited to pecuniary damages[195] and allowing greater recovery for unseaworthiness "would be inconsistent with our place in the constitutional scheme [if we] were to sanction more expansive remedies in a judicially created cause of action in which liability is without fault [for unseaworthiness] than Congress has allowed in cases of death resulting from negligence."[196] Again, using the painting metaphor, the Court's painting not only must not paint over (conflict) with Congress' work, it must not threaten or go beyond its essential character. And allowing recovery of loss of society damages for unseaworthiness for a seaman covered by the Jones Act would have done exactly that according to the Court.

In the current context, one might argue that Congress has abolished *Sieracki* seamen status for LHWCA workers, as it had limited the rights of the wrongful death beneficiaries of Jones Act seamen and the beneficiaries of those killed on the high seas. To allow more generous recovery in those instances based on the general maritime law would have been inconsistent with what Congress had said even if there was a technical gap in the law. Here, to allow non-LHWCA *Sieracki* seamen to continue to exist in the gaps is equally inconsistent with what Congress meant to accomplish with §905(b).

However, there are a few responses. First, in *Higginbotham* and *Miles*, the expanded recovery would have been to the same person who was the plaintiff on both causes of action

[194] 498 U.S. 19 (1990).
[195] 46 U.S.C. §30104, incorporating 51 U.S.C. §51 *et seq.*
[196] *Miles,* 498 U.S. at 32-33.

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arising out of the same common nucleus of operative facts. And the result would have been recovery for those plaintiffs on the judicially created claim of a type of damage Congress had denied in the legislative claims. In essence the remedies provided by the general maritime law claim and the statutory claims conflicted. In the *Sieracki* situation we are dealing with different affected people and no express conflict: the LHWCA covered worker who cannot recover for unseaworthiness per §905(b) but can recover worker's compensation benefits under the LHWCA and the putative *Sieracki* seamen who does not recover benefits under the LHWCA but seeks to recover for unseaworthiness.

Second, the Court's uniformity principle is not unlimited. In a case where neither the DOHSA nor the Jones Act apply, the general maritime law wrongful death action allows recovery of loss of society damages.[197] Moreover, where DOHSA does not apply and the decedent is not a seafarer subject to a comprehensive tort recovery regime the survivors may seek recovery of loss of society damages under state law.[198]

Additionally, there is an important timing distinction between the wrongful death cases and the *Sieracki* situation. In the wrongful death cases, Congress painted first. That is Congress enacted the DOHSA and the Jones Act in 1920. The Supreme Court did not decide *Moragne* and recognize the general maritime law wrongful death action until 1970 and it did not hold that loss of society damages were recoverable on that claim until 1974.[199] Thus, Congress spoke first and to judicially recognize the right to recover for nonpecuniary, loss of society, damages in

[197] *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).
[198] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).
[199] *Gaudet*, 414 U.S. 573 (1974).

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Higginbotham and *Miles* would have conflicted with or expanded beyond Congress' pre-exiting legislation, limiting recovery in Jones Act and DOHSA cases to pecuniary damages.

Alternatively, in the *Sieracki* pocket situation, the Court created the *Sieracki* seaman claim in 1946. The claim provided an additional right to the LHWCA worker that did not conflict with the worker's rights under the LHWCA. Then, the Court extended that right to non-LHWCA workers. All of this occurred before 1972. When it comes to *Sieracki,* the Court painted first in a spot on the canvas untouched by the original LHWCA. Thus, it would be impossible for anything the Court did before 1972 to conflict with something Congress did afterwards.[200]

And, most importantly, circling back again to the language of what Congress did do with the enactment of §905(b) in 1972. It eliminated the *Sieracki* remedy for persons covered by the act. The language it chose did not expressly eliminate the remedy for those not covered by the act. Certainly, as noted previously, Congress is presumed to be aware of the law when it acts. I bring this point up again here because it has critical importance to the wrongful death uniformity principle articulated in *Miles.*

As noted, it was critical to the Court's holding in *Miles* that nonpecuniary damages are not recoverable under the Jones Act. Now, the Jones Act does not expressly say that but in 1913

[200] The importance of timing is manifest in the Court's maritime punitive damages/personal injury cases as well. For instance, in *Atlantic Sounding Co., Inc. v. Townsend,* 557 U.S. 404 (2009), the Court held that a seaman could recover punitive damages for the arbitrary and capricious failure to pay maintenance and cure. The general maritime law right to recover maintenance and cure predated the Jones Act, the right to recover punitive damages predated the Jones Act, and there was no evidence punitive damages were not available for the arbitrary and capricious failure to pay maintenance and cure at the time of the passage of the Jones Act. Contrariwise, in *The Dutra Group v. Batterton,* 139 S.Ct. 2275 (2019), the Court held that punitive damages were not available in general maritime law unseaworthiness cases brought by seamen because there was not sufficient historical evidence that punitive damages were available on unseaworthiness claims.

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in *Michigan Central R. Co. v. Vreeland*,[201] the Court held that loss of society damages were not recoverable in a Federal Employer's Liability Act ("FELA") case.[202] And, when it enacted the Jones Act in 1920, Congress essentially incorporated the FELA giving the seaman the same rights as the FELA interstate railroad worker. Thus, because of *Vreeland*, the Jones Act does not allow recovery of nonpecuniary damages in a wrongful death case. As Justice O'Connor noted in *Miles:*

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation.[203]

Likewise, as I have said, when it amended the LHWCA in 1972, Congress must have been aware of cases like *Sandoval*, and the language it chose to eliminate the *Sieracki* remedy for LHWCA workers did not eliminate it for others. Congress did not treat everyone involved the same way. The uniformity argument is substantially weakened.

VI. Conclusion

Herein, we have considered the origins of *Sieracki* seamen, the extension of the *Sieracki* remedy to non-LHWCA workers, the 1972 amendments to the LHWCA, the precise language used in §905(b)—"a person covered under this chapter," and the failure of that language to expressly eliminate the *Sieracki* remedy for those workers not covered by the LHWCA. We have also considered the Fifth Circuit jurisprudence recognizing pockets of remaining *Sieracki*

[201] 277 U.S. 59 (1913).
[202] 45 U.S.C.A. § 51.
[203] *Miles,* 498 U.S. at 32.

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seaman and the Ninth Circuit's rejection of their survival. Thereafter, we considered the arguments for and against the survival of the non-LHWCA *Sieracki* seamen.

In analyzing those arguments one consistent theme emerged, the precise language Congress used in 1972 to eliminate unseaworthiness recovery for LHWCA workers clearly did not accomplish the same result for non-LHWCA workers. Literalism, purposeful interpretation, the equities, and even careful consideration of the supposed need for uniformity all circled back to the precise language used and its clear meaning that *Sieracki* survives for those not covered by the LHWCA. Neither metaphors of roots and branches nor a plea for uniformity can change the simple, clear words Congress chose.

To finish where we began, Charles painted (the initial consideration of worker's rights); Louise painted (the enactment of the LHWCA); Charles painted some more (*Sieracki, Haenn, Ryan, Sandoval*); Louise painted again (the 1972 LHWCA amendments); Charles painted (*Aparicio, Normile*); Louise painted (the 1984 LHWCA amendments); Charles painted (*Green, Rivera)*. If the Supreme Court were to hold that the 1972 amendments eliminated *Sieracki* entirely, given the express language Congress used in §905(b), it would be as if Charles painted over Louise's work—"person covered by this chapter." And this, we know, Charles cannot do. If Louise paints; Charles cannot paint over it.

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