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DEEPWATER PORTS: WHAT REMEDIES ARE AVAILABLE TO INJURED WORKMEN?

On January 3, 1975, President Ford signed into law the Deepwater Port Act of 1974.¹ Deepwater ports² are offshore facilities for the unloading of petroleum from deep draft oil tankers.³ The use of these facilities is believed to be more economical⁴ and environmentally safer⁵ than the use of conventional tankers. The primary purpose of the Deepwater Port Act is to authorize and regulate the construction and operation of deepwater ports in waters beyond the territorial limits of the United States.⁶ Deepwater ports have already been built in Canada, the United King-

1. Deepwater Port Act of 1974, Act of January 3, 1975, Pub. L. No. 93-627, 88 Stat. 2126 (codified at 33 U.S.C. § 1501 *et seq.* (1970)) [hereinafter cited as the Deepwater Port Act].

2. The Deepwater Port Act § 3 (10) defines a deepwater port as:

[A]ny fixed or floating manmade structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State The term includes all associated components and equipment, including pipelines, pumping stations, service platforms, mooring buoys, and similar appurtenances to the extent they are located seaward of the high water mark.

Although this definition classifies a deepwater port as something "other than a vessel," the phrase was intended to exclude docking ships and auxiliary ships from the licensing requirement of the Deepwater Port Act, and not to define a deepwater port as a non-vessel in the admiralty tort sense. *See* H.R. REP. No. 668, 93d Cong., 2d Sess. 4 (1974).

3. Deep draft tankers, commonly referred to as "supertankers," are defined as vessels which range in size from 200,000 to 500,000 deadweight tons. By virtue of their enormous size, they can transport large volumes of oil on a long-haul voyage at a lower cost than smaller, conventional tankers. In contrast to supertankers, the average size of tankers used to transport petroleum to the United States is 30,000 to 35,000 deadweight tons. STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D CONG., 2D SESS., DEEPWATER PORT POLICY ISSUES 1 (Comm. Print 1974) [hereinafter cited as POLICY ISSUES].

It should be noted that except for two ports on the West Coast, all domestic ports situated near major oil refining centers are too shallow to receive tankers which are larger than 80,000 deadweight tons, and most ports are restricted to tankers of half that size. S. REP. No. 1217, 93d Cong., 2d Sess. 6 (1974).

4. POLICY ISSUES 3-5.

5. POLICY ISSUES 7-10. *Our Orphaned Superships*, 26 NAT'L REV. 261 (1974). In the time period of 1967-1972, nearly 24,000 vessels were involved in accidents in United States waters or with United States ships. It is hoped that deepwater ports will reduce this figure. *Deepwater Ports: Issue Mixes Supertankers, Land Policy*, 181 SCIENCE 825 (1973).

6. Deepwater Port Act § 2(a)(1). Among the other purposes of the Act are the minimization of the adverse environmental impact of such ports and the protection of United States interests in the construction of deepwater ports. *Id.* § 2(a)(2)(4).

dom, Africa, and Japan,⁷ and several United States companies have shown an interest in building deepwater ports off the United States coast as authorized under the Deepwater Port Act.⁸

In many respects, the Deepwater Port Act is quite comprehensive. It provides for the licensing of deepwater ports by the Secretary of Transportation,⁹ a procedure for obtaining a license,¹⁰ a review of environmen-

7. Single buoy type deepwater ports (*see* section I.B.1 *infra* for descriptions of the various types of deepwater ports) have been built in the United Kingdom, Africa and Japan. The average cost was \$500 million. Prototypes of the artificial island type deepwater ports have been built in the Persian Gulf, the Caribbean Sea, and off the British Isles. This type of deepwater port costs approximately \$700 million. *TIME*, March 12, 1973, at 79.

Recently, Gulf Oil Canada, Ltd. built a superport at Port Hawkesbury, Nova Scotia, Canada. *Gulf Superports Await the Green Light*, *BUSINESS WEEK*, May 26, 1973, at 68, 69.

8. The U.S. Air Force, for example, proposed a single buoy type deepwater port off the Delaware coast, but Delaware rejected the proposal. *N.Y. Times*, March 13, 1975, at 77, col. 8. (Under the Deepwater Port Act § 9(b)(1), states can reject proposed deepwater ports off their coast.)

Louisiana has passed legislation which authorizes deepwater ports off its coast. *LA. REV. STAT. ANN.* § 34:3101 *et seq.* (West Supp. 1975). The Louisiana Offshore Oil Port, Inc. (LOOP), a corporation whose shareholders are various oil companies, has proposed a single buoy type deepwater port off the Louisiana Coast.

Texas also has passed legislation which permits deepwater ports off its shore. *TEX. REV. CIV. STAT. ANN.* art. 5414e-1 (Supp. 1975). Seadock, a corporation whose shareholders are various oil companies, considered a single point mooring pier and artificial island type deepwater port, but settled on the single buoy type deepwater port off the Texas coast.

For both projects, the estimated cost is \$700-800 million and the anticipated construction time is 30-36 months. *Gulf Superports Await the Green Light*, *BUSINESS WEEK*, *supra* note 7, at 68-69; *Offshore Ports Get OK; Two Projects in Gulf Set to Go*, *INDUSTRY WEEK* 16 (Jan. 13, 1975).

There is some question as to when LOOP and Seadock will begin construction because both are having problems with the proposed Department of Transportation regulations under the Deepwater Port Act. Section 18 of the Act permits an antitrust review; the oil companies which make up LOOP and Seadock object to the proposed regulations under that section. *Seadock, LOOP Hit Deepwater Port Regulations*, 73 *OIL & GAS J.* 38 (1975).

Standard Oil Co. of California had made plans to build a single buoy type deepwater port off the California coast, but it dropped the plans for the present citing rising costs, the uncertainty of supply and demand, and the tariff policy as its reasons. *Socal Drops Plans for Off-California Crude Terminal*, 73 *OIL & GAS J.* 149 (1975).

On the other hand, Pittston Company of New York proposed an oil refinery and a dock which came under severe criticism from Canadian environmentalists who foresaw inevitable oil spills. The Maine Board of Environmental Protection approved plans for the refinery but denied Pittston permission to construct a dock for delivery of crude oil at the site. As an alternative, the Board suggested a mono buoy deepwater port, but Pittston rejected the suggestion as uneconomical. *N.Y. Times*, March 5, 1975, at 12, col. 6; *Id.*, March 13, 1975 at 77, col. 7.

9. Deepwater Port Act § 4(a).

10. *Id.* § 5.

tal considerations,¹¹ an examination of potential antitrust problems,¹² judicial review of the Secretary of Transportation's decisions to issue a license for a deepwater port,¹³ the establishment of a liability fund for damages caused by oil spills,¹⁴ and an annual report by the Secretary of Transportation to Congress.¹⁵ The Act fails, however, to deal explicitly with the issue of what remedies are to be made available to workmen injured on deepwater ports. Rather than specifically deal with this and other issues of law, the Deepwater Port Act contains a "general laws applicable" clause, which states that federal laws are applicable where appropriate, supplemented by state laws which are not inconsistent with the federal provisions.¹⁶ Congress left it to the courts to decide exactly which laws are applicable in any given situation.

The Deepwater Port Act, therefore, has left unanswered the question of what remedies are available to injured deepwater port workmen. This Note will examine the possible remedies, discuss the relevant case law, review the Deepwater Port Act in light of both the case law and the applicable policy considerations, and propose a solution to the problem in light of the policy factors involved.

I

BACKGROUND AND LEGAL ISSUES

A. THE ALTERNATIVE REMEDIES

In deciding what laws are applicable to injured deepwater port workers, the courts are faced with two choices. They could decide that deepwater ports are vessels, in which case the workmen would be treated as seamen, and therefore compensated under one or more of the following:

11. *Id.* § 6(a).

12. *Id.* § 7(a).

13. *Id.* § 17.

14. *Id.* § 18.

15. *Id.* § 20.

16. The Deepwater Port Act in § 19 provides:

(a)(1) The Constitution, laws, and treaties of the United States shall apply to a deepwater port licensed under this Act and to activities connected, associated, or potentially interfering with the use or operation of any such port, in the manner as if such port were an area of exclusive Federal jurisdiction located within a State

(b) The law of the nearest adjacent coastal State, now in effect or hereinafter adopted, amended, or repealed, is declared to be the law of the United States, and shall apply to any deepwater port licensed pursuant to this Act, to the extent applicable and not inconsistent with any provision or regulation under this Act or other Federal laws and regulations now in effect or hereafter adopted, amended, or repealed

the general maritime law,¹⁷ the Jones Act,¹⁸ and/or the Death on the High Seas Act.¹⁹ Alternatively, courts could determine that deepwater

17. Under the general maritime law, an injured seaman can maintain a suit against his employer (a) for maintenance and cure, or (b) for breach of the employer's duty to provide a seaworthy vessel. Additionally, the recent case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) allowed a seaman's family to recover under federal maritime law for (c) wrongful death proximately caused by negligence or an unseaworthy condition.

(a) The doctrine of maintenance and cure provides an injured or sick seaman with an absolute right to his wages to the end of the voyage or the term of his employment contract, along with subsistence, lodging, and medical care until he has reached the maximum cure obtainable. This right cannot be contracted away, and only gross negligence or willful disobedience by the seaman is a defense to the employer's obligation. However, since no compensatory damages are awarded, and treatment is usually at a United States Public Health Service Hospital, the recovery is often small as compared to possible recoveries under the other remedies. G. GILMORE & C. BLACK, JR., *THE LAW OF ADMIRALTY* (2d ed. 1975) 281-82, 297-314 [hereinafter cited as GILMORE & BLACK]; Jones, *Personal Injury—Offshore Oil Operations*, 5 NAT. RES. L. 681, 687-89 (1972).

(b) For breach of the employer's duty to provide a seaworthy vessel, a seaman can recover compensatory damages for an injury caused by the unseaworthiness of the vessel. The doctrine of comparative negligence applies, even though neither the defense of assumption of the risk nor the fellow servant rule applies. Since the remedy provides compensatory damages, it is a more far-reaching remedy than that available in an action for maintenance and cure. GILMORE & BLACK 383-404; Jones, *supra*, at 689-91.

(c) While the details of the recovery for wrongful death under the general maritime law have not yet been completely formulated by the courts, the decision of *Sea-Land Services, Inc. v. Gandet*, 414 U.S. 573, *rehearing denied*, 415 U.S. 986 (1974) held that the family of a seaman, whose death was proximately caused by negligence or an unseaworthy condition, can recover damages for loss of support, services, and society, but not for the survivors' grief. The rationale of the decision indicates that the family can also recover for decedent's pain and suffering before death and for the loss of the decedent's services. GILMORE & BLACK 367-74; Levin, *General Maritime Law and the Wrongful Death Dilemma*, 12 DUQ. L. REV. 891 (1974); Note, *Admiralty—Wrongful Death—Recovery of Survivor's Grief Under the General Maritime Law*, 48 TUL. L. REV. 395 (1974).

In all three causes of action, a jury trial is not allowed if the case is tried in the admiralty court. If the case is brought in a state court or a district court, a jury trial would be allowed. GILMORE & BLACK 468.

18. The Jones Act, 46 U.S.C. § 688 (1970), provides for the recovery of compensatory damages by any seaman negligently injured by his employer or a fellow crew member. The Act authorizes a cause of action for wrongful death and permits recovery not only for pecuniary loss, but also for the defendant's pain and suffering. There is a hierarchical classification of beneficiaries, a three-year statute of limitations, and trial by jury. The doctrine of comparative negligence obtains, and neither the defense of assumption of the risk nor the fellow servant rule applies. GILMORE & BLACK 325-28; Jones, *supra* note 17, at 694-97; Peters, *Death Actions Under the Jones Act: A General Introduction*, 14 TRIAL LAW GUIDE 53 (1970).

19. The Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970), provides recovery of pecuniary losses to the family of any person who is negligently killed on waters which are more than a marine league offshore. Although the Act does not explicitly provide for recovery for decedent's pain and suffering, the cases interpreting the Act allow such recovery and also permit damages for certain other pre-death injuries to decedent. There

ports are not vessels, and therefore the injured workmen would be covered under the Longshoremen's and Harbor Workers' Compensation Act.²⁰ In this latter case, third party suits²¹ would be adjudicated under either the general maritime law²² and the Death on the High Seas Act²³

is a two-year statute of limitations, jury trials are not provided for in admiralty jurisdiction, the comparative negligence rule applies, there is no hierarchical classification of beneficiaries, and the schedule of beneficiaries is broader than the schedule under the Jones Act. Both this Act and the Jones Act can apply concurrently. GILMORE & BLACK 359-67; Jones, *supra* note 17, at 697-99.

20. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 90 *et seq.* (1970), *as amended*, 33 U.S.C. § 901 *et seq.* (Supp. III, 1974) [hereinafter cited as the Longshoremen's Act] allows longshoremen injured on the job to recover under a fixed schedule of benefits. The Act also allows an employee's spouse to recover under a fixed schedule of benefits for the death of the employee. Both schedules of benefits are based on the employee's weekly wages and are the exclusive remedies against the employer. The defense of assumption of the risk, the contributory and comparative negligence rules, and the fellow servant doctrine do not apply. GILMORE & BLACK 408-12; Jones, *supra* note 17, at 702-703; Watson, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683 (1973); Comment, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972); Comment, *Longshoremen's Remedies for Work Related Injuries: A Reappraisal*, 45 TEMP. L.Q. 591, 591-93 (1972); Comment, *Marine Jurisdiction and Longshoremen's Remedies*, 1973 WASH. L.Q. 649.

21. In *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969), the Supreme Court held that for third party suits under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970) [hereinafter cited as the Lands Act] state wrongful death statutes apply, as opposed to the Death on the High Seas Act. The court reasoned that admiralty jurisdiction does not apply to structures under the Lands Act. Under this reasoning, appropriate state survivor statutes would apply, and in the case of injury, state common law negligence standards would apply to Lands Act structures.

In arriving at this decision, the court relied on the language in § 1333(a)(1)(2) of the Lands Act which is a "general laws applicable" clause. Since the "general laws applicable" clause in § 19 of the Deepwater Port Act is a copy of the Lands Act clause, it is quite possible that the courts will follow the *Rodrigue* rationale and decide that state wrongful death and survivor statutes and state common law negligence standards should apply to third party injury suits involving deepwater ports. If the courts do not so decide, then the general maritime law and the Death on the High Seas Act will apply. Many state statutes provide for the recovery of not only pecuniary losses, the exclusive remedy of the Death on the High Seas Act, but also for loss of consortium. Some state statutes also allow recovery for decedent's pain and suffering. LeBlanc & McNamara, *Reflections on Rodrigue*, 35 INS. COUN. J. 626 (1969); Note, *Admiralty—The Outer Continental Shelf Lands Act as the Exclusive Method of Recovery for Deaths of Nonmaritime Workers on Artificial Island Drilling Rigs*, 48 TEX. L. REV. 680 (1970). Therefore, the decision as to whether to follow the *Rodrigue* precedent has important financial ramifications.

22. Under the general maritime law, an injured employee can recover compensatory damages from any third party who negligently injured the employee. A jury trial cannot, however, be obtained in an admiralty court, and the doctrine of comparative negligence applies. The defense of assumption of the risk and the fellow servant doctrine also are not available. GILMORE & BLACK 449-55; M. NORRIS, MARITIME PERSONAL INJURIES § 178 (2d ed. 1966). Recovery may also be had for wrongful death. See note 17 *supra*.

23. See note 19 *supra*.

or under state common law negligence standards²⁴ and state wrongful death and survivor statutes.²⁵

Because of the large variety of remedies which may be available to an injured deepwater port worker or his family, it is hard to generalize about the comparative advantages and disadvantages to a workman of being compensated as a seaman or as a longshoreman. From the standpoint of legal proof, however, it is possible to determine a preference depending on the factual situation. If an employee or his family can prove negligence or breach of the employer's duty to provide a seaworthy vessel, then the employee would want to be classified as a seaman. The Jones Act and general maritime law provide for compensatory damages and juries are often generous, while the Longshoremen's Act provides a set schedule of benefits which is less liberal. On the other hand, if the employee or his family cannot prove negligence or unseaworthiness, the employee would prefer to be classified as a longshoreman. The Longshoremen's Act's benefits are available irrespective of negligence; whereas, an employee classified as a seaman who cannot prove negligence can only recover under the less generous doctrine of maintenance and cure.²⁶

Given this wide discrepancy in available remedies, it will probably be in the best interests of an injured deepwater port workman to litigate the issue of his status as either a longshoreman or seaman. The Deepwater Port Act is similar to the Lands Act,²⁷ under which there has been a

24. Under state common law negligence standards, an injured seaman can recover compensatory damages. The doctrine of contributory negligence, the defense of the assumption of the risk, and the fellow servant rule may or may not apply depending on the state. The statute of limitations also varies from state to state. Trial is by jury. W. PROSSER, *LAW OF TORTS* 139-204, 416-57 (4th ed. 1971).

25. Most states have wrongful death statutes which allow recovery of pecuniary losses. Some state statutes, unlike the Death on the High Seas Act, provide for recovery of loss of love and affection. Some states also have survival statutes which allow recovery for any damages which the decedent would have recovered if he were alive. The largest item is usually the pain and suffering of the decedent. The doctrine of contributory negligence, the defense of assumption of the risk, and the fellow servant rule may or may not be applicable, depending on the state. The statute of limitations varies from state to state, and trial is by jury. PROSSER, *supra* note 24, at 416-57, 898-914; LeBlanc & McNamara, *supra* note 21, at 628-29.

26. Larson, *Conflicts Between Seamen's Remedies and Workmen's Compensation Acts*, 40 *FORD. L. REV.* 473 (1972).

27. The Senate committee report, S. REP. NO. 1217, 93d Cong., 2d Sess. 4 (1974), in referring to the "general laws applicable" clause of the Deepwater Port Act, § 19, stated that "deepwater port development will be regulated in the same manner as resources on the Outer Continental Shelf." Indeed, the "general laws applicable" clause of the Deepwater Port Act is a virtual copy of the "general laws applicable" clause of the Lands Act. See note 16 *supra*.

substantial amount of litigation over the status of workmen.²⁸ Therefore, there is a real possibility that the Deepwater Port Act will follow the pattern set by the Lands Act and produce numerous cases on the issue of the status of deepwater port workers, and, indirectly, the remedies available to them.

B. THE COURTS' PROBABLE HANDLING OF THE ISSUE

The courts must decide whether injured deepwater port workers should be compensated as seamen or as longshoremen. In order for a workman to be classified as a seaman, he must meet three requirements: he must work on a vessel in navigation, he must have a more or less permanent connection with the ship, and his function on the ship must be primarily "in aid of navigation."²⁹ If a deepwater port is a vessel in navigation, then the last two requirements are very likely to be satisfied by the workmen on the deepwater port.³⁰ The central issue, therefore, is whether or not a deepwater port is a vessel in navigation.

1. *Physical Design of the Deepwater Ports*

When deciding on whether a structure is a vessel, the courts have

28. The Lands Act authorizes and regulates offshore drilling platforms. After much litigation, the courts decided that although an offshore oil drilling platform permanently affixed to the ocean floor is not a vessel, such a platform when placed on a barge or similar mobile structure is a vessel. Jones, *supra* note 17; Kennelly, *Admiralty: What is a Seaman, What is a Vessel and What is Navigable Waters?—A Typical Case*, 17 TRIAL LAW GUIDE 453 (1973); Moreland, *Recovery for Injuries or Death on Offshore Drilling Platforms: A Problem of Applicable Law Under the Lands Act*, 51 ORE. L. REV. 813 (1972); Comment, *When is an Offshore Oilfield Worker a Seaman?* 27 LA. L. REV. 757 (1967).

29. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), *rehearing denied*, 342 U.S. 934 (1952); *See* Larson, *supra* note 26, at 474-75 for a list of other cases specifying these three requirements.

30. The courts have held that for a workman to be "permanently connected to the ship" his job need only be substantially connected with the operation of the vessel. For example, in *Weiss v. Cent. R.R. Co. of New Jersey*, 235 F.2d 309, 313 (2d Cir. 1956) the court, in sustaining a judgment for maintenance and cure for a workman who split his working time between a ferry and dock, stated:

We know of no authority . . . for holding that a seaman is not entitled to the traditional privileges of his status merely because his voyages are short, because he sleeps ashore, or for other reasons his lot is more pleasant than that of most of his brethren.

Any workman's job on a deepwater port, almost by definition, is substantially connected to the operation of the deepwater port, and thus the workman will meet this requirement.

In order for a workman to be "primarily in aid of navigation," his job must pertain to the "operation of the vessel" or assist in "forwarding its enterprise." *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953), *cert. denied*, 346 U.S. 817 (1953); Larson, *supra* note 26, at 486-87. It is virtually undisputed that a deepwater port worker's job will forward the vessel's enterprise of unloading oil.

focused on its physical attributes. If the structure is physically "like" a vessel, then the courts have held that it is a vessel. Thus, the first point of inquiry is the physical design of the deepwater ports themselves. The Deepwater Port Act does not require any particular type of structure, and therefore various designs of deepwater ports are possible. The four basic types of deepwater ports are the single buoy mooring facility, the conventional buoy mooring facility, the single point mooring pier, and the artificial island.

The first two buoy designs consist of floating hoses from a floating buoy which are to be attached to the supertankers, and hoses from the buoy to a pipeline which runs along the ocean floor to an onshore tank farm. The single point mooring pier consists of a floating pier which is connected to the ocean floor by a single point pile structure. The pipeline from the pier runs through the pile structure and along the ocean floor to the onshore tank farm. The artificial island contains berths for the use of supertankers which would unload to a tank farm on the artificial island; subsequent shipment of oil to shore would be via pipeline or lighter vessels.³¹ It is important to note that the first three designs, but not the fourth, consist of structures that float although they are not mobile. In addition to the above designs, a self-propelled mobile deepwater port has been proposed.³² This structure would be qualitatively different from the others since it would not only float, but would be mobile as well.

2. Case Law and the Longshoremen's Act

Once these physical characteristics are ascertained, the court will apply the rules of general maritime law which govern the question of whether or not the structure is a vessel. The rules of general maritime law outline certain standards for defining a vessel. While the courts are consistent in applying these standards, there is little logic behind the standards themselves, and, at times, they seem rather arbitrary.

Admiralty statutes provide an extremely vague definition of the word "vessel,"³³ and this has forced the courts to develop more specific re-

31. Artistic drawings of the four basic deepwater port designs are provided in POLICY ISSUES 57-58. Knight, *International Legal Aspects of Deep Draft Harbor Facilities*, 4 J. MARITIME L. & COMM. 367, 370-71 (1973) contains a general discussion of the physical characteristics of deepwater ports. For a detailed analysis of the various deepwater port designs, see *Hearings on S. 1751 and S. 2232 Before the Special Joint Subcomm. on Deepwater Port Legislation of the Senate Comm. on Commerce, the Senate Comm. on Interior and Insular Affairs, and the Senate Comm. on Public Works*, 93d Cong., 1st Sess. 380-99 (1973).

32. H.R. REP. NO. 668, 93d Cong., 1st Sess. 5 (1973).

33. 1 U.S.C. § 3 (1970) provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of

quirements for defining a vessel. The principal requirement the courts have developed is that the structure float: indeed, it has been said that almost anything which floats is a vessel.³⁴ Furthermore, the structure can be temporarily tied up to land or a dock,³⁵ need not have motive power,³⁶ and can be stationary during use.³⁷ Under these liberal conditions, a deepwater port could qualify as a vessel.

A further distinction is made between a platform which is permanently affixed to the ocean floor and one that is temporarily so situated. In 1967, the Fifth Circuit held that an oil drilling platform which was permanently fastened to the ocean floor and thus did not float is not a vessel.³⁸ Eight years earlier, however, the same court stated that a barge which had eight retractable legs and carried oil drilling equipment was a vessel despite the fact that at the time of the accident it was temporarily affixed to the ocean floor and thus did not float.³⁹ The logic in holding that a permanently fixed platform is not a vessel, but that a temporarily tethered platform does qualify as a vessel is questionable. A workman on a fixed nonfloating platform faces the same risks and hazards whether the structure is permanently or temporarily affixed to the ocean floor.⁴⁰ Yet the courts consider the distinction sufficient to justify classifying one as a vessel and the other as a non-vessel.

In light of the standards promulgated in these two cases, it is clear that the artificial island-type deepwater port is not a vessel because it is permanently affixed to the ocean floor.⁴¹ Furthermore, since the self-

transportation on water.”

34. In deciding that a barge is a vessel despite its temporary location on the ocean floor, the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769, 771 (5th Cir. 1959) stated:

The [Jones] Act has always been construed liberally, but recent decisions have expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable waters.

35. In *Mroz v. Dravo Corp.*, 293 F. Supp. 499 (W.D. Pa. 1968), the court held that a ship is still a “vessel in navigation” even if it is temporarily tied up to a dock. For a collection of cases on this issue, see Annot., 5 A.L.R. Fed. 674, 696-97 (1970).

36. In *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944), the Supreme Court held that a barge is a vessel despite the fact that it has no motive power. The Court stated that it is enough that it is a means of transportation.

37. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372-73 (1957), rehearing denied, 353 U.S. 931 (1957), the Supreme Court held that a dredge is a vessel even though it is anchored when in use. Annot., 5 A.L.R. Fed. 674, 702-704 (1970) provides a list of cases on this question.

38. *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv.*, 377 F.2d 511, 513 (5th Cir. 1967), cert. denied, 389 U.S. 849 (1967). See Annot., 5 A.L.R. Fed. 674, 694-96 (1970) for a collection of cases holding that fixed structures are not vessels.

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

40. Of course, when the barge is floating the risk may be different.

41. Indeed, it could be argued that under the doctrine of local concern, admiralty

propelled type of deepwater port is mobile and only occasionally will be fastened to the ocean floor, it is clearly a vessel.

The other deepwater port designs involve structures which are permanently affixed to the ocean floor by an anchor or pile but also float. Although the law on this question was once in doubt,⁴² two recent Fifth Circuit cases⁴³ have determined that floating structures permanently affixed to the ocean floor are not vessels. In *Atkins v. Greenville Ship Building Corp.*,⁴⁴ the court held that, as a matter of law,⁴⁵ a floating dry dock which is designated for neither transportation nor navigation is not a vessel.⁴⁶ In *Cook v. Belden Concrete Products, Inc.*,⁴⁷ the court decided that a floating construction platform which was secured to the dock by

jurisdiction does not apply to artificial islands because they are a "matter of local concern." See *Larson*, *supra* note 26, at 508-11. In such a case, state workmen's compensation statutes would apply.

42. In *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) it was stated that a "special purpose structure usually not employed as a means of transportation by water but designed to float" could be a vessel. On the other hand, a subsequent case held that mere flotation was not enough to qualify a structure as a vessel, but that it must also be committed to navigation. *Bernard v. Bethlehem Steel Co.*, 200 F. Supp. 534, 538 (S.D.N.Y. 1961), *aff'd*, 314 F.2d 604 (2d Cir. 1963). *Accord*, *In re United States Air Force Texas Tower No. 4*, 203 F. Supp. 215, 217 (S.D.N.Y. 1962). These two standards seem in conflict when applied to deepwater ports, since although the ports are special purpose structures which float, they are not really "in navigation."

43. *Atkins v. Greenville Ship Bldg. Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1974).

44. 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969).

45. In general, the question of whether a particular structure is or is not a vessel is a question of fact. In the leading case of *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372-73, *rehearing denied*, 353 U.S. 931 (1957), the Supreme Court decided that the status of a handyman on a dredge, and by implication, the status of the structure, was a jury question and the jury decision is final if reasonable. The Court stated that in deciding the issue, the jury has the same discretion which it has in judging negligence or any other fact. See also *Bodden v. Coordinate Caribbean Transport, Inc.*, 369 F.2d 273 (5th Cir. 1966) (the question of whether a ship tied up in dry dock is a "vessel in navigation" is an issue of fact for the jury to decide). Whether it is wise to let the jury decide such a complex issue is questionable.

On the other hand, other cases have held that a certain structure as a matter of law is not a vessel. See *e.g.*, *Desper v. Starved Rock Ferry Co.*, 342 U.S. 186 (1952), *rehearing denied*, 342 U.S. 934 (1952), in which the Supreme Court held that as a matter of law, sight-seeing motorboats which were laid up offshore for the winter are not vessels in navigation. See generally, *Annot.*, 20 A.L.R. Fed. 600, 613-16 (1974); *Annot.*, 5 A.L.R. Fed. 674, 685-91 (1970); *Annot.*, 75 A.L.R.2d 1312, 1316-18 (1961); *Comment*, *When is an Offshore Gilfield Worker a Seaman?*, *supra* note 28, at 763-75.

46. The court stated that a dry dock is distinguishable from the barge in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) because the dry dock was attached to the land by cables.

47. 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 846 (1974).

ropes was not a vessel despite its capability of perpendicular and lateral movement.⁴⁸

While the logic of these decisions is not clear,⁴⁹ their implication is obvious. Any structure which floats but is fixed to one location by something like a rope, anchor, or buoy is not a vessel. Thus, the remaining deepwater port designs which float but are fixed to one location are not vessels.

In summary, it appears that the self-propelled type deepwater port will be classified as a vessel and the workmen compensated as seamen.⁵⁰ The other type of deepwater ports—single and conventional buoy mooring facilities, single point mooring pier, and artificial island—will be declared non-vessels and the workmen compensated as longshoremen.⁵¹

Despite the likelihood of this classification, the difference in the remedies available to seamen and longshoremen⁵² will still provide an incentive for workers to litigate their status as one or the other. For example, a deepwater port worker who can prove that his employer's negligence proximately caused his injury would receive more liberal benefits as a seaman than as a longshoreman.⁵³ Thus, if the case law indicates that he should be classified as a longshoreman, he will try to distinguish the prior cases⁵⁴ or change the existing common law. Since there is little

48. Although "some movement, both perpendicular and lateral, is necessarily part of the regular operation of floating dry docks and similar structures," the court said, such capacity is "insufficient to establish that such crafts are constructed for the purpose of navigation." *Id.* at 1002.

49. One may ask how a court can decide that a barge temporarily fixed to the ocean floor is a vessel, but a floating drydock which is permanently fixed to one location is not a vessel. The court gives no apparent rationale for the distinction, and it seems clear that there is none. Yet, it is equally clear that this is the applicable test the courts use, and we must live with it.

50. See notes 17-19 *supra*.

51. See notes 20-25 *supra*. Once it is decided that these deepwater ports are vessels, it is clear that workmen on them come within the coverage of the Longshoremen's Act. See § 902(3) of the Longshoremen's Act, which defines "employee" as including "any person engaged in maritime employment . . ." See also § 903 of the Act, relating to the definition of "navigable waters of the United States," upon which compensable injuries must have occurred. Even if the Longshoremen's Act did not apply on its own terms, it could be argued that it applies under the Lands Act, which covers "exploring for, developing, removing and transporting resources [from the subsoil and seabed of the Outer Continental Shelf]." Lands Act § 1333(a)(1) (emphasis supplied). Since deepwater ports are attached to the Outer Continental Shelf and they "transport" oil, they appear to fall within this coverage. The counterargument is that the word "transporting" in the Lands Act refers only to oil extracted from the Outer Continental Shelf subsoil, and not oil from other sources.

52. See notes 17-25 *supra*.

53. Larson, *Conflicts Between Seamen's Remedies and Workmen's Compensation Acts*, *supra* note 26.

54. For example, it can be argued that a deepwater port is distinguishable from the dry

logic behind the prior decisions, both avenues of attack have a real probability of success. In view of this foreseeable litigation, it is surprising that Congress, when it considered the Deepwater Port Act, virtually ignored the problem.

II

A PROPOSED SOLUTION

A. THE DEEPWATER PORT ACT

The Deepwater Port Act, through the use of its "general laws applicable" clause,⁵⁵ evades the question of what tort remedies will be available for injured deepwater port workmen. The courts, therefore, will have to look to the general rules of maritime law to decide the question. As already noted, these rules depend on the illogical standards developed in previous case law concerning the question of whether certain structures are "vessels."⁵⁶ Congress was fully aware that this would cause the Act to be involved in numerous court cases, but felt that the Act should follow the precedent set by the Lands Act, which also used a "general laws applicable" clause.⁵⁷ In light of the flood of litigation which followed the Lands Act,⁵⁸ the decision to emulate that Act was an irrespon-

dock in *Atkins v. Greenville Ship Corp.*, 411 F.2d 279 (5th Cir.), cert. denied, 414 U.S. 846 (1969), and the construction platform in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973), cert. denied, 414 U.S. 868 (1974) because the deepwater port is used to transport a cargo (oil). Unfortunately, the argument seems rather weak in light of *Cookmeyer v. Louisiana Dep't of Highways*, 309 F. Supp. 881 (E.D. La. 1970), aff'd, 433 F.2d 386 (5th Cir. 1970), where the court held that a pontoon bridge was not a vessel because automobile traffic over it did not qualify as "transportation of cargo." Other lines of attack might be more successful.

The Deepwater Port Act itself might be used as a distinguishing factor. Section 11 allows the United States to agree to treaties concerning deepwater ports, but it does not specify which international treaty should be used to justify the existence of deepwater ports. Therefore, some international authorization is needed for deepwater ports. Various treaties are available. Since some international treaties deal with vessels, and others deal with non-vessels, the choice of which treaty is used to justify deepwater ports will produce an inference that the deepwater ports are or are not vessels. A court could consider this as modifying the existing common law. Since the international treaty would only produce an inference, however, it is doubtful whether it would be strong enough to influence a court. See generally, POLICY ISSUES, *supra* note 3, at 27-28; Knight, *supra* note 31.

55. See note 16 *supra*. See also note 21 *supra* where a conflict between state and federal law is examined.

56. See section I.B.2 *supra*.

57. The Senate Committee was aware of the lack of an explicit tort remedy for injured deepwater port workers, but apparently did not want to take the time to study the various possible remedies. Telephone interview with James P. Walsh, Staff Counsel of the Senate Committee on Commerce, Jan. 12, 1975.

58. See note 28 *supra*.

sible avoidance of duty.⁵⁹

This result is even more disappointing in light of an earlier version of the Deepwater Port Act which contained a provision that would have explicitly dealt with the question of what remedies are available for injured deepwater port workmen. The earlier version provided that injured deepwater port workers be compensated under the Longshoremen's Act.⁶⁰ The provision was inserted into the Deepwater Port Act in order to create certainty in the area of tort remedies for injured deepwater port workmen.⁶¹ Unfortunately, the final statute omitted this provision and relied on the "general laws applicable" clause.⁶² No reason was given to explain this change.

In light of this congressional history and the foreseeable litigation, the question arises as to how Congress should correct the situation.

B. POLICY CONSIDERATIONS

If the only problem was the illogical nature of the standards differentiating vessels and non-vessels, and in turn longshoremen and seamen, the solution would be simple enough. Congress could study the risks that deepwater port workers face. If the risks seemed similar to those to which seamen are exposed, then deepwater ports could be classified as

59. Congress' stance on the issue seems analogous to the decision of the commander of the famed Light Brigade. As Tennyson so elegantly described the situation:

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do or die.

Into the valley of Death rode the six hundred.

60. H.R. 10701, 93d Cong., 2d Sess. § 204(f) (1974) (as passed by the House of Representatives on June 6, 1974) [hereinafter cited as H.R. 10701]. The provision was first suggested in the House Committee on Merchant Marine and Fisheries which was examining a bill on deepwater ports, H.R. REP. No. 692, 93d Cong., 1st Sess. (1973).

61. Letter from Mrs. Leonor Sullivan, Chairwoman of the House Merchant Marine and Fisheries Committee, to this author, Feb. 3, 1975, on file at the office of the Cornell International Law Journal.

62. Although the provision was contained in H.R. 10701 when it passed the House of Representatives, it was deleted by the conference committee which combined the House and Senate versions of the deepwater port legislation. The conference report, H.R. REP. No. 1605, 93d Cong., 2d Sess. (1974), does not give any explanation for the deletion. Representative Sullivan, who also served on the conference committee, wrote in her letter to the author, *supra* note 61:

Furthermore, when the conference on the two versions was held, my recommendation for specific language in this act was ignored and the general "applicability" language of the Senate was accepted by the other House Conferees. While I believe that the intention of the Conferees was substantially the same as mine, I also believe that the method in which they handled this particular situation will result in substantial litigation on various legal issues before the courts finally decide what the intent of the language was.

vessels and the workers compensated as seamen. If the hazards were more like those faced by longshoremen, alternatively, then deepwater ports could be defined as non-vessels, and the workmen compensated as longshoremen. Indeed, at least one authority has noted the similarity between seamen and workers on fixed offshore platforms⁶³ which are similar to deepwater ports.

Behind the illogical standards, however, lies a more fundamental problem: the distinction between the remedies themselves is not logical. As already noted, a worker is better off being classified as a seaman if he can prove negligence or unseaworthiness, but if he cannot, he would be in a better position if he were classified as a longshoreman. This distinction is an historical accident that has emerged over time as the remedies for seamen and longshoremen developed. There is no rational justification for such a distinction. This situation must be corrected.

C. THE SIMPLE SOLUTION

The problem of remedies for workers injured on deepwater ports can be solved in at least two ways. The simple solution, which is proposed because of Congress' reluctance to deal with the problem, would be for Congress to explicitly state how the workmen should be compensated. Since both the seamen's and longshoremen's remedies have advantages and disadvantages, Congress could arbitrarily pick one or the other.

At first the suggestion that Congress arbitrarily pick one set of remedies over another seems absurd, but the proposal must be considered in light of the present situation. As already noted, the court's method for classifying workmen as either seamen or longshoremen is illogical; an arbitrary choice by Congress will be no more illogical. Further, since there is no clear-cut advantage to being classified as either a seaman or a longshoreman, an arbitrary choice between the two neither benefits nor harms the deepwater port workmen. Yet, there is a great savings. Because the issue will have been decided, albeit arbitrarily, there will be no need to litigate the question. This creates certainty, saves the courts time, and saves the workmen the cost of attorney's fees.⁶⁴

63. Comment, *When is an Offshore Oilfield Worker a Seaman?*, *supra* note 28, at 757, 779-80.

64. A more rational version of this simple solution would be for Congress to choose between seaman and longshoreman status on the basis of an evaluation of the types of risks to which deepwater port workers are exposed. *See* section II.B. *supra*. Even this, however, would not be the perfect solution. It assumes that the risks that seamen and longshoremen face are substantially different. Furthermore, it assumes that the difference in the remedies for seamen and longshoremen is based on the assumed difference in the risk. Neither assumption seems to be true.

D. THE COMPLEX SOLUTION

A more comprehensive solution to the problem would be for Congress to completely replace the variety of remedies currently available to maritime workers with a single unified system. The present system is arbitrary because there is no substantial difference between the risks that seamen and longshoremen face. Moreover, even if there was, the difference in the remedies available to seamen and longshoremen is not based on a risk factor, but rather is the product of an historical accident. The very fact that one set of remedies is better when negligence and unseaworthiness can be proven and the other system is better when they cannot be proven demonstrates the unsoundness of the two separate systems of remedies.

In light of the arbitrariness of the present system, the best possible and most far-reaching solution would be for Congress to replace the entire present system of differential remedies for seamen and longshoremen with one system of remedies for all maritime workers. While a negligence system is possible, the more advisable approach is a no-fault workmen's compensation system. The no-fault system has the advantages of certainty and a lack of litigation.

While most states have workmen's compensation statutes which could be used as a model,⁶⁵ the most convenient model is the Longshoremen's Act. While it may seem strange to suggest the Longshoremen's Act as a solution, use of the Act could eliminate the arbitrary classifications by including all maritime workmen under the act: seamen, longshoremen, and deepwater port workmen. Not only would this be just, it would avoid litigation. Some adjustments to the Longshoremen's Act, however, will be needed.

The basic problem with the Longshoremen's Act is that the compensation given is too low. Compensation for total disability is limited per week to 66 2/3 percent of the average weekly wages. Loss of an arm is limited to 312 weeks of wages. For other such injuries there are similar limits.⁶⁶ The death benefits are also limited per week to 66 2/3 percent of the average weekly wages.⁶⁷ To fully compensate the worker and his family, these limits must be raised to 100 percent for total permanent disability and death. The other limits must also be raised to more realistic levels.

With the exception of these minor adjustments, however, the Longshoremen's Act could be adopted as is. The only change needed would

65. See PROSSER, *supra* note 24, at 530-34.

66. Longshoremen's Act, § 908.

67. *Id.*, § 909.

be for the coverage clause to include seamen and deepwater port workmen.⁶⁸

CONCLUSION

Since Congress has failed to provide tort remedies for deepwater port workmen in its recent Deepwater Port Act, substantial litigation over the question of compensation will inevitably result. The resolution of the issue will depend on whether the courts treat deepwater ports as vessels or non-vessels, and this in turn requires the application of illogical standards developed in previous case law. If these latter standards are followed, the self-propelled mobile type deepwater port would be classified as a vessel and the workmen thereon compensated for their injuries as seamen. The other deepwater port designs (single and conventional buoy, single point mooring pier, and the artificial island) would be defined as non-vessels and injured workers compensated as longshoremen.

Congress can avoid this illogical result, the foreseeable litigation, and improve the whole system of maritime tort remedies by classifying all maritime workers—longshoremen, seamen and deepwater port workmen—under one no-fault compensation system similar to the present Longshoremen's Act. If Congress is not willing to venture so far, it should at least arbitrarily classify deepwater port workmen as either seamen or longshoremen and thus avoid litigation on the issue. Unless one of these solutions is implemented, injured deepwater port workmen face protracted litigation for the determination of an arbitrary answer to a contrived and artificial problem.

Lawrence P. Postol

68. If and when Congress decides to correct the present situation, it should also consider the related problem of state ownership of deepwater ports. See Deepwater Port Act § 5(i)(2)(A), which provides for state ownership of deepwater ports. Since a state is normally immune from tort liability, an injured workman on a state-owned deepwater port may be left without a remedy. See S. REP. NO. 1217, 93d Cong., 2d Sess. 76-77 (1974), which noted that unless a state waives its sovereign immunity, workers injured on state-owned deepwater ports would not be able to sue. For a discussion of state immunity, see PROSSER, *supra* note 24, at 970-87. This situation could be corrected if the state were required to consent to compensation of its workmen under the Longshoremen's Act.