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EDITORIAL COMMENT

We are privileged to present as the lead article in this issue the transcript of the thought-provoking inaugural Nicholas J. Healy Lecture on Admiralty Law delivered at the New York University Law School on November 5, 1992, by the Honorable John R. Brown, Senior Judge of the United States Court of Appeals for the Fifth Circuit. Unfortunately, Judge Brown died on January 23rd.

In this important lecture entitled "Admiralty Judges: Flotsam on the Sea of Maritime Law?" Judge Brown decried the fact, as he put it, that the "Supreme Court . . . has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress." After pointing out that Justices of the Supreme Court are admiralty judges when they hear admiralty appeals, he said: "Apparently admiralty judges should now assume the role of followers rather than leaders. Have admiralty judges become flotsam on the sea of maritime law?"

Judge Brown stressed that the "power given to the federal judiciary to hear admiralty and maritime cases is demonstrated by the fact that this is the only grant of jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article. Oddly, the Constitution does not contain a similar grant of specific authority to Congress over admiralty and maritime law." He went on to point out that the grant of power imposed "the duty on admiralty judges to exercise that power," and "to declare the governing principles of maritime law."

The conclusions of Judge Brown warrant deep consideration by all concerned with the maritime law of the United States. It is for that reason, and not only because of the fine reputation which Judge Brown had earned, we obtained permission to publish the speech here in addition to its scheduled publication in the Journal of Maritime Law and Commerce.

Any MLA member interested in putting forward comments on Judge Brown's speech for publication in the next issue of the MLA Report is invited to submit them to the editor.

Gordon W. Paulsen,
Editor

ADMIRALTY JUDGES: FLOTSAM ON THE SEA OF MARITIME LAW?

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ADMIRALTY JUDGES: FLOTSAM ON THE SEA OF MARITIME LAW?

by

*The Honorable John R. Brown**

I. INTRODUCTION

The United States Constitution and Congress have expressly granted admiralty and maritime jurisdiction to the federal courts. Exercising this authority, admiralty judges have enunciated principles of maritime law that provide both certainty to commercial shipping and protection to those who risk life or property at sea. Moreover, the image of the great maritime judges and their opinions have been a beacon to judges in other areas of the law.

After two centuries of leadership, the tide has begun to turn on admiralty judges. The Supreme Court—whose members are admiralty judges when they hear admiralty appeals—has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress. Apparently admiralty judges should now assume the role of followers rather than leaders. Have admiralty judges become flotsam on the sea of maritime law?

II. WHAT IS ADMIRALTY AND MARITIME LAW?

A. The Power and Authority of Admiralty Judges

The importance of the admiralty judge in the United States precedes the adoption of the United States Constitution. Admiralty courts sat in the colonies that bordered the sea long before the Declaration of Independence.[1] After the colonies declared their independence, admiralty courts

*I am indebted to Kenneth Engerrand, Esq., Houston, Adjunct Professor, South Texas College of Law, and my Law Clerks, Bonnie Hobbs, J.D., Washington & Lee University School of Law, and Peter Ku, J.D., George Washington University School of Law, for their assistance in extensive research, reworking on exchange of drafts, etc., and citation checking.

[1]Putnam, *How the Federal Courts Were Given their Admiralty Jurisdiction*, 10 Cornell L.Q. 460 (1925) [hereinafter Putnam].

were established in all of the states to adjudicate admiralty claims.[2] Even when they were governed by the Articles of Confederation, however, the states recognized the necessity of uniform admiralty law. Thus, the Articles conferred on the Continental Congress the authority to establish courts for appeal of maritime matters.[3]

The weakness of the central government under the Articles of Confederation was felt in the judicial and maritime areas as strongly as in any other realm. Justice Pitney noted that "one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority."[4] It was not enough for the Continental Congress to establish a maritime court of appeals to hear appeals from state courts. "The weak point of the system was the absence of power in the central government to enforce the judgment of the appellate tribunal if it had to reverse the decree of the state court."[5]

When the Constitutional Convention was held in 1787, the Founding Fathers had to address the necessity of a system of federal courts and whether such federal courts should be granted jurisdiction over admiralty cases. Although there was substantial debate over the extent of power and jurisdiction of federal judges, the grant of admiralty jurisdiction to the federal courts was added "without controversy."[6] Alexander Hamilton stated the following:

> [The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.] These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.[7]

The result of the Constitutional Convention was a strong affirmation of the need of federal authority over admiralty: "The judicial Power shall

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[2]I *Benedict on Admiralty 91*, §6–5 (7th ed. 1992).

[3]Putnam, *supra* n.1, at 464. The areas addressed included prize and capture cases, piracies and felonies committed on the high seas.

[4]Southern Pac. Co. v. Jensen, 244 U.S. 205, 232 (1917) (Pitney, J., dissenting).

[5]Id. at 233.

[6]Putnam, *supra* n.1, at 469.

[7]*The Federalist*, No. 80, at 478.

extend . . . to all Cases of admiralty and maritime jurisdiction. . . ."[8] The significance of this power given to the federal judiciary to hear admiralty and maritime cases is demonstrated by the fact that this is the only grant of jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article. Oddly, the Constitution does not contain a similar grant of specific authority to Congress over admiralty and maritime law.

The grant of judicial power[9] to the federal courts in Article III of the Constitution also imposes the duty on admiralty judges to exercise that power.[10] This duty requires that the admiralty judges declare the governing principles of maritime law. "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require."[11]

When admiralty judges declare the governing principles of admiralty and maritime law they are doing more than carrying out their Constitutional duty. The admiralty law that they declare carries the authority of the very Constitution itself. The Constitutional underpinning of the admiralty law as enunciated by the admiralty judges was initially expressed by Justice Bradley as follows:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'[12]

Justice McReynolds explained that "the Constitution itself adopted the rules concerning rights and liabilities applicable therein."[13] Therefore, as admiralty judges decide maritime cases, they determine rights and liabilities adopted by the Constitution.

True, the Constitution adopted a system of general maritime law; however, the Constitution did not specify the details of that law. Despite the important influence of the English admiralty Judges on the development of maritime law, American judges developed admiralty law from principles,

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[8]U.S. Const. Art. III, Sec. 2, cl. 1.

[9]The St. Lawrence, 66 U.S. (1 Black) 522, 526 (1862).

[10]Id.

[11]The Resolute, 168 U.S. 437, 439 (1897).

[12]The Lottawanna, 88 U.S. (21 Wall.) 558, 574 (1875).

[13]Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 161 (1920).

codes and decisions from all of the maritime nations.[14] Justice Marshall described the source of the governing law: "These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."[15]

American admiralty judges also declared their independence from the English courts on the matter of jurisdiction. The political climate in England had restricted the jurisdiction of its admiralty courts while expanding the authority of the common-law courts. Initially, some admiralty judges in the United States took the position that the grant of "admiralty and maritime jurisdiction" in the Constitution "must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice we derive our systems of jurisprudence)."[16] The turning point was Justice Story's powerful opinion in *DeLovio v. Boit*.[17] Although Justice Story recognized the "importance and novelty of the questions"[18] involved in the case, he could not have anticipated the impact of his opinion.

The underlying admiralty jurisdiction issue in *DeLovio v. Boit* was the jurisdiction of the federal courts over a dispute on a marine insurance contract. The English courts, with their limited admiralty jurisdiction, would not have had jurisdiction over the case. Justice Story reasoned not only that the language of the clause of the Constitution conferred "admiralty" jurisdiction but also that the word "maritime" had been "superadded"[19] to the grant. In light of the intentional use of the words "admiralty and maritime" in the Constitution, Justice Story rejected a narrow construction of the jurisdictional grant that would engraft "the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle."[20] To the contrary, Justice Story believed the language of the Constitution would "warrant the most liberal interpretation"

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[14]The Scotia, 81 U.S. 170 (1872); *Lottawanna*, 88 U.S. at 572–573.

[15]American & Ocean Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 545–546 (1828).

[16]United States v. McGill, 4 U.S. (4 Dall.) 426, 429–430 (1806).

[17]F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, Circuit Justice).

[18]Id. at 418.

[19]Id. at 442.

[20]Id. at 443.

and that it would "not be unfit to hold" that the phrase "admiralty and maritime" referred to the following:

> ...that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.[21]

Justice Story concluded that it "seems little short of an absurdity" to extend the restrictions in English statutes to the broader language of the Constitution.[22] Therefore, "without the slightest hesitation,"[23] Justice Story extended the federal jurisdiction to include "all maritime contracts, torts and injuries."[24]

The influence of Justice Story's analysis of the grant of admiralty and maritime jurisdiction is found not only in the words of *support* from *admiralty judges* for his opinion,[25] but in the expansive reading *subsequently given* the clause by the *Supreme Court*. Despite the controversy caused by Justice Story's broad interpretation of the grant[26], the Supreme Court broadly held that the federal admiralty jurisdiction was not "*restricted* to the subjects cognizable in the English Courts of Admiralty at the date of the Revolution."[27] Instead of providing a limited authority over

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[21]Id.

[22]Id.

[23]Id. at 444.

[24]Id.

[25]Justice Bradley referred to the "learned and exhaustive opinion of Justice Story" and stated that it "will always stand as a monument of his great erudition." Insurance Co. v. Dunham, 78 U.S. (1 Wall.) 1, 35 (1871). Similarly, Judge Ware concurred in Justice Story's "very learned and masterly opinion." Drinkwater v. The Spartan, 7 F. Cas. 1085, 1087 (C.C.D. Maine 1828) (No. 4,085).

[26]See Jackson v. The Magnolia, 61 U.S. (20 How.) 296, 335–336 (1857).

[27]The Belfast, 74 U.S. (7 Wall.) 624, 636 (1868).

maritime matters, the jurisdiction of the admiralty judges was extended to encompass "every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers. . . ."[28]

The wisdom of investing admiralty judges with broad authority to declare the admiralty law of the United States is reflected throughout the jurisprudence of the great admiralty judges. Initially, when the United States was confined to a group of coastal states that were tied to the sea, the admiralty jurisdiction was similarly bound to the ebb and flow of the tide.[29] As trade and commerce moved inland, the admiralty judges expanded the maritime jurisdiction with the march of the pioneers.[30] When commerce moved past the tidal waters, the Supreme Court recognized that admiralty law could no longer be confined: "For if it be the construction, then a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below."[31] Noting that admiralty courts "have been found necessary in all commercial countries,"[32] Justice Taney extended the authority of the admiralty judges to any navigable waters.[33]

As admiralty jurisdiction expanded with the progress of the pioneers, the admiralty judges developed the principles of maritime law that fostered the growth of commercial activity while protecting the rights of the laborers who faced the hazards of maritime activity. These principles, which were carefully crafted by innovative admiralty judges such as Justice Story, continue to influence the course of admiralty and maritime law a century and a half later. Justice Story authored three opinions in his capacity as a circuit judge that exemplify his contribution to the development of the admiralty law.

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[28]*Lottawanna*, 88 U.S. at 576.

[29]The Thomas Jefferson, 23 U.S. 428 (1825). Justice Taney pointed out: "In the old thirteen States the far greater part of the navigable waters are tide waters." The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 455 (1851).

[30]Waring v. Clarke, 46 U.S. (5 How.) 441 (1847); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837).

[31]*Genesee Chief*, 53 U.S. at 456–457.

[32]Id. at 454.

[33]Id. at 457.

Certainly the most quotable opinion from Justice Story is *Harden v. Gordon*.[34] Despite the colorful language, however, the principles underlying *Harden v. Gordon* remain the basis for much of the law of seamen's remedies today. William Harden, a mate on the Brig *Enterprise*, took ill in a foreign port and brought a libel seeking to recover the expenses that were occasioned by his sickness. Justice Story faced a challenge to the jurisdiction of the court and defenses based on statute and contract.

The first issue was the jurisdiction of the court to hear the seaman's claim, particularly since the common-law courts had also taken jurisdiction of claims arising out of seamen's contracts. In England the dispute between admiralty courts and common-law courts had led to the erosion of the power of admiralty courts to hear many traditional maritime matters. Rather than "troubling ourselves to find out the origin of" the common-law jurisdiction, Justice Story analyzed the issue in terms of the power and authority of the admiralty courts.[35] As the obligation to provide cure for the seaman arises out of the seaman's articles "and is a material ingredient in the compensation for the labor and services of the seamen,"[36] Justice Story did not hesitate to extend the American admiralty jurisdiction to encompass the claim despite the restrictive English authorities cited by the shipowner. "[U]ntil I am better informed by the highest tribunal, which I am bound to obey, I shall continue to seek for the true exposition of admiralty jurisdiction in the instructive labors of admiralty judges."[37]

Second, to determine whether admiralty substantive law should provide a remedy for the seaman who took sick in a foreign port, Justice Story found support for his answer both in intrinsic equity and in the protection of shipping. His oft-quoted discourse as to the seamen's habits forms the foundation for the principle cited below that seamen are the wards of the admiralty:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances

[34]11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

[35]Id. at 481.

[36]Id.

[37]Id. at 481–482.

> are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.[38]

Justice Story was not content to anchor his analysis solely on the necessity to protect indulgent seamen. He also recognized the needs of shipowners and maritime commerce and the necessity that the law properly combine with the customs and usages of the sea:

> On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the serious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation. . . . Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw.[39]

Third, once Justice Story convincingly established that the general maritime law should afford a remedy to Mr. Harden, he had to address the role of Congress in formulating maritime law. Congress had legislated on the subject of cure and that legislation included a provision requesting the vessel owner to provide a medicine chest. In the absence of a proper medicine chest, the master was required to provide medicine and medical care in any port where the vessel called.[40] The vessel owner contended that the statute acted to repeal a general maritime law remedy when the shipowner *actually provided a medicine chest as required by law.* The statute did not, however, expressly prohibit a maritime remedy and at most only

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[38]Id.

[39]Id.

[40]Id. at 484.

contained "a strong implication" against the granting of the maritime remedy.[41] Unless there was language that was "inconsistent with or repugnant to" the maritime law remedy, the statute would be interpreted as cumulative of such a remedy.[42] The "affirmative words" of the statute would not be construed to vary the antecedent maritime rights of the parties.[43]

One problem with the application of a maritime law remedy in Harden's case was the provision of the seaman's articles that the seaman would pay for all medical aid further than the medicine chest. In evaluating the shipping articles, Justice Story articulated the standard by which admiralty judges would treat seaman thereafter:

> Every court should watch with jealousy an encroachment upon the rights of seamen because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with the trustees.[44]

Harden was unaware of the stipulation and gave no consideration for it. Thus, Justice Story considered it his duty, as an admiralty judge, to set aside the provision.

Similarly, the fact that the seaman had signed a receipt in full for all demands when he departed the vessel was held to not bar his maritime claim. Deviating from the common-law rule, Justice Story reasoned "that courts of admiralty in the administration of their duties, seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in general equity. . . ."[45] Therefore, as the Supreme Court would hold a century later[46] in *Garrett v.*

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[41]Id.

[42]Id.

[43]Id.

[44]Id. at 485.

[45]Id. at 487.

[46]Garrett v. Moore-McCormack Co., 317 U.S. 239, 1942 AMC 1645 (1942).

Moore-McCormack, Justice Story held that the receipt presented no bar to the maritime law claim.[47]

Justice Story continued his development of maritime remedies in *Reed v. Canfield*.[48] Several crew members of the *Albion* went ashore in the ship's home port of New Bedford to take supper at the home of friends of the vessel's helmsman. While the crew members were returning to the vessel, they became trapped in drifting ice after a great change in wind and weather. Crew member William Canfield's feet were so severely frozen that his toes had to be amputated.

Citing common-law principles, the vessel owners contended that they could not be liable for the injury in the vessel's home port "any more than a mechanic or manufacturer at home for like injuries in the service of his employer."[49] Justice Story distanced maritime law from common law, however, because the seamen are "in some sort co-adventurers upon the voyage."[50] For this reason, seamen are subject to different discipline and suffering than landsmen and are entitled to "peculiar rights, privileges, duties and liabilities."[51] Consequently, Justice Story rejected analogy to common law in favor of the "more enlarged principles, which guide and control the administration of the maritime law."[52]

In determining the extent of the remedy, Justice Story was not unmindful of the principles of maritime law that guided him in granting relief. He held that the vessel owners were liable for expenses until Canfield reached the completion *of his cure* as far as ordinary medical means extended. Thereafter, the owners were not responsible.[53] A century later the Supreme Court would ratify Justice Story's analysis.[54]

The final defense asserted by the vessel owner was that the seaman's negligence barred his claim. Once again, Justice Story departed from common-law doctrines in favor of maritime rules that do not visit a forfeiture when there has been ordinary negligence. "It is rather the tendency of the law to wink at slight offenses, and to punish those only which are gross and deeply injurious to the ship's service."[55] Without any "gross negli-

[47]*Harden*, 11 F. Cas. at 488.

[48]20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641).

[49]Id. at 428.

[50]Id.

[51]Id.

[52]Id.

[53]Id. at 429.

[54]Farrell v. United States, 336 U.S. 511 (1949).

[55]*Reed*, 20 F. Cas. at 430.

gence, or any unreasonable and intentional delay on the part of the boat's crew, in wilful disobedience of orders," Mr. Canfield would receive his cure.[56] The Supreme Court also ratified this holding a century later.[57]

The rejection of common-law remedies for all co-adventurers on the voyage in *Reed v. Canfield* became the basis for a more important legal definition in Justice Story's opinion in *United States v. Winn*.[58] Prior to the advent of steamships, admiralty judges used navigational duties as the basis for determining who was a seaman or crew member.[59] When steam replaced sail as the main motive power for vessels, the duties of the laborers on the voyage changed. While seamen originally had to *"hand, reef and steer"* their vessels,[60] the new steamships required laborers who worked with boilers, fuel, and a host of new cargoes.[61] In *Winn*,[62] Justice Story freed the word "crew" from restriction to laborers with navigational duties to include the ship's company.[63] After *Winn*, the definition of the terms crew member and seaman became based on the worker's connection to the vessel and were expanded to encompass all the officers and common workers who labored on the voyage.[64] Justice Story's analysis "opened the door to permit such workers as bartenders, horsemen and muleteers, coopers, pursers, cooks and stewards, and a host of others to attain seaman status."[65] By the end of the Nineteenth Century, most admiralty judges,[66]

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[56]Id.

[57]Warren v. United States, 340 U.S. 523, 1951 AMC 416 (1951).

[58]28 F. Cas. 733 (C.C.D. Mass. 1838) (No. 16,740).

[59]E.g., Black v. The Louisiana, 3 F. Cas. 503 (C.C.D. Pa. 1804) (No. 1,461).

[60]The Canton, 5 F. Cas. 29, 30 (C.C.D. Mass. 1858) (No. 2,388).

[61]Erastus Benedict, *The American Admiralty* §241, at 134 (1st ed. 1850).

[62]K. Engerrand & J. Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431, 434 (1983).

[63]Winn, 28 F. Cas. at 734. Justice Story had previously foreshadowed this result and departed from requiring navigational duties in his opinion in United States v. Thompson, 28 F. Cas. 102 (C.C.D. Mass. 1832) (No. 16,492).

[64]Id.

[65]K. Engerrand & J. Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. at 434–435.

[66]The Ocean Spray, 18 F. Cas. 558, 560 (C.C.D. Ore. 1876) (No. 10,412); Saylor v. Taylor, 77 F. 476, 479 (4th Cir. 1896); The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916).

including such important admiralty judges as Judge Henry Billings Brown (who as Justice Brown subsequently authored *The Osceola*[67]) and Judge Learned Hand,[68] had adopted the rule that it is the connection to the vessel that is the important issue, so that all of the "co-laborers in the leading purpose of the voyage" had status as seamen.

As the twentieth century unfolded, the court developed a "myriad of standards and lack of uniformity in administering the elements of seaman status" that finally received the attention of the Supreme Court in *McDermott International, Inc. v. Wilander*.[69] Although the Supreme Court did not resolve all of the questions of seaman status, the Court did return to the fundamental principle enunciated more than a century earlier by Justice Story and rejected tests based upon a worker's navigational duties.[70] "It is not the employee's particular job that is determinative, but the employee's connection to a vessel."[71]

The admiralty judges of the twentieth century have taken the helm from their nineteenth century brethren and have continued to advance the principles that set admiralty law apart from the common law. The leadership of the admiralty judges is exemplified by Judge Learned Hand's opinion in *The T.J. Hooper*.[72]

Two coal barges in coastwise tow of the tugs *Montrose* and *T.J. Hooper* were lost in a gale off the coast of New Jersey in March, 1928. Each tug had sailed with fair weather and there were no signs of any impending problems. During the voyage, however, both tows encountered gale force winds that caused the loss of the end barge of each tow. Had the tugs carried radio receivers, they would have received weather reports during the voyage that predicted an increase in wind from fresh to strong. The masters of the tugs indicated that, had they received a storm warning, they would probably have put into a safe port. The issue was the liability of the tugs for failing to carry radio receiving sets by which they could have received warnings in time to seek shelter from the gale.

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[67]189 U.S. 158 (1903).

[68]The Minna, 11 F. 759, 760 (E.D. Mich. 1882); The J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910).

[69]111 S. Ct. 807, 816, 1991 AMC 913, 917 (1991) (citing K. Engerrand & J. Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. at 432–433).

[70]111 S. Ct. at 817.

[71]Id.

[72]60 F.2d 737, 1932 AMC 1169 (2d Cir.), cert. denied, 287 U.S. 662 (1932).

The owners of the tugs contended that they could not be liable because there was no general custom of coastwise carriers to equip their tugs with radio receivers. Judge Hand recognized that admiralty judges have often equated industry standards with proper diligence and that reasonable prudence may, in many cases, be common prudence.[73] However extensive the industry practice may be, Judge Hand declared, it is the duty of the courts to "say what is required."[74] Under the circumstances Judge Hand declined to follow the custom of the industry and declared the tugs unseaworthy for lack of proper equipment.[75]

The rejection of common-law technicalities and distinctions has led admiralty judges not only to dispense equity[76] in admiralty cases but also to set a course for their land-locked brethren to jettison some of the doctrines that have encumbered the common law. A classic example is Justice Stewart's opinion in *Kermarec v. Compagnie General Transatlantique*.[77] While paying a social call on a crew member of the *S.S. Oregon*, Joseph Kermarec fell and sustained injuries because of the defective manner in which a canvas runner had been tacked to a ladder. Believing Kermarec to be "a gratuitous licensee," the district judge applied the substantive law of New York and set aside the jury's verdict in favor of the plaintiff because there was no evidence that the shipowner had actual knowledge of the defective condition.

The Supreme Court initially held that New York law did not apply to the case and that the rights and liabilities were "measurable by the standards of maritime law."[78] This required Justice Stewart to determine what standard of care was imposed by the general maritime law on vessel owners in the case of injuries to social guests. In his role as an admiralty judge, Justice Stewart recognized that "[t]he issue must be decided in the performance of the Court's function in declaring the general maritime law, free from

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[73]Id. at 740.

[74]Id.

[75]Id.

[76]One admiralty judge expressed it: "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense as would his landlocked brother, that which equity and good conscience impels." Compania Anonima Venezolana de Navegacion v. A.J. Peres Export Co., 303 F.2d 692, 699, 1962 AMC 1710 (5th Cir.), cert. denied, 371 U.S. 942 (1962).

Editor's Note: The admiralty judge was Judge Brown.

[77]358 U.S. 625, 1959 AMC 597 (1958).

[78]358 U.S. at 628.

inappropriate common-law concepts."[79] The common-law distinctions between licensees and invitees, which "were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism,"[80] are "foreign" to the fundamental principles of admiralty law which are based on "traditions of simplicity and practicality."[81] Consequently, Justice Stewart would not import such distinctions into the admiralty law:

> The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which statutes depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea.[82]

Following the maritime law's ancient "traditions of simplicity and practicality," Justice Stewart declared that the vessel owes a duty of reasonable care under the circumstances of each case for all those on board the vessel for purposes not inimical to the vessel's legitimate interests.[83]

The *Kermarec* decision has had an enormous impact on common-law judges who are no longer willing to abide feudal distinctions in twentieth century society. Sailing in *Kermarec's* wake, the California Supreme Court in *Rowland v. Christian*[84] "stripped away" the same "ancient concepts as to the liability of the occupier of land" as were decried by Justice Stewart.[85] Echoing "the failings of the common law rules" which were eloquently invoked by Justice Stewart,[86] the California Supreme Court concluded that the historical justifications for the common-law distinctions are no longer "justified in the light of our modern society."[87] As in *Kermarec*, the California Supreme Court held that the plaintiff's status was not determinative, and that the possessor of land would be judged "as a reasonable man in view of the probability of injury to others."[88] Subsequently, other

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[79]Id. at 630.

[80]Id.

[81]Id. at 631.

[82]Id. at 631–632 (footnote omitted).

[83]Id. at 632.

[84]69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[85]69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

[86]69 Cal. 2d at 116, 443 P.2d at 566, 70 Cal. Rptr. at 102.

[87]69 Cal. 2d at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

[88]69 Cal. 2d at 119, 443 P.2d 568, 70 Cal. Rptr. at 104.

common-law courts have adopted the simplicity of the maritime rule announced in *Kermarec*.[89]

The role of the admiralty judge is best summarized by the eloquent opinion of Justice Chase, sitting as Circuit Judge in *The Sea Gull*.[90] The steamers *Sea Gull* and *Leary* collided, causing the death of a stewardess on the *Leary*. The husband of the stewardess brought a libel against the *Sea Gull* to recover damages for the losses he sustained which were caused by the death of his wife. The *Leary* contended that the stewardess' cause of action died with her. Justice Chase acknowledged that the common law supported the vessel's position; however, he pointed out that "the common law has its peculiar rules in relation to the subject, traceable to the feudal system and its forfeitures."[91] Although "the weight of authority in common-law courts seems to be against the action," Justice Chase believed that "natural equity and the general principles of law are in favor of it."[92] In contrast to the common-law approach, Justice Chase stated that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[93] Consequently, the court entered a decree in favor of the libellant for the losses he sustained.

B. The Role of Congress in Formulating General Maritime Law

The Constitution does not contain any express grant of authority to Congress over admiralty law that is similar to the judicial power contained in Article III. In fact, the authority of Congress to regulate navigation was contested early in *Gibbons v. Ogden*.[94] The dispute originated in New York legislation that granted Robert Fulton and Robert Livingston the exclusive right to navigate steamboats in New York waters. Fulton and Livingston had assigned their rights to Aaron Ogden. Thomas Gibbons had two steamboats that were licensed by the United States, pursuant to Con-

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[89]These cases are collected in V. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitees, Licensees, or Trespassers*, 22 A.L.R. 4th 294, 301–310 (1983).

[90]21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578).

[91]Id. at 910.

[92]Id. (quoting Cutting v. Seabury, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3,521)).

[93]21 F. Cas. at 910.

[94]22 U.S. (9 Wheat.) 1 (1824).

gressional statute, to engage in coastwise trade. The New York courts enjoined Gibbons from navigating his vessels between New York and Elizabethtown in violation of the rights granted under New York law to Fulton and Livingston.

Ogden argued that the Constitution did not delegate to Congress any powers over navigation, and that the authority granted to Congress by the Constitution to regulate commerce[95] was limited to buying, selling and exchanging commodities.[96] Chief Justice Marshall responded that the term "commerce" encompassed "something more: it is intercourse."[97] Once "intercourse between nations" was held to fall within the definition of commerce, the door was opened to most admiralty matters: "The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admissions of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."[98] Thus, Chief Justice Marshall upheld the federal licenses granted to Gibbons (under the Act of Congress) and dissolved the state injunction.[99]

Once the Constitution granted Congress authority over admiralty and maritime law, delineation of the relationship of the boundaries between Congress and the admiralty judges in maritime matters became necessary. The division of such powers initially was addressed in the context of admiralty jurisdiction and procedure. The conflict arose because Article III, Section 2, provides that the federal judicial power shall extend to admiralty and maritime cases, and Article III, Section 1, invests the judicial power in the Supreme Court and such inferior courts as Congress shall establish. Thus, Congress has the power to create federal courts that are granted jurisdiction derived from the Constitution. In the Judiciary Act of 1789, Congress dually established federal district courts and granted admiralty and maritime jurisdiction to them.[100]

Justice Taney described the relationship between Congress and the admiralty judges of the federal courts in *The St. Lawrence*.[101] Although

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[95]U.S. Const. Art. I, Sec. 8.

[96]*Gibbons*, 22 U.S. at 198.

[97]Id.

[98]Id. at 190–191.

[99]Id. at 239–240.

[100]Act of Sept. 24, 1789, ch. 20, §1, Stat. 73, 77 (codified at 28 U.S.C. §1333(1)).

[101]The *St. Lawrence*, 66 U.S. (1 Black) 522 (1861).

Congress may prescribe the forms and mode of pleading in the courts,[102] Congress may not enlarge the boundaries of the court's admiralty jurisdiction nor "make it broader than the judicial power may determine to be its true limits."[103] The boundary of the courts' power "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purpose for which admiralty and maritime jurisdiction was granted to the Federal government."[104] Justice Bradley expanded on Justice Taney's analysis in *The Lottawanna*.[105] He explained that "the true limits of maritime law and admiralty jurisdiction" are "exclusively a judicial question."[106] For this reason "no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."[107]

After addressing the authority of the admiralty judges in determining their Constitutionally defined jurisdiction, Justice Bradley turned to the substantive admiralty and maritime law. Justice Bradley declared that the substantive law that the Constitution intended for admiralty judges to apply referred to the foreign law and codes of France, Germany and Italy as well as the legal history, legislation and adjudications in the United States.[108] Justice Bradley then defined the Constitutional role of the admiralty judge as follows: while the admiralty judges are Constitutionally bound to declare the law, in reference to the international and American sources of admiralty and maritime law, the judges do not "make the law."[109] In the event that changes in the general maritime law become necessary, his advice was for the parties to look to Congress. Expanding on Justice Marshall's analysis in *Gibbons v. Ogden*, Justice Bradley stated that "Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[110] Justice Bradley emphasized, however, that there is a difference between the grant of judicial authority over admiralty and maritime law and Congressional power

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[102]See The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459–460 (1851).

[103]66 U.S. at 527.

[104]Id.

[105]88 U.S. 558 (1875).

[106]Id. at 576.

[107]Id.

[108]Id.

[109]Id. at 576–577.

[110]Id. at 577.

over commerce. "The scope of the maritime law, and that of commercial regulation are not coterminous."[111] He concluded that commercial regulation would embrace "much the largest portion of ground covered by" the maritime law.[112] With regard to the issue in *The Lottawanna*—repairs furnished to a vessel in her home port—Justice Bradley did not "doubt that Congress might adopt a uniform rule for the whole Country."[113]

Justice Bradley, in *Butler v. Boston & Savannah Steamship Co.*,[114] reiterated his support for Congressional modification of general maritime law. Although recognizing that "the limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national,"[115] Justice Bradley did acknowledge that Congress may, within the Constitutional boundaries, amend and modify the maritime law as declared by the Supreme Court.[116]

By the early twentieth century, decisions such as *Butler* led the Supreme Court to conclude that "considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions,[117] Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[118] Emphasizing how much is in the hands of admiralty judges in the absence of a controlling statute, however, "the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."[119]

While recognizing the authority of Congress over maritime substantive law, the Supreme Court did enforce Constitutional limitations on Congress' power. In *Southern Pacific Co. v. Jensen*,[120] the Supreme Court dealt with a state worker's compensation claim arising out of the death of a

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[111]Id.

[112]Id.

[113]Id.

[114]130 U.S. 527 (1889).

[115]Id. at 557.

[116]Id.

[117]The Court referred to the Constitutional grant of admiralty and maritime jurisdiction and the grant of power to Congress to make all laws "necessary and proper for carrying into execution the foregoing powers." U.S. Const. Art. 1, Sec. 8.

[118]Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

[119]Id.

[120]Id.

longshoreman on the gangway of a vessel. Justice McReynolds stated the governing principle with regard to state authority over maritime law as to others:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[121]

Applying this principle, Justice McReynolds emphasized that the application to foreign ships of a different statute in every state would destroy the uniformity established by the Constitution so that "freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."[122] Consequently, Congressional application of the state workers' compensation law to a maritime accident was unconstitutional.

The absence of a compensation remedy for maritime workers led Congress to enact an amendment to the grant of admiralty jurisdiction to the federal courts,[123] saving "to claimants the rights and remedies under the Workmen's Compensation Law of any state."[124] The constitutionality of this provision was successfully challenged in *Knickerbocker Ice Co. v. Stewart*.[125] As in *Jensen*, a state worker's compensation claim was asserted in connection with the death of a maritime worker.

After reviewing the Constitutional principles that led the Court to invalidate the application of the state law in *Jensen*, the Court stated that "the field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein."[126] Thus, substantive principles of admiralty law carry the authority of the Constitution itself and Congress can modify such principles only in a limited manner. Justice McReynolds described the role of Congress in changing the maritime law adopted by the Constitution: "To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."[127]

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[121]Id. at 216.

[122]Id. at 217.

[123]28 U.S.C. §1333(1) (1964).

[124]Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

[125]253 U.S. 149 (1920).

[126]Id. at 161.

[127]Id. at 160.

The Congressional purpose of the enactment reviewed in *Knickerbocker Ice Co. v. Stewart* was to permit application of state compensation statutes to maritime injuries. The object of the grant of admiralty and maritime jurisdiction to the federal government, however, "was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."[128] The authorization by Congress of state compensation statutes would, as in *Jensen*, "inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established."[129] Consequently, the Congressional attempt to circumvent *Jensen* violated the uniformity mandated by Article III, Section 2, and was unconstitutional.

Still determined to provide a Congressional mechanism, Congress, after the decision in *Knickerbocker Ice*, again amended the admiralty jurisdiction statute. The intent was to preserve "to claimants for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies when conferred by such law shall be exclusive. . . ."[130]

The Supreme Court addressed the constitutionality of this latest Congressional enactment in *Washington v. W.C. Dawson & Co.*[131] As in *Knickerbocker Ice*, the statute made "no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any state to alter the maritime law, and thereby introduce conflicting requirements."[132] The Supreme Court reiterated the restricted role that the Constitution gave to Congress to modify the general maritime law:

> Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction

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[128]Id. at 164.

[129]Id.

[130]Act of June 10, 1922, ch. 216, 42 Stat. 634.

[131]264 U.S. 219 (1924).

[132]Id. at 228.

> looks to uniformity; otherwise wide discretion is left to Congress.[133]

Congress had not acted within its role of providing uniform national duties or obligations in the amendment to the admiralty jurisdiction statute. Consequently, the statute was unconstitutional. Justice McReynolds emphatically advised Congress as follows:

> To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme.[134]

The limitation that Congress may enact modifications of the maritime law only if they are uniform throughout the country is not the only Constitutional restriction on the power of Congress. In his role as admiralty Judge, Justice Henry Billings Brown reviewed centuries of maritime codes and decisions in order to declare the remedies of seamen in *The Osceola*.[135] Following settled principle of maritime law, Justice Brown concluded that seamen who fall ill or are injured are entitled to maintenance and cure, wages to the end of the voyage and an indemnity for injuries caused by the unseaworthiness of the vessel.[136] He concluded, however, that seamen are not entitled to an indemnity for the negligence of the master or crew.[137] Congress enacted the Jones Act in 1920[138] to create the negligence remedy that the maritime law did not provide. The Act gives seamen the right to maintain an action for damages at law based on the statute granting a negligence remedy to railway employees.[139]

The Supreme Court addressed the constitutionality of the Act in *Panama R.R. Co. v. Johnson*.[140] Andrew Johnson was injured while ascending a

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[133]Id. at 227–228.

[134]Id. at 228.

[135]189 U.S. 158 (1903).

[136]Id. at 175.

[137]Federal Employers' Liability Act, 45 U.S.C. §§51–60 (1988).

[138]46 U.S.C. §688 (1992).

[139]Federal Employers' Liability Act, 45 U.S.C. §§51–60 (1988).

[140]264 U.S. 375, 1924 AMC 551 (1924).

ladder from the deck to the bridge. He brought an action as a seaman under the Jones Act against his employer on the common-law side of the federal district court.

Justice Van Devanter began his analysis by reviewing the Constitutional foundation of the general maritime law. "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character."[141] The framers of the Constitution were familiar with the principles of general maritime law and placed this subject under national control. Although the Constitution contained "no express grant of legislative power over the substantive law," the commentators, courts and Congress believed the Constitution had implicitly given power to Congress. "Practically therefore the situation is as if that view were written into the provision."[142] Consequently, the substantive admiralty law was considered to be "subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require."[143]

While giving wide discretion to Congress, the Court acknowledged that the power was also subject to limitations:

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments—when not relating to matters whose existence or influence is confined to a more restricted field . . . shall be coextensive with and operate uniformly in the whole of the United States.[144]

Justice Van Devanter did not find any constitutional impediment to altering maritime rules to bring them into relative conformity with the common law or in permitting rights founded on the maritime law to be enforced in actions on the common-law side of the courts, such as in an *in personam* action.[145]

The shipowner contended that the Jones Act ran afoul of the Congressional limitations because the statute allowed "a seaman asserting a cause of

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[141]Id. at 385.

[142]Id. at 386.

[143]Id.

[144]Id. at 386–387.

[145]Id. at 388.

action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction and to have it determined according to the principles of a different system, applicable to a distinct and irrelevant field."[146] The Supreme Court did not, however, read the Jones Act literally. First, Justice Van Devanter held that the Jones Act added to the general maritime law a new right—the negligence remedy. This action could be brought as a maritime action on the admiralty side of the court.[147] This action would be tried by the court like any other general maritime law claim brought on the admiralty side of the court.[148] Justice Van Devanter acknowledged that this provision was "not in so many words made part of that law; but an express declaration was not essential to make them such."[149] However, it was the duty of the court to construe the statute so as to avoid the conclusion that it was unconstitutional.[150] Once the new admiralty action was established, Congress granted seamen an election to bring the action on the law side of the court with a trial by jury.[151] "Rightly understood," the Jones Act was not unconstitutional because it "neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so."[152] In essence the seaman was granted an election "between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system."[153]

Finally, Justice Van Devanter did not believe that the adoption of the railway workers' negligence remedy violated the Constitutional requirement of uniformity. As construed by the Court, the statute provides a uniform maritime remedy and "neither is nor can be deflected therefrom by local statutes or local views of common-law rules."[154]

In conclusion, admiralty judges and Congress are both given authority in admiralty and maritime cases. Admiralty judges were given the final authority over matters concerning the Constitutional grant of jurisdiction, but Congress was given the power to modify the body of substantive maritime law adopted by the Constitution. This power was, however, subject to Constitutional limits. Congress may not exclude matters from

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[146]Id. at 387.

[147]Id. at 391.

[148]Id.

[149]Id. at 389.

[150]Id. at 390.

[151]Id. at 391.

[152]Id. at 388.

[153]Id. at 388–389.

[154]Id. at 192.

the general maritime law nor include matters within it that are not maritime. Further, any Congressional enactment must operate uniformly throughout the United States. Congressional efforts have been repeatedly scrutinized by the admiralty judges to insure harmony between the principles of maritime law incorporated by the United States Constitution and the power to regulate commerce granted to Congress. In this context the words of Justice Story in *Harden v. Gordon*[155] provide the greatest illumination. When Congress legislates affirmatively in an area, the statute should not be read as varying or repealing the existing general maritime law. There must be something inconsistent or repugnant to the maritime law principle before the statute impugns a doctrine that is Constitutionally based.[156] As in *Panama R.R. Co. v. Johnson*, the Court should endeavor to construe all Congressional enactments consistently with the governing principles of the general maritime law.

III. THE DEMISE OF THE ADMIRALTY JUDGE

The decision of the Supreme Court in *The Harrisburg*[157] was unfortunate for two reasons. First, the Court declined to follow the enlarged principles which guide and control the administration of the general maritime law and instead adopted the common-law rule which declined to afford a cause of action for wrongful death. Second, because Congress legislated in the area in response to the inequity of the Court's decision, the Supreme Court has subsequently compounded its initial failure to act by abdicating its Constitutional authority in this area.

The Steamer *Harrisburg* and the Schooner *Marietta Tilton* collided in Massachusetts waters on May 16, 1877. The widow and child of Silas Richards, First Officer of the schooner, brought an *in rem* action against the *Harrisburg* seeking to recover damages caused by the negligence of the steamer. Chief Justice Waite began his analysis with the common-law rule that "no civil action lies for any injury which results in death."[158] Despite the intervention of statutes such as Lord Campbell's Act in England, Chief Justice Waite found "no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally,

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[155]11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

[156]Id. at 484.

[157]119 U.S. 199 (1886).

[158]Id. at 204 (quoting Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 756 (1877)).

leaves the matter untouched."[159] Adding these two propositions together, Chief Justice Waite concluded the following:

> Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.[160]

In answer to *The Harrisburg*, Congress in 1920 enacted the Death on the High Seas Act (DOHSA)[161] to provide a remedy for deaths caused on the high seas, beyond a marine league from shore.[162] Congress did not legislate a federal remedy for state waters but chose rather to leave "unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States."[163] Use of state remedies by admiralty judges to provide a remedy for deaths caused in territorial waters (as envisioned by Congress) was sanctioned by the Supreme Court in *Western Fuel Co. v. Garcia*.[164] Simultaneously with the passage of DOHSA, Congress enacted the Jones Act, which provides a negligence remedy to injured seamen. The Act also grants a wrongful death remedy when seamen are killed as a result of their employer's negligence.[165] The Jones Act did not provide a remedy for the wrongful death of a seaman caused by breach of the warranty of seaworthiness under the general maritime law, and the Supreme Court declined to allow state wrongful death statutes to fill the gap and provide such a remedy.[166]

The combination of Congressional and state statutes provided a partial patchwork of remedies which left Edward Moragne's widow without a remedy when he died while working as a longshoreman aboard the vessel *Palmetto State* in Florida waters. Justice Harlan's opinion—a superb piece

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[159]119 U.S. at 213.

[160]Id.

[161]46 U.S.C. §§761–767 (1992).

[162]Id. at §761.

[163]S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919).

[164]257 U.S. 233 (1923).

[165]46 U.S.C. §688 (1992).

[166]Lindgren v. United States, 281 U.S. 38, 1930 AMC 399 (1930).

of judicial craftsmanship—in *Moragne v. States Marine Lines, Inc.*[167] exemplifies how admiralty judges should respond to an inequity in the maritime law. Rather than placing one more patch on a flawed system, Justice Harlan proceeded directly to the source of the problem—the decision in *The Harrisburg*. Finding that the opinion in *The Harrisburg* created "an unjustifiable anomaly in the present maritime law,"[168] the Court overruled it in favor of the creation of a general maritime remedy for death caused by violation of maritime duties[169] (including seaworthiness).

Justice Harlan did not lightly overturn the established precedent. He revisited the analysis originally cited in support of *The Harrisburg* decision and determined that the common-law rule it adopted "was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all."[170] Justice Harlan chided his predecessors for their blind adherence to the common law. "Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical in this respect to the common law."[171] In contrast to Chief Justice Waite's restrictive interpretation, Justice Harlan believed that the application of the fundamental principles of maritime law "suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea."[172]

Regardless of the validity of *The Harrisburg* at the time it was decided in 1886, the development of the law thereafter demonstrated that "the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law."[173] Therefore, Justice Harlan found "no present public policy against allowing recovery for wrongful death."[174]

After sweeping away any substantive objections to the establishment of a general maritime law wrongful death remedy, Justice Harlan believed it was appropriate to review the maritime statutes enacted by Congress to

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[167]398 U.S. 375, 1970 AMC 967 (1970).

[168]Id. at 378.

[169]Id. at 409.

[170]Id. at 381, 386.

[171]Id. at 388.

[172]Id. at 387.

[173]Id. at 388.

[174]Id. at 390.

insure the appropriateness of application of a general maritime law wrongful death remedy on the facts of that case.[175] But he did not stop there. He was not satisfied with finding and then applying an act of Congress to supply the remedy. But in deference to Congress, Justice Harlan also looked beyond the specific subject of the legislation to determine "the compass of the legislative aim" so that the Court could declare maritime law consistent with the "direction" given by Congress.[176]

The purpose of Congress in enacting DOHSA was to eliminate the "disgrace" of *The Harrisburg* and to "bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea."[177] Congress has not attempted to "pre-empt the entire field" and destroy remedies that previously existed such as state wrongful death statutes.[178] Congress only legislated in DOHSA to cover the high seas. The decision not to extend the statute to territorial waters was based on "lack of necessity" and did not reflect "an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act."[179]

Justice Harlan also found no preclusion in the Jones Act, which provides only a statutory wrongful death remedy for the death of a seaman caused by his employer's negligence and which does not affect the seaman's general maritime law unseaworthiness remedy. While Edward Moragne was a longshoreman and the Jones Act did not apply to his widow's suit, Justice Harlan recognized that the creation of a general maritime law remedy for death "seems to be beyond the preclusive effect of the Jones Act."[180] The seaman's representative would have a statutory negligence remedy under the Jones Act and a cause of action for unseaworthiness under the general maritime law, for which a wrongful death remedy was afforded by DOHSA in the event the death was caused on the high seas, and a general maritime law wrongful death remedy pursuant to *Moragne* in the event the death was caused in territorial waters.[181] Justice Harlan stated that "the existence of a maritime remedy for death of seamen in territorial waters

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[175]Id. at 392–393.

[176]Id.

[177]Id. at 397 (quoting S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3, 4 (1920)).

[178]*Moragne*, 398 U.S. at 398.

[179]Id. at 398–399.

[180]Id. at 396 n.12.

[181]Id.

rather than hinder, 'uniformity in the exercise of admiralty jurisdiction.' "[182]

In summary, Justice Harlan found no "compelling evidence" to presume that Congress affirmatively intended to "freeze" into the maritime law the distinctions that arose from the patchwork of legislation enacted to circumvent *The Harrisburg*.[183] "There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States."[184] Finding that Congress had no intention "of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law,"[185] Justice Harlan overruled *The Harrisburg* and held "that an action does lie under general maritime law for death caused by violation of maritime duties."[186]

Justice Harlan did not "spell out" all of the elements of the maritime wrongful death remedy in *Moragne*.[187] This process began in *Sea-Land Services, Inc. v. Gaudet*.[188] As in *Moragne, Gaudet* involved the death of a longshoreman in state waters. The first issue was whether the decedent's recovery for his personal injuries would bar a subsequent wrongful death action. Justice Brennan recognized that "a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime."[189] This includes the FELA and, by incorporation, the Jones Act.[190]

The policy underlying a wrongful death remedy is to compensate the decedent's dependents "for their losses."[191] Therefore, from a policy standpoint, "the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries."[192] Justice Brennan found no statutory language that would

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[182]Id. (quoting Gillespie v. United States Steel Corp., 379 U. S. 148, 155, 1965 AMC 1 (1964)).

[183]*Moragne*, 398 U.S. at 396.

[184]Id.

[185]Id. at 400.

[186]Id. at 409.

[187]Id. at 405.

[188]414 U.S. 573 (1974).

[189]Id. at 579.

[190]Mellon v. Goodyear, 277 U.S. 335, 345 (1928).

[191]*Gaudet*, 414 U.S. at 583.

[192]Id.

"require a contrary conclusion," so he was guided by *The Sea Gull* maritime principle that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[193]

Justice Brennan similarly analyzed the question as to the elements of damages available in the general maritime remedy. Both the Jones Act and DOHSA limited awards to pecuniary losses so that loss of society could not be recovered under those statutes.[194] Despite these limitations, the Court held that loss of society is an element of the maritime wrongful death remedy. Justice Brennan concluded that "our decision is compelled if we are to shape the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."[195]

Justices Harlan and Brennan declared the maritime law in *Moragne* and *Gaudet* in a fashion consistent with their Constitutional role as admiralty judges, while acknowledging the power of Congress to alter the maritime law. There was no Congressional intent in any federal statute to preclude a general maritime remedy or to prescribe the element of such a remedy in the situation of Edward Moragne or Awtrey Gaudet—the death of a longshoreman in state waters. A more difficult situation, however, involved deaths on the high seas—the precise situs to which DOHSA applies.

When the pilot and passengers were killed in a helicopter crash on the high seas off the coast of Louisiana, the Supreme Court was presented with the opportunity to address the relationship between DOHSA and the maritime wrongful death remedy, in *Mobil Oil Corp. v. Higginbotham.*[196] Four years after *Gaudet* and only eight years after *Moragne*, the majority of the Court doffed the admiral's hats they had worn in *Moragne* and *Gaudet* and donned the common-law robes that they wore in 1886 when they froze the maritime law in *The Harrisburg*.

The issue in *Higginbotham* was whether to award damages for loss of society, as was allowed in *Gaudet* under the general maritime law wrongful death remedy in the case of deaths caused on the high seas. The parties

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[193]Id. (quoting Justice Chase's opinion in The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578)).

[194]Congress expressly limited recovery under DOHSA. 46 U.S.C. §762 (1992). The Supreme Court judicially limited claims under the Federal Employers' Liability Act, 45 U.S.C. §§51–60, the remedy incorporated by the Jones Act. See Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 67 (1913).

[195]*Gaudet*, 414 U.S. at 558 (footnote omitted).

[196]436 U.S. 618, 1978 AMC 1069 (1978).

presented alternative policy arguments to the Court as to the substantive issue, but the majority of the Court concluded that "we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses."[197] The majority viewed the pecuniary loss limitation in DOHSA as Congress' considered judgment on the issue of damages and reasoned that when Congress "speaks directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."[198] The majority drew a distinction between "filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[199] In view of the express pecuniary loss limitation in DOHSA, the majority believed that they had "no authority to grant a nonstatutory maritime remedy in this case."[200]

The Court also addressed the plaintiffs' argument that application of DOHSA's limitation would violate the uniformity of the maritime law. While the Court recognized the "value of uniformity," the majority considered the award of different recoveries depending on whether the death was caused in territorial waters or on the high seas to pose "only a minor threat to the uniformity of maritime law."[201] However, the Court concluded that "even if this difference proves significant, a desire for uniformity cannot override the statute."[202]

In dissent, Justice Marshall returned to the analysis used by Justice Harlan in *Moragne* and reviewed Congress' purpose in enacting DOHSA. Justice Harlan found "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law."[203] Similarly, Justice Marshall concluded from the legislative history that "Congress was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover at least their pecuniary loss."[204] In the absence of "congressional directive to foreclose nonstatutory remedies," Justice Marshall believed that "maritime law principles

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[197]436 U.S. at 623.

[198]Id. at 625.

[199]Id.

[200]Id. at 626.

[201]Id. at 624.

[202]Id.

[203]Id. at 629 (Marshall, J., dissenting).

[204]Id.

require us to uphold the remedy for loss of society at issue here."[205] There was no established and inflexible rule that precluded the maritime law recovery. There was "at most" an expression by Congress of a "minimum recovery" for deaths on the high seas.[206] As "Congress did not mean to exclude the possibility of recovery beyond pecuniary loss," Justice Marshall would have effectuated the maritime policy favoring the granting of the remedy.[207]

Justice Marshall based his analysis on the principles set out by Justice Chase in *The Sea Gull* and Justice Story in *Harden v. Gordon* which envision a different role for the admiralty judge than the restrictive view that the Supreme Court adopted in *Higginbotham*. Justice Marshall did not point out that the majority also failed to account for the Constitutional limit that Congressional intervention in the general maritime law must have uniform application. In view of the availability of damages for nonpecuniary losses under the general maritime law in state waters and the limitation on damages on the high seas, the application of the statutory limitation resulted in a non-uniform geographic patchwork with regard to recoverable damages. The majority simply answered this challenge with circular reasoning that "a desire for uniformity cannot override the Statute."[208]

Prior to *Moragne* the three-mile limit had been the line at which recovery might be granted or denied based on reasons wholly unrelated to the merits of the claim. Justice Harlan in *Moragne* wisely rejected such a fortuitous circumstance as the basis for recovery. Eight years later in *Higginbotham*, the Court sailed full circle and returned to the three-mile limit as the fortuitous dividing line between recovery for pecuniary and nonpecuniary losses.

While the deference shown to Congress by the Court in *Higginbotham* is perhaps more understandable in view of the coverage of DOHSA and the limitation on damages contained in that statute, the self-imposed limitation on the power of admiralty judges in *Miles v. Apex Marine Corp*,[209] is more troublesome. When Ludwick Torregano was stabbed to death by a fellow crew member on a vessel in the harbor of Vancouver, Washington, his mother brought a wrongful death action against the vessel's owner, operators and charterer seeking to recover for negligence under the Jones Act and unseaworthiness under the general maritime law. The Fifth Circuit

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[205]Id.

[206]Id. at 630.

[207]Id.

[208]Id. at 624.

[209]111 S. Ct. 317, 1991 AMC 1 (1991).

reversed the jury's finding of 7% negligence and held that the vessel was unseaworthy as a matter of law. The Court of Appeals affirmed awards for loss of support and services and for the decedent's pain and suffering (elements of damages which may be recovered under the Jones Act), and affirmed the denial of any award for loss of society on the ground that a nondependent parent may not recover for loss of society in a general maritime law wrongful death action.[210] The Supreme Court affirmed the ruling that loss of society was unavailable in the general maritime law action for a different reason.

In arriving at this result, however, the Court reversed the Constitutional roles of admiralty judges and Congress. Justice O'Connor began her opinion in *Miles* by stating that "legislation has always served as an important source of both common law and admiralty principles."[211] She then noted that Congress may place limits on admiralty judges and they may not go beyond those limits.[212] In the field of wrongful death remedies, Justice O'Connor reviewed at length Justice Harlan's analysis in *Moragne* that DOHSA was created to fill a void on the high seas so there was no proscription against creation of a maritime wrongful death action for territorial waters.[213]

After reviewing the history of DOHSA, Justice O'Connor analyzed the unseaworthiness action asserted under the general maritime law in *Miles*. When DOHSA and the Jones Act were enacted in 1920, the seaman's general maritime law unseaworthiness remedy was undeveloped and largely ignored. It was only after the Supreme Court transformed unseaworthiness into a doctrine of strict liability in 1944[214] that the doctrine practically superseded the Jones Act as a basis for recovery by seamen.[215] It was the emergence of unseaworthiness (for which the general maritime law at that time declined to provide a wrongful death remedy) that resulted in the manifestation of anomalies that led to the *Moragne* decision. First, a seaman who was injured by unseaworthiness in state waters could recover damages, but if he died his claim died with him. Second, the location of the injury causing a seaman's death by unseaworthiness would determine whether there was a recovery; (no recovery in state waters; recovery under DOHSA if on the high seas).

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[210]Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989).

[211]Miles v. Apex Marine Corp., 111 S. Ct. at 321.

[212]111 S. Ct. at 321.

[213]Id.

[214]Mahnich v. Southern S.S. Co., 321 U.S. 96, 1944 AMC 1 (1944).

[215]*Miles*, 111 S. Ct. at 322.

Third, the representatives of a longshoreman killed by unseaworthiness in state waters could recover if the state statute granted a wrongful death remedy, but those of a true seaman could not.[216] Justice O'Connor acknowledged that Congress could not have anticipated the emergence of the unseaworthiness remedy.[217] At least in usual terms of statutory construction, it would be even more mystifying if in 1920, Congress could have anticipated that unseaworthiness would become a basis of liability for death, so much so that whatever limitation—here pecuniary losses—would be imposed on death recoveries now, was then an undeveloped remedy for unseaworthiness. Consequently, she concluded that nothing in DOHSA "or in the Jones Act could be read to preclude this Court from exercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed."[218]

After wearing the admiral's hat as an admiralty judge and establishing a general maritime law wrongful death remedy for a seaman killed by unseaworthiness, Justice O'Connor did not believe that she was empowered to apply the general maritime law rule of damages (from *Gaudet*) for violation of the warranty of seaworthiness in state waters. In contrast to Justice Harlan's analysis in *Moragne*, Justice O'Connor changed the focus of the Constitutional role of admiralty judges and Congress:

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these [70 year old] legislative enactments for policy guidance. 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 [which could

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[216]*Moragne*, 398 U.S. at 395–396.

[217]*Miles*, 111 S. Ct. at 322 (citing *Moragne*, 398 U.S. at 399).

[218]111 S. Ct. at 322.

> not have anticipated the development of recovery based on unseaworthiness] both direct and delimit our actions.[219]

Applying the concept that admiralty judges may only enunciate principles that vindicate or are consistent with statutory policies, Justice O'Connor found nothing in the Jones Act that evinces "general hostility to recovery under maritime law."[220] Thus, the Jones Act does not preclude a separate wrongful death action for unseaworthiness based either upon DOHSA on the high seas or under the general maritime law *(Moragne)* in state waters.[221]

On the issue of damages, the Jones Act and the FELA are silent. However, the Supreme Court has judicially declared that the FELA provides recovery only for pecuniary losses.[222] In doing so, the Supreme Court pointed out that, like the FELA, Lord Campbell's Act did not use the word "pecuniary" to limit the damages which could be recovered.[223] However, despite the absence of a specific limitation, Lord Campbell's Act "and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."[224]

As the pecuniary loss limit of FELA recoveries was in effect at the time the Jones Act was enacted, "Congress must have intended to incorporate the pecuniary limitation on damages as well."[225] But oddly, Congress must not have intended to incorporate the DOHSA limitation to pecuniary losses. Thus, recovery in a Jones Act negligence action is limited to such losses. The final step in Justice O'Connor's analysis applies the limitation on recovery, which Congress impliedly placed on the seaman's statutory Jones Act cause of action based on negligence, to the seaman's separate cause of action under the general maritime law for breach of the warranty of seaworthiness. Justice O'Connor concluded that it would be "inconsistent" with the role of the Court in the Constitutional scheme if the Court sanctioned a more expansive remedy in a judicially created cause of action than in the action enacted by Congress.[226] Consequently, the Court denied

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[219]Id. at 323.

[220]Id. at 324.

[221]Id.

[222]Michigan Cent. R.R. v. Vreeland, 227 U.S. at 59, 69–71.

[223]Id. at 71.

[224]Id.

[225]*Miles,* 111 S. Ct. at 325.

[226]Id. at 326.

recovery under the general maritime law for loss of society for the death of a seaman killed by unseaworthiness in territorial waters.[227]

The decision of the Supreme Court to bar recovery of nonpecuniary damages in an unseaworthiness claim under the general maritime law, based on the old statute providing a negligence remedy which was enacted under Congress' power to regulate commerce, leads to the most strained preemption holding ever reached by an American admiralty judge. In essence, the *implied* effect of the *implied* provision in a statute enacted under an *implied* power of Congress served to eliminate a remedy declared by the admiralty judges of the Supreme Court in exercise of their power conferred directly by the Constitution. Moreover, Justice O'Connor's preemptive interpretation of the Jones Act now directly implicates the Constitutionality of the application of that statute. The Supreme Court had to give the Jones Act a strained construction in *Panama R.R. Co. v. Johnson*,[228] so as to avoid the conclusion that the statute withdrew a cause of action from the general maritime law in order to have it determined according to the principles of a different system. By interpreting the Jones Act as providing a new negligence remedy, enforceable in admiralty and at law, Justice Van Devanter avoided a successful Constitutional attack on the statute.

In *Moragne* and *Gaudet*, the Supreme Court established that when a longshoreman's widow brought an unseaworthiness action for death in state waters, she was entitled to recover nonpecuniary losses. The holding in *Miles* withdraws the element of nonpecuniary losses from the unseaworthiness cause of action in the case of the death of a seaman solely because Congress impliedly followed Lord Campbell's Act when it enacted the Jones Act. While the Supreme Court upheld the constitutionality of the Jones Act when it was construed as establishing a negligence cause of action in admiralty, the constitutionality of the Act is subject to question when it is applied to withdraw an element of damages from a seaman's separate general maritime law cause of action for breach of the warranty of seaworthiness. The removal of nonpecuniary losses from the recovery available for breach of the warranty of seaworthiness and the limitation on those damages based on principles derived from interpretation of an English statute (Lord Campbell's Act) contravene the Constitutional limits of Congress' power over admiralty law.

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[227]Id.

[228]264 U.S. 375, 1924 AMC 551 (1924). See Page 9812, *supra*.

IV. CONCLUSION

The decisions in *Higginbotham* and *Miles* represent a complete reversal of the roles of admiralty judges and Congress. Prior to these decisions, admiralty judges exercised their Constitutional duty to declare the admiralty and maritime law based on enlarged principles of justice combined with the customs and usages of the sea. Admiralty judges were not bound by technical rules, common law distinctions, feudal concepts or limitations imposed by jealousy-based wars about jurisdiction in England. Seamen were considered to be wards of the admiralty court and were treated with special solicitude by admiralty judges.

In the past fifteen years the justices of the Supreme Court have abandoned their role as admiralty judges. Justice O'Connor's words could not evince the sentiment any clearer: "We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection."[229] Justice O'Connor advised that admiralty judges should look primarily to the legislature for policy guidance and should supplement the statutory remedies only to achieve uniform vindication of legislative policies.[230] In other words, admiralty judges are no longer charged with declaring principles of maritime law based on the customs and usages of the sea or based on the policies of furthering commerce and protecting maritime workers. Instead, they must look way back over their shoulders so as not to step on the penumbras of legislation that might apply to some related area.

The reversal of roles articulated by the current Supreme Court denigrates not only the Constitutional duty entrusted to admiralty judges; it also turns back two centuries of leadership of both the admiralty law and the common law. The mere fact that Congress has legislated in an area is insufficient to preempt maritime remedies in the absence of Congressional purpose to do so. The affirmative intervention of Congress in the maritime field should be interpreted in a positive and supportive fashion and should not be used to emasculate the power of admiralty judges to declare admiralty law. As Justice Story concluded, even a strong implication by Congress is insufficient to deprive admiralty judges of their duty to enunciate the law in conformity with governing maritime principles. Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution.

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[229] 111 S. Ct. at 323.

[230] Id.

In contrast to the previous interpretation given to federal statutes by the admiralty judges of the Supreme Court, Justice O'Connor's construction of DOHSA and the Jones Act prevents recovery of damages available under the general maritime law despite the absence of any Congressional intent to preclude maritime remedies. Moreover, the proposition that admiralty judges may not declare uniform principles of admiralty law has fostered inconsistency between maritime remedies and Congressional enactments.[231]

In his role as an admiralty judge in *Moragne,* Justice Harlan predicted that the granting of a general maritime law wrongful death remedy would bring more "placid waters"[232] to the subject. The decisions of the Supreme Court have engendered instead a flood of cases seeking to turn the maritime law into traditional common law, incorporating restrictions and limitations such as those in Lord Campbell's Act. This process will only continue as long as the Justices of the Supreme Court—who are and must continue to be the leading American admiralty judges—abdicate their role to declare maritime law as admiralty judges.

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I will conclude as did Lord Nottingham in the great case of the *Duke of Norfolk*,[233]

> I have made several decrees since I have had the honor to sit in this place, which have been reversed in another place; and I was not ashamed to make them, nor sorry when they were reversed by others.[234]

Whether an appeal to fellow judges is helpful may be doubtful. While noting that Justice Story's opinion [in *DeLovio v. Boit*] was "celebrated for its research and remarkable in its boldness in asserting novel conclusions," Justice Daniel stated in *Jackson v. The Magnolia*[235] that "I believe I express a general, if not universal opinion of the legal profession in saying that the judgment was erroneous."

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[231]For example, as a result of *Miles* the recovery for the death of a seaman in territorial waters will be limited to pecuniary losses, while the recovery for the death of a longshoreman caused by the negligence of a shipowner or other third party will include nonpecuniary damages.

[232]*Moragne*, 398 U.S. at 408.

[233]3 Ch. Cas. 52.

[234]Id. at 444.

[235]61 U.S. (20 How.) 296, 335-336 (1857).

COMMITTEE ON CARRIAGE OF GOODS
CARGO NEWSLETTER NO. 24

Editors: Richard E. Repetto and Michael J. Ryan

WHAT YOU GET IS WHAT YOU RELY ON

Plaintiff purchased unfinished leather, which was loaded on pallets into containers. One particular container was loaded with ten (10) pallets of raw leather at Asuncion, Paraguay and sealed. The container was transported to Montevideo, where it was delivered to Ivaran Line, still intact and sealed. Ivaran did not weigh the container, but issued a Montevideo/New York bill of lading which listed the gross weight as 10,726 kilos. The bill indicated that freight was charged on 10,726 KG. The container was then loaded on deck and carried to Red Hook Terminal, New York. When the trucker picked up the container, it held only two empty pallets and the strong aroma of leather. The seal had been tampered with expertly.

Liability was conceded. The issue, based on *Berisford Metals v. S/S SALVADOR*, 779 F.2d 841 (2d Cir. 1985), was "whether a carrier that issues a clean on board bill of lading erroneously stating that certain goods have been received on board when they have not been so loaded should be precluded from limiting its liability pursuant to an agreement binding the parties to the package limitation of COGSA." The Court held that the availability of any package limitation "rests squarely on reliance by the owner and others in paying based on the bill of lading." The Court went on to hold that the proof of reliance on the Ivaran bill of lading in paying for the goods was in "precise equipoise . . . Because the proof is evenly balanced, plaintiff cannot prevail on that issue."

However, the Court held that plaintiff had proved that it relied on the Ivaran bill of lading in paying freight, duty and related costs. Thus the Court ordered that plaintiff recover $500 per pallet plus freight and duty. Plaintiff's further argument that stowage on deck constituted an unreasonable deviation was dismissed as no causal connection between the alleged deviation and the loss was proven. "Nothing about stowage of the container on deck . . . would make it any more likely that thieves would or did make off with the contents than if [it] had been stowed below deck."

Metro Leather Corp. v. M/V SAVANNAH, No. 90-2971 (S.D.N.Y. June 16, 1992) (Mukasey, J.) (reported at 1992 WL 147618).

A CARRIER WITHOUT A CONTRACT IS NOT A COGSA CARRIER

Plaintiff purchased a shipment of rebars from shipper, who agreed to deliver the bars in Puerto Rico. Shipper then chartered a tug and an unmanned barge. The charter granted shipper the exclusive use of the barge. Shipper hired stevedores to load the barge at Norfolk, Va. and issued a bill of lading to the buyer. The cargo arrived in damaged condition.

Plaintiff sued the barge/tug owner *in personam* and named the tug and barge *in rem*; however, no process was served within 120 days, so the *in rem* claims were dismissed. Barge owner moved for a stay pending arbitration based on the arbitration clause in its charter party with the shipper. Consignee opposed, claiming it was not bound by the arbitration clause, which covered only disputes between the "owner" and "charterer". The Court agreed and denied the stay. Owner then moved for summary judgment on the ground that it was not a carrier.

The consignee admitted that it had no knowledge of the charter party; that it had dealt only with the shipper and paid only the shipper; and, like the owner, that is was not involved with loading or discharge. The court therefore found no contract between consignee and owner, and granted owner's motion for summary judgment.

The court found that the shipper, Port Everglades, rather than the consignee, Otto Wolff, had chartered the barge from Sheridan and had paid Sheridan. Port Everglades used its own *pro forma* bill of lading and was named in the bill's heading. Furthermore, Port Everglades signed the bill of lading, which was issued under its authority. Conversely, Sheridan did not authorize anyone to issue a bill of lading on its behalf. Also, while Port Everglades hired the loading stevedores in Norfolk, Sheridan took no part in the loading or unloading of the barge.

In the court's view, these facts revealed a bareboat charter between Port Everglades and Sheridan. Thus, once perfected, the consignee Otto Wolff's sole remedies were against Port Everglades or the barge JAMES SHERIDAN *in rem.*

Otto Wolff Handelsgesellschaft v. Sheridan Transport, 800 F. Supp. 1353 (E.D. Va. 1992).

DAMAGE DOES NOT COMPUTE . . .

Hughes Aircraft Company and North American Van Lines, Inc. ("Van Lines") contracted to transport household products and certain "high

value" products. The contract included a provision requiring Van Lines to indemnify Hughes for damage that might occur during shipment and established a tariff for the transportation of "high value" goods. The tariff also provided for a discounted rate and a limitation of liability totalling $.60 per pound, per article.

A mainframe computer was damaged during transportation when the driver, after working lengthy hours, fell asleep at the wheel of his truck near Tucson, Arizona. As a result of the accident, Hughes became liable to the owner of the mainframe computer and ultimately settled that claim for $2.3 million. In addition to this sum, Hughes claimed business interruption losses against Van Lines. Van Lines offered $12,408 as compensation. Hughes rejected the offer and commenced suit in state court. The action was then removed to the federal district court, where summary judgment was granted on the grounds that the contract properly limited liability and that the Carmack Amendment preempted Hughes' common law claims.

On appeal, the Ninth Circuit Court of Appeals affirmed the district court. As to the limitation, the court stated:

> Before a carrier's attempt to limit its liability will be effective, the carrier must (1) maintain a tariff in compliance with the requirements of the Interstate Commerce Commission; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper's agreement as to his choice of carrier liability limit; and (4) issue a bill of lading prior to moving the shipment that reflects any such agreement. (citations omitted).

The court also noted that the carrier had the burden of proving that it complied with the foregoing requirements.

The Ninth Circuit found that Hughes had reasonable notice and an opportunity to make a deliberate, thoughtful choice in selecting the liability limit because it had drafted the contract and had directly negotiated its terms.

Explaining why the Carmack Amendment preempted Hughes' negligence cause of action, the court stated that it is clear that the Carmack Amendment established a uniform national liability policy for interstate carriers. Hughes argued that Van Lines was acting as a contract carrier; however, the court noted that the Interstate Commerce Act defines a "carrier" as "a common carrier and a contract carrier." Hence, the court dismissed Hughes' argument as "illogical," stating:

> Most carriers presumably sign contracts of one sort or another when they undertake to transport cargo across state lines, which is

not surprising since the carrier cannot limit its liability unless the shipper agrees in writing.

Hughes Aircraft Co. v. North American Van Lines Inc., No. 91-15352 (9th Cir. July 14, 1992).

CALIFORNIA HERE I COME—NOT!

A claim was asserted in the U.S. District Court for the Central District of California for the alleged contamination of jet fuel transported from Singapore to Oman. The vessel was owned by a Norwegian company. The contract for the sale of the jet fuel contained a provision stating that English law would apply.

The bills of lading issued for the cargo also specified that the law of England would govern any disputes. Both the shipper and consignee commenced actions in the English High Court. The consignee/purchaser sued the vessel *in rem* and the owner *in personam* in California. The vessel was arrested and security was provided.

On motion to dismiss for lack of venue or based upon forum non conveniens, the district court was asked to enforce the forum selection clauses in the purchase order and the bills of lading. Referring to *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972), the court noted that forum selection clauses are *prima facie* valid and should be enforced unless the party opposing enforcement "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." The court also referred to the recent Supreme Court decision of *Carnival Cruise Lines. Ltd. v. Shute*, 111 S. Ct. 1522, 1991 A.M.C. 1697 (1991), where the Supreme Court upheld a forum clause in a ticket for passage on a cruise ship.

The trial court noted there was no evidence of bad faith, fraud or overreaching by the owner. The consignee had agreed to the forum selection clause in the purchase order. Although the consignee did not see the bills of lading and did not negotiate their terms, the court found the consignee had received notice of the clause by virtue of its own purchase order and acceptance. The court therefore dismissed the action in its entirety on the ground that the parties had agreed that all disputes arising out of the bills of lading would be decided by the English Court.

Oman Refinery Company LLC v. MT BERTINA, No. 92-3616 (C.D. Cal. September 25, 1992) (Wilson, J.).

BACK IN GOTHAM CITY—I

Cargo was lost when a feeder vessel sank during a voyage from Naples to Valencia, Spain. The plaintiffs were U.S. corporations. The vessel was owned by a Germany company, and bareboat chartered to an Antiguan company. The cargo was to have been transferred to a large container ship at Valencia for carriage to the United States.

Plaintiffs sued Spanish Line in New York. Spanish Line moved to dismiss on the basis of *forum non conveniens*. Outlining the applicable law, Judge Leval noted that, as a general matter, "the defendant has the overall burden of proving that the case should be dismissed when *forum non conveniens* is applicable." The court then considered the existence of an adequate alternative forum and the various private and public interests. As to an alternative forum, the court summarized plaintiffs' arguments as follows: "Cargo plaintiffs contend that under the liability limitation, their aggregate losses of $1.9 million would expose Spanish Line to a maximum of only $350,000 liability. Plaintiffs argue that this sharp limitation on their potential recovery renders Spain an inadequate forum."

Unfortunately for Plaintiffs, however, the Supreme Court in *Piper Aircraft* had rejected that argument, stating that the "possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." 454 U.S. at 247. Further, only "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interest of justice." *Piper Aircraft*, 454 U.S. at 254. A recovery of 20 cents on the dollar may not be ideal, but it does not fall within the category of "no remedy at all." *See also Damigos v. Flanders Compania Naviera, S.A. (Panama)*, 716 F. Supp. 104, 109 (S.D.N.Y. 1989) ("It is not the proper function of the choice of forum doctrine to assure the plaintiff access to whatever forum accords him the most favorable legal rules").

Based upon these holdings, the trial court concluded:

> . . . defendant has not satisfied the heavy burden of showing that Spain will serve the convenience of the parties and the ends of justice. Even assuming that Spain is an adequate alternative forum, Spain's connection with the evidence is not especially significant. The most important witnesses are in other European countries. . . . In sum, there is no perfect forum. . . . The defendant had not shown entitlement to dismissal so that the case

may be prosecuted in Spain. The plaintiffs' choice of forum here prevails.

Insurance Co. of North America v. S/S CTE ROCIO., No. 91–2820 (S.D.N.Y. June 17, 1992).

BACK IN GOTHAM CITY—II

Plaintiff, a subrogated cargo insurer, brought suit for loss of a shipment of copper plates carried from Tampico, Mexico, to Puerto Cabello, Venezuela. The bill of lading provided that claims for loss or damage shall be filed with Maritima Aragua, S.A. "or with Managua Line's general agent in the United States."

When defendant moved to dismiss based upon *forum non conveniens*, the court referred to the factors set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). It noted that defendant carried the burden of proving the existence of an adequate alternative forum, and that the balance of *Gilbert* factors tilt strongly in favor of dismissal. Ordinarily, the alternative forum requirement is satisfied by establishing that the opponent is "amenable to process" in the alternative jurisdiction. In this case, plaintiff contended that Venezuela was not an adequate forum, since the claim would be time barred in Venezuela and defendants had not establish that the Venezuelan courts would recognize any waiver of the time bar.

The trial court found that the defendant had failed to prove that Venezuela would accept the time-barred action, and, therefore, had not shown that Venezuela was an adequate alternative forum.

As to the *in rem* claim, the court noted that service of process had not been made upon the vessel and that plaintiff had not shown good cause why service had not been made within 120 days pursuant to Rule 4 (j) of the Federal Rules of Civil Procedure. Hence, the court dismissed the *in rem* claim against the vessel.

Albany Ins. Co. v. S/S MAR ESMERALDA, No. 91–1379 (S.D.N.Y. September 3, 1992).

"PRIVATE" PARTS PLAINTIFF FROM *PRIMA FACIE* PRESENTATION

A shipowner appealed from a lower court decision holding it liable to a voyage charterer for rust damage. The District Court had determined that COGSA governed the parties' rights. On appeal, the vessel owner argued that the trial court had misapplied the rules on burden of proof.

The Second Circuit discussed the history of COGSA, noting that COGSA was principally intended to cover "public carriers" and not charter parties, which were roughly synonymous with private carriage. The court noted that COGSA specifically provided that it does not apply to charter parties.

The Court found that the charter party did not itself incorporate COGSA (disagreeing with the District Court's construction of the charter party and bills of lading). The court of appeals therefore concluded that the District Court had erred in concluding that a Clause Paramount, which required that *bills of lading* shall be subject to COGSA, was sufficient to expressly incorporate COGSA into the charter party.

The court then discussed the burden of proof, noting the difference between "private carriage" and "common carriage." Under private carriage, "if the evidence on cause of damage or source of negligence is in equipoise, the charterer-plaintiff's claim must fail." Under COGSA, in contrast, the plaintiff need only establish a *prima facie* case, requiring the defendant to show that the damage did not result from its negligence.

The case was remanded to the District Court for reconsideration of the evidence, based upon the requirement that plaintiff charterer had the burden of proving a breach of the contract of carriage.

Associated Metals and Minerals v. M/V Jasmin, No. 92–7417 (2d Cir. January 7, 1993).

UNDERWRITER AXED BY AXLE HOUSINGS

Plaintiff, a subrogated underwriter, sued for damage to a shipment of automobile axle housings which were packed into a container in Spain, then shipped to Baltimore where they were delivered by the ocean carrier.

The trial court summarized the shipment as follows: "The shipment was 'house to house,' meaning that Hapag-Lloyd AG was not involved in packing the axle housings into the containers; the containers were packed and sealed by Eaton S.A. and remained sealed in the care of Hapag-Lloyd AG."

The vessel encountered heavy weather on its trans-Atlantic crossing. The court noted that under COGSA a *prima facie case* may be made by showing delivery to the ocean carrier in good condition and arrival at destination in a damaged condition. Thereafter, the burden falls upon the defendant to show that the loss falls within one of COGSA's exceptions.

The court found "Assuming *arguendo*, that Sun has presented a *prima facie case* under COGSA, Hapag-Lloyd AG has proven by a prepon-

derance of the evidence that insufficient packing caused the damage to the axle housings." The plaintiff introduced evidence that the packing methods had not changed in approximately 20 years and that no other axle housings than those in the instant case had been broken during shipment for the same period. However, the court was persuaded by expert testimony that the manner of packing and stowage into the container was inadequate. Hence, it concluded that the axle housings were damaged by improper packing.

With respect to Hapag-Lloyd's counterclaim for damage to the containers, the court observed that a bill of lading provided for indemnification "for any expenses, fine, loss, damage or detention sustained or incurred by or levied upon (Hapag-Lloyd AG or the DUSSELDORF) in connection with the goods howsoever caused, and whether due to the fault and neglect of the merchant and not." While under the plain terms of the provision, the consignee-assured would be liable to the carrier for damage to the containers, the court noted that suit was brought in the name of the subrogated underwriter.

Although the ocean carrier could claim defenses and a right of *set-off*, in this case the subrogated underwriter had not been granted any damages to which a set-off would apply. Thus, the ocean carrier could not otherwise hold the subrogated underwriter liable for its claim against the underwriter's assured.

The court also awarded costs incurred subsequent to an Offer of Judgment having been tendered to the subrogated underwriter plaintiff.

Sun Ins. Co. of New York v. Hapag-Lloyd AG, No. 91–1125 (S.D.N.Y. October 26, 1992) (Preska, J.)

WITHHOLDING WHO, WHEN, AND WHERE WAYLAYS WAY-BILL LIMITATION UNDER WARSAW

Distinguishing its decision in *Exim Industries v. Pan Am World Airways*, 754 F.2d 106 (2nd Cir. 1985), the Second Circuit Court of Appeals vacated and remanded a district court judgment which limited an air carrier's liability under the Warsaw Convention.

The consignee's subrogated underwriter, based upon an air waybill which indisputably incorporated the Warsaw Convention, refused settlement with the air carrier (Emery Air Freight) for the $20 per kilogram limitation and instituted suit for the full amount of its claim ($58,220).

The cargo of photographic equipment had been lost en route to Toronto from Panama via Miami. Pan Am was the carrier for the initial leg of the trip from Panama to Miami. However, the third party action against Pan Am was dismissed when Pan Am filed for bankruptcy.

The air waybill issued by Emery did not disclose (1) the date and place of its execution; (2) the agreed stopping places; (3) the identity of the first carrier; or (4) the volume or dimensions of the shipment. Plaintiff argued that these omissions violated Articles 8(a), (c), (e) and (i) of the Warsaw Convention and pursuant to Article 9, deprived Emery of its limitation of liability protection. The district court, relying upon *Exim Industries v. Pan Am World Airways*, disagreed with plaintiff and limited damages to $20 per kilogram. The district court found that the plaintiff had not satisfied its burden of proof that the omissions in the air waybill were "commercially significant" or prejudicial under the test articulated in *Exim*.

The Second Circuit reversed. While stating that *Exim* remains good law, the Court of Appeals held that *Exim* "must be limited to its facts." Accordingly, the "commercially significant" test under *Exim* was held to apply only in cases where subsections (h) and (i) of the Warsaw Convention came into play. The Court of Appeals reasoned that judicial interpretation is required in such cases because "subsections (h) and (i) are ambiguous" inasmuch as the text is unclear "whether the items listed in each subsection should be read conjunctively or disjunctively." The Court went on to state that the differences among the French, British and American translations of these sections created confusion and thereby justified judicial interpretation.

In the case at hand, however, the Court of Appeals found that subsections (a), (c) and (e) of Section 8 of Warsaw were "clear" and "unambiguous":

> No confusion can possibly arise as to the meaning of the 'place and date of [the waybills's] execution' '[t]he agreed stopping places', or '[t]he name and address of the first carrier'.

The Court of Appeals thus held that it was prohibited from judicial interpretation or engrafting the "commercially significant" test where no ambiguity in the text of the Convention was found to exist:

> '[W]here the text is clear . . . we have no power to insert an amendment.' *Chan*, 490 U.S. at 134. Even if a judicial interpretation is 'sensible,' 'to engraft such an interpretation onto the plain language of Article 18 would require an impermissible judicial amendment of the Convention.' *Victoria Sales*, 917 F.2d at 708. Both precedent and reason counsel that courts refrain from altering even slightly the plain, unambiguous language of a treaty negotiated among diverse sovereign nations. On the other hand, when language is unclear, courts are enjoined to construe treaties more liberally than private agreements and may employ tradi-

tional methods of interpretation. *See Air France v. Saks*, 470 U.S. 392, 396 (1985). However, there can be no doubt that we may rely on these methods *only* when there is ambiguity in the text of the treaty. *Chan*, 490 U.S. at 134; *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

Significantly, the Court of Appeals expressly overruled any prior district court decisions in the Second Circuit which had expanded the *Exim* "commercially significant" test beyond subsections (h) and (i) of Section 8 of the Convention.

Maritime Ins. Co. Ltd. v. Emery Air Freight Corp., No. 92-7672 (2d Cir. January 13, 1993).

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March 1993

COMMITTEE ON MARITIME ARBITRATION NEWSLETTER NO. 9A[1]

Editors: David A. Nourse and R. Glenn Bauer

"DEATH OF AN ARBITRATOR" REVISITED: SECOND CIRCUIT DECLINES TO EXTEND DOCTRINE OF *TRADE & TRANSPORT, INC. VS. NATURAL PETROLEUM CHARTERERS, INC.*

In *Marine Products Export Corp. v. M/T GLOBE GALAXY*, 977 F.2d 66, 1993 A.M.C. 190 (2d Cir. 1992), the Second Circuit held that, absent a final decision on any issue by the panel prior to the death of an arbitrator or an agreement by the parties on how to fill a vacancy on the panel, the death of an arbitrator required that an entirely new panel should be chosen and the arbitration of all issues should commence anew. The court referred to the general rule announced in *Cia de Navegacion Omsil. S.A. v. Hugo Neu Corp.*, 359 F. Supp. 898, 899 (S.D.N.Y. 1973), and refused to extend the "special circumstances" exception of *Trade & Transport Inc. v. National Petroleum Charterers, Inc.*, 931 F.2d 191, 1991 A.M.C. 1948 (2d Cir. 1991). It was noted that the arbitrators, prior to the death of panel member Joseph Simms, heard testimony and issued at least two interlocutory orders related to discovery. The panel had not, however, issued any final decision on the merits of the dispute. Accordingly, there were no special circumstances to warrant deviation from the general rule that the arbitration must start afresh.

COURT OVERTURNS AWARD WHERE PARTY FOLLOWS PRE-HEARING RULING TO SUBMIT ONLY SUMMARIES OF VOLUMINOUS DOCUMENTS AND ARBITRATORS LATER DECIDE THAT PARTY FAILED TO SUBMIT SUFFICIENT EVIDENCE

In *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992), an award rendered by the Iran-United States Claims Tribunal was overturned in a proceeding brought under the U.N. Convention on the Recog-

[1]The decisions discussed herein include one case contained in the Committee on Maritime Arbitration's Newsletter No. 9, dated November 5, 1992, which was distributed at the Fall Meeting of the MLA, as well as several more recent decisions.

nition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C. §201 (1970).

At a pre-hearing conference with one arbitrator absent, the tribunal approved the request of Avco that it present its case by summarizing voluminous documents rather than by submitting all of the documents. By the time the hearings were held at a later date, one arbitrator who had participated in the pre-hearing conference had resigned and was replaced by a new arbitrator. When the new panel issued its award, Avco's claims were disallowed by a 2–1 vote on the basis that the audited summaries presented in evidence were not a proper substitute for the actual invoices themselves.

The challenge to the award was based on Article V(1)(b) of the New York Convention, which provides for non-enforcement where a party was not given proper notice of the proceedings, "or was otherwise unable to present his case." The Second Circuit held that this Article sanctioned the application by the forum state of its standards of due process and that, if Avco was denied the opportunity to be heard in a meaningful manner, it was denied due process. The replacement arbitrator had been made aware of the pre-hearing ruling but never made Avco aware that the tribunal would now require the actual invoices to substantiate its claim. The court said that by misleading Avco, however unwittingly, the tribunal denied Avco the opportunity to present its claim in a meaningful manner as required under the New York Convention.

APPEALABILITY OF DECISION DIRECTING ARBITRATION REVISITED: SECOND AND FIFTH CIRCUITS ACT TO RESTRICT APPEAL

The 1988 amendment to the U.S. Arbitration Act, set out in new Section 16, provided generally for an appeal from any order *denying* arbitration but not from an order *granting* arbitration. In the Committee on Maritime Arbitration's Newsletter No. 7A (*see* MLA Report, March 31, 1992, at 9689–9690), we noted the "loophole" provided by section 16(a)(3), which states that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title", and the distinction which has developed between a suit in which the arbitration issue is "independent" (with the result that an order compelling arbitration is appealable as a final judgment) and one in which the arbitration issue is "embedded" (with the result that the order compelling arbitration is considered interlocutory).

In *Filanto S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58 (2d Cir. 1993), an Italian shoe manufacturer brought a diversity action against Chilewich,

a New York import-export company, for breach of contract to manufacture shoes and boots for sale to a Soviet Government entity. Chilewich moved to stay the action pending arbitration in Moscow, alleging that Moscow arbitration, a term of its contract with the Soviet buyer, had been incorporated by reference. The District Court concluded that Filanto was estopped to deny the agreement to arbitrate and ordered the parties to proceed to arbitration in Moscow. The court also concluded that it had the power to stay the action pending completion of the arbitration but that it would be inappropriate to do so. However, the action was not dismissed. Rather, the docket entries showed it had been "closed".

The Second Circuit emphasized the distinction between proceedings which were "independent", "i.e., the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or not arbitrable, and no party seeks any other relief . . ." and those which were "embedded", "i.e., a party has sought some relief other than an order requiring or prohibiting arbitration, (typically some relief concerning the merits of the allegedly arbitrable dispute)." It held that this was "a classic example of an embedded proceeding and therefore the order directing arbitration was not immediately appealable under Section 16(b)(2) (. . . an appeal may not be taken from an interlocutory order . . . directing arbitration . . ." [or] "compelling arbitration. . . .") It made no difference that the case had been marked "closed", a step which the Court assumed was "for administrative or statistical convenience."

In *McDermott Int'l Inc. v. Underwriters at Lloyds Subscribing to Memorandum of Insurance No. 104207*, 981 F.2d 744 (5th Cir. 1993), McDermott had filed two actions in Louisiana state court, claiming damages in one action for its Underwriters' denial of coverage and seeking in the other to block arbitration sought by Underwriters. Both actions were removed to federal court on the basis of the New York Convention and then consolidated. Subsequently, three additional actions were consolidated into this action, namely, a removed state court suit by McDermott against the adjuster, Young, and two diversity actions by Underwriters against Young seeking indemnification for any damages awarded to McDermott against Underwriters. McDermott appealed from the District Court's decision granting Underwriters' motion to compel arbitration and staying the litigation pending arbitration.

The Fifth Circuit held that the District Court's order was not a "final order" from which an appeal was permitted under Section 16(a) (3), denying McDermott's argument that the decision was final in its "judicial context" because the only jurisdictional basis for removal of the original suits was the question of arbitrability under the New York Convention.

The Court instead concluded that when the cases were consolidated they became a single judicial unit and that " . . . the finality of the arbitration decision depends upon the present posture of the case, not the narrow context in which the arbitrability question first arose." Although stayed, the indemnification claim between Underwriters and Young remained pending in the District Court and would have to be addressed following the arbitration, as would McDermott's claim against Young. The arbitration order was thus interlocutory and appeal was barred under Section 16(b)(2). The Fifth Circuit also denied McDermott's application for a writ of mandamus, finding that it had not met its heavy burden of demonstrating that the District Court had clearly overstepped its authority when it granted the order compelling arbitration and stayed further proceedings. The Court also noted that "it is more than well settled that a writ of mandamus is not to be used as a substitute for appeal."

See also West of England Ship Owners Mutual Ins. Assn. (Luxembourg) v. American Marine Corp., 981 F.2d 749 (5th Cir. 1993) (decided contemporaneously on the same grounds.)

WHERE A CHALLENGE IS MADE TO AN ARBITRATION AWARD WITHOUT JUSTIFICATION, COSTS INCLUDING ATTORNEYS' FEES ARE SOMETIMES BUT NOT ALWAYS AWARDED TO THE DEFENSE

In *Kerr-McGee Chemical Corp. v. United Steel Workers of America, AFL-CIO, CLC, LOCAL NO. 15258*, 800 F. Supp. 1405 (N.D. Miss. 1992), an arbitrator's award in a collective bargaining dispute was confirmed and upheld by the District Court. The union, which had won the arbitration, claimed attorneys' fees, costs and damages against the company challenging the award. The court recognized the rule that when an arbitrator's decision is challenged without justification, costs, including reasonable attorneys' fees, may be granted. In this case, however, the court found that the challenge was not so unfounded as to justify the award of attorneys' fees and costs.

COURT FINDS NO EVIDENT PARTIALITY WHERE ARBITRATOR ENGAGED IN ONE BUSINESS DEALING WITH A PARTY FIVE YEARS PRIOR TO ARBITRATION PROCEEDINGS

In *Austin South I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135 (N.D. Fla. 1992), a proceeding was brought under Section 9 of the U.S. Arbitra-

tion Act to confirm an arbitration award in a construction arbitration. One of the arbitrators had made a disclosure that he knew the former CEO of one of the parties. He disclosed that he had worked with the CEO and his company in preparing a presentation for new construction job which was unsuccessful. The other party objected to his appointment but the AAA retained him on the panel. A suit was brought to have the arbitrator disqualified but was dismissed without prejudice. At the arbitration the aggrieved party made a motion to recuse the arbitrator. This was denied by the arbitrators.

Upon the motion to vacate the award, the court discussed the requirements of disclosure in *Commonwealth Coatings v. Continental Casualty,* 393 U.S. 145 (1968), and numerous subsequent cases, and held that the relationship between the arbitrator and the former CEO was remote and trivial and did not demonstrate evident partiality. The losing party then requested an evidentiary hearing on the question of bias, citing *Sanko Steamship Co. v. Cook Industries,* 495 F.2d 1260 (2d Cir. 1973). The court held that it was not shown that the relationship was other than as already stated by the arbitrator. Therefore, no evidentiary hearing was required. The arbitration award was upheld.

LORD MUSTILL CRITICIZES *McCREARY TIRE & RUBBER CO. V. CEAT S.p.A.*

McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3rd Cir. 1974), holding that the New York Convention required discharge of an attachment obtained under Rule 64 of the Federal Rules of Civil Procedure and state attachment procedure, has long been considered a troublesome and limiting decision in situations in which maritime attachment is not available. It is therefore of some interest that, in *Channel Tunnel Group Ltd. v. Balfour Beatty Const. Ltd.* [1993] 2 W.L.R. 262 [House of Lords 1993], Lord Mustill, who has had considerable influence on English arbitration, was critical of the *McCreary* holding.

In *Channel Tunnel Group Ltd.*, the defendants had been employed to build a tunnel under the English Channel and also to construct a cooling system for the tunnel. Disputes arose concerning the compensation to be paid for the cooling system. The defendants threatened to stop work on the project. The Channel Tunnel Group sought an injunction to restrain the defendants from stopping work. Evans, J. held that he would be inclined to grant an injunction (although he did not do so as the defendants had given an undertaking to give notice before stopping work) and denied the defendants' application for a stay of the court action pending arbitration in Brussels.

The Court of Appeals allowed defendants' appeal and granted a stay of the action, holding in part that the court had no power to grant injunctive relief under Section 12(6)(h) of the Arbitration Act 1950 and that, whether or not there was jurisdiction to do so under Section 37(1) of the Supreme Court Act 1981, as a matter of judicial restraint, it should not be exercised respecting a dispute subject to arbitration abroad. The House of Lords dismissed the appeal from the decision of the Court of Appeals.

Lord Mustill's opinion, with which the other four law lords agreed, is too lengthy to summarize here. However, the following section, a portion of his discussion of the court's power to grant an injunction, shows a keen appreciation for the practicalities of enforcing arbitration agreements in an international context:

> . . . The purpose of interim measures of protection . . ., is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.
>
> For similar reasons I am unable to agree with those decisions in the United States (there has been no citation of authority on this point from any other foreign source) which form one side of a division of authority as yet unresolved by the Supreme Court. These decisions are to the effect that interim measures must necessarily be in conflict with the obligations created assumed by the subscribing nations to the New York Convention, because they 'bypass the agreed upon method of settling disputes'. *See McCreary Tire & Rubber Co. v. CEAT S.p.A.* (1974) 501 F.2d 1032, 1038. I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it.

This is a view that international practitioners will applaud.

COMMITTEE ON THE INTERNATIONAL LAW OF THE SEA* NEWSLETTER, MARCH 1993

Editor: Timothy F. Burr, Esq.

JURISDICTION

Lucky-Goldstar v. Phibro Energy International, Ltd., 958 F.3d 58, 1992 A.M.C. 2235 (5th Cir. 1992).

The Fifth Circuit reviewed the problematic area of whether a "mixed" contract comes within the purview of admiralty jurisdiction in this case. Lucky-Goldstar contracted to purchase from Phibro 1000 metric tons of toluene, and Phibro agreed to ship the toluene by sea to Singapore in a vessel of its nomination. The title would pass to the buyer as the toluene passed the ship's flange in the United States. Pursuant to the contract, Phibro also agreed to ensure that the toluene was not commingled with other goods and that the cargo would be received by a set date. Lucky-Goldstar filed suit against Phibro for breach of contract, contending that the shipment was six days late and that the toluene was commingled with another parcel, and Phibro demanded a jury trial.

The Fifth Circuit began its analysis by noting that, in order to support admiralty jurisdiction in a breach of contract suit, the underlying contract must be wholly maritime. The court determined that the underlying contract between Lucky-Goldstar and Phibro was not wholly maritime, and that the sale of the toluene by itself would not be "maritime" merely because Phibro agreed to ship the goods by sea to the buyer. The court noted, however, that a contract may come under the purview of maritime jurisdiction when it contains both maritime and non-maritime elements if one of two circumstances exists. First, if the contract can be characterized as primarily maritime, and the non-maritime elements of the contract are incidental, the incidental aspects of the contract will not defeat admiralty jurisdiction. Second, if the maritime obligations of the contract are separable from its non-maritime aspects such that the non-maritime elements can be tried separately without prejudice to the other, admiralty jurisdiction would extend over the maritime obligations.

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*The Chairman of the International Law of the Sea Committee is Winston E. Rice, Esq. The Vice-Chairman is Samuel P. Menefee, Esq.

The court determined that the subject contract fit neither of the two circumstances for "mixed contracts" necessary for the exercise of admiralty jurisdiction. The court found delivery was not necessary to the sale and Lucky-Goldstar took title as the product crossed the ship's flange at the load port, and the court reiterated that not every contract for sale of goods requiring the seller to arrange seaward shipment is a maritime contract.

Howard v. Crystal Cruises, Inc., 1992 A.M.C. 1645 (E.D. Cal. 1992).

The decedent was a passenger who was injured while disembarking from a ship in foreign territorial waters. He subsequently died of blood clots that were allegedly caused by the injury. His widow and son sued the cruise shipowner for negligence. They brought five causes of action against the shipowner, including a wrongful death claim under the general maritime law, a survival action for the estate, a wrongful death claim for unseaworthiness, a claim under DOHSA, and a claim for breach of maritime contract/maritime tort.

The plaintiff moved to amend the complaint to add a claim for negligent infliction of emotional distress and for partial summary judgment on the question whether DOHSA was applicable to their claims. The owner sought summary judgment on the first three claims, saying they were precluded under DOHSA.

The court found that DOHSA did apply to the wrongful death action and that the cause of action for wrongful death under general maritime law was precluded by DOHSA because DOHSA is an exclusive remedy. While on its face, DOHSA only applies to deaths occurring on the high seas and the incident in question occurred in foreign territorial waters, the court concluded that the purpose of the law was to create a remedy for deaths occurring outside the reach of the state courts. It held that foreign territorial waters are within the scope of DOHSA.

The court found that, because DOHSA does not address survival actions, the plaintiffs' survival claim could co-exist with DOHSA.

Finally, the court found that a wrongful death claim for unseaworthiness was barred by Supreme Court precedent which established that such claims were limited to seamen and did not extend to passengers. The court also denied the plaintiffs' motion to amend their complaint to add claims for negligent infliction of emotional distress because such a claim was barred by precedent as well as DOHSA.

[9847]

Tismo v. M/V IPPOLYTOS, 776 F. Supp. 928, 1992 A.M.C. 667 (D.N.J. 1991).

A Philippine seaman, who was employed onboard a Cypriot flag vessel under an employment contract executed in the Philippines and approved by the Philippine Overseas Employment Agency (POEA), brought suit against the vessel *in rem* and against the owner *in personam* to recover wages and penalty wages allegedly due under a collective bargaining agreement which the owner had signed with the Cypriot union.

The owner contended that the district court lacked jurisdiction under the Act of State doctrine as a treaty between Cyprus and the Philippines provided for the resolution of disputes "in the country of the seaman's nationality where the contract of employment was signed and approved." Furthermore, the seaman's contracts provided they were subject to the treaty, and the POEA "shall have original and exclusive jurisdiction over any and all disputes, controversies arising out of, or by virtue of this contract."

The district court noted that the Act of State doctrine reflects a strong policy of the judicial branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs. The district court further noted that the treaty between Cyprus and the Philippines, providing for exclusive jurisdiction of disputes between seamen and shipowners, would be rendered invalid if the district court were to assume jurisdiction. The district court additionally noted that the governments of the Philippines and Cyprus had made the affirmative decision as to dispute resolution that contracts between seamen and shipowners be governed by the treaty.

In contrast to the above policy, the district court noted that the purpose of the wage penalty statute is to protect from overreaching a generally impecunious class and to ensure that foreigners will not be turned ashore without funds so that they will become a public charge of the harbor, as well as to equalize the cost of operating United States and foreign-flag vessels.

Finally, the Act of State doctrine directed the court to respect and validate acts of foreign governments, in this case a treaty between Cyprus and the Philippines, and the district court concluded the assumption of jurisdiction in this case would have the opposite effect. Accordingly, the district court accorded comity to the nations of Cyprus and the Philippines in the expectation that the plaintiffs would receive a fair hearing on the wage claims, and declined the exercise of jurisdiction in this matter.

VESSEL STATUS

Ducote v. V. Keeler & Co., Inc., 953 F.2d 1000, 1992 A.M.C. 1681 (5th Cir. 1992).

The plaintiff was a crane operator who worked aboard a spud barge used to drive pilings. He was operating a dragline/crane when it began to tip over and was allegedly injured while jumping out of the cab. The district court, relying on the Fifth Circuit's opinion in *Ellender,* held as a matter of law that the spud barge was not a vessel, and granted the defendant's Motion for Summary Judgment. In *Ellender,* the court had noted that it had previously granted summary judgment on the grounds that a single construction barge is not a vessel and several barges strapped together to form a floating work platform do not constitute vessels under the Jones Act.

Folse v. Western Atlas Int'l, 593 So.2d 341, 1992 A.M.C. (La. 1992).

The plaintiff was employed as a senior off-shore seismic operator and was assigned to a vessel. The vessel could carry up to 13 crew members but was not authorized to carry passengers. Plaintiff was injured while attaching a shackle to a buoy. As he flipped the buoy over the stern, an air gun rack weighing approximately one ton slid into his feet.

The plaintiff sued under the Jones Act. The trial court granted summary judgment, holding that plaintiff was not a seaman because he was not permanently attached to a specific vessel or an identifiable fleet of vessels. The Court of Appeals affirmed and the Supreme Court of Louisiana granted a writ to consider whether summary judgment was properly entered on plaintiff's Jones Act seaman status.

The state Supreme Court examined the plaintiff's connection to the vessel and determined that seaman status under the Jones Act is a mixed question of law and fact and that a direct verdict or summary judgment on the issue was inappropriate. The court then examined the factors connecting the plaintiff to the vessel and found that the plaintiff's off-shore assignments lasted about four days, during which he slept and ate aboard the vessel. The court found that the vessel's voyage and the plaintiff's job were co-extensive. Thus, the court reversed the judgment of the Court of Appeals and remanded to the trial court for further proceedings.

LIABILITY INVOLVING FIXED PLATFORM OPERATIONS

Friou v. Phillips Petroleum Company, 948 F.2d 972 (5th Cir. 1991).

The plaintiff, an employee of Gulf/Inland Contractors (GIC), an independent contractor for a project on a Phillips fixed offshore platform, was injured while using a vice owned by Phillips to remove a fitting from a pipe. Because the vice was rusty and scaly, Friou used a "cheater bar" to operate the vice, but the bar slipped off the bent vice handle when Friou was pushing, causing him to fall and sustain injuries.

With respect to the plaintiff's strict liability claim, the court stated that it was his burden to prove that the vice was in Phillips's custody and that a defect in the vice created an unreasonable risk of harm that resulted in his injury. The court found that because Phillips did not exercise "operational control" over the vice, it did not have "custody" or "garde" for purposes of Louisiana Civil Code Article 2317 and, therefore, the plaintiff's strict liability claim was properly dismissed.

In adjudicating the plaintiff's negligence claim, the court first looked to the terms of the Service Agreement entered into between GIC and Phillips. The agreement specified that GIC would provide all labor, skill, equipment, and supplies necessary for the performance of its work, and would be solely responsible for work safety and the industrial hygiene of its employees. The court found that, if the terms of the contract had been fully applied to this project, Phillips would have been entitled to summary judgment; however, the court noted that written contracts may be modified by subsequent oral agreements or by the conduct of the parties.

Because there was evidence that Phillips knew for some time that GIC employees were using the Phillips vice, that the handle was bent seven to eleven days before Friou's alleged injury, and that the damage to the vice was reported to Phillips at least three to six days before his injury, the court found that the Service Agreement had been modified and that Phillips had assumed the duty of furnishing tools for GIC employees. Accordingly, the issue of whether Phillips was negligent in furnishing the rusty vice presented a question of fact that precluded Phillips from obtaining summary judgment on the plaintiff's negligence claim.

Robertson v. ARCO Oil and Gas Co., 948 F.2d 132 (5th Cir. 1991).

Robertson was employed by Helmerich and Payne International Drilling Co. ("Helmerich") as a roustabout and assigned to work on a fixed offshore drilling platform owned by ARCO Oil and Gas Company

("ARCO"). Helmerich owned the drilling rig used on the ARCO platform and provided all personnel necessary to operate the rig. Only one direct employee of ARCO worked on the platform.

On the day of the accident, Robertson was moving a piece of drilling machinery from the rig deck to a vessel docked adjacent to the platform. While Robertson and the other Helmerich workers were on the deck of the vessel, bundles of drilling pipe that Helmerich personnel had previously stowed on the deck fell and Robertson sustained injuries when some of the pipe landed on his leg.

ARCO filed a Motion for Summary Judgment to dismiss Robertson's negligence action. The court recited the familiar premise that when a platform owner hires independent contractors to supply operations and carry out the drilling, and the owner neither possesses nor exercises actual control over the independent contractors, the owner has no duty to remedy hazards created by its independent contractors.

The record established that Helmerich contractually agreed that it was an independent contractor with the authority to control and direct the performance of the details of the work, and that it had primary responsibility for the safety of all its operations, and for taking all measures necessary to protect the personnel and facilities. Helmerich also agreed to inspect the materials and appliances furnished by ARCO and to ensure that they were in good working condition. The court also found that ARCO exercised no actual control over any of Helmerich's operations, either on this particular occasion or on any other. In addition, the court pointed out:

> The fact that ARCO owned the platform where Robertson was employed cannot be construed —in the face of the facts and the clear terms in the contract—to constitute operational control by ARCO.

Accordingly, the court affirmed the trial court's granting of ARCO's Motion for Summary Judgment.

Duplantis v. Shell Offshore, Inc., 498 F.2d 187 (5th Cir. 1991).

The plaintiff was injured while working for Grace Offshore Company (GOC) as a roustabout aboard its rig, situated on a platform owned by Shell in the Gulf of Mexico off the Louisiana coast. The accident occurred when the plaintiff's supervisor instructed him to carry a piece of wood and place it on an existing wood stack in a particular area of the platform; Duplantis slipped on a grease-covered board and fell on the padeye of the cover of a pedestal crane belong to Shell. Shell filed a Motion for Sum-

mary Judgment to dismiss the plaintiff's negligence and strict liability claims.

The evidence established that Shell did not own the greased board in question nor did it place it in the area where the plaintiff allegedly was injured. On the contrary, the board was apparently owned by GOC and various witnesses testified that it was the responsibility of GOC employees, including the plaintiff, to perform housekeeping duties such as cleaning the rig floor area; no witness testified that Shell was responsible for the board. Further, all witnesses testified that the crane cover had not been moved since GOC began working on the rig, and Duplantis even admitted that he knew where the crane cover was and that it had been in the same position since he started working on the rig eight months prior to the accident.

However, the plaintiff claimed that Shell had exercised "operational control" over GOC's employees because it maintained a "company man" on the rig who held safety meetings in conjunction with GOC personnel and who had played a role in removing a GOC crane operator from the job. The court responded by noting that the "company man" did not have the authority to remove the crane operator, and further, "the fact that a principal takes an active interest in the safety of employees of its independent contractor does not, in and of itself, constitute direct operational control." Accordingly, the Summary Judgment in favor of Shell was affirmed.

Ellison v. Conoco, Inc., 950 F.2d 1196 (5th Cir. 1992).

The plaintiff was employed by SSI, a company that performed snubbing work for Conoco on its fixed offshore platform located on the Outer-Continental Shelf. Ellison was injured aboard the rig as a result of an incident involving oilfield snubbing equipment that was allegedly owned by Associated Oilfield Services ("Associated"). Ellison filed suit against Conoco, basing jurisdiction on the Outer-Continental Shelf Lands Act ("OCSLA") and alleging a cause of action for injuries under the Louisiana Civil Code, Articles 2315, 2317 and 2322. Ellison added Associated as a defendant based on its alleged strict liability for failing properly to design, manufacture or maintain the snubbing equipment that caused his injury.

The district court dismissed the claim against Associated on the ground that Associated had no ownership or control over the oilfield snubbing unit and dismissed the plaintiff's strict liability claims against Conoco on the ground that it did not exercise custody or control over the snubbing unit. However, the court denied Conoco's Motion for Summary Judgment on the plaintiff's negligence claim pursuant to Article 2315.

At trial, the plaintiff alleged that the excessive noise generated by Conoco's turbine rendered him unable to hear the offending hydraulics in time to avoid being struck and pinned, and therefore Conoco was negligent in failing to remedy that noise hazard. Although the jury ruled in the plaintiff's favor on his negligence claim, the trial judge granted Conoco's Motion for JNOV, and the plaintiff appealed.

After resolving the issue whether the plaintiff's appeal was timely, the Fifth Circuit explained that the plaintiff's negligence claim should be resolved by applying the "duty-risk analysis", as enumerated by the Louisiana Supreme Court. That analysis requires the following inquiries:

1. Was the affirmative conduct a cause-in-fact of the resulting harm?
2. Was there a duty to protect this plaintiff from this type of harm arising in this manner?
3. Was the duty breached?

The court found that Conoco's failure to shut-down the engine was a cause-in-fact of Ellison's accident based on the trial testimony of three SSI employees who claimed to have heard the turbine over all other noise on the rig and had even complained to Conoco regarding the noise. In addressing whether the scope of Conoco's duty to the plaintiff included protecting him from the particular injury that he sustained, the plaintiff noted that Conoco's safety manual required it to shut down its turbines while wireline operations, such as those in this case, were being performed on a "live" well. However, the undisputed trial testimony established that running the turbine under those circumstances only presented an enhanced risk of fire or explosion, and the requirement to shut down the turbine was designed solely to protect against those risks of harm. Therefore, because Ellison's injury resulted from his inability to respond to an audible warning signal instead of from a fire or an explosion, his injury was not within the scope of the risk contemplated by Conoco's safety regulations.

Further, although the SSI workers had complained that the turbine was loud and that they felt it was important to be able to hear their own equipment operate, the SSI workers never suggested to Conoco that the turbine noise made it difficult to hear critical audio cues from their own equipment. Rather, the evidence indicated the snubbing workers had relayed a dislike of the noise to Conoco solely because of its intensity and, in response, both Conoco and SSI required that employees wear ear protection in high noise areas. Moreover, Ellison himself testified that he had physical and visual contact with the machine shortly before impact. Therefore, the court found that, from Conoco's standpoint, the manner in which

the plaintiff's injury occurred was not a foreseeable result of the continued operation of the turbine engine and, consequently, Conoco was under no duty at the time of Ellison's accident to discontinue the engine's operation.

Additionally, the plaintiff challenged the district court's granting of Summary Judgment on his strict liability claim against Conoco on the grounds that its representative exercised "operational control" over the snubbing equipment because he habitually discussed work procedures with the SSI crew, and because SSI employees occasionally would have to check with him before proceeding further with their work. However, in affirming the district court's ruling, the Fifth Circuit court noted that the Conoco representative had never inspected or tested the snubbing equipment; rather, he merely monitored the operation and specified the work Conoco wanted done. Further, although the court noted that the Conoco company representative "could have ordered the work stopped if he observed an obviously dangerous situation," it found that inspections of equipment and the choice of safe snubbing methods were understood by all to be the responsibility of SSI.

Finally, in addressing the district court's dismissal of the strict liability claim against Associated, the court noted that Associated could not be held liable unless it had "custody" or "garde" of the snubbing equipment. The facts showed that the snubbing unit most likely involved in the accident had been manufactured by SSI, "sold" to Associated, and immediately leased back to SSI under a "sale-leaseback" agreement. The court held that, although an owner of an object who transfers its possession, but not its ownership, to another person, continues to have "garde" or custody over the object and is obligated to protect others from damage caused by structural defects in the object that arose before the transfer, Associated never obtained physical possession over the equipment by virtue of the "sale-leaseback" agreement and therefore never had custody or "garde" over the snubbing equipment. Accordingly, the district court's dismissal of the plaintiff's claim against Associated was affirmed.

Seneca v. Phillips Petroleum Co., 963 F.2d 762 (5th Cir. 1992).

Seneca was an employee of Nitrogen Pumping and Coiled Tubing Specialists, Inc. ("NPACT") assigned to perform coil tubing services on a Phillips Petroleum offshore platform. Phillips ordered NPACT to rig down its coil tubing unit on a platform, an operation which normally called for three employees, although only two NPACT employees were available. A Phillips employee, John Guidry, was assigned to assist the NPACT employees with the rig down. However, before the rig down was com-

pleted, Guidry stopped assisting the plaintiff and left the immediate area and Seneca continued to coil the last few feet of hose and then attempted to close the heavy gate to the hose basket by himself, severely injuring his back. Seneca filed suit against Phillips on theories of negligence and strict liability pursuant to the Louisiana Civil Code. Phillips moved for summary judgment, which was granted by the district court.

Seneca alleged that Phillips was liable because Guidry was negligent in leaving the work area during the rig-down operation. However, the undisputed evidence was that Guidry left Seneca's immediate area for only one to two minutes. The court noted that there were no exigent circumstances requiring that the gate be lifted before Guidry returned or someone else was available to assist Seneca, and the court found that the accident resulted from Seneca's decision to attempt to lift the gate on his own, not from any negligent action by Guidry.

The court then found that Seneca failed to establish a genuine issue of material fact as to whether the coil tubing unit contained a vice or defect, necessary to prove liability under Louisiana Civil Code, Article 2317. Seneca alleged that the unit was defective because it did not contain a tag cautioning that two persons were required to lift the basket. However, the evidentiary support for this claim was an expert report which was placed into evidence after the district court had ruled on Phillips's Motion for Summary Judgment and, noting that the Fifth Circuit would consider only the materials before the district court at the time of its ruling, the court held it would not consider the expert's unsworn letter. The court further stated that, even if it were to consider the report, the relevant portion contained only an equivocal statement of possible defect coupled with a clear denial of causation such that the court held it could not possibly have created an issue of fact sufficient to withstand summary judgment.

Finally, Seneca alleged liability under Louisiana Civil Code, Article 2322, which requires a demonstration that a building which a defendant owns has a ruin caused by a vice in construction, or the neglect of the owner caused the plaintiff's damage. Because Article 2322 extends to appurtenances of buildings, the court noted that it had to determine whether the coil tubing was an appurtenance of the oil platform and consider how securely the structure was attached to the platform and the degree of permanence intended. Because the coiled tubing unit rested on skids and was only temporarily connected to the platform, and was intended to be moved by NPACT from one platform to another as needed, the court concluded that the unit was not an appurtenance covered under Article 2322. Accordingly, the judgment of the district court was affirmed.

REPORT OF AD HOC COMMITTEE ON YORK-ANTWERP RULES

by Howard L. Myerson

On December 3–4, 1992, a meeting of the Comité Maritime International's Subcommittee on General Average, Revision of York-Antwerp Rules ("the Rules"), was held in Brussels, Belgium, with David Taylor as Chairman. Delegates from ten nations attended, as well as observers from UNCTAD and the International Union of Marine Insurance.

Prior to the meeting, questionnaires requesting views on the revision of the Rules had been sent to national maritime law associations. Answers were received from about eighteen countries, including a complete revised text of the Rules prepared by the USMLA Ad Hoc Committee on York-Antwerp Rules.

During the discussions, two major topics received a great deal of attention, namely:

1) Attempts by some countries to reduce the scope of expenses or allowances in General Average based upon:
   A) The judicial decision of some maritime countries limiting the scope of allowances below the amounts allowed by the present York-Antwerp Rules, or recent legal decisions dealing with the Rules in their present form. In the latter circumstance, two recent British decisions, *The Alpha*, (LLR, Part 5 {1991}, Vol. 2, November 1991, Page 515), and *The Bijela*, (LLR, Part 6 {1992} Vol.1, June, 1992, Page 636), the former of which appears to have expanded the scope of sacrifices, whilst the latter limits the scope of expenditures that traditionally had been allowed under the 1974 Rules; and

   B) An agenda put forward by "underdeveloped" countries through the medium of UNCTAD, in which those countries felt that any expansion of General Average would fall more heavily on them as shippers of cargo, as opposed to "developed" countries, whose shipowners were said to control the vast preponderance of vessels in international trade.

2) Measures taken to control damage to the environment and/or pollution. The former had only been dealt with in the 1990 revision of the Rules insofar as it related to the International Convention on Salvage, 1989, Articles 13 and 14. Among the issues left unresolved were those concerning pollution resulting directly from acts of Gen-

eral Average, and the cost of measures taken to prevent or minimize damage to the environment prior to entering or while remaining at a port of refuge.

In addition to these topics, consideration was given to the revision of Rules whose wording resulted in a variation of actual practice among average adjusters.

The views of the USMLA Ad Hoc Committee were put forward, and they generally coincided with the views of those who wished to restrain the scope of General Average, and to eliminate pollution liability and clean-up costs from General Average. There was a spirited discussion of these topics, and it was agreed that they would be summarized by the Chairman and the various points of view resubmitted to the member countries of the C.M.I. for further consideration. It was the Chairman's opinion that at least two additional meetings would be required prior to the C.M.I. meeting at Sydney in October, 1994, where the revision will be formally dealt with.

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Convention on the International Maritime Organization, as amended, TIAS 4044, 6285, 6490, 8606, 10374, 11094 (done at Geneva, March 6, 1948; entered into force, March 17, 1958).
Acceptance deposited: Estonia, January 31, 1992.

Convention on the Territorial Sea and the Contiguous Zone, TIAS 5639 (done at Geneva, April 29, 1958; entered into force, September 10, 1964).
Accession deposited: Lithuania, January 31, 1992.

International Convention for the High Seas Fisheries of the North Pacific Ocean, with Annex, as Amended, with Protocol of April 25, 1958, TIAS 2786, 9242 (signed at Tokyo May 9, 1952; entered into force, June 12, 1953).
Notice of termination: Presented by the U.S., February 21, 1992; effective: February 21, 1993.

BOOK REVIEW

RECREATIONAL BOATING LAW, edited by C. Peter Theut of Detroit, Michigan, Chairman of the MLA Recreational Boating Committee. (Pub. Matthew Bender, 11 Penn Plaza, New York, NY 10001. One Volume, $125, including periodic updates.)

This fine publication is designed to fill a need for a concise work dealing with the burgeoning recreational boating community. As the number of persons seeking recreation on our rivers, lakes and oceans increases there will inevitably be an increase in situations where legal assistance will be required. This volume fills a basic need in that it deals concisely with each of the various legal problems which a recreational boater is most apt to encounter and correctly omits discussions of topics which would be of importance only to those involved in commercial maritime matters. While written for lawyers, the treatise is very readable and could profitably be read by lay persons. Those who own a boat or, on occasion, charter boats would find especially interesting Chapter 13, "Regulations of Pleasure Craft and Commercial and Private Charter Boats."

All of the practitioners who wrote chapters are members of the MLA and most are members of its Recreational Boating Committee. Contributors to the Volume, in addition to **Peter Theut**, include: **Bruce E. Alexander** of Baltimore; **Professor Joseph W. Little** of Gainesville; **Almer W. Beale II,** of Jacksonville; **Michael B. McCauley** of Philadelphia; **A. Gordon Grant, Jr.** of New Orleans; **Robert D. McIntosh** of Fort Lauderdale; **Gerard T. Gelpi** of New Orleans; **Brian J. Miles** of Detroit; **E. Steven Herb** of Sarasota; **Dennis Minichello** of Chicago; **Bruce King** of Seattle; **Thomas A. Russell** of Long Beach; **John C. Koster** of New York; **David McI. Williams** of Baltimore; **John M. Woods** of New York. The chapter on collisions has been reviewed by Past President **Nicholas J. Healy** of New York who, together with **Prof. Joseph C. Sweeney** of Fordham University Law School, is currently working on a new text book on maritime collisions. Mr. Healy writes as follows:

> Chapter 3 is a 17–page outline of the law of collision. It is of course impossible to deal in depth with so broad an area in so short a space, but the basic principles have been well summarized, and the chapter will provide the small boat owner with an interesting and informative overview of this important area of the maritime law.
>
> The chapter includes an explanation of the law governing collisions and the parties liable for them. It then treats inevitable

accident, proportional fault, unseaworthiness, negligent navigation, errors *in extremis,* and the *Pennsylvania rule* and other presumptions. While mention is made of the Rules of the Road and the navigational problems regulated by them, the chapter does not discuss particular rules, presumably because of space limitations.

There is a good discussion of damages sustained by vessels and other property resulting from collision, including detention damages and economic losses to parties other than property owners. Mention is made of damages for personal injury and wrongful death, and of limitation of liability, but the reader is referred to Chapters 5 and 7 for a more detailed discussion of those subjects.

Finally, the chapter treats post-collision responsibilities, including the duty to stand by, and the obligation to report collisions and any ensuing water pollution to the U.S. Coast Guard.

Some of the other chapters have been reviewed by MLA members who list recreational boating among their hobbies, including **Benjamin Allston Moore** of Charleston, who in a 42–foot Ketch has just retraced a discovery voyage Christopher Columbus had made some 500 years ago. Mr. Moore, assisted by his associate **David Collins**, after having reviewed the chapter on Salvage, writes:

Accompanying the recent rapid expansion of recreational boating has been the rise of pleasure boat salvage operations and the concomitant necessity of applying the hoary laws of salvage to this burgeoning field. This attempt to fill old skins with new wine is the subject of Chapter 8 of *Recreational Boating*.

The first portion of this chapter deals with matters of traditional salvage law, such as the distinction between salvage and towage and the appropriate calculation of salvage awards. This section is then followed by a discussion of the recent jurisdictional developments in the pleasure craft area and an analysis of the application of these authorities to the salvage context.

The chapter concludes with its most interesting and helpful, section—a comprehensive discourse on the propriety of the use of Lloyd's Open Form (LOF) for pleasure boat salvage. The author of this chapter underscores the opportunities for abuse inherent in the routine use of this contract and outlines several potential defenses available to the small boat owner confronted with the potential of arbitration in London. In addition to citation to

> numerous cases, articles and treatises, this discussion also proffers policy arguments both for and against the strict enforcement of LOF.
>
> As the need for salvage, and legal advice pertinent thereto, arises on short notice, this reference volume can be of invaluable assistance to the admiralty attorney or, for that matter, to the unlucky boat owner. On my next ocean voyage, I "won't leave home without it."

Chapter 12, "Liens on Recreational Craft: The Arrest of Vessels" was reviewed by **Bruce Paulsen** of New York, a yacht racing enthusiast. He writes:

> This chapter includes clear, concise discussions—punctuated by practical "planning notes"—of maritime lien law with respect to, *inter alia,* contract liens, tort liens, liens arising while a vessel is *in custodia legis* as well as priority of liens. The chapter also discusses the enforcement of liens by briefly touching upon the steps involved in proceeding *in rem* against a vessel, from arrest through judicial sale.
>
> Each subsection of the chapter contains a succinct, cogent analysis in a point-by-point, no-nonsense style of the law of maritime liens and their enforcement which will give the practitioner ready entree into the leading cases. Although the chapter makes little reference to maritime liens arising specifically in the recreational boating context, this is no doubt dictated by the commercial nature of the relevant authorities, which are also largely applicable to actions involving recreational craft.

Dewey Villareal of Tampa, a small boat sailor as well as a licensed mariner and prominent maritime lawyer reviewed Chapter 13 on the regulation of pleasure craft and commercial and private charter boats. He tersely comments that the chapter:

> . . .is a very well thought out handling of a subject which is often hard for specialists to sort out. If they left anything out, I didn't see it. I would think the book would be a godsend to owners or charterers.

Finally, **Donald M. Waesche** of New York, another MLA "Blue Water" sailor, after reviewing the timely chapter on searches, seizures and forfeitures of pleasure craft, comments on the Fourth Amendment to the United States Constitution, which provides in part: "The right of the

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, ..." Mr. Waesche writes:

> As this chapter clearly explains, one's boat is not one's home. Members of the United States Coast Guard have the right to board a boat without a warrant, for the limited purpose of examining the vessel's documentation, and to make sure of compliance with Federal regulations promulgated for safety. They may not search one's person or personal belongings. If the Coast Guard has reasonable suspicion that the vessel is being used in a criminal activity the Coast Guard may then search the boat from stem to stern from the overhead to the bilge, and again may conduct such a search without a warrant. The authors include a colorful discussion of the doctrine that a "plain view" or "plain smell" may give sufficient basis for what might otherwise be an "illegal search or seizure."

In conclusion, this volume, which includes in its appendix forms of various complaints and other pleadings and primary source materials, should be a most useful compendium for all who are concerned with the "side effects" of ownership or operation of recreational, non-commercial vessels.

GWP