ADMIRALTY

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There were no dramatic new developments in admiralty law during this survey period. The work product of the Fifth Circuit was relatively pedestrian, and the United States Supreme Court decided only two cases involving principles peculiar to maritime law.

The appeals court occupied itself with abating some of the confusion which followed in the wake of *Executive Jet Aviation, Inc. v. City of Cleveland*,[1] the Supreme Court's landmark decision revising the test of admiralty jurisdiction in tort cases. The Supreme Court's activities included the clarification of its much misunderstood opinion in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[2] concerning right of contribution in noncollision maritime cases, and the addition of a second chapter to its admiralty *corpus juris* on wrongful death which had its beginning in *Moragne v. States Marine Lines*.[3]

Although there was activity at the district court level in cases controlled by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act,[4] none of these cases reached the Fifth Circuit during this survey period.[5] Efforts to interpret and to apply these remedial statutes no doubt will form an important part of the business of the appellate courts during calendar year 1975.

In editing the material for this survey article, we have passed over those cases in which the appeal was concerned largely with a review of the fact findings of a jury or of a trial court. Instead we have focused upon those cases which interpret and apply what in our judgment are significant principles of maritime law.

Supreme Court cases decided during the survey period are included in this commentary because of the decisive role which the Court plays in the formation of admiralty law in the United States.

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1. 409 U.S. 249 (1972).
2. 342 U.S. 282 (1952).
3. 398 U.S. 375 (1970).
4. 33 U.S.C. §§901-50 (Supp. 1972). In addition to expanding the harbor worker's compensation benefits, the amendments enacted in 1972 placed significant restrictions upon third-party actions by harbor workers against shipowners. Recent commentaries upon the amendments include Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, INS. COUNSEL J. 63 (Jan. 1974); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act-After the 1972 Amendments*, 6 J. MARITIME L. & COMMERCE 1 (Oct. 1974).
5. Examples of cases decided during the survey period at the district court level include Hite v. Maritime Overseas Corp., 375 F. Supp. 233 (E.D. Tex. 1974) (granting motion to strike portions of complaint), 380 F. Supp. 222 (E.D. Tex. 1974) (motion for directed verdict granted); Fedison v. Vessel WISLICA, 382 F. Supp. 4 (E.D. La. 1974).

I. JURISDICTION

The *Executive Jet Aviation* case[6] was decided against the background of the controversy over whether claims arising out of the crash of an airplane into navigable waters should be treated as admiralty tort claims.[7] Those cases which applied admiralty standards in such instances were relying upon the most literal reading of the locality rule, particularly in situations like *Executive Jet* where the aircraft was flying between two inland points and crashed into navigable waters purely by chance. Thus the problem being dealt with by the Supreme Court in *Executive Jet* was whether maritime law should be applied in a case where there was an incidental maritime locality but absolutely no maritime subject matter. The Court rested its ultimate conclusion that jurisdiction was lacking upon the general statement that in determining questions of admiralty tort jurisdiction, the more sensible approach is to make it depend upon "the relationship of the wrong to traditional maritime activity [rather than upon] a purely mechanical application of the locality test."[8]

In effect the Supreme Court had approved a growing body of critical opinion that admiralty tort jurisdiction should have a subject matter relationship to things maritime rather than being bottomed solely upon a simplistic locality requirement.[9]

Although a subject matter test of admiralty jurisdiction had been applied in contract cases at least as long as locality had served as the test of jurisdiction in tort cases, *Executive Jet* received a wide variety of interpretation at the lower court level.[10] This was the background against which *Gypsum Carrier, Inc. v. Union Camp Corp.*[11] was decided.

Having just discharged a cargo of gypsum rock, the bulk carrier PACIFIC CARRIER collided with a railroad bridge in the Savannah harbor after experiencing a sudden loss of visibility in a cloud of smoke from a riverside paper mill. After petitioning for limitation of liability, the vessel's owners and charterers impleaded the paper mill, invoking rule 14 (c) in an effort to redirect numerous damage claims at the offending paper mill while concurrently asking for both indemnity and contribution.[12] The district court, however, dismissed the third-party complaint for lack of admiralty jurisdiction, citing *Executive Jet* as its authority. The lower court's

6. 409 U.S. 249 (1972).

7. *See* discussion in 7A J. MOORE, FEDERAL PRACTICE ¶¶.220[1]-[4] (2d ed. 1953). [hereinafter cited as MOORE].

8. 409 U.S. at 261.

9. 7A MOORE ¶.325[3], at 3529-41.

10. *See* Chamlee, *Annual Fifth Circuit Survey: Admiralty*, 25 MERCER L. REV. 787, 790 n.22 (1974).

11. 489 F.2d 152 (5th Cir. 1974).

12. Under the distinctly admiralty procedure of FED. R. CIV. P. 14(c), a defendant may through impleader direct the plaintiff's claim at a "target defendant" not named in the complaint.

position was that there was no relationship between the paper mill's shore-based operations and "traditional maritime activity."

The Fifth Circuit reversed. The PACIFIC CARRIER, it said, is "by its very essence maritime."[13] The fact that the obstructing paper mill smoke "had a nonmaritime origin is irrelevant to any issue since it caused injury to a vessel then under way on navigable waters."[14]

When read in conjunction with the court's earlier opinion in *Kelly v. J.C. Smith*[15] involving shore-based rifle fire directed at an outboard motor boat, the *Gypsum Carrier* case makes it clear that any claim for obstruction of navigation or injury to a vessel or its crew is within the admiralty jurisdiction regardless of the nonmaritime nature or source of the injury-producing activity. This interpretation of *Executive Jet* by the Fifth Circuit is entirely consistent with the historical objectives of admiralty jurisdiction and demonstrates that *Executive Jet* is not a radical departure from traditional concepts.[16]

In Re Dearborn Marine Service, Inc.[17] is *Gypsum Carrier* in reverse. An offshore oil worker, assigned to a fixed drilling platform in the Gulf of Mexico and performing office work aboard a crewboat moored to the platform, was killed when a flash fire originating on the platform spread to the vessel. The court concluded that the decedent's work was unrelated to the vessel which he was temporarily using as his office. Even though his death occurred aboard a vessel on navigable waters, a maritime locality, the decedent was engaged at all times in platform-related work and the tortious activity which resulted in his death arose out of work being carried out on the platform. The requisite maritime relationship between wrong and activity was, therefore, lacking and the death claim was cognizable not in admiralty but under the Outer Continental Shelf Lands Act.[18]

II. JONES ACT SEAMEN

Brown v. ITT Rayonier, Inc.[19] demonstrates the truth of the old adage that there is more than one way to skin a cat. A college student temporarily employed by a pulp mill was sent out in a motorboat with another em-

13. 489 F.2d at 155.

14. *Id.*

15. 485 F.2d 520 (5th Cir. 1973).

16. Admiralty's traditional concern for granting relief for obstructions to navigation and injuries to vessels is reflected in a resolution adopted in 1632 by the English courts acknowledging the jurisdiction of the admiralty court over such claim. DeLovio v. Boit, 7 F. Cas. 418, 431 n.28 (No.3,776) (C.C.D. Mass. 1815); Philadelphia, W. & B. Ry. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 216 (1859).

17. 499 F.2d 263 (5th Cir. 1974).

18. 43 U.S.C. §§1331-43 (1970). For a discussion of claims arising under the Outer Continental Shelf Lands Act, see Chamlee, *Annual Fifth Circuit Survey: Admiralty*, 23 MERCER L. REV. 723, 724-28 (1972).

19. 497 F.2d 234 (5th Cir. 1974).

ployee to collect water samples from a river which received the mill's effluents. The motorboat struck a stump and the student was injured. Alert counsel, conscious of the limited recovery available under the Longshoremen's and Harbor Workers' Compensation Act,[20] sought to establish in an action against the mill owner that their client occupied the favored status of a Jones Act seaman at the time of his injury.[21] If successful in this effort, the claimant would enjoy the merchant seaman's privileges of freedom from workmen's compensation restrictions,[22] the advantages afforded by the liberal Jones Act negligence standards[23] and by the warranty of seaworthiness,[24] and even the seaman's ancient guarantee of maintenance and cure when injured in the service of the ship.[25]

While acknowledging that the student did contribute to the navigation of his employer's boat, the Fifth Circuit somewhat reluctantly concluded that a temporary assignment aboard a motorboat of three and one-half hours duration was not such a "permanent connection with a vessel" as would sustain "blue water" seaman's status.[26] Strike one on the claimant.

The next pitch was labelled "Sieracki seaman"[27] and the claimant hit it out of the park. The de facto seaman need have no permanent connection with the vessel; all that is required is that he be doing "seaman's work" or the type of work formerly done by seamen. Since the claimant's duties were "directly involved in the mission" of the boat, the court concluded that he shared the same status enjoyed by longshoremen and other harbor workers with relationship to vessels served by them and that he was entitled to the warranty of seaworthiness.[28]

Having held that the student was not a "member of a crew of any vessel,"[29] it would appear on the surface that the court would have been constrained to find that the Longshoremen's Act provided the exclusive remedy against the employer, the paper mill. However, in a 1963 decision,

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20. $24,000 in cases not involving death or permanent total disability. 33 U.S.C. §914(m) (1970). This limit was eliminated by the 1972 amendments.

21. The Longshoremen's Act expressly excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3) (1970).

22. States cannot make their workmen's compensation acts applicable to seamen. Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

23. "Under [the Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957).

24. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

25. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943).

26. 497 F.2d at 238.

27. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), extended the seaman's warranty of seaworthiness to longshoremen on the theory that they were engaged in what formerly had been "seaman's work." Later decisions expanded the *Sieracki* doctrine to include shipyard workers and other types of harbor workers.

28. 497 F.2d at 239.

29. Note 21, *supra*.

Reed v. S.S. YAKA,[30] the Supreme Court ruled that in situations where the employer of a Sieracki seaman was also the owner or bareboat charterer of the vessel on which the injury occurred, the claimant had, notwithstanding the exclusivity provision of the Act, the same remedy against his employer that he would have had against a third party shipowner.

Williams v. Brasea, Inc.[31] is a tortuous review of the fact findings of a district court in a shrimp boat accident case, most of which is beyond the scope of this article. Nevertheless, it contains one insight involving the law of seamen which is worthy of comment.

The captain of the shrimper was using his hands to untangle a line wound about a winch drum. A crewman suddenly actuated the winch with the result that the captain's hands and arms were crushed between the line and the drum. The captain claimed that the owner of the boat was liable for his injuries because of the boat's unseaworthiness and the crewman's negligence in turning on the winch. The crewman testified on trial that the captain ordered him to turn on the winch. The captain denied this but the trial judge concluded that it made no difference; the crewman was negligent in any event.

The Fifth Circuit took sharp issue with the lower court's conclusion, pointing out that a seaman has a duty to obey the orders of his immediate superior. This essential tenet of ship's discipline would be seriously compromised if the seaman was required by law to pass judgment on the wisdom of the order before he carried it out. The court concluded as a matter of law that compliance by a seaman with the order of his immediate superior cannot constitute negligence.[32]

Forfeiture of the seaman's right to maintenance and cure by refusal to accept medical care offered by the shipowner is the subject matter of *Oswalt v. Williamson Towing Co.*[33] Maintenance and cure is such a hallowed privilege of seamen that the courts are loath to deny it except for the most gross abuses.[34] The Fifth Circuit acknowledges this principle in its *Oswalt* opinion, but it also recognizes that the shipowner should not be put to unnecessary expense by a seaman's arbitrary refusal to accept adequate medical care offered by his employer. For example, a seaman who refuses the free medical care available at a U. S. Public Health Service facility in order to obtain treatment at a private facility can seldom recover

30. 373 U.S. 410 (1963). The decision has been criticized as constituting judicial rescission of a specific congressional enactment on non-constitutional grounds. Bue, *Yaka and Jackson; P & I Casualty Insurance; Contractual Liability*, 43 TULANE L. REV. 531, 538 (1969).

31. 497 F.2d 67 (5th Cir. 1974).

32. A seaman is subject to forfeiture of up to four days pay for "willful disobedience of any lawful command at sea." 46 U.S.C. §701 (1970).

33. 488 F.2d 51 (5th Cir. 1974).

34. "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection [maintenance and cure]." Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 731 (1943).

the cost of the private medical care from the shipowner.[35] The shipowner in the *Oswalt* case, however, had adopted the unusual practice of sending its employees to private physicians. The Fifth Circuit reasoned that since the shipowner had elected to incur this extra expense, there was no rational basis for denying the seaman reimbursement for his expenses simply because he had selected a physician other than the one engaged by the shipowner.

III. De Facto Seamen

One of the principal objectives of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act was to eradicate the *Sieracki-Ryan* harbor worker litigation which has choked the dockets of the federal courts for two decades. Nevertheless, these cases continue to occupy the attention of the Fifth Circuit as it attempts to digest those claims which arose prior to November 26, 1972, the effective date of the amendments.[36] Highlights of the Fifth Circuit's work in this area include:

> The personal choice by an individual longshoreman of an unsafe method of handling cargo when alternative safe methods are available is not the equivalent of a stevedoring contractor's improper work method which will render the vessel unseaworthy under the *Sieracki* doctrine.[37]
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> Vapor or fog in a refrigerated cargo hold which impaired the visibility of longshoremen working in the hold and allegedly resulted in one of the men being hit in the head by a spreader bar was held not to constitute unseaworthiness because the conditions which existed, permitting visibility up to 17 feet, were not unreasonable for reefer compartments.[38] Judge Godbold dissented, contending that unseaworthiness in the context of the case was a fact issue which should not have been decided as a question of law.[39]

IV. Wrongful Death

Sea-Land Services, Inc. v. Gaudet[40] is an appeal to the Supreme Court from a decision of the Fifth Circuit[41] holding that a longshoreman's settlement of a claim for personal injuries during his lifetime did not bar his

35. Sanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958, 973 (5th Cir. 1969).
36. Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041, 1042 (1st Cir. 1974).
37. Baker v. S/S CRISTOBAL, 488 F.2d 331 (5th Cir. 1974).
38. Shephard v. S/S NOPAL PROGRESS, 497 F.2d 963 (5th Cir. 1974).
39. *Id.* at 967.
40. 414 U.S. 573 (1974).
41. Gaudet v. Sea-Land Services, Inc., 463 F.2d 1331 (5th Cir. 1972). This decision is reviewed in Chamlee, *Annual Fifth Circuit Survey: Admiralty*, 24 Mercer L. Rev. 703, 715-16 (1973).

personal representative from asserting a wrongful death claim when the longshoreman subsequently died from these same injuries. A bare majority of the Supreme Court agreed with the Fifth Circuit, observing that a claim for personal injuries is entirely distinct from a claim for wrongful death. The claim for personal injuries is intended to compensate the person who is physically harmed whereas the wrongful death action is intended to compensate those persons who receive their support from the decedent. The Supreme Court acknowledged that wrongful death statutes modeled after Lord Campbell's Act had traditionally been interpreted to bar a wrongful death action where the decedent had recovered for his fatal injuries during his lifetime. This, however, was a problem of statutory construction arising from the fact that Lord Campbell's Act had been interpreted to require that the decedent's claim for personal injuries be unsettled and viable at the time of his death as a condition to maintaining an action under the statute for wrongful death. Stressing the "humane and liberal character" of admiralty proceedings, the majority concluded that dependents should not be denied compensation for their losses merely because the decedent had recovered for his personal injuries during his lifetime.

A vigorously worded dissent[42] protested that admiralty's two wrongful death statutes had been interpreted in the traditional manner to allow no recovery for wrongful death where the decedent had settled or obtained judgment on his personal injury claim. Furthermore, *Moragne* had instructed the lower courts to look to the Jones Act and the Death on the High Seas Act for guidance in fashioning the new maritime death remedy, clearly indicating that the new remedy should be administered consistently with the existing statutory remedies.

The Court next dealt with the contention that a double recovery would result if dependents were allowed to recover on top of a recovery by the decedent. The elements of damages recoverable in a maritime wrongful death action with a single exception, the majority argues, are distinct from those recoverable by the decedent. These elements include "loss of support, services, and society, as well as funeral expenses."[43] Damages for loss of society "including love, affection, care, attention, companionship, comfort, and protection" are justified by the majority on "humanitarian" grounds even though such damages have not been allowed in actions under the Death on the High Seas Act or by most lower courts in *Moragne*-based cases.[44]

Finally the Court comes to grips with what is obviously a double recovery: recovery for loss of support by dependents where the decedent had already recovered damages for loss of future wages. The Court's solution

42. 414 U.S. at 595 (Burger, C. J., Powell, Stewart & Rehnquist, J.J., dissenting).
43. *Id.* at 584.
44. *Id.* at 585.

is the application of collateral estoppel to prevent a double recovery, a solution which seems to create more problems than it solves. Support due dependents from the decedent's future wages may not be religigated in the wrongful death action under principles of collateral estoppel in the absence of proof that "the dependents' total support received from the decedent exceeds the future wages paid to the decedent by the tortfeasor."[45] No real solution is offered for the problem of determining what portion of the decedent's recovery represents loss of future wages.

The apparent objective of the majority of the Court in *Sea-Land* is to adopt for the new maritime wrongful death remedy the most liberal and humanitarian trends of tort law relating to death claims. The "special solicitude" of admiralty for injury claimants is offered as justification for the many inconsistencies between the new remedy and the comparable admiralty and state wrongful death statutes.[46] However, there can be no doubt that the Court has made a significant departure from its purpose, as announced in *Moragne*, of using the Death on the High Seas Act as the basic model for fashioning the new remedy.[47]

V. THE *Halcyon* RULE

The Supreme Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[48] has been read by some courts as standing for the principle that contribution cannot be had by one joint tortfeasor against another in noncollision admiralty cases.[49] Both the Fifth and Second Circuits have interpreted *Halcyon* as denying a right of contribution between joint tortfeasors only in cases where the defendant enjoys a statutory immunity, most commonly that provided by a workmen's compensation statute.[50] *Halcyon* in fact was a typical suit for personal injuries by a longshoreman against a shipowner who, in turn, impleaded the longshoreman's compensation-covered employer. The Fifth Circuit simply adopted the prevailing view that the exclusivity clause in a workmen's compensation act bars a third-person tortfeasor from recovering contribution from the covered employer of a killed or injured workman.[51] In *Cooper Stevedoring*

45. *Id.* at 592 n.30.

46. *Id.* at 588.

47. In a post-*Sea-Land* opinion, the Fifth Circuit emphasizes the distinction drawn by the Supreme Court between loss of love and affection, which is compensable, and the mental anguish or grief suffered by the survivors, which is not compensable. McDonald v. Federal Barge Lines, Inc., 496 F.2d 1376 (5th Cir. 1974).

48. 342 U.S. 282 (1952).

49. Simpson Timber Co. v. Parks, 390 F.2d 353 (9th Cir. 1968); *In re* Standard Oil Co. of Cal., 325 F. Supp. 388 (N. D. Cal.. 1971).

50. Horton & Horton, Inc. v. T/S J. E. DYER, 428 F.2d 1131 (5th Cir. 1970); *In re* Seaboard Shipping Corp., 449 F.2d 132 (2d Cir. 1971), *cert. denied*, 406 U.S. 949 (1972).

51. Annot., *Effect of Workmen's Compensation Act on Right of Third-Person Tortfeasor to Recover Contribution from Employer of Injured or Killed Workman*, 53 A.L.R.2d 977 (1957)

Co. v. Fritz Kopke, Inc.,[52] the Supreme Court, after 22 years of confusion in the lower courts, granted certiorari in a case from the Fifth Circuit[53] and settled the issue once and for all, upholding the Fifth Circuit's interpretation of *Halcyon*.

It is not unlikely that the Supreme Court had been looking for a noncollision case where contribution was being sought against a joint tortfeasor who had no statutory immunity vis-a-vis the the original claimant.[54] In the *Cooper* case, the essential ingredient was found: a Houston longshoreman was injured due to the negligent stowage of Mobile stevedores; the longshoreman recovered against the shipowner on a finding of negligence and unseaworthiness; and the shipowner was awarded contribution against the Mobile stevedores for one-half of the plaintiff's recovery. There was no compensation act immunity between the Houston plaintiff and the Mobile stevedores.

The Supreme Court affirmed. The common law rule prohibiting contribution between joint tortfeasors does not promote "equal distribution of justice" by forcing one of two joint wrongdoers to bear the entire loss. *Halcyon* was reaffirmed but with the admonition that it is restricted in application to situations where a compensation statute confers immunity upon an employer.

VI. MISCELLANEOUS

The Fifth Circuit dealt with a wide range of maritime law problems in other cases.

A fire aboard a ship loading military cargo was the basis for salvage claims by two stevedore superintendents who assisted firemen and ship's crew in extinguishing the fire.[55] The trial court denied the claims, observing that the fire was of short duration and was attended by adequate numbers of trained fire-fighting personnel. The Fifth Circuit reversed. A fire aboard ship is a classic marine peril. The fact that the services rendered by the two claimants were unsolicited did not affect the validity of the claims so long as the services were not rejected by those in authority.

A longshoreman refused to honor a verbal agreement to settle his personal injury claim against a shipowner, contending that he had subsequently discovered that his injuries were worse than he had believed at the time he agreed to settle.[56] The Fifth Circuit affirmed a judgment enforcing

52. 417 U.S. 106 (1974).

53. Cooper Stevedoring Co. v. Fritz Kopke, Inc., 479 F.2d 1041 (5th Cir. 1973), *cert. granted*, 414 U.S. 1127 (1974).

54. The court granted certiorari in Atlantic Coast Line R.R. v. Erie Lackawanna R. R., 406 U.S. 340 (1972), in order to clarify its decision in *Halcyon*. Subsequently it discovered that the case was "factually indistinguishable from *Halcyon*." Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 113-14 (1974).

55. Legnos v. M/V OLGA JACOB, 498 F.2d 666 (5th Cir. 1974).

56. Strange v. Gulf & South American S.S. Co., 495 F.2d 1235 (5th Cir. 1974).

the settlement agreement. The claimant was represented at all times by competent counsel and the negotiations were conducted at arms-length and in good faith.

Is the invoice value of cargo proper evidence of its fair market value at destination in a cargo damage case? Yes, said the Fifth Circuit, provided there are no market fluctuations which would cause the fair market value of the cargo at the time of arrival at destination to be substantially lower than the invoice value.[57]

A two-masted schooner, damaged in a storm, purposely grounded in the Jacksonville, Florida harbor, and subsequently abandoned by its owner, was the subject of a criminal appeal from a conviction of the owner under the Rivers and Harbors Act.[58] The Fifth Circuit affirmed the conviction, holding that an abandoned sunken vessel is an unauthorized obstruction of a navigable waterway and that there is a duty on the part of the owner to mark the sunken vessel as prescribed by statute.[59] The court declined to pass upon a count charging the owner with failure to remove the wreck in advance of a civil action by the government to establish the owner's liability for the removal costs.[60]

Is a towage contract which requires the barge owner to fully insure his vessel, to name the tug owner and crew as additional insureds, and to furnish a policy which includes a waiver of subrogation in favor of tug owner and crew such an agreement as relieves the tower from responsibility for his own negligence?[61] No, decided the Fifth Circuit.[62] The towage contract still leaves the barge owner free to bring an action against the towboat company for loss of the barge if the underwriters for any reason failed to pay the loss. The contract does not undertake to circumscribe the tower's responsibility for the loss of or damage to the tow.

Orient Mid-East Lines, Inc. v. A Shipment of Rice[63] is an unusual case involving double misfortune by a cargo vessel chartered to transport rice

57. Emmco Ins. Co. v. Wallenius Caribbean Line, S.A., 492 F.2d 508 (5th Cir. 1974). The measure of damages in cargo damage cases is "the difference between the fair market value of the cargo in sound condition at its destination and the fair market value in its damaged state." *Id.* at 514.

58. The prosecution was specifically under 33 U.S.C. §403 (1970), forbidding obstruction of navigable waters and under 33 U.S.C. §409 (1970) requiring the marking and removal of sunken vessels.

59. United States v. Raven, 500 F.2d 728 (5th Cir. 1974).

60. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), held that the owner of a sunken vessel cannot be held personally liable to the Government for removal costs unless the sinking is the result of the intentional or negligent act of the owner. The Supreme Court did not decide whether the negligence of the crew, as distinguished from that of the owner, will be imputed to the owner under these circumstances.

61. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), held that a towboat company could not enforce a towage contract which provided that the towing was to be done "at the sole risk" of the tow.

62. Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974).

63. 496 F.2d 1032 (5th Cir. 1974).

from Mobile, Alabama and Beaumont, Texas to South Vietnam. After completing loading at Beaumont but before completing necessary boiler repairs, the ship was required to vacate its berth to make room for another vessel. The ship was deliberately grounded on the mud bottom of an unused channel to permit completion of the repair work prior to sailing. Refloating the vessel, however, resulted in nearly $9,000 in expenses. This was the first misfortune. The second misfortune occurred en route to Vietnam and proved to be calamitous. An inexperienced teenage fireman lost track of the amount of water in the ship's boiler. A desperate engineer, not knowing whether the boiler was too full or too low on water, guessed wrong and fed cold water into the boiler causing it to overflow and to destroy the turbine blades. The stricken ship was towed first to Panama and then back to Beaumont where its cargo was discharged and later reshipped on another vessel.

The shipowners then sued the cargo interests for contribution in general average in hope of cutting their heavy losses. The Fifth Circuit affirmed the judgment of the trial court denying both claims. The grounding and refloating episode was not a general average situation since it did not involve peril to ship and cargo. Besides, the ship was admittedly in an unseaworthy condition at the time and the expenses were incurred during efforts to make the ship seaworthy.[64]

The destruction of the turbines was the direct result of entrusting the ship's machinery to an incompetent crew member working in conjunction with an inadequately staffed engine department. The ship was therefore unseaworthy due to an inadequate crew.

64. Generally there is no right to contribution in general average where the peril is due to the fault of the party claiming contribution. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 243 (1957). In order to take advantage of those immunities conferred on a shipowner by the Carriage of Goods by Sea Act, most bills of lading contain a "Jason clause" which provides that if the loss is caused by some negligence of the carrier for which he is not responsible by statute, his right to contribution in general average is not affected. Correspondingly, if the carrier *is* responsible for the loss under COGSA, he is not entitled to a general average contribution.