Golden Gate University Law Review

Volume 6
Issue 2 *Ninth Circuit Survey*

Article 7

January 1976

Admiralty

Roger Allen

ADMIRALTY

INTRODUCTION

Although only the Fifth and Second Circuits appear to handle more admiralty cases than the Ninth Circuit,[1] this past term the court did not render any decisions which significantly changed the current law. In the areas of admiralty jurisdiction and damages resulting from collisions, the court found itself primarily responding to recent precedent from the Supreme Court; in the area of harbor injury, the court had to decide the cases under a doctrine which is now largely mooted by amendments to the controlling statute. And in cases which raised issues concerning cargo, salvage, maritime liens and subsidies, the Ninth Circuit followed long-standing precedent and administrative practice.

During the term four cases before the Ninth Circuit dealt with jurisdictional issues and the power of the court to decline to hear a case. In one case the court ruled that the striking of a fishing vessel in navigable waters by a missile negligently released from a Navy jet was a maritime tort which the plaintiff should have prosecuted in admiralty rather than on the law side of federal court.[2] In another case, the court held that an injured harbor worker could sue in admiralty when he was struck on the pier by concrete pilings lowered by a crane attached to a barge.[3] In two cases the court upheld the exercise of the federal courts' wide discretionary power to dismiss admiralty suits between foreigners.[4]

The court also heard six personal injury and wrongful death cases.[5] Each case involved harm to a harbor worker which had

1. Volumes 500 to 526 of the second series of *Federal Reporter* contain 131 cases which discuss admiralty issues. Of these, 52 are Fifth Circuit decisions, 32 are Second Circuit decisions, and 18 are decisions of the Ninth Circuit.

2. T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir. Dec., 1974) (per Kilkenny, J.), *cert. denied*, 421 U.S. 1000 (1975).

3. Huser v. Santa Fe Pomeroy, Inc., 513 F.2d 1298 (9th Cir. Apr., 1975) (per curiam).

4. *See* Philippine Packing Corp. v. Maritime Co. of the Philippines, 519 F.2d 811 (9th Cir. July, 1975) (per curiam); Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber, 513 F.2d 667 (9th Cir. Mar., 1975) (per Jameson, D.J.).

5. *See* Stranahan v. A/S Atlantica & Tinfos Papirfabrik, 521 F.2d 700 (9th Cir. July, 1975) (per curiam); Adams v. Ugland Management Co., 515 F.2d 89 (9th Cir. Apr.,

occurred prior to the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[6] These decisions can thus be regarded as rulings on questions of unseaworthiness and indemnity which can no longer arise under the amended act.

In one of three collision cases the Ninth Circuit applied the new rule on apportionment of damages set forth by the Supreme Court.[7] In the second collision case the court relied upon conflict of law principles in refusing to apply the *Pennsylvania* Rule, which presumes fault in the violator of a safety statute, to a collision occurring in Japanese waters.[8] In the third case the court held that traditional negligence concepts required a compulsory pilot to indemnify the United States as the shipowner for liability it incurred as a result of the pilot's negligence.[9]

The court also heard five other cases. In two cases involving the Carriage of Goods by Sea Act,[10] the court estopped a carrier of bulk goods from impeaching its bill of lading[11] and held a shipowner liable for fire damage to cargo.[12] In a third case the court held that a ship chandler's lien was barred by the equitable doctrine of laches.[13] In a fourth case the court held that government

1975) (per Merrill, J.); Griffin v. United States, 513 F.2d 1321 (9th Cir. Apr., 1975) (per curiam); United States v. San Francisco Elevator Co., 512 F.2d 23 (9th Cir. Feb. 1975) (per Van Oosterhout, J.); Ryan v. Pacific Coast Shipping Co., Liberia, 509 F.2d 1054 (9th Cir. Jan., 1975) (per Lumbard, J.); Dillingham Corp. v. Massey, 505 F.2d 1126 (9th Cir. Oct., 1974) (per curiam). In *Dillingham*, which is not discussed below, the court affirmed a worker's compensation award which was made by the deputy commissioner under the LHWCA, stating that since the worker's pre-existing injury was not manifested to the employer at the time of employment, the award should not be pro-rated as a "previous disability" between the employer and the Second Injury Fund, which is provided by the government.

6. 33 U.S.C. §§ 901-50 (Supp. II, 1972).

7. *See* Crown Zellerbach Corp. v. Willamette-Western Corp., 519 F.2d 1327 (9th Cir. July, 1975) (per Ely, J.). In United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975), the Supreme Court struck down the century old rule which required each party involved in a collision to bear an equal amount of loss whenever both parties were found at fault, and held that damages will be assessed on the basis of comparative negligence.

8. *See* Ishizaki Kisen Co. v. United States, 510 F.2d 875 (9th Cir. Feb., 1975) (per Sneed, J.).

9. United States v. Joyce, 511 F.2d 1127 (9th Cir. Feb., 1975) (per Wallace, J.).

10. 46 U.S.C. §§ 1300-15 (1970).

11. *See* Portland Fish Co. v. States S.S. Co., 510 F.2d 628 (9th Cir. Sept., 1974) (per Koelsch, J.).

12. *See In re* Liberty Shipping Corp., 509 F.2d 1249 (9th Cir. Jan., 1975) (per Merrill, J.).

13. *See* Tagaropulos, S.A. v. S.S. Santa Paula, 502 F.2d 1171 (9th Cir. Sept., 1974) (per Ely, J.).

subsidized carriers of certain cargo, which by law foreign carriers could not carry, did not have an unfair and illegal advantage over unsubsidized domestic carriers in the bidding for the carriage of such cargo.[14] Finally, the court in a divided opinion upheld the propriety of a salvage award.[15]

I. JURISDICTION

Traditionally, admiralty jurisdiction has existed over all torts to person and property occurring in navigable waters and all contracts which relate to the navigation, business and commerce of the sea, and with some significant exceptions, a vessel is as subject to liability through in rem proceedings as the vessel's owner is through in personam proceedings.[16] When accidents in navigable waters involve commercial or public vessels, admiralty jurisdiction is readily available. With the advent of air travel in the twentieth century, however, federal courts were faced with deciding whether suits arising from airplane crashes in navigable waters properly belonged in admiralty.

A. JURISDICTION OVER TORTS

In *Executive Jet Co., Inc. v. City of Cleveland*,[17] the Supreme Court responded to a confusion which had resulted from the lower courts' development of two diverging theories for finding admiralty jurisdiction over torts. One theory conferred jurisdiction over every harm occurring in navigable waters (the strict locality test); the second theory required, in addition to satisfaction of the strict locality test, that the harm bear some significant relationship to traditional maritime activity (the maritime connection test). The Supreme Court opted for the maritime connection test in *Executive Jet*.[18] In *Executive Jet* a jetliner had crashed into

14. *See* Columbia S.S. Co., Inc. v. American Mail Line, Ltd., 510 F.2d 29 (9th Cir. Jan., 1975) (per Sneed, J.).

15. *See* Saint Paul Marine Transp. Corp. v. Cerro Sales Corp., 505 F.2d 1115 (9th Cir. Sept., 1974) (per Williams, D.J.). Since this case involves the upholding of certain factual findings and does not deal with legal issues, it is not discussed in the text of this article.

16. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 18-37 (2d ed. 1975).

17. 409 U.S. 249 (1972).

18. *Id.* at 261. *Exeucutive Jet* contains a complete discussion of this history of the maritime connection and strict locality tests. *Id.* at 253-61. For detailed analyses of the Court's opinion see Bell, *Admiralty Jurisdiction in the Wake of Executive Jet*, 15 ARIZ. L. REV. 67 (1973); Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet*, 1974 DUKE L.J. 757; *Admiralty, 1975 Fifth Circuit Survey*, 6 TEX. TECH. L. REV. 403, 406-09 (1975); Note, *Hops, Skips and Jumps into Admiralty Revisited*, 39 J. AIR L. & COM. 625 (1973); 47 TUL. L. REV. 1143 (1973).

Lake Erie after ingesting seagulls into its engines following take-off. In affirming the trial court's dismissal of the suit, the Supreme Court noted a growing recognition among federal courts of the maritime connection test and observed that this test produced more sensible results than a purely mechanical application of the strict locality test.[19] The Court stated that unless the harm bore a significant relationship to traditional maritime activity, suits arising from airplane accidents could not be heard in admiralty in the absence of contrary legislation. The fact that the accident occurred over navigable waters was insufficient by itself to establish the necessary relationship.[20]

In *T. J. Falgout Boats, Inc. v. United States*,[21] the Ninth Circuit applied the maritime connection test to a situation where the plaintiff's fishing vessel was struck by a missile which had been negligently released from a Navy jet. The plaintiff, relying on *Executive Jet*, filed its action under the Federal Tort Claims Act.[22] Both parties agreed on the facts, the extent of damage suffered by the plaintiff's vessel and, if jurisdiction were good, that the plaintiff should recover. The *Falgout* court affirmed the holding that plaintiff's exclusive remedy lay under the Suits in Admiralty Act,[23] and that the plaintiff was barred by that Act's statute of limitations.[24]

---

19. 409 U.S. at 261.

20. *Id.* at 268. The federal courts have not uniformly implemented the rule of *Executive Jet*. Some courts have interpreted it to apply only to aircraft accidents, and have continued to apply the locality rule to all other cases. *See, e.g.*, Earles v. Union Barge Line Corp., 486 F.2d 1097 (3d Cir. 1973); Maryland v. Amerada Hess Corp., 356 F. Supp. 975 (D. Md. 1973). Other courts have read *Executive Jet* to require a finding of both a locality and a maritime nexus in all cases for admiralty jurisdiction to arise. *See, e.g.*, Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973).

Since *Executive Jet*, district courts have found admiralty jurisdiction to exist over personal injuries arising out of aircraft crashes into the sea. *See* Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D.V.I. 1973) (holding that a seaplane crash was a maritime tort, at least when the plane had not completed its take-off and been brought under control as an airborne vehicle); Hammill v. Olympic Airways, S.A., 398 F. Supp. 829 (D.D.C. 1975) (holding that an airplane crossing the sea from a Greek island to Athens was exercising the function traditionally performed by seagoing vessels, and thus the plaintiff had satisfied the *Executive Jet* test).

21. 508 F.2d 855 (9th Cir. Dec., 1974) (per Kilkenny, J.), *cert. denied*, 421 U.S. 1000 (1975).

22. 28 U.S.C. § 1346(b) (1970).

23. 46 U.S.C. §§ 741-52 (1970). This act authorizes suits against the federal government for maritime torts committed by its vessels.

24. 508 F.2d at 856. By choosing the incorrect statute under which to bring suit, the plaintiff in *Falgout* was denied a recovery which all parties conceded it deserved. The

In ruling that the tort was maritime in nature the court adopted the criteria which the Fifth Circuit has established for construing *Executive Jet*.[25] The criteria to be considered are: (1) the types of vehicles and instrumentalities involved; (2) the functions and roles of the parties; (3) the causation and the type of injury; and (4) traditional concepts of maritime law.[26] Weighing these factors the *Falgout* court emphasized that the naval aircraft by its nature is maritime because it serves primarily to support the Navy's sea operations, and therefore the plaintiff should have filed suit in admiralty.[27]

In *Huser v. Santa Fe Pomeroy, Inc.*,[28] the second case turning on a jurisdictional issue, the court upheld admiralty jurisdiction where a harbor worker was injured on the dock. The court relied on the Supreme Court case of *Gutierrez v. Waterman S.S. Corp.*,[29] which involved a dockside injury during the unloading of a vessel. The *Huser* court distinguished *Victory Carriers, Inc. v. Law*,[30] in which the Supreme Court found that jurisdiction was lacking; plaintiff's injuries in *Victory Carriers* were caused exclusively by pierside equipment. The plaintiff in *Huser* was injured by an appurtenance of the vessel being unloaded, a crane affixed to the barge carrying the cargo. The essence of the *Huser* decision has been incorporated into the LHWCA by the 1972 amendments,[31] which extend the Act's coverage to all pierside injuries to harbor workers.

Federal Tort Claims Act has a three-year statute of limitations and the Suits in Admiralty Act has a two-year statute of limitations.

25. *See* Kelly v. Smith, 485 F.2d 520, 525 (5th Cir.), *cert. denied*, 416 U.S. 969 (1973). In *Kelly*, the court upheld admiralty jurisdiction over a suit by two deer poachers who were struck by rifle fire when fleeing a hunting preserve in a small boat in the Mississippi River. The court ruled that the rifle fire presented sufficient danger to maritime commerce to make it appropriate for the federal courts to assume admiralty jurisdiction.

In *In re* Motor Ship Pacific Carrier, 489 F.2d 152 (5th Cir. 1974), the court held that the *Executive Jet* test was satisfied when a vessel was blinded by smoke from a shoreside factory, thereby causing it to collide with a bridge.

26. 508 F.2d at 857.

27. The court also noted that the release of the missile created a potential hazard to navigation and that the discharge of an explosive projectile at sea was a maritime activity. *Id.*

Before concluding that naval aircraft is by nature maritime, the court looked to 10 U.S.C § 5012 (1970), which outlines the composition and functions of the Navy, and states that the principal function of the Navy—which includes naval aviation—is the "prompt and sustained combat incident to operations at sea." *Id.*

28. 513 F.2d 1298 (9th Cir. Apr., 1975) (per curiam).

29. 373 U.S. 206 (1963).

30. 404 U.S. 202 (1971).

31. Although the *Huser* opinion does not clearly state the basis for plaintiff's action, the court's observation that plaintiff's negligence justified a decrease in the award to

B. Forum Non Conveniens

Federal courts sitting in admiralty have wide discretion to refuse to exercise jurisdiction over suits between foreigners.[32] In two cases before the Ninth Circuit during this past term, the court affirmed the district courts' exercise of this discretion. Both *Paper Operations Consultants v. S.S. Hong Kong Amber*[33] and *Philippine Packing Corp. v. Maritime Co. of the Philippines*[34] involved suits by foreign shippers against foreign carriers for damage to cargo. In both cases the Ninth Circuit affirmed dismissals of the actions conditioned on the defendants' submission to the jurisdiction of a foreign court. Since all parties were foreigners who could have brought the action in a foreign court, *Paper Operations* found that the federal venue statute[35] was inapplicable. Instead, the court found the doctrine set forth by the Supreme Court in *Canada Malting Co. v. Paterson Steamships Ltd.*[36] to be controlling—*i.e.*, in a suit between foreigners a district court has wide discretion to refuse to exercise jurisdiction and will only be reversed for an abuse of discretion.[37]

The *Paper Operations* court stated that the grounds for dismissal of a case between foreigners are extreme prejudice and a hardship to the defendant which is out of proportion to the plaintiff's convenience, or a showing that the chosen forum is inappropriate due to the court's own administrative problems.[38] In both cases the court emphasized the fact that the bulk of the witnesses and documentation were located abroad.[39] In *Paper Operations*, the dismissal was affirmed because the court found that the dearth of contact with the United States would unduly burden the federal court's adjudication of the matter.[40] In *Philippine Packing* the court affirmed the dismissal because the plaintiff could not

---

him suggests that plaintiff was suing for negligence rather than unseaworthiness. The LHWCA as amended precludes the virtual strict liability action of unseaworthiness; however, the action for negligence—available before the amendments—has been preserved. *See* notes 42-48 *infra* and accompanying text.

32. *See* Comment, *Admiralty Suits Involving Foreigners*, 31 Tex. L. Rev. 889 (1953).

33. 513 F.2d 667 (9th Cir. Mar., 1975) (per Jameson, D.J.).

34. 519 F.2d 811 (9th Cir. July, 1975) (per curiam).

35. 28 U.S.C. § 1404 (1970) provides for the transfer of a civil action to another district court for the "convenience of the parties" or in the "interests of justice."

36. 285 U.S. 413 (1932).

37. *Id.* at 418.

38. 513 F.2d at 670.

39. *See id.* at 672; 519 F.2d at 812-23.

40. 513 F.2d at 671-72.

show hardship to its witnesses by the hearing of the case in Japan.[41]

II. PERSONAL INJURY

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[42] thereby making two substantial changes on personal injury law in admiralty. First, the amendments significantly increased the benefits available to injured harbor workers, and second, they eliminated the strict liability unseaworthiness action which workers had against vessels along with the consequential indemnity action which vessels had against the workers' employers. The amendments retained the negligence action which was permitted to harbor workers against the vessels. Also, the amendments notably expanded the Act's coverage from injuries aboard ship and on a drydock to include those sustained on "any adjoining pier, wharf, . . . terminal, building, way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[43] The legislation did retain the original provision declaring that the worker's sole remedy against the employer lay under the Act.

According to one leading treatise on admiralty law, Congress' purpose in enacting the amendments was to overturn a series of Supreme Court decisions which had permitted the unseaworthiness and indemnity actions mentioned above.[44] The strict liability unseaworthiness action was formulated in 1946 in *Seas Shipping Co. v. Sieracki*[45] to accord longshoremen the same protection seamen had traditionally enjoyed. The Supreme Court developed the indemnity action in 1956 in *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*[46] to enable shipowners who had been found liable under *Sieracki* to recover from the workers' employers if the employers could be shown to be in some degree responsible for

41. 519 F.2d at 813.

42. 33 U.S.C. §§ 901-50 (Supp. II, 1972).

43. *Id.* § 903(a).

44. *See* G. GILMORE & C. BLACK, *supra* note 16, at 409. For a discussion of the history of the allocation of liability among shipowners, harbor workers and their employers see 1A BENEDICT ON ADMIRALTY §§ 1-14 (7th ed. rev. 1975); G. GILMORE & C. BLACK, *supra* note 16, at 408-55; Proudfoot, *"The Tar Baby": Maritime Personal Injury Indemnity Actions*, 20 STAN. L. REV. 423 (1968); Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954).

45. 328 U.S. 85 (1946).

46. 350 U.S. 124 (1956).

the injuries. The employers' liability under *Ryan* was based on a warranty of workmanlike service which the Supreme Court found to be implicit in the employers' contracts with the shipowners.[47] With implementation of the *Sieracki-Ryan* doctrine, employers complained that they were paying the premiums on compensation insurance for the benefit of employees, but at the same time they were not being insulated from suit by their employees (which is normally provided by compensation acts). Thus, it was within this context that Congress enacted the 1972 amendments.

Although district courts have been readjusting the liability for harbor workers' injuries among vessels, workers and employers in light of the 1972 amendments, courts of appeals must decide these cases under the *Sieracki-Ryan* doctrine whenever the injury arose before enactment of the amendments. Since all of the harbor injury cases before the Ninth Circuit during the survey period involved injuries occurring before the effective date of the amendments, they were decided under the pre-amendment law.[48]

A. Unseaworthiness

In *Ryan v. Pacific Coast Shipping Co., Liberia*,[49] the Ninth Circuit considered the distinction between negligence and vessel unseaworthiness in determining what caused a longshoreman's injuries. The plaintiff was injured when a crane operator who was discharging a bundle of steel pipes into a railroad car on which the plaintiff was standing swung the bundle so that it struck the car's side. Following the "operational negligence" theory of the Su-

47. *Id.* at 133-34.

48. Two circuits have explicitly stated that the amendments do not apply retroactively. *See* Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041 (1st Cir. 1974); Eskine v. United Barge Co., 484 F.2d 1194 (5th Cir. 1973).

In two cases decided after the survey period, the Ninth Circuit considered the effect of the 1972 amendments on injuries received after their enactment. Dodge v. Mitsui Shintaku Ginko Tokyo, 528 F.2d 669 (9th Cir. 1975); Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975). In both cases the trial court had found that the shipowners and the employers were concurrently negligent. The Ninth Circuit refused to decrease the amount of the workers' awards against the shipowners in negligence actions pursuant to 33 U.S.C. § 905(a)(b) (Supp. II, 1972) of the amended act, or to enforce the contribution claims by the shipowners against the stevedore-employers. 528 F.2d at 673; 528 F.2d at 680-81. In *Dodge* the court permitted the employer to recover from the shipowner the compensation and medical benefits which the employer had paid to the worker. 528 F.2d at 681.

49. 509 F.2d 1054 (9th Cir. Jan., 1975) (per Lumbard, J.).

preme Court in *Usner v. Luckenbach Overseas Corp.*,[50] the *Pacific Coast* court ruled that the injury resulted from a single negligent act and not from an unseaworthy condition of the vessel, thus reversing the lower court award to the plaintiff based on unseaworthiness.[51] The *Usner* theory is applied whenever an injury is the immediate and direct consequence of a negligent act and when it could not have resulted from an improper work method, defective equipment or personnel, or other continuing inadequacy rising to the level of a "condition;" operational negligence, therefore, does not constitute a breach of the owner's warranty of seaworthiness.[52]

In a vigorous dissent Judge Koelsch argued that the trial judge had properly distinguished operational negligence from unseaworthiness. The trial court's finding that the crane operator's act constituted unseaworthiness in the form of an improper loading technique, rather than personal negligence, should not be disturbed on appeal. Judge Koelsch felt that matters which deal with motive are better left to trial judges because such matters frequently elude easy perception in the cold records which are before an appellate court.[53]

---

50. 400 U.S. 494 (1970).

51. 509 F.2d at 1056. In the first trial, judgment was entered for plaintiff Ryan and affirmed by the Ninth Circuit. Ryan v. Pacific Coast Shipping Co., Liberia, 448 F.2d 525 (9th Cir. 1971). The Supreme Court vacated this judgment, 404 U.S. 1035 (1972), and remanded the case to the Ninth Circuit for reconsideration in light of Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1970), and Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971). The Ninth Circuit directed the district court to re-try the case; this was done and the district court entered virtually the same judgment. The Ninth Circuit reversed. 509 F.2d at 1055.

52. 400 U.S. at 494, 499-500. The plaintiff longshoreman in *Usner* was injured during loading operations when a crane operator lowered the "fall" of a winch too far and too fast, causing it to strike the plaintiff. *Id.* at 494-96.

The Ninth Circuit noted that its opinion was appropriate as a matter of policy because it comported with the 1972 LHWCA amendments which eliminated unseaworthiness claims such as those asserted in *Pacific Coast*. 509 F.2d at 1057. Apparently, the plaintiff's counsel did not advance the argument that the stevedore-employer was negligent in supervising its crane operator, thus rendering the vessel unseaworthy. A similar argument was successful in a contractually based indemnity suit. *See* Griffin v. United States, 513 F.2d 1321 (9th Cir. Apr., 1975), which is discussed at text accompanying notes 54-57 *infra*.

53. 509 F.2d at 1057-58. In a second case raising the issue of unseaworthiness, the Ninth Circuit affirmed the dismissal of a wrongful death action. Adams v. Ugland Management Co., 515 F.2d 89 (9th Cir. Apr., 1975) (per Merrill, J.). The *Adams* court attributed decedent's death to his isolated act of personal negligence in attempting to free a snagged line by climbing down the side of the dock; the court felt that the decedent should have utilized the ship's available equipment to winch the line back. *Id.* at 90.

B. INDEMNITY

In *Griffin v. United States*,[54] the Ninth Circuit interpreted the indemnity provisions of a contract between the government, as shipowner, and Matson Terminals, Inc., as the employer of the injured longshoreman. The court affirmed the shipowner's indemnity claim against the employer. The employee was injured when he was struck in the eye by an unidentified falling object as he was emerging from the hold of a naval vessel.[55]

The indemnity provisions in the contract established two conditions for Matson to be held liable: (1) a Matson employee must have been found negligent; and (2) the unseaworthiness of the ship must have been discoverable or the injury otherwise avoidable through the exercise of due diligence by Matson. The *Griffin* court found that both conditions were satisfied. The accumulation of debris on the ladder above the employee amounted to unseaworthiness, and the negligence of a co-worker caused the debris to strike the employee in the eye. The court relied on an earlier Ninth Circuit case for the proposition that the dock workers' failure to exercise adequate care for their own safety could give rise to a breach of their employers' implied warranty of workmanlike service in favor of the shipowner.[56] Here the dock worker's negligence was failing to watch out for debris on the ladder, precisely the condition of unseaworthiness which the employer should have discovered. The court felt that if Matson had exercised due diligence in supervising its employee, whose foot dislodged the debris, the accident would not have occurred.[57]

In *United States v. San Francisco Elevator Co.*,[58] the court considered whether the indemnity provisions of the prime or subcon-

54. 513 F.2d 1321 (9th Cir. Apr., 1975) (per curiam).

55. *Id.* at 1322. The district court had originally dismissed Griffin's unseaworthiness claim against the United States as shipowner. The Ninth Circuit reversed, holding that the vessel was unseaworthy and that Griffin was entitled to recovery; the court remanded for a computation of damages and a resolution of the government's indemnity claim against Matson, the stevedoring company. Griffin v. United States, 469 F.2d 671, 672 (9th Cir. 1972).

56. 513 F.2d at 1322-23. The *Griffin* court relied on Arista Cia. DeVapores, S.A. v. Howard Terminal, 372 F.2d 152 (9th Cir. 1967), which stated that the employer's warranty included the duty to provide employees who would work safely. The *Arista* court ruled that the failure of dock workers to safely perform their duties constitutes a breach of the stevedore's warranty rendering the stevedoring company liable for all harm to the shipowner resulting from the breach. "This is true whether the negligence of the longshoreman injures only himself or others." *Id.* at 154.

57. 513 F.2d at 1323.

58. 512 F.2d 23 (9th Cir. Feb., 1975) (per Van Oosterhout, J.).

tract in question limited the indemnity rights of a vessel owner against a subcontractor which had breached its implied warranty of workmanlike service. The prime contract had limited the prime contractor's duty to indemnify the government to $300,000 per accident; the subcontract required the subcontractor to indemnify the prime contractor for any liability it incurred as a result of the subcontractor's failure to perform in accordance with the contract.[59] The court held that the subcontractor was liable to the vessel owner for the full amount of the judgment which the latter had to pay in a wrongful death action based on unseaworthiness of the vessel.[60]

Even though the *Ryan* warranty of workmanlike service running from contractors to shipowners was contractual in origin, the *San Francisco Elevator* court found that the obligation to indemnify did not depend on privity of contract between them. The subcontractor in the instant case owed the shipowner an independent duty to perform in a workmanlike manner by virtue of its undertaking to repair an appliance of the ship. The court stated that the warranty owed was plainly for the benefit of the vessel, whether or not the vessel's owner was a party to the contract. The court expressly rejected the subcontractor's argument that the only indemnity rights the vessel owner has arise from its position as a third-party beneficiary of the subcontract, and the companion argument that the subcontractor is the third-party beneficiary to the prime contract.[61] Also, the court declared that the district court's finding that the government was concurrently negligent would not preclude the indemnity award unless the government's negligence interfered with the performance of the subcontractor.[62]

In *Stranahan v. A/S Atlantica & Tinfos Papirfabrik*,[63] the court refused to extend the coverage of the *Ryan* warranty to a time-charterer seeking to recover its litigation costs from a stevedoring company, when the time-charterer assumed no operational control of the vessel. In an earlier unseaworthiness action the plaintiff, an employee of the time-charterer, had prevailed against the

59. *Id.* at 25. The district court had assessed damages against the government at $370,000, but limited its recovery from the sub-contractor to the $300,000 figure in the prime contract.

60. *Id.* at 28.

61. *Id.*

62. *Id.* at 27.

63. 521 F.2d 700 (9th Cir. July, 1975) (per curiam).

vessel owner who had impleaded the time-charterer and the stevedoring company under the *Ryan* doctrine. The district court in the earlier action required the time-charterer to indemnify the vessel owner. The Ninth Circuit reversed, holding that the stevedoring company should reimburse the owner, thus absolving the time-charterer.[64] Subsequently, Weyerhaeuser Co., the time-charterer, filed a motion in district court seeking indemnification from the stevedoring company for costs and attorneys' fees it incurred in successfully defending the earlier action.[65]

The *Stranahan* court declined to accept Weyerhaeuser's contention that it was the third-party beneficiary of the stevedoring company's *Ryan* warranty running to the vessel. The court stated that the *Ryan* warranty of workmanlike service was developed to mitigate the severity of the shipowner's duty announced by the *Sieracki* court to provide harbor workers with a seaworthy vessel.[66] The *Stranahan* court found that this policy reason was absent in the instant case, since Weyerhaeuser had assumed no operational control and thus had no duty to provide a seaworthy vessel. Therefore, no right to indemnification could exist.[67]

III. COLLISION

Two rules of law which are important to the adjudication of collision cases commanded the court's attention during the survey period. Each has been a part of admiralty law for more than a century. One—the *Pennsylvania* Rule—was devised by the Supreme Court in 1874 to impress upon mariners the need to obey navigational rules designed to promote safety.[68] The Rule states

64. Stranahan v. A/S Atlantica & Tinfos Papirfabrik, 471 F.2d 369 (9th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

65. 521 F.2d at 702. The court noted that the district court could properly have refused to entertain the time-charterer's motion because the company had not evidenced any interest in its indemnity claim against the stevedoring company until it filed its motion. Nevertheless, the court chose to rule on the merits.

66. *Id.* at 702-03. In support of its argument that the *Ryan* warranty is for the benefit of the vessel, the court cited Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1958).

67. 521 F.2d at 702-03. In so ruling, the court followed a Fifth Circuit decision holding that a time-charterer not in operational control made no *Ryan* warranty to a shipowner. D/S Ove Skou v. Hebert, 365 F.2d 341 (5th Cir. 1966), *cert. denied*, 400 U.S. 902 (1970). Furthermore, the court declared that the Supreme Court, in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), has restated the general policy that absent a statute or enforceable contract courts are not allowed to award attorneys' fees as an item of costs.

68. *See* The Pennsylvania, 86 U.S. (19 Wall.) 125 (1874). For a discussion of the history of the Rule's application see Comment, *The Pennsylvania Rule: Charting a New*

that a vessel which is involved in a collision while simultaneously violating a statute designed to prevent collisions must demonstrate to the court that its violation could not have been a contributing cause of the mishap. Thus, the Rule, in effect, is a presumption of fault which is extremely difficult to rebut.

The rule of divided damages was the second rule before the court. This rule directs that when the fault of both vessels causes a collision, each vessel shall bear one half of the loss. The result is that the less damaged vessel must pay the other vessel one half of the difference between the dollar loss suffered by each.[69] The rule has been criticized by commentators as producing extremely unfair results, particularly where one vessel is much more negligent and suffers greater damage than the other vessel.[70]

Responding to this growing criticism, the Supreme Court, in *United States v. Reliable Transfer Co., Inc.*,[71] abrogated the rule during the survey period and replaced it with a rule that apportions liability according to the fault of the respective parties. In reversing the judgment which had divided damages, the Supreme Court reviewed the history of the rule and declared that the system of proportional fault would produce greater fairness, align the United States with the vast majority of maritime nations, and be more likely to induce care than would the rule of divided damages.[72]

A. DAMAGES

In *Crown Zellerbach Corp. v. Willamette-Western Corp.*,[73] the

Course for an Ancient Mariner, 54 BOSTON U.L. REV. 78 (1974) [hereinafter cited as *The Pennsylvania Rule* Comment].

69. Although ancient in origin, an early United States expression of the rule arose from the Supreme Court in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855). For a discussion of its origins see 4 R. MARSDEN, BRITISH SHIPPING LAWS, COLLISIONS AT SEA 119 (11th ed. 1961); Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

70. *See* J. DONOVAN & L. RAY, *Mutual Fault–Half-Damage Rule–A Critical Analysis*, 41 INS. COUN. J. 395 (1974); Allbritton, *Division of Damages in Admiralty–A Rising Tide of Confusion*, 2 J. MAR. L. & COM. 323 (1971); Jackson, *The Archaic Rule of Dividing Damages in Marine Collisions*, 19 ALA. L. REV. 263 (1967). Professor Gilmore had called for replacement of the rule with the more "civilized" rule of comparative negligence. *See* G. GILMORE & C. BLACK, *supra* note 16, at 528-31.

71. 421 U.S. 397 (1975).

72. *Id.* at 401-05. The Court noted that the rule's unfairness is magnified when used in conjunction with the *Pennsylvania* Rule, since a vessel guilty of a minor statutory violation would be forced to divide damages with one whose fault was egregious. The Court also noted that every other maritime nation has employed comparative negligence in collision litigation with little administrative difficulty. *Id.* at 405-07.

73. 519 F.2d 1327 (9th Cir. July, 1975) (per Ely, J.).

Ninth Circuit affirmed a district court decision which had apportioned damages according to the fault of the parties in a collision between a vessel and an electric power line.[74] Notwithstanding the fact that the Supreme Court's decision in *Reliable Transfer* was rendered after the lower court decision in *Crown Zellerbach*, the court rejected the defendant's contention that the trial court had erred in not dividing damages.[75]

The *Crown Zellerbach* court also faced the question of whether the trial court erroneously refused to apply the *Pennsylvania* Rule to the plaintiff's statutory violation; the plaintiff had allowed its power line to sag below the minimum authorized height. The court stated that the *Pennsylvania* Rule concerned only the question of whether an alleged statutory violation was a proximate cause of the collision. The Rule does not serve to exonerate other parties whose negligence might also have caused the collision. Since the trial court found that the plaintiff as well as the defendants were at fault, the latter were not prejudiced by the court's alleged non-application of the *Pennsylvania* Rule.[76]

B. Liability

In *Ishizaki Kisen Co. v. United States*,[77] the Ninth Circuit applied conflict of law principles to decide that neither the *Pennsylvania* Rule nor the divided damages rule were controlling

74. The two defendants in *Crown Zellerbach* were each found 40 percent at fault when a raised boom of their flotilla struck and severed plaintiff's power line suspended across a side channel of the Columbia River. The trial court ruled that plaintiff was 20 percent at fault because its power line had sagged to a level lower than that required by the Corps of Engineers permit, which authorized the hanging of the line.

75. *Id.* at 1328-29. Neither *Reliable Transfer* nor *Crown Zellerbach* address the question of whether the new rule should have retroactive effect. That the Ninth Circuit permitted plaintiff in *Crown Zellerbach* to benefit from the new rule indicates that the rule is applicable to cases in the appellate process on the date of decision in *Reliable Transfer*.

A district court in Oregon has held that *Reliable Transfer* requires the decrease of a plaintiff's negligence award against a shipowner by the proportion of plaintiff's fault when the harm occurred prior to the decision in *Reliable Transfer*. *See* Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224, 1233 (D. Ore. 1975).

The Third Circuit has held that *Reliable Transfer* requires a proportional allocation of joint tortfeasor contribution liability between a shipowner and owner *pro hac vice*, if both should be held liable to the plaintiff on remand, when the injury occurred prior to the decision in *Reliable Transfer*. *See* Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31, 44 (3d Cir. 1975). A district court in the Fifth Circuit has also applied *Reliable Transfer* to collision and personal injury cases when the casualties occurred in 1972. *See* Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 398 F. Supp. 1094, 1106 (E.D. La. 1975); Guidry v. LeBeouf Bros. Towing Co., Inc., 398 F. Supp. 952, 960 (E.D. La. 1975).

76. 519 F.2d at 1329.

77. 510 F.2d 875 (9th Cir. Feb., 1975) (per Sneed, J.).

with respect to a collision that occurred in Japanese waters. The court affirmed the district court decision which had applied Japanese substantive law. The *Ishizaki* court concluded that Japanese law has abolished legal presumptions of fault with respect to collision litigation, thereby precluding application of the *Pennsylvania* Rule,[78] and that it apportions the fault and liability between the respective parties, thereby precluding application of the divided damages rule.[79]

The plaintiff sued the United States for damages received by its hydrofoil vessel, the *Kinsei-Go*, in a collision with a United States Army cargo and personnel carrier in the harbor at Kure, Japan. The United States vessel had violated a local safety statute by not flying its international call sign as it plied the waters of the harbor.[80] The trial court found specifically that the failure of the United States vessel to fly her international call sign did not contribute in any way to the collision.[81] The lower court then allocated fault and liability: 75 percent to the *Kinsei-Go* and 25 percent to the carrier.

In considering whether to apply the *Pennsylvania* Rule, the Ninth Circuit declared that Japanese substantive law would control because the collision occurred in Japanese waters. Long-established conflict principles support this assertion.[82] The *Ishizaki* court then concluded that since Japan is a signatory to the International Convention with Respect to Collisions of 1910, and since the Convention abolishes "legal presumptions of fault," the

78. *Id.* at 882-83.

79. *Id.* at 878-79. At the time of the Ninth Circuit's decision in *Ishizaki*, substantive law in the United States still required a division of damages in collisions involving mutual fault. The Supreme Court's abrogation of this rule occurred three months after the *Ishizaki* decision.

80. *Id.* Japan, the United States and most other maritime nations are signatories of the International Convention on Safety of Life at Sea, 1948, which has been enacted by Congress as the International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 1051-94 (1970). Rule 19 (33 U.S.C. § 1081 (1970)), applicable to the *Ishizaki* case, requires that when two power vessels are crossing on a collision course the vessel which has the other on its starboard side shall give way. Japanese Port Regulation 18-1 modifies Rule 19 by requiring "miscellaneous vessels"—defined as "launches, lighters, small boats and all craft propelled wholly or primarily by oar"—to give way to all others. Article 30.1 of the Japanese Port Regulations law requires all non-miscellaneous vessels to fly their international call sign when in transit in a Japanese harbor. 510 F.2d at 878 nn.2-4.

81. 510 F.2d at 878-79.

82. *See* Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914). *See also* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

Convention abolishes any Japanese version of the *Pennsylvania* Rule which may have existed.[83]

The court suggested that the *Pennsylvania* Rule could apply to this collision on two independent bases notwithstanding the location of the collision. The first ground would involve a finding that the interests of the forum outweigh those of the place of the collision, thus requiring application of the forum's substantive law. The second ground would exist if the *Pennsylvania* Rule is found to be a part of the procedural law of the forum.

In considering whether the *Pennsylvania* Rule should be applied because the interests of the forum outweigh the interests of Japan, the court first examined the principal purposes for the Rule and found that there were two such purposes. The first is to enforce obedience to the mandate of safety statutes. Although the *Ishizaki* court suggested that application of the Rule to this case would promote this purpose, the court rejected its application because there was no showing that Japanese maritime law ever contained a rule similar to the *Pennsylvania* Rule. The court stated that the second purpose of the Rule is to simplify adjudication of collision cases which divide damages equally when both parties are at fault. The court declared that the *Pennsylvania* Rule would complicate adjudication of collision cases in proportional fault jurisdictions, because the difficulty of assigning relative weights to fault arising from a statutory violation and to nonstatutory fault could lead to arbitrary, unjust results.[84]

---

83. 510 F.2d at 882-83.

84. *Id.* at 880. Although the *Kinsei-Go* violated Rule 19 and the carrier violated Article 30.1, *see* note 80 *supra*, the court did not deal with the question of the effect of the *Pennsylvania* Rule in a collision suit where both parties have violated safety statutes. For a collection of such cases see *The Pennsylvania Rule* Comment, *supra* note 68, at 83-84. In such a situation the *Pennsylvania* Rule might compel the very division of damages which *Reliable Transfer* has ruled archaic and counter-productive, because probably neither party could discharge its burden under the Rule. Alternatively, a trial court might rule that with both parties in violation of safety statutes the burdens under the rule cancel each other out. With neither alternative does the Rule serve to aid the court. If the impact of the Rule was reduced to that of a rebuttable presumption it might be applied to a proportional fault jurisdiction without the pernicious results described above.

The court seems to suggest that the *Pennsylvania* Rule and the rule of divided damages are harmonious. Certainly, when used together, the *Pennsylvania* Rule facilitates an order for divided damages; however, the Supreme Court criticized this result in *Reliable Transfer*. *See* 421 U.S. at 405-07. Since the Ninth Circuit found the Rule troublesome when used in a proportional fault context and the Supreme Court found it unduly harsh when used in connection with divided damages, one can only hope that the Supreme Court will soon rule on the wisdom of having the Rule at all.

The Ninth Circuit also refused to apply the Rule as a part of the procedural law of the forum. If the Rule was designed merely to shift to the statute violator the burden of going forward with the evidence, then it would be procedural and applicable in the instant case. But the Rule shifts the burden to the violator in such a way as to require it to show beyond all doubt that the violation could not have caused the collision. Thus, the Rule has the effect of disposing of crucial issues of causation and liability. The court decided that since the effect is so severe, it is "more akin to substantive law than to rules of procedure concerned primarily with judicial administration."[85]

C. INDEMNITY

In *United States v. Joyce*,[86] the court considered the indemnity rights of the government as a vessel owner against a compulsory pilot.[87] The court affirmed a decision requiring the defendant pilot to indemnify the government for damages it was required to pay in a separate suit as a result of a collision between a government vessel and a tugboat.[88] The court applied traditional negligence concepts in holding that the compulsory pilot was liable. Relying on an earlier Ninth Circuit case, the *Joyce* court declared that while such pilots owed no contractually based duty to the piloted vessel, they nonetheless owed a tort duty of care to the vessel's owner,[89] thereby rejecting the pilot's argument that the trial court had erroneously applied the *Ryan* warranty doctrine

85. 510 F.2d at 880-81. At trial and on appeal both parties framed the issue as whether Article 6 of the 1910 collision convention, declaring presumptions of fault invalid, superseded a Japanese version of the *Pennsylvania* Rule. Since neither party could demonstrate that Japan ever had such a rule, and since Article 6 was inconsistent with such a rule, the court stated that it was prepared to hold that Japan had no equivalent of the *Pennsylvania* Rule. *Id.* at 882-83.

86. 511 F.2d 1127 (9th Cir. Feb., 1975) (per Wallace, J.).

87. A compulsory pilot is one whose services are imposed by local law on vessels entering or traversing a harbor, and is distinguished from a hired pilot whose services are purchased voluntarily. *See* G. GILMORE & C. BLACK *supra* note 16, at 520-22.

88. The compulsory pilot, Joyce, was in charge of moving the S.S. *Lindenwood Victory* from one pier to another in Seattle Harbor with the aid of two tugs. Without informing the tug *Thor*, he ordered the *Lindenwood*'s engines astern as the tug was towing the *Lindenwood* stern to stern. Because of the wash from the tug's propeller and the fact that the *Lindenwood*'s propeller was wholly submerged, the *Thor*'s crew was unable to detect the operation of the *Lindenwood*'s engines. The tug was drawn up against the *Lindenwood*, capsized and sunk. 511 F.2d at 1128-29.

89. *Id.* at 1131, *citing* City of Long Beach v. American President Lines, Ltd., 223 F.2d 853 (9th Cir. 1955). For a review of literature supporting the court on the question of negligence by pilots see 511 F.2d at 1131 n.3.

against him.[90] The court's opinion did not elaborate on the underlying policy reasons for holding the pilot liable, beyond distinguishing between compulsory pilots (those who are required by statute) and voluntary or hired pilots (those whose services are contracted for) and declaring that the former have a tort duty of care to the vessel's owner. The *Joyce* court similarly did not deal with the statute under which the pilot's services were compelled.[91]

IV. CARRIAGE OF GOODS

The Carriage of Goods by Sea Act (COGSA)[92] governs the rights and duties of shippers, carriers and purchasers on the movement of goods under bills of lading to and from United States ports in international trade. It imposes on the carrier a duty to use due care in the handling of the cargo and to furnish a seaworthy vessel from the time of loading to unloading of the cargo. The Harter Act[93] includes within its scope both domestic and foreign water carriage under bills of lading. Unlike COGSA, however, the Harter Act has no limitations on its effect to any period of time, and it forbids stipulations in the bill of lading issued by the carrier to the shipper which eliminate the duty to

90. *See* text accompanying notes 44-48 *supra*. Both parties had argued the merits of extending the *Ryan* doctrine to collision cases, and the trial judge had found that Joyce had breached his "implied warranty of workmanlike service to provide skilled, expert and professional pilotage services" without citing authority for this conclusion. 511 F.2d at 1131. *Ryan*'s purpose was to reimburse shipowners for unseaworthiness judgments against them where a stevedore or other contractor's fault created or activated the unseaworthiness. *See* Stranahan v. A/S Atlantica & Tinfos Papirfabrik, 521 F.2d 703 (9th Cir. 1975). There was no question of unseaworthiness raised in *Joyce*. *Joyce* also raised issues concerning pre-trial orders, expert testimony and collateral estoppel. 511 F.2d at 1130-32.

91. For a general discussion of the differing treatments accorded to the liability of vessels and owners between admiralty and civil law see Comment, *The Compulsory Pilot Defense: A Reexamination of Personification and Agency*, 42 U. CHI. L. REV. 199 (1974).

On appeal Joyce also argued that the *Pennsylvania* Rule burden should have been imposed on the government. Joyce contended that the failure of the captain of the *Lindenwood* to station an officer at the stern violated two federal statutes—one which states that nothing in the rule of navigation shall "exonerate any vessel. . . from the consequence . . . of any neglect to keep a proper lookout," 33 U.S.C. § 221 (1970), and the other which specifies the number of officers a vessel must carry, 46 U.S.C. § 223 (1970). The fact that the *Lindenwood* was short one licensed mate, argued Joyce, prevented the stationing of an officer astern. The court disagreed, declaring that the statutes did not require that officers be the lookouts and that the statute prescribing the number of officers did not require a full complement of officers on voyages of less than 400 miles. 511 F.2d at 1129-30.

92. 46 U.S.C. §§ 1300-15 (1970).

93. *Id.* §§ 190-96.

use care. When the goods are in movement in foreign trade upon the oceans, the provisions of COGSA supersede the analogous provisions of the Harter Act. Together, the two acts operate to curb abuses by carriers who, prior to enactment of the statutes, were able to contractually avoid liability for damage to cargo and for inaccuracies in the descriptions of cargo in bills of lading.[94]

A. Estoppel Under COGSA

In *Portland Fish Co. v. States Steamship Co.*,[95] the Ninth Circuit considered the question of whether a carrier could be estopped from impeaching its bill of lading under COGSA.[96] The court held that the defendant carrier should be estopped from denying the weight and the number of fish it had entered on its bill of lading. The court rejected defendant's contention that the phrase in COGSA that a bill of lading constituted "prima facie evidence of receipt" meant that the carrier's bill was a rebuttable presumption of receipt by the carrier, which therefore precluded estoppel.[97]

94. *See generally* G. Gilmore & C. Black, *supra* note 16, at 93-191; H. Longley, Common Carriage of Cargo (1967).

95. 510 F.2d 628 (9th Cir. Sept., 1974) (per Koelsch, J.).

96. The subsections pertinent to this case are in 46 U.S.C. § 1303 (1970). Subsection 3(c) provides:

> That no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Subsection 4 provides:

> Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c) of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49 [the Pomerene or Federal Bill of Lading Act of 1916].

97. 510 F.2d at 631. The purchaser, Portland Fish Co., had deposited in a Manila bank an irrevocable letter of credit authorizing payment of $562.50 per short ton of tuna upon presentation by the seller of a bill of lading. The seller delivered some fish to the defendant carrier, which verified the number of fish received at 519 and accepted the seller's weight estimate of 30 short tons because the carrier had no weighing facilities. Upon reaching its destination the defendant outturned 580 fish weighing 12.825 short tons. The plaintiff sued in admiralty for the difference between the sum paid the seller pursuant to the letter of credit and the value of the cargo outturned. Defendant counterclaimed for the value of the 61 excess fish. The trial court rejected the plaintiff's claim, ruling that since the defendant carrier had delivered to the purchaser all the fish it had received, the plaintiff could not recover, but had to pay the defendant for the extra tuna. The Ninth Circuit reversed. The bill contained no disclaimer by the carrier. *Id.* at 630.

The court noted that COGSA was enacted in 1936 against the background of the Pomerene (or Federal Bill of Lading) Act,[98] of which section 102 embodied the plaintiff purchaser's argument: that a carrier is liable to a good faith purchaser who reasonably relies on the bill's description. The Pomerene Act is designed to eliminate abuses by carriers similar to that which occurred in *Portland Fish*.[99] Although the Pomerene Act applies only to bills of lading issued in the United States, the legislative history of COGSA, and the proviso in section 1304(4) of COGSA which prohibits the use of its provisions to repeal or limit the Pomerene Act, evidences a continuing congressional desire to prevent such abuses. The court found that Congress' purposes for enacting COGSA were to establish uniformity in bills of lading, to define the rights and duties of carriers in foreign trade, and generally to enhance the currency and negotiability of ocean bills of lading. These purposes make it unlikely that Congress intended carriers to be held to different standards of care depending on the location of the port where a bill of lading was issued.[100] The court stated that the continued vitality of the estoppel doctrine serves this important congressional objective.

The Ninth Circuit and other circuits have applied the estoppel doctrine consistently in cases arising under COGSA and the Harter Act.[101] A party urging estoppel must demonstrate that it reasonably relied on the description in the bill of lading. In the instant case, the plaintiff's reliance was found to be reasonable. Thus, the court concluded that statements which a carrier makes in its bill of lading become conclusive as against a holder in due course.[102]

---

98. 49 U.S.C. §§ 81-124 (1970).

99. *See* text accompanying note 94 *supra*.

100. 510 F.2d at 631-32.

101. *See, e.g.*, Daido Line v. Thomas P. Gonzalez Corp., 299 F.2d 669 (9th Cir. 1962); Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009 (2d Cir. 1972); G. GILMORE & C. BLACK, *supra* note 16, at 148; H. LONGLEY, *supra* note 94, at 1921; A. KNAUTH, OCEAN BILLS OF LADING 408-09 (1953). For introductory material on the two statutes see text accompanying notes 92-94 *supra*.

102. 510 F.2d at 633. The court noted that under 46 U.S.C. § 1303(3)(c) (1970), a carrier can protect itself by refusing to state on a bill of lading information which the carrier suspects to be untrue. Further, *id*, § 1303(5) deems the shipper a guarantor of the accuracy of weights, quantity, etc. furnished by it to the carrier and states that the

> shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

The Ninth Circuit refused to grant an order for rehearing after several ocean carriers filed amicus briefs concerning the possible effect of the decision on the ocean transportation of containerized cargo.[103] Whether carriers will be liable for the accuracy of information furnished to them by the shippers of cargo in large sealed containers is an issue which did not confront Congress when it drafted COGSA in 1936. Section 1303(3)(c), which provides that a carrier need not state in the bill of lading particulars which it has no reasonable means of checking, should be of use to such carriers. Thus, carriers should be able to protect themselves from the inclusion of misinformation furnished to them by shippers by describing on the bills of lading that the containers are sealed and that the contents therein are not susceptible to inspection.[104]

B. Damage to Cargo by Fire

Before statutes were enacted dealing with loss to cargo by fire, carriers were insurers of all such loss to cargo owners in the absence of an exception to this liability in the contract of carriage.[105] With implementation of the Fire Statute in 1851[106] and COGSA in 1936,[107] Congress limited carriers' liability for fire loss to cargo to those situations where the actual fault, neglect or privity therein of the vessel owner could be shown.[108]

In *In re Liberty Shipping Corp.*,[109] the Ninth Circuit considered the question of whether a shipowner was properly held liable for fire loss, given the limitations of the Fire Statute and COGSA. The court affirmed the trial court's holding of liability, noting that the fault of the carrier-owner was sufficiently demonstrated by

103. 510 F.2d at 634. Judge Kilkenny would have granted the rehearing and affirmed the judgment of the lower court. *Id.*

104. For materials discussing the questions of carrier liability and immunity for the description in bills of lading of containerized cargo see G. Gilmore & C. Black, *supra* note 16, at 144 n.19b.

105. *See* H. Longley, *supra* note 94, at 164, 197.

106. 46 U.S.C. § 182 (1970). "No owner of any vessel shall be liable to any person for loss to cargo . . . by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

107. *Id.* §1304(2)(b). "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . Fire, unless caused by the actual fault or privity of the carrier." Professor Gilmore has stated that courts construe The Fire Statute and this provision of COGSA to have identical meanings. G. Gilmore & C. Black, *supra* note 16, at 161.

108. *See generally* H. Longley, *supra* note 94, at 163-65.

109. 509 F.2d 1249 (9th Cir. Jan., 1975) (per Merrill, J.).

the finding that the crew was not adequately trained to use the ship's firefighting equipment.[110] The court declared that even though the trial court found the origin of the fire to be unknown, this finding did not mandate a ruling that the cargo owner had failed to meet its burden of showing "design or neglect" or "actual fault or privity" of the carrier. To adopt this narrow reading of COGSA and the Fire Statute, urged by the defendant, would seriously weaken the statutes; the court interpreted the statutes to require carrier-owner liability whenever the fire damage could have been prevented absent the fault of the carrier-owner. The court agreed with a Second Circuit case on the same issue that this narrow reading would hold shipowners liable for cargo damage from negligently caused fires, but exempt them from liability when the shipowner failed to maintain equipment adequate to extinguish a non-negligently caused fire.[111]

The *Liberty Shipping* court also rejected the defendant's argument that the trial court improperly imposed strict liability upon the defendant by attributing the cargo damage to unseaworthiness as well as fire. The court stated that the finding of unseaworthiness was appropriate because it was based on a statute[112] rather than on the traditional, non-delegable implied warranty of seaworthiness. The fault of the owner in *Liberty Shipping* was failure to exercise due diligence required by COGSA section 1303(1), since the vessel went to sea without the master and crew being properly trained in the use of the firefighting equipment. Thus the Fire Statute and COGSA exemptions did not apply.[113]

V. MARITIME LIENS: DEFENSE OF LACHES

A maritime lien is a property right which arises in a person who has performed some service for a vessel, *e.g.*, furnished it supplies or extended credit on its security, or who has been in-

110. The trial court had ruled that the cargo damage resulted from a fire of unknown origin and the unseaworthiness of the carrying vessel. *Id.* at 1250-51. The unseaworthiness consisted of an "incompetent master and crew" which were improperly trained in the use of the vessel's fire fighting equipment and deficiencies of certain vent closing devices. *Id.* at 1250.

111. *Id.* at 1251, *citing* Asbestos Corp. Ltd. v. Compagnie De Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 672 (2d Cir. 1973). G. GILMORE & C. BLACK, *supra* note 16, at 161, reads the *Asbestos* case to mean that unseaworthiness of firefighting equipment means liability for the owner "notwithstanding the fire exemption."

112. 46 U.S.C. § 1303(1) (1970) provides: "The carrier shall be bound, before and at the beginning of the voyage to . . . (a) Make the ship seaworthy . . . ."

113. 509 F.2d at 1252.

jured through its instrumentality. A maritime lien is enforced by its holder through an in rem proceeding against the vessel. In contrast to a land-based lien, its holder need not have possession of the vessel, nor is it discharged by transfer to a bona fide purchaser without notice. Furthermore, a maritime lien is often secret and unrecorded, since the governing federal statute only permits recordation of a maritime lien in the home port where the vessel is subject to a preferred ship mortgage.[114]

In *Tagaropulos, S.A. v. S.S. Santa Paula*,[115] the Ninth Circuit affirmed a holding of laches against a ship chandler who had delayed more than three years in asserting its lien against a vessel. The *Tagaropulos* court ruled that the plaintiff was "inexcusably dilatory" in making no attempt to collect from the vessel or its new owners.[116] The court noted that the plaintiff did not exercise the "high degree of diligence" which is required of a holder of an unrecorded lien for that lien to be effective against a bona fide purchaser. Facts supporting the court's finding of laches included the failure to file a home port lien, the failure to arrest the ship on occasions when it could have been arrested, and the failure to assert a claim against the vessel's purchaser until more than a year had elapsed since the date of sale. The court concluded that to grant the plaintiff relief would work a gross inequity on the ship's innocent purchaser who had no reasonable opportunity to obtain notice of the lien.[117]

VI. GOVERNMENT SUPPORT OF THE SHIPPING INDUSTRY

The government of every maritime nation accords its country's shipping industry a special status because of the crucial role that commercial shipping plays in the distribution of population and economic activity and in the balance of power among na-

114. G. GILMORE & C. BLACK, *supra* note 16, at 35-36. *See* 2 BENEDICT ON ADMIRALTY §§ 21-27 (7th ed. 1975); Ship Mortgage Act, 46 U.S.C. § 925 (1970); Federal Maritime Lien Act, *id.* §§ 971-75.

115. 502 F.2d 1171 (9th Cir. Sept., 1974) (per Ely, J.).

116. Plaintiff had allowed the original owners of the vessel to charge more than $30,000 in supplies from November, 1968 to June, 1970. Although the terms of credit called for payment within 30 days, the owners made only partial payment, and the plaintiff took no action to force them to pay. The vessel was sold to defendant in December, 1970, after having been advertised for sale for more than a year. Defendant checked the ship's log and home port for liens prior to purchase but found no record of the plaintiff's claim. *Id.* at 1172.

117. *Id.* at 1172-73. For treatment of laches as a discharge of a maritime lien see 2 BENEDICT ON ADMIRALTY § 62 (7th ed. 1975).

tions.[118] The United States merchant marine has occupied an inferior status with respect to the shipping interests of other nations since the Civil War.[119] Accordingly, government concern in this country has been expressed in legislative programs which exclude foreign-flag vessels from operating in the coasting trade[120] or from carrying certain types of cargo.[121] Legislation also provides for subsidy payments to carriers and shipbuilders in the amount of the difference between foreign and domestic costs.[122]

In *Columbia Steamship Co., Inc. v. American Mail Line, Ltd.*,[123] the Ninth Circuit considered whether carriers receiving operating differential subsidies (ODS) had an unfair and illegal advantage over unsubsidized domestic carriers in the bidding for the carriage of cargo which foreign carriers were prohibited from carrying (preference cargo). The court affirmed the dismissal of the complaint, ruling that the Merchant Marine Act of 1936 did not preclude the carriage of preference cargo by subsidized carriers.[124]

The plaintiff, an unsubsidized carrier, had sued the defendants alleging violations of section 601[125] and section 810[126] of the Act. Section 601 provides for an ODS when, *inter alia*, the operation of the vessel "is required to meet foreign flag competition and to promote the foreign commerce of the United States."[127] Section 810 declares unlawful any action by subsidized carriers in concert with one another "which is unjustly discriminatory or unfair to any other citizen who operates a common carrier by water" registered in the United States in foreign trade.[128] Section 810 provides that such carriers shall lose their subsidies and be liable for treble damages to the aggrieved unsubsidized carriers.

---

118. *See* G. GILMORE & C. BLACK, *supra* note 16, at 958-59.

119. *Id.* at 965.

120. 46 U.S.C. § 11 (1970).

121. Cargo Preference Act, 10 U.S.C. § 2631 (1970); Merchant Marine Act, 46 U.S.C. § 1241(b) (1970).

122. Merchant Marine Act, 46 U.S.C. §§ 1151-1161, 1171-82 (1970). *See* G. GILMORE & C. BLACK, *supra* note 16, at 958-77. *See generally* Bowman, *The Merchant Marine Act of 1970*, 2 J. MAR. L. & COM. 715 (1971).

123. 510 F.2d 29 (9th Cir. Jan., 1975) (per Sneed, J.).

124. *Id.* at 31-33. The court stayed the issuance of its mandate pending final disposition of a related issue before the District of Columbia Circuit. *See* text accompanying notes 135-39 *infra*. *Id.* at 30, 32-33.

125. 46 U.S.C. § 1171 (1970).

126. *Id.* § 1227.

127. *Id.* § 1171.

128. *Id.* § 1227.

The defendants were bidding at less than cost without crediting the ODS for the carriage of military and other government cargo, which foreign carriers were not allowed to carry. The plaintiff charged that under section 601 subsidized carriers are prohibited from carriage of preference cargo. Further, the plaintiff argued that the defendants' below cost bidding for preference cargo, in conjunction with their receipt of ODS and their knowledge that each of the other carrier defendants was receiving a subsidy and submitting such bids, constituted the "in concert" activity in violation of section 810.[129]

The *Columbia* court rejected both arguments in concluding that the trial court was correct in dismissing the plaintiff's claims. The court held that section 601 does not prohibit subsidized carriers from carrying preference cargo.[130] The court reasoned that to limit ODS payments only to those areas where American vessels are in direct competition with foreign carriers would substantially reduce the effectiveness of the subsidy program designed to place the American shipping industry in a position of competitive parity with its foreign counterparts. The court agreed with the district court's notation that the link between the rates of subsidized domestic carriers (even when bidding for preference cargo) and foreign carriers is too strong to justify withdrawing the subsidy.[131]

Once the court determined that vessels carrying preference cargo are entitled to ODS, it had no difficulty in upholding the bidding at less than cost for preference cargo, without crediting the ODS. The *Columbia* court found this system not to be "unjustly discriminatory or unfair" to a United States citizen who operates a domestic carrier.[132] Further, the practice is not made unfair by the knowledge on the part of the defendants, that each was submitting bids amounting to less than fully distributed costs.[133] Moreover, since the bids enable the federal government

129. The cargo referred to is governed by the Cargo Preference Act, 10 U.S.C. § 2631 (1970) (military cargo); and the Merchant Marine Act, 46 U.S.C. § 1241(b) (1970) (cargo owned or financed by the government).

The court also affirmed the dismissal of plaintiff's charge that defendants had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1970), declaring that defendants were in constant competition with each other and therefore could not have possessed the required monopoly power. 510 F.2d at 34-35.

130. 510 F.2d at 33.

131. *Id.*

132. *Id.* at 34.

133. In support of this contention the court relied by analogy on the conclusion

to benefit through lower rates from the ODS and this in turn permits the taxpayers to receive a direct return from a subsidy made available by their dollars, the court concluded that this activity "surely cannot be contrary to an act of Congress in the absence of a very clear expression to that effect."[134]

The *Columbia* court stayed enforcement of its mandate, however, until final disposition of the appeal before the Court of Appeals for the District of Columbia in the consolidated case of *States Marine International, Inc. v. Peterson*.[135] In *Peterson* the appellate court reversed the district court, holding that the Maritime Subsidy Board (MSB) had the authority to change its policy and to issue a rule implementing the change which has the effect of awarding subsidies to carriers *only* when the competitive nature of the shipments is considered. The MSB had made a determination that payment of subsidies for operation of vessels be "governed by the degree to which the competitiveness of that operation is reflected in actual operating experience."[136] Specifically, the order declared that ODS will be paid in full for vessel operations only if a substantial portion of the gross revenues earned for that service are earned from the carriage of cargoes subject to foreign-flag competition. The MSB interpreted "substantial portion" to mean 50 percent.[137] In upholding this order, the *Peterson* court relied on the policy underlying ODS payments, which is to

---

reached by a district court within the Ninth Circuit. *See* Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743 (N.D. Cal. 1959), *aff'd* 322 F.2d 656 (9th Cir. 1963). In *Independent Iron Works* the district court ordered a directed verdict for the defendant where the cause of action arose under the Sherman Act and involved allegations of a conspiracy to prevent free and competitive bidding on railroad car underframes.

134. 510 F.2d at 33-34.

135. 518 F.2d 1070 (D.C. Cir. 1975), *cert. denied*, 44 U.S.L.W. 3468 (U.S. Feb. 23, 1976) (No. 800).

136. 518 F.2d at 1075, citing from Board's Order.

137. *Id.* at 1076-78. The court declared that although ODS payments had been made for years to preference carriers who could not comply with the MSB ruling, Congress could not be said to have acquiesced in this situation because the legislative history does not indicate that Congress was aware of the situation until it conducted hearings in 1970 on proposed amendments to the 1936 Act. In section 40(a) of the 1970 Act (84 Stat. 1037) Congress declared that nothing in the amendments to the ODS sections should be read to change "existing law or contracts" with respect to MSB proceedings then pending. *Id.* at 1078. The regulations promulgated by the MSB are published in 46 C.F.R. § 280 (1972).

The *Peterson* court also upheld the district court in ruling that construction differential subsidies awarded to domestic firms which build ships that will compete in foreign commerce did not have to be abated when the vessel carries preference cargo. *Id.* at 1082-83.

allow subsidized carriers to compete internationally and not to compensate carriers which have no actual or potential foreign competition.[138] The *Peterson court*, in addition to upholding the MSB order, stated that it agreed with the Ninth Circuit holding in *Columbia* that subsidized carriers were not prohibited from carriage of preference cargo. In light of the *Peterson* decision, the Ninth Circuit directed issuance of its mandate in *Columbia*.[139] Even though *Peterson* upheld the withdrawal of ODS payments based on the degree of competitiveness in the actual operating experience of the subsidized carrier, it is unclear whether the Ninth Circuit, in light of the *Peterson* holding, will find that the subsidized carrier whose payment had been withdrawn will be liable to an unsubsidized carrier for unfair competition as proscribed by the Merchant Marine Act.

Roger Allen

138. 518 F.2d at 1075.
139. 525 F.2d 1364 (9th Cir. Nov., 1975).