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I. Admiralty

FOURTH CIRCUIT REVIEW

I. ADMIRALTY

The Fourth Circuit Advances and Retreats on Shipowner's Liability.

In three recent Fourth Circuit decisions, owners of vessels on navigable waters of the United States received increased protection from personal injury claims brought against them by longshoremen. *Pryor v. American President Lines*[1] and *Sacilotto v. National Shipping Corp.*[2] restricted the application of maritime law to claims by longshoremen injured on land to situations in which the ship "proximately caused" the injury. In *Bess v. Agromar Line,*[3] the court held that the shipowner's duty to provide a reasonably safe place of work to a longshoreman aboard ship was neither absolute nor nondelegable. However, in another recent decision, *Abbott v. United States Lines,*[4] the Fourth Circuit expanded the duty of a vessel to rescue a missing crewman by holding that the duty to search arises when the ship's officers could reasonably have discovered the crewman missing.

A. The Applicability of Maritime Law in Personal Injury Claims

An admiralty court's jurisdiction[5] over personal injury claims was traditionally limited to injuries occurring on navigable waters.[6] How-

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[1] 520 F.2d 974 (4th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (U.S. Jan. 13, 1976).

[2] 520 F.2d 983 (4th Cir. 1975).

[3] 518 F.2d 738 (4th Cir. 1975).

[4] 512 F.2d 118 (4th Cir. 1975).

[5] The Constitution provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2. Congress implemented the constitutional provision by giving the district courts original and exclusive jurisdiction in any civil case of admiralty or maritime jurisdiction. 28 U.S.C. § 1333 (1970).

[6] Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). *Jensen* marked the origin of the gangplank or locality rule of admiralty jurisdiction. In *Jensen,* the widow of a longshoreman, who was killed on the gangplank leading from ship to shore, was not allowed to recover under state workmen's compensation because the gangplank was located over navigable water. *Id.* at 217-18. Thus, the dividing line between admiralty and state jurisdiction was drawn where the gangplank touched the pier. In Swanson v. Marra Bros., Inc., 328 U.S. 1

ever, in the Admiralty Extension Act[7] of 1948, Congress expanded that jurisdiction to injuries occurring on land. The Act established a test which extended substantive maritime law to all claims by plaintiffs whose injuries, whether occurring on land or sea, were "caused" by a vessel. In *Pryor v. American President Lines*[8] and *Sacilotto v. National Shipping Corp.*,[9] plaintiffs sought to invoke this extension of federal maritime law to recover for shore injuries.

The fundamental issue in both *Pryor* and *Sacilotto* was whether the vessels owned by the defendants had "caused" the plaintiffs' injuries under the terms of the Extension Act. However, due to the differences between the two cases in procedural setting, the resolution of this substantive question had a different dispositive impact in each case. In *Sacilotto,* an affirmative answer to the Extension Act test for the applicability of maritime law was necessary to establish admiralty jurisdiction.[10] In *Pryor,* jurisdiction was based on diversity,[11] but

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(1946), the Supreme Court specifically held the pier to be an extension of land and not subject to admiralty jurisdiction under the locality rule. *Id.* at 7.

[7] 46 U.S.C. § 740 (1970) provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water . . . .

Id.

Congress has the power to expand, contract, or alter the requirements for admiralty jurisdiction. *See* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Admiralty Extension Act apparently falls within the proper bounds of that power since the statute has survived constitutional attack in the lower federal courts and was applied without question by the Supreme Court in Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 209-10 (1971). *See generally* Garrett v. Gutzeit O/Y, 491 F.2d 228 (4th Cir. 1974).

[8] 520 F.2d 974 (4th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3398 (U.S. Jan. 13, 1976). The plaintiff in *Pryor* was a longshoreman employed by an independent stevedoring contractor to load defendant's vessel. Plaintiff was connecting the ship's winch to coils of steel wire in a railroad gondola car on the dock, preparatory to the winch lifting the coils aboard ship. When the top coil was lifted one of the coils underneath sprung open and injured the plaintiff. *Id.* at 976.

[9] 520 F.2d 983 (4th Cir. 1975). The facts of *Sacilotto* closely parallel those in *Pryor. See* note 8 *supra.* The plaintiff was in a railroad gondola car on the dock preparing steel billets for loading aboard defendant's ship. When some top billets were lifted, one of those underneath, which had been bowed by the weight of the lifted billets but had not otherwise been touched, sprung and injured the plaintiff. *Id.* at 984.

[10] It was necessary to establish jurisdiction in *Sacilotto* because the district court had denied the plaintiff both diversity and admiralty jurisdiction. The plaintiff pur-

the court still found it necessary to determine whether the Extension Act test was met. Only if maritime law applied could the plaintiff pursue recovery under the warranty of seaworthiness, a substantive maritime cause of action.[12] Hence, the essentially substantive question, whether the ships caused the plaintiffs' injuries, was a ground for jurisdiction and a basis to invoke a substantive maritime theory of recovery.[13]

In *Pryor*,[14] the court recognized only two possible theories of causation which could satisfy the Extension Act test. The first, or "ship's winch" theory, was that the action of the ship's winch had "caused" the coil which injured plaintiff to spring open. The second, or "ship's cargo" theory, was that the defectively banded coil was "ship's cargo" for which the vessel bore responsibility, thus imputing the "cause" of plaintiff's injury to the ship.[15] The Fourth Circuit rejected the ship's winch theory by upholding the district court's finding that

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sued only the latter on appeal. 520 F.2d at 983-84.

[11] Although in its unreported opinion the district court in *Pryor* found both diversity and admiralty jurisdiction, the case proceeded on the admiralty side of the court. 520 F.2d at 976. Because the defendant, American President Lines, had admitted facts that showed diversity in the lower court, the Fourth Circuit declined to consider the propriety of the lower court's finding of admiralty jurisdiction. *Id.* at 976-77. Consideration of that issue was unnecessary because the "saving to suitors" clause of 28 U.S.C. § 1333 (1970) allows cases under maritime law to be brought in a non-admiralty federal court if the separate jurisdictional requirements of that court are met.

[12] The plaintiffs in both cases pursued seaworthiness claims as alternatives to any they might have pursued in land-based law, since federal maritime law, once found to apply, applies exclusively. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). In *Pryor*, the plaintiff was already in court under diversity and could have asserted a land-based negligence claim. However, the plaintiffs in the two cases sought the application of maritime law and the warranty of seaworthiness probably because the warranty imputes liability to a shipowner for any injury caused by an unsafe condition of his vessel, whether or not such condition resulted from his lack of care. *See* text accompanying notes 38-50 *infra*.

[13] A recent First Circuit case spoke of the double significance of a decision on the applicability of maritime law. The court stated that ". . . the choice-of-law question . . . whether the substantive principles applicable were those of maritime or state law—necessarily implicates the jurisdictional issue presented here, since jurisdiction under 28 U.S.C. § 1333 is certainly no broader than the area in which maritime principles are properly applied." Kinsella v. Zin Israel Navigation Co., 513 F.2d 701, 703 n.4 (1st Cir. 1975), *citing* Victory Carriers, Inc. v. Law, 404 U.S. 202, 216 (1971).

[14] Pryor v. American President Lines, 520 F.2d 974 (4th Cir. 1975). In *Sacilotto*, the Fourth Circuit expressly adhered to the interpretation of the Admiralty Extension Act which it adopted in *Pryor*. Sacilotto v. National Shipping Corp., 520 F.2d 983, 984-85 (4th Cir. 1975). The discussion hereinafter, although based on *Pryor*, will thus apply equally to *Sacilotto*.

[15] 520 F.2d at 978.

the winch had been operated properly while loading the cargo.[16] Thus, since the court adopted a proximate cause construction of the Extension Act,[17] and the winch was only a "but for" cause of the plaintiff's injury,[18] the plaintiff lost on this theory.

The Fourth Circuit supported a proximate cause construction of the Extension Act with two Fifth Circuit cases, *Kent v. Shell Oil Co.*[19] and *Adams v. Harris County*.[20] These cases held maritime law inapplicable where the alleged injury-causing article, although part of or appurtenant to the ship, was not the proximate cause of the plaintiffs' injuries.[21] Prior Fourth Circuit decisions,[22] as well as those of the

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[16] *Id.* at 976, 978.

[17] *Id.* at 979.

[18] Professor Prosser defines the "but for" rule as one which eliminates a defendant's conduct as a cause of an event if the event would have occurred without such conduct. W. PROSSER, LAW OF TORTS § 41, at 238-39 (4th ed. 1971). If a "but for" construction had been adopted in *Pryor*, "the action of the ship's winch in lifting neighboring coils to allow the coil that injured [the plaintiff] to spring open would [have invoked] maritime law." 520 F.2d at 978.

[19] 286 F.2d 746 (5th Cir. 1961). In *Kent* the plaintiff was injured while on the dock loading pipes from a truck onto a barge. As he was readjusting the skids upon which the pipes were rolled from the truck to the barge, one of the pipes rolled out of the truck and struck him. The court found that "[n]othing the barge or tug did caused the pipe to roll or move. Indeed, nothing about the skids or the fact that they may have slipped or needed repositioning caused the pipe to roll." *Id.* at 750.

[20] 452 F.2d 994 (5th Cir. 1972). The plaintiff in *Adams* sued for injuries suffered when he ran into the lowered barricade of a drawbridge. The bridge had been mistakenly raised to allow passage of a small pleasure boat. The boat was in the water by right and had made no sign to the bridge operator to raise the bridge. *Id.* at 995.

[21] In *Kent*, the Fifth Circuit expressly rejected a "but for" interpretation of the term "caused" in the Extension Act:

> It might be argued that he would not have been in that position were it not for the skids being used. But the cause of the injury in no sense could be attributed to the vessel or its appurtenances . . . . The extension of admiralty jurisdiction statute, 46 U.S.C.A. § 740, does not therefore make a classic non-maritime, land-based injury into something else.

286 F.2d at 750 (footnote omitted).

Similarly, the court in *Adams* stated:

> The question, then is: Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect . . . . The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and *no act of the vessel proximately caused his negligence* . . . .
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> *It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act.*
>
> It inexorable follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act.

Supreme Court[23] and other circuits,[24] have unquestioningly applied proximate cause.[25] For example, in *Tucker v. Calmar Steamship Corp.*,[26] the Fourth Circuit held that, because the "proximate cause" of plaintiff's injuries was the improper use of the ship's gear in loading operations, maritime law applied to the shore injury.[27] The court applied a proximate cause test, but the decision provided no rule for other cases in which proximate cause could not be found.[28] Thus, *Pryor* represents the first broadly applicable limitation on the term "caused" in the Fourth Circuit.

Although the *Pryor* court did not expressly label the cause of action arising from the ship's winch theory of causation, by implication both negligence and warranty of seaworthiness labels apply because the two Fifth Circuit cases requiring proximate cause proceeded on those theories.[29] This is especially significant for negligence

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452 F.2d 996-97 (emphasis added).

[22] *See* Garrett v. Gutzeit O/Y, 491 F.2d 228 (4th Cir. 1974); Kloster v. *S.S. Chatham*, 475 F.2d 43 (4th Cir. 1973); Snydor v. Villain & Fassio et Compania Internazionale Di Genova Societa Reunite Di Naviagaione, S.P.A., 459 F.2d 365 (4th Cir. 1972), *aff'g* Green v. Pope & Talbot, Inc., 328 F. Supp. 71 (D. Md. 1971); Tucker v. Calmar S.S. Corp., 457 F.2d 440 (4th Cir. 1972).

[23] *See* Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

[24] *See* Huser v. Santa Fe Pomeroy, Inc., 513 F.2d 1298 (9th Cir. 1975); Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964). *See also* Di Paola v. International Terminal Operating Co., 294 F. Supp. 736 (S.D.N.Y. 1968), *remanded on other grounds*, 418 F.2d 906 (2d Cir. 1969).

[25] In none of these cases, however, did the parties offer any other causal theory. *See* cases cited notes 22-24 *supra*.

[26] 457 F.2d 440 (4th Cir. 1972). The plaintiff was injured while loading pipe from a railroad gondola car onto defendant's ship by a method that utilized the ship's winch. He was struck by a pipe which slid out of the sling which was holding one end of the pipes too high. *Id.* at 442-43.

[27] *Id.* at 442 n.1.

[28] *See, e.g.*, Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir. 1964), in which a ship's winch and engines were used to bump a railroad car into place by the hatch of the ship's hold, throwing the plaintiff, a longshoreman, from the car and severely injuring him. Although the causation issue was not before the Third Circuit, it noted language of the district court opinion which apparently distinguished the "but for" and proximate cause theories. *Id.* at 660. The district court had stated that plaintiff's position on the railroad car had not caused the accident; rather, it was the negligent use of the vessel's winch and engines. Thompson v. Calmar S.S. Corp., 216 F. Supp. 234, 238-39 (E.D. Pa. 1963).

In Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963), the Supreme Court applied maritime law because plaintiff's injuries were proximately caused by defective cargo containers appurtenant to the vessel, but did not say that proximate cause was required in every case. *Id.* at 207.

[29] *See* cases cited notes 19 and 20 *supra*. The plaintiff in *Kent* sought recovery in

actions. If a "but for" causation test had been adopted, the negligence theory applied in maritime law would have been different from standard negligence. With the adoption of the proximate cause test, however, the plaintiff in a maritime action must prove the same elements as a plaintiff proceeding under land-based negligence theory. Although the court's requirement of proximate cause in a negligence claim was dictum,[30] the decision might indicate how the Fourth Circuit will rule when the question is actually presented.[31]

The Fourth Circuit stated that requiring the plaintiff to prove proximate cause will properly limit the expansion of federal maritime jurisdiction into areas previously governed by state law.[32] By confining cases under maritime law to those in which the injury on land was proximately caused by a ship or its appurtenances, the *Pryor* court precludes federal court decision in cases that meet only the broader "but for" causation test. Thus, the holding in *Pryor* implements the Supreme Court's policy against expansion of federal jurisdiction into areas traditionally subject to state law.[33]

The finding, under the "ships cargo" theory of causation, that the cargo of steel coils which injured the plaintiff had not become appurtenant to the ship also implements the policy of restricting federal jurisdiction.[34] The *Pryor* court analyzed this theory of recovery as a claim under the warranty of seaworthiness.[35] However, since the steel coils had not come within the ship's control so that the vessel could

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seaworthiness, 286 F.2d at 748, while the plaintiff in *Adams* sought damages through a negligence claim, 452 F.2d at 995.

[30] The question of negligence was not before the court in *Pryor*. The plaintiff had given up that theory on appeal. 520 F.2d at 976.

[31] The *Pryor* dictum may have particular importance in the future, because the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act removed the warranty of seaworthiness as a longshoreman's cause of action against a vessel. Under the amendments, longshoremen may now proceed against vessels only on negligence theory, 33 U.S.C. § 905(b) (Supp. III, 1973), *amending* 33 U.S.C. § 905 (1970). *See* note 37 *infra*.

[32] 520 F.2d at 980.

[33] Victory Carriers, Inc. v. Law, 404 U.S. 202, 211-12 (1971).

[34] Pryor v. American President Lines, 520 F.2d 974, 982 & n.13 (4th Cir. 1975). *See* text accompanying notes 32 and 33 *supra*.

[35] The warranty of seaworthiness is founded on an absolute, nondelegable duty of the shipowner to furnish a reasonably safe place to work. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). Due diligence by the shipowner will not relieve him of liability if an unsafe condition of his vessel causes injury to a seaman, Mahnich v. Southern S.S. Co., *id.*, to a longshoreman aboard ship, Seas Shipping Co. v. Sieracki, *supra*, or to a longshoreman on the dock where the Admiralty Extension Act applies, Gutierrez v. Waterman S.S. Corp., *supra*.

be held responsible for their defective condition, the plaintiff failed to recover under the warranty.[36] Despite recent congressional abolition of the warranty of seaworthiness for longshoremen,[37] this aspect of *Pryor* retains much vitality.

The Fourth Circuit reached its decision on the ship's cargo theory by adopting a test of appurtenancy as a prerequisite for longshoremen's recovery under the warranty of seaworthiness.[38] Traditionally, the liability of a vessel for breach of the warranty attached without proof of the ship's fault.[39] However, most cases brought under the

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[36] 520 F.2d at 982.

[37] The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act withdrew from longshoremen a right of action against a vessel under the warranty of seaworthiness. 33 U.S.C. § 905(b) (Supp. III, 1973), *amending* 33 U.S.C. § 905 (1970). *See* note 31 *supra*. The 1972 amendments were not considered in the *Pryor* and *Sacilotto* decisions, apparently because the injuries claimed by the plaintiffs occurred prior to the amendments, which are not retroactively applied to injuries incurred before November 26, 1972, the effective date of the amending Act. *See* 118 CONG. REC. 36,384 (1972) (remarks of Mr. Burton and Mr. Quie). Cases will be decided under the old Longshoremen's Compensation Act for a number of years, since maritime tort claims, although subject to laches, are unrestricted by statutes of limitation. Watz v. Zapata Off-Shore Co., 500 F.2d 628 (5th Cir. 1974).

Despite the abolition of the warranty of seaworthiness for longshoremen, the holdings in *Pryor* and *Sacilotto* will be important under the 1972 amendments. A recent case stated that § 905(b) does not disturb the jurisdiction of the admiralty court; instead, it merely defines the rules of law to be applied once jurisdiction has been established. Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G., 387 F. Supp. 440, 445 (E.D. Pa. 1974), *cert. denied*, 44 U.S.L.W. 3204 (U.S. Oct. 7, 1975). Thus the holdings of *Pryor* and *Sacilotto* will be applied to determine the applicability of maritime law in negligence cases permitted under the 1972 amendments. Moreover, one court suggested in dictum that § 905(b) of the amendments eliminated seaworthiness liability only for suits by longshoremen. Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G., 387 F. Supp. 440, 442 n.6 (E.D. Pa. 1974), *cert. denied*, 44 U.S.L.W. 3204 (U.S. Oct. 7, 1975). The language of the amendments substantiates this. 33 U.S.C. § 905(b) (Supp. III, 1973). Thus non-longshoremen and non-seamen (seamen are covered by traditional maritime jurisdiction and by the Jones Act, 46 U.S.C. § 688 (1970)) could bring seaworthiness actions against a vessel using the Admiralty Extension Act to establish the applicability of maritime law if the injury occurred on land.

[38] 520 F.2d at 978 & n.3, *citing* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209-10 (1963). *See* text accompanying notes 43 and 45 *infra*.

[39] The warranty of seaworthiness is founded upon concern for the safety of the seaman aboard ship. While at sea, a seaman is unable to escape an abuse of power by his superior officers, such as their allowance of unsafe working conditions. If he abandons the ship in port to escape such dangers, he may lose his pay and be subjected to penalties for desertion. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 430-31 (1939). The duty of a vessel to provide a safe place of work was extended to benefit the longshoreman by Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Protection of the longshoreman is evidently still an important goal today, since in the 1972 amendments

warranty arose from injuries incurred on vessels. The Fourth Circuit recognized this, and deduced that the no-fault liability under the warranty existed only on the presumption that the vessel was the last contributor to the injury-causing defect which the ship's owner could have inspected and cured.[40] Since the injury in *Pryor* occurred on shore, the court reasoned that the vessel could not logically be responsible under the seaworthiness theory unless the presumption was satisfied.[41] Thus, the *Pryor* court held that unless the ship exercised some control over the coil, so that the defective article could be considered appurtenant to the ship and the injury therefore attributed to the vessel, the plaintiff could not recover under the warranty. Since the vessel's owner never had an opportunity to inspect, the court determined that the ship never had sufficient control over the cargo to make the defective steel coil an appurtenancy. Thus, the doctrine of seaworthiness was held to apply only after cargo had first come to rest on the ship's deck. Thereafter, the warranty could be applied shoreward to an extent not remote in time or place.[42]

In measuring the shoreward applicability of seaworthiness claims by the test of appurtenancy, the *Pryor* court adhered to decisions of the Supreme Court, its own previous decisions, and decisions of other circuits.[43] For example, in *Garrett v. Gutzeit O/Y*,[44] the Fourth Circuit held that a shipowner is responsible for injuries caused by defective ship's cargo only after the ship has accepted the cargo. The Supreme Court in *Gutierrez v. Waterman Steamship Corp.* adopted a similar rule.[45] These cases are consistent with *Pryor* in that the

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to the Longshoremen's Compensation Act, Congress increased the benefits payable to longshoremen under the Act. 33 U.S.C. § 906 (Supp. III, 1973), *amending* 33 U.S.C. § 906 (1970). *See* H.R. REP. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted at* 1972 U.S. CODE CONG. & AD. NEWS 4698.

[40] 520 F.2d at 981.

[41] *Id.* at 982.

[42] *Id.*

[43] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Garrett v. Gutzeit O/Y, 491 F.2d 228 (4th Cir. 1974); Huser v. Santa Fe Pomeroy, Inc., 513 F.2d 1298 (9th Cir. 1975). *Contra,* Gebhard v. *S.S. Hawaiian Legislator,* 425 F.2d 1303 (9th Cir. 1970). *See generally* Snydor v. Villain & Fassio et Compania Internazionale Di Genova Societa Reunite Di Naviagaione, S.P.A., 459 F.2d 365 (4th Cir. 1972), *aff'g* Green v. Pope & Talbot, Inc., 328 F. Supp. 71 (D. Md. 1971); Kinsella v. Zin Israel Navigation Co., 513 F.2d 701 (1st Cir. 1975); Mascuilli v. American Export Isbrandtsen Lines, Inc., 381 F. Supp. 770 (E.D. Pa. 1974), *aff'd,* 511 F.2d 1394 (3d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3202 (U.S. Oct. 7, 1975).

[44] 491 F.2d 228, 232-33 (4th Cir. 1974).

[45] 373 U.S. 206 (1963). The Court stated: "When the shipowner accepts cargo in a faulty container or allows the container to become faulty, he assumes the responsibil-

coverage of the warranty of seaworthiness begins when the ship takes the cargo aboard and applies thereafter until the ship relinquishes control. Although the Fourth Circuit specified no linear measurement of the inland extension of maritime law,[46] the test of appurtenancy should identify the limit according to the facts of each case.[47] *Pryor* is significant because the court marries the test of appurtenancy to its proximate cause interpretation of the Admiralty Extension Act. The Act expressly requires that the injury to the plaintiff be caused by a ship.[48] Since a claim in unseaworthiness is for injury caused by an unsafe condition of the ship or its appurtenance, that condition must be linked to the ship in order to satisfy the terms of the Act.[49] Thus, the court in *Pryor* devised the control requirement to link the injury-causing instrument to the vessel. Only if the link was satisfactorily proved could the ship logically be deemed the proximate cause of the injury under the warranty.[50]

The dual cause factual setting of *Pryor* presented an opportunity for the Fourth Circuit to hold that the "caused by a ship" language of the Admiralty Extension Act meant proximate cause. Unlike previous cases in which proximate cause was present and thus not a

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ity for injury that this may cause to seamen or their substitutes on or about the ship." *Id.* at 213-14. In *Gutierrez*, the plaintiff was injured when he slipped on beans which had spilled from defective bags just unloaded from the defendant's ship. *Id.* at 207. The Court held that the duty to provide a seaworthy ship, including cargo containers, applies to longshoremen unloading the ship whether they are working on the pier or on the vessel. *Id.* at 215.

[46] The *Pryor* court in fact expressly declined to set linear boundaries on the inland extension of maritime law. 520 F.2d at 982.

[47] The *Pryor* court explained the control requirement as allowing, in a case where the original cause of the defective condition is unknown, liability under the warranty to be imputed to the last person in command of the defective article. *Id.* at 981. The warranty would thus apply inland to the extent control of the defective good was not clearly exercised by someone other than the vessel.

[48] 46 U.S.C. § 740 (1970). For the text of § 740, see note 7 *supra.*

[49] The *Pryor* court labelled the ship's cargo theory as a claim in unseaworthiness. Clearly the Fourth Circuit treated the theory as such a claim, because only under seaworthiness does the issue of whether the injury-causing instrument is a part or appurtenance of the ship arise. The Supreme Court recently distinguished claims under the seaworthiness warranty from negligence claims by recognizing that the former are founded on defective conditions of the ship or its appurtenances, while the latter are based upon the acts or omissions of the shipowner or crewmen themselves. Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971). *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

[50] The Fourth Circuit stated in *Pryor:* "[w]e think the no-fault doctrine of unseaworthiness is inapplicable on the facts of this case. For a ship to be responsible for injuries shoreward of the gangplank we think it must proximately cause injury to those ashore." 520 F.2d at 982.

dispositive issue, its absence in *Pryor* enabled the court to make it such an issue. The decision in *Sacilotto v. National Shipping Corp.*,[51] which was controlled by *Pryor*, permitted the court specifically to support the proximate cause rule in a purely jurisdictional setting. Although these cases have effected no actual change in the law of seaworthiness as applied to claims by longshoremen injured on shore, they do solidify existing practice. Additionally, the dictum in *Pryor* requiring proximate cause in a negligence claim brought under the Act is consistent with current policy requiring that land-based negligence principles apply to personal injury claims of longshoremen.[52]

B. Shipowner's Duty of Care

Prior to 1972 a longshoreman could maintain an action against a vessel under the warranty of seaworthiness.[53] A recent amendment to the Longshoremen's and Harbor Workers' Compensation Act[54] expressly abolished this theory of recovery for persons subject to the Act, but § 905(b) reserved the right of a longshoreman to sue the vessel in negligence.[55] However, the amended Act left some question concerning the degree of a shipowner's duty of care, the breach of which would give rise to an injured plaintiff's recovery under § 905(b). In *Bess v. Agromar Line*,[56] the problem of identifying what duties of care shipowners owed longshoremen under the amended Act arose in the Fourth Circuit.

The plaintiff in *Bess* asserted that his injuries resulted from the

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[51] 520 F.2d 983 (4th Cir. 1975). For the facts of *Sacilotto*, see note 9 *supra*. In *Sacilotto*, as in *Pryor*, the test of appurtenancy was not met because the shipowner had had no opportunity to control the injury-causing instrument. The defendant shipowner in *Sacilotto* had no chance to inspect the steel billets because they had not been loaded aboard defendant's vessel, and thus were not ship's cargo. 520 F.2d at 984-85.

[52] *See* text accompanying notes 73-75 *infra*.

[53] *See, e.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[54] 33 U.S.C. §§ 901-950 (Supp. III, 1973), *amending* 33 U.S.C. §§ 901-950 (1970).

[55] 33 U.S.C. § 905(b) (Supp. III, 1973) provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter.

Id.

[56] 518 F.2d 738 (4th Cir. 1975).

defendant shipowner's breach of a nondelegable duty to provide a safe place of work.[57] After examining prior law,[58] the Fourth Circuit found that this duty traditionally arose under the warranty of seaworthiness.[59] However, since the 1972 amendments to the Longshoremen's Compensation Act expressly abolished liability to longshoremen under the seaworthiness theory, the court concluded that the duty to provide a safe place to work had been abolished as well, at least as it had applied in a seaworthiness claim.[60] Nevertheless, the *Bess* court considered whether a nondelegable duty to provide a safe place of work might also inhere in the negligence action preserved by the amended Act.[61]

While the Fourth Circuit resolved that the defendant's asserted duty did not so inhere,[62] it left unresolved the question of the standard of care required of a shipowner under the Act. A decision on that question was unnecessary[63] because the legislative history of the Longshoremen's Compensation Act expressly ruled out the plaintiff's assertion.[64] The *Bess* court stated that the provisions of the House

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[57] *Id.* at 740. Bess and his work partner were loading bales of paper pulp in the hold of defendant's vessel. Because both the bales and the ship's hold were of irregular shape, gaps remained between the stacked bales. Bess stepped into one of these gaps while attempting to lift a bale onto the third tier of the bales already stacked, and fell with the five hundred pound bale on top of him. Plaintiff had previously asked the "hatch tender" for plywood dunnage—sheets of plywood typically used in loading operations in a ship's hold to separate cargo and provide a uniform working surface—to lay over the tiers, but none had been supplied. Both plaintiff and the hatch tender were employees of an independent stevedoring contractor who supplied longshoremen to load the defendant's vessel. *Id.* at 739-40.

[58] *Id.* at 740-41. The court cited Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968), and Boleski v. American Export Lines, Inc., 385 F.2d 69 (4th Cir. 1967). Both of these cases followed Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), which held the shipowner's duty to provide a reasonably safe place of work to be nondelegable and absolute. The Supreme Court held that this duty did not require an accident-free ship, but one reasonably fit for its intended use. *Id.* at 550. *See* Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975). *See also* note 35 *supra.*

[59] *See* note 35 *supra.*

[60] 518 F.2d at 740-41.

[61] *Id.*

[62] *Id.* at 742.

[63] *But see* Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975), in which a district court took an alternate route to its holding that the nondelegable and absolute duty of seaworthiness had been eliminated by the 1972 amendments. The court found that Congress had intended to adopt land-based negligence law in the amendments. Recognizing that the negligence duty conflicted with that of seaworthiness, the court held the latter duty inapplicable. *Id.* at 1098.

[64] H.R. REP. No. 1441, 92d Cong., 2d Sess. 6-7 (1972), *reprinted at* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4703-04, *quoted*, 518 F.2d at 741.

Committee Report illustrated the intent of Congress, in passing the 1972 amendments, to abolish both the seaworthiness warranty and its underlying duty irrespective of the label given that duty.[65] Moreover, Congress placed a more limited substantive duty on all vessels by stating that a shipowner has the responsibility to correct dangerous conditions of which he knows or should know.[66] In dictum, *Bess* found the defendant without knowledge, either actual or constructive, of the unsafe condition in the hold of the ship, and therefore not bound to take corrective action under the limited duty suggested by the legislative history.[67] Thus, by construing congressional intent, the court rejected the plaintiff's assertion and approved the defendant shipowner's conduct, but was not required to determine the breadth of the duty of care required under the amended Act.[68]

The plaintiff in *Bess* also sought recovery under traditional negligence theories. First, Bess asserted that the shipowner had a duty to provide plywood dunnage to insure safe work conditions, and that defendant's breach of this duty contributed to the unsafe condition which proximately caused his injury.[69] Second, plaintiff contended that defendant had this duty as a matter of law because the need for

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[65] *Id.* at 742. The Committee Report stated:

> The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court . . . which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen . . . .
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> . . . .
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> The Committee believes that . . . there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen and other workers covered under the Act who are injured while working on those vessels.

H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4-6 (1972), *reprinted at* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4702-03.

[66] The report stated the duty as follows: "[N]othing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6 (1972), *reprinted at* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4704.

[67] 518 F.2d at 741-42.

[68] Congress intended land-based negligence law to supply the duty of care required under the 1972 amendments. *See* Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974); Citizen v. *M/V Triton*, 384 F. Supp. 198 (E.D. Tex. 1974); Fedison v. Vessel *Wislica*, 382 F. Supp. 4 (E.D. La. 1974). *See also* text accompanying notes 73-75 *infra*.

[69] 518 F.2d at 742. *See* note 57 *supra*.

dunnage was foreseeable.[70] Because these theories were based on traditional negligence principles, the Fourth Circuit found them clearly cognizable under the 1972 amendments to the Longshoremen's Compensation Act.[71] However, the court held against Bess because he had failed to present sufficient evidence to prove that the defendant was under any duty to provide dunnage.[72]

Although the *Bess* court must have found that the defendant shipowner owed Bess a duty of reasonable care in order to test the sufficiency of plaintiff's evidence, it neglected to state the basis for the duty. Pursuant to the legislative history of the 1972 amendments,[73] cases under the amended Act have looked to land-based negligence principles for the source of the duty of care.[74] These cases

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[70] 518 F.2d at 742.

[71] *Id.*

[72] Apparently, Bess failed to offer proof sufficient to meet his burden of going forward with the evidence. Professor Prosser suggests that the term "duty" should be limited to the legal obligation of reasonable conduct of one party to another which arises because of their relationship. He explains that often courts will apply "duty" terminology to what is really only a standard of conduct necessary to satisfy a duty already established. W. PROSSER, LAW OF TORTS § 53 (4th ed. 1971). This is apparently what the *Bess* court did when it stated that the plaintiff failed to prove with sufficient evidence a duty on defendant to provide dunnage. Had this been the actual duty under the negligence cause of action, as Prosser recommends the term be used, the plaintiff could have recovered because the defendant did not supply dunnage. Since Bess did not recover, the court must have used the term to signify a standard of conduct the breach of which plaintiff failed to prove. Because the court refers to plaintiff as the employee of an independent stevedoring contractor, the duty which the court adopted was probably that due a business invitee under land-based negligence. However, in no other way does the Fourth Circuit indicate what duty it used. *See* text accompanying note 75 *infra.*

[73] The House Committee Report stated:

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4 (1972), *reprinted at* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4702.

[74] *See* Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975); Anuszewski v. Dynamic Mariners Corp., Panama, 391 F. Supp. 1143 (D. Md. 1975); Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Ore. 1974); Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974); Citizen v. *M/V Triton,* 384 F. Supp. 198 (E.D. Tex. 1974); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974); Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G., 379 F. Supp. 759 (E.D. Pa. 1974). In *Anuszewski* the court stated:

> [The legislative history] speaks clearly for itself, and establishes that land-based principles of law apply to longshoremen's claims for dam-

have analogized factual situations similar to *Bess* to the relationship, in land-based negligence law, between the owner of premises and his business invitee.[75] Arguably, *Bess* followed this line of reasoning;[76] however, the court failed to state that the duty it applied arose from the plaintiff's relationship as a business invitee of the defendant. In leaving the breadth of the duty of care required under the amended Act thus undefined, *Bess* does not clarify the law.

C. The Duty of a Ship to Rescue

The duty of a ship at sea to undertake the rescue of a crewman who had fallen overboard depended traditionally on whether there was a reasonable possibility of rescue.[77] The rescue duty derived from the relationship between the ship's officers and the members of the crew. Because the crewmen were in a subordinate position, the law implied in the contract of employment a duty on the ship to undertake every reasonable effort to rescue a missing crewman.[78] Under prior law, the duty arose when the crewman was discovered to be missing.[79] In *Abbott v. United States Lines, Inc.*,[80] however, the

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> ages against third parties and that a ship has no different liability to longshoremen employed to work aboard it by a stevedoring company than the owner of a land-based property owes to the employees of an independent contractor who perform work on that property.

391 F. Supp. at 1146.

[75] *See* Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975), in which, drawing an analogy to land-based tort law, the court found the plaintiff in the position of a business invitee. On that basis the shipowner must protect the invitee from unreasonable defects which he could have discovered with reasonable care, and which he should have realized were dangerous with respect to the invitee. However, if the shipowner may reasonably expect the invitee to discover the harm and protect himself against it, then there is no duty. The *Frasca* court found the danger to be of this latter type, and since the longshoremen had control of the loading procedure, the shipowner had reason to expect them to remedy any dangerous situation. *Id.* at 1102.

[76] *See* note 72 *supra.*

[77] Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963).

[78] Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931). *See* Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932). The Court in *Cortes* stated: "Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection." *Id.* at 377.

[79] Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821 (1948). *Anderson* was an action filed under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1970), to recover for the death of an employee of the defendant Railway Company. Nevertheless, it is relevant authority for a maritime duty of rescue since the Jones Act, 46 U.S.C. § 688 (1970), under which the plaintiff in *Abbott* filed suit, provides that ". . . all statutes of the United States conferring or regulating the right of action for death in

Fourth Circuit extended the duty of rescue by adopting a reasonable care test to determine when the ship's officers should have known that a crewman was missing.[81]

The specific issue facing the court in *Abbott* was whether the defendant shipowner had negligently breached his duty to rescue by not discovering the deceased crewman's absence sooner, thereby causing his death.[82] The Fourth Circuit held that "if there is a reasonable possibility of rescue, a ship is under a duty to search and attempt a rescue when its officers know *or in the exercise of reasonable care should have known* that a crewman is missing."[83]

In *Abbott,* the lower court relied upon *Gardner v. National Bulk Carriers, Inc.,*[84] an earlier Fourth Circuit case, in holding that the duty to rescue did not arise until the crewman was known to be missing.[85] However, in *Gardner* the ship had been fully searched without finding the deceased, and the court concluded that the ship had a duty to search the waters where the ship might have been when the deceased fell overboard.[86] In reversing, the Fourth Circuit in *Abbott* did not alter the duty to rescue a crewman who was known to be missing. However, relying upon general negligence principles, the Fourth Circuit extended the duty to include a requirement of reasonable care to discover initially that a crewman is missing.[87]

Nevertheless, the reasoning behind the decision in *Gardner*[88] supports the result in *Abbott,* and illustrates a policy which may be used in future cases. The crewman in *Gardner* had been missing for an indefinite period of time, but the court held that rescue must be

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the case of railway employees shall be applicable." 46 U.S.C. § 688 (1970).

[80] 512 F.2d 118 (4th Cir. 1975).

[81] *Id.* at 121.

[82] Plaintiff sued under the Jones Act, 46 U.S.C. § 688 (1970), and the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), for the death of her husband when he apparently fell overboard from defendant's ship, of which he was chief engineer. At about 5:00 a.m. on the day of his death, the deceased was summoned to the engine room due to engine problems necessitating the shutting down of the engines. When called, he replied he would come down. The problem was quickly cured before the deceased arrived; however, deceased was not notified. At 8:00 a.m. it was discovered that deceased had not been in his cabin since shortly after he had originally been called. The ship was searched and then returned to where it had been at 5:00 a.m., but deceased was not found. 512 F.2d at 119-20.

[83] *Id.* at 119 (emphasis in original).

[84] 310 F.2d 284 (4th Cir. 1962), *cert. denied,* 372 U.S. 913 (1963).

[85] 512 F.2d at 120.

[86] 310 F.2d at 288.

[87] 512 F.2d at 121. The Fourth Circuit remanded the case for a new trial. *Id.*

[88] Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied,* 372 U.S. 913 (1963).