Inez Marie DRACHENBERG, widow of Tracy V. Lilly, Plaintiff-Appellant,

v.

CANAL BARGE COMPANY, INC., Jena Marine Corporation and XYZ Insurance Company, Defendants-Appellees.

No. 74-2050.

United States Court of Appeals, Fifth Circuit.

April 21, 1978.
Rehearing Denied May 18, 1978.

Before BROWN, Chief Judge, and WISDOM and COLEMAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Tracy V. Lilly (Decedent), an employee of the Freeport Gulf Sulphur Company, was supervising the unloading of molten sulphur from a barge in the Mississippi River into storage tanks on the shore, when the marine unloading arm which connected the barge piping system to the storage tanks broke, spilling molten sulphur on Lilly and causing injuries which resulted in his death. Decedent's widow, Inez Marie Drachenberg (plaintiff) brought suit against the barge company for damages for her husband's death. The District Court, although finding that admiralty jurisdiction attached because the accident occurred on the deck of the barge, denied recovery. Crucial to its judgment were its findings and conclusions of law (i) that the marine unloading arm affixed to the barge was not an appurtenance of the barge, under *Victory Carriers, Inc. v. Law*, 1971, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383, 1972 A.M.C. 1; (ii) that the owners of the barge and the barge crew were guilty of no negligence whatsoever; (iii) that Decedent was not a *Sieracki*[1] seaman; (iv) that the sole proximate cause of Decedent's accident was his own negligence; and (v) that Decedent was 100% contributorily negligent. Because we find that Decedent was a *Sieracki* seaman entitled to a guarantee of seaworthiness, which guarantee extended to the unloading arm, and that the marine unloading arm was unseaworthy, that the doctrine of assumption of risk is inapplicable here, and that the finding that Decedent was 100% contributorily negligent is clearly erroneous, we reverse the District Court and remand for trial on the issue of damages.

On May 6, 1972, the Tow Boat M/V ELIZABETH HUGER[2] and the unmanned barge CBC-31[3] were moored at the Freeport sulphur unloading facility at the Stauffer Chemical Dock on the Mississippi River in Baton Rouge, Louisiana. The barge, handled by the crew from the ELIZABETH HUGER, was laden with a cargo of liquid molten sulphur maintained at 270° Fahrenheit. The cargo sulphur was owned by Freeport Sulphur Company, Inc., and was to be unloaded into the Freeport storage tanks located at the Freeport unloading dock facility.

The Decedent was employed by Freeport as Transportation Manager and Terminal Supervisor. Although he maintained an office in the Freeport office in the Commerce Building in New Orleans, where he had a desk job, he was required to go to Baton Rouge whenever sulphur was being unloaded, in order to supervise the unloading. Decedent had overall control of the dock facility, which included the responsibility for the inspection and maintenance of all machinery and equipment and the arranging for whatever repairs were necessary. He was also in charge of operating all of Freeport's dock equipment and had general supervi-

1. *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.

2. Owned and operated by Canal Barge Company, Inc.

3. Owned by Jena Marine Corporation and operated by Canal Barge Company, Inc.

sion of the unloading of molten sulphur from barges.

The dock had a piping system which permitted barges to be unloaded and their cargoes to be pumped directly into the shoreside lines and then into Freeport's tanks on shore. This dock-side piping system was permanently affixed to the dock. Presumably to permit the molten sulphur to be pumped into tanks or other containers, where as it cooled it would solidify, the discharge line ran vertically to an elevation of approximately 55 to 60 feet (the water level being approximately 23 feet). The critical element in the dock piping system was a marine unloading arm made of aluminum consisting of a series of swivel joints, 90° elbow pipes, and straight pipes. The arm connected by a swivel joint to the seaward edge of the dock piping system at an elevation of 43 feet. The arm was in two sections of substantially equal length. The two sections were joined by a swivel joint. At the vessel end of the second pipe was a 90° elbow which by a swivel was connected to a similar elbow which in turn was bolted to the flange on a short extension of the barge's header. This extension, likewise a short 90° elbow, was bolted by a flange to the header. The connection from the pipe to the elbow attached to the barge's header was during operation somewhat in the shape of an horizontal "S". There was a wire cable from the area of the swiveled joint between the two sections of pipes running vertically to an electrical hoist at an elevation exceeding 60 feet. The function of this arrangement was to permit three dimensional movement—vertically as the barge's draft lessened with cargo discharge, horizontally as the barge moved to and from the dockside from current, swells or waves in the river, and longitudinally as like forces moved the barge up or down the dock plus a combination of one or more or all these movements.

Although the loading arm was a permanent part of the dock-side piping system it is obvious that it and the receiving connections permanently on the barge were designed to function together as an integrated system, each being indispensable and neither being more important than the other. Like the good marriage it was one no man could put asunder.

On May 6, 1972, during the unloading of the barge, Decedent operated the electric hoist and lowered the marine unloading arm down to the members of the crew of the ELIZABETH HUGER, who were handling the barge. These crew members secured the nuts and bolts which connected the 90° elbow flange of the dock-side unloading arm to the barge piping system. Under Decedent's directions, pumping was started. At 11:50 a. m., pumping was shut down due to a clogged or plugged side line. Decedent cleared the line and pumping started again at 3:30 p. m.

At 8:00 p. m., Decedent went on board the barge to talk with a mate of the ELIZABETH HUGER's crew. He told the mate that he was going to gauge the shoreside tanks and would signal to him with a flashlight when the tanks were full, so that pumping operations could be shut down. Ending this discussion, Decedent turned and walked on the deck of the barge toward the dock, where he was going to measure the tanks. While walking across the deck of the barge toward the dock, the marine unloading arm, part of which hung over the deck of the barge, broke.

The swivel joint in the center of the horizontal "S" connection broke. The break involved only the unloading arm and not the regular barge piping system. After the break the severed loading arm, still connected to the seaward edge of the dock piping system and supported by the electric hoist, swung away about three feet from the opening created by the rupture. Molten sulphur poured backwards out of the arm, covering Decedent, and causing the injuries from which he died eight days later.

The District Court found as a fact—a

fact not disputed here—that "the arm broke as a direct result of the fact that the last section of the dock-side unloading arm was reversed so that there was not the proper number of swivels in the arm at the point where the swivels were required to allow the arm to move freely with anticipated movement of the barge." The record also discloses that, on several previous occasions, Decedent had had trouble with the unloading arm and had supervised its repair. However, the reasons thought by Decedent and his supervisors at Freeport to be causing the failures of the arm were bad welds, deteriorated swivel joints, worn out ballbearings and the like. The evidence does not support a finding that Decedent or any others at Freeport were aware that the last section of the loading arm was reversed or that there was any risk in using the arm. The uncontradicted testimony of Decedent's predecessor at the Freeport dock shows that the unloading arm was in this reversed position the entire time he worked for Freeport as dock supervisor, so that the arm was in a reversed position when Decedent took over the job. The evidence also shows that an engineering study conducted by Freeport's engineering department prior to the accident for the purpose of recommending necessary improvements in the unloading arm did not disclose the reversal of the last section of the arm. Thus, although Decedent and Freeport knew that something had gone wrong with the arm in the past, there was no explicit evidence that the last section of the arm was reversed or that there was reason for them to suspect that there was any particular risk involved in using the arm.

The liability stage at this trial was before a Judge sitting without a jury, and his disposition of the case made trial on damages unnecessary. In his findings of fact, he found, among others, that (i) Decedent "knew or should have known that the lower arm of the unloading arm was installed backwards;" (ii) Decedent's work was "not that of a seaman or member of a crew of a vessel but was the work of a shore side employee;" (iii) the "dock-side unloading arm was permanent shore side equipment and not a part of the ship's equipment;" (iv) the "equipment was not an appurtenance of the vessel and not attached to the vessel despite the temporary fixing of the arm to the barge discharge piping;[4]" (v) there is "maritime jurisdiction based upon the fact that Mr. Lilly was injured while physically on the barge itself;" (vi) "Canal Barge Company, Inc. and its crew were not guilty of any negligence contributing to this casualty, and that their actions were those of reasonable men under the circumstances;" (vii) "the accident resulting in Mr. Lilly's death was caused solely because of his own negligence and alternatively, Mr. Lilly's actions and failure to act constituted 100% contributory negligence on his part which would bar recovery herein."

In his conclusions of law, the District Court found, among others, that (i) "the pier side unloading arm * * * was not part of the [Barge] or the M/V ELIZABETH HUGER's usual gear or that was stowed on board and accordingly this is not a basis for maritime jurisdiction," citing *Victory Carriers, Inc., v. Law*, 1971, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383, 1972 A.M.C. 1, reh. denied, 404 U.S. 1064, 92 S.Ct. 731, 30 L.Ed.2d 753; (ii) "the shore side unloading arm was not attached to the vessel in the manner contemplated [in] *Victory Carriers, supra*, and was merely a temporary attachment permanently affixed to the shore and not an appurtenance of the ship and never disconnected from the shore and accordingly would not be a basis for maritime jurisdiction;" (iii) the District Court did have maritime jurisdiction "based purely and simply on the fact that the Plaintiff's Decedent was injured while on board the barge itself rather than on the dock;"

4. "It is noted that the arm, once it was secured to the dock was never moved or intended to be moved from the dock and was a permanent fixture of the dock itself."

(iv) "Canal Barge Company, Inc. and/or its crew were not guilty of any negligence whatsoever in this case;" (v) Decedent was not a *Sieracki* seaman; (vi) it was incumbent upon Decedent to inspect, repair, maintain and properly assemble the unloading arm, and that because "the sole proximate cause of Mr. Lilly's accident was his own negligence, * * * the claim brought by the plaintiff on the issues of negligence and unseaworthiness is * * * denied;" (vii) even if the Court should hold the unloading arm unseaworthy, no recovery is possible because the District Court's finding of Decedent's 100% contributory negligence would bar recovery.

Preliminary Matters

Before proceeding to the heart of this analysis, we emphasize that this accident occurred before the passage of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, *et. seq.* The legislative history of these amendments convinces us that they were to have only prospective effect, so that we need not concern ourselves with the effect of the amendments[5] upon the accident occurring here. *See, e. g.*, 118 Cong. Rec. H 1043 (Daily Ed. Oct. 14, 1972); *see also Martinez v. Dixie Carriers, Inc.*, 5 Cir., 1976, 529 F.2d 457; *McCawley v. Ozeanosun Co., Maritime, S. A.*, 5 Cir., 1974, 505 F.2d 26, 1975 A.M.C. 480; *Addison v. Bulk Food Carriers, Inc.*, 1 Cir., 1974, 489 F.2d 1041, 1974 A.M.C. 652.

Second, we conclude that the record fully supports the District Court's finding that the Canal Barge Company and the crew of the ELIZABETH HUGER were in no way negligent and that their actions were those of reasonable men under the circumstances. Thus, if Plaintiff is to recover at all, it cannot be under a Jones Act negligence claim, but must be under a maritime law seaworthiness claim. We also agree with the District Court's conclusion that the unloading arm was permanently affixed to the dock.

Finally, we conclude that the District Court's finding and conclusion that Decedent was 100% contributorily negligent was clearly erroneous. Although we make no guesses here as to the extent of Decedent's contributory negligence, if any, we conclude that there is no reasonable reading of the record which will support the District Court's finding that Decedent's negligence was the sole proximate cause of his accident. *See Manning v. M/V Sea Road*, 5 Cir., 1969, 417 F.2d 603, 1970 A.M.C. 145.

Maritime Jurisdiction

[1] Under the locality rule, in determining maritime tort jurisdiction the location of the accident on navigable waters[6] is to be given nearly controlling weight.[7] The only restriction on this is *Executive Jet's*[8] requirement that the claim must bear a significant relationship to traditional maritime activity. The extensions to the rule are extremely short, and are either based in

5. For a thorough discussion of the new amendments, *see* Gilmore & Black, The Law of Admiralty 408-56 (2d Ed. 1975); Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoreman's and Harbor Workers' Compensation Act, 7 J.Mar.L. & Comm. 447 (1976). *See generally* Robertson, Admiralty Procedure and Jurisdiction after the 1966 Unification, 74 Mich.L.Rev. 1628 (1976); Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex.L.Rev. 1973 (1977).

The Supreme Court first construed the amendments in *Northeast Marine Terminal Co., Inc. v. Caputo*, 1977, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320.

6. *See, e. g., Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, 1954 A.M.C. 1; *Kelly v. Smith*, 5 Cir., 1973, 485 F.2d 520, *cert. denied*, 1974, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558; *Delome v. Union Barge Line Co.*, 5 Cir., 1971, 444 F.2d 225, 1971 A.M.C. 1837, *cert. denied*, 1972, 404 U.S. 995, 92 S.Ct. 534, 30 L.Ed.2d 547.

7. The locality rule was given extensive recognition in *Victory Carriers, Inc. v. Law*, 1971, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383, 1972 A.M.C. 1, where the Court cited over 40 cases which had reiterated the rule. *See* 404 U.S. at 205 n. 2, 92 S.Ct. at 421 n. 2, 30 L.Ed.2d at 387 n. 2. The Court acknowledged that:

> "The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States."

Id. at 205, 92 S.Ct. at 421, 30 L.Ed.2d at 387.

8. *Executive Jet Aviation, Inc. v. City of Cleveland*, 1972, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1973 A.M.C. 1.

a federal statute (such as the Admiralty Extension Act of 1948, 46 U.S.C.A. § 740; see, e. g., *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649, *reh. denied*, 374 U.S. 858, 83 S.Ct. 1868, 10 L.Ed.2d 1082), or in the limited situations implied by the Supreme Court's discussion in *Victory Carriers*.[9] Thus, maritime jurisdiction will almost always exist when an accident occurs on the deck of a ship in navigation and it arises out of operations having a significant relationship to traditional maritime activity.

In this case, we agree with the District Court's finding that it had maritime jurisdiction over this case because the accident occurred on the deck of the barge, which was in navigable waters at the time, the accident arising out of an incident directly connected with traditional maritime activity—the unloading of the ship's cargo.

Sieracki Seamen

[2] In *Sieracki*, the Supreme Court phrased the issue as "whether the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore injured while working aboard the ship." 328 U.S. at 87, 66 S.Ct. 872, at 874, 90 L.Ed.2d at 1102. The Court answered this question by saying that "when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights." *Id.* at 97, 66 S.Ct. 872, at 878, 90 L.Ed. at 1107. Thus, "for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes, he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Id.* at 99–100, 66 S.Ct. 872, at 879, 90 L.Ed. at 1108–09.

In *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, 1954 A.M.C. 1, the Supreme Court was asked by appellant in that case either to overrule *Sieracki* or distinguish it on its facts, on the ground that Sieracki was a stevedore, while Hawn was a carpenter who was injured when he fell through an uncovered hatch hold on a ship on which he was repairing grain loading equipment. The Court resoundingly reaffirmed *Sieracki* and held that *Sieracki* was not distinguishable from the facts in *Pope*:

"We * * * adhere to Sieracki. We are asked, however, to distinguish this ed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Id. at 412–13, 74 S.Ct. 202, at 206, 98 L.Ed. at 152–53.

9. See quote from *Victory Carriers* (404 U.S. at 213–14, 92 S.Ct. at 426, 30 L.Ed.2d at 392) at page 918, *infra*.

Under the principles announced in *Sieracki* and in *Pope* we have no doubt whatsoever that Decedent in this case was a *Sieracki* seaman entitled to protection from unseaworthiness of the vessel on which he was working at the time of his accident. At the time of his accident, he was engaged in the process of directing and supervising the unloading of the barge's cargo. This is a "function essential to maritime service on board a ship," as *Sieracki* requires. The entire policy underlying the historic doctrine of seaworthiness dictates that we give Decedent the protection of the warranty of seaworthiness. Decedent was a Sieracki seaman and his survivor is therefore entitled to bring a maritime claim for unseaworthiness unless—and the unless can be a big one—the thing which failed is not sufficiently related to the vessel to be a part of it. That he was, as the District Court found, shore based is no more significant than it was as to Sieracki and Hawn each of whom lived ashore as have the thousands of *Sieracki-Yakus* "seamen" whose recoveries probably sparked the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901, *et seq.*

Seaworthiness

[3] The owner of the vessel has a duty to provide a vessel that is reasonably fit for its intended use. This duty to provide a seaworthy vessel requires that the vessel, its gear, appurtenances, and operation must be reasonably safe. *Seas Shipping Co. v. Sieracki*, 1945, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698. "That [a vessel] owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 99, 64 S.Ct. 455, 88 L.Ed. 561, 564, and authorities cited." *Id.* at 90, 66 S.Ct. 872, at 875, 90 L.Ed. at 1103.

In *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649, the Supreme Court concluded that "things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." *Id.* at 213, 83 S.Ct. at 1190, 10 L.Ed.2d at 303. More recently, in *Usner v. Luckenbach*, 1971, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562, 1971 A.M.C. 277, the Supreme Court said that: "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service." *Id.* at 499, 91 S.Ct. at 517–18, 27 L.Ed.2d at 562. Consequently, for plaintiff to recover it must be determined that a maritime cause of action for unseaworthiness exists. More precisely, since the District Judge's findings regarding the negligence of the barge owner are sufficiently above the Plimsoll line of Rule 52(a), F.R.Civ.P., for plaintiff to recover it must be determined whether the warranty of seaworthiness extends to the marine unloading arm, the instrumentality which caused Decedent's death.

The Supreme Court's holding in *Victory Carriers, Inc. v. Law*, 1971, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383, 1972 A.M.C. 1, serves as the beacon by which we steer our evaluation of whether an unseaworthiness claim lies in this case. In *Victory Carriers* a longshoreman was injured on shore while he was operating a forklift truck in the process of loading a ship. The longshoreman's injury was caused when the forklift's overhead protection rack came loose and fell on him. The longshoreman was an employee of the stevedore company, and the forklift was owned and under the control of the stevedore company.

Victory Carriers presented the Supreme Court with a choice of law question: "The question presented here is whether state law or federal maritime law governs [this] suit . . . ." *Id.* at 202, 92 S.Ct. at 420, 30 L.Ed.2d at 385.[10] The Supreme Court concluded that no federal maritime cause of action existed under the circumstances. The underpinning of the decision was the Court's concern over the extension of maritime law to pier-side accidents.[11] The Court emphasized that the finding of a maritime cause of action under the facts presented in *Victory Carriers* "would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." 404 U.S. at 214, 92 S.Ct. at 426 (footnote omitted). Thus, the Supreme Court placed a substantive limitation on at least the shoreward reach of the seaworthiness remedy.

[4] The present case, however, does not involve the shoreward extension of a maritime cause of action which so concerned the Supreme Court in *Victory Carriers*. Instead, in this case the injury occurred on-ship, aboard a blue-water, navigable-water-going vessel. Accordingly, recognizing that this important difference attenuates the application to this case of the principles expressed in *Victory Carriers*, we examine that decision for the light it may reflect on whether a maritime cause of action exists under the facts of the present litigation.

The Supreme Court pointed out under the facts existing in *Victory Carriers* that "[t]he typical elements of a maritime cause of action are particularly attenuated: respondent Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment that injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank." 404 U.S. at 213–14, 92 S.Ct. at 426, 30 L.Ed.2d at 392. The last element, as emphasized above, obviously and unquestionably is satisfied in the present case. The fact that Decedent's injury was received on board, and not dock-side, carries great weight.

The other typical elements of a maritime cause of action discussed in *Victory Carriers* capsulize the Supreme Court's effort to determine whether the forklift could be considered an appurtenance of the vessel thus justifying the shoreward extension of a seaworthiness claim.[12] The Court found that the forklift which injured Law was not a piece of equipment that was part of the ship's usual gear or that was stored on board; the forklift was in no way attached to the ship; and the forklift was not under the control of the ship or its crew. Appro-

10. Plaintiff's claim invoked both diversity jurisdiction under 28 U.S.C.A. § 1332 and admiralty jurisdiction under 28 U.S.C.A. § 1333. Thus, as a technical matter the Court's decision did not deal with the reach of federal subject matter jurisdiction since diversity of citizenship provided an alternative basis for jurisdiction.

11. "[T]he threshold issue is whether maritime law governs accidents suffered by a longshoreman who is injured *on the dock* by the allegedly defective equipment owned and operated by his stevedore employer. We hold that under the controlling precedents, federal maritime law does not govern this accident. Nor, in the absence of congressional guidance, are we now inclined to depart from prior law and extend the reach of the federal law to *pier-side* accidents caused by a stevedore's *pier-based* equipment." 404 U.S. at 204, 92 S.Ct. at 420–21, 30 L.Ed.2d at 386–87 (emphasis added).

12. In *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649, a longshoreman was injured on the dock while unloading a vessel. The Supreme Court's decision that the shipowner was liable for unseaworthiness turned upon the fact that the longshoreman's injury was caused by an appurtenance on the ship—the defective cargo containers. See the discussion of *Gutierrez* in *Victory Carriers*, *supra*, 404 U.S. at 210–11, 92 S.Ct. at 424, 30 L.Ed.2d at 390. *See also Burrage v. Flota*, 5 Cir., 1969, 431 F.2d 1229, 1970 A.M.C. 2254 (finding vessel unbeanworthy).

priately, the Supreme Court in effect concluded that the forklift used on the dock was not an appurtenance of the vessel to which the duty of seaworthiness extended.[13] In the present case, however, under the existing circumstance of an on board injury, there can be no doubt that the seaworthiness remedy lies if the instrumentality which caused Decedent's death, the marine unloading arm, was attached to or related to the vessel in such a way as to make it an appurtenance of the vessel.

In *Victory Carriers* one aspect of an appurtenance which the Court examined and found absent was *attachment* of the equipment to the vessel. Two Supreme Court decisions discussed in *Victory Carriers* shed light on the type of attachment of which the Supreme Court spoke. "In *Alaska S.S. Co. v. Petterson*, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 (1954), aff'g. 205 F.2d 478 (C.A. 9 1953), and *Rogers v. United States Lines*, 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120 (1954), rev'g. 205 F.2d 57 (C.A. 3 1954), the Court decided without opinion that unseaworthiness recovery would be possible to a longshoreman injured by equipment brought aboard ship by the stevedore company. In both of these cases, the accident occurred on navigable water. Both longshoremen were injured while in the hold of the ship by defective apparatus attached to the ship's gear." *Victory Carriers, supra*, 404 U.S. at 211 n.11, 92 S.Ct. at 424 n.11, 30 L.Ed.2d at 391 n.11.

In *Rogers, supra*, the longshoreman was injured on board while unloading ore from the cargo hold of the vessel. The operation involved the use of the ship's booms, the stevedore's land fall, the two ship's winches, a ship's runner on one of the winches and the stevedore's land fall runner on the other. All parties agreed that the longshoreman's injury was caused by the stevedore's land fall runner in the operation of one of the winches by an employee of the stevedoring company. Thus, in reversing the Court of Appeals and finding that a seaworthiness claim could lie, the Supreme Court in effect agreed that the stevedore's equipment, adopted by the vessel and incorporated with the ship's cargo handling equipment, became an appurtenance of the vessel.

Similarly, in *Petterson, supra*, a longshoreman on board a vessel was utilizing a breaking block brought aboard by the stevedoring company to unload the ship. While being used in connection with the ship's gear in a proper manner by the longshoreman, the block broke causing his injuries. The Supreme Court affirmed the Court of Appeals' decision that a seaworthiness claim was cognizable.[14]

13. See the discussion on *Victory Carriers* in 7A Moore's Federal Practice, § .325 at 136 (1977–78 Supplement).

Read as an evaluation of whether under general maritime law the forklift could be found to be appurtenant to the vessel, *Victory Carriers* can also be interpreted as dealing with the reach of federal subject matter jurisdiction in admiralty, since the Admiralty Extension Act, 46 U.S.C.A. § 740, extends jurisdiction to include injuries on land "caused by vessel", which in turn means caused by an appurtenance of a vessel. *See Whittington v. Sewer Const. Co., Inc.*, 4 Cir., 1976, 541 F.2d 427, 432 n.1; *Kinsella v. Zim Israel Navigation Co., Ltd.*, 1 Cir., 1975, 513 F.2d 701, 703 and n.4, 1975 A.M.C. 1208; *Garrett v. Gutzeit*, 4 Cir., 1974, 491 F.2d 228, 232, 1974 A.M.C. 319. Indeed, a subsequent Supreme Court case has interpreted *Victory Carriers* in exactly this fashion as a commentary on jurisdiction under the Extension Act. *Askew v. American Waterways Operators, Inc.*, 1972, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280, 1973 A.M.C. 811.

14. See the articulation of the First Circuit in *Romero Reyes v. Marine Enterprises, Inc.*, 1 Cir., 1974, 494 F.2d 866, 1974 A.M.C. 2236, where the Court stated:

> "The seaworthiness warranty is not, however, limited to gear 'owned' by the shipowner, and while the phrase 'equipment appurtenant' to the vessel suggests equipment 'belonging' physically to the vessel, it may, and in this case does, include equipment vital to the vessel's mission that does not accompany it while at sea."

494 F.2d at 869. We do not overemphasize this case since some might consider, but we do not think, it to be in conflict with our decision in *Parker v. South Louisiana Contractors, Inc.*, 5 Cir., 1976, 537 F.2d 113 (see notes 15 and 19, *infra*.), which is binding on our Circuit.

Coupled with the language of *Victory Carriers*, the decisions in *Rogers* and *Petterson* suggest several relevant propositions. First, certain types of temporary attachment to the vessel by equipment not part of the ship's usual gear or stored on board or controlled by the ship's crew can satisfy the requirements for finding a maritime cause of action. Next, the equipment must be utilized in a manner fundamentally related to traditional maritime activities. Finally, it must be emphasized that in both *Rogers* and *Petterson* the accidents occurred aboard ship.

In the present case the marine unloading arm, although permanently affixed to the dock, was firmly and physically attached to the vessel during the use which gave rise to the claim. The marine arm itself was a critical component integrally related to the vessel's function as a carrier of molten sulphur. Finally, identical to the accident seen in *Rogers* and *Petterson*, the injury in this case occurred on board the vessel.

One of our own opinions additionally flushes out the concept of attachment. In *Davis v. W. Bruns & Co.*, 5 Cir., 1973, 476 F.2d 246, 1973 A.M.C. 1148, two longshoremen were injured on the dock in the process of unloading bananas from a ship. One's arm became entangled in a conveyor belt which was being used to unload the bananas while the other suffered injuries when struck by boxes of bananas that fell from the conveyor belt. The longshoremen argued that the conveyor belt, which was connected by two guy wires, was "attached" to the ship and that this was sufficient to create federal admiralty jurisdiction for their claims. We found that the presence of these two guy wires was not sufficient attachment to the ship in a sense meant by *Victory Carriers*: "The Supreme Court obviously intended 'attachment' to mean something more than the temporary affixing of steadying wires." 476 F.2d at 248. Consequently, we found federal jurisdiction wanting.

In *Davis*, we found that the connection of mere steadying wires, so common to every docking and loading operation, did not rise to the level of attachment to establish federal admiralty jurisdiction.[15] Also, the guy wires themselves were in no way defective, involved with or responsible for the injury. In contrast, in the present case the marine arm itself was firmly and physically affixed to the vessel, was crucial to the unloading to the particular cargo and was defective and responsible for plaintiff's injury. Additionally, it is highly significant that the accident in *Davis* was dock-side while the accident in this case was on board.[16]

Charting our course by these dim yet visible lights we conclude that the marine unloading arm was an appurtenance of the

15. Because the accident was pier-side in *Davis*, we focused strictly on the question of whether maritime jurisdiction existed. This necessarily involved a more rigorous examination in order to deter those seeking to extend federal admiralty jurisdiction from its water-based routes to new land-locked disputes. This is not the case in the present litigation since jurisdiction is established under the locality rule.

Also, in *Parker v. South Louisiana Contractors, Inc.*, 5 Cir., 1976, 537 F.2d 113, we found federal admiralty jurisdiction wanting. In that case an injury occurred on a ramp permanently affixed to the dock used for ingress and egress from vessels. We determined that the injury occurred not on a gangplank but on a structure most closely resembling a dock or pier. Consequently, the decision, while focusing on the jurisdictional question, concluded that a dock-like structure was not an appurtenance of the ship through which admiralty jurisdiction could be found.

Of course, the inquiry under the admiralty extension act is question begging. If the appliance is an appurtenance of the vessel admiralty jurisdiction under the extension act exists, although the question might still remain whether substantive rights conferred by the body of law called maritime should be applied to the particular person or situation.

16. The importance of this single factor was underscored in *Davis*, 476 F.2d at 249, by its author, Judge Goldberg, who was acutely aware of *Victory Carriers*. *See, Law v. Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376, *rev'd* 1971, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383.

vessel. The marine arm was firmly and physically attached to the vessel thereby satisfying a typical element of a maritime cause of action. Moreover, the unloading arm was an essential—indeed, crucial—part of the unloading process. The unloading of the molten sulphur from the hold of a floating barge to the immobile shore-side storage tanks was greatly facilitated by the use of the flexible marine unloading arm which linked the two and, so far as the evidence reveals, could not have been accomplished by any other means.

[5] This case in no way involves the shoreward extension of maritime law which so concerned the Supreme Court in *Victory Carriers*. In effect, the finding that the injury occurred on board reduces the examination to a search for minimal attachment. Certainly, however, more than minimal attachment was present in this case and the warranty of seaworthiness extended to the marine unloading arm.[17] We also conclude that the marine unloading arm, without sufficient flexibility to accommodate the rise and fall of the barge in the water proved itself under normal expected use to be unfit and was, therefore, unseaworthy. *Walker v. Harris*, 5 Cir., 1964, 335 F.2d 185, 1964 A.M.C. 1759, *cert. denied*, 379 U.S. 930, 85 S.Ct. 326, 13 L.Ed.2d 342.

Taffrail Remarks

[6, 7] Because we find that this claim is appropriately covered by federal maritime jurisdiction, Decedent was a *Sieracki* seaman entitled to the warranty of seaworthiness (including a warranty that the unloading arm was seaworthy), the arm was unseaworthy in fact, and Decedent was not guilty of 100% contributory negligence, we reverse the District Court and remand for trial on damages. During this trial, of course, defendants are entitled to prove the extent of Decedent's contributory negligence, if any.[18]

Finally, we wish to emphasize the narrow scope of our ruling today. First, of course, because of the change in law created by the passage of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, our decision today may have very little precedential effect. Second, we emphasize that our decision is in no way meant to expand federal admiralty *jurisdiction*. Our holding is limited to the situation where federal admiralty jurisdiction already exists under the locality—maritime-related—rule, where a warranty of seaworthiness already exists generally, and where the only question left to be answered is to what the warranty extends. We hold only that, under these circumstances, the extent

17. "That longshoremen injured on the pier in the course of loading or unloading a vessel are legally distinguished from longshoremen performing similar services on the ship is neither a recent development nor particularly paradoxical. The maritime law is honeycombed with differing treatment for seamen and longshoremen, on and off the ship . . . ." *Victory Carriers, supra*, 404 U.S. at 212, 92 S.Ct. at 425, 30 L.Ed.2d at 391–92.

18. Proof of contributory negligence would go to mitigation of damages rather than to liability, of course. *See Pope & Talbot, Inc., supra*, 346 U.S. at 408–09, 74 S.Ct. at 204, 98 L.Ed. at 150, 1954 A.M.C. 1. *See also Kelloch v. S&H Subwater Salvage, Inc.*, 5 Cir., 1973, 473 F.2d 767, 1973 A.M.C. 948; *Manning v. M/V Sea Road*, 5 Cir., 1969, 417 F.2d 603, 1970 A.M.C. 145; *Grigsby v. Coastal Marine Service of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011, *cert. denied*, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531.

of this warranty of seaworthiness must be determined in a manner consistent with its underlying humanitarian policies.

Faithful as we must be to *Victory Carriers*, we are satisfied that our decision in no way ignores or improperly applies that precedent, nor have we found any cases by United States Circuit Courts that differ in analysis or application.[19]

REVERSED and REMANDED.

19. Interestingly enough, shepardizing *Victory Carriers* reveals that approximately 53 U.S. Circuit Court decisions, 43 U.S. District Court decisions, and 16 state court decisions have referred to that case.

The following is a fair summary of the pertinent United States Circuit Court decisions:

Maritime Recovery Disallowed

Whittington v. Sewer Construction Co., 4 Cir., 1976, 541 F.2d 427 (crane located on bridge to be demolished and used to lower debris to vessel below not an appurtenance of vessel in case where plaintiff's injuries sustained when he dropped from the crane to the vessel below); *Parker v. South Louisiana Contractors, Inc.*, 5 Cir., 1976, 537 F.2d 113 (ramp permanently attached to dock not an appurtenance of vessel); *Bennett v. Faircape Steamship Corp.*, 5 Cir., 1975, 524 F.2d 979, 1975 A.M.C. 1642 (stevedore's "pineapple gear" which was to be used with ship's tackle to unload cargo but had never been aboard or connected in any way with vessel not an appurtenance of ship in dock-side injury case); *Sacilotto v. National Shipping Corp.*, 4 Cir., 1975, 520 F.2d 983, 1975 A.M.C. 1357, *cert. denied*, 423 U.S. 1055, 96 S.Ct. 787, 46 L.Ed.2d 644 (steel billets causing shoreside injury in the process of being loaded aboard, but not yet aboard, not an appurtenance of the vessel); *Kinsella v. Zim Israel Navigation Co., Ltd.*, 1 Cir., 1975, 513 F.2d 701, 1975 A.M.C. 1208 (dunnage from vessel used on pier during unloading not an appurtenance of vessel); *Davis v. W. Bruns & Co.*, 5 Cir., 1973, 476 F.2d 246, 1973 A.M.C. 1148 (banana conveyor facility permanently affixed to shore and connected to vessel only by two steadying wires not an appurtenance of the vessel in dock-side injury case); *Snydor v. Villain & Fassio et Compania Int. Di. Genova, etc.*, 4 Cir., 1972, 459 F.2d 365 (pier-side equipment not connected with a vessel, in seven consolidated cases, held not to be appurtenances of vessel).

Maritime Recovery Allowed

Huser v. Santa Fe Pomeroy, Inc., 9 Cir., 1975, 513 F.2d 1298 (crane affixed to barge causing dock-side injury was appurtenance of vessel); *Romero Reyes v. Marine Enterprises, Inc.*, 1 Cir., 1974, 494 F.2d 866, 1974 A.M.C. 2236 (gangway permanently affixed to pier-based tower was appurtenance of vessel); *Garrett v. Gutzeit, O/Y*, 4 Cir., 1974, 491 F.2d 228, 1974 A.M.C. 319 (bales of pulp paper on pier, recently unloaded from vessel and to be moved via hand trucks to sled on pier, constituted appurtenance of vessel); *Kloster v. S.S. Chatham*, 4 Cir., 1973, 475 F.2d 43, 1973 A.M.C. 1271 (maritime cause of action cognizable where slack mooring lines and consequential excessive motion of vessel in water caused ship's hoist to dislodge pipe injuring plaintiff on pier).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 82-2465

BRUCE ERFTMIER,

Plaintiff-Appellee,

versus

ROWAN COMPANIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(JULY 28, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges*.

CLARK, Chief Judge:

Bruce Erftmier was employed by Rowan Companies, Inc. as a head roustabout on board its vessel, the ROWAN III. Erftmier injured his back during the course of performing his duties. He brought this action pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law alleging that his injury was caused by the negligence of his employer and the unseaworthiness of the ROWAN III. After a bench trial, the district court held in favor of

*Judge Politz recused himself after hearing argument. He did not participate in the preparation of this opinion by a quorum of the court. 28 U.S.C. § 46(d).

Erftmier on both claims and awarded him $600,000. Rowan appeals. It argues that the critical finding of the district court that the design of an access hole created an unreasonably dangerous working condition was clearly erroneous. We agree, and reverse and render judgment here in favor of Rowan.

Erftmier supervised a crew of three roustabouts. His crew was assigned to repaint a void space located beneath a bathroom on the port side of the ROWAN III. The void space was immediately aft of the boiler room. The space contained numerous pipes, beams, and columns of various shapes and sizes. The purpose of the space was to allow access to those pipes and supports. The area was not used on a regular basis for any other purpose. The space was approximately three and one-half feet high. It was illuminated by a temporary work light.

Access to the void space was gained through an oval opening cut into the steel bulkhead that separated the space from the boiler room. The bulkhead was less than an inch thick at the place of the opening. The hole measured two and one-half feet high at its highest point and twenty inches at its widest. The bottom of the hole was six inches above the deck.

An electrical junction box was attached to the bulkhead immediately above the hole. The box stood out about five inches from the bulkhead. Two electrical conduits led down from inside the box. One conduit bent ninety degree and proceeded almost horizontally to the right. The other conduit proceeded downward, but then bent into a U-shape and proceeded toward the ceiling. Both conduits were fastened to the bulkhead. Both were roughly one

inch in diameter. The U-shaped conduit partially obstructed entry into the access hole. The conduit that was bent horizontally obstructed the hole very little if at all.

Off to the left of the access hole was a large cylindrical tank of the kind used to store hot water. A very large pipe passed below the hole close to the bulkhead. At a higher level, and somewhat further from the bulkhead, was a smaller pipe. The pipe made several angled turns. Numerous fittings, valves, faucets, dials, and other appendages were attached to the pipe. It was necessary for a seaman to cross over these pipes to get to the access hole. The presence of these pipes made entry into the hole more difficult than it would have been in their absence.

The roustabouts in Erftmier's crew had already been working in the void space without him for two days when he attempted to enter through the access hole in order to check their progress. As he stooped down and attempted entry, Erftmier felt a sharp pain in his leg. The pain was eventually diagnosed as the outward evidence of a back injury. The injury required surgery. Despite the operation, Erftmier remains disabled. As a result of the incident, his ability to continue employment as a physical laborer has been permanently impaired.

The district court found that, because of its size, configuration, location, and distance off the deck, the access hole was not a reasonably safe place for work aboard the vessel. The court concluded that Rowan was negligent in its failure to provide a reasonably safe work environment, and that its negligence caused Erftmier's injury. The court also found that Rowan's failure to

provide a reasonably safe work place rendered the ROWAN III unseaworthy. It is these findings that Rowan contends are clearly erroneous.

Under the Jones Act, a vessel owner will be deemed negligent if he fails to exercize reasonable care to maintain a reasonably safe work environment. Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 327 (1960); Verrett v. McDonough Marine Service, No. 82-3001, slip. op. 4700, 4704 (5th Cir. May 31, 1983); Ober v. Penrod Drilling Co., 694 F.2d 68, 70 (5th Cir. 1982); Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1193 (5th Cir. 1982). This court may not disturb the district court's assessment of the owner's negligence unless the court's finding is clearly erroneous. Verritt, slip op. at 4704; Ober at 70.

A vessel is unseaworthy if it and its appurtenances are not reasonably safe and fit for their intended use. Mitchell v. Trawler Racer, Inc., 363 U.S. 539, 550 (1960); Ceja at 1193; Stevens v. East-West Towing Co., 649 F.2d 1104, 1107 (5th Cir. 1981), cert. denied, 102 S.Ct. 1007 (1982). Again, the district court's findings with respect to the vessel's seaworthiness are entitled to clearly erroneous review. Ober at 70. The burden of proving unseaworthiness and negligence is on the seaman. Loehr v. Offshore Logistics, Inc., 691 F.2d 758, 762 (5th Cir. 1982).

A review of the record leaves us with a definite and firm conviction that a mistake has been made. There is no question that a seaman was required to bend over in order to pass through the access hole. It is likewise true that the conduits, pipes and associated hardware made entry more difficult. But passage through

the hole was no more bothersome than many of the normal tasks of a seaman. The job by its very nature is an arduous one. In the ordinary course of his duties, a typical seaman must bend over and reach up. He must lift heavy objects, work in confined spaces, and traverse wet and inclined decks. He must climb down ladders, pass through scuttle holes, manuever in difficult areas, and negotiate narrow catwalks. He must operate intricate equipment, handle potentially dangerous tools, suffer the wrath of the elements, and work long, weary hours. "There are inevitable hazards--some of a very severe nature--in the calling of those who go to the sea in ships, hazards which when not occasioned by negligence or unseaworthiness, have to be borne by those who follow the calling." Massey v. Williams-McWilliams, Inc., 414 F.2d 675, 678 (5th Cir.), cert. denied, 396 U.S. 1037 (1969). It is the responsibility of the owner to supply a reasonably safe work environment in which the seaman can perform his demanding duties, not an accident-free ship. Trawler Racer, Inc., 362 U.S. at 550.

If the size and shape alone of the access hole rendered the ROWAN III unseaworthy, then record testimony indicates that almost every modern ship of a substantial size is unseaworthy. The hole was virtually identical in size and shape to many other scuttle holes found in the ROWAN III and other modern vessels. Several seamen testified that they had passed through such holes, and particularly this hole, without incident. They testified that passage through such holes is part of the ordinary, run-of-the-mill duties of a roustabout.

It is also a prevalent practice to locate scuttle holes and hatches several inches above deck level. The purpose of this practice is to prevent water that may collect on some portions of a deck from flowing between compartments. In this way, standing water may be isolated, and instead of two or more compartments having wet and slippery floors, only one compartment will be affected. Safety on board, as well as the integrity of the ship, is promoted, not impeded.

The record, including photographic evidence, shows that it was necessary for a seaman to negotiate two pipes and avoid two small electrical conduits in order to enter the hole. But many, if not most, scuttle holes are found deep in the innards of a ship where such pipelines and conduits abound. It would be extremely difficult to design all such passageways so that ingress would never be impaired by conduits, valves, meters, beams, fittings, cylinders, or other obstructions. This is especially true when the hole must be located below a bathroom and beside a boiler room.

Of particular relevance is the fact that the void space was rarely entered. The only need to enter the area was to do maintenance work. As a result, long stretches of time would pass during which no crew members would go into the area. We would be presented with an entirely different case if the hole provided access to a dining or sleeping area, a workshop, or a regularly used storage area.

The court's finding that the access hole created an unreasonably dangerous working environment is clearly erroneous. Because the court's conclusions that Rowan was negligent and that

the ROWAN III was unseaworthy were completely dependent on this finding, we reverse. Because no further factual development is called for, we render judgment here for Rowan.

REVERSED AND RENDERED.

(Cite as: 358 U.S. 625, 79 S.Ct. 406)

Joseph KERMAREC, Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE.

No. 22.

Argued Nov. 13, 1958.

Decided Feb. 24, 1959.

On November 24, 1948, the respondent's vessel, the S. S. OREGON, was berthed at a pier in the North River, New York City. About noon on that day, Joseph Kermarec came aboard to visit Henry Yves, a member of the ship's crew. The purpose of the visit was entirely personal, to pay a social call upon Yves and to give him a package to be delivered to a mutual friend in France. In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer authorizing Kermarec to come aboard.[1] As he started to leave the ship several hours later, Kermarec fell and was injured while descending a stairway. On the theory that his fall had been caused by the defective manner in which a canvas runner had been *627 tacked to the stairway, Kermarec brought an action for personal injuries in the District Court for the Southern District of New York, alleging unseaworthiness of the vessel and negligence on the part of its crew. Federal jurisdiction was invoked by reason of the diverse citizenship of the parties, and a jury trial was demanded. The district judge was of the view that the substantive law of New York was applicable. Accordingly, he eliminated the unseaworthiness claim from the case and instructed the jury that Kermarec was 'a gratuitous licensee' who could recover only if the defendant had failed to warn him of a dangerous condition within its actual knowledge, and only if Kermarec himself had been entirely free of contributory negligence.[2]

The jury returned a verdict in Kermarec's favor. Subsequently the trial court granted a motion to set the verdict aside and dismiss the complaint, ruling that there *628 had been a complete failure of proof that the shipowner had actually known that the stairway was in a dangerous or defective condition. A divided Court of Appeals affirmed. The opinion of that court does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or upon a determination that the controlling legal principles would in any event be no different under maritime law. 245 F.2d 175. *Certiorari* was granted to examine both of these issues. 355 U.S. 902, 78 S.Ct. 335, 2 L.Ed.2d 259.

[1][2] The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. *See The Plymouth*, 3 Wall. 20, 18 L.Ed. 125; *Philadelphia, Wilmington and Baltimore Railroad Co. v. Philadelphia and Havre de Grace Steam Tugboat Co.*, 23 How. 209, 215, 16 L.Ed. 433; *The*

Commerce, 1 Black 574, 579, 17 L.Ed. 107; *The Rock Island Bridge*, 6 Wall. 213, 215, 18 L.Ed. 753; *The Belfast*, 7 Wall. 624, 640, 19 L.Ed. 266; *Leathers v. Blessing*, 105 U.S. 626, 630, 26 L.Ed. 1192; *The Admiral Peoples*, 295 U.S. 649, 651, 55 S.Ct. 885, 886, 79 L.Ed. 1633. If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259, 42 S.Ct. 475, 476, 66 L.Ed. 927. Where **409 the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. Whatever doubt may once have existed on that score was effectively laid to rest by *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411, 74 S.Ct. 202, 204, 98 L.Ed. 143. It thus becomes necessary to consider whether prejudice resulted from the court's application of the substantive law of New York.

*629 [3][4] In instructing the jury that contributory negligence on Kermarec's part would operate as a complete bar to recovery, the district judge was clearly in error. The jury should have been told instead that Kermarec's contributory negligence was to be considered only in mitigation of damages. *The Max Morris*, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-409, 74 S.Ct. 202, 204. It is equally clear, however, that this error did not prejudice Kermarec. By returning a verdict in his favor, the jury necessarily found that Kermarec had not in fact been guilty of contributory negligence 'even in the slightest degree.'

[5] The district judge refused to submit the issue of unseaworthiness to the jury for the reason that an action for unseaworthiness is unknown to the common law of New York. Although the basis for its action was inappropriate, the court was correct in eliminating the unseaworthiness claim from this case. Kermarec was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship. *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202. Kermarec was aboard not to perform ship's work, but simply to visit a friend.

[6] It is apparent, therefore, that prejudicial error occurred in this case only if the maritime law imposed upon the shipowner a standard of care higher than the duty which the district judge found owing to a gratuitous licensee under the law of New York. If, in other words, the shipowner owed Kermarec the duty of exercising ordinary care, then upon this record Kermarec was entitled to judgment, the jury having resolved the factual issues in his favor under instructions less favorable to him than should *630 have been given.[3] Stated broadly, the decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law.

[7][8] It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. *Leathers v. Blessing*, 105 U.S. 626, 26 L.Ed. 1192; *The Max*

Morris, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586; *The Admiral Peoples*, 295 U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633.[4] But this Court has never determined whether a different and lower standard of care is demanded if the ship's visitor is a person to whom the label 'licensee' can be attached. The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts. *The Lottawanna*, 21 Wall. 558, 22 L.Ed. 654; **410 *The Max Morris*, 137 U.S. 1, 11 S.Ct. 29.[5]

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each.[6] Yet even *631 within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict.[7] As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on owners and occupiers a single duty of reasonable care in all the circumstances.'[8]

[9] For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. *The Lottawanna*, 21 Wall. 558, at page 575, 22 L.Ed. 654. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system *632 in that respect entirely alien to the law of the sea.[9] We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.[10] It follows that in the present case the judgment **411 must be vacated and the case remanded to the District Court with instructions to reinstate the jury verdict and enter judgment accordingly.

It is so ordered.

Judgment vacated and case remanded with instructions.

1. The pass contained the following language: 'The person accepting this pass, in consideration thereof, assumes all risks of accidents, and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees, or otherwise, for any injury to his person or for any loss or injury to his property.' The district judge instructed the jury that this attempted disclaimer could have no effect unless it had been made known to Kermarec. The evidence showed that Kermarec had not seen the pass. By its verdict the jury implicitly found that Kermarec had not been informed of the language appearing on it. Since that finding is not disputed here, we need not consider what effect the attempted disclaimer would have had if Kermarec had been aware of it. *See Moore v. American Scantic Line, Inc.*, 2d Cir., 121 F.2d 767. Compare 46 U.S.C. § 183c, 46 U.S.C.A. § 183c.

2. With respect to the first issue of fact, namely, the alleged negligence of the defendant, you must bear in mind that the owner of a ship such as the defendant is subject to liability for bodily harm caused to a gratuitous licensee, such as the plaintiff, by any artificial condition on board the ship, only if both of the following conditions are present: (1) if the defendant knows of the unsafe condition and realizes that it involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and (2) if the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein.

In short, in order that the plaintiff recover in this case, he must establish by a fair preponderance of the evidence that the defendant knew of the unsafe condition and invited the plaintiff aboard without either correcting the condition or warning him of it.

In connection with damages, if you find that the plaintiff's injuries were the proximate result of the defendant's negligence and the plaintiff's own contributory negligence, even in the slightest degree, then the plaintiff cannot recover at all.

3. The record clearly justifies a finding that the canvas runner was defectively tacked to the stairway, and that this caused a dangerous condition of which the shipowner's agent would have known in the exercise of ordinary care. By its verdict, the jury found that much and more.

4. *Cf. The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760.

5. Where there is no impingement upon legislative policy. *Cf. United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 72 S.Ct. 666, 96 L.Ed. 907; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318.

6. Random selection of almost any modern decision will serve to illustrate the point. *E.g., Chicago G.W.R. Co. v. Beecher*, 8 Cir., 150 F.2d 394 (licensee by express invitation; licensee by implied invitation; bare licensee).

7. For example, the duty of an occupier toward a licensee under the law of New York, which the District Court thought applicable in the present case, appears far from clear. *Compare Fox v. Warner-Quinlan Asphalt Co.*, 204 N.Y. 240, 245, 97 N.E. 497, 498, 38 L.R.A.,N.S., 395; *Mendelowitz v. Neisner*, 258 N.Y. 181, 184, 179 N.E. 378, 379; *Paquet v. Barker*, 250 App. Div. 771, 293 N.Y.S. 983 (2d Dept.); *Byrne v. New York C. & H.R.R. Co.*, 104 N.Y. 362, 10 N.E. 539; *Higgins v. Mason*, 255 N.Y. 104, 109, 174 N.E. 77, 79; *Ehret v. Village of Scarsdale*, 269 N.Y. 198, 208, 199 N.E. 56, 60; *Mayer v. Temple Properties*, 307 N.Y. 559, 563–564, 122 N.E.2d 909, 911–913; *Friedman v. Berkowitz*, 206 Misc. 889, 136 N.Y.S.2d 81.

8. *See Chief Judge Clark's dissenting opinion* in the Court of Appeals, 245 F.2d 175 at 180. A survey here of the thousands of judicial decisions in this area during the last hundred years is as unnecessary as it would be impossible. A recent critical review is to be found in 2 *Harper and James, The Law of Torts*, c. XXVII, *passim* (1956). *See also, Prosser, Business Visitors and Invitees*, 26 Minn. L. Rev. 573; *Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L. Q. Rev. 182, 359.

9. This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea. Such status has now been extended to others aboard 'doing a seaman's work and incurring a seaman's hazards.' *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, at page 99, 66 S.Ct. 872, at page 880, 90 L.Ed. 1099.

10. The inconsistent and diverse results reached by courts which have tried to apply to the facts of shipboard life common-law distinctions between licensees and invitees reinforce the conclusion here reached. As to a seaman crossing another vessel to reach the pier, see Radoslovich v. Navigazione Libera Triestina, S.A., 2 Cir., 72 F.2d 367 (invitee); Aho v. Jacobsen, 1 Cir., 249 F.2d 309 (licensee); Anderson v. The E. B. Ward, Jr., C.C., 38 F. 44 (invitee); Griffiths v. Seabord Midland Petroleum Corp., D.C.Md., 33 A.M.C. 911 (invitee); see also Lauchert v. American S.S. Co., D.C., 65 F.Supp. 703 (licensee). As to a guest of a passenger, see McCann v. Anchor Line, 2 Cir., 79 F.2d 338 (invitee); Zaia v. 'Italia' Societa, 324 Mass. 547, 87 N.E.2d 183, 11 A.L.R.2d 1071 (licensee); The Champlain, 151 Misc. 498, 270 N.Y.S. 643, 34 A.M.C. 25 (invitee). See also Metcalfe v. Cunard S.S. Co., 147 Mass. 66, 16 N.E. 701 (licensee). The English courts appear to have differentiated between an invitee and a licensee in cases of personal injury on shipboard, without critical inquiry. See, e.g., Smith v. Steele, L.R. 10 Q.B. 125 (1875) and Duncan v. Cammell Laird & Co., Ltd., (1943) 2 All E.R. 621. These distinctions have after thorough study (Law Reform Committee, Third Report, Cmd. No. 9305 (1954), been eliminated entirely from the English law by statutory enactment. Occupiers' Liability Act, of 1957, 5 and 6 Eliz. 2, c. 31.

Alfred LEWIS, Plaintiff-Appellant
Cross-Appellee,

v.

TIMCO, INC., et al.,
Defendants-Appellees,

v.

JOY MANUFACTURING,
Defendant-Appellee
Cross-Appellant.

No. 81-3022.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1983.

Operator of hydraulic tong sued owner of jackup drilling barge, tong manufacturer, and others to recover for injuries sustained when he became entangled in "snub line." The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., rendered judgment from which plaintiff appealed and manufacturer cross-appealed. The Court of Appeals, Politz, Circuit Judge, 697 F.2d 1252, reversed in part and affirmed in part. Petition to rehear en banc the manufacturer's entitlement to reduction by amount of plaintiff's fault was granted. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that notwithstanding strict products liability theory of case, comparative fault of hydraulic tong operator would be applied to reduce liability of manufacturer of the defective tong which malfunctioned, resulting in injury to maritime worker; general considerations of fairness and efficiency supported comparative fault defense in the products liability action, at least where such application would not frustrate any strong policy of Louisiana, in whose territorial waters accident occurred.

Application of maritime principles of comparative fault affirmed; case returned to Court of Appeals panel.

Politz, Circuit Judge, dissented and filed opinion, in which Johnson and Jerre S. Williams, Circuit Judges, joined.

I. Admiralty ⇐20

Maritime jurisdiction was properly invoked where injury was sustained on board drilling barge, that is, a "vessel," in navigable territorial waters of Louisiana.

2. Admiralty ⇐1.5

Principles of maritime law, as informed by common-law tort developments, are traditionally applied in maritime tort cases, unless policy determination has been made by Congress.

3. Negligence ⇐97

Maritime principle of comparative fault is applicable in maritime strict products liability cases. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 6, 46 U.S.C.A. § 766; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

4. Negligence ⇐97

Notwithstanding strict products liability theory of case, comparative fault of drilling barge worker would be applied to reduce liability of manufacturer of defective hydraulic tong which malfunctioned, resulting in injury to worker; general considerations of fairness and efficiency supported comparative fault defense in maritime products liability action, at least where such application would not frustrate any strong policy of Louisiana, in whose territorial waters accident occurred.

Robert K. Guillory, Cornelius Dupre, II, Eunice, La., for Lewis.

Hal Broussard, Lafayette, La., for Timco, Inc.

Patrick A. Juneau, Jr., Lafayette, La., for Home Petroleum.

Robert M. Contois, Jr., Edith Brown Clement, New Orleans, La., for Atwood Oceanic, Inc.

James E. Diaz, Lafayette, La., for Rebel Rentals.

John A. Jeansonne, Jr., Lafayette, La., for Joy Mfg.

Vinson & Elkins, Charles T. Newton, Jr., Harold K. Watson, Houston, Tex., for Petroleum Equip. Suppliers Assoc., amicus curiae.

Appeals from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We face the question of whether the doctrine of comparative fault applies in a products liability suit maintained under the maritime jurisdiction of the federal courts. We are persuaded that it does.

I

Alfred Lewis was injured when working as a member of a crew furnished by his employer, Timco, Inc., to Atwood Oceanics, Inc. for work aboard Oceanics' drilling barge, the Vicksburg. At the time of the accident, the Vicksburg was in Louisiana's territorial waters.

Lewis operated hydraulic tongs used to "make up" tubing joints to be placed in a well. These tongs were owned and supplied by Rebel Rentals, Inc. and were manufactured by Joy Manufacturing, Inc. On the day before the accident, equipment was accidentally dropped in the drilling hole. Edwards Rental and Fishing Tools, Inc. furnished an employee to retrieve the equipment from the hole with a special fishing tool. Lewis was using the hydraulic tongs to assist in the "make up" of the fishing tool. Because of a design defect, these tongs failed to shut off when Lewis released their throttle and a snubbing cable attached to the tongs wrapped around Lewis, seriously injuring him.

A trial to the court resulted in an award for Lewis's serious and permanently disabling injuries. The trial court found multiple causes for the injury. It found that Lewis was negligent in attempting to make up the fishing tool joint without adjusting the length of the snubbing line. It found that the tongs manufactured by Joy Manufacturing had a design defect that allowed them to continue operating when the throttle was released. It also found that Rebel's representatives were negligent in failing to instruct Lewis as to the proper method of synchronizing the tong controls. Finally, it found that the Edwards employee had been negligent in not advising Lewis to shorten the snub line. The trial court apportioned 20 percent of the fault each to Joy Manufacturing and Rebel Rentals, 10 percent to Edwards Rental, and 50 percent to Lewis.

On appeal a panel of this court affirmed all but the district court's reduction of Lewis's award against Joy Manufacturing by the amount of his fault. 697 F.2d 1252 (5th Cir.1983). We granted a petition to rehear en banc the manufacturer's entitlement to the reduction. Lewis argues that Joy Manufacturing's liability for the product defect should not be reduced by that part of his injury caused by his own negligence. He argues alternatively that if comparative fault be applied the trial court's assessment of 50 percent was clearly erroneous. The panel having concluded that comparative fault was not to be applied did not reach the question of whether there was sufficient evidence to sustain that level of fault. We find that issue appropriate for decision by the panel and return the case to it for that review. We decide only that the trial court was correct in its decision that the maritime principle of comparative fault is applicable in maritime cases that urge strict liability for defects in products.

We will review comparative fault as applied under the maritime law, then turn to

its application in products cases where liability rests on the principle of strict liability.[1] Finally, we will explain the basic policy choice we make. We turn first to comparative fault in maritime jurisprudence, pausing to explain our jurisdiction and the relevance of state law.

II

[1, 2] The citizenship of the parties was not diverse and Lewis's suit by the time of trial was footed solely upon maritime jurisdiction. There is such jurisdiction because the injury was sustained on board a drilling barge, a "vessel," in the navigable territorial waters of Louisiana. In maritime tort cases courts traditionally apply principles of maritime law, as informed by common law tort developments, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), unless a policy determination has been made by the Congress. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). Admiralty courts make their own decisions but, true to legal analogical processes, do so with an awareness of other courts' solutions to similar problems, sensitive to whether a "significant policy" of the state within whose territorial waters the injury occurred "would be frustrated by such an application." *See Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 113 (5th Cir.1970).

III

[3] Admiralty courts have long engaged in the exercise of comparing plaintiffs' negligence to both fault and non-fault based liability of defendants. For example, comparative fault is applied in the strict liability action for unseaworthiness, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408–09, 74 S.Ct. 202, 204, 98 L.Ed. 143 (1953), in personal injury actions under the Jones Act, 46 U.S.C. § 688, in actions brought under the Death on the High Seas Act, 46 U.S.C. § 766, and in longshoremen's suits against vessels under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977). "The admiralty rule in personal injury cases is, in effect, one of comparative negligence." G. Gilmore & C. Black, *The Law of Admiralty* 500 n. 70 (2d ed. 1975).

Lewis's desire to except maritime products cases from this consistent application of comparative fault also overlooks the fact that maritime law traditionally resists doctrinal change that might balkanize its uniformity and generality. Most notably, courts applying maritime law have repeatedly rejected choice of law notions that would reference state tort doctrines. State workers' compensation schemes were held to be inapplicable to personal injury claims arising from maritime related work on vessels in navigable waters. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). State negligence law was held not applicable in a maritime personal injury suit, *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927 (1922), including state law defenses of contributory negligence, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. at 409–11, 74 S.Ct. at 204–06. In 1948 Congress extended admiralty jurisdiction shoreward with the Extension of Admiralty Act, 46 U.S.C. § 740, which provides that maritime jurisdiction shall include loss caused by a vessel on navigable water even if the injury is finally suffered on land. Even resort to states' wrongful death statutes ended with recognition of a general maritime law right of recovery for wrongful death. *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *see Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976).

1. Products cases can rest on traditional warranty and negligence grounds as well as on strict liability. We use strict liability here to refer to those cases that rest on strict liability theories such as Restatement (Second) of Torts § 402A (1965). We already apply comparative fault in negligence cases and we see no principled distinction for doing otherwise with warranty cases. The practical result is that comparative fault will apply to all maritime products cases.

In sum, comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity. These values of uniformity, with their companion quality of predictability, a prized value in the extensive underwriting of marine risks, are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit. We are persuaded that the fit within general maritime principles of a doctrine of strict liability for defective products without comparative fault would be uneven at best.

The Death on the High Seas Act, which encompasses claims for personal injuries caused by defects in products, illustrates the problems of not recognizing comparative fault in maritime products liability cases. Under DOHSA, the court is directed to "take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly." 46 U.S.C. § 766. If Lewis's argument were accepted, when a worker's death on the high seas was caused by a defective product, the recovery would be reduced on account of the worker's negligence, but not when he was only injured. Moreover, because DOHSA applies to accidents occurring beyond a marine league from shore plaintiffs would be treated differently depending upon where a fatal accident occurred.

Other examples of its poor fit come quickly to mind in multi-party litigation so common to the admiralty practice. When a negligent plaintiff, negligent defendants, and the manufacturer of a defective product are all held jointly responsible for injuries, plaintiff's negligence would diminish his potential recovery from the negligent defendants but not from the manufacturer. If the liability was joint and several, plaintiff could recover the entire amount of his damages from the manufacturer. From the plaintiff's perspective, assuming the solvency of the manufacturer, it is as if there were no doctrine of comparative fault with respect to the negligent defendants as well. From the manufacturer's perspective, contribution might be available, but somebody would bear more than his share of the damages. In other words, erosion of the comparative fault principle, once started in the products liability field, will cut at the legs of negligence as well.

The traditional doctrine of seaworthiness will also likely be affected. If a vessel is unseaworthy because a product was defective, we will be forced to decide whether to hold the manufacturer of the product to a stricter standard of liability than the vessel owner, traditionally a near insurer in cases of unseaworthy vessels. Even more taxing will be the categorization process as seamen attempt to escape the comparative fault of the traditional theory of unseaworthiness and label their case products cases. Ultimately, there would be the inquiry of whether a vessel is not itself a product. It takes little imagination to see, indeed predict, that should we reject comparative fault, many maritime torts of our circuit will become product cases with the companion problem that the courts of this circuit would be favored over more convenient courts by seamen with a choice of forum.

While the issue seems to be open in most circuits, our decision to apply comparative fault to a strict liability case controlled by the general maritime law is supported by the only other circuit court to expressly consider the issue. In *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir.1977), the Ninth Circuit, impressed by the recent endorsement of comparative fault by state courts and by the prevalence of comparative fault in maritime law, held that the damages suffered by a plaintiff in a maritime strict products liability case could be reduced by his fault's contribution to his injury.

IV

Lewis offers two primary reasons why strict liability and comparative fault are unsuitable partners. Lewis first argues that comparing a defendant's strict liability with a plaintiff's negligence is an "apples

and oranges" effort. The argument is that while negligence focuses on a plaintiff's personal conduct, the focus of the strict products liability action is on the condition of the product and not on the conduct of the defendant. The argument continues that this difference hinders apportionment of fault in that it requires a necessarily crude and essentially arbitrary allocation, given the task of comparing incomparable ideas.

The second and related argument against comparative fault is that it requires a trier of fact to hypothesize the fault of the defendant in an unstructured way in frustration of the allocating objective of enterprise liability. That objective is to place upon the manufacturer the burden of accidental injuries caused by its products, an objective accomplished in part by a rejection of the defense of contributory negligence. *See* Restatement (Second) of Torts § 402A, Comments c and n (1965). The rationale is that the manufacturer is in a better position than the user to absorb the economic loss by spreading it throughout the chain of distribution. Eventually, the cost is passed on to society in the form of an increased cost of the product. The effect of reducing a plaintiff's recovery by the amount of his fault, the argument goes, will be to reduce or remove the manufacturer's incentive to produce safe products.

At a practical level, Lewis's argument that negligence cannot be compared to strict liability fault overlooks the fact that such comparisons were already and inevitably required in this case. Here, apart from questions of Lewis's own contribution to his injuries, the trial judge compared Joy Manufacturing's strict liability fault with the negligent fault of Edwards Rental and Rebel Rentals. In short, Lewis's proffered "conceptual problem has never bothered admiralty courts in applying the rule." Owen & Moore, "Comparative Negligence in Maritime Personal Injury Cases," 43 La.L.Rev. 942, 948 (1983).

Nor have the arguments persuaded common law jurisdictions for despite these conceptual attacks, *see, e.g., Kinard v. Coats Co.*, 553 P.2d 835 (Colo.App.1976), the majority of state courts and federal courts sitting in diversity that have faced this issue have held that comparative fault, as adopted by the legislature or the courts, should be applied to actions founded on strict products liability. Their reasoning supports the application of comparative fault in maritime cases based on strict products liability.

Alaska was one of the first states to apply its judge-made comparative fault doctrine in a strict products liability case. In *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976), the Alaska Supreme Court analyzed the purposes of the two doctrines and emphasized the anomalous situation that would exist "in a products liability case to have damages mitigated if the plaintiff sues in negligence, but allow him to recover full damages if he sues in strict liability, particularly where the complaint contains alternate counts for recovery in negligence, strict liability, and/or breach of warranty." *Id.* at 46 (footnote omitted). The court concluded that "the public policy reasons for strict product liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct." *Id.*

This court, applying Mississippi law, reached a similar result in *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir.1976). The trial court there had instructed the jury to compare the conduct of the defendants and the plaintiffs, to decide if both contributed to the cause of the accident, and to then reduce plaintiff's recovery to the extent his negligence contributed to the accident. Holding that "the trial court took the correct path through the thicket of strict liability and contributory negligence,"

we remarked that "a noted commentator has suggested that the proper interaction between strict liability and contributory negligence 'should be apparent on reflection. It is to apply a system of comparative fault of the pure type and apply it to strict liability as well as negligence.'" *Id.* at 290 (quoting Wade, "Strict Tort Liability," 44 Miss.L.J. 825, 850 (1973)). Similarly, in *West v. Caterpillar Tractor Co., Inc.*, 547 F.2d 885 (5th Cir.1977), we held, in response to the Florida Supreme Court's answer to a certified question, that "strict liability ... lies in bystander actions, and that want of ordinary due care—in its comparative negligence form—is a defense...."[2] We thus affirmed a 35 percent reduction in plaintiff's judgment to reflect his fault.

The reasoning in *Butaud, Edwards,* and *West* was amplified by the California Supreme Court in *Daly v. General Motors Corp.*, 20 Cal.3d 725, 144 Cal.Rptr. 380, 575 P.2d 1162 (1978). Extending its judge-made "pure" comparative fault system to strict liability cases, the court rejected the same arguments now made by Lewis and answered the suggestion that the two concepts cannot be merged:

> The inherent difficulty in the "apples and oranges" argument is its insistence on fixed and precise definitional treatment of legal concepts. In the evolving areas of both products liability and tort defenses, however, there has developed such conceptual overlapping and interweaving in order to attain substantial justice.... We think, accordingly, the conclusion may fairly be drawn that the terms "comparative negligence," "contributory negligence" and "assumption of risk" do not, standing alone, lend themselves to the exact measurements of a micrometer-caliper, or to such precise definition as to divert us from otherwise strong and consistent countervailing policy considerations. Fixed semantic consistency at this point is less important than the attainment of a just and equitable result.

575 P.2d at 1167–68.

The court also rejected the arguments that applying comparative fault would erode the protection afforded by the strict liability doctrine and reduce the incentive to produce safer products. In response to the concern that comparative fault would diminish protection of consumers, the court emphasized that plaintiffs will continue to be relieved of proving that a manufacturer or distributor was negligent and that their recovery will be reduced *only* to the extent their lack of reasonable care contributed to the injury. *Id.* at 1168. The court also reasoned that manufacturers, who cannot assume the users of a defective product to be blameworthy, will not face reduced incentives because their continuing liability for a defective product "will be lessened only to the extent that the trier finds that the victim's conduct contributed to his injury." *Id.* at 1169. Moreover, the court noted that the extension of comparative principles to strict liability actually would produce the "felicitous result" of relieving the inequities associated with absolute defenses that provide windfalls to manufacturers. *Id.*

Following the reasoning of *Daly*, the Third Circuit in *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir.1979) (applying Virgin Islands law) also responded to the suggestion that a trier of fact will be unable to apportion fault between a negligent plaintiff and a strictly liable defendant. Though conceding that "there is no proven faulty conduct of the defendant to compare with

2. Nevertheless, we noted that the Florida Supreme Court had excepted plaintiffs' negligent failure to discover defects or guard against the possibility of their existence. 547 F.2d at 887 n. 2. *See West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla.1976). This case does not present the question of whether a plaintiff's "fault" in failing to discover the defect can serve to reduce his recovery. An argument may be made that such fault comparison is subsumed by the initial inquiry into whether a defect existed and that the concept is in actuality comparative causation. On the other hand the Ninth Circuit reached the opposite conclusion. *Pan-Alaska, ETC. v. Marine Const. & Design Co.*, 565 F.2d 1129, 1139 (1977). We leave the question to another day.

the faulty conduct of the plaintiff," the court noted that:

> In apportioning damages we are really asking how much of the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions.... Although fault, in the sense of the defendant's defective product or the plaintiff's failure to meet a standard of care, must exist before a comparison takes place, the comparison itself must focus on the role each played in bringing about the particular injury.

Id. at 159–60 (footnote omitted).

The accuracy of the court's observation in *Murray* is seen when one looks at possible jury questions. Within its broad discretion in the manner of instructing the jury a district court might sequence Rule 49 interrogatories as follows: (1) was the product defective; (2) was it a cause of injury to plaintiff; (3) was the plaintiff at fault; (4) was plaintiff's fault a cause of plaintiff's injury; and (5) the percentage of plaintiff's injury caused by plaintiff's fault. The result then is that when the jury "compares fault" the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation. "Fault" that did not cause injury is not relevant.

An increasing number of courts have been persuaded by the policy considerations articulated in such cases as *Daly* and *Murray*. *See, e.g., Trust Corp. of Montana v. Piper Aircraft Corp.*, 506 F.Supp. 1093 (D.Mont.1981) (applying Montana law); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va.1982); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Hawaii 1982); *Kennedy v. City of Sawyer*, 4 Kan. App.2d 545, 608 P.2d 1379, 1386 (Ct.App.), *aff'd*, 228 Kan. 439, 618 P.2d 788 (1980); *Baccalleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979). Most recently, the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 26 Tex.S.Ct.J. 507 (Tex. July 16, 1983) applied comparative fault to strict products liability cases despite a comparative contribution statute otherwise held inapplicable to strict liability cases. In short, at the same time that much judicial learning is moving *towards* comparative fault in strict liability cases, Lewis would have us abandon those principles in the maritime law.

Finally, we inquire whether any strong policy of Louisiana, in whose territorial waters this accident occurred, would be frustrated by adopting comparative fault in maritime products cases. While Louisiana courts do not appear to have applied comparative fault principles to strict products liability cases, the state has no "significant policy" against doing so. Its legislature adopted a comparative fault statute that became effective on August 1, 1980. *See* Acts 1979, No. 431 (amending LSA–C.C. Art. 2323). Unlike some comparative fault statutes that expressly apply only to actions based upon negligence, *see e.g., Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okl. 1974), Louisiana's statute applies "[w]hen contributory negligence is applicable to a claim for damages." It proportionately reduces recovery when "a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons...." LSA–C.C. Art. 2323. We have recently certified to the Louisiana Supreme Court the question whether Louisiana law recognizes contributory negligence as a defense to a products liability action, *see Bell v. Jet Wheel Blast*, 709 F.2d 6 (5th Cir.1983). *See also Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614 (5th Cir.1983); Plant, "Comparative Negligence and Strict Tort Liability," 40 La.L.Rev. 403 (1980). While we may be uncertain in this reading of Louisiana law, we are confident that recognition of comparative fault in products cases will not "frustrate" a dedicated policy of Louisiana.

V

It is relevant to an analysis[3] of how a rule allocates liability for accident losses resulting from use of a product to consider: (1) short-term and long-term cost; (2) amount of use of the product in the economy or "activity"; and (3) cost of administering the rules of liability. It is relevant because fault has both an ethical and an efficiency dimension. The latter is expressed by asking which party can prevent the injury at the least costs.

The short-term costs are the immediate expenditures to avoid accidents as well as the immediate costs of accidents themselves. Of course the two primary actors influenced by the rule choice are the manufacturer and the user. The manufacturer will alter its product to avoid an accident if the manufacturer's share of the expected cost of the accident (coverage cost times the probability it will occur) exceeds the cost of altering the product. A system of strict liability with comparative fault includes in the manufacturer's share of the accident costs only those costs caused by product defects. In that case the manufacturer will have the correct economic incentive to adjust the design of the product to minimize accident costs caused by the design. A system of strict liability with no comparative fault would add to the manufacturer's share those accident costs caused by negligent use and not by any product defect. This increase in the manufacturer's share would result in an increased, and therefore inefficient, level of expenditures on preventive measures.

The situation with respect to the user's expenditures is precisely complementary. The user will intentionally alter his use of the product only if his perceived cost of altering his use to avoid an accident is less than his expected cost from an accident resulting from his failure to alter his behavior. The inclusion of comparative fault will affect user behavior in a manner that results in a more efficient utilization of resources. Under simple strict liability, as proposed by the plaintiff, the user has no economic incentive to avoid an accident that he could avoid more cheaply than the manufacturer.

Besides affecting long-term research for safe products and the immediate decisions on how much to invest in preventive measures, rules of liability affect the level of product use. When the liability for blameless accidents is placed on the manufacturer, the price of products whose use results in high accident costs will go up relative to those whose use results in small accident costs. The use of the comparative fault standard reduces the risks of non-negligent users indirectly paying for negligent users. The comparative fault standard allows the price of the product to reflect the cost of its non-negligent use. Hence a comparative fault standard allows the economically efficient amount of the product to be used. If, for example, the use of a particular piece of equipment has resulted in several costly accidents due to the negligence of the user, the cost of the product will not be driven up because of the expected cost of accidents for which the producer will be or has been liable. The producer will not have to charge non-negligent consumers a premium to cover the liability from accidents by negligent users. The proper use of a safe product will not be stifled by negligent use.

The final economic consideration in choosing a rule of liability is the cost of administering the system. It might appear

3. The "analysis" of part V presents nothing novel. It describes what maritime jurists intuitively sensed long ago. We do no more than talk in an analytical way about judgments intuitively made. Because stated rationale is a hallmark of our work, we believe the effort worthwhile, despite its rudimentary character. We suggest no decisional calculus. Instead we only acknowledge that such inquiry adds light to the problem at hand. While ultimately choices among potential tort rules may turn on notions of "fairness" as viewed through the eyes of each judge's ethical regimen, those choices will only be guesses if the judges are inadequately informed of their impact. *See Dobson v. Camden*, 705 F.2d 759, 775 n. 1 (5th Cir.1983).

that strict liability without comparative fault would be less expensive to administer both because it simplifies the issues at litigation and because it removes uncertainty thereby facilitating settlements, which are cheaper than trials. *But see United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 408 n. 13, 95 S.Ct. 1708, 1714 n. 13, 44 L.Ed.2d 251 (1975). The matter, however, is more complex: by increasing the certainty of victory, if it does, strict liability may increase the plaintiff's willingness to spend money on litigation and decrease his willingness to settle. There is no indication that strict liability with comparative fault would increase cost.

VI

[4] We are persuaded that general considerations of fairness and efficiency support a comparative fault defense in products liability actions. In maritime suits, these considerations are bolstered by the historical reliance on comparative fault as integral to an essentially uniform and unitary body of law. We hold that it governs here, AFFIRM the district court's application of maritime principles of comparative fault, and RETURN the case to the panel for its review of Lewis's assertion that the level of found fault was not supported by the evidence.

STOP

POLITZ, Circuit Judge, with whom JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

Believing the majority opinion to be at odds with the principles underlying strict liability, I respectfully dissent. Though mindful of Justice Holmes' observation that the law is grounded in experience, not logic, *Holmes, The Common Law*, p. 1 (1881), I am not convinced that this case obliges us to ignore the logic underpinning the tort principles pertinent to the issue before us. I perceive strict liability and comparative fault as incompatible concepts.

Strict Liability

Strict liability is not a development in the law of negligence; it evolved separately. *See, Prosser, The Law of Torts* § 98 (4th ed. 1971). *See also, Powers, The Persistence of Fault in Products Liability*, 61 Tex. L.Rev. 777 (1983). Strict liability for goods derives from the law of warranty. *See McPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916), and its progeny. Strict liability for unseaworthiness in maritime law arose from the concept of an implied warranty of seaworthiness by the owner of the ship: "It is essentially a species of liability without fault ... the liability is neither limited by conceptions of negligence nor contractual in character ... [i]t is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 66 S.Ct. 872, 877, 90 L.Ed. 1099 (1945). The concepts of maritime strict liability and products strict liability are both based on the concern that the injured party cannot adequately protect himself from the potential harm. *Compare Sieracki* with *Greenman v. Yuba Power Products*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

Strict liability is based on a theory of responsibility which requires no finding of fault. The law of strict liability, applicable in some form in most American jurisdic-

Harold E. ALVEREZ, Plaintiff-Appellant
Cross-Appellee,

v.

J. RAY McDERMOTT & CO., INC., Defendant-Appellee Cross-Appellant.

No. 80-3836.

United States Court of Appeals,
Fifth Circuit.

May 5, 1982.

Before BROWN, GEE and GARWOOD, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Plaintiff Harold E. Alverez sued his employer, J. Ray McDermott & Co. (McDermott), for injuries sustained while working aboard the Lay Barge 22. Appealing a judgment based on a jury verdict in his favor, Alverez complains that the jury's answers to special interrogatories are inconsistent and that the damage award should be increased for maintenance and cure. McDermott has filed a cross-appeal, asserting that the damage award designated by the jury is a gross figure that should have been reduced by the District Court for the percentage of Alverez' negligence fixed by the jury. McDermott also challenges Alverez' right to raise on appeal the issue of inconsistent jury findings. Having determined that the interrogatories are not inconsistent and that the damage award, already diminished for the plaintiff's negligence, includes maintenance and cure, we affirm.

I. *Facts*

Harold Alverez was employed by McDermott as a member of the crew of the Lay Barge 22. On Alverez' first day back after treatment for a sinusitis condition, he was assigned duties at the forwardmost bow "imprep" station, located on a pipe rack fourteen feet above the port side bow deck. At approximately 5:30 p. m., the dinner meal was called. There were four methods of egress to reach the galley area from Alverez' work station—two stairwells, a gangway, and a walkway across the pipe rack. All of these, according to Alverez, were obstructed or dangerous. Alverez chose to go across the pipe rack, a route utilized frequently by many of the crew, as well as supervisory and safety personnel. Unfortunately, Alverez was not successful in navigating his way across the pipe to the galley and fell from the pipe rack to the deck fourteen feet below, injuring his back, side and head. This fall resulted in a back injury which has kept Alverez from returning to heavy types of employment.

Alverez brought suit against his employer under the Jones Act and General Maritime Law, claiming that his injuries resulted from the negligence of McDermott and unseaworthiness of the Lay Barge 22. He also sought to recover maintenance and cure. At trial, Alverez presented evidence that the passageways were cluttered and dangerous and that the pipe route, the only unobstructed path, was often used by supervisory and safety personnel. Alverez also attempted to demonstrate that McDermott was operating with a short crew, the result being that although Alverez was feeling ill on the day of the accident, he was asked to "stick it out." McDermott presented testimony that contradicted Alverez concerning whether the passageways were obstructed. McDermott also established that Alverez, on the day of the accident, in violation of the employer's regulations, had failed to notify the medic on board the barge that he was taking prescribed medicine at the time which could cause drowsiness.

The case was submitted to the jury under F.R.Civ.P. 49(a) with a general charge and five special interrogatories covering both Jones Act negligence and unseaworthiness.[1] The jury found that McDermott was negligent (int. 1) but that the Lay Barge 22 was not unseaworthy (int. 2). Further, the jury determined that (i) Alverez was negligent, (ii) his negligence was not a "proximate cause" of his injury but (iii) his negligence was a producing cause of his injuries (int. 3). The percentage that Alverez' negligence contributed to his injuries was found to be 90% (int. 4) and his damages were fixed at $18,000 (int. 5).

Alverez' motion for j. n. o. v. on the issue of maintenance and cure, motion to set aside the jury verdict, and motion for entry of judgment in favor of the plaintiff or in the alternative for a new trial were denied. Following oral argument and submission of memoranda by counsel, the District Court rendered an opinion that the jury figure of $18,000 was a net figure, not subject to diminution by 90% and judgment was entered accordingly.

On appeal, Alverez raises three points of error. First, he asserts that the jury's finding that McDermott was negligent is inconsistent with the finding that the barge was not unseaworthy. Second, Alverez contends that the finding that his negligence produced 90% of his injuries is inconsistent with the finding that his negligence was not a proximate cause of his injury. Finally, he argues that the jury's verdict must be increased because there is no provision in the damage award for maintenance and cure, penalties, and attorney's fees for "arbitrary and capricious termination" of maintenance and cure. In its cross-appeal, McDermott contends that the $18,000 awarded by the jury represents a "gross" figure that should then have been reduced by the District Court for the amount of Alverez' contributory negligence (90%) to yield the net figure of $1,800. McDermott also maintains that Alverez has waived his right to challenge the consistency of the interrogatories by failing to ask for resubmission at the time the jury returned its verdict.

1. INTERROGATORIES TO THE JURY

1. Was the defendant J. Ray McDermott negligent?

Answer X Yes or ____ No

If the answer to question No. 1 is Yes, answer (a).

(a) Did that negligence play any part, however slight, in producing plaintiff's injury?

Answer X Yes or ____ No

2. Was the Lay Barge 22 unseaworthy?

Answer ____ Yes or X No

If the answer to question No. 2 is Yes, answer (a).

(a) Was that unseaworthiness a proximate cause of Plaintiff's injury?

Answer ____ Yes or ____ No

If the answer to question No. 1(a) or question No. 2(a) is Yes, answer question No. 3.
If the answers to questions Nos. 1 and 2 are BOTH No, or if the answers to questions Nos. 1(a) and 2(a) are BOTH No, have the foreperson date and sign this form and return it to the Court.

3. Was the plaintiff Mr. Alverez negligent?

Answer X Yes or ____ No

If the answer to question No. 3 is Yes, answer (a).

(a) Was that negligence a proximate cause of his injury?

Answer ____ Yes or X No

If the answer to question No. 3(a) is No, answer (b).

(b) Did that negligence play any part, however slight, in producing plaintiff's injury?

Answer X Yes or ____ No

4. If the answer to question No. 3(a) or question No. 3(b) is Yes, to what degree expressed in percentage did plaintiff's negligence contribute to his injuries?

90% %

5. If the answer to question No. 1(a) or question No. 2(a) is Yes, state in dollars the amount of plaintiff's damages.

$ 18,000.00

II. *Inconsistent Interrogatories*

A. *Standard of Review*

[1] Two of the three asserted errors raised by Alverez concern allegedly inconsistent answers to special interrogatories. We are required under the Seventh Amendment to make a concerted effort to reconcile apparent inconsistencies in answers to special verdicts if at all possible. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 806–07 (1962); *Mercer v. Long Mfg. N. C., Inc.*, 665 F.2d 61 (5th Cir.), *rehearing denied*, 671 F.2d 946 (1982); *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103, 1106–07 (5th Cir. 1975); *Griffin v. Matherene*, 471 F.2d 911, 915 (5th Cir. 1973). "We therefore must attempt to reconcile the jury's findings, by exegesis, if necessary, before we are free to disregard the jury's verdict and remand the case for new trial." *Gallick v. B&O R. R. Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618, 627 (1963). *See Morrison v. Frito-Lay, Inc.*, 546 F.2d 154 (5th Cir. 1977); *Gonzales v. Missouri Pacific Railroad Co.*, 511 F.2d 629 (5th Cir. 1975); *R. B. Co. v. Aetna Insurance Co.*, 299 F.2d 753 (5th Cir. 1962). Whenever it is possible to reconcile conflicts, this Court is able to direct "a comprehensive, final disposition to the case without infringing in the slightest upon the inviolate nature of the jury trial and resolution." Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 347 (1968).

[2] The test for determining whether jury answers to special verdicts are inconsistent is well-established in this Circuit.

> This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict.... If on review of the District Court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew.

Griffin, 471 F.2d at 915 (citations omitted). *See also Mercer, supra; Guidry v. Kem Manufacturing Co.*, 598 F.2d 402, 408 (5th Cir.), *rehearing denied*, 604 F.2d 320 (5th Cir. 1979), *cert. denied*, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980); *Willard v. The John Hayward*, 577 F.2d 1009 (5th Cir. 1978). In attempting to reconcile special verdicts, our constitutional mandate to create consistency requires that we look beyond the face of the interrogatories to the court's instructions as well. *Mercer, supra; Griffin, supra; McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961).

[3] McDermott attempts to foreclose entirely any review upon appeal of the inconsistency of the answers to the interrogatories. McDermott would have us hold that the failure to request resubmission to the jury prior to its discharge results in a waiver of the party's subsequent right to complain of the inconsistent special verdicts. Neither F.R.Civ.P. 49(a) nor the law of this Circuit has established any such rule of waiver and we decline to do so in this case. That this Circuit has never adopted such a waiver rule in cases with special interrogatories under F.R.Civ.P. 49(a) is made quite clear in our opinion in *Mercer v. Long Mfg. N. C., Inc.*, 671 F.2d 946 (5th Cir. 1982) (denial of petition for rehearing).[2]

2. In the instant case, the inconsistencies in the special interrogatories, at least the findings of no proximate cause and 90% negligence, in light of the court's general charge, were not so blatant that the parties would have immediately perceived while the jury was present that a judgment could not be entered upon them.

B. *Negligence and Unseaworthiness*

The first asserted inconsistency is between the finding of negligence (int. 1) and the finding of no unseaworthiness (int. 2). Alverez argues that *all* of the elements of negligence that he proved at trial also established the unseaworthiness of the vessel, demonstrating that the work environment aboard the barge was unsuitable for its intended purpose and was unsafe. Therefore, if the jury found that McDermott had been negligent in allowing the unsafe condition to exist, then logically the jury should have also found the barge to be unseaworthy. Alverez reasons that since the jury impliedly found in favor of him on the factual issues of obstruction of passageways and sufficiency of crew, as a matter of law, the negligent operations of McDermott created an unseaworthy vessel. In this approach the alleged inconsistency appears not from the face of the interrogatories but through an examination of the evidence supporting the answers.

[4] We find this argument without merit. Jones Act negligence and unseaworthiness are two separate and distinct claims. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971); *Mitchell v. Trawler Racer*, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941, 948 (1960). Individual acts of negligence do not necessarily create the condition of unseaworthiness "To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions." *Usner*, 400 U.S. at 500, 91 S.Ct. at 518, 27 L.Ed.2d at 567 (footnote omitted). The jury in this case was separately and specifically charged on the distinct issues of negligence and unseaworthiness.

[5] Alverez presented evidence at trial of several grounds upon which a finding of negligence might be based, including obstructed passageways, shorthanded crew, and improper behavior of supervisory personnel in walking along the pipes. Thus it was possible for the jury to find negligence on the part of McDermott based on one or more theories and yet find that the barge was seaworthy. For example, the jury could have determined that the passageways were not obstructed and therefore the barge was not unseaworthy, but that McDermott was negligent in allowing supervisory personnel to engage in the habit of walking on the pipes. We do not attempt to discern conclusively which theories were credited and which were rejected by the jury, but only point out that within the context of the trial and in light of the charges on both unseaworthiness and negligence, the jury's answers do represent a logical and consistent decision.

C. *Proximate Cause and Contributory Negligence*

[6] The second alleged inconsistency is between the finding that Alverez' negligence was not a proximate cause (int. 3(a)) and the finding that his negligence contributed 90% to his injuries (int. 4). Considering the distinct substantive standards which we discuss at length, the analyses would regard the inconsistency on the basis of underlying evidence rather than a conflict on the face of the interrogatories and their answers. We assume, without deciding, that this sort of inconsistency is properly challengeable. While Alverez' argument that a finding of no proximate cause is inconsistent with a finding of 90% contributory negligence has superficial appeal, we find that the jury's answers, when viewed in the context of the charge given by the

District Court,[3] represent a logical decision. *R. B. Company*, 299 F.2d at 758.

The District Court made clear to the jury, in both the construct of the interrogatories and the general charge, that there were two separate theories of liability, Jones Act and unseaworthiness, with two different standards of proof of causation.[4] The "producing cause" standard, that used for Jones Act negligence, is the FELA lax standard, incorporating any cause regardless of its immediacy. Plaintiff's burden of proving cause is "featherweight," *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 331 (5th Cir. 1977), and all that is required is a showing of "slight negligence," *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 361 (5th Cir. 1980). In keeping with this less demanding standard of proof and causation, the test for sufficiency of evidence in a Jones Act case also requires less evidence to support a finding, and directed verdicts and j. n. o. v. motions are granted "only when there is a complete absence of probative facts" to support a verdict. *Lavender v. Kurn*, 327 U.S. 645, 652–53, 66 S.Ct. 740, 743, 90 L.Ed. 916, 922 (1946) (construing standard for FELA—Jones Act cases, *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511, 513 (1957)); *Kendrick v. Illinois Central Gulf Railroad Co.*, 669 F.2d 341, 343 n.1 (1982); *Comeaux v. T. L. James & Co.*, 666 F.2d 294, 298 n.3 (5th Cir. 1982); *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 359–60 (5th Cir. 1980).[5] Like-

3. The District Court gave the following charge on causation:

> Now, we must consider the matter referred to in the law as "causation." Although negligence or unseaworthiness may exist when an accident happens, it does not follow necessarily that that negligence or unseaworthiness caused the accident. The law does not recognize only one cause of an injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause an injury, and in such a case, each may be a cause.
>
> A different rule applies to proof of causation under the Jones Act than the rule applicable to a claim of unseaworthiness.
>
> Under *the Jones Act*, which is the first causation stated by the plaintiff, an injury or damage is considered caused by a negligent act, or negligent failure to act, whenever it appears, from a preponderance of the evidence in the case, that the *act or omission played any part, no matter how small*, in *bringing about* or actually causing the injury or damage.
>
> However, with respect to an *unseaworthiness claim*, an injury or damage is considered caused by unseaworthiness of a vessel whenever it appears from a preponderance of the evidence in the case that the *unseaworthiness was a proximate cause of the injury.* Proximate cause means: first, that the unseaworthiness or the negligence *played a substantial part* in bringing about or actually causing the injury; and *two*, that the *injury was either a direct result of a reasonable probable consequence* of the *unseaworthiness* or negligence.
>
> As to the claim of unseaworthiness, the law of damages is not concerned with the effect or remote causes, but only those which *play a substantial part* in bringing about or actually causing the injury and those which naturally flow from the unseaworthiness or the negligent act.

(emphasis supplied)

4. The issue of proximate cause assumes special significance in seaman's personal injury litigation because different standards of causation are applied depending on whether the action is for unseaworthiness and/or Jones Act negligence; the separate standards must be employed to determine whether one or both aspects of the case should be submitted to the jury, and the jury must then be instructed as to each remedy's individual rule of causation. An action based on unseaworthiness will normally present no problem for the judge since he need only instruct the jury in traditional common law proximate cause: the act or omission must be a "cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of, and without which it would not have occurred." The burden on the plaintiff of proving causal negligence under the Jones Act, however, is considerably lighter; the Act does not exclude liability for remote damages: the ship owner will be held liable if his 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' It is in failing to take account of this distinction that the trial judge can easily commit reversible error.

1B *Benedict on Admiralty* § 28 at 3–162–166 (7th ed. 1980).

5. This standard is distinctly different from the *Boeing* "reasonable minds" test applied to unseaworthiness claims. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). *See* note 7 *infra*.

wise, we have applied the same FELA standards of proof, causation, and review of a plaintiff's negligence to that of contributory negligence. *See Campbell v. Seacoast Products, Inc.*, 581 F.2d 98, 99 n.2 (5th Cir. 1978) (applying *Lavender* standard of review to Jones Act case whether jury verdict favors plaintiff or defendant) [6]; *McBride v. Loffland Brothers Co.*, 422 F.2d 363, 365 (5th Cir. 1970) (applying *Lavender* test to sufficiency of evidence of contributory negligence); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 822-24 (5th Cir. 1965) (FELA case applying single standard of proximate causation to employer and employee negligence). *See also Weese v. Chesapeake & O. Ry. Co.*, 570 F.2d 611, 615 (6th Cir. 1978); *Dixon v. Penn Central Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Fleming v. American Export Isbrandtsen Lines, Inc.*, 451 F.2d 1329, 1331 (2nd Cir. 1971). Thus the interrogatory on Jones Act negligence specifically asks if McDermott's negligence played any part "however slight, in *producing* plaintiff's injury" (emphasis added). The complementary interrogatory concerning Alverez' negligence correctly uses the "producing" cause standard (int. 3(b)). It is clear that the jury, utilizing equal Jones Act standards for both seaman and employer, found under the Jones Act that McDermott was negligent and that Alverez was also negligent. In a separate question (int. 4), the jury established that Alverez' negligence had *contributed* 90% to his injury.

The standard of causation for unseaworthiness is a more demanding one than that for Jones Act and requires proof of proximate cause, that is a direct and substantial cause.[7] The jury found that the barge was not unseaworthy. And not inconsistent with this and in light of the instructions given, see note 3 *supra*, they found Alverez' negligence not to be a proximate cause of his injuries (int. 3(a)).

Given our constitutional mandate to find consistency where reasonably possible, we find that the determination of no proximate cause and 90% contributory cause are reconcilable. First, the interrogatory on Alverez' negligence (int. 3) is not inconsistent. The jury found causation on Alverez' part under the lax Jones Act *producing* cause standard but not under the more exacting unseaworthiness *proximate* cause standard. Thus the jury determined that Alverez' negligence, while not immediate enough or direct enough to equal proximate cause, contributed even if only remotely to the extent of 90% to the injury. Second, since the jury was carefully charged on the two theories of liability and their separate standards of causation, the jury, we are entitled to assume, understood that if it found no unseaworthiness, the question of Alverez' negligence being a proximate cause with respect to such situations was basically superfluous. Their concern was only with *producing cause*, having found Jones Act negligence enough. Their answer to int. 4 (concerning the percentage that Alverez' negligence *contributed* to his injuries) was reached in light of the instructions on producing cause, that is "any part, however slight." While it would have been preferable for the District Court to have constructed the interrogatories so that the issue of Alverez' contributory negligence, under each standard, followed the appropriate theory of McDermott's liability (i.e., so that the order would be int. 1, 3(b), 4; 2, 3(a), 4), we have no difficulty in holding that the answers, when viewed along with the instructions, represent a logical and probable decision on the relevant issues as submitted. In fact, the interrogatories, as constructed, and the charge, as given, carefully distinguish between the separate theories of liability and their applicable standards of causation.

6. *Cf. Allen v. Seacoast*, *supra*, at 360 & n.9 (not deciding if FELA standard applies to directed verdicts against a seaman).

7. The test for sufficiency of evidence in an unseaworthiness claim is likewise more exacting, utilizing the *Boeing* standard. *Comeaux v. T. L. James & Co.*, 666 F.2d at 298 & n.3; *Allen v. Seacoast Products, Inc.*, 623 F.2d at 359; *Claborn v. Star Fish & Oyster Co.*, 578 F.2d 983, 987 (5th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1281, 59 L.Ed.2d 494 (1979).

[7] Nor can we accept Alverez' contention that the finding of 90% contributory negligence is based on an improper determination by the jury that Alverez "assumed the risk" of walking on the pipe. The jury was properly instructed that assumption of the risk is not a defense[8] and we have no reason to believe that the jury disregarded this instruction. It was certainly possible under the various theories of negligence for the jury to find that McDermott was negligent and that Alverez was 90% contributorily negligent without finding that Alverez assumed the risk of climbing on the pipe. For instance, the jury could have found that McDermott's Jones Act negligence was in not instructing Alverez not to walk on the pipes but that Alverez' contributory negligence was in the manner he traversed the pipes or in the failure to inform the medic on board that he was taking medication which caused drowsiness. The determination that McDermott was negligent is not necessarily a determination that there were no alternative routes to the galley or that Alverez had no choice but to walk across the pipe.

III. *Maintenance and Cure*

Alverez' final contention is that the award for damages should be increased to reflect recovery for maintenance and cure, and damages, penalties and attorney's fees for "arbitrary and capricious termination" of these benefits. Alverez asserts that the jury's lump sum damage award did not include maintenance and cure. In the alternative, if the award included such an amount, Alverez maintains that this figure was improperly reduced 90% for Alverez' contributory negligence. Prior to trial, Alverez brought a motion for summary judgment on the issue of maintenance and cure, and damages, penalties, and attorney's fees for arbitrary and capricious termination of these benefits. At the hearing on the motion, the District Court denied the motion because the trial was set for approximately two weeks in the future and because the fact of the accident was contested. While the judge indicated at that time that he was sympathetic to Alverez' argument, he in no way indicated that maintenance and cure would not be included in the impending jury trial.[9]

8. The District Court gave the following instruction on assumption of the risk:

> A person acting in the service of a vessel, who is properly aboard the vessel to do his job, cannot legally be considered to have voluntarily assumed the risk that the vessel might in any respect be unseaworthy, even if the unseaworthy, dangerous or unsafe condition is known by, or obvious to, him.

In giving instructions on the Jones Act claim, the District Court gave the following instructions concerning contributory negligence:

> A seaman does not have the same control over his work conditions as a person who works on land. He must, to a certain degree, accept conditions as they are. Therefore, he is not obligated to devise a safer method of doing the work and he is not obligated to call for additional or for different equipment. A seaman's duty is to obey and to do his work as he is instructed.
>
> On the other hand, if a seaman is provided with a safe way to work and he chooses to do something in way that he knows or should know to be unsafe and dangerous, his employer is not responsible for the results of a choice made knowingly by the seaman.
>
> Therefore, if you find that the plaintiff, Mr. Alverez, did what he was told to do by the defendant and was not at fault himself, you are not to find him negligent. On the other hand, if you find that the plaintiff chose to use an unsafe method in violation of instructions, and that he knew or should have known it was unsafe, you may find he was wholly or partly responsible for what happened.

9. At the conclusion of that hearing, Judge Arceneaux stated to the attorney for McDermott:

> THE COURT: Let me tell you something Mr. Galloway. This cause is set for trial on the 16th of June and McDermott has contested whether or not there was in fact an accident.
> MR. GALLOWAY: yes, sir.
> THE COURT: Also alleged that it was willful misconduct on the part of the plaintiff. I don't mean to pre-judge it, but I certainly don't think much of that contention.
> If this matter were not fixed for trial on June 16, I'd be very, very inclined to award this man maintenance back to April 1978, or thereabout. Because we are so close to trial, roughly two weeks away and because there is such a contested fact, I'm not going to run the risk of having my summary judgment reversed across the plaza. But I want you to know that on the 16th of June, the 17th and the 18th, whatever time it takes to get that jury back, if there is a jury verdict in favor of

[8] At the subsequent trial, the jury was clearly charged on the issues of maintenance and cure and arbitrary and capricious termination of these benefits.[10] In fact, the plaintiff at trial specifically objected to the District Court's form of instructions on maintenance and cure and the Court's failure to give its proposed instructions. We find nothing wrong with the District Court's instructions. Nor do we agree with Alverez' position that if the damage award included maintenance and cure, the jury improperly reduced the maintenance and cure award by the percentage of Alverez' negligence. The judge carefully charged the jury that maintenance and cure was not to be reduced for negligence on the part of Alverez.[11] While Alverez objected to the

Mr. Alverez insofar as this accident is concerned, I'm going to relish awarding maintenance back as far as I can award it back, with interest and attorney's fees, and any other declaration I can hang on it. I'm convinced that J. Ray McDermott terminated this man from employment because he hired a lawyer, terminated his supplemental $11 a day, because he hired a lawyer and terminated, I think, his maintenance because he hired a lawyer. To me that is unconscienable, where you put a man on the street simply because he exercises a right he has. If that jury comes back with a verdict for Mr. Alverez insofar as the accident is concerned, I am going to enjoy thoroughly hanging around J. Ray McDermott every dollar I can hang on them for maintenance.

10. The District Court stated:

Now, let's talk a second about maintenance and cure. Maintenance and cure includes two separate items. The obligation of "maintenance" refers to the duty of the owner of a vessel to supply an injured or sick seaman with food and lodging when he is unable to work due to an injury or disease that has occurred while the seaman was in the service of his ship. The term "cure" means the owner's obligation to furnish nursing and medical attention for that kind of injury.

* * * * * *

The adequate protection of an injured seaman against suffering and want requires more than the assurance that he will receive payments at some time in the indefinite future. Payments must be promptly made at a time close to the illness or injury. An employer who fails to pay maintenance that is owed to a seaman, and does so arbitrarily or capriciously or with callous disregard for the claim subjects itself to penalties for such failure. "Arbitrarily" means to do something without any reason. "Capriciously" means to do something without a rational reason. The penalties for arbitrary or capricious failure to pay maintenance are money damages for any prolongation or aggravation of the physical injury suffered by the seaman; and for expenses incurred by the injured seaman; and for expenses incurred by the injured seaman to hire a lawyer to prosecute his claim for maintenance.

An employer is not obliged to pay maintenance and cure to a seaman merely because the seaman claims an injury. The law imposes on the employer only the duty to investigate the claim in good faith and with reasonable diligence, and then to pay maintenance and cure to the seaman if the results of the investigation justify such payments. But damages are not due merely because the employer fails to pay maintenance and cure even if they are due. Damages are due only if payment is withheld arbitrarily or capriciously or in callous disregard of the claim.

In the event that you decide that the plaintiff should in fact recover maintenance and cure, then you must also consider the separate question whether or not the employer was arbitrary or capricious or acted with callous disregard in failing to make such payments, and hence is liable for damages in addition to the amount due for maintenance and cure.

In resolving this second question, you should consider such matters as the nature and timeliness of the notice that the plaintiff gave of his injury, the nature and amount of information available to and discoverable by the employer, the reasonableness of the investigation by the employer, and in general such other matters as may be shown by the evidence to have any bearing on the question whether the employer was arbitrary or capricious or acted with callous disregard in not paying maintenance or in stopping payments.

If you find that the owner did not act arbitrarily or capriciously in stopping the payments of maintenance, then you may not award any damages or attorneys' fees for its failure to pay maintenance and cure.

11. The District Court stated:

The duty of the vessel owner to provide maintenance and cure is imposed by law and, therefore, does not rest upon negligence or culpability on the part of the owner or master. Nor is the duty of maintenance and cure restricted to those cases where the seaman's employment is the cause of the illness or injury. It is due if the seaman is injured or becomes ill at any time while he is in the service of his ship. *Neither maintenance nor cure is to be reduced because of any negligence on the part of the seaman.* (emphasis added).

instructions on maintenance and cure, there was no specific objection to the determination of a lump sum damage award based on the possibility that the jury might improperly reduce the maintenance and cure award. Although Alverez does not raise the issue of a single damage interrogatory in his brief, at oral argument Alverez' counsel indicated that he had objected at the charge conference to the maintenance and cure charge. Alverez' attorney also submitted requested jury interrogatories which did split out the types of damages (lost wages, past and future, pain and suffering, medical expense) and asked whether Alverez was entitled to maintenance and cure, if so from what dates, and whether McDermott had been arbitrary and capricious in failing to pay such benefits.

While it might have been preferable for the District Court to propound interrogatories similar to those proposed by Alverez' counsel and which separated the types of damages, we find that the jury was properly charged that maintenance and cure was not to be diminished for contributory negligence. The total damage award, $18,000, exceeds the amount requested for maintenance and cure.[12] Thus we find no error by the District Court and hold that the damage award included recovery for maintenance and cure. While we cannot determine if the jury also awarded damages for arbitrary and capricious termination of benefits, they were properly charged on these issues and we cannot say that they failed to follow the instructions on this aspect or on the requirement that maintenance and cure may not be reduced for contributory negligence.

IV. *Gross or Net*

[9] In its cross-appeal, McDermott contends that the damage award of $18,000 is a "gross" figure rather than a "net" figure. Thus McDermott's position is that the figure must be adjusted for the 90% contributory negligence of Alverez, leaving a final figure of $1,800 for damages. The District Court in a post-trial ruling determined that the $18,000 was a net figure not subject to further diminution for Alverez' contributory negligence. In determining that the award was a net figure, the District Court emphasized its charge to the jury in which it stated "damages shall be diminished by the jury in proportion to the amount of negligence attributable to Mr. Alverez."[13] The District Court proceeded to state: "Since the special interrogatory neglected to restate the above admonition, the Court, in order to remain consistent, and avoid conflicting answers, must reason that the jury reduced plaintiff's damages by ninety percent before filling in the amount of the award." We agree with the District Court that in light of the instructions given and the proof of maintenance and cure, the jury, in accordance with the instructions, diminished its award, other than that amount for maintenance and cure, for the ninety percent contributory negligence of Alverez.

AFFIRMED.

12. Alverez, in his brief, indicates that he incurred medical expenses of $6,292.08. He also states: "The amount plaintiff claims to be entitled to for the period of his injury up to the point of his reaching a point of maximum medical cure on May 27, 1980 is $4,655.00. That sum would only be on the basis of days that he would have been off the vessel because we asked for $33,000.00 in lost wages and, as such the request for $19 per day for each day since March 24, 1978 may have been considered a double recovery. However, if no consideration is made for wage loss, the amount of maintenance attributed for each day since injury would be $11,704.80."

13. The District Court also stated, in explaining contributory and comparative negligence:

> [T]he fact that Mr. Alverez was contributorily negligent shall not bar his recovery, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to Mr. Alverez.... Written questions will be submitted to you later on for you to answer, and all of this is set out in the questions, so you won't have to try and remember how to work out the comparative negligence.

NORFOLK SOUTHERN RAILWAY COMPANY, Petitioner v. TIMOTHY SORRELL

No. 05-746

SUPREME COURT OF THE UNITED STATES

549 U.S. 158; 127 S. Ct. 799; 166 L. Ed. 2d 638; 2007 U.S. LEXIS 1006; 75 U.S.L.W. 4045; 29 A.L.R. Fed. 2d 693; 25 I.E.R. Cas. (BNA) 786; 2007 AMC 192; 20 Fla. L. Weekly Fed. S 39

October 10, 2006, Argued
January 10, 2007, Decided

SUBSEQUENT HISTORY:
On remand at *Sorrell v. Norfolk S. Ry. Co., 2007 Mo. App. LEXIS 180 (Mo. Ct. App., Jan. 29, 2007)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT.
Sorrell v. Norfolk S. Ry., 170 S.W.3d 35, 2005 Mo. App. LEXIS 1024 (Mo. Ct. App., 2005)

DISPOSITION: Vacated and remanded.

SYLLABUS

[***642] Respondent Sorrell was injured while working for the petitioner railroad (Norfolk), and sought damages for his injuries in Missouri state court under the Federal Employers' Liability Act (FELA), which makes a railroad liable for an employee's injuries "resulting in whole or in part from [the railroad's] negligence," *Section 1*. FELA reduces any damages awarded to an employee "in proportion to the amount [of negligence] attributable to" the employee, *Section 3*. Missouri's jury instructions apply different causation standards to railroad negligence and employee contributory negligence in FELA actions. An employee will be found contributorily negligent if his negligence "directly contributed to cause" the injury, while railroad negligence is measured by whether the railroad's negligence "contributed in whole or in part" to the injury. After the trial court overruled Norfolk's objection that the instruction on contributory negligence contained a different standard than the railroad negligence instruction, the jury awarded Sorrell $1.5 million. The Missouri Court of Appeals affirmed, rejecting Norfolk's contention that the same causation standard should apply to both parties' negligence.

Held:

1. Norfolk's attempt to expand the question presented to encompass *what* the FELA causation standard should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence, is rejected. This Court is typically reluctant to permit parties to smuggle additional questions into a case after the grant of certiorari. Although the Court could consider the question of what standard applies as anterior to the question whether the standards may differ, the substantive content of the causation standard is a significant [***643] enough issue that the Court prefers not to address it when it has not been fully presented.

2. The same causation standard applies to railroad negligence under FELA *Section 1* as to employee contributory negligence under *Section 3*. Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law, *Urie v. Thompson, 337 U.S. 163, 182, 69 S. Ct. 1018, 93 L. Ed. 1282*, and unless common-law principles are expressly rejected in FELA's text, they are entitled to great weight, *CONRAIL v. Gottshall, 512 U.S. 532, 544, 114 S. Ct.*

2396, 129 L. Ed. 2d 427. The prevailing common-law view at the time FELA was enacted was that the causation standards for negligence and contributory negligence were the same, and FELA did not expressly depart from this approach. This is strong evidence against Missouri's practice of applying different standards, which is apparently unique among the States. Departing from the common-law practice would in any event have been a peculiar approach for Congress to take in FELA: As a practical matter, it is difficult to reduce damages "in proportion" to the employee's negligence if the relevance of each party's negligence is measured by a different causation standard. The Court thinks it far simpler for a jury to conduct the apportionment FELA mandates if the jury compares like with like. Contrary to Sorrell's argument, the use of the language "in whole or in part" with respect to railroad negligence in *FELA Section 1*, but not with respect to employee contributory negligence in *Section 3*, does not justify a departure from the common-law practice of applying a single causation standard. It would have made little sense to include the "in whole or in part" language in *Section 3*; if the employee's contributory negligence contributed "in whole" to his injury, there would be no recovery against the railroad in the first place. The language made sense in *Section 1*, however, to clarify that there could be recovery against the railroad even if it were only partially responsible for the injury. In any event, there is no reason to read the statute as a whole to encompass different causation standards, since *Section 3* simply does not address causation. Finally, FELA's remedial purpose cannot compensate for the lack of statutory text: FELA does not abrogate the common-law approach. A review of FELA model instructions indicates that there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as other jurisdictions in deciding how to do so, so long as it now joins them in applying a single standard. On remand, the Missouri Court of Appeals should address Sorrell's argument that any error in the jury instructions was harmless, and should determine whether a new trial is required.

170 S. W. 3d 35, vacated and remanded.

COUNSEL: Carter G. Phillips argued the cause for petitioner.

Mary L. Perry argued the cause for respondent.

JUDGES: Roberts, C. J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, Souter, Thomas, Breyer, and Alito, JJ., joined. Souter, J., filed a concurring opinion, in which Scalia and Alito, JJ., joined, post, p.172. Ginsburg, J., filed an opinion concurring in the judgment, post, p.177.

OPINION BY: ROBERTS

OPINION

[*160] [**802] [***644] Chief Justice Roberts delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] Timothy Sorrell, respondent in this Court, sustained neck and back injuries while working as a trackman for petitioner Norfolk Southern Railway Company. He filed suit in Missouri state court under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, *45 U.S.C. §§ 51-60*, which makes railroads liable to their employees for injuries "resulting in whole or in part from the negligence" of the railroad, *§ 51*. Contributory negligence is not a bar to recovery under FELA, but damages are reduced "in proportion to the amount of negligence attributable to" the employee, *§ 53*. Sorrell was awarded $1.5 million in damages by a jury; Norfolk objects that the jury instructions reflected a more lenient causation standard for railroad negligence than for employee contributory negligence. We conclude that the causation standard under FELA should be the same for both categories of negligence, and accordingly vacate the decision below and remand for further proceedings.

I

On November 1, 1999, while working for Norfolk in Indiana, Sorrell was driving a dump truck loaded with asphalt to be used to repair railroad crossings. While he was driving between crossings on a gravel road alongside the tracks, another Norfolk truck approached, driven by fellow employee Keith Woodin. The two men provided very different accounts of what happened next, but somehow Sorrell's truck [*161] veered off the road and tipped on its side, injuring him. According to Sorrell's testimony, Woodin forced Sorrell's truck off the road; according to Woodin, Sorrell drove his truck into a ditch.

On June 18, 2002, Sorrell filed suit against Norfolk in Missouri state court under FELA, alleging that Norfolk failed to provide him with a reasonably safe place to

work and that its negligence caused his injuries. Norfolk responded that Sorrell's own negligence caused the accident.

Missouri purports to apply different standards of causation to railroad and employee contributory negligence in its approved jury instructions for FELA liability. The instructions direct a jury to find [**803] an employee contributorily negligent if the employee was negligent and his negligence "directly contributed to cause" the injury, Mo. Approved Jury Instr., Civ., No. 32.07(B), p. 519 (6th ed. 2002), while allowing a finding of railroad negligence if the railroad was negligent and its negligence contributed "in whole or in part" to the injury, *id.*, No. 24.01.[1]

1 Missouri in the past directed a jury to find a railroad liable if the railroad's negligence "directly resulted in whole or in part in injury to plaintiff." Mo. Approved Jury Instr., Civ., No. 24.01 (1964). This language persisted until 1978, when the instruction was modified to its present version. *Ibid.* (2d ed. 1969, Supp. 1980). The commentary explains that the word "direct" was excised because, under FELA, "the traditional doctrine of proximate (direct) cause is not applicable." *Id.*, No. 24.01, p. 187 (Committee's Comment (1978 new)). Cf. *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359, 364-365 (Mo. App. 1995). The contributory negligence instruction, on the other hand, has remained unchanged. Mo. Approved Jury Instr., Civ., No. 32.07(B) (6th ed. 2002).

When Sorrell proposed the Missouri approved instruction for employee contributory negligence, Norfolk objected on the ground that it [***645] provided a "different" and "much more exacting" standard for causation than that applicable with respect to the railroad's negligence under the Missouri instructions. App. to Pet. for Cert. 28a-29a. The trial court overruled the objection. App. 9-10. After the jury re [*162] turned a verdict in favor of Sorrell, Norfolk moved for a new trial, repeating its contention that the different standards were improper because FELA's comparative fault system requires that the same causation standard apply to both categories of negligence. *Id.*, at 20. The trial court denied the motion. The Missouri Court of Appeals affirmed, rejecting Norfolk's contention that "the causation standard should be the same as to the plaintiff and the defendant." App. to Pet. for Cert. 7a, judgt. order reported at *170 S. W. 3d 35 (2005) (per curiam).* The court explained that Missouri procedural rules require that where an approved instruction exists, it must be given to the exclusion of other instructions. *Ibid.*; see *Mo. Rule Civ. Proc. 70.02(b) (2006).*

After the Missouri Supreme Court denied discretionary review, App. to Pet. for Cert. 31a, Norfolk sought certiorari in this Court, asking whether the Missouri courts erred in determining that "the causation standard for employee *contributory negligence* under [FELA] differs from the causation standard for railroad *negligence*." Pet. for Cert. i. Norfolk stated that Missouri was the only jurisdiction to apply different standards, and that this conflicted with several federal court of appeals decisions insisting on a single standard of causation for both railroad and employee negligence. See, *e.g.*, *Page v. St. Louis & Southwestern Ry. Co.*, 49 F.2d 820, 823 (CA5 1965) ("[T]he better rule is one of a single standard"); *Ganotis v. N.Y. Cent. R.R. Co.*, 342 F.2d 767, 768-769 (CA6 1965) (per curiam) ("We do not believe that [FELA] intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence"). In response, Sorrell did not dispute that Missouri courts apply "different causation standards . . . to plaintiff's and defendant's negligence in FELA actions. The defendant is subject to a more relaxed causation standard, but the plaintiff is subject [*163] only to the traditional common-law standard." Brief in Opposition 2. We granted certiorari. *547 U.S. 1127, 126 S. Ct. 2018, 164 L. Ed. 2d 778 (2006).*

[***LEdHR3] [3] In briefing and argument before this Court, Norfolk has attempted to expand [**804] the question presented to encompass *what* the standard of causation under FELA should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence. In particular, Norfolk contends that the proximate cause standard reflected in the Missouri instruction for employee contributory negligence should apply to the railroad's negligence as well.

Sorrell raises both a substantive and procedural objection in response. Substantively, he argues that this Court departed from a proximate cause standard for railroad negligence under FELA in *Rogers v. Missouri*

Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). There we stated:

> "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing [***646] the injury or death for which damages are sought.
>
> . . . .
>
> "[F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Id., at 506, 508, 77 S. Ct. 443, 1 L. Ed. 2d 493.*

Sorrell argues that these passages from *Rogers* have been interpreted to mean that a plaintiff's burden of proof on the question whether the railroad's negligence caused his injury is less onerous than the proximate cause standard prevailing at common law, citing cases such as *CONRAIL v. Gottshall, 512 U.S. 532, 542-543, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)*; *Holbrook v. Norfolk Southern R. Co., 414 F.3d 739, 741-742 (CA7 2005)*; *Hernández v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 436 (CA4 1999)*; and *Summers v. Missouri Pacific R. Co., 132 F.3d 599, 606-607* [*164] *(CA10 1997)*.

Norfolk counters that *Rogers* did not alter the established common-law rule of proximate cause, but rather simply rejected a flawed and unduly stringent version of the rule, the so-called "sole proximate cause" test. According to Norfolk, while most courts of appeals may have read *Rogers* as Sorrell does, several state supreme courts disagree, see, *e.g., Chapman v. Union P. Railroad, 237 Neb. 617, 626-629, 467 N.W.2d 388, 395-396 (1991)*; *Marazzato v. Burlington Northern R. Co., 249 Mont. 487, 490-491, 817 P.2d 672, 674 (1991)*, and "there is a deep conflict of authority on precisely that issue." Reply Brief for Petitioner 20, n 10.

Sorrell's procedural objection is that we did not grant certiorari to determine the proper standard of causation for railroad negligence under FELA, but rather to decide whether different standards for railroad and employee negligence were permissible under the Act. What is more, Norfolk is not only enlarging the question presented, but taking a position on that enlarged question that is contrary to the position it litigated below. In the Missouri courts, Norfolk argued that Missouri applies different standards, and that the less rigorous standard applied to railroad negligence should also apply to employee contributory negligence. Thus, Norfolk did not object below on causation grounds to the railroad liability instruction, but only to the employee contributory negligence instruction. App. 9-10. Now Norfolk wants to argue the opposite--that the disparity in the standards should be resolved by applying the more rigorous contributory negligence standard to the railroad's negligence as well.

We agree with Sorrell that we should stick to the question on which certiorari [**805] was sought and granted. We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31-34, 114 S. Ct. 425, 126 L. Ed. 2d 396 (1993) (per curiam)*. Although [*165] Norfolk is doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented. We also agree with Sorrell [***647] that it would be unfair at this point to allow Norfolk to switch gears and seek a ruling from us that the standard should be proximate cause across the board.

What Norfolk *did* argue throughout is that the instructions, when given together, impermissibly created different standards of causation. It chose to present in its petition for certiorari the more limited question whether the courts below erred in applying standards that differ. That is the question on which we granted certiorari and the one we decide today.

II

In response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies. *Second Employers' Liability Cases, 223 U.S. 1, 53-55, 32 S. Ct. 169, 56 L. Ed. 327 (1912)*. Unlike a typical workers' compensation scheme, which provides relief without regard to fault, *Section 1 of FELA* provides

a statutory cause of action sounding in negligence:

> "[E]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." *45 U.S.C. § 51.*

[***LEdHR4] [4] FELA provides for concurrent jurisdiction of the state and federal courts, *§ 56*, although substantively FELA actions are governed by federal law. *Chesapeake & Ohio R. Co. v. Stapleton, 279 U.S. 587, 590, 49 S. Ct. 442, 73 L. Ed. 861 (1929)*. Absent express language [*166] to the contrary, the elements of a FELA claim are determined by reference to the common law. *Urie v. Thompson, 337 U.S. 163, 182, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)*. One notable deviation from the common law is the abolition of the railroad's common-law defenses of assumption of the risk, *§ 54; Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58, 63 S. Ct. 444, 87 L. Ed. 610 (1943)*, and, at issue in this case, contributory negligence, *§ 53*.

At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 65, pp 461-462 (5th ed. 1984) (hereinafter Prosser & Keeton); 1 D. Dobbs, Law of Torts § 199, p 494 (2001) (hereinafter Dobbs). Under *Section 3 of FELA*, however, an employee's negligence does not bar relief but instead diminishes recovery in proportion to his fault:

> "[In all actions under FELA], the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." *45 U.S.C. § 53.*

[***LEdHR1B] [1B] Both parties agree that at common law the causation standards for negligence and contributory negligence were the same. [**806] Brief for Respondent 40-41; Tr. of Oral Arg. 46-48. As explained in the Second Restatement of Torts:

> "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation [***648] between the defendant's negligent conduct and resulting harm to others." *§ 465(2), p. 510 (1964).*

See also Prosser & Keeton § 65, at 456; Dobbs § 199, at 497. ("The same rules of proximate cause that apply on the issue of negligence also apply on the issue of contributory negligence" (footnote omitted)). This was the prevailing view when FELA was enacted in 1908. See 1 T. Shearman & A. [*167] Redfield, Law of Negligence § 94, pp 143-144 (5th ed. 1898) ("The plaintiff's fault . . . must be a proximate cause, in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action").

Missouri's practice of applying different causation standards in FELA actions is apparently unique. Norfolk claims that Missouri is the only jurisdiction to allow such a disparity, and Sorrell has not identified another.[2] It is of course [*168] possible that everyone is out of step except Missouri, but we find no basis for concluding that Congress in FELA meant to allow disparate causation standards.

2 A review of model and pattern jury instructions in FELA actions reveals a variety of approaches. Some jurisdictions recommend using the "in whole or in part" or "in any part" formulation for both railroad negligence and plaintiff contributory negligence, by using the same language in the respective pattern instructions, including a third instruction that the same causation standard is applied to both parties, or including in commentary an admonition to that effect. See, *e.g.*, 5 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, *Modern Federal Jury Instr. -- Civil PP89.02-89.03*, pp 89-7, 89-44, 89-53 (3d ed. 2006); 4 Fla. Forms of Jury Instr. §§ 161.02, 161.47, 161.60 (2006); *Cal. Jury Instr., Civ., Nos. 11.07, 11.14*, and Comment (2005); 3 Ill. Forms of Jury Instr. §§ 91.02[1], 91.50[1] (2005); 3 N. M. Rules Ann., Uniform

Jury Instr., Civ., Nos. 13-905, 13-909, 13-915 (2004); Model Utah Jury Instr., Civ., Nos. 14.4, 14.7, 14.8 (1993 ed.); Manual of Model Civil Jury Instr. for the District Courts of the Eighth Circuit § 7.03, and n 7 (2005); Eleventh Circuit Pattern Jury Instr. (Civil Cases) § 7.1 (2005). Other jurisdictions use the statutory formulation ("in whole or in part") for railroad negligence, and do not contain a pattern instruction for contributory negligence. See, *e.g.*, Mich. Non-Standard Jury Instr., Civ., § 12:53 (Supp. 2006). Both Alabama and Virginia use formulations containing language of both proximate cause and in whole or in part. 1 Ala. Pattern Jury Instr., Civ., Nos. 17.01, 17.05 (2d ed. 1993) (railroad negligence "proximately caused, in whole or in part"; plaintiff contributory negligence "proximately contributed to cause"); 1 Va. Jury Instr. §§ 40.01, 40.02 (3d ed. 1998) (railroad negligence "in whole or in part was the proximate cause of or proximately contributed to cause," plaintiff negligence "contributed to cause"). In New York, the pattern instructions provide that railroad causation is measured by whether the injury results "in whole or in part" from the railroad's negligence, and a plaintiff's contributory negligence diminishes recovery if it "contributed to caus[e]" the injury. 1B N. Y. Pattern Jury Instr., Civ., No. 2:180 (3d ed. 2006). Montana provides only a general FELA causation instruction. Mont. Pattern Instr., Civ., No. 6.05 (1997) ("[A]n act or a failure to act is the cause of an injury if it plays a part, no matter how small, in bringing about the injury"). Kansas has codified instructions similar to Missouri's, Kan. Pattern Instr. 3d, Civ., No. 132.01 (2005) (railroad liable when injury "results in whole or in part" from railroad's negligence); *id.*, No. 132.20 (contributory negligence is negligence on the part of the plaintiff that "contributes as a direct cause" of the injury), but the commentary to these instructions cites cases and instructions applying a single standard, *id.*, No. 132.01, and Comment, and in practice the Kansas courts have used the language of in whole or in part for both parties' negligence. See *Merando v. Atchison, T. & S. F. R. Co.*, *232 Kan. 404, 406-409, 656 P.2d 154, 157-158 (1982)*.

[**807] We have explained that "although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Gottshall, 512 U.S., at 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427.* In *Gottshall* we "cataloged" the ways in which FELA expressly [***649] departed from the common law: it abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense. *Norfolk & Western R. Co. v. Ayers, 538 U.S. 135, 145, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003); Gottshall, supra, at 542-543, 114 S. Ct. 2396, 129 L. Ed. 2d 427.* The fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against Missouri's disparate standards. See also *Monessen Southwestern R. Co. v. Morgan, 486 U.S. 330, 337-338, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)* (holding that, because FELA abrogated some common-law rules explicitly but did not address "the equally well-established doctrine barring the recovery of prejudgment interest, . . . we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*").

Departing from the common-law practice of applying a single standard of causation for negligence and contributory [*169] negligence would have been a peculiar approach for Congress to take in FELA. As one court explained, under FELA,

> "[a]s to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. So far as negligence is concerned, that standard is the same--ordinary prudence--for both Employee and Railroad alike. Unless a contrary result is imperative, it is, at best, unfortunate if two standards of causation are used." *Page, 349 F.2d at 823.*

As a practical matter, it is difficult to reduce damages "in proportion" to the employee's negligence if the relevance of each party's negligence to the injury is measured by a different standard of causation. Norfolk argues, persuasively we think, that it is far simpler for a

jury to conduct the apportionment FELA mandates if the jury compares like with like--apples to apples.

Other courts to address this question concur. See *Fashauer v. New Jersey Transit Rail Operations, 57 F.3d 1269, 1282-1283 (CA3 1995)*; *Caplinger v. Northern Pacific Terminal, 244 Ore. 289, 290-292, 418 P.2d 34, 35-36 (1966)* (en banc); *Page, supra, at 822-823*; *Ganotis, 342 F.2d at 768-769*.[3] The most thoughtful treatment comes in *Page*, in which the Fifth Circuit stated: "[W]e think that from the [*170] very nature of comparative negligence, the standard of causation should be single. . . . Use of the terms 'in proportion to' and 'negligence attributable to' the injured worker inescapably calls for a comparison. . . . [**808] [I]t is obvious that for a system of comparative fault to work, the basis of comparison has to be the same." *349 F.2d at 824*. See also *Restatement (Third) of Torts: Apportionment of Liability § 3, Reporters' Note, p. 37, Comment a (1999)*. [***650] ("[C]omparative responsibility is difficult to administer when different rules govern different parts of the same lawsuit"). We appreciate that there may well be reason to "doubt that such casuistries have any practical significance [for] the jury," *Page, supra, at 823*, but it seems to us that Missouri's idiosyncratic approach of applying different standards of causation unduly muddies what may, to a jury, be already murky waters.

3 See also *Bunting v. Sun Co., Inc., 434 Pa. Super. 404, 409-411, 643 A.2d 1085, 1088 (1994)*; *Hickox v. Seaboard System R. Co., 183 Ga. App. 330, 331-332, 358 S. E. 2d 889, 891-892 (1987)*. An exception is a Texas case that no court has since cited for the proposition, *Missouri-Kansas-Texas RR. Co. v. Shelton, 383 S.W.2d 842, 844-846 (Civ. App. 1964)*, and that the Texas model jury instructions, which instruct the jury to determine plaintiff or railroad negligence using a single "in whole or in part" causation standard, at least implicitly disavow. See 10 West's Texas Forms: Civil Trial and Appellate Practice § 23.34, p 27 (3d ed. 2000) ("Did the negligence, if any, of the [plaintiff or railroad] cause, in whole or in part, the occurrence in question?").

[***LEdHR5] [5] Sorrell argues that FELA does contain an explicit statutory alteration from the common-law rule: *Section 1 of FELA* --addressing railroad negligence--uses the language "in whole or in part," *45 U.S.C. § 51*, while *Section 3* --covering employee contributory negligence--does not, *§ 53*. This, Sorrell contends, evinces an intent to depart from the common-law causation standard with respect to railroad negligence under *Section 1*, but not with respect to any employee contributory negligence under *Section 3*.

The inclusion of this language in one section and not the other does not alone justify a departure from the common-law practice of applying a single standard of causation. It would have made little sense to include the "in whole or in part" language in *Section 3*, because if the employee's contributory negligence contributed "in whole" to his injury, there would be no recovery against the railroad in the first place. The language made sense in *Section 1*, however, to make clear that there could be recovery against the railroad even if it were only partially negligent.

Even if the language in *Section 1* is understood to address the standard of causation, and not simply to reflect the fact [*171] that contributory negligence is no longer a complete bar to recovery, there is no reason to read the statute as a whole to encompass different causation standards. *Section 3* simply does not address causation. On the question whether a different standard of causation applies as between the two parties, the statutory text is silent.

[***LEdHR1C] [1C] Finally, in urging that a higher standard of causation for plaintiff contributory negligence is acceptable, Sorrell invokes FELA's remedial purpose and our history of liberal construction. We are not persuaded. FELA was indeed enacted to benefit railroad employees, as the express abrogation of such common-law defenses as assumption of risk, the contributory negligence bar, and the fellow servant rule make clear. See *Ayers, 538 U.S., at 145, 123 S. Ct. 1210, 155 L. Ed. 2d 261*. It does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees. See *Rodriguez v. United States, 480 U.S. 522, 526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (per curiam)* ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primarily objective must be the law"). FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards in a comparative negligence regime, and the statute's remedial purpose cannot compensate for the lack

of a statutory basis.

[***LEdHR2B] [2B] We conclude that FELA does not abrogate the common-law approach, and that the same standard of causation applies to railroad negligence under *Section 1* as to plaintiff [***651] contributory negligence under *Section 3*. Sorrell does not dispute that Missouri applies different standards, see Brief for Respondent 40-41; see also Mo. Approved Jury Instr., Civ., No. 24.01, [**809] Committee's Comment (1978 New), and accordingly we vacate the judgment below and remand the case for further proceedings.

The question presented in this case is a narrow one, and we see no need to do more than answer that question in [*172] today's decision. As a review of FELA model instructions indicates, n 2, *supra*, there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as the other States in deciding how to do so, so long as it now joins them in applying a single standard.

Sorrell maintains that even if the instructions improperly contained different causation standards we should nonetheless affirm because any error was harmless. He argues that the evidence of his negligence presented at trial, if credited by the jury, could only have been a "direct" cause, so that even with revised instructions the result would not change. This argument is better addressed by the Missouri Court of Appeals, and we leave it to that court on remand to determine whether a new trial is required in this case.

The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCUR BY: Souter; Ginsburg

CONCUR

Justice **Souter**, with whom Justice **Scalia** and Justice **Alito** join, concurring.

I agree that the same standard of causal connection controls the recognition of both a defendant-employer's negligence and a plaintiff-employee's contributory negligence in Federal Employers' Liability Act (FELA) suits, and I share the Court's caution in remanding for the Missouri Court of Appeals to determine in the first instance just what that common causal relationship must be, if it should turn out that the difference in possible standards would affect judgment on the verdict in this case. The litigation in the Missouri courts did not focus on the issue of what the shared standard should be, and the submissions in this Court did not explore the matter comprehensively.

The briefs and arguments here did, however, adequately address the case of ours with which exploration will begin, [*173] and I think it is fair to say a word about the holding in *Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)*. Despite some courts' views to the contrary, * *Rogers* did not address, [**810] much less alter, existing law governing [***652] the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.

* Recently, some courts have taken the view that *Rogers* smuggled proximate cause out of the concept of defendant liability under FELA. See, *e.g., Holbrook v. Norfolk Southern R. Co., 414 F.3d 739, 741-742 (CA7 2005)* (concluding that "a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case" because "a railroad will be held liable where 'employer negligence played any part, even the slightest, in producing the injury'" (quoting *Rogers, 352 U.S., at 506, 77 S. Ct. 443, 1 L. Ed. 2d 493*)); *Summers v. Missouri Pacific R. Co., 132 F.3d 599, 606-607 (CA10 1997)* (holding that, in *Rogers*, the Supreme Court "definitively abandoned" the requirement of proximate cause in FELA suits); *Oglesby v. Southern Pacific Transp. Co., 6 F.3d 603, 606-609 (CA9 1993)* (same). But several State Supreme Courts have explicitly or implicitly espoused the opposite view. See *Marazzato v. Burlington No. R. Co., 249 Mont. 487, 490-491, 817 P.2d 672, 674-675 (1991)* (*Rogers* addressed multiple causation only, leaving FELA plaintiffs with "the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]" (alteration in original)); see also *Gardner v. CSX Transp., Inc., 201 W. Va. 490, 500, 498 S.*

E. 2d 473, 483 (1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes v. Chicago Central & Pacific R. Co., 484 N.W.2d 162, 164 (Iowa 1992)* ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident"); *Chapman v. Union P. Railroad, 237 Neb. 617, 627, 467 N.W.2d 388, 395 (1991)* ("To recover under [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury").

Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely. See, *e.g.*, 3 J. Lawson, Rights, Remedies, and Practice 1740 (1890) ("Natural, [*174] proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage'"); T. Cooley, Law of Torts 73 (2d ed. 1888) (same). Defendants were held to the same standard: under the law of that day, a plaintiff's contributory negligence was an absolute bar to his recovery if, but only if, it was a proximate cause of his harm. See *Grand Trunk R. Co. v. Ives, 144 U.S. 408, 429, 12 S. Ct. 679, 36 L. Ed. 485 (1892)*.

FELA changed some rules but, as we have said more than once, when Congress abrogated common law rules in FELA, it did so expressly. *Norfolk & Western R. Co. v. Ayers, 538 U.S. 135, 145, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003)*; *CONRAIL v. Gottshall, 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)*; see also *Second Employers' Liability Cases, 223 U.S. 1, 49-50, 32 S. Ct. 169, 56 L. Ed. 327 (1912)* (cataloguing FELA's departures from the common law). Among FELA's explicit common law targets, the rule of contributory negligence as a categorical bar to a plaintiff's recovery was dropped and replaced with a comparative negligence regime. *45 U.S.C. § 53*; see *Grand Trunk Western R. Co. v. Lindsay, 233 U.S. 42, 49, 34 S. Ct. 581, 58 L. Ed. 838 (1914)*. FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence, and throughout the half-century between FELA's enactment and the decision in *Rogers*, we consistently recognized and applied proximate cause as the proper standard in FELA suits. See, *e.g.*, *Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520 (1944)* (FELA plaintiff must prove that "negligence was the proximate cause in whole or in part" of his injury); see also *Urie v. Thompson, 337 U.S. 163, 195, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)* (recognizing proximate cause as the appropriate standard in FELA suits); *St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 46 S. Ct. 520, 70 L. Ed. 979 (1926)* (judgment as a matter [***653] of law owing to FELA plaintiff's failure to prove proximate cause).

Rogers left this law where it was. We granted certiorari in *Rogers* to establish the test for submitting a case to a jury [*175] when the evidence would permit a finding that an injury had multiple causes. *352 U.S., at 501, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493*. We rejected Missouri's "language of proximate causation which ma[de] a jury question [about a defendant's liability] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id., at 506, 77 S. Ct. 443, 1 L. Ed. 2d 493*. The notion that proximate cause must be exclusive proximate cause [**811] undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief, and we held that a FELA plaintiff may recover even when the defendant's action was a partial cause of injury but not the sole one. Recovery under the statute is possible, we said, even when an employer's contribution to injury was slight in relation to all other legally cognizable causes.

True, I would have to stipulate that clarity was not well served by the statement in *Rogers* that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ibid.* But that statement did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations. It spoke to apportioning liability among parties, each of whom was understood to have had some hand in causing damage directly enough to be what the law traditionally called a proximate cause.

The absence of any intent to water down the common law requirement of proximate cause is evident from the prior cases on which *Rogers* relied. To begin with, the "any part, even the slightest" excerpt of the opinion (cited by respondent in arguing that *Rogers* created a more "relaxed" standard of causation than proximate cause) itself cited *Coray v. Southern Pacific Co., 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949)*. See *Rogers, supra, at 506, n. 11, 77 S. Ct. 443, 1 L. Ed. 2d 493*. There, just eight years before *Rogers*, Justice Black unambiguously recognized proximate cause as [*176] the standard applicable in FELA suits. *335 U.S., at 523, 69 S. Ct. 275, 93 L. Ed. 208* ("[P]etitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"). Second, the *Rogers* Court's discussion of causation under "safety-appliance statutes" contained a cross-reference to *Coray* and a citation to *Carter v. Atlanta & St. Andrews Bay R. Co., 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949)*, a case which likewise held there was liability only if "the jury determines that the defendant's breach is a 'contributory proximate cause' of injury." *Id., at 435, 70 S. Ct. 226, 94 L. Ed. 236*. *Rogers, supra, at 507, n. 13, 77 S. Ct. 443, 1 L. Ed. 2d 493*.

If more were needed to confirm the limited scope of what *Rogers* held, the Court's quotation of the Missouri trial court's jury charge in that case would supply it, for the instructions covered the requirement to show proximate cause connecting negligence and harm, a point free of controversy:

> [***654] "'[I]f you further find that the plaintiff . . . did not exercise ordinary care for his own safety and was guilty of negligence and that such negligence, if any[,] was the sole proximate cause of his injuries, if any, and that such alleged injuries, if any, were not directly contributed to or caused by any negligence of the defendant . . . then, in that event, the plaintiff is not entitled to recover against the defendant, and you will find your verdict in favor of the defendant.'" *352 U.S., at 505, n. 9, 77 S. Ct. 443, 1 L. Ed. 2d 493*.

Thus, the trial judge spoke of "proximate cause" by plaintiff's own negligence, and for defendant's negligence used the familiar term of art for proximate cause, in referring to a showing that the defendant "directly contributed to or caused" the plaintiff's injuries. We took no issue with the trial court's instruction in this respect, but addressed the significance of multiple causations, as explained above.

Whether FELA is properly read today as requiring proof of proximate causation before recognizing negligence is up to the [**812] Missouri Court of Appeals to determine in the first [*177] instance, if necessary for the resolution of this case on remand. If the state court decides to take on that issue, it will necessarily deal with *Rogers*, which in my judgment is no authority for anything less than proximate causation in an action under FELA. The state court may likewise need to address post-*Rogers* cases (including some of our own); I do not mean to suggest any view of them except for the misreading of *Rogers* expressed here and there.

Justice **Ginsburg**, concurring in the judgment.

The Court today holds simply and only that in cases under the Federal Employers' Liability Act (FELA), railroad negligence and employee contributory negligence are governed by the same causation standard. I concur in that judgment. It should be recalled, however, that the Court has several times stated what a plaintiff must prove to warrant submission of a FELA case to a jury. That question is long settled, we have no cause to reexamine it, and I do not read the Court's decision to cast a shadow of doubt on the matter.

In *CONRAIL v. Gottshall, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)*, we acknowledged that "a relaxed standard of causation applies under FELA." Decades earlier, in *Crane v. Cedar Rapids & Iowa City R. Co., 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969)*, we said that a FELA plaintiff need prove "only that his injury resulted in whole or in part from the railroad's violation." *Id., at 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176* (internal quotation marks omitted). Both decisions referred to the Court's oft-cited opinion in *Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)*, which declared: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Id., at 506, 77 S. Ct. 443, 1 L. Ed. 2d 493*

(emphasis added). *Rogers*, in turn, drew upon *Coray v. Southern Pacific Co., 335 U.S. 520, 524, 69 S. Ct. 275, 93 L. Ed. 208 (1949)*, in which the Court observed: "Congress . . . imposed extraordinary safety obligations [***655] upon railroads and has commanded that if a [*178] breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

These decisions answer the question Norfolk sought to "smuggle . . . into" this case, see *ante, at 164, 166 L. Ed. 2d, at 646*(majority opinion), *i.e.*, what is the proper standard of causation for railroad negligence under FELA. Today's opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more "relaxed" than in tort litigation generally.

A few further points bear emphasis. First, it is sometimes said that *Rogers* eliminated proximate cause in FELA actions. See, *e.g.*, *Crane, 395 U.S., at 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176* (A FELA plaintiff "is not required to prove common-law proximate causation."); *Summers v. Missouri Pacific R. Co., 132 F.3d 599, 606 (CA10 1997)* ("During the first half of this century, it was customary for courts to analyze liability under . . . FELA in terms of proximate causation. However, the Supreme Court definitively abandoned this approach in *Rogers*." (citation omitted)); *Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603, 609 (CA9 1993)* ("[Our] holding is consistent with the case law of several other circuits which have found [that] 'proximate cause' is not required to establish causation under the FELA."). It would be more accurate, as I see it, to recognize [**813] that *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *352 U.S., at 506, 77 S. Ct. 443, 1 L. Ed. 2d 493.*

Whether a defendant's negligence is a proximate cause of the plaintiff's injury entails a judgment, at least in part policy based, as to how far down the chain of consequences a defendant should be held responsible for its wrongdoing. See *Palsgraf v. Long Island R. Co., 248 N. Y. 339, 352, 162 N. E. 99, 103 (1928)* (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law [*179] arbitrarily declines to trace a series of events beyond a certain point."). In FELA cases, strong policy considerations inform the causation calculus.

FELA was prompted by concerns about the welfare of railroad workers. "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year," and dissatisfied with the tort remedies available under state common law, "Congress crafted a federal remedy that shifted part of the human overhead of doing business from employees to their employers." *Gottshall, 512 U.S., at 542, 114 S. Ct. 2396, 129 L. Ed. 2d 427* (internal quotation marks omitted); see also *Wilkerson v. McCarthy, 336 U.S. 53, 68, 69 S. Ct. 413, 93 L. Ed. 497 (1949)* (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."). "We have liberally construed FELA to further Congress' remedial goal." *Gottshall, 512 U.S., at 543, 114 S. Ct. 2396, 129 L. Ed. 2d 427*. With the motivation for FELA center stage in *Rogers*, we held that a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury.

The "slightest" cause sounds far less exacting than "proximate" cause, [***656] which may account for the statements in judicial opinions that *Rogers* dispensed with proximate cause for FELA actions. These statements seem to me reflective of pervasive confusion engendered by the term "proximate cause." As Prosser and Keeton explains:

> "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason 'legal cause' or perhaps even 'responsible cause' would be a more appropriate term." W. Keeton, D. Dobbs, R. Keeton, & D. [*180] Owen, Prosser and Keeton on Law of Torts § 42, p 273 (5th ed. 1984) (footnotes omitted).

If we take up Prosser and Keeton's suggestion to substitute "legal cause" for "proximate cause," we can state more clearly what *Rogers* held: Whenever a

railroad's negligence is the slightest cause of the plaintiff's injury, it is a legal cause, for which the railroad is properly held responsible.[1]

1 I do not read Justice Souter's concurring opinion as taking a position on the appropriate causation standard as expressed in *CONRAIL v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)*, and *Crane v. Cedar Rapids & Iowa City R. Co., 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969)*. See *supra, at 177-178, 166 L. Ed. 2d, at 651-652*.

[**814] If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors. Nothing in today's opinion should encourage courts to use "proximate cause," or any term like it, in jury instructions. "[L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on their merits." *Busta v. Columbus Hospital Corp., 276 Mont. 342, 371, 916 P.2d 122, 139 (1996)*. Accord *Mitchell v. Gonzales, 54 Cal.3d 1041, 1050, 1 Cal. Rptr. 2d 913, 819 P.2d 872, 877 (1991)* ("It is reasonably likely that when jurors hear the term 'proximate cause' they may misunderstand its meaning.").[2]

2 See also Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, *54 Vand. L. Rev. 941, 987 (2001)* ("[T]he inadequacy and vagueness of jury instructions on 'proximate cause' is notorious."); Cork, A Better Orientation for Jury Instructions, *54 Mercer L. Rev. 1, 53-54 (2002)* (criticizing Georgia's jury instruction on proximate cause as incomprehensible); Steele & Thornburg, Jury Instructions: A Persistent Failure to Communicate, *67 N. C. L. Rev. 77 (1988)* (demonstrating juror confusion about proximate cause instructions).

Sound jury instructions in FELA cases would resemble the model federal charges cited in the Court's opinion. *Ante, at 167-168, n 2, 166 L. Ed. 2d, at 648*. As to railroad negligence, the relevant instruction tells the jury:

> [*181] "The fourth element [of a FELA action] is whether an injury to the plaintiff resulted in whole or in part from the negligence of the railroad or its employees or agents. In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff?" 5 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, *Modern Federal Jury Instructions — Civil P89.02*, p 89-44 (3d ed. 2006).

[***657] Regarding contributory negligence, the relevant instruction reads:

> "To determine whether the plaintiff was 'contributorily negligent,' you . . . apply the same rule of causation, that is, did the plaintiff's negligence, if any, play any part in bringing about his injuries." *Id.*, P 89.03, p 89-53.

Both instructions direct jurors in plain terms that they can be expected to understand.

Finally, as the Court notes, *ante, at 172, 166 L. Ed. 2d, at 650-651*, on remand, the Missouri Court of Appeals will determine whether a new trial is required in this case, owing to the failure of the trial judge properly to align the charges on negligence and contributory negligence. The trial court instructed the jury to find Norfolk liable if the railroad's negligence "resulted in whole or in part in injury to plaintiff." App. 14. In contrast, the court told the jury to find Sorrell contributorily negligent only if he engaged in negligent conduct that "*directly* contributed to cause his injury." *Id.*, at 15 (emphasis added). At trial, Norfolk sought a different contributory negligence instruction. Its proposed charge would have informed the jury that Sorrell could be held responsible, at least in part, if his own negligence "contributed in whole or in part to cause his injury." *Id.*, at 11.

Norfolk's proposal was superior to the contributory negligence instruction in fact delivered by the trial court, for the [*182] railroad's phrasing did not use the word "directly."[3] [**815] As Sorrell points out, however, the instructional error was almost certainly harmless. Norfolk alleged that Sorrell drove his truck negligently, causing it to flip on its side. Under the facts of this case,