Joinder of Unseaworthiness and the Jones Act: A Seaside Shift

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I. Introduction

The Jones Act and the warranty of seaworthiness weave together intricately through the juxtaposition of maritime and tort theories to provide a fairly seamless means of recovery for an injured seaman. The maritime milieu upon which the Jones Act's prima facie case is applied facilitates its harmonious joinder with a plaintiff's claim of unseaworthiness. As such, this paper will explore the role of the sea in shaping the Jones Act case. For instance, the unique circumstances that strain upon the life of a seaman propel courts to extend the ship owner's liability to cover seamen while on shore leave, particularly if the sailor is classified as a "blue water" versus a "brown water" seaman, an interesting distinction in of itself to be explored later in the paper. n[1] As another example, the command structure in place at sea creates a hierarchical system centered around the captain as master which influences the court's interpretation of comparative negligence. Furthermore, the implementation of a wanton and reckless standard with respect to Jones Act defense in a "rescue attempt" n[2] underscores the dramatic influence of the sea upon the Jones Act. These examples are just a few of the themes this paper will develop to explore the effect that the maritime setting has on the implementation of Jones Act tort theory. While developing the Jones Act, this paper will also dive into the unseaworthiness cause of action which provides plaintiffs with both an in rem proceeding against

[1] *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 734 (1943).
[2] *See Furka v. Great Lakes Dredge and Dock Co.*, 824 F.2d 330, 331 (4th Cir. 1987).

the ship and an in personam claim against her owner or operator under admiralty jurisdiction. n[3] As such, the unseaworthiness cause of action diverges significantly from the Jones Act because in addition to its in rem procedural provision, its admiralty jurisdiction does not regularly provide the plaintiff with a jury trial as afforded by the Jones Act. n[4] Furthermore, the unseaworthiness doctrine operates largely outside of the negligence imbued context of the Jones Act with the exception of a few overlapping subtleties. Regardless, the profound effect of the sea upon the Jones Act facilitates the coalescence of the two causes of action under one trial and may explain why the Supreme Court permits their joinder. n[5]

Comparing the Jones Act and unseaworthiness causes of action provides a relevant background for interpreting why the Court permits plaintiffs to style both claims under one petition, even going so far as to allow plaintiffs to prosecute their unseaworthiness cause of action through the same jury trial provided by the Jones Act. n[6] Indeed, this exploration will provide a possible contextual framework to rationalize the Court's decision in *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 21 (1963), which permitted Jones Act jury trials to include an unseaworthiness cause of action. n[7] Considering that the admiralty jurisdiction underpinning the claim of unseaworthiness does not permit jury trials, the decision in *Fitzgerald* represents a bold endorsement on the Court's part of the two claims' symmetry. Thus, through a discovery of the profound influence of the sea upon the negligence inspired Jones Act alongside an exploration of unseaworthiness, this paper provides a foundation for the Court's decision in *Fitzgerald*. Yet, first, separate explorations of the two theories instills the background for later analysis of the sea's vast influence upon the Jones Act and its consequential coalescence with unseaworthiness.

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[3] *See* Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-25 (4th ed. 2004).
[4] *See* Steven Friedell, Benedict on Admiralty 1B-1 § 4 (98 Ed. 2005).
[5] *See Fitzgerald v. U. S. Lines Co.*, 374 U.S. 16, 21 (1963).
[6] *Id.*
[7] *Id.*

A. The Jones Act: A General Background

Prior to investigating the coalescence of the Jones Act and unseaworthiness, background in both causes of action individually will expand the juxtaposition's analytical value. Firstly, the Jones Act provides that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. n[8]

This section of the Act symbolizes its alignment with tort through the specific jury trial provision which allows for a "personal representative" n[9] in the case of a deceased seaman. Thus, the Jones Act signifies a seaside shift away from ordinary admiralty proceedings. Thomas Schoenbaum wrote, the "Jones Act grants seamen who suffered personal injury in the course of their employment the right to seek damages in a jury trial against their employers in the same manner as the Federal Employers' Liability Act, (FELA), allows claims by railroad employees." n[10] The Fourth Circuit explained the Jones Act's commonality with FELA:

> Thus, through the mechanism of incorporation by reference [to FELA], the Jones Act gives seamen rights that parallel those given to railway employees under the FELA. The FELA provides in relevant part that "[e]very common carrier by railroad … shall be liable in damages … 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." n[11]

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[8] 46 U.S.C.A. App. § 688 (West 1996).
[9] *Id.*
[10] Schoenbaum, *supra* note 3 at § 6-21.
[11] *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting 45 U.S.C.A. § 51 (West 1996)).

Since the Jones Act traces the FELA and subsequent case law interpretation, its adjudication offers plaintiffs protection from the negligence which stems from other officers and employees of the ship and not simply the ship's owner or party held liable in the lawsuit. n[12]

Furthermore, as in tort, the Jones Act operates under a negligence standard. Schoenbaum wrote, "Such negligence may arise from a dangerous condition on or about the ship, failure to use reasonable care to provide a seaman with a safe place to work, failure to inspect the vessel for hazards, and any other breach of the shipowner's duty of care." n[13] Thus, negligence under the Jones Act is broad in scope. Furthermore, the Court opined that "the shipowner becomes liable for injuries to a seaman resulting in whole or in part from the negligence of another employee." n[14] Although duty under the Jones Act will be examined in greater detail below, these examples illustrate the Act's basic alignment to fundamental tort theory. Thus, like most employers who operate in a tort climate, "The employer's fundamental duty under the Jones Act is to provide its [employed] seaman with a reasonably safe place to work." n[15] Consequently, as in tort, "the employer has a duty to warn the seaman of a dangerous condition of which the employer should be aware." n[16] In addition to the more fundamental analogies between the two doctrines, many of tort's intricacies manifest in the Jones Act's jurisprudence.

For instance, the negligence per se doctrine applies to liability under the Jones Act with the exception that when compared to ordinary negligence per se, the plaintiff's prima facie burden is actually diminished. n[17] Steven Friedell wrote, "The employer shipowner will be liable under the Jones Act whenever he is guilty of breaching any statute or regulation if such breach is

[12] *See Id.*
[13] Schoenbaum, *supra* note 3 at § 6-21.
[14] *Johnson v. United States*, 333 U.S. 46, 49 (1948).
[15] Schoenbaum, *supra* note 3 at § 6-21.
[16] *Id.*
[17] *See* Friedell, *supra* note 4 1B-3 § 21.

the proximate cause of the seaman's injury; it does not matter that the statute or regulation was enacted for a purpose having nothing whatever to do with the welfare or protection of seamen." n[18] Indeed, this description of a shipowner's liability under the Jones Act sounds in tort akin to negligence per se because of the statutory imprimatur it assigns to the shipowner's liability. Nevertheless, Friedell's analysis indicates an important distinction from tort's requirement that negligence per se apply to a statute providing for the safety of the class of individuals that correspond to the injured plaintiff. In Justice Cardozo's famous opinion in *Martin v. Herzog*, 126 N.E. 814 (1920), the court's majority opined that:

> We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway (*Highway Law, sec. 329* [italics presence in opinion] a). By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. n[19]

Justice Cardozo's formulation of the negligence per se doctrine underscores the role of safety in the statute's purpose. Both "Intended for the guidance and protection of other travelers" n[20] and "safeguard prescribed by law for the benefit of another that he may be preserved in life or limb" n[21] illustrate the importance that Justice Cardozo's articulation of negligence per se assigned to the safety relatedness of the statute in question. Although Friedell's articulation of negligence per se under the Jones Act diminishes the significance of the relevant statute's safety-relatedness, still, "if such breach is the proximate cause of the seaman's injury" n[22] subtly alludes to the safety relatedness of the statute in question. Although the judicial implementation of Jones Act statutory based negligence does not require the statute's strict foundation lay in safety, it

[18] Friedell, *supra* note 4 1B-3 § 21.
[19] *Martin v. Herzog*, 126 N.E. 814, 815 (1920).
[20] *Id.*
[21] *Id.*
[22] Friedell, *supra* note 4 1B-3 § 21.

elucidates a similar purpose through the proximate cause requirement which will be studied later in the paper. Furthermore, by not requiring that the statute be safety based, the Jones Act seemingly fails to require that the seaman plaintiff be in the class of persons the statute intended to protect. Nevertheless, the effect of a statutory based breach of duty on the Jones Act further aligns the federal provision for injured seaman to the basic tort doctrine.

Additionally, the Jones Act's inclusion of res ipsa loquitir n[23] harmonizes with tort's utilization of this expansive doctrine when the proof of a defendant's breach is unclear. The Court has held that "No act need be explicable only in terms of negligence in order for the rule of ***res ipsa loquitir*** [emphasis in opinion] to be invoked." n[24] Thus, by alluding to negligence as the source of the res ipsa loquitir's application to a Jones Act case, the Court indirectly highlighted the practical overlap in the two bodies of law. In *Johnson v. United States*, 333 U.S. 46 (1948), a Jones Act res ipsa loquitir case, the facts found that a block was dropped upon the plaintiff, seemingly due to the negligence of Dudder, a fellow worker, but as to why the block fell, the Court admitted uncertainty. n[25] Consequently, where negligence undoubtedly applied, the Court employed res ipsa loquitir from the tort tool kit to award the plaintiff while side stepping the breach of duty dilemma. n[26] As such, the Court held that,

> The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act. n[27]

Although the exact causal duty remained unresolved, the Court utilized res ipsa loquitir to award the plaintiff, who by no fault of his own but rather by the negligence of some other under the

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[23] *See Johnson*, 333 U.S. at 49.
[24] *Id.*
[25] *Id.* at 48.
[26] *Id.* at 49-50.
[27] *Id.* at 50.

duty of the ship's owner, here the United States, was injured. Thus, the res ipsa loquitir doctrine applies to Jones Act cases.

Also, the adjudication of Jones Act damages, which distinguishes between mental and physical components, n[28] further underscores the Act's similarity to the tort system. For instance, the Fifth Circuit dichotomized Jones Act mental and physical damages to uphold the plaintiff's anguish award when her claim of sexual harassment combined physical damages. n[29] To describe the relationship between the plaintiff's emotional and physical damages, the court stated:

> There is evidence indicating that she [the plaintiff] suffered physical manifestations of harm, including weight loss, vomiting, and diarrhea. In addition, Wilson testified to incidents of unwanted physical contact instigated by her male co-workers, contact which in some instances amounted to a common-law battery. Such conduct could be found wrongful even if Title VII had never been enacted and without regard to concepts of sex discrimination. These assertions of tortious physical contact and significant physical injury are sufficient to create a claim for harassment, which this Circuit has recognized as cognizable under the Jones Act. n[30]

Here, the court's frequent reference to tort underscores its pervasive influence on the Jones Act. Aligning the plaintiff's physical component with the tort of battery, the court found "These assertions of tortious physical conduct" n[31] sufficient to bolster the plaintiff's accompanying mental damages under a harassment theory. Thus, the court upheld a mental damages claim with accompanying physical damages under the Jones Act. The Fifth Circuit completed the doctrinal rubric respecting damages for emotional injuries under the Jones Act in another case decided some ten years later, dealing also with a sexual harassment claim but this time, one lacking

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[28] Schoenbaum, *supra* note 3 at § 6-21 (citing *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991)).
[29] *Id.*
[30] *Wilson*, 939 F.2d at 265-66.
[31] *Id.* at 265.

substantiated allegations of accompanying physical harm. n[32] The court determined that the plaintiff "provided no other evidence that she suffered any physical injuries. Therefore, it was proper for the district court to conclude that Martinez [the plaintiff] had failed to allege and adduce any evidence on an essential element of her case under the Jones Act." n[33] Thus, the Fifth Circuit solidified the requirement that for compensation, mental damages require an accompanying claim of physical damages. Indeed, the Jones Act requirement of actual damages aligns with much of the common law on tort damage awards.

As such, the prohibition on mental damages, not tethered to a claim of physical damages under the Jones Act, further aligns with courts' procedural adjudication of negligence claims in general. For example, the Texas Supreme Court held in its seminal opinion, *Boyles v. Kerr,* 855 S.W.2d 593 (Tex. 1993), that mental anguish damages should be compensated only in connection with a defendant's breach of some other duty imposed by law. n[34] Accordingly, under Texas tort law, a claim of mental damages alone is insufficient for a plaintiff to recover damages. Furthermore, the Alabama Supreme Court promulgated their tort doctrine on mental and emotional damages:

> We note, as *Flagstar* points out, that there is no cause of action in Alabama for the negligent infliction of emotional distress. Implied in our holding in *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990), a case involving allegations of verbal abuse and threats of physical violence, is the idea that one cannot negligently "inflict" emotional distress on another. … Accordingly, this Court has recognized that only the intentional infliction of severe emotional distress is actionable as a separate tort. … Damages for emotional distress may be awarded in a negligence case, even in the absence of physical injury. n[35]

Although the Alabama Supreme Court does permit damages for emotional distress absent physical injury, the high court's in depth analysis of the doctrine underscores its importance and

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[32] *See* Schoenbaum, *supra* note 3 at § 6-21 (citing *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474 (5th Cir. 2001)).
[33] *Martinez*, 244 F.3d at 478.
[34] *See Boyles v. Kerr*, 855 S.W.2d 593, 596 (Tex. 1993).
[35] *Flagstar Enters., Inc. v. Davis*, 709 So. 2d 1132, 1141 (Ala. 1997).

through comparison, reinforces the Jones Act's alignment to tort law in its distinction between pure emotional and physical damages.

Thus, the Jones Act substantially mirrors tort theory from both a broad doctrinal perspective and a closer viewing of the intricacies both share in common. Possibly more insightful than the basic similarities between tort and the Jones Act is the overlap found in the subtleties of negligence per se and res ipsa loquitir, not to mention the similar patterns for legitimating damages under the pure mental to pure physical spectrum of recovery. Nevertheless, the juxtaposition of tort and the Jones Act provides insight for a structural analysis of the Jones Act alongside the claim of unseaworthiness. But first, an individual analysis of unseaworthiness seems in order.

B. Unseaworthiness: A General Background

Just as important as grounding a Jones Act analysis in its basic doctrinal underpinnings, focusing independently on admiralty jurisdiction's warranty of seaworthiness provides the background ultimately to coalesce the two doctrines. The Ninth Circuit succinctly expounded upon seaworthiness liability by citing the Court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), "Liability resulting from a failure to provide a seaworthy ship does not depend upon the negligence of the owner. The duty is absolute and thus creates a variety of liability without fault." n[36] Accordingly, the duty to provide a seaworthy vessel diverges significantly from the tort theory of the Jones Act in its independence from the "negligence of the [ship's] owner." n[37] The Ninth Circuit continued, "It [Duty to provide a seaworthy vessel] is completely independent of any duty to exercise reasonable care under the Jones Act. … 'What has evolved

[36] *Reinhart v. United States*, 457 F.2d 151, 152 (9th Cir. 1972) (citing *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960)).
[37] *Id.*

is a complete divorcement of unseaworthiness liability from concepts of negligence.'" n[38] In an opinion by Chief Justice Stone, the Supreme Court elucidated this "'complete divorcement'" n[39], "If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness." n[40] Accordingly, the Court underscored the power of the unseaworthiness claim via an explanation of its insusceptibility to a contributory negligence defense on behalf of the ship's officers. Friedell analyzed the profound effect that this negligence void has on a plaintiff seaman's litigation strategy:

> The question of what constitutes negligence under the Jones Act has assumed less and less importance as the scope of the warranty of seaworthiness has expanded. Since a seaman is not entitled to independent recoveries for negligence and unseaworthiness, and since negligence is more difficult to prove than unseaworthiness because negligence requires a showing of actual or constructive knowledge while liability for unseaworthiness is predicated without regard to fault or the use of due care, it can be said with some authority that once a plaintiff has proved the existence of an unseaworthy condition, additional proof of negligence will do nothing to advance his chances for recovery. n[41]

Thus, absent a requirement to prove any form of negligence, the plaintiff seaman, under admiralty jurisdiction or with proper joinder to a Jones Act claim, may plead an unseaworthiness cause of action to circumnavigate possible negligence barriers. "In this regard the Fifth Circuit has stated: 'When the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived.'" n[42] As a hypothetical example, if an injured seaman fell through a rotten hatch into the bilge below decks, his claim against the vessel for her unseaworthy condition remains viable even if her owner previously requested the hatch to be repaired and it's repair delay resulted from the indeterminate

[38] *Id.* (quoting *Mitchell*, 362 U.S. at 550).
[39] *Id.*
[40] *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944).
[41] Friedell, *supra* note 4 1B-3 § 21.
[42] *Id.* (quoting *Clevenger v. Star Fish & Oyster Co., Inc.*, 325 F.2d 397 (5th Cir. 1963)).

negligence of either the captain or the first mate. Thus, "The owner of a vessel has an absolute and non-delegable duty to provide a seaworthy ship." n[43]

Even though this paper will subsequently explore duty in the unseawothiness setting more closely, it is worthwhile in dredging the doctrine's background to analyze the duty's prospective class of plaintiffs. "The warranty of seaworthiness is a powerful doctrine, but it is a duty owed to a narrow class of maritime workers--those who can claim 'seaman' status under the law." n[44] Schoenbaum's depiction of the basic doctrine illustrates how narrowly tailored the applicable "class of maritime workers" n[45] who may sue under the unseaworthiness doctrine are. In fact, to determine whether the plaintiff belongs to the proper "class of maritime workers" n[46] deserved of the seaworthiness protection, courts employ:

> a twofold test: (1) the employee's duties must contribute to the function of a vessel or to the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. Thus, the plaintiff in the typical unseaworthiness case is a member of a crew of the vessel on which the injury is sustained. n[47]

Indeed, the test requires the plaintiff to possess a substantial relationship to the vessel in question.

Even though a detailed discussion of the adjudication of seaman status is beyond the scope of this paper, Judge Sam Kent's opinion in *Speer v. Taira Lynn Marine, Ltd., Inc.*, 116 F. Supp. 2d 826 (S.D. Tex. 2000) provides a thorough and exemplary application of the court's procedural determination of seaman status. Here, the plaintiff attempted to elevate his

[43] *Am. President Lines, Ltd. v. Welch*, 377 F.2d 501, 504 (9th Cir. 1967).
[44] Schoenbaum, *supra* note 3 at § 6-27.
[45] *Id.*
[46] *Id.*
[47] *Id.*

employment status with the defendant company by enrolling in a tankerman training course. n[48] The first week's training occupied an air conditioned classroom, but at the onset of the plaintiff's transition to actual field training at a derelict barge in Channelview, he suffered a heart attack within the first fifteen minutes. n[49] Thus, the plaintiff's tenuous classification as a crewman aboard the barge became a central issue before the court. Judge Kent held,

> As with Plaintiff's Jones Act agency argument disposed of above, the Court finds that the notion that Plaintiff was a member of the training barge's crew, while creative, lacks any merit. Plaintiff was on the barge to learn to be a tankerman. Thus, Plaintiff's status appears to be that of a licensee or invitee "as to whom . . . the maritime law extends no warranty of seaworthiness." n[50]

Thus, paralleling the doctrinal outlay described by Schoenbaum, the court poured out the plaintiff's claim firstly because he failed to meet the Jones Act standard and furthermore, because his brief tenure as a trainee did not entitle him to crewman classification. The court continued, "It makes no difference how physically active Plaintiff was while attending this training course aboard the barge. Even if Plaintiff engaged in tasks that might, if not a simulation, be undertaken by a vessel's crew, this does not convert him into a member of that crew." n[51] Judge Kent's strict analysis of the plaintiff's tenure aboard the vessel strongly suggests the heightened judicial scrutiny given to determining the plaintiff's crew member status. Indeed, *Speer* illustrates the court's emphasis on determining a plaintiff's crewmember status as a threshold for bringing an unseaworthiness claim in admiralty. From a discussion of the duty's structure and applicability, an analysis of what constitutes an unseaworthy vessel follows.

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[48] *Speer v. Taira Lynn Marine, Ltd., Inc.*, 116 F. Supp. 2d 826, 827 (S.D. Tex. 2000).
[49] *Id.* at 830.
[50] *Id.* (quoting *Roberts v. Williams-McWilliams Co.*, 648 F.2d 255, 263 (5th Cir. 1981)).
[51] *Speer*, 116 F. Supp. 2d at 830.

Typically, the unseaworthiness determination remains a question of fact, but the judicial test relies on a reasonableness standard. n[52] Schoenbaum encapsulated the factual test for unseaworthiness as "whether the vessel, equipment, or appurtenances were 'reasonably fit for their intended use.'" n[53] The Supreme Court held, "The standard [for seaworthiness liability] is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." n[54] Furthermore, the Fifth Circuit drew a blue print for distinguishing the duty to fit a seaworthy ship by reprinting the lower court's jury charge: "[Seaworthiness] duty … requires that the vessel and its parts and equipment must be reasonably fit for their intended uses. Thus, this duty extends not only to the vessel itself, but to all of its parts and equipment, so that the vessel, its gear, appurtenances and operation must be reasonably safe." n[55] As pronounced by the Fifth Circuit, the duty formulation for unseaworthiness broadly encompasses the vessel in its entirety. Furthermore, the Fifth Circuit continued by analyzing the doctrine as it applies to crew inadequacy: "The duty to provide a seaworthy vessel also includes a duty to supply an adequate and competent crew. A vessel may be found to be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task." n[56] Thus, just as the seaworthiness duty broadly encompasses the ship and its appurtenances from stem to stern, it also expands to the adequacy of the crew selected for the voyage. Consequently, a ship that sets sail with a completely inexperienced crew is liable for injuries resulting from this unseaworthy condition just as if the crew was injured as a result of a ship befitted with tattered sails. Nevertheless, the Fifth Circuit placed limits on the doctrine:

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[52] *See* Schoenbaum, *supra* note 3 at § 6-25.
[53] Schoenbaum, *supra* note 3 at § 6-25 (quoting *Mitchell*, 362 U.S. at 550).
[54] *Mitchell*, 362 U.S. at 550.
[55] *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 190 (5th Cir. 1991).
[56] *Id.*

> On the other hand, the owner of a vessel is not required to furnish an accident-free ship. The duty of the owner is only to furnish a vessel and appurtenances reasonably fit for their intended use and a crew that is reasonably adequate for their assigned tasks. A vessel is not called upon to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use and a crew that is reasonably adequate. n[57]

Thus, likely cognizant of the corrosive, salt laden environment most vessels operate in, courts do not require perfection but simply specify a reasonableness standard. Still, the expansiveness of the doctrine's protection and its extension to the proficiency and adequacy of the crew demonstrate unseaworthiness' strength in providing solid ground for the plaintiff's recovery.

Although an attempt to delineate all of the ways a ship may be found unseaworthy is virtually impossible n[58], the Supreme Court's holding in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922), provides a pier to peer out upon the sea of cases adjudicating unseaworthiness. Here, the facts showed that the seaman plaintiff suffered severe burns when in preparation for lighting a fire on board the ship, he poured gasoline over wood under the mistaken impression that the can, labeled coal oil, actually contained coal oil. n[59] Consequently, the application of a lit match to the gasoline doused wood set the plaintiff on fire. n[60] In an attempt to extinguish his burning clothes, the seaman sought a life preserver at first before abandoning the search and jumping overboard anyway. n[61] Thus, the ship was unseaworthy if she left port carrying a mislabeled can of gasoline and without appropriate life preservers. n[62] Furthermore, the facts also provided that "petitioner or its agents negligently filled with gasoline and placed thereon a

[57] *Id.*
[58] Friedell, *supra* note 4 1B-3 § 24.
[59] *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 257 (1922).
[60] *Id.* at 257-8.
[61] *Id.*
[62] *See Id.* at 259.

can which ordinarily contained coal oil." n[63] Nevertheless, the Court disregarded the apparent negligence in its holding. n[64] The Court held,

> The trial court might have told the jury that wothout [sic] regard to negligence the vessel was unseaworthy … if the can marked "coal oil" contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages. n[65]

Thus, "wothout [sic] regard to negligence" n[66], the court found that the coal oil can catastrophe, which happened aboard a vessel missing life preservers, constituted a proper unseaworthiness cause of action. Indeed, *Carlisle Packing Co*. illustrates the application of unseaworthiness to a plaintiff's injury produced by fellow crewmembers own negligence.

Additionally, the Court's holding in *Waldron v. Moore-McCormack Lines, Inc*., 386 U.S. 724 (1967) demonstrates the applicability of unseaworthiness to crew mismanagement. Here, the injured crewman on board the S. S. *Mormacwind* was ordered at the last minute, while the ship approached the dock, to put out a heavy mooring line which at the time, was coiled on the deck. n[67] Expert testimony found that "'3 or 4 men rather than 2 were required to carry the line in order to constitute 'safe and prudent seamanship.'" n[68] Consequently, the plaintiff fell in the process and injured his back. n[69] In fact, the Court encapsulated the seaman's complaint: "His sole contention was that the mate's assignment of two men to do the work of three or four … made the vessel unseaworthy." n[70] Finding this type of unseaworthiness claim deserving of review in light of the then existing conflict in the circuit courts n[71], the Court legitimized an

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[63] *Id.* at 257.
[64] *See Id.* at 259.
[65] *Id.* at 259.
[66] *Id.*
[67] *Waldron v. Moore-McCormack Lines, Inc*., 386 U.S. 724, 725 (1967).
[68] *Id.* (quoting *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247 (2nd Cir. 1966).
[69] *Waldron*, 386 U.S. at 725.
[70] *Id.*
[71] *Id.* at 724.

unseaworthiness claim with facts having little to do with the ship's condition or its attendant equipment. The Court argued by analogy to its opinion in *Mahnich* that since a successful unseaworthiness claim could be constructed from the misuse of otherwise fully functional equipment, then "'We see no reason to draw a line between the ship and the gear on one hand and the ship's personnel on the other.'" n[72] As such, the Court strengthened the plaintiff's footing on an unseaworthiness claim. Furthermore, the Court also anchored its opinion in public policy: "This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection." n[73] Here, the Court underscored the sea's role in shaping a jurisprudence that must account for its power and inherent dangers. Thus, as in *Carlisle Packing Co*., the Court's decision in *Waldron* illustrates the pervasiveness of unseaworthiness as a potential liability for ships and their owners.

Furthermore, comparable to the Jones Act which securely mores in the bay of tort negligence, certain underlying negligence principles do indeed surround the adjudication of unseaworthiness and are worthy of surfacing. Recalling the Ninth Circuit's pronouncement of a "'complete divorcement'" n[74] of negligence principles from the doctrine of unseaworthiness, tort theory is distinguished from unseaworthiness. Regardless, negligence principles still flow into the adjudication of unseaworthiness. For instance, "The Supreme Court has said that the inference of unseaworthiness is 'merely a particular application of the doctrine of *res ipsa loquitur* [emphasized in opinion], which similarly is an aid to the plaintiff in sustaining the

[72] *Id.* at 727 (quoting *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 339 (1955)).
[73] *Id.* at 728.
[74] *Reinhart*, 457 F.2d at 151 (quoting *Mitchell*, 362 U.S. at 550).

burden of proving breach of the duty of care . . .'" n[75] Accordingly, the Court permits the use of inference to ground a claim of unseaworthiness in a manner similar to tort's use of inference under res ipsa loquitir to establish a duty breach.

Furthermore, negligence per se casts its shadow upon the adjudication of unseaworthiness. n[76]Although negligence is typically disavowed from the unseaworthiness analysis, the Supreme Court required its analysis when applying res ipsa loquitir to a claim of unseaworthiness. The Fifth Circuit followed the Supreme Court's holding: "Res ipsa loquitur properly applies if: 1) the injured party was without fault; 2) the instrumentality causing the injury was under the exclusive control of the defendant; and 3) the mishap is of a type that ordinarily does not occur in the absence of negligence." n[77] To determine the role of negligence in the res ipsa loquitir finding, the Fifth Circuit opined that "a party who fails to observe a safety regulation has the burden of showing 'not merely that [its] fault might not have been one of the causes [of the loss], or that it probably was not, but that it could not have been.'" n[78] Whereas the adjudication of this rather complex rule known in admiralty as the Rule of The *Pennsylvania* has been significantly limited by the Court in *United States v. Reliable Transfer*, 421 U.S. 397 (1975), it's continued existence underscores the subtle influence of tort doctrine upon the unseaworthiness cause of action. n[79] Even though tort's influence on unseaworthiness is negligible when compared to its pervasiveness in the Jones Act realm, its subtle effect is noteworthy, especially in the context of the two doctrines' coalescence.

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[75] *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1115 (quoting *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 113 (1941)).
[76] *See United States*, 778 F.2d at 1116 (quoting *The Pennsylvania*, 86 U.S. 125, 136) (1874).
[77] *United States*, 778 F.2d at 1115-6 (citing *Johnson* 336 U.S.).
[78] *United States*, 778 F.2d at 1116 (quoting *The Pennsylvania*, 86 U.S. 125, 136 (1874)).
[79] *See Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1052 (5th Cir. 1981).

Thus, although the unseaworthiness doctrine lacks many of the formal connections to negligence theory found in the Jones Act, its adjudication still entails certain vestiges of tort. Accordingly, the Ninth Circuit's pronouncement of a "'complete divorcement'" n[80] likely constitutes judicial exaggeration. Still, the Ninth Circuit's bold statement underscores the difference between negligence and unseaworthiness. Whereas negligence principles draw out duty pockets, unseaworthiness' duty practically spans the ocean's breath. Indeed, "The duty is absolute and thus creates a variety of liability without fault." n[81] Following this broad duty pronouncement, courts have attributed unseaworthiness liability not only for the condition of the ship but also the composition, management, and actions of the crew. n[82] Considering the doctrine's expanse, courts limit its potential somewhat through strict interpretation of seaman status, among other means to be explored later in this paper. n[83] Yet, in unseaworthiness' divergence from negligence, certain tort principles still influence its jurisprudence. Res ipsa loquitir and negligence per se provide two examples. Thus, those harbingers of negligence's bearings upon unseaworthiness subtly illustrate the doctrinal overlap which fosters the joint pleading of the two theories under one Jones Act jury trial. Indeed, a more detailed analysis of the two doctrines' procedural dichotomy, duty formulations, causation strictures, and claim defenses uncovers some of the more intricate overlap in the two theories. As a result, the coalescence of the two doctrines on a microscopic level may reveal the policy behind the Court's decision in *Fitzgerald*.

II. Procedural Dichotomy

[80] *Reinhart*, 457 F.2d at 151 (quoting *Mitchell*, 362 U.S. at 550).
[81] *Reinhart*, 457 F.2d at 152.
[82] *See* Friedell, *supra* note 4 1B-3 § 24.
[83] *See Speer*, 116 F. Supp. 2d.

The Jones Act's in personam proceeding advantages the injured seaman's prospects of recovery significantly by rejecting two previous Supreme Court propositions. n[84] Seventeen years before the passage of the Jones Act, in *The Osceola No. 98*, 189 U.S. 158 (1903), which by means of admiralty jurisdiction, limited the seaman's recovery when a crewmember's negligence precipitated the injury in question. n[85] Indeed, the facts of The *Osceola* bear great significance upon the Court's struggle to determine the appropriate damages for a plaintiff in the context of an in rem proceeding. Here,

> The [ship's] owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. n[86]

Yet, the Court was asked to determine whether the derrick's operation while the ship was still at sea constituted negligence. n[87] Thus, rather than the condition of the ship, the captain's potentially negligent orders caused the plaintiff's damages. In an opinion by Justice Brown, the Court elucidated the injured seaman's barrier to recovery prior to the enactment of the Jones Act:

> The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. n[88]

Thus, before the Jones Act's passage, the procedural nature of admiralty jurisdiction restricted the seaman's recovery to liable against the ship or against her owners via in personam jurisdiction for claims of both unseaworthiness and maintenance and cure. Nonetheless, a brief look at the Jones Act's relationship with the pivotal Supreme Court holding in *The Osceala*

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[84] *See* Schoenbaum, *supra* note 3 at § 6-21.
[85] *Id.* at § 6-20.
[86] *The Osceala*, 189 U.S. 158 (1903) (as represented in the Prior History portion of the opinion).
[87] *See Id.*
[88] *The Osceala*, 189 U.S. at 172.

reveals the statute's potential to compensate a plaintiff for negligence caused by the captain or crew.

Indeed, the Jones Act statutorily supersedes two of the Court's main propositions in The *Osceala* through its inclusion of a negligence based cause of action brought in the at law jurisdiction. n[89] The Court promulgated four general tenants of maritime law in The *Osceala*. The first provided for the maintenance and cure of seamen for injuries incurred in service to the ship while proposition two espoused the unseaworthiness doctrine. n[90] Yet, propositions three and four voided a seaman's potential claim against the negligence of the ship's captain or crew. n[91] Specifically, proposition three stated, "That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure." n[92] This heavy restriction forseeably burdened plaintiffs inordinately due to the captain and crew's accountability for many accidents aboard ships. The Court continued in this theme with proposition four, "That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident." n[93] Again, the Court reaffirmed the restrictive nature of the plaintiff's claim to maintenance and cure for injuries resultant from the crew's negligence. Schoenbaum wrote, "The Jones Act legislatively overrules Propositions numbered three and four [of the Court's holding in The *Osceala*] by providing a cause of action for a seaman injured in the course of his employment by the

[89] *See* Schoenbaum, *supra* note 3 at § 6-20.
[90] *See The Osceala*, 189 U.S. at 175.
[91] *Id.*
[92] *Id.*
[93] *Id.*

negligence of his employer, the ship's master, or fellow crew members." n[94] Consequently, the Jones Act filled the plaintiff seaman's previous void with respect to recovery for the negligence of the captain or crew.

Furthermore, the Court's seminal decision in *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924) clarified the procedural relationship between admiralty proceedings and the inclusion of jury trials. Interpreting the Jones Act, the Court held:

> Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modofied [sic], and not between that law and some nonmaritime system. n[95]

Thus, the Jones Act provides the plaintiff with options rather than restricting procedural rights as the Court did in The *Osceala*. Nevertheless, the Court in *Panama Railroad Co.* still reaffirmed the continued vitality of federal admiralty jurisdiction: "The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law." n[96] Thus, the procedural aspects of admiralty law remain even after the statute's enactment and serve as a proper foundation for the Jones Act's implementation.

Furthermore, the seafaring environment impacts the procedural nature of the Jones Act. Indeed, the subcontracting involved in the shipping industry requires particular attention to the proper defendant under the Jones Act liability theory. n[97] For instance, the Second Circuit in *Mahramas v. American Export Isbrandtsen*, 475 F.2d 165 (2nd Cir. 1973) found that the

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[94] Schoenbaum, *supra* note 3 at § 6-20.
[95] *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 388-9 (1924).
[96] *Id.* at 389.
[97] *See Mahramas v. Am. Export Isbrandtsen*, 475 F.2d 165 (2nd Cir. 1973)

plaintiff, Anna Mahramas, improperly selected a defendant under the Jones Act. [n98] Mahramas, a hairdresser on board the original defendant's cruise liner, was assigned to the ship's beauty shop by her employer, House of Albert. [n99] Sharing a cabin with another beauty shop employee, the plaintiff used the upper bunk which required access via a ladder. [n100] Unfortunately, the bottom step gave way injuring the plaintiff's lower back. [n101] Although to be discussed in greater length under the duty section, it is noteworthy at present to mention the court's finding that Mahramas satisfied the Jones Act's seaman status requirement. [n102] Nevertheless, the plaintiff's difficulty resided in her choice of defendants under the Jones Act. [n103] The court analyzed the correct test for determining the appropriate employer and defendant under the Jones Act: "In determining a seaman's employer, a court must look to 'the plain and rational meaning of employment and employer,' … which means that the right of control is one of the most important factors to consider." [n104] Consequently, under a right of control test, the court found that the plaintiff's choice of defendant did not calibrate to the test's "'rational meaning of employment and employer.'" [n105] In finding that "the plaintiff [Mahramas] was not only hired but also paid by the independent contractor [House of Albert]," [n106] the court concluded that "Mrs. Mahramas' claims under the Jones Act and for maintenance and cure were properly dismissed against the defendant Export, the shipowner, because it [the ship owner] was not her employer. Nevertheless, the House of Albert was a proper party for the plaintiff to sue on these

[98] *See Id.* at 170.
[99] *Id.* at 167.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 170.
[103] *See Id.*
[104] *Id.* at 171 (quoting *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 791 (1949)).
[105] *Id.*
[106] *Mahramas*, 475 F.2d at 171.

claims because it was her employer." n[107] Thus, the court transferred liability to the plaintiff's direct employer for an accident that likely resulted from the negligence of the ship's owners, captain, or crew since those three entities comprised the probable matrix of responsibility for the ship's upkeep and safe passage. In some senses, the court's transfer of liability beguiles common sense because House of Albert, as a subcontractor, likely possessed little to no authority over the ship's maintenance and inspection of bunk bed latter steps. Nonetheless, this illogical dichotomy in Jones Act liability will be seen to coalesce with unseaworthiness' procedure for selecting defendants.

As another example, the District Court of Rhode Island's decision in the tragedy that beset the Tall Ship *S/V Marques* illustrates the court's adherence to the Jones Act's employment requirement for selection of a proper defendant. Here, the deceased, Mr. and Mrs. Heath, discovered an advertisement for the American Sail Training Association (ASTA)'s program in a sailing magazine. n[108] Complying with the application requirements and referencing "their considerable sailing experience," n[109]ASTA accepted their application. n[110] The *Marques* classified as a "117 foot, three masted, wooden barque." n[111] The court vividly described the Heaths responsibilities aboard the ship, "ASTA trainees, despite their payment of fees to ASTA (and indirectly, to the shipowners), were expected to sing for their supper. They were subject to all orders of the captain, assigned to the round-the-clock watch schedule in the same frequency and rotation as the crew." n[112] Regardless of the handsome fee that the Heaths paid to join the crew for a racing experience from Bermuda to Nova Scotia, they were obliged to fulfill many of

[107] *Id.* at 172.
[108] *Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1462 (D. R.I. 1986).
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1463.
[112] *Id.*

the more ornery responsibilities of a regular crewmember. n[113] After completing a presail briefing on the crew's hierarchy and the ship's layout, ten ships including the *Marques* began the race on a glorious June afternoon. n[114] Nevertheless, the court solemnly found that "Toward 4:00 a.m., the Marques reached her rendezvous with destiny. The weather changed. The wind picked up, and a steady downpour began. Suddenly, the rain became fierce (close to torrential), and the wind intensified. The Marques was caught in a deadly squall." n[115] Sadly, after turning over on her starboard, the *Marques* took on water and then "'like a saucer in dishwater,'" sank in less than a minute. n[116] Caught below deck, the Heaths drowned with the ship and of the twenty-eight crewmembers, only nine survived. n[117]

After surfacing the sad facts of the case, the court turned to the plaintiffs' Jones Act claim against ASTA. The court reiterated the strict employment standard required by the Jones Act: "That an employer-employee relationship is essential to recovery under the Jones Act cannot be gainsaid." n[118] The court elaborated on the "right of control" n[119] standard (cite) by providing a four element test for considering employment status: "(i) the selection and engagement of the putative employee, (ii) the situation vis-a-vis payment of wages, (iii) the situs of the power of dismissal, and (iv) the situs of control over on-the-job conduct." n[120] Indeed, as would be inferred by the decedents' submission of a substantial fee to join the ship's crew, the court determined that the plaintiffs failed to establish the necessary employment relationship to satisfy the Jones Act requirement. n[121] Citing the classic "'workaway'" n[122] relationship wherein a

[113] *Id.* at 1460-1463.
[114] *Id.* at 1463.
[115] *Id.* at 1464.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 1468.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 1469.

seaman works aboard a vessel in return for free passage, the court determined that the Heaths "were not workaways in that they did not execute the ship's articles and did not trade sweat for free passage. Rather, they paid for the privilege of learning the ropes aboard the Marques." n[123] Indeed, their status more closely aligned with a cruise ship passenger than an employed seaman entitled to Jones Act protection. As such, the court found that, "ASTA … derived no tangible benefit from whatever labors the Heaths undertook to perform. Nor can it be said that ASTA possessed a meaningful power of dismissal over the trainees once the cruise began, or that the organization retained the right to 'control' them in any meaningful way during the voyage." n[124] Thus, the court found that "beyond the shadow of a doubt … ASTA and the Heaths did not share the requisite employment relationship." n[125] Indeed, "No matter how the compass is spun, the needle swings back to point squarely to ASTA's total lack of control during the voyage." n[126] As a result, just as in *Mahramas*, the defendant in *Heath* lacked the requisite level of control to legitimate an employment relationship as required by the Jones Act.

Yet, unlike the Jones Act's statutorily constrained employment relationship as a basis for the cause of action, unseaworthiness maintains an operational control standard to select the appropriate defendant. n[127] Schoenbaum wrote, "The appropriate defendant in an unseaworthiness case is the person who had operational control of the ship at the time the condition was created or the accident occurred." n[128] Accordingly, an operational control standard comports with logic since unseaworthiness is a direct variable of the ship's maintenance, staffing, and preparation for conditions at sea among other factors. Consequently,

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[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 1468.
[126] *Id*. at 1469.
[127] *See* Schoenbaum, *supra* note 3 at § 6-23.
[128] *Id*.

the plaintiff should derive the appropriate defendant or defendants from those parties who control these variables aboard the ship. Whereas an operational control standard sounds akin to the Jones Act right of control rubric, in application, the unseaworthiness procedure eases the plaintiff's burden for choice of defendant because the determination is neutral to the plaintiff by instead focusing on the link between the cause of the injury and the responsible party. Indeed, "This [party who maintained operational control] is normally the shipowner, but a demise charter also normally invests the charterer with powers of control so as to place upon him the duties of unseaworthiness." n[129] Typically, the ship owner has ultimate control over unseaworthiness variables and consequently will be liable in most instances for accidents resulting from findings of unseaworthiness. n[130] In contrast, the Jones Act inquires not only upon the cause of the injury and the responsible party, but it also probes the relationship between the plaintiff and the responsible party to ascertain the correct choice of defendants. The court's holding in *Mahramas* directly elucidates this pivotal distinction by upholding the plaintiff's choice of defendants for an unseaworthiness claim while denying the same under the Jones Act. n[131] In fact, the court in *Mahramas* seemed quick to bolster the plaintiff's case against the defendant on unseaworthiness ground when it denied the Jones Act claim, "At the outset, it should be noted that there is no question raised concerning the propriety of the plaintiff's actions against the shipowner for unseaworthiness." n[132] Indeed, the court upheld the plaintiff's logical choice of defendants under the unseaworthiness doctrine. Thus, just as in other factors, the two claims seesaw back and forth with respect to the burden placed on one element over the other. Here, the standard for selecting a defendant is somewhat easier to satisfy under the unseaworthiness doctrine, yet other

[129] *Id.*
[130] *See Id.*
[131] *Mahramas*, 475 F.2d at 169-70.
[132] *Id.* at 169.

elements of unseaworthiness maintain a higher burden on the plaintiff. Indeed, like the waves on the beach, there is a natural give and take between the two doctrines that further harmonizes their union under one petition.

Entitled a "procedural dichotomy", this section points to a doctrinal divide between the Jones Act and unseaworthiness, particularly with regard to the crucial choice of defendants. Prior to the Jones Act, the Court's opinion in The *Osceala* demonstrated the procedurally narrow recourse for a plaintiff injured by the negligence of the crew. Nevertheless, superseding Propositions three and four, the Jones Act removed two potentially substantial barriers to recovery via easing restrictions not only for the negligence of the crew but also extending liability beyond simple maintenance and cure to recovery for the captain's negligence. n[133] Following thereafter, the Court's decision in *Panama Railroad* provides unique insight into the development of Jones Act procedure. Nevertheless, the sea's impact on the Jones Act seeps through to its core process. The court's decision in *Mahramas* illustrates how the unique circumstances around maintenance and upkeep of the ship sometimes misalign with a right of control standard for determining liability. Nevertheless, the plaintiff's right of recovery under the unseaworthiness doctrine points to the doctrinal interlay between the Jones Act and unseaworthiness. In *Mahramas*, the court found that the defendant, ship owner, did not possess sufficient right of control over the defendant under the Jones Act but maintained adequate operational control over the cause of the plaintiff's injury to legitimate an unseaworthiness liability claim. n[134] Thus, the linguistic subtleties in the two standards disguise the fundamental differences between the Jones Act and unseaworthiness' selection standards for choosing proper defendants. Nevertheless, the court's decision in *Mahramas* demonstrates how the two doctrines

[133] *See* Schoenbaum, *supra* note 3 at § 6-20; *The Osceala*, 189 U.S. at 175.
[134] *Id.* at 169-70.

operate in tandem to uphold a plaintiff's legitimate claim when one or the other might unfairly restrict recovery.

IV. Duty

Just as the sea shapes the procedural nature of the Jones Act, its influence is also paramount with respect to duty. Schoenbaum wrote, "The Jones Act allows recovery for a seaman's personal injury suffered 'in the course of his employment.' This issue commonly arises with respect to personal injuries suffered ashore. Whether a seaman was in the course of his employment when injured is typically a question of the particular circumstances involved." n[135] Nevertheless, the role of the sea is profound in shaping the circumstantial nature of this pivotal determination.

No more evident is the powerful influence of the sea on determining Jones Act duty than the distinction between "blue water" and "brown water" seamen. The "blue water" classification pertains to offshore seamen because of the water's propensity to turn deep blue as the continental shelf drops off yielding to the depths of the ocean floor. Closer to shore at most ports, the water maintains a brown hue since the bottom is nearer to the surface, increasing the water's murkiness. As such, a seaman classified as "blue water" receives far greater protection when away from his ship or offshore platform than a "brown water" seaman does while on break from his ordinary duties. n[136] The Fourth Circuit referenced the Court's holding in *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943) and found that:

> "Blue water" seamen endure the hazards and unique life associated with extended voyages to foreign ports. … [T]he Supreme Court, in recognizing the distinction between "blue water" seamen and inland commuter seamen, noted that, with respect to "blue water" seamen, shore leave, with its attendant relaxation, is a necessary and beneficial antidote for the confinement and rigid discipline to

[135] Schoenbaum, *supra* note 3 at § 6-21 (quoting 46 U.S.C.A. App. § 688 (West 1996)).
[136] *See* Schoenbaum, *supra* note 3 at § 6-21.

> which the seamen are subjected aboard ship by reason of the unique nature of their employment. n[137]

Due to the vastness of earth's seas, "blue water" seamen spend extraordinary amounts of time aboard their vessels or offshore platforms, confined within cramped spaces while voyaging often on long passages. Consequently, "It is in the shipowner's best interest to ensure that the [blue water] seamen shall enjoy these hours of relaxation." n[138] Accordingly, in *Aguilar*, the Court held that the shipowner's liability extended generally to shore leave for "blue water" classified seamen. n[139] Although *Aguilar* is not a Jones Act case, it's analysis of the "blue" versus "brown water" distinction applies to Jones Act cases as accorded by the Fourth Circuit's detailed reference to *Aguilar* when determining employment status under the Jones Act. n[140] Justice Rutledge opined on behalf of the Court that during a voyage, "the vessel is not merely his [the blue water seaman's] place of employment; it is the frame-work of his existence." n[141] Thus,

> The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If in those surroundings the seaman, without disqualifying misconduct, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. … In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment. n[142]

Because of the unique characteristics of a "blue water" seaman's work, shore leave is integral and "Unlike men employed in service of our land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit." n[143] Consequently, the sea profoundly shapes the Jones Act duty owed to seamen,

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[137] *Lee v. Mississippi River Grain Elevator, Inc., Barge Div.*, 591 So.2d 1371, 1375 (4th Cir. 1991).
[138] *Id.*
[139] *Aguilar*, 318 U.S. at 734.
[140] *See Lee*, 591 So.2d at 1375.
[141] *Aguilar*, 318 U.S. at 732.
[142] *Id.* at 734.
[143] *Id.* at 731-2.

particularly "blue water" seamen. Indeed, although substantially similar to the duty formulation found in ordinary tort environments, it is the distinctions forged by the sea such as the differentiation between "blue" and "brown water" seamen that facilitate the Jones Act's union with a claim of unseaworthiness.

Furthermore, the Jones Act's variation in duty with respect to the location of employment at sea parallels the courts' analysis of duty in unseaworthiness. As noted above, the applicable class of maritime workers who may claim protection under the duty of seaworthiness is narrowly tailored. n[144] Nevertheless, the analysis undertaken by the court in *Speer* to determine a plaintiff's seaman status logically assimilates to the judicial distinction between "blue" and "brown water" seamen when applying the Jones Act's course of employment provision. Both are determinants of the sea and are irrespective of the doctrinal divergence between the Jones Act and the warranty of seaworthiness. Furthermore, the impact of the sea upon Jones Act negligence aligns with the unseaworthiness duty's applicability to crew competence. The Ninth Circuit declared that, "The ship must be properly manned. 'To be inadequately or improperly manned is a classic case of an unseaworthy vessel.'" n[145] Although clear from its namesake, the unseaworthiness doctrine is indeed influenced by the sea. Passage making requires a crew to work tirelessly to ensure their own safety and that of their ship's cargo as she plies treacherous waters and weathers brutal storms. Nevertheless, hard work is insufficient if the crew is neither appropriately numbered nor varied adequately in skills to perform all the necessary functions aboard a vessel. Thus, the sea's effect upon the judicial outlay of unseaworthiness is quite manifest, yet it is its unique effect upon the Jones Act duty formulation that permits the two doctrines to unite behind a plaintiff in one petition for restitution. Whether adjudicating course

[144] Schoenbaum, *supra* note 3 at § 6-27.
[145] *Am. President Lines, Ltd.*, 377 F.2d at 504 (quoting *June T., Inc. v. King*, 290 F.2d 404, 407 (5th Cir. 1961)).

of employment under the Jones Act duty provision or seaman status under the unseaworthiness duty, both are impacted by the intricacies of the sea and thus, harmonize nicely to substantiate a plaintiff's claim.

The role of duty in both doctrines highlights their potential for union. Like the tide upon a beach, the sea pushes the Jones Act's underlying tort theory towards a harmonious blending with its unique environment. As evident from the distinction between "blue" and "brown water" for classifying employment status under the Jones Act, its duty application is imbued with the vagaries of its environment. Likewise and rather manifestly by its namesake, unseaworthiness' duty is vastly influenced by the sea. The sea not only foists a heightened duty upon the shipowner or charterer with respect to the ship's condition; it also commands attention to the competence and adequacy of the crew. With respect to duty's pervasiveness, the sea shifts the Jones Act to provide greater coverage for "blue water" sailors whereas the duty to provide a seaworthy vessels broadens the breath of potential claims of recovery in light of the many ways a ship may become unseaworthy. Nevertheless, just as in the procedural context, the duty formulations of the two doctrines operate in tandem to provide coverage where one or the other might leave a deserving plaintiff devoid of recovery.

V. Causation

Causation furthers the coalescence of unseaworthiness and the Jones Act. First, a look at how the Jones Act's basic tort theory of causation is shaped by the sea orients its unification with unseaworthiness to provide causation protection for injuries that typically occur in maritime occupations. In a case before the Fifth Circuit, the original plaintiff argued "that the district court failed to instruct the jury that an employer must show a higher degree of care for work

aboard a vessel than on land." n[146] Although the Fifth Circuit dismissed the plaintiff's argument since "The record clearly establishe[d] that the district court did instruct the jury that the Jones Act negligence claims required only a showing of slight negligence," n[147] the court's acceptance of the plaintiff's underlying theory underscores the sea's role in shaping the landscape of Jones Act causation.

Because of the unique environmental influences of the sea, courts consider Jones Act causation under a minimal standard, following a "featherweight" n[148] threshold. n[149] Still, the Fifth Circuit "expressly recognized that even in Jones Act cases the necessary causal connection requires more than simple 'but for' cause. … The negligence must be 'a legal cause' of the injury." n[150] Indeed,

> the Supreme Court has cautioned that the FELA, and derivatively the Jones Act, is not to be interpreted as a workers' compensation statute and that the unmodified negligence principles are to be applied as informed by the common law. … Thus, the basis of liability under the FELA, and derivatively the Jones Act, remains grounded in negligence and not merely on "the fact that injuries occur." n[151]

Thus, the Court clearly requires a certain level of causation under the Jones Act by differentiating the maritime statute from ordinary workers' compensation. However, the causation requirement still entails a low "featherweight" n[152], threshold for the plaintiff. Indeed, "'[t]he question of proximate cause … under the Jones Act turns on whether the actions of the defendant contributed to the injury even in the slightest degree.'" n[153] Consequently, the

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[146] *Robin v. Wilson Bros. Drilling*, 719 F.2d 96, 97 (5th Cir. 1983).
[147] *Id.*
[148] Schoenbaum, *supra* note 3 at § 6-22.
[149] *See Id.*
[150] *Gavagan v. United States*, 955 F.2d 1016, 1019-20 (5th Cir. 1992) (quoting *Chisholm v. Sabine Towing & Transp. Co., Inc.*, 679 F.2d 60, 67 (5th Cir. 1982)).
[151] *Hernandez*, 187 F.3d at 436-7 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947))).
[152] Schoenbaum, *supra* note 3 at § 6-22.
[153] *Gavagan*, 955 F.2d at 1019 (quoting *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 966 (5th Cir. 1969)).

"'slightest degree'" n[154] threshold requires a minimal showing on the part of the plaintiff seaman. In *Peymann v. Perini Corp.*, 507 F.2d 1318, 1324 (1st Cir. 1974), the court stated:

> The reason why under the Jones Act the plaintiff is entitled to a charge that he need show only that defendant's negligence contributed to his injury was fully explained in *Rogers*. Basically it is because, as distinguished from the common law, where defendant's negligence must be the "sole, efficient, producing cause" and plaintiff would be barred if his own negligence was [the] contributing cause, the Jones Act "expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence." n[155]

Thus, the statutory language of the Jones Act, which diminishes the contributing cause barrier, smoothes the plaintiff's prima facie burden on causation through its "'in whole or in part'" n[156] language. Consequently, courts seem to operate under a "slightest degree" n[157] determinant for causation under the Jones Act to fulfill the plaintiff's "featherweight" n[158] causation requirement. Indeed, the case law analyzed below illustrates the Fifth Circuit's reference in *Robin* to the role of the sea in shaping the Jones Act, particularly with regard to its causation requirement. Yet, to align the Jones Act case law properly with the adjudication of causation under unseaworthiness, it is logically advantageous to discover the courts' interpretation of causation standards in the unseaworthiness context alone first.

In contrast to the Jones Act causation requirement, unseaworthiness upholds a higher causation standard. n[159] The Fifth Circuit held that "The standard of causation for unseaworthiness is a more demanding one [than the Jones Act causation requirement] and requires proof of proximate cause." n[160] In another opinion, some ten years later, the Fifth

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[154] *Id*.
[155] *Chisholm*, 679 F.2d at 62 (quoting *Peymann v. Perini Corporation*, 507 F.2d 1318, 1324 (1st Cir. 1974)).
[156] *Hernandez*, 187 F.3d at 436 (quoting 45 U.S.C.A. § 51 (West 1996)).
[157] *Gavagan*, 955 F.2d at 1019 (quoting *Sanford Bros. Boats, Inc.*, 412 F.2d at 966).
[158] Schoenbaum, *supra* note 3 at § 6-22.
[159] *See Chisholm*, 679 F.2d at 62.
[160] *Chisholm*, 679 F.2d at 62.

Circuit more narrowly defined the required "proof of proximate cause" n[161] as follows: "'To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness.'" n[162] This "substantial part" n[163] coupled with "a direct result or a reasonably probable consequence of the unseaworthiness" n[164] language elevates the plaintiff's causation requirement considerably in the unseaworthiness context, especially when compared to the Jones Act's "slightest degree" n[165] proximate cause standard.

Nonetheless, this higher standard of causation comports with logic in the unseaworthiness context. Recalling how Friedell found the number of ways a vessel may be found unseaworthy practically innumerable n[166], it is consequently sensible that courts require unseaworthiness plaintiffs to link their injuries more directly to the conditions upon the vessel that triggered seaworthiness liability. To allow a plaintiff to locate an unseaworthy aspect of the vessel and then rather flimsily link their injury to that unseaworthy condition would open vessels and their owners to inordinately high levels of liability. Unseaworthiness' stringent causation standard solves this potential problem. Although these judicial descriptions are helpful at the onset, a detailed analysis of particularly illustrative cases applying these causation standards across the Jones Act, unseaworthiness spectrum demonstrates the inherent union of these two causes of action through their causation requirements. But first, a case most relevant to interpreting

[161] *Id*.
[162] *Gavagan*, 955 F.2d at 1020 (quoting *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988)).
[163] *Id*.
[164] *Id*.
[165] *Gavagan*, 955 F.2d at 1019 (quoting *Sanford Bros. Boats, Inc.*, 412 F.2d at 966).
[166] Friedell, *supra* note 4 1B-3 § 24.

proximate cause in the unseaworthiness context properly sets off the analytical juxtaposition between the causation theories under the Jones Act and unseaworthiness.

The Fourth Circuit's opinion in *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432 (4th Cir. 1999), thoroughly illustrates unseaworthiness' proximate cause standards. Captain Hernandez, an experienced seaman, previously spent twelve to fifteen years captaining shrimp boats in Texas before moving to the east coast to captain scallop trawlers of the ilk that he voyaged upon the day of his accident. n[167] The east coast scallop trawler, subject to Captain Hernandez's claim of unseaworthiness and concomitant claim against her owner under the Jones Act, fished for scallops by towing two dredges on the port and starboard side of the vessel to catch scallops in bags. Winches then raised the bags up on deck. n[168] Upon completing each voyage, Captain Hernandez submitted a written list of mechanical defects that occurred during the voyage, so that the defendant could make appropriate repairs. n[169] Prior to the voyage in question, Hernandez previously reported problems with the automatic pilot system, the public announcement [PA] system, and a winch prone to sticking on the starboard side. n[170] Responding to the repair requests, one of the defendant's representatives informed Hernandez that the problems were resolved prior to the voyage in question. n[171] Nevertheless, a few days into the voyage, all three systems began malfunctioning once again. n[172] Indeed, for the successful operation of the dual scallop dredges, the ship must steer straight to avoid entangling the dredge lines. n[173] Consequently, the auto pilot feature is highly important to the ship's safe handling, particularly in heavy or following seas. In these conditions, human error is virtually

[167] *Hernandez*, 187 F.3d at 435.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 435-6.
[173] *Id.* at 435.

inevitable when attempting to compensate for the conditions at the helm to maintain a straight course. Captain Hernandez claimed injury from bumping his head on the pilot house door frame in his frantic effort to instruct the winch operators to pull the winches out of gear. n[174] Having felt the strain of tangled dredges upon the engine and smelling burning rubber, Hernandez, assumedly knowing the PA system was inoperable, darted towards the dredge operators to order them to neutralize the winches. n[175] Unfortunately, on his way out of the pilot house, Hernandez bumped his head on the door frame. n[176]

Upon predicating the three potential sources of unseaworthiness liability on the *F/V Miss Vertie Mae*, the court poured out Hernandez's claim by holding that the inoperable automatic pilot system, the broken PA system, and the faulty starboard winch each were insufficient to meet the more stringent proximate cause standards of an unseaworthiness claim. n[177] Seeming to disregard the nature of scallop fishing which requires the straight steerage of the vessel to avoid entangling the dredges n[178], the Fourth Circuit held, "There is no indication that a vessel required to be steered manually is in any way unseaworthy." n[179] Furthermore, "while Hernandez bumped his head because he failed to duck, there is no indication that the broken PA system caused him not to duck on this particular passage through the doorway when he had ducked every other time that he had passed through." n[180] Accordingly, the court found that the PA system's inoperability failed the unseawothiness proximate cause standard because the plaintiff had crossed through the doorway several times safely even after the PA was no longer operable. "The same must be said for the causative impact of a sticking winch. … A sticking winch may

[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 439.
[178] *Id.* at 435.
[179] *Id.* at 439.
[180] *Id.*

have caused Hernandez to pass through the doorway one more time than he otherwise would have, but each additional time … could not be considered a proximate cause of his failure to duck." n[181] Consequently, the sticking winch, although the immediate cause of the plaintiff's urgent need to address the winch operator, failed the court's stringent proximate cause standard for an unseaworthiness claim. Although harsh for the plaintiff, the court's holding comports with logic because the plaintiff's link between his injuries and the vessel's mechanical failures appears farfetched since nothing about the door itself was unseaworthy.

Whereas the causation burden in the unseaworthiness context is rather arduous, the influence of the sea weakens the causation standard in the Jones Act far below the standard threshold found in other negligence settings. The Court in *Ferguson v. Moore-McCormack, Inc.*, 352 U.S. 521 (1957) illustrated this weak threshold in a case concerning a baker employed aboard a passenger ship, the *Brazil*. n[182] Having received an order from one of the ship's waiters for twelve servings of ice cream and upon instructions to give the waiters prompt service, the baker procured the ice cream but realized that it had not been thawed properly in the tempering chest. n[183] In turn, the hardened ice cream rendered the scoop useless. n[184] Without an ice chipper available, the baker used a sharp butcher knife to loosen the ice cream, and the gruesome facts provided that he lost two fingers on his right hand as a result. n[185] In reversing the Court of Appeals' directed verdict against the trial court's judgment, the Court held that "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent

[181] *Id.*
[182] *See Ferguson v. Moore-McCormack, Inc.*, 352 U.S. 521 (1957).
[183] *Id.* at 521-3.
[184] *Id.* at 522.
[185] *Id.*

could have anticipated that a knife would be used to get out the ice cream." n[186] Under these facts, the variance in causation standards between unseaworthiness and the Jones Act manifests clearly. Seemingly, if applied to the Jones Act facts in *Ferguson*, the Fourth Circuit's unseaworthiness' causation analysis would have stymied the plaintiff's claim as unforeseeable and not sufficiently direct of consequence from failing to supply a proper implement to serve hardened ice cream safely. Indeed, applying both causation theories demonstrates their wide variance in strictness. The Jones Act possesses a reduced causation threshold as evident from the decision to legitimate the baker's claim but revoke the captain's claim in *Hernandez* even though a foreseeable connection seems to exist between the broken appliances aboard the ship and his injuries. The Court in *Ferguson* continued, "On this record, fairminded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him." n[187] Nevertheless, it seems that "fairminded men" n[188] could also conclude that it is beyond comprehension that a baker, trained in culinary arts, would use a knife in such a dangerous way. In comparison, it actually seems more foreseeable that a captain would bump his head or fall down and even worse, collide with another ship having left the helm unattended, than it does for a baker to use a knife to serve ice cream. Hence, the application of these diverging causation standards boldly highlights the difference between the Jones Act's "featherweight" n[189] causation theory and the more arduous standards employed in the unseaworthiness context.

Causation provides another example of the sea influencing the Jones Act alongside unseaworthiness to foster in tandem the coverage of deserving injuries at sea. Unlike regular

[186] *Id.* at 523.
[187] *Id.*
[188] *Id.*
[189] Schoenbaum, *supra* note 3 at § 6-22.

negligence applications, the Jones Act significantly diminishes the plaintiff's causation barrier. Described as "featherweight," n[190] the Jones Act's "'slightest degree'" n[191] determinant considerably diminishes torts' causation requirements which were intellectually advanced by Justice Cardozo and Andrews' opinions in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (New York 1928). Indeed, the Fifth Circuit's decision in *Robin* evinces the sea's role in reducing the standard tort theories of causation to one of "featherweight." n[192] Whereas the Jones Act diminishes the causation burden, unseaworthiness promotes a significantly stronger causation threshold. Indeed, operating under a "direct result or a reasonably probable consequence" n[193] standard, the difference is profound as demonstrated by the disparity in outcome between the court's unseaworthiness conclusion in *Hernandez* versus the court's Jones Act decision in *Ferguson* with facts in both cases portraying substantially similar levels of unforeseeability. Nevertheless, again, the two doctrines may effectively operate in tandem to bolster a plaintiff's claim when one or the other simply erects too great of barrier for recovery.

VI. Claim Defense

In a manner similar to its effect on causation, the sea profoundly shapes the role of comparative negligence as a Jones Act defense and furthers its coalescence with unseaworthiness. Framing the weighty effect of the sea upon Jones Act defense options, the Court stated in *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939) that "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which

[190] *Id.*
[191] *Gavagan*, 955 F.2d at 1019 (quoting *Sanford Bros. Boats, Inc.*, 412 F.2d at 966).
[192] Schoenbaum, *supra* note 3 at § 6-22.
[193] *Gavagan*, 955 F.2d at 1020 (quoting *Johnson*, 845 F.2d at 1354).

attend shore employment." n[194] At the onset of its analysis of Jones Act comparative negligence, the Court distinguished the unique circumstances of a seaman's employment:

> The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. … In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. n[195]

Just as the Court has opined in the adjudication of other Jones Act elements, the sea extracts a substantial toll upon the seaman and exposes the sailor to unduly harsh conditions rift with great danger. Accordingly, the court should be particularly protective of seamen's rights to recover when injured. Citing the "conformity to its [admiralty's] traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances" n[196], the Court concluded that comparative negligence, rather than assumption of the risk, best serves the underlying interests provided for under maritime law. n[197] In the same year that the Court decided *Socony-Vacuum Oil Co*., Congress adopted the 1939 amendment to the Employers' Liability Act alleviating the Jones Act of an assumption of the risk, comparative negligence distinction by terminating assumption of the risk as a defense altogether. n[198] Prior to the 1939 amendment absolving assumption of the risk, the First Circuit found that the divergence of contributory negligence and assumption of the risk under the Jones Act instilled confusion and caused courts "to practice 'the

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[194] *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430 (1939).
[195] *Id.* at 430-1.
[196] *Id.* at 432.
[197] *See Id.*
[198] *See Hernandez*, 187 F.3d at 436.

niceties, if not casuistries, of distinguishing between … [the two] conceptions which never originated in clearly distinguishable categories, but were loosely interchangeable until the statute attached such vital differences to them.'" n[199] Although the First Circuit labeled the alternative to assumption of the risk as contributory negligence, the tort concepts of contributory negligence and comparative negligence align sufficiently for analytical purposes when compared to assumption of the risk. In a later case returning to the comparative negligence concept professed in *Socony-Vacuum Oil Co.*, the Fourth Circuit explained that "To further the humanitarian purpose of compensating at-risk employees, in the FELA, Congress abolished several common law defenses that restrict recovery: the fellow servant rule, the doctrine of contributory negligence (in favor of comparative negligence), the doctrine of assumption of risk, and the ability of employers contractually to exempt themselves." n[200] Since Congress's goal was "To further the humanitarian purpose of compensating at-risk employees," n[201] the termination of the assumption of the risk defense highlights the underlying and powerful role that the seafaring environment plays in the Jones Act's development.

Further exploration of comparative negligence in the Jones Act setting reveals the courts' determination to diminish the defendant's prospects of posing a significant comparative negligence defense. The Fifth Circuit held that "As to contributory negligence, 'the burden is upon the shipowner to prove that [the] plaintiff was guilty of contributory negligence'; that 'contributory negligence is not a bar to a plaintiff's recovery under the Jones Act, but serves to mitigate or apportion damages in accordance with the doctrine of comparative negligence.'" n[202] In addition to placing the burden upon the defendant shipowner, the Fifth Circuit reemphasized

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[199] *Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 211(1st Cir. 1955) (quoting *Tiller v. Atlantic C. L. R. Co.*, 318 U.S. 54, 63 (1943) (quoting *Pacheco v. New York, N. H. & H. R. Co.*, 15 F.2d 467, 467 (2nd Cir. 1926))).
[200] *Hernandez*, 187 F.3d at 436.
[201] *Id.*
[202] *Gavagan*, 955 F.2d at 1018 (quoting district court findings).

the propriety of a comparative rather than contributory negligence standard under the Jones Act. Continuing this theme, the Tenth Circuit found that "Contributory negligence is, however, a valid defense if it does not result in a complete bar of all claims, but rather in an allocation of fault on a comparative basis." n[203] Thus, in an apparent effort to protect the seaman's cause of action, the Tenth Circuit cabined the defendant's contributory negligence claim to a percentage basis short of one hundred percent contributory negligence. Furthermore, this protection underscores the FELA's decree that comparative rather than contributory negligence is the standard for Jones Act defense. n[204] An analysis of comparative negligence as effected by a ship's command structure and by exigent circumstances inherent to at sea rescues provide two specific contextual frameworks for exploring the sea's direct effect on shaping Jones Act defense.

The command structure inherent to vessel operations infuses a rigid framework to life at sea which must be accounted for in quantifying comparative negligence under the Jones Act. In *Williams v. Brasea, Inc.*, 497 F.2d 67 (5th Cir. 1974), the Fifth Circuit heard a case involving a terrible accident aboard a shrimper, the *Ciapesc I*, out of Freeport, Texas. n[205] While trawling for shrimp in the Gulf of Mexico, the captain, Roy Williams, returned to the deck after detecting that the cathead device involved in raising the shrimp nets had powered down. n[206] Discerning the problem, Williams began untangling the lines. n[207] Although the actual issuance of the order remained in dispute at the appellate level, one version found that Williams ordered crewman Edward Terry to power up the winch which tragically entangled Williams within the cathead.

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[203] *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682 (10th Cir. 1981).
[204] *See Hernandez*, 187 F.3d at 436.
[205] *Williams v. Brasea, Inc.*, 497 F.2d 67, 71 (5th Cir. 1974).
[206] *Id.*
[207] *Id.*

n[208] Sadly, the accident necessitated the amputation of both the captain's arms. n[209] Although focusing on negligence in general rather than the Jones Act in its discussion of comparative negligence, n[210] the analysis logically parlays to the Jones Act setting through its reliance on basic tort law. As such, the Fifth Circuit found that "A seaman's duty to obey orders from his immediate superior overrides the postulate that the seaman must delay execution of the order until he makes a reasonable effort to be sure that following the order will not injure the superior who gave the order." n[211] Referencing back to the Court's decision in *Socony*, the court found that seamen often must act quickly without time to consider all relevant safety measures. n[212] Here, the Fifth Circuit equilibrated for the sea's profound influence upon the Jones Act by adjusting the comparative negligence standards from ordinary principles of tort defense. The Fifth Circuit, still using the contributory rather than the comparative negligence standard, continued: "Indeed, a seaman may not be contributorily negligent for carrying out orders that result in his own injury, even if he recognizes possible danger." n[213] Thus, by following orders, a seaman's liability for contributory negligence is practically nullified by an inherent duty to obey commands without afterthought. Thus, if Williams actually ordered Terry to repower the winch, then the court should absolve Terry of any contributory negligence. Accordingly, the unique seafaring state of servitude cast upon crewmembers further diminishes the plaintiff's barrier to restitution by practically absolving contributory negligence when the seaman acts under the authority of superior officers.

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[208] *Id.*
[209] *Id.*
[210] *See Id.* at 72-3.
[211] *Id.* at 73.
[212] *Socony-Vacuum Oil Co.*, 305 U.S. at 431.
[213] *Williams*, 497 F.2d at 73.

Whereas the command structure inherent to seamanship diminishes the defendant's prospects of erecting a comparative negligence defense against claims levied by ordinary crew members, the command structure reversely increases the plaintiff captain's responsibility under the Jones Act if his or her injury is due to personal negligence. n[214] Judge Learned Hand's often cited opinion in *Walker v. Lykes Bros. S.S. Co., Inc.*, 193 F.2d 772 (2nd Cir. 1952), provides the framework for subsequent courts to interpret the intricacies of the captain's position with respect to comparative negligence under the Jones Act. In *Walker*, the plaintiff captain took command of the ship in Staten Island, New York. n[215] Soon thereafter, he discovered that catches designed to keep filing drawers in place during the ship's inevitable movement at sea were defective, occasionally causing a drawer to roll out upon the floor. n[216] Several months into the ship's passage, one of the drawers rolled out and struck the plaintiff on the shin resulting in serious leg injuries. n[217] Adjudicating the captain's Jones Act claim under the contributory rather than comparative negligence definition, Judge Hand opined, "Thus, if the plaintiff [captain] failed to repair the catches, although he was able to do so, his failure was … 'contributory negligence' in the first sense." n[218] Judge Carter in *Snow v. Boat Dianne Lynn, Inc.*, 664 F. Supp. 30 (D. ME. 1987) blueprinted Judge Hand's decision in *Walker*:

> *Walker* was an action brought under only the Jones Act … [A]pparently plaintiff there had not raised a claim of unseaworthiness as a separate ground for relief. Judge Hand was properly concerned in *Walker* with the question of whether a master of a ship should be able to recover under the doctrine of comparative fault where the hazard-inducing condition existed solely due to his continued breach of his duty to repair it. n[219]

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[214] *See Walker v. Lykes Bros. S.S. Co., Inc.*, 193 F.2d 772, 774 (2nd Cir. 1952).
[215] *Id.* at 773.
[216] *Id.*
[217] *Id.*
[218] *Id.* at 774.
[219] *Snow v. Boat Dianne Lynn, Inc.*, 664 F. Supp. 30, 33 (D. ME. 1987).

Thus, the alignment of *Walker* with the framework in *Snow* illustrates the distinct role of responsibility entrusted upon the ship's captain. Indeed, the captain's Jones Act claim faces the contributory negligence scrutiny of whether the injury somehow resulted from a failure to fulfill a duty pertaining to his or her position as master of the ship. In turn, the high threshold of a contributory negligence defense potentially diminishes a plaintiff captain's Jones Act claim. Three years after Judge Hand delivered *Walker*, the First Circuit interpreted his holding to conclude:

> that where the master of a ship contributes to his own injury by reason of a breach of his supervisory duties owed to his employer, this is not the type of "contributory negligence" which results under the Act in a mere diminution of the amount of recovery, but rather is a breach of duty to the shipowner which bars the master's recovery "absolutely." n[220]

Subtly and intricately, the court seems to have promulgated a contributory negligence determination for the master that is akin to the assumption of the risk doctrine that was statutorily excluded from the Jones Act in 1939. Nevertheless, the First Circuit's finding illustrates the elevated standards placed upon the captain. When contrasted with the reduced threshold for comparative negligence on the part of other crew members, the court's holding underscores the vast influence of the sea upon the Jones Act through its attention to the inherent hierarchy of seafaring vessels.

Analogous to the inherent command structure existent aboard seafaring vessels, the unique exigencies surrounding rescues at sea also diminish the plaintiff's comparative negligence barrier under the Jones Act. The Fourth Circuit boldly declared, "'of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to

[220] *Boat Dagny, Inc.*, 224 F.2d at 210-1.

save life and limb and property.'" n[221] Thus, the impulsiveness required of rescuers operating under the severe stress of a sailor overboard or other kinds of rescues in both mild and ill tempered seas should influence the court's proper determination of comparative negligence under the Jones Act. To justify its implementation of a wanton and reckless standard for determining contributory negligence in a rescue scenario, the Fourth Circuit stated, "Rescue springs more from the impulse to aid than from any … measure of reflection. The wanton and reckless standard aims to encourage the impulse to assist. The law will not deter rescuers by charging them 'with the consequences of errors of judgment resulting from the … confusion of the moment.'" n[222] Aware of the criticality of time during at sea rescues, the court followed sound policy to promote expedited reactions versus liability conscious second guessing during rescue attempts. The court further delineated this special standard for calculating comparative negligence: "The same standard governing conduct that saves the lives of seamen must apply to the perception that generates the act. By definition, the perception of danger requiring prompt action is formed under the same stress and on the same imperfect information as the rescue itself." n[223] Accordingly, the court held that "in admiralty, the correct standard is whether the rescuer was wanton and reckless both in perceiving the need for a rescue and in undertaking it." n[224]

Although adjudicating a pure negligence claim rather than operating under the Jones Act, the court in *Lewis v. C.J. Langfelder & Son, Inc.*, 2004 U.S. Dist. Lexis 26941 (E.D. VA. 2004) applied the Fourth Circuit's wanton and reckless standard to find that crewmembers' attempted

[221] *Furka*, 824 F.2d at 332 (quoting *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4th Cir. 1985) (quoting *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969))).
[222] *Furka*, 824 F.2d at 332-3 (quoting *Corbin v.City Of Philadelphia*, 45 A. 1070, 1074 (1900)).
[223] *Furka*, 824 F.2d at 332.
[224] *Id.*

rescue of their captain did not constitute negligence. n[225] Here, Captain Willie Lewis recently agreed over the phone to master the *Kent Island*, a pusher-type tug vessel out of Love Port, Maryland. n[226] Although his slated arrival time for his first voyage as her captain was between six and seven in the morning on December 26, 2000, he actually arrived aboard at approximately three in the morning. n[227] After awakening crewmember, John Powell, Lewis disembarked the tug to retrieve his gear from his truck. n[228] While making coffee, Powell looked up just in time to discern Captain Lewis falling from the port side of the vessel. n[229] Reacting quickly to the emergency, Powell ran to Lewis's aid without sounding a general alarm or deploying a life ring. n[230] Excusing these potential lapses in judgment on his assumption that Lewis had fallen upon dry land, n[231] Powell assured that Lewis's head was above water and after unsuccessfully trying to elevate Lewis from the water, Powell ran inside the tugboat to awaken the other crewmember onboard, William Bowen, and enlist his help in elevating Lewis out of the water. n[232] Still unable to lift Lewis out of the water, Bowen ran ashore to phone in the emergency. n[233] Arriving several minutes later, emergency personnel successfully pulled Lewis out of the water but tragically, he was pronounced dead at the hospital. n[234]

Citing *Furka*, the court determined in dicta that Powell's actions under the circumstances did not rise to the level of wanton and reckless. n[235] Accordingly, Powell's failed rescue attempt

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[225] *Lewis v. C.J. Langfelder & Son, Inc.*, 2004 U.S. Dist. Lexis 26941 at * 26-27 (E.D. VA. 2004).
[226] *Id.* at * 2.
[227] *Id.* at * 2-3.
[228] *Id.* at * 4.
[229] *Id.*
[230] *Id.* at * 24.
[231] *Id.*
[232] *Id.* at * 5.
[233] *Id.*
[234] *Id.*
[235] *Id.* at * 26.

did not constitute negligence. n[236] To Legitimize the reasonableness of Powell's initial reaction to the circumstances, the court held:

> It follows, then, that Powell was not unreasonable in failing to deploy a life ring when he ran to the bow and found Lewis in the water because he did not expect him to be in the water. … Under the circumstances, it may be that Powell could have taken a more appropriate course of action, but it is certainly not the case that the choices he made constitute reckless conduct. n[237]

Thus, because "a more appropriate course of action" n[238] does not comprise wanton and reckless action, the court underscored the latitude provided to the rescuer at sea. Consequently, "'The law will not deter rescuers.'" n[239]

The Jones Act's unique adjudication of comparative negligence under a wanton and reckless standard for rescue scenarios illustrates the sea's profound effect upon its tort based foundation. As demonstrated by *Lewis*, courts seem reticent to second guess a rescuer operating under the inordinate stress and demands present during a rescue at sea. Likely, few claims under the Jones Act will lose completely because of comparative negligence during a rescue operation.

Whereas both the Jones Act and unseaworthiness operate under a comparative or contributory negligence standard depending upon the court, defense of unseaworthiness claims revolves largely around the availability of reasonably safe alternatives. n[240] The reasonably safe alternative represents a possible course of action that the plaintiff could have taken to accomplish the same goal yet avoid the unseaworthy condition that caused the injury. n[241] The Tenth Circuit illustrated unseaworthiness' safe alternative approach: "A seaman may not be denied recovery

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[236] *Id.* at * 26-7.
[237] *Id.* at * 25-26.
[238] *Id.* at * 26.
[239] *Furka*, 824 F.2d at 332 (quoting *Corbin*, 45 A. at 1074).
[240] *Joyce*, 651 F.2d at 682.
[241] *See Id.*

because he proceeds in an unsafe area of the ship or uses an unsafe appliance in absence of a showing that there was a safe alternative available to him." n[242] Accordingly, "'the defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition.'" n[243] Simply stated, assuming the risk of an inherently dangerous duty does not open the plaintiff to a contributory negligence claim. Rather, the plaintiff must have deferred from a safer alternative in choosing the means which resulted in his or her injury.

The Tenth Circuit illustrated this reasonable alternative approach in its application to the facts in *Smith v. U.S.*, 336 F.2d 165 (4th Cir. 1964). "Had an alternative … route been available to Smith, his deliberate choice of a course known to be unsafe could possibly have indicated contributory fault, but mere knowledge of the unseaworthy condition and use of the ladder in the absence of … an alternative is not contributory negligence." n[244] Thus, to fail the reasonable alternative test, a reasonable alternative must have existed which the plaintiff failed to utilize. Accordingly, if the plaintiff simply was aware of the dangers involved in his actions but proceeded, nevertheless, because no reasonable alternative availed, the defendant's recourse in contributory fault fails.

Therefore, the reasonable alternative test in unseaworthiness focuses not on the plaintiff's acceptance of a dangerous condition but rather on illuminating the availability of reasonable alternatives. This shift in focus comports with the Jones Act's analogous transfer away from assumption of the risk. Thus, whether the plaintiff accepts the inherent danger of his activity remains irrelevant under both the Jones Act and unseaworthiness. In stead, under the

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[242] *Id.*
[243] *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1183 (6th Cir. 1990) (quoting *Hall v. American Steamship Co.*, 688 F. 2d 1062, 1066 (6th Cir. 1982)).
[244] *Joyce*, 651 F.2d at 682 (quoting *Smith v. United States*, 336 F.2d 165, 168 (4th Cir. 1964)).

unseaworthiness rubric, courts focus primarily on the reasonableness of the plaintiff's available alternatives to the unseaworthy condition that caused the injury. n[245] Furthermore, "The burden of showing that a safe alternative existed, as part of the affirmative comparative negligence defense, rests with the shipowner." n[246]

Prior to the court's decision in *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178 (6th Cir. 1990), the Sixth Circuit demonstrated its dissolution of the assumption of the risk doctrine in favor of comparative negligence with respect to unseaworthiness defense. n[247] In *Hall v. Am. Steamship Co.*, 688 F.2d 1062 (6th Cir. 1982), the plaintiff's ship was loaded with iron ore pellets. n[248] Due to an unfortunate communications breakdown, the plaintiff, Timonthy Hall, did not receive his instructions to abandon washing off the leftover pellets while the ship was traveling under poor weather conditions. n[249] In turn, a large wave washed over the ship and knocked Hall against a hatch, inflicting a serious injury. The court found:

> even if Hall had the option to cease hosing down the deck if conditions became too rough, his performance of this task in a non-negligent manner could amount only to assumption of risk. Since American Steamship did not and does not contend that Hall was guilty of negligence in the manner in which he was washing down the deck, the district court did not err in striking the defense of contributory negligence. n[250]

Thus, the court's finding underscores a judicial aversion to assumption of the risk in its unwillingness to fault the plaintiff for performing the task in obviously dangerous conditions. Furthermore, since "American Steamship did not … contend that Hall was guilty of negligence in the manner in which he was washing down the deck" n[251], the court likely inferred that no

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[245] *Joyce*, 651 F.2d at 682.
[246] *McCoy v. United States*, 689 F.2d 1196, 1198 (4th Cir. 1982).
[247] *See Hall v. Am. Steamship Co.*, 688 F.2d 1062, 1066 (6th Cir. 1982).
[248] *Id.* at 1063.
[249] *Id.*
[250] *Id.* at 1066.
[251] *Id.*

reasonable alternative existed to the plaintiff's method of washing down the ship's decks. Accordingly, the defendant lost its comparative negligence defense.

The Sixth Circuit's citation in *Yehia* to two cases in particular illustrates the reasonable alternative approach by dichotomizing an unsuccessful from a successful comparative negligence defense. n[252] Through unfortunate circumstances, the plaintiff, an injured maintenance technician charged with the upkeep of fans and turbines within the engine room, n[253] slipped twice in three months on board the *U.S.N.S. Potomac*, injuring his shoulder both times. n[254] The court held, "It is irrelevant that the unseaworthy condition was obvious to McCoy unless it was shown that he spurned safe alternatives. McCoy's duty was to maintain the fans, and he cannot be held to have breached this duty simply by recognizing the job was dangerous." n[255] Thus, the court denied the defendant's comparative negligence claim on the ground that his own knowledge of the oily and unseaworthy surface that he slipped on was irrelevant. Finding that the plaintiff had not "spurned safe alternatives" n[256], the court allowed the plaintiff's claim to continue free of a comparative negligence burden because his knowledge of the unseaworthy condition was irrelevant.

On the other hand, the court in *Yehia* demonstrated that a plaintiff's failure to utilize a reasonable alternative in its detailed reference to the First Circuit's opinion in *Peymann v. Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974). n[257] In *Peymann*, the plaintiff served as an engineer who unfortunately stood upon an oil covered rail while servicing the vessel's engine. n[258] Indeed, the

[252] *See McCoy*, 689 F.2d; *Peymann*, 507 F.2d.
[253] *McCoy*, 689 F.2d at 1197.
[254] *Id.*
[255] *Id.* at 1198.
[256] *Id.*
[257] *See Yehia*, 898 F.2d at 1183-4.
[258] *Id.* at 1183.

plaintiff admitted his duty both to use a ladder and keep the rails clean of oil. n[259] Accordingly, the First Circuit held that "'if there was a ladder available which was the single means the engineer was supposed to use, as, indeed, his own testimony suggested, it would not be proper to hold the vessel responsible to any degree if his decision not to use it was a free choice.'" n[260] By identifying a reasonable alternative that the plaintiff spurned and even admitted to in his duty confession, the court upheld the defendant's negligence claim.

Just as under the Jones Act, the command structure at sea influences the contributory negligence jurisprudence in the unseaworthiness doctrine. In a Ninth Circuit opinion, the plaintiff, a seafaring engineer, dismantled an auxiliary oil pump with the help of an oiler who was assigned to provide support. n[261] However, after lunch, the plaintiff returned to the job alone and lifted two heavy pistons up several sets of stairs to the ship's machine shop unassisted. n[262] Feeling pain almost immediately, the plaintiff complained to the first engineer who authorized him to take off the remaining portion of the day. n[263] The ship was set to disembark for Honolulu the following day. n[264] Later medical examination uncovered severe injuries. n[265] At the trial court level, the judge found that "The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job." n[266] Nevertheless, the district court also determined that the plaintiff was fifty percent contributorily negligent for not seeking assistance to carry the two heavy pistons up to the machine shop. n[267] The plaintiff's failure to seek proper assistance likely constituted the

[259] *Id.*
[260] *Id.* at 1183-4 (quoting *Peymann*, 507 F.2d at 1322.
[261] *Am. President Lines, Ltd.*, 377 F.2d at 502.
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *See Id.* at 503.
[266] *Id.* at 503.
[267] *Id.* at 504.

reasonably safe alternative to the unseaworthy removal of pistons from the engine room without proper assistance. In its contributory negligence determination, the court alluded to the ship's command structure by upholding the defendant's claim:

> Appellee's superior officer was in the engine room while appellee repaired the lube pump. He had authority to assign an extra man to help in the repair if requested. In our opinion it was not clearly erroneous to hold that a reasonable man would have asked for help and the fact that appellee did not ask for help contributed to his resulting injury. n[268]

Thus, the court upheld the trial court's contributory negligence finding against the plaintiff due to his disregard for the reasonably safe alternative of requesting assistance with the heavy lifting that precipitated his injury.

Interestingly, the command structure's role in unseaworthiness seems to contradict the Jones Act's diminishing comparative negligence standard under similar circumstances. Recalling the Fifth Circuit's holding that "A seaman's duty to obey orders from his immediate superior overrides the postulate that the seaman must delay execution of the order until he makes a reasonable effort to be sure that following the order will not injure the superior who gave the order," n[269] unseaworthiness' suggestion that the plaintiff should evaluate commands given with respect to staffing projects prior to engaging in risky work details muddies the waters of applying the two doctrines concomitantly. Since the Fifth Circuit strongly cautioned against promoting second guessing of orders given at sea, it seems contradictory to suggest that the crewman, for contributory negligence purposes in later litigation, should consider requesting additional help when in essence, such a request impugns the superior's orders. Nevertheless, the apparent contradiction may stem from the inherent differences in the two doctrines that when pleaded in the alternative, offer most deserving plaintiffs proper recourse. Due to the relative omnipresence

[268] *Id.* at 504-5.
[269] *Williams*, 497 F.2d at 74.

of potentially unseaworthy conditions aboard a seafaring vessel, n[270] courts seem to elevate the plaintiff's burden of proof. In *American*, the court enlarged the reasonably safe alternative standard to include a crewman's duty to evaluate the number of seamen assigned to a task and request assistance when the superior's original staffing orders are insufficient. n[271] Such an elevated standard of contributory negligence review parallels the direct comparison of proximate cause standards across the Jones Act, unseaworthiness bridge. Indeed, unseaworthiness requires a greater proximate cause showing than the Jones Act "featherweight" standard. n[272] Nonetheless, the similarly heightened standards under the contributory negligence and proximate cause requirements for unseaworthiness counter balance the cornucopia of possible unseaworthiness claims resulting from the immense wear and tear extracted by the sea upon the captain, crew, and vessel. Still, aside from the varied proximate cause and comparative negligence standards, much of the two doctrines provide seamless overlap in the seaman's compensation structure. For instance, the *Walker* doctrine overlaps both the Jones Act and unseaworthiness. n[273]

Although questioned by a district court in Maine n[274], the Ninth Circuit indeed applied Judge Hand's analysis in *Walker* to an unseaworthiness claim, thus furthering the link between the Jones Act and unseaworthiness. n[275] In *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972), the plaintiff, Robert Reinhart, served as chief mate onboard the *S.S. Queens Victory*, a ship assigned to the transportation of ammunition from the United States to Vietnam. n[276] The ship's hold was laid with wooden sheathing to prevent her cargo of bombs from clanging against

[270] *See* Friedell, *supra* note 4 1B-3 § 24.
[271] *See Am. President Lines, Ltd.*, 377 F.2d at 504-5.
[272] Schoenbaum, *supra* note 3 at § 6-22.
[273] *See Walker*, 193 F.2d; *Reinhart*, 457 F.2d.
[274] *Snow*, 664 F. Supp. at 33.
[275] *See Reinhart*, 457 F.2d.
[276] *Id.* at 151-2.

the ship's metal hull. n[277] Invariably, the unloading process would damage that sheathing. n[278] After completing the unloading process at Cam Rhan Bay, Reinhart undertook his duty to set traps and inspect for rats in the hold before the ship left Vietnam. n[279] Unfortunately, in that process, Reinhart fell through the sheathing and suffered a hernia. n[280] Factually, the Ninth Circuit found that, "Reinhart, on the other hand, took no steps to patch up the damage before the ship left Vietnam or to provide adequate lighting, which the court found could have been done; he made no effort to see that the area was safe for the … return voyage." n[281] In essence, as in *Walker*, the court interpolates the circumstances surrounding the unseaworthy condition to be a direct result of the plaintiff's personal neglect of duty aboard the ship. Indeed, "The trial court concluded as a matter of law that if the Chief Officer had properly performed his inspection duties and corrected the unsafe condition, no accident would have occurred. His failure to do so constituted a breach of his contractual duty to the defendant." n[282] By concluding that Reinhart failed in his duties, one could argue by analogy that the court actually applied the reasonably safe alternative test. Since Reinhart failed his duty "to patch up the damage", n[283] the plaintiff indirectly disregarded a reasonably safe alternative to the unseaworthy condition and accordingly, became susceptible to a contributory negligence defense. In fact, "relying on *Walker*, the court [in *Reinhart*] held that the plaintiff's failure to fulfill his responsibility to the shipowner--by not being aware of the defects through proper inspection and by not repairing the defects--barred his recovery under a claim of unseaworthiness." n[284]

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[277] *Id.* at 152.
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.* at 154.
[282] *Reinhart*, 457 F.2d. at 154.
[283] *Id.*
[284] *Snow*, 664 F. Supp. at 33.

Nevertheless, the court in *Snow v. Boat Dianne Lynn, Inc.*, 664 F.Supp. 30 (D. Me. 1987) dismissed the Ninth Circuit's application of the *Walker* doctrine to unseaworthiness. Upon determining that *Walker* was an action based solely upon the Jones Act, n[285] the court boldly opined that "His [Judge Hand's] reasoning, however, appears to be particularly inappropriate in a case raising the issue of unseaworthiness where the owner's duty is nondelegable." n[286] The court further found:

> Other courts, however, have disregarded the scope of the issue raised in *Walker* and have applied the *Walker* rule to cases involving unseaworthiness claims. The rationale for this extension of *Walker* appears to rest on the more troublesome configuration of facts presented in these cases where the unseaworthy condition arose after the ship had begun her voyage and the person injured was responsible for maintaining the ship in a seaworthy condition during the voyage. n[287]

Although the court in *Snow* reserved judgment on the *Walker* doctrine's applicability to unseaworthy conditions arising after the commencement of the voyage as was the case in *Reinhart*, n[288] the court's reference to *Reinhart* and its bold statement with respect to Judge Hand's reasoning increases the probability that if presented with the facts and issues in *Reinhart*, the District Court of Maine will not apply *Walker*. Regardless, the Ninth Circuit's application of *Walker* to *Reinhart* underscores the union of unseaworthiness and the Jones Act.

Indeed, the sea shifts the Jones Act comparative negligence to align with unseaworthiness' reasonably available alternative doctrine. Consequently, the two doctrines together lay a smooth path to the shoreline of recovery for the plaintiff. In 1939, the Court in *Socony-Vacuum Oil Co.* differentiated the role that the seafaring environment should have upon the Jones Act comparative negligence landscape. Operating under a "wards of the admiralty"

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[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.* at 33-34.

n[289]approach, the Court prior to Congress's reification, voided assumption of the risk in favor of a comparative negligence standard. n[290] Then, Congress followed suit with the formal abolition of assumption of the risk in Jones Act defense. n[291] Thus, the unique seafaring environment foisted an elevated threshold upon Jones Act defense by protecting seamen from losing their claims for assuming the risk of their precarious employment. Furthermore, the command structure which reduces the potency of a comparative negligence defense as applied to crewmembers reversely heightens that defense as it applies to the captain. Regardless, the command structure's influence underscores the tailoring effect of the Jones Act's jurisprudence to its marine environment. Also, the courts' special implementation of a wanton and reckless standard for comparative negligence around rescue attempts n[292] also illustrates the exigencies of the sea upon Jones Act defense. Whereas Jones Act defense focuses largely on comparative negligence, unseaworthiness defense scrutinizes the reasonableness of available alternatives. Nevertheless, the sea's unique effect upon the command structure in the Jones Act setting parallels and consequently, unifies with the command structure's role in unseaworthiness' assumption of the risk doctrine. Yet, while the Jones Act case law seems to advise crewmembers not to question authority on the ship, an underlying current in unseaworthiness alternatively requires the seamen to request help when appropriate from superior officers. Nevertheless, this subtle doctrinal divide underscores this paper's analysis that the two doctrines work in tandem. Furthermore, the command structure analysis in unseaworthiness substantially dovetails that seen in the Jones Act when witnessed from Judge Hand's perspective in *Walker*. On the whole then, claim defense provides yet another example of the two doctrines operating in tandem. Just as in

[289] *Socony-Vacuum Oil Co.*, 305 U.S. at 431.
[290] *Id.* at 432.
[291] *See Hernandez*, 187 F.3d at 436.
[292] *See Furka*, 824 F.2d at 332-3 (quoting *Corbin v.City Of Philadelphia*, 45 A. 1070, 1074 (1900)).

the procedural, duty, and causation contexts, the two doctrines operate in tandem to uphold a reasonable plaintiff's claim. As such, exploring the joinder jurisprudence of the Jones Act and unseaworthiness follows this paper's analysis to its logical fruition.

VII. Joinder

Although not directly inferred from the jurisprudence, the joinder of unseaworthiness and the Jones Act may derive from the tandem effect explored throughout this paper's analysis. Furthermore, undertones of the doctrinal overlap indeed penetrate the somewhat dense jurisprudence on the two claims' joinder. In its seminal decision to allow joinder of unseaworthiness with the Jones Act jury provision, the Court in *Fitzgerald*, opined that:

> Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery. n[293]

Indeed, the Jones Act and unseaworthiness possess "different origins" n[294] as in the difference between a tort based theory grounded in negligence versus unseaworthiness' basis in a non-negligent, pervasive duty standard. The Court continued, "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." n[295] Again, the Court underscored the doctrines' overlap not withstanding their varied origins. Indeed, the sea shapes the Jones Act's application sufficiently to bridge the divide between their origins and "serve the same purpose of indemnifying a seaman for damages caused by injury." n[296] The Court continued, "Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly

[293] *Fitzgerald*, 374 U.S. at 18.
[294] *Id.*
[295] *Id.* at 21.
[296] *Id.* at 18.

complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel, and can easily result in too much or too little recovery." n[297] In fact, the Court's concern aligns with this paper's tandem approach to rationalizing both the overlap and dissimilarities between the two claims. If the two claims were tried separately, one claim might grant recovery while the other void relief in a manner difficult for the practitioner to predict prior to filing the plaintiff's petition. For instance, whereas proximate cause under the Jones Act is a significantly lower barrier to recovery than under unseaworthiness, unseaworthiness' duty formulation fosters greater protection than the more narrowly defined application under the Jones Act. Consequently, the matrix of factors which vary the claim's likelihood to be upheld either as a Jones Act or unseaworthiness cause of action are complex and if tried separately, would lose their tandem effect and might sink a plaintiff's proper right to recovery.

Indeed, the Court held that submission of unseaworthiness alongside a Jones Act claim entitles the plaintiff to joinder under one jury trial to decide both causes of action. n[298] The Court held that:

> since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone. Therefore, the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactments to try all the claims. [299]

Although the Court's general reference to "all the claims" n[300] focused largely on maintenance and cure rather than unseaworthiness, later decisions analyzed the Court's holding to include unseaworthiness as well. n[301] The Second Circuit interpreted the Court's decision in *Fitzgerald* to mean "that when a Jones Act claim was given to a jury, unseaworthiness and maintenance and

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[297] *Id.* at 18-19.
[298] *See Haskins v. Point Towing Co.*, 395 F.2d 737, 740 (3rd Cir. 1968).
[299] *Id.* at 21.
[300] *Id.*
[301] *See Haskins*, 395 F.2d at 740; *Mahramas*, 475 F.2d at 172.

cure claims arising out of the same set of circumstances must also go to the jury so that one trier of fact could determine the entire claim." n[302] In an earlier opinion, the Third Circuit also expounded upon the holding in *Fitzgerald*, "It therefore is beyond question that a plaintiff who files a complaint at law under the Jones Act and demands a jury trial, has the right to join with it and have tried before a jury … his claims under maritime law for unseaworthiness." n[303] Both the Second and Third Circuits extended the Court's holding in *Fitzgerald* to unseaworthiness, thus paving the way for the claim's joinder to the Jones Act jury trial. Nevertheless, the Second Circuit expressed concern over the possibility that a plaintiff would file a Jones Act claim frivolously to bring an admiralty claim under the jury trial. n[304] The court opined, "If the rule [requiring a "real Jones Act claim"] were otherwise, any plaintiff could receive a jury trial on his admiralty claims simply by alleging a Jones Act count, whether or not he had any evidence to support it." n[305] Although permitting joinder increases judicial economy, the Second Circuit, nonetheless, requires the Jones Act foundational claim to hold water before other admiralty claims can be poured into the same jury trial.

Even though *Fitzgerald* parted the waters for joinder of unseaworthiness and Jones Act claims under one petition, confusion remains as to the proper remedy to result from the proceedings. n[306] In *Plamals v. S.S. Pinar Del Rio,* 277 U.S. 151 (1928), the Court held that "Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both." n[307] Therefore, the seaman's recovery is limited to either the result of the Jones Act or

[302] *Mahramas*, 475 F.2d at 172.
[303] *Haskins*, 395 F.2d at 740.
[304] *See Mahramas*, 475 F.2d at 172-3.
[305] *Mahramas*, 475 F.2d at 172-3.
[306] *See* Friedell, *supra* note 4 1B-1 § 4.
[307] *Plamals v. S.S. Pinar Del Rio,* 277 U.S. 151, 156-7 (1928).

unseaworthiness claim but not both. The district court of Maryland reaffirmed the Court's principle, holding that: "seamen may invoke, at their election, (a) the relief accorded by the traditional admiralty rules in rem against the ship, or (b) that provided by the Jones Act with the right of jury trial against the employer, but not both." n[308] Yet, the Third Circuit held the opposite. n[309] The court stated that requiring an unseaworthiness claim to be pendant upon the law side of the two jurisdictions voids the advantages "which inhere in the characteristic admiralty claims, such as in rem process, interlocutory appeals, admiralty attachment and the right to obtain depositions within twenty days of commencement of the action without permission of the court." n[310] Accordingly, "There is no reason to make relinquishment of the procedural advantages of these inherent admiralty claims for unseaworthiness and maintenance and cure the price for a jury trial." n[311] Following up on *Fitzgerald*, the Third Circuit held that:

> *Fitzgerald* has made it clear that the reason for trial by jury in claims for unseaworthiness and maintenance and cure is not that they are actions at law, but rather that there should be one fact finder and that when they are joined with the Jones Act claim under which a right of trial by jury is guaranteed, they, too, may be tried by the same jury. n[312]

Nevertheless, the Third Circuit's interpretation of *Fitzgerald* possesses logical merit but may lack certain credibility in its avoidance of *Plamals*. In fact, "The result reached in [Third Circuit case] *Haskins* has not been directly supported by any other court, and at least two courts have failed to adopt its rationale when they might have done so." n[313] Irrespective of the proper position, the debate itself highlights the complexity of the joinder jurisprudence while underscoring the inherent need for the tandem effect that results from the two claims' joinder.

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[308] *Fernandes v. United Fruit Co.*, 303 F. Supp. 681, 682 (D. MD. 1969).
[309] *See Haskins*, 395 F.2d at 741.
[310] *Haskins*, 395 F.2d at 741.
[311] *Id.*
[312] *Id.*
[313] Friedell, *supra* note 4 1B-1 § 4.

VIII. Conclusion

As with the flow of tidal waters inland, the sea shapes the Jones Act jurisprudence and enhances its effective coalescence with unseaworthiness to safeguard in tandem a plaintiff's prospects of recovery. Quite early in American jurisprudence, the Court recognized the sea's unique setting and adjusted its theory accordingly. n[314] In a powerful opinion on the life and duty of a seaman, Justice Joseph Story wrote,

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour [sic]. … If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. … Every act of legislation which secures their healths [sic], increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw." n[315]

This bold reflection upon the unique exigencies of a life at sea and the Court's proper reciprocation for seamen's sacrifice underscores this same theme throughout the Jones Act's implementation. Many years later, the courts seem to refer back to Justice Story's understanding of the sea's impact on admiralty in orienting the Jones Act's tort theory to its maritime application. Indeed, that orientation to the sea facilitates its joinder to unseaworthiness and as seen throughout the two doctrines' combined analysis, they seemingly function in tandem. Ultimately, though, it is the Court's decision in *Fitzgerald* that boldly resurfaces in the modern context, the concern Justice Story showed for seamen. By allowing plaintiffs to join the two claims before one jury, the jurisprudence

[314] *See Aguilar*, 318 U.S. at 729 (quoting *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. No. 6047 (C.C.), at 483).
[315] *Aguilar*, 318 U.S. at 729 (quoting *Harden*, 2 Mason at 483).

will less likely devoid an injured seaman of recovery as a result of complications in the often nuanced variances between the two doctrines and in the choice of bringing one cause of action over the other. Indeed, permitting joinder "secures their [seamen] healths [sic], increases their comforts, and administers to their infirmities." n[316]

[316] *Id.*