Introduction, The Osceola After 100 Years: Its Meaning and Effect on Maritime Personal Injury Law in the United States

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SYMPOSIUM: *THE OSCEOLA*+

INTRODUCTION: *THE OSCEOLA* AFTER 100 YEARS: ITS MEANING AND EFFECT ON MARITIME PERSONAL INJURY LAW IN THE UNITED STATES

*Craig H. Allen* *

I. INTRODUCTION

A century ago the United States Supreme Court issued its decision in *The Osceola*, announcing four legal propositions that controlled personal injury claims by seamen at the time. On the 100th anniversary of the Court's decision, the four admiralty law professors contributing to this symposium take the opportunity to critically examine the Court's renowned decision, Congress' responses to the decision, and the effect of both *The Osceola's* four propositions and the responsive legislation on the remedies available to injured maritime workers in the 21st century. In the first of the three articles that follow, Professor Steven Friedell mines the archival record behind this important decision to reveal numerous factual aspects of the case that were, until now, largely overlooked or misstated by the official reports. Professor Joel Goldstein then scrutinizes the reasoning and support for each of the case's famous four propositions, noting the Court's comparative law approach, the effect of the four propositions on uniformity in maritime law and also their summary, even elliptical, phraseology. In the third article, Dean Thomas Galligan takes aim at the fourth of *The Osceola's* propositions, revealing its illogic and its failure to promote the exercise of due care by ship masters and fellow servants. Dean Galligan demonstrates why those who believe the Jones Act rendered *The Osceola* irrelevant to a contemporary maritime personal injury claim should reconsider.

II. BACKGROUND: THE FEDERAL ROLE IN MARITIME LAW

To evaluate the modern relevancy of *The Osceola*, it is important first to understand the federal role in shaping maritime law and in adjudicating cases falling within the admiralty and maritime jurisdiction. Article III of the

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1. 189 U.S. 158 (1903).
United States Constitution prescribes the judicial power of the United States. That power includes jurisdiction over several categories of cases or controversies, including those arising under the Constitution, federal law, or treaties, and those in which the parties are diverse. In neither of those two jurisdictional bases is the substantive law applied to resolve the case created by the federal courts. In so-called federal question cases, the substantive law is found in the Constitution itself, or in international agreements, statutes or regulations prescribed or entered into by the legislative and executive branches. However, in “diversity” cases, the Supreme Court made clear in its 1938 decision in *Erie Railroad Co. v. Tompkins*, that state law, both statutory and common law, provides the rule of decision for the federal courts.

In contrast to the federal question and diversity jurisdiction clauses, the admiralty and maritime jurisdiction clause in Article III has been held to confer three distinct powers, including legislative power. Justice Felix Frankfurter summarized these powers in *Romero v. International Terminal Operating Co.*

Article III, § 2, cl. 1 (3d provision) of the Constitution and section 9 of the Act of September 24, 1789, have from the beginning been the sources of jurisdiction in litigation based upon federal maritime law. Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the “[t]ribunals inferior to the [S]upreme Court” which were authorized by Art. I, § 8, cl 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law “inherent in the admiralty and maritime jurisdiction” . . . and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.
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The Court had earlier acknowledged Congress' Article III legislative power in Crowell v. Benson. In upholding the constitutionality of what was then called the Longshoremen's and Harbor Workers' Compensation Act, Chief Justice Hughes explained:

As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. III, § 2 . . . ) and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute.

Modernly, it seems unlikely, in view of the broad construction given to the Article I, Section 8 interstate and foreign commerce power, that Congress would need to rely on its implied Article III power to enact legislation prescribing the standard of liability in maritime personal injury or wrongful death claims.

As authors of the general maritime law, the federal courts developed several key aspects of maritime personal injury law well before The Osceola was decided in 1903. Even those early cases recognized that the liability regime varied according to the injured person's status. Justice Joseph Story's important contributions to seaman personal injury law in those early cases will be described below. In Leathers v. Blessing, the Supreme Court held in 1881 that admiralty provided a cause of action for a visitor who was


9. Nevertheless, the lower courts continued to rely on the implied Article III power of Congress in upholding the 1972 amendments to the LHWCA, which extended the Act's coverage to injuries sustained by covered workers in certain locations "adjacent to" the navigable waters. See, e.g., Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178-79 (5th Cir. 1977).

10. Despite the Supreme Court's recognition of the legitimacy of a general maritime law fashioned by federal judges both before and after the Court's 1938 Erie decision, some still question the constitutionality of any federal common law. See, e.g., MARTIN H. REPIISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER 140 (2d ed. 1990).

injured while on board a moored vessel due to the master’s negligence. In The Max Morris v. Curry, the Court held in 1890 that a longshore worker’s contributory negligence was not a complete bar to recovery, when he was injured while loading coal on a vessel.

As the substantive maritime law developed over the nineteenth and twentieth centuries, two conflict dimensions emerged. The first is the ongoing “vertical” conflict between federal and state law, which was characterized as diabolically messy in a widely cited 1960 article by Professor David Currie. The second concerns a more subtle, but increasingly important, “horizontal” conflict between the coordinate branches of the federal government, which operates under the rubric of separation of powers and its corollary principle of legislative supremacy over the courts in matters of substantive law.

A. Federalism and the Vertical Conflict Dimension

The respective roles of the federal and state governments are established through express and implied constitutional provisions. Where the federal constitution, a treaty, or a federal statute or regulation provides the rule of law, the federal rule prevails over any conflicting state rule by operation of the Supremacy Clause in Article VI of the Constitution. As a matter of constitutional case law, largely founded on non-textual arguments, the judge-made general maritime law also displaces conflicting state law. For

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13. 137 U.S. 1 (1890). The Court adverted to The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1854), a collision case, in which the Court held thirty-five years earlier that damages should be divided equally in cases involving mutual fault.
14. The Max Morris, 137 U.S. at 15. In The Ances, 93 F. 240 (4th Cir. 1899), the court recognized an injured longshore worker’s right to proceed in rem against a vessel on which the worker was injured due to the alleged negligence and incompetence of a winch operator employed by the ship’s officer. The court’s reasoning clearly suggests that the basis for the claim was negligent misuse of a proper appliance, not an unseaworthy condition.
example, in its 1875 decision in *The Lottawanna*,17 reviewing the validity of a state's lien law, the Court observed:

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.18

In the Judiciary Act of 1789, the first Congress chose to make federal judicial jurisdiction concurrent with the states in most cases falling within the admiralty and maritime jurisdiction.19 The effect of the so-called "saving to suitors clause" is to provide the plaintiff bringing most *in personam* claims falling within the admiralty and maritime jurisdiction with three forum options: (1) suit in an appropriate federal district court on the "admiralty side," under 28 U.S.C. § 1333; (2) suit in an appropriate federal district court on the "law side," with a right of trial by jury, if the suit meets the requirements for federal question jurisdiction, 28 U.S.C. § 1331, or diversity of citizenship jurisdiction, 28 U.S.C. § 1332; or (3) suit in an appropriate state court. Actions to enforce a maritime lien through an *in rem* action are, however, exclusively within the federal admiralty court's jurisdiction.20

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17. 88 U.S. (21 Wall.) 558 (1874).
18. Id. at 574-75.
19. Act of Sep. 24, 1789, ch. 20, 1 Stat. 76. Section 9 of the Act, often referred to as the "saving to suitors clause," provided that the federal district courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The present version is codified as amended in 28 U.S.C. § 1333(1) (2000).
Until the early part of the twentieth century most courts assumed that the states’ concurrent jurisdiction implied that the state was free to apply its own substantive law to cases falling within the admiralty and maritime jurisdiction. The Supreme Court put an end to that practice in a series of cases handed down from 1917 through the 1950s. In 1918, for example, the Court held in Chelentis v. Luckenbach Steamship Co., that federal maritime law, not state common law, governed liability in seaman personal injury cases, notwithstanding the “saving to suitors” clause’s option to bring the claim in a state court. Modernly, just as the Supreme Court’s decision in Erie requires federal courts to apply state law in cases arising under the court’s diversity jurisdiction, the Court has recognized a “reverse-Erie” doctrine that requires state courts to apply federal substantive law in cases arising under federal law, including federal maritime law.

21. For example, see then-Massachusetts Supreme Judicial Court Judge O.W. Holmes’ opinion in Kalleck v. Deering, 37 N.E. 450, 452 (Mass. 1894), which upheld the application of state common law to a personal injury claim within admiralty jurisdiction despite its conflict with substantive federal admiralty rule. As a U.S. Supreme Court Associate Justice, Holmes reiterated his views on the role of state law in his dissent in Southern Pacific Co. v. Jensen, 244 U.S. 205, 218-23 (1917) (Holmes, J., dissenting) (citing, among other cases, Belden v. Chase, 150 U.S. 674, 691 (1893)).

22. The watershed 1917 decision was Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), in which the Court struck down the New York Court of Appeals decision affirming a worker’s compensation award to the family of a fatally injured longshoreman.

23. 247 U.S. 372, 382 (1918) (holding that “no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law”). The Chelentis holding was later applied in Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239, 248-49 (1942) (holding that federal maritime law, not state law, governs question of which party has the burden of proof on releases by injured seamen), Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953) (holding that state rule of contributory negligence does not apply to harbor worker’s claim for personal injury), and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628-29 (1959) (rejecting application of state law to claim by visitor injured on board vessel on navigable waters).

24. Some have argued that Chelentis cannot be reconciled with the Court’s earlier decision in Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatantique, 182 U.S. 406 (1901), which applied common law respondeat superior principles to hold that a vessel owner was not vicariously liable for the torts of a compulsory pilot. Closer inspection reveals that the claim in Homer Ramsdell concerned a ship-to-shore tort, which under the then-controlling rule in The Plymouth, 70 U.S. (3 Wall.) 20 (1866), was not within admiralty jurisdiction and was therefore governed by the common law. The Admiralty Extension Act of 1940, presently codified at 46 U.S.C. app. § 740 (2000), later extended admiralty jurisdiction to such claims.

25. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986). There the Court explains:
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Until quite recently, the Supreme Court's decisions on the reach of admiralty and maritime jurisdiction turned in part on the belief that cases falling within the admiralty and maritime jurisdiction would be resolved by application of substantive maritime law. For example, in *Foremost Insurance Co. v. Richardson*,²⁶ Justice Marshall reasoned on behalf of the five-member majority that "[t]he federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals engaged in commercial maritime activity. This interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct."²⁷

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*,²⁸ the Court similarly remarked that "[w]ith admiralty jurisdiction comes the application of substantive maritime law."²⁹ Less than a decade later, the Court began to back away from that position. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,³⁰ the Court rejected the City of Chicago's argument that if the Court were to hold that the case fell within the admiralty jurisdiction, substantive admiralty law would automatically displace state law. Writing for the majority, Justice Souter explained that to characterize admiralty law as:

"federal rules of decision" . . . is "a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the . . .

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²⁷. Id. at 674-75. As the dissenters noted, the underlying struggle was primarily over choice of law. Id. at 677-78 (Powell, J., dissenting). Under Louisiana law at the time, contributory negligence was a complete defense (see FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 9.01 (1996) (describing the Louisiana rule before 1980)), while admiralty followed the rule of comparative fault. The four dissenters argued that "[t]he issue is whether the federal law of admiralty law, rather than traditional state tort law, should apply to an accident on the Amite River in Louisiana between two small boats." Id. at 678 (Powell, J., dissenting).
²⁹. Id. at 864.
needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.\footnote{Id. at 545-46 (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 373 (1959)).}

The decision to decouple jurisdiction and choice of law was further refined in the Court’s decision in \textit{Yamaha Motor Corp., U.S.A. v. Calhoun},\footnote{516 U.S. 199 (1996).} in which the Court upheld application of state substantive laws on remedies, to claims by the parents of a 12-year old girl who was fatally injured when her personal watercraft collided with an anchored boat in the navigable waters of Puerto Rico.\footnote{Id. at 201-02. \textit{But see In re Amtrack [sic] “Sunset Limited,”} 121 F.3d 1421, 1423-24 (11th Cir. 1997) (holding that, notwithstanding the Supreme Court’s decision in \textit{Calhoun}, general maritime law, not Alabama state law, governs remedies available in wrongful death claims by survivors of train passengers killed following a tug’s collision with a railroad bridge), \textit{cert. denied,} 522 U.S. 110 (1998).} The Supreme Court left open the question whether state or federal law would govern questions of liability. On remand, the Court of Appeals for the Third Circuit held that federal law controlled questions of liability, and the Supreme Court denied certiorari without comment.\footnote{216 F.3d 338 (3d Cir. 2000), \textit{cert. denied,} 531 U.S. 1037 (2000).}

\textbf{B. The Separation of Powers Dimension: From Judicial to Legislative Primacy}

As the general maritime law on personal injury developed, it was shaped by a number of policies. Perhaps the best-known policy is Justice Joseph Story’s “seamen-are-wards-of-admiralty” rationale in \textit{Harden v. Gordon}.\footnote{11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).} Harden, the mate on a vessel owned and commanded by Gordon, brought a claim for wages after a voyage between Portland, Maine and Guadeloupe, in the West Indies. Gordon had deducted the expenses incurred for Harden’s medical treatment while in a port during the voyage. In holding that the medical care expense should be borne by the shipowner rather than the seaman, Justice Story wrote:

\begin{quote}
Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in
\end{quote}

\footnote{Id. at 201-02. \textit{But see In re Amtrack [sic] “Sunset Limited,”} 121 F.3d 1421, 1423-24 (11th Cir. 1997) (holding that, notwithstanding the Supreme Court’s decision in \textit{Calhoun}, general maritime law, not Alabama state law, governs remedies available in wrongful death claims by survivors of train passengers killed following a tug’s collision with a railroad bridge), \textit{cert. denied,} 522 U.S. 110 (1998).}

\footnote{216 F.3d 338 (3d Cir. 2000), \textit{cert. denied,} 531 U.S. 1037 (2000).}

\footnote{11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).}
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sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty.

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs.

In holding in *The Sea Gull* that the admiralty court had jurisdiction over a wrongful death claim brought by the husband of a woman killed in a collision, Chief Justice Chase, sitting as circuit justice, articulated a second often-heard policy, reasoning: “[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.”

The modern Supreme Court has repeatedly stressed that Congress has superior authority over the development of maritime law. In the first edition of their admiralty treatise, Professors Gilmore and Black described the Supreme Court’s role in liberalizing maritime worker remedies since 1940 as having gone so far that “it is clear that a revolution has taken place.” As late as 1975, the highly-respected authors could still conclude in their second edition that, despite occasional setbacks, a majority of the Court had remained “faithful to the revolution which had been wrought from the 1940’s on.” If that were so in 1975, it now seems equally clear that the revolution has quietly died out, or at the very least has taken on a new cause.

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36. *Id.* at 483, 485.
37. 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578).
Congress' role in fashioning maritime law. As Justice O'Connor explained in *Miles v. Apex Marine Corp.*:

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

The modern Court's narrow view of the judiciary's role in progressive development of maritime law is not without its critics, including one who would likely be deemed by the admiralty bench and bar as the modern jurist who was, in his time, best qualified to instruct the federal judiciary on the vital role admiralty judges serve in developing maritime law in the U.S.

III. THE *OSCEOLA* DECISION

Any examination of the law should begin with consideration of the historical context. In 1903, when *The Osceola* was decided, the Victorian era had just come to an end. President Theodore Roosevelt was in the White House. The Industrial Revolution was well underway. Upton Sinclair would shortly expose the darker side of that revolution in his book, *The Jungle*. The fictional characters of Joseph Conrad and Jack London provided readers with poignant insight into the seaman's life. Steam had largely displaced sail as the principal means of propulsion for vessels. The U.S. Transcontinental

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42. *Id.* at 28; see also *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001) (reasoning that "[b]ecause of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress").
Railroad and the Suez Canal had been in operation for more than thirty years. The Senate gave its approval to the Panama Canal treaty that year, and Roosevelt would soon begin work on the canal. 1903 also witnessed the Wright Brothers complete their first successful flight of a motorized airplane. The population of the United States, which by then consisted of 45 states, was in the neighborhood of 80 million. A steady stream of immigrants, many of whom paid $10 for space in a trans-Atlantic vessel’s “steerage” compartment for a journey that would end at Ellis Island, promised to increase that number. Maritime commerce on the Great Lakes and western rivers had been steadily growing for more than 50 years. The Supreme Court still met in the old Senate chamber of the Capitol, where it had been since 1860. It would not move to its present location until 1935. Melville W. Fuller, described by many, including Justice Holmes, as a very effective chief justice, presided over the Court.

The Court’s decision in The Osceola arose out of an injury to Patrick Shea, a crewman employed on board the captioned steamship, which operated on the Great Lakes. From the facts available (as considerably supplemented through Professor’s Friedell’s research) it seems plain that Shea, although a “coal passer,” met the then-existing test for seaman status, in that he was possessed of the skills to “hand, reef and steer” the vessel. In December of 1896, when the Osceola was roughly three miles offshore in Lake Michigan and approaching the port of Milwaukee, the master of the vessel ordered the crew to make ready the forward port gangway, to expedite the discharge of cargo upon arrival. Shea was among the crewmen ordered to assist. The vessel was making 11 miles per hour and facing a head wind of 8 miles per hour when the crew began to hoist the gangway using a derrick crane. As soon as the gangway swung clear of the ship’s side, it was caught by the wind and pushed aft, pulling the derrick over. The falling derrick struck and injured Shea.

Shea sued the vessel in rem in the federal district court for the Eastern District of Wisconsin, alleging (according to the Supreme Court’s report) that his injury was caused by the master’s negligence. Shea’s in rem claim relied in part on a Wisconsin liability statute, which Shea apparently argued conferred a lien on the vessel. At the time of the suit, state home-port lien

45. Some of the details of the case are taken from Jo Desha Lucas, Flood Tide: Some Irrelevant History of the Admiralty, 1964 SUP. CT. REV. 249, 262-84.
46. The Canton, 5 F. Cas. 29, 30 (D. Mass. 1858) (No. 2,388).
47. Wisc. STAT. § 3348 (1898) provided in part, that ships navigating in state waters were liable for all damages arising from injuries done to persons or property by such ship and created a lien on the vessel in favor of the injured party. The Osceola, 189 U.S. 158, 164
The district court entered judgment for Shea. The shipowners appealed to the circuit court. The circuit court in turn certified three questions to the U.S. Supreme Court:

First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

Associate Justice Henry Billings Brown wrote the opinion for a unanimous court. Justice Brown had been a federal district judge in Michigan from 1875 until 1890, when President Benjamin Harrison appointed him to the Supreme Court. He served on the Supreme Court from 1890 to 1906. Justice Brown was also the compiler of Brown's Admiralty Reports, and the author of an early admiralty casebook that he used in

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(1903). By federal statute enacted in 1845, certain admiralty cases arising on the Great Lakes may be tried to a jury. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (codified at 28 U.S.C. § 1873 (2000)). Thus, by bringing his case in admiralty, Shea did not necessarily sacrifice the opportunity to have his case tried before a jury.

48. State home-port lien statutes were intended to fill the gap in federal maritime law created by the Supreme Court's decision in The General Smith, 17 U.S. (4 Wheat.) 438, 443 (1819) (holding that recovery for repairs or necessaries provided to a vessel in her homeport "is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognised by that law"). The home-port lien bar was eventually abolished by federal statute and state statutes purporting to confer a lien on vessels for necessaries provided to the vessel are no longer enforceable by in rem action in admiralty. See 46 U.S.C. § 31307 (2000).

49. The Osceola, 189 U.S. at 160.

50. Aspects of the Court's decision and its effect were reviewed in several contemporary law review articles. See Frederic Cunningham, The Extension to the Admiralty of the Fellow Servant Doctrine, 18 HARV. L. REV. 294 (1904-05); Fitz-Henry Smith, Jr., Liability in the Admiralty for Injuries to Seamen, 19 HARV. L. REV. 418 (1905-06); Frederick Cunningham, Respondeat Superior in Admiralty, 19 HARV. L. REV. 445 (1905-06).

51. HENRY B. BROWN, REPORTS OF ADMIRALTY AND REVENUE CASES ARGUED AND
connection with his lectures on admiralty at the Georgetown University School of Law. Labeled a "particularly learned" admiralty judge, Justice Henry B. Brown, along with Judge Addison Brown, who served with distinction in the Southern District of New York from 1881 to 1901, and the admiralty treatise author Arthur Browne created what one commentator has called a fertile "brown period of U.S. admiralty" law. In 1898, Justice Brown authored the Court's decision in *The Elfrida*, the leading case in the nation on the enforceability of contracts for marine salvage. In 1901, he wrote the Court's path-breaking decision in *The Barnstable*, in which the court imposed *in rem* liability upon a vessel for conduct by persons for whom the owner of the vessel bore no vicarious liability.

In the Court's decision in *The Osceola*, Justice Brown wrote that the question whether the vessel was liable turned on whether Shea had a lien on the vessel under the general maritime law or the Wisconsin statute. In disposing of *The Osceola* case as it did, the Court found it "necessary to express an opinion only upon the first and third questions" certified by the circuit court. After a fairly lengthy examination of federal, state and English cases, the Court announced its famous four propositions:

[w]e think the law may be considered as settled upon the following propositions:

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53. David J. Sharpe, *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium: Admiralty Procedure*, 31 J. MAR. L. & COM. 217, 220 (2000). On the same day *The Osceola* decision came down, the Court decided *The Roanoke*, 189 U.S. 185 (1903), which was also written by Justice Brown. *The Roanoke* rejected application of a Washington state lien statute to a vessel home-ported in Chicago. The decision announces, in language very close to that used in *The Osceola*, that "the following [three] propositions may be considered as settled." *Id.* at 193.
54. 172 U.S. 186 (1898).
56. 181 U.S. 464 (1901). At the time of the collision the *Barnstable* was under a demise charter, by which the owner chartered (leased) the vessel to a charterer/lessee. *Id.* at 465. The master and crew on the vessel were employed by the charterer/lessee. *Id.* Accordingly, the owner of the vessel was not vicariously liable for their torts. *Id.* Nevertheless, the Court held that the vessel was liable *in rem* for harm caused by the crew's negligence. *Id.* at 471.
58. *Id.*
1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

3. 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.

4. 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.

Upon receiving answers to the certified questions, the circuit court reversed the district court and remanded the case with instructions to dismiss the libel.

As framed by the Supreme Court, Shea's suit against The Osceola was predicated solely on negligence grounds; therefore, the first and second propositions are plainly dicta. The third proposition, which answers the second question certified by the circuit court, adopted the fellow servant rule that had prevailed in the common law since 1837. The fourth proposition, the true holding of the decision, temporarily shut the door on claims in

59. Id. at 175 (citations omitted).
60. Bottsford v. Shea, 125 F. 1000, 1000-01 (7th Cir. 1903). Bottsford (and others) intervened as owners of the Osceola. Id. at 1000.
62. See Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. D. 1837). Congress answered the question whether the fellow servant rule extended to the master in the negative in 1915. See infra note 78 and accompanying text. The Supreme Court held that “full effect must be given this whenever the relationship between such parties becomes important.” Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918).
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admiralty for seamen injured by negligence of the master or fellow crewmembers. The Supreme Court later held in *Chelentis* that seamen were similarly barred from asserting such negligence claims under the common law.63 Dean Galligan’s article in this Symposium critically examines this fourth proposition.

Though the Court in *The Osceola* imported the fellow servant defense into seaman injury claims through the third proposition (at least for all but the master), it did not mention the contributory negligence or assumption of risk defenses. In *The Max Morris*, the Court had earlier held that contributory negligence by an injured longshore worker would reduce, but not bar, the plaintiff’s recovery.64 One year after *The Osceola* was handed down, the Court, again through Justice Brown, observed in *The Iroquois*:

“A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen.”

Despite the assumption of risk dictum, the Court in *The Iroquois* went on to hold that the vessel had a duty to put in at the first available port if necessary to provide prompt and adequate maintenance and cure to a seaman who is injured during the voyage.67

IV. THE CONGRESSIONAL RESPONSE

Supreme Court decisions in the early 1900s initially left shore-based and ship-based maritime workers with a fractured and inconsistent recovery regime that many felt only Congress could address. Shore-based maritime

63. See Lucas, supra note 45, at 288; see also Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) (holding that state court erred in instructing jury on negligence theory in case involving seaman’s personal injury claim against vessel owner, but that error was harmless because liability existed independently for breach of duty to provide seaworthy vessel).

64. 137 U.S. 1. The Court left open the question whether the damages would be divided equally or by some proportion. *Id.* at 15. The Court later held in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), that, notwithstanding the Court’s earlier decision in *Erie*, a state contributory negligence bar to recovery was inapplicable in such cases when brought in federal court under diversity jurisdiction.

65. 194 U.S. 240 (1904). The case concerned a claim by a seaman whose leg was broken in a fall during a voyage while the vessel was off the southern tip of South America. *Id.* at 240. The master had the leg splinted and continued on to San Francisco. *Id.* The leg failed to heal and later required amputation. *Id.* at 241.

66. *Id.* at 243.

67. *Id.* at 246-48.
workers, the longshore and harbor workers who load and unload cargo and repair or supply ships, were excluded from state workers' compensation remedies by the Court's 1917 decision in *Southern Pacific Co. v. Jensen.* Although those workers could bring general maritime law claims for negligence against their employers if injured while on navigable waters, they were often met with the "unholy trinity" of defenses, including assumption of risk, contributory negligence and the fellow servant doctrine. After a sputtering start, and perhaps motivated by a 1926 decision by the Supreme Court holding that longshore workers qualified as "seamen" under the Jones Act, Congress eventually enacted what is today known as the Longshore and Harbor Workers' Compensation Act [LHWCA], which provides land-based maritime workers with a workers' compensation-like remedy, in lieu of the negligence remedy such workers had under the general maritime law. Significant amendments to the Act in 1972 eliminated the longshore and harbor workers' general maritime law cause of action for unseaworthiness against vessels and their owners and barred indemnity actions by shipowners against stevedores for claims to injured longshore

68. 244 U.S. 205 (1917).
69. See *Atlantic Transp. Co. v. Imbrovek,* 234 U.S. 52 (1914) (distinguishing longshore and harbor workers from seamen and denying their claims under the fourth proposition of *The Osceola,* because they were not subject to the ship's discipline). A similar rationale is invoked to bar claims by military personnel against the government under the so-called "Feres doctrine." See, e.g., United States v. Brown, 348 U.S. 110, 112 (1954).
70. Congress' first attempt to provide longshore and harbor workers with a workers' compensation-like benefit in 1917 by simply amending the "saving to suitors" clause to include state workers' compensation acts was declared unconstitutional in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920). The second attempt, again by amending the "saving to suitors" clause, was struck down in *Washington v. W.C. Dawson & Co.,* 264 U.S. 219 (1924).
71. Int'l Stevedoring Co. v. Haverty, 272 U.S. 50 (1926). The *Haverty* negligence cause of action against the employer was eliminated by the LHWCA, which now provides that compensation benefits under the Act are the injured worker's exclusive remedy against the employer. See 33 U.S.C. § 905(a) (2000). The exception to the rule concerns workers covered by the LHWCA but who are employed directly by the shipowner. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983).
74. 33 U.S.C. § 905(b) (2000) ("The liability of the vessel . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."). Claims by covered workers for injuries caused by vessel negligence under 33 U.S.C. § 905(b) may be brought against the vessel *in rem.* See *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983).
workers caused by the stevedore’s neglect. A 1984 amendment to LHWCA’s definition of a covered maritime “employee” eliminated coverage for a number of workers who might otherwise be covered by the Act. The LHWCA and decisions involving workers covered by the Act played an important role in the evolution of the second proposition of The Osceola because much of the development of the unseaworthiness remedy arose in claims by injured longshore or harbor workers before the 1972 LHWCA amendments abolished such claims.

The path to coverage for ship-based maritime workers (the seamen) was no more direct. No doubt intending to overrule the bar on negligence claims established by The Osceola, in 1915 Congress enacted the Act to Promote the Welfare of American Seamen, Section 20 of which provided that: “In any suit to recover damages for any injury sustained on board [a] vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority.”

In Chelentis v. Luckenbach Steamship Co., handed down just one year after the Supreme Court’s decision in Southern Pacific, the Supreme Court struck again. Like seaman Shea in The Osceola, the injured seaman in Chelentis made no claim that the vessel was unseaworthy, but rather argued that the sole cause of his injury was an improvident order by a superior.
officer. Chelentis argued that his negligence claim was cognizable under the 1915 Act. In denying the injured seaman's claim, the Supreme Court held that the 1915 Act did no more than to address the third proposition in *The Osceola*, the so-called fellow servant rule. The 1915 Act failed, however, to address the fourth proposition. Professors Gilmore and Black characterize the Court's decision in *Chelentis* as one in which the Supreme Court gave "Congress a lesson in [how to read a case] of a type familiar to any first term law student."

Congress' second attempt, in what is now known as the Jones Act, amended Section 20 of the Act of March 4, 1920, to provide 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. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The reference to the rights of remedies in cases of injuries to railroad employees is understood to incorporate the Federal Employers' Liability Act [FELA], the constitutionality of which the Supreme Court had already upheld. The relevant section of FELA provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any

80. Chelentis, 247 U.S. at 278-79.
81. Id. at 380.
82. Id. at 384.
83. GILMORE & BLACK, supra note 40, § 6-20, at 325.
person suffering injury while he is employed by such carrier in such
commerce, or, in case of the death of such employee, to his or her personal
representative, for the benefit of the surviving widow or husband and
children of such employee; . . . 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, or by reason of any defect or insufficiency, due to its negligence,
in its cars, engines, appliances, machinery, track, roadbed, works, boats,
wharves, or other equipment.\textsuperscript{87}

FELA expressly provides for vicarious liability of employers while
substituting comparative fault for the common law defenses of contributory
negligence and assumption of the risk.\textsuperscript{88}

In 1924, the Supreme Court, in \textit{Panama Railroad Co. v. Johnson},\textsuperscript{89}
upheld the constitutionality of the Jones Act. The Court grounded its holding
on Congress’ implied Article III legislative powers, not on the federal
commerce power. As the Court has recognized, the Article III power has
been given a more limited geographical application than has the commerce
power.\textsuperscript{90} As a result, it might be surmised that the Jones Act is applicable
only on waters subject to the admiralty and maritime jurisdiction, even
though Congress could constitutionally extend its application to the full
reach of the Commerce Clause. However, the Supreme Court later held in
\textit{O’Donnell v. Great Lakes Dredge & Dock Co.} that the constitutional
authority of Congress to modify the Jones Act derives from its authority to
regulate commerce, and that the Jones Act therefore not only statutorily
overrides the third and fourth propositions of \textit{The Osceola}, it also provides a
remedy for any seaman injured in the course of his or her employment, even
if the injury occurred in a location where admiralty jurisdiction might not
otherwise apply.\textsuperscript{91} The Jones Act, therefore, provides a remedy for some


§ 54 (2000) abolishes the assumption of risk defense in cases involving employer or fellow
employee negligence or violation of a safety statute. \textit{See also} \textit{The Arizona v. Anelich}, 298
U.S. 110 (1936) (holding that assumption of risk is not a defense to claims under the Jones
Act); \textit{Socony-Vacuum Oil Co. v. Smith}, 305 U.S. 424 (1939) (holding that assumption of risk
is not a complete defense, but may operate to reduce seaman’s recovery where conduct was
unreasonable).

\textsuperscript{89} 264 U.S. 375 (1924).

\textsuperscript{90} \textit{Crowell v. Benson}, 285 U.S. 22, 55 (1932) (holding that “[i]n amending and
revising the maritime law, the Congress cannot reach beyond the constitutional limits which
are inherent in the admiralty and maritime jurisdiction”) (citation omitted).

\textsuperscript{91} 318 U.S. 36, 40-43 (1943); \textit{see also} \textit{Braen v. Pfeifer Oil Transp. Co.}, 361 U.S. 129,
injuries that would not have been within the ambit of the general maritime law rule in *The Osceola*.

Despite the "election" of remedies language in the Jones Act, the Supreme Court has held that an injured seaman need not forgo the general maritime law remedies of maintenance and cure for injuries caused by vessel unseaworthiness to pursue the Jones Act negligence remedy. As a result, a seaman may recover under all three theories, though of course, double recovery is not permitted. The following section examines the judicial ebb and flow on seamen personal injury remedies.

V. EVOLUTION OF THE *OSCEOLA’S* FIRST AND SECOND PROPOSITIONS

The century since the Court set out its four propositions for injured seamen in *The Osceola* can be characterized as a period of episodic evolution in the remedies available under the maintenance and cure rubric and for injuries caused by vessel unseaworthiness, both of which survived enactment of the Jones Act. Much of the evolution can be explained by changes in the composition of the Supreme Court and the differing attitudes of the justices to the two conflict dimensions identified earlier.

A. Evolution of the First Proposition: Maintenance and Cure

Maintenance and cure is a general maritime law remedy provided to seamen who fall sick or are injured while in service of the ship. “Cure”
refers to the medical care provided to an ill or injured seaman, and "maintenance" is the per diem allowance provided to recovering seamen for food and lodging while undergoing treatment.

Much of the credit for the early development of the American general maritime law of maintenance and cure set out in the first of The Osceola's propositions must go to Joseph Story. In two seminal cases he authored while on circuit, Justice Story drew on a variety of authorities to establish what, at the time, must have been considered a progressive remedy for seamen who fell sick or were injured while in service of the ship.

The first decision, Harden v. Gordon, has already been mentioned. In the second decision, Reed v. Canfield, Justice Story upheld a claim by a seaman who suffered frostbite to his toes, which necessitated their amputation and required medical care for approximately one year. The seaman suffered the frostbite when caught in a snowstorm while ashore, attempting to return to the vessel. The vessel owner argued that the obligation to provide maintenance and cure did not apply when the vessel was in her homeport. Justice Story rejected the argument, holding that the remedy "embraces all sickness, and all injuries, sustained in the service of the ship, and while the party constitutes one of her crew, without ... any difference between their occurring in a home or in a foreign port, upon the ocean, or upon tide-waters." Justice Story went on to hold that "in service of the ship" extended from the commencement of the voyage until the seaman's discharge from the vessel. To these decisions must be added earlier authority holding that the seamen's maintenance and cure remedy includes unearned wages, a remedy expressly recognized in The Osceola's first proposition.

are included in the annotations to 46 U.S.C.A. § 11102 (West 2002), the federal requirement for certain U.S. vessels to carry "medicine chests" to enable them to provide immediate "cure" to seamen injured at sea.

97. See supra notes 35-36 and accompanying text.
98. 20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641).
99. Id.
100. Id.
101. Id. at 427-28.
102. Id.
103. Id. at 428.
104. See, e.g., Walton v. The Neptune, 29 F. Cas. 142, 142-43 (D. Pa. 1800) (No. 17,135) (suits for unearned wages of seamen who died due to fever while in service of ship).
In a series of cases between 1938 and 1962, the Supreme Court expanded the scope of the maintenance and cure remedy. In 1938, the Supreme Court confronted the question whether the illness or injury for which maintenance and cure was sought must be causally connected to the seaman’s service on the ship. The Court’s decision in *Calmar Steamship Corp. v. Taylor* rejected any requirement for proof of a causal link, holding instead that proof of an incapacitating injury or illness while the seaman was in the service of the ship was sufficient. Five years later, in *Aguilar v. Standard Oil Co.*, the Court held that the operative term “in service of the ship” includes cases of illness or injury occurring while the seaman was ashore in the course of departing on or returning from shore leave. Then, in *Farrell v. United States*, the Court extended the remedy to injuries sustained by seamen while on shore leave and engaged in activities unrelated to their duties on the vessel.

The Court in *Aguilar* also held that conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk are not defenses in claims for maintenance and cure. Only “willful misbehavior or deliberate act of indiscretion” bars recovery. In 1962, the Court held that a seaman may recover attorneys’ fees in cases where the shipowner’s “recalcitrance” forced the injured seaman “to hire a lawyer and go to court to get what was plainly owed him.” In that same decision, the majority

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105. 303 U.S. 525 (1938).
106. 318 U.S. 724 (1943) (holding that the shipowner/employer has a duty to provide maintenance and cure to a seaman who was struck by a vehicle ashore while returning to the vessel).
107. *Id.*
109. *Id.; see also* Warren v. United States, 340 U.S. 523 (1951). Although *Farrell* gave a somewhat liberal interpretation to the phrase “in service of the ship,” the decision is perhaps better known for its conservative position limiting the entitlement to the point at which the injured seaman reaches “maximum cure,” even if the injury is a permanent one that necessitates future, non-curative medical treatment. 336 U.S. at 519. The *Farrell* position was later elaborated on by the Court’s decision in *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975) (holding that maintenance and cure must be paid until the injury was declared to be permanent). The *Vella* court expressly reserved the question of maintenance and cure coverage for “palliative” care. *Id.* at 5 n.4.
110. *Aguilar*, 318 U.S. at 731.
111. *Id.* The Court cited, for example, injuries resulting from intoxication. *Id.* at nn.11-12. Maintenance and cure may also be denied in cases where the seaman knowingly concealed a pre-existing condition. *See, e.g.*, McCorpen v. Cent. Gulf S.S. Corp., 396 F.2d 547, 548 (5th Cir. 1968).
also held that the seaman's maintenance payments would not be reduced by his earnings from another job he held while recovering, based in part on the majority's conclusion that the seaman was "forced" to seek employment by the employer's unreasonable failure to provide maintenance and cure.\footnote{113} Although the seaman's maintenance and cure remedy is sometimes characterized as an implied contractual right,\footnote{114} the Supreme Court held that it is "a duty that no private agreement is competent to abrogate."\footnote{115} The maintenance and cure obligation (and liability) is imposed upon the seaman's employer at the time of injury or when the illness manifests itself.\footnote{116}

**B. Evolution of the Second Proposition: The Remedy for Unseaworthiness**

The Supreme Court's development of the remedy for vessel unseaworthiness is best understood if divided into three periods.\footnote{117} The first period spans the years 1920 to 1950, when seamen generally relied on the Jones Act as the principal legal theory for recovery. As the Court liberalized and expanded the reach of the unseaworthiness remedy beginning in the 1940s, replacing what many thought was a due diligence standard with one characterized as an absolute duty, seamen increasingly relied on the unseaworthiness theory from 1950 to 1970. Following a partial retreat by the Court in 1971, and Congressional amendments to the LWHCA in 1972, true

\footnote{113. *Id.* The justices in the majority and the dissent disagreed over the question whether the injured seaman took the intervening job voluntarily or because he was forced to by the shipowner's refusal to pay maintenance. See *id.* at 534 (Stewart, J., dissenting).

114. Justice Story, in his decision on circuit in *Harden v. Gordon*, 11 F. Cas. 480, 482 (C.C.D. Me. 1823) (No. 6,047), characterized the seaman's right to maintenance and cure as "an essential term in the contract."


116. *Mahramas v. Am. Exp. Isbrandtsen Lines*, Inc., 475 F.2d 165 (2d Cir. 1973). The plaintiff in *Mahramas* was a hairdresser employed by an independent contractor that operated a beauty shop on board a cruise ship. *Id.* at 167. In dismissing plaintiff's claims against the shipowner for maintenance and cure and under the Jones Act, the court held that Mahramas's *in personam* claims were available only against her employer, the contractor who operated the beauty shop. *Id.* at 172. On the other hand, the unseaworthiness claim was properly lodged against the shipowner (or the demise charterer, as the owner *pro hac vice*). *Id.; see also McAleer v. Smith*, 57 F.3d 109, 119 (1st Cir. 1995) (dismissing "tallship" crewmembers' claims against master of vessel for (1) unseaworthiness, because master was not a vessel owner; (2) under the Jones Act, because the master was not the crewmembers' employer; and (3) for negligence, because the general maritime law affords a seaman no cause of action for injuries caused by negligence of the master or a fellow crewmember, citing *The Osceola*).

117. See GHILMORE & BLACK, supra note 40, §§ 6-38 to 6-44.
seamen turned to what may be characterized as the modern three-theory approach, where both Jones Act negligence theories and unseaworthiness theories are joined with a claim for maintenance and cure. As mentioned earlier, growing judicial deference to the legislative branch and a concomitant hesitation to further expand general maritime law remedies also mark this latter period.\footnote{118} The remedy for injuries caused by vessel unseaworthiness articulated in the second proposition in \textit{The Osceola} were vastly expanded by the Court between 1944 and 1971, effectively eroding any distinction between unseaworthy conditions and operational negligence.\footnote{119} In \textit{Mahnich v. Southern Steamship Co.},\footnote{120} Justice Stone held that the Court’s decision in \textit{The Osceola} was correctly to be understood as holding that the duty to provide a seaworthy ship does not depend upon the negligence of the shipowner or the shipowner’s agents,\footnote{121} thereby distinguishing the duty of seaworthiness owed to seaman from the analogous duty owed to cargo.\footnote{122}

\footnote{118. \textit{See} discussion \textit{supra} note 4 and accompanying text.}
\footnote{119. Cases on unseaworthiness are collected in the annotations to 46 U.S.C.A. ch. 109 (West 2002) ("proceedings on unseaworthiness"). Chapter 109 codifies the current law on the circumstances under which a seaman may lawfully refuse to proceed to sea, without forfeiting his or her wages, on the ground that the vessel is unseaworthy. \textit{See} 46 U.S.C. § 10904 (2000). The chapter also provides for a penalty of up to $1,000 and imprisonment up to five years for knowingly sending or attempting to send to sea an unseaworthy vessel that is likely to endanger the life of an individual. 46 U.S.C. § 10908 (2000).}
\footnote{120. 321 U.S. 96 (1944). In the case, any claim by the plaintiff under the Jones Act was barred by the three-year statute of limitations, thus limiting him to the unseaworthiness theory. \textit{Id.}}
\footnote{121. \textit{Id. at} 102-03. In ruling that the duty to provide a seaworthy vessel was absolute, Justice Stone apparently found a "ruling" in \textit{The Osceola} "that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances." \textit{Id. at} 100. The closest support for Justice Stone’s reading of \textit{The Osceola} may be found in the case of \textit{The Edith Godden}, cited in the opening passage of the discussion of the seaworthiness doctrine. In that case, district judge Addison Brown applied a standard of "the highest rule of diligence and care in ascertaining the sufficiency of all such modern appliances for the exigencies to which they are to be subjected." \textit{The Edith Godden}, 23 F. 43, 46 (S.D.N.Y. 1885). \textit{But see} Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928) (reaffirming \textit{The Osceola’s} exclusion of claims based on operational negligence).}
\footnote{122. Under the Harter Act and the Carriage of Goods By Sea Act, the carrier must exercise "due diligence" to make a vessel seaworthy. \textit{See} 46 U.S.C. app. §§ 191 [Harter Act] & 1303(a) [COGSA] (2000). The statutory standard is in derogation of the general maritime law rule. \textit{See} The Niagara v. Cordes, 62 U.S. (21 How.) 7 (1858) (the duty of a common carrier by water, in the absence of a contrary statute, is that of an "insurer").}
Two years later, in *Seas Shipping Co. v. Sieracki*, the Court extended the duty of seaworthiness to longshore workers who “are doing a seaman’s work and incurring a seaman’s hazards,” and at the same time described the unseaworthiness duty as “absolute.” The Court extended the shipowner’s liability for unseaworthiness to conditions involving equipment brought aboard the vessel by an independent contractor over which the owner had no control in *Alaska Steamship Co. v. Petterson.* In *Boudoin v. Lykes Brothers Steamship Co.*, the Court held that the unseaworthiness doctrine imposed liability for injuries caused by what might be called “defective” personnel. Still later, in *Mitchell v. Trawler Racer, Inc.*, the Court upheld a seaman’s claim for injury caused by a “transitory” unseaworthy condition, even though the condition arose after the vessel sailed from (and then returned to) her homeport. Writing for the Court, Justice Stewart rejected the argument that liability for unseaworthiness would not lie absent proof by the plaintiff that the slime and gurry that caused his fall had been on the rail long enough for the defendant to discover and rectify the condition. He then reviewed the Court’s earlier decisions and characterized the duty to provide a seaworthy vessel as follows:

The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard 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.\textsuperscript{133}

Thus, the vessel must be a “reasonably fit” place on which to work and live. The obligation (and liability) is imposed on the vessel operator, who may in some cases be different than the owner. In addition, injuries caused by vessel unseaworthiness give rise to a maritime lien, enforceable against the vessel \textit{in rem}. In contrast to the standard of “slight causation” under the Jones Act, the “proximate causation” standard applies to claims based on vessel unseaworthiness.\textsuperscript{134} As a result, the recently revived “superseding cause” doctrine\textsuperscript{135} may act to cut off the ship operator’s liability for injuries caused by vessel unseaworthiness in cases involving extraordinary negligence by the plaintiff. Neither assumption of the risk nor contributory negligence by the injured seaman bars a claim for unseaworthiness; however, under the principle of comparative fault the seaman’s recovery will be reduced to reflect causative fault by the seaman.

In 1970, the Supreme Court first recognized a general maritime law wrongful death remedy. The case, \textit{Moragne v. States Marine Lines, Inc.},\textsuperscript{136} involved a longshore worker who suffered a fatal injury caused by an unseaworthy condition on board a vessel moored in Florida territorial waters. The \textit{Moragne} remedy for deaths caused by unseaworthy conditions on vessels on navigable waters (other than those waters covered by the

\textsuperscript{133} Id. at 550; \textit{see also} Morales v. City of Galveston, 370 U.S. 165 (1962) (vessel on which plaintiff was injured was not unseaworthy because it lacked a forced ventilation system, which might have prevented plaintiff’s inhalation of a fumigant).

\textsuperscript{134} \textit{See} Ribitzki v. Canmar Reading & Bates, Ltd. Partnership, 111 F.3d 658, 662, 665 (9th Cir. 1997) (“even the slightest negligence” is sufficient to support a Jones Act finding of negligence; however, causation in unseaworthiness claim is established by proof that the unseaworthy condition was a “substantial factor” in causing the injury).

\textsuperscript{135} \textit{See} Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996) (holding that extraordinary negligence by plaintiff vessel owner’s master following failure of mooring buoy was a superseding cause of the vessel’s eventual grounding, cutting off any potential liability of parties responsible for allegedly defective mooring buoy). Because the proximate cause standard does not apply to negligence claims under the Jones Act, the rule of superseding cause should have no application to those claims.

\textsuperscript{136} 398 U.S. 375 (1970). Four years later, in \textit{Sea-Land Services, Inc. v. Gaudet}, 414 U.S. 573 (1974), the Court held that the widow of a longshore worker was entitled to recover non-pecuniary damages in the \textit{Moragne} wrongful death cause of action for death caused by vessel unseaworthiness. Because the 1972 LHWCA amendments eliminated the longshore workers’ unseaworthiness cause of action, both \textit{Moragne} and \textit{Gaudet} are inapplicable on their facts.
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Death on the High Seas Act\textsuperscript{137} was later extended to true seamen in \textit{Miles v. Apex Marine Corp.}\textsuperscript{138} The Court’s 1971 decision in \textit{Usner v. Luckenbach Overseas Corp.}\textsuperscript{139} is seen by many as the first sign that the Court’s expansive period was over.\textsuperscript{140} The following year Congress amended the LHWCA, eliminating the longshore and harbor workers’ claim for vessel unseaworthiness.

VI. THE \textsc{Osceola}’S CENTURY-LONG SHADOW

Before turning to the individual contributions to this Symposium, it may be helpful to the reader to get a sense of the contemporary relevance of \textit{The Osceola}. The import of the case is, in part, a function of the broad reach of admiralty and maritime jurisdiction, which was long ago extended to the Great Lakes and other navigable waterways,\textsuperscript{141} and of the evolving legal definition of “seamen.”\textsuperscript{142} Like any century-old case, \textit{The Osceola} must be seen as a waypoint in the ongoing evolution of maritime law. The decision reflects an effort to collect, synthesize and summarize the relevant law as it stood, or as the Supreme Court saw it, in 1903. The first and second “propositions” articulated by the Court in 1903 appear to be just as true today, but only because they were cast in such general terms that the “details” might undergo considerable development without undermining the accuracy of the general proposition. While we must be mindful of Justice Holmes’ admonition that “general propositions do not decide concrete


\textsuperscript{139} 400 U.S. 494 (1971) (distinguishing, however ambiguously, negligent operation of seaworthy equipment from unseaworthy conditions on the vessel).

\textsuperscript{140} See also Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) (holding that admiralty jurisdiction does not extend to a claim by a longshore worker injured on a dock where injury was caused by equipment on the dock that was owned by the injured worker’s employer). The dissent was not persuaded by the majority’s attempt to distinguish the Court’s earlier decision in Gutierrez v. Waterman Steamship Co., 373 U.S. 206 (1963) (upholding unseaworthiness claim by longshore worker against vessel for injury caused in slipping on spilled coffee beans on pier after the cargo was offloaded from vessel). \textit{Victory Carriers}, 404 U.S. at 216-17 (Douglas, J., dissenting).

\textsuperscript{141} See, e.g., The Eagle, 75 U.S. (8 Wall.) 15, 25 (1869) (extending admiralty jurisdiction to the Great Lakes); Fretz v. Bull, 53 U.S. (12 How.) 465 (1851) (extending admiralty jurisdiction to the Mississippi River above the range of the tide).

\textsuperscript{142} See infra note 146 and accompanying text.
cases," it seems clear that the first two of _The Osceola's_ four propositions have proved to be a durable standard for deciding thousands of seaman personal injury cases, largely due to the fact that their generality has accommodated progressive development and application of the law. The Court's 1903 decision continues to cast a long shadow over maritime personal injury law is demonstrated by even a brief examination of the citators. _Shepard's Citations_ lists well over 800 decisions, many of which are recent, that cite _The Osceola_. _Westlaw's_ "texts and periodicals" database lists nearly 150 works citing the decision. In their admiralty treatise, Professors Grant Gilmore and Charles Black observed: The four propositions of _The Osceola_ have been reproduced in hundreds of cases as the classical statement of the liability of the ship and her owner to sick and injured seamen. Like holy writ they are ritually invoked, respectfully recited, rarely analyzed and never criticized. The facts of the case have been lost from sight: even the admiralty casebooks merely reprint the four propositions with no indication of the context in which Justice Brown delivered his celebrated statement.

At the same time it is important to note the functional limits of the case. _The Osceola_ concerned a claim by a seaman against his employer. The case presented no question regarding Shea's status as a seaman, a vexing question of classification that generated four recent decisions by the Court. The case does not speak to claims a seaman might have against third parties, such as a product manufacturer or supplier, whose fault may have contributed to the injury. It is also important to distinguish cases like Shea's involving injuries to ship-based maritime workers (i.e., seamen) from those involving land-based maritime workers, and to distinguish claims by maritime

144. _See generally JEROME FRANK, LAW AND THE MODERN MIND_ 11-12 (Coward-McCann 1949) (concluding "that the widespread notion that law either is or can be made approximately stationary and certain is irrational and should be classed as an illusion or a myth").
145. _GILMORE & BLACK, supra_ note 40, § 6-3, at 276.
147. That said, it must also be acknowledged that much of the development in the general maritime law of unseaworthiness took place in claims brought against vessels by longshore and harbor workers before the 1972 LHWCA amendments eliminated those claims.
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workers from non-maritime workers\textsuperscript{148} or other “nonseafarers” injured outside the employment context.\textsuperscript{149} A shipowner owes no duty of seaworthiness to non-seamen, thus excluding claims based on unseaworthiness by longshore and harbor workers,\textsuperscript{150} visitors and passengers aboard the vessel.\textsuperscript{151} Liability in such cases turns on proof of causative negligence under the general maritime law.\textsuperscript{152} It must also be borne in mind that The Osceola concerned a personal injury claim, not one involving wrongful death.

Brief mention should also be made of the choice of law principles applicable to claims for injuries to foreign seamen when brought in U.S. courts. In 1982, Congress amended the Jones Act to eliminate coverage for certain workers engaged in foreign offshore oil and gas operations.\textsuperscript{153} Choice of law in claims by foreign seamen whose coverage was not eliminated by the 1982 Jones Act amendment is governed by the Supreme

\textsuperscript{148} Generally, state workers’ compensation benefits provide the exclusive remedy for non-maritime workers who suffer injury in the course of their employment; however, such workers may elect to bring a claim against their employer under the general maritime law if the tort giving rise to the claim falls within the admiralty and maritime jurisdiction. See, e.g., Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994) (reversing district court’s dismissal of injured employee’s claim against employer under general maritime law even though the worker was not a seaman, longshoreman or harbor worker); see also Rhodes v. Washington Dep’t of Labor & Industries, 700 P.2d 729, 731 (Wash. 1985) (holding that injured worker who accepted state workers’ compensation benefits is not barred from suing employer under general maritime law).

\textsuperscript{149} The importance of the distinction between maritime and non-maritime plaintiffs was recently highlighted by the Supreme Court’s decision in Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), in which the Court upheld application of a state wrongful death statute to a suit arising out of the death of a “nonseafarer.”

\textsuperscript{150} See 33 U.S.C. § 905(b) (2000).

\textsuperscript{151} Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332 (11th Cir. 1984) (“A carrier by sea... is not liable to passengers as an insurer, but only for its negligence”), cert. denied, 470 U.S. 1004 (1985); Rainey v. Paquet Cruises, Inc., 709 F.2d 169, 172 (2d Cir. 1983) (holding that shipowner owes no duty to passenger to provide a seaworthy vessel; liability must be founded on negligence).

\textsuperscript{152} Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (holding that the owner of a ship on navigable waters owes to all who are on board for purposes not inimical to the shipowner’s legitimate interests the duty of exercising reasonable care under the circumstances). For applications of the Kermarec rule to passenger cases, see Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1321 (11th Cir. 1989).

\textsuperscript{153} Pub. L. No. 97-389, § 503(a), 96 Stat. 1955 (codified at 46 U.S.C. app. § 688(b) (2000)). The amendment precludes claims by such workers under the Jones Act or “under any other maritime law of the United States for maintenance and cure or for damages for the injury or death.” Id.
Court’s seven-part choice of law test established in *Lauritzen v. Larsen*,\(^{154}\) and later supplemented with an eighth factor in *Hellenic Lines Ltd. v. Rhoditis*.\(^{155}\) The result is that, by application of the eight-factor test, some seaman personal injury claims adjudicated in U.S. courts will not be governed by the maritime law principles that have descended from *The Osceola*.

*The Osceola* and the Congressional response have left seamen with three possible remedies, some of legislative origin and some grounded in general maritime law. The duty to provide maintenance and cure is imposed upon the seaman’s employer, though the claim also gives rise to a maritime lien against the vessel,\(^{156}\) which the shipowner may ultimately be required to pay in order to protect its interest in the vessel. The Jones Act claim does not give rise to a maritime lien,\(^{157}\) and, therefore, cannot be brought against the vessel *in rem*, while the unseaworthiness claim confers a lien which can be enforced against the vessel *in rem*. Where the vessel owner/operator and the seaman’s employer are not the same person or entity, the case can quickly turn complex. Because there is ordinarily no right to a jury trial on admiralty claims, the multiplicity of possible claims and defendants frequently raises questions regarding jury trials in cases involving both law (statutory or common) and admiralty claims,\(^{158}\) particularly if the injured worker attempts to join an *in rem* claim against the vessel with a claim for which the seaman is entitled to a trial by jury.\(^{159}\)

\(^{154}\) 345 U.S. 571, 579 (1953). The factors considered include: (1) the place of the wrongful act; (2) the flag of the vessel; (3) the domicile of the seaman; (4) the allegiance of the shipowner; (5) the place of the contract; (6) the accessibility of the foreign forum; and (7) the law of the forum. *Id.*

\(^{155}\) 398 U.S. 306, 309 (1970) (adding the defendant shipowner’s base of operations as the eighth factor).

\(^{156}\) Fredelos v. Merritt-Chapman & Scott Corp., 447 F.2d 435 (5th Cir. 1971). The holding is plainly embraced by the language used in the first proposition of *The Osceola*.

\(^{157}\) Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928).

\(^{158}\) See, e.g., Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Romero v. Int’l Terminal Operating Co., 358 U.S. 354 (1959). The Court held in *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316 (1927), that a seaman must join a Jones Act claim with a claim for unseaworthiness, or the omitted claim is waived under the “bar” prong of *res judicata*.

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The contrast in protections afforded to seamen and shore-based maritime workers covered by the LHWCA invites litigation over the injured worker's status and has been the subject of frequent criticism. In a 1964 comment on the post-Jones Act/LHWCA development of maritime personal injury law for seaman and longshore workers, Professor Jo Desha Lucas quite correctly observed that, for reasons of its own, Congress had chosen not to view the entire maritime industry as a unit when it designed the respective personal injury regimes. He then quipped:

It has followed the Supreme Court's distinction between shrimps and oysters. A seaman is a shrimp, a free-swimming fish; the longshoreman is an oyster, living in beds along the coast. Congress has cast its legislation to reflect this difference. For a quarter of a century the Supreme Court has doggedly refused to accept this distinction and has set about to bring equality of treatment to workers in the shipping industry.160

Less than a decade later, Congress effectively put an end to the Supreme Court's "dogged refusal" to accept the distinction, by eliminating the longshore worker's unseaworthiness action. In his contemporary treatise Professor Schoenbaum concludes that the dual recovery system is "arbitrary," "the distinction between land-based and sea-based maritime workers is now devoid of significance," and that despite "cracks in the very foundation of the system, Congress has avoided fundamental reform so the courts as well as the maritime industry and their attorneys must struggle to make sense out of the system as best they can."161 So long as the legislative scheme remains out of balance, further evolution of The Osceola's four propositions of general maritime law seems inevitable. It is therefore entirely fitting that the authors of the three articles that follow this Introduction scrutinize the Court's decision and its subsequent treatment.

160. Lucas, supra note 45, at 260. The analogy to the shrimp and oyster distinction highlights the Supreme Court's differing approaches to state regulation of those fisheries in Toomer v. Witsell, 334 U.S. 385 (1948) (South Carolina law imposing differential license fee on non-resident shrimpers held unconstitutional) and McCready v. Virginia, 94 U.S. 391 (1876) (Virginia law prohibiting non-citizens from planting oysters in Virginia tidewaters held constitutional).
