Inherent Inequities in Affording Offshore Workers Jones Act Recoveries: A Plea for a Uniform Compensation Scheme

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Abstract

This comment provides an analysis of existing legislation governing recovery for injuries received by offshore workers and the manner in which these statutes are interpreted and applied by the courts. Part One will examine the various types of drilling rigs employed in the development of offshore resources. Parts Two and Three will enumerate the statutory bases of recovery and the development of criteria utilized by the courts in determining the applicability of the provisions of the Jones Act. Finally, Part Four will explore potential alternatives to existing legislation.
COMMENTS

INHERENT INEQUITIES IN AFFORDING OFFSHORE WORKERS JONES ACT RECOVERIES:
A PLEA FOR A UNIFORM COMPENSATION SCHEME

INTRODUCTION

With the depletion of proven oil and gas reserves on land and the inability to develop new land-based fields, the search for new sources of energy has shifted dramatically in recent years to offshore development. The intensified exploration and exploitation of mineral reserves on the Continental Shelf has created a hybrid species of marine laborer. Offshore oil laborers engage in a livelihood similar to that of traditional seamen in that they spend a major portion of their lives on water. These workers may be distinguished from traditional blue-water seamen, however, in that

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1. It has been estimated that approximately two-thirds of all recoverable oil resources located in the United States had been exhausted by 1975. J. LICHTBLAU & H. FRANK, OUTLOOK FOR WORLD OIL INTO THE 21ST CENTURY, WITH EMPHASIS ON THE PERIOD TO 1990, 4-7 (1978). Further, of the estimated 85 billion barrels of crude oil yet to be produced by the United States, approximately 65 percent of this total will be produced offshore. Id. at 4-10.

2. Prior to 1947 there was no significant drilling in offshore regions anywhere in the world. AMERICAN PETROLEUM INSTITUTE, HISTORY OF PETROLEUM ENGINEERING 67 (1961). Today exploratory wells have been drilled in the waters of at least 90 countries and currently there are more than 30 nations producing either oil or gas from offshore operations. Such significant deposits of petroleum have been discovered that offshore proven crude oil reserves are presently estimated at 240 billion barrels, representing 37 percent of the world's estimated reserve. PUBLIC AFFAIRS DEPT' OF EXXON CORP., THE OFFSHORE SEARCH FOR OIL AND GAS 2 (4th ed. Sept. 1980).

3. The Continental Shelf may be defined as those submerged lands lying outside of a line three geographical miles distant from the coast line of each state. Outer Continental Shelf Lands Act (Lands Act), 43 U.S.C. § 1333 (Supp. III 1979). See note 55 infra, for further discussion of the boundaries of the Continental Shelf. To date over 24,600 wells have been drilled on the Continental Shelf of the United States. THE OFFSHORE SEARCH FOR OIL AND GAS, supra note 2, at 2.

they are subject to an increased likelihood of serious injury by being exposed to the hazards of drilling as well as maritime risks.\textsuperscript{5}

Congress has initiated measures to ensure the safety and welfare of offshore workers and to reduce the probability of serious injury.\textsuperscript{6} Despite these safety precautions, accidents do happen, and far more frequently than in almost any other industry.\textsuperscript{7} Unfortunately for the offshore workers, the proliferation of offshore operations has not prompted corresponding legislation designed to provide adequate compensation in the event of an industrial mishap. Rather, due to congressional passivity, the courts have assumed the unenvi-

\begin{itemize}
\item[5.] "Many of the . . . seamen on these vessels share the same marine risks to which all aboard are subject. And in many instances these seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling." Offshore Co. v. Robison, 266 F.2d 769, 780 (5th Cir. 1959).
\item[6.] Federal jurisdiction and control over the Continental Shelf are derived from the Lands Act which provides for federal administration of this area. 43 U.S.C. §§ 1331-1343 (1976). The Lands Act authorizes the Secretary of the Interior to prescribe rules and regulations to govern competitive bidding for offshore leases. \textit{Id.} at § 1337(a). Rules and regulations covering such matters as the training of offshore personnel and safety procedures are promulgated by the United States Geological Survey. J. \textit{Kitchen, Labor Law and Offshore Oil} 36-37 (1977).
\item[7.] While it would appear that the rule-making power of the United States Geological Survey was designed to be all-inclusive, there remains some overlap of federal statutes governing activities on the Continental Shelf. For example, the Fair Labor Standards Act provides that the provisions of that act shall apply with respect to employment performed in a workplace on outer continental shelf lands. 29 U.S.C. § 213(f)(1976). Further, in the Outer Continental Shelf Lands Act, itself, is the express provision that:
\begin{quote}
The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures . . . as he may deem necessary.
\end{quote}
43 U.S.C. § 1333(e) (1976). Thus, while the regulation of activities on the Continental Shelf may be thorough, it is at times confusing and inefficient. In fact, as noted by one commentator, the system for the regulation of activities on the Continental Shelf is:

\begin{quote}
[I]nordinately complicated, beset by problems of definition, problems relating to jurisdiction, the overlapping of statutes, and the division of responsibilities for the administration and supervision of the activities between numerous different agencies with the Coast Guard, the US Geological Survey, the Corps of Engineers, and the Occupational Safety and Health Administration all having some responsibility for safety standards and their enforcement.
\end{quote}
\item[7.] Between 1955 and April 1974, there were at least sixty-eight major offshore disasters throughout the world, involving the loss of at least 100 lives and costing approximately $198 million. J. \textit{Kitchen, supra} note 6, at 126. Moreover, twenty-nine rigs, constituting 12 percent of the world total of operational offshore rigs, were total losses. \textit{Id.} The worst offshore disaster involved the collapse of a platform located in the North Sea, in which 123 workers lost their lives. \textit{See N.Y. Times, March 28, 1980, at 1, col. 1.}
\end{itemize}
able task of ascertaining which maritime principles are applicable to offshore operations. The vacuum created by Congressional inactivity has led the courts to utilize traditional maritime concepts ill-suited for marine petroleum workers.\(^8\)

At present, offshore workers injured in the scope of their employment are limited to recovery under one of two compensatory schemes: maritime law or workmen’s compensation.\(^9\) The theory upon which a particular offshore worker relies is dictated by the type of structure to which he is assigned.\(^10\) If the injured worker is permanently assigned to a fixed drilling installation,\(^11\) he may seek recovery only under federal or state workmen’s compensation schemes which provide for a fixed schedule of payments.\(^12\) If the offshore worker is injured while assigned to a movable rig\(^13\) he is entitled to the more generous benefits of the Jones Act.\(^14\) In essence, the existing compensation program distinguishes two classes of offshore workers—those engaging in maritime activities and those performing duties essentially industrial in nature.

The inherent defect of this classification scheme lies in its underlying premise that workers on movable rigs are exposed to substantially greater maritime risks and should therefore be accorded

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\(^8\) As “wards of admiralty,” seamen have been accorded unique rights and remedies, among them recovery for maintenance, cure and wages and recovery for injuries sustained due to the unseaworthiness of a vessel. See, e.g., Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Farrell v. United States, 336 U.S. 511 (1949); The Osceola, 189 U.S. 158 (1903). The concept of maintenance and cure imposes on the shipowner the absolute duty to furnish a “seaman” injured while in the service of the ship with food, lodging and subsistence until the maximum cure has been attained. The concept of negligence and fault have no application to this ancient principle of maritime laws. Jones, Personal Injury—Offshore Oil Operations, 5 Nat. Resources Law 681, 726 (1972).

Under the seaworthiness doctrine the shipowner warrants that the “vessel” and its equipment are free from defect and reasonably fit for their intended use. As with maintenance and cure, the duty to furnish a seaworthy vessel is absolute, the breach thereof giving rise to a species of liability without fault. Furthermore, the duty to provide a seaworthy vessel and appurtenances is said to be non-delegable. Id.

\(^9\) See notes 49-73 infra and accompanying text.

\(^10\) See notes 114-31 infra and accompanying text.

\(^11\) See notes 30-40 infra and accompanying text.

\(^12\) Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950 (1976). The determination of whether state or federal law governs a particular accident is made pursuant to the Lands Act, 43 U.S.C. §§ 1311, 1333 (1976). That act provides that accidents occurring within three miles of the adjacent state are subject to state law while those beyond the three mile limit are subject to federal jurisdiction.

\(^13\) See notes 30-43 infra and accompanying text.

greater protection. Actually, all offshore workers are subject to the same hazards of the sea and of drilling regardless of the type of structure being utilized at the drilling site. Drilling operations involving either movable rigs or fixed structures are usually conducted at such distance from the shore and under such extreme weather conditions that effective aid from land in the event of an emergency is an impossibility. In this respect, the plight of all offshore workers may be equated to that of imperiled seamen in that neither group can rely on prompt help from shore but are dependent upon ships in the immediate vicinity. Both classes of offshore workers are equally secluded and their emergencies assume a uniquely maritime character; they both confront the dangers of the sea.

Further examination of this classification scheme reveals that it is founded upon maritime principles of limited application to offshore operations. Primarily, the courts reason that workers assigned to

15. The weakness of this classification scheme was first recognized by the courts in Offshore Co. v. Robison, 266 F.2d 769, 780 (5th Cir. 1959). Nevertheless, the ensuing case law disregards the warning espoused by Robison and rigidly adheres to criteria that ignore the reality of offshore drilling. See the following cases in which offshore workers were denied equitable coverage: Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981) (pusher); Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108 (5th Cir. 1980) (roustabout); Kirk v. Land & Marine Applicators, Inc., 555 F.2d 481 (5th Cir. 1977) (sandblaster); In re Dearborn Marine Serv., Inc., 499 F.2d 263 (5th Cir. 1974), cert. dismissed, 423 U.S. 886 (1975) (platform supervisor); Cox v. Otis Eng'r Corp., 474 F.2d 613 (5th Cir. 1973) (wireline operator); Ross v. Mobil Oil Corp., 474 F.2d 989 (5th Cir.), cert. denied, 414 U.S. 1012 (1973) (welder); Keener v. Transworld Drilling Co., 468 F.2d 729 (5th Cir. 1972) (temporary helper).


17. The decision whether to utilize a fixed platform or a mobile rig at a particular site is usually made in accordance with business considerations. It also should be noted that the use of fixed platforms in deepwater projects encounters technological limitations. The largest fixed platform currently in use is Cognac, which is situated in 1,025 feet of water in the Gulf of Mexico. Houston Business Journal, August 3, 1981, at 16, col. 1.

18. Offshore operations located in the deep waters of the Gulf of Mexico, where the greatest concentration of drilling is being conducted in United States waters, must be built to endure winds of up to 140 miles per hour and waves more than 70 feet in height. The OFFSHORE SEARCH FOR OIL AND GAS, supra note 2, at 12.

19. As of September 1980, offshore drilling had taken place in waters as deep as 4,900 feet and at distances more than 200 miles from shore. Id. at 2.

20. Consequently, Great Britain enacted legislation requiring that a standby vessel be assigned to each manned installation in the North Sea in order to accelerate an emergency rescue in the event of a serious accident. Mineral Workers Act, 1971, s.6.

21. See, e.g., Jones, supra note 8. This commentator notes that:

[for admiralty and maritime principles of law to apply equally to 'seaman' and
movable rigs are subject to maritime risks incident to movement at sea. In fact, a movable rig operates at one drilling site for a substantial length of time, thereby sharply curtailing the period of navigation. Thus, actual movement of drilling rigs occurs infrequently and only under the most favorable of conditions. Consequently, workers assigned to mobile rigs are exposed to minimal danger due to movement.

One aspect of offshore drilling virtually ignored in the formulation of this classification scheme is that of transportation of workers to and from the drilling site. Workers on both movable and fixed rigs are transported to and from shore by use of crewboats. Hampered by rough seas and inclement conditions, the transfer from platform to vessel can become an extremely dangerous maneuver. This is not to say that these passengers are necessarily seamen within the meaning of maritime law, but rather to suggest that universal hazards confront all offshore workers.

In sum, the different degrees of protection afforded to offshore workers is the product of a classification scheme based on an artificial distinction. Utilization of this scheme in determining the type of recovery available to the injured offshore worker has resulted in...
the inequitable denial of effective recovery to fixed platform workers. The courts, however, are not the appropriate forum for the resolution of this dilemma. Legislative action is needed to design a compensation program which would promote the development of offshore resources by adequately protecting all offshore workers.

This Comment will provide an analysis of existing legislation governing recovery for injuries received by offshore workers and the manner in which these statutes are interpreted and applied by the courts. Part One will examine the various types of drilling rigs employed in the development of offshore resources. Parts Two and Three will enumerate the statutory bases of recovery and the development of criteria utilized by the courts in determining the applicability of the provisions of the Jones Act. Finally, Part Four will explore potential alternatives to existing legislation.

I. THE PHYSICAL NATURE OF OFFSHORE DRILLING UNITS

Although there are a variety of offshore rigs designed for underwater exploitation or exploration, all such structures may be categorized as either a movable rig or a fixed platform. The movable rig is one which can travel from site to site without major dismantlement or modification, regardless of whether it has its own means of locomotion. In contrast, fixed platforms are permanently attached to the ocean floor and cannot be moved. As noted previously, the mobility of the offshore unit determines the type of recovery available to an offshore worker.

29. In Smith v. Falcon Seaboard, Inc., 463 F.2d 206 (5th Cir.), cert. denied, 409 U.S. 1085 (1972), the widow of a worker assigned to an offshore drilling platform challenged as unconstitutional the different remedies afforded workers assigned to platforms and those assigned to vessels, by § 1333(c) of the Longshoremen's and Harbor Worker's Compensation Act. 43 U.S.C. §§ 1331-43 (1976). While rejecting plaintiff's claim that the "mobility of the situs" constituted an arbitrary criterion, the court stressed that inequities that the state may produce "can more appropriately be dealt with in the halls of Congress, where the statutory distinction originated." 463 F.2d at 208.

30. Fallon, supra note 4, at 596; Robertson, supra note 4, at 982.


32. Id.

33. See notes 12, 14-20 supra and accompanying text.
The class of movable drilling units currently utilized in offshore operations includes submersible\textsuperscript{34} and semi-submersible rigs,\textsuperscript{35} barges,\textsuperscript{36} jack-up rigs,\textsuperscript{37} and drill ships.\textsuperscript{38} Because of their mobility, all floating structures are treated as vessels.\textsuperscript{39} Those individuals who are employed permanently aboard these rigs and perform tasks that further the object or purpose of the rig\textsuperscript{40} are considered members of the crew,\textsuperscript{41} and as such have access to the same legal

\textsuperscript{34} A submersible drilling rig is designed to operate in relatively shallow waters, being an adaptation of the land based rig. The deck of the rig is supported on a number of vertical and horizontal pontoons which are flooded when the rig is in position for drilling. E. Whitehead, \textit{An A-Z of Offshore Oil and Gas} (1976) quoted in M. Summerskill, \textit{Oil Rigs: Law and Insurance} (1979). See, e.g., Adams v. Kelly Drilling Co., 273 F.2d 887 (5th Cir.), cert. denied, 364 U.S. 845 (1960).

\textsuperscript{35} A semi-submersible drilling rig is one which floats above the drilling site. It is partially submerged and moored by anchors, much like a ship. M. Summerskill, \textit{Oil Rigs: Law and Insurance} 5 (1979). The semi-submersible rig is generally engaged in drilling operations in water depths less than 2,500 feet. \textit{The Offshore Search for Oil and Gas}, supra note 2, at 12. See, e.g., Loftis v. Southeastern Drilling, Inc., 43 F.R.D. 32 (E.D. La. 1967).

\textsuperscript{36} Drilling barges are usually employed in in-shore waters, rivers and estuaries. M. Summerskill, \textit{supra} note 35, at 3. These units are designed to operate while afloat and usually have no primary propelling machinery. \textit{Id.} See, e.g., Landry v. Amoco Production Co., 595 F.2d 1070 (5th Cir. 1979).

\textsuperscript{37} "A jack-up or self-elevating drilling unit is one which, after being towed, or in some cases propelling itself, to its location, is able to lower its legs so that they rest on the seabed, the deck then being raised above the sea level." M. Summerskill, \textit{supra} note 35, at 9. The utility of this type of rig is limited to operations in waters approximately 300 feet deep. \textit{The Offshore Search for Oil and Gas}, supra note 2, at 9. See, e.g., Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976).

\textsuperscript{38} A drill ship is a vessel with an opening in the hull enabling it to engage in drilling operation in waters as deep as 6,000 feet. \textit{The Offshore Search for Oil and Gas}, supra note 2, at 13. \textit{See, e.g., Howard v. Global Marine, Inc.}, 28 Cal. App. 3d 809, 105 Cal. Rptr. 50 (1972).


\textsuperscript{40} It has been held that anyone who contributes to the labors, operation or welfare of the vessel (or mobile rig) furthers the mission of that vessel, even if that contribution has no effect on the navigation of that vessel. Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). The determination of whether or not a contribution to the function or mission of the vessel has been made is a question of fact. \textit{Id.} at 778-80.

\textsuperscript{41} \textit{See} note 64 \textit{infra} and accompanying text.
remedies available to the traditional blue-water seaman, including Jones Act protection. Therefore, the injured fixed platform worker is limited to compensation benefits from his employer. The determining factor as to which compensation scheme should be utilized (i.e., federal or state) is whether the platform was located within the territorial waters of the adjoining state or the area covered by the Outer Continental Shelf Lands Act.

It is thus apparent that a worker's fortuitous assignment to a floating rig or fixed structure and its location within or outside the offshore waters of the United States control his potential monetary recovery in the event of personal injury or death. The irony of this situation is that these two classes of employees are governed by different laws although their job descriptions and duties may be identical. Further, as noted above these two classes of workers are subject to similar working environments, thereby exposing all offshore workers to the same maritime risks.
II. LEGISLATION GOVERNING ACTIVITY ON THE CONTINENTAL SHELF

A. The Outer Continental Shelf Lands Act

Following the Presidential Proclamation issued by President Truman in 1945 declaring that the resources of the Continental Shelf were property of the United States government, Congress enacted the Outer Continental Shelf Lands Act (Lands Act) which provides for the federal administration and control of these areas. The Lands Act provides the basic legal framework governing offshore drilling operations, including remedies for industrial accidents. The Lands Act provides in pertinent part:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

However, an employee is defined to exclude the master or member of the crew of any vessel or any employee of any state government or the federal government or any of its agencies. Thus, maritime compensation remedies are left intact for seamen engaged in operations on vessels located on the Continental Shelf.

Under this extension, Longshoremen's Act benefits became the sole remedy available to all workers assigned to fixed platforms located beyond three miles from shore, regardless of the situs of the injury. However, workers on fixed platforms within three miles from shore continued to look to state workmen's compensation as

51. 43 U.S.C. § 1333(b), (c) (Supp. III 1979).
52. 43 U.S.C. § 1333(c)(1).
54. See Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 432 n.11 (5th Cir. 1977) (dictum), rev'd on other grounds, 436 U.S. 618 (1978); Smith v. Chevron Oil Co., 517 F.2d 1154, 1156 (5th Cir. 1975) (injury on platform) (Longshoremen's Act held applicable where injury occurred on a platform located on the outer Continental Shelf).
their primary injury remedy.\textsuperscript{55} The court in \textit{Olsen v. Shell Oil Co.}\textsuperscript{56} recognized the problem inherent in this statutory scheme. Specifically, the court noted that the Lands Act was not properly designed to implement a system of uniform liability coverage to protect the offshore worker; rather:

\begin{quote}
(t)here can be no question that the primary purpose for this legislation was to assert United States jurisdiction over the shelf, and to set up a system for the full development of its natural resources. Protection of the workers on the platform, while no doubt a legitimate concern of Congress, was not a motivating force behind the legislation, and, in fact, only became relevant if jurisdiction was asserted. Therefore, it would not be unfair to say that protection of these workers . . . was 'at best a secondary concern' of the Act.\textsuperscript{57}
\end{quote}

Thus, Congress has left an area void of appropriate legislation rendering fixed platform workers with inadequate liability protection.

Furthermore, while the provisions of the Lands Act dictate the theory of recovery available to an injured offshore worker, the Supreme Court reasoned in \textit{Rodrique v. Aetna Casualty & Surety Co.}\textsuperscript{58} that the purpose of the Lands Act was to encourage exploration and development of underground resources on the continent's submerged shelf lands. The Lands Act's legislative history reflects Congress' belief that such exploration is substantially a land-related activity and alien to the traditional interests of maritime law.\textsuperscript{59} In

\begin{footnotes}
\item[55] The Lands Act defines the shelf as all submerged lands lying outside of a line of each state. However, the act contains a proviso that state waters may extend beyond this limit if such boundary existed at the time the state became a member of the Union. Under this provision, Texas is entitled to a marine boundary three leagues (10.36 geographical miles) from shore by virtue of an historical claim recognized upon admission in 1845. United States v. Louisiana, 363 U.S. 1, 64 (1960). Florida has a marine boundary extending three leagues into the Gulf because of Article I of Florida's Constitution of 1868, approved by Congress upon readmission during Reconstruction. United States v. Florida, 363 U.S. 121, 127 (1960).

\item[56] 561 F.2d 1178 (5th Cir. 1977), cert. denied, 444 U.S. 979 (1979).

\item[57] \textit{Id.} at 1188. The primary purpose of the Lands Acts was to amend the Submerged Lands Act to permit the area in the outer Continental Shelf beyond the boundaries of the States to be leased and developed by the Federal Government. H.R. REP. No. 413, 89th Cong., 1st Sess. 2, reprinted in [1953] \textit{U.S. Code Cong. \& Ad. News} 2177.

\item[58] 395 U.S. 352 (1969).

\item[59] \textit{Id.} at 364-66. In support of this conclusion the Court quoted the testimony of an admiralty expert given at the congressional hearings that "[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose." \textit{Id.} at 365 n.12. In fact, the Senate considered the application
\end{footnotes}
sum, what Congress accomplished with passage of the Lands Act was the creation of inadequate protection for workers on fixed platforms while leaving intact "ill-adapted" maritime remedies for workers on mobile rigs. This anomalous consequence can only be rectified by Congressional enactment of legislation carefully tailored to meet the unprecedented needs of all offshore workers. In short, what is needed is a uniform compensation scheme applicable to all offshore workers.

B. The Jones Act

1. Coverage and Remedies

Offshore workers permanently assigned to mobile drilling rigs are covered by various maritime laws and principles, the most comprehensive and advantageous being the Jones Act. Under the Jones Act if a seaman has sustained a personal injury or has been killed in the course of his employment, an action for damages against the seaman's employer may be brought by either the

60. The limitations of maritime law were emphasized by Senator Cordon, who presented the Lands Act bill to the Senate:

this [maritime] approach was not an adequate and complete answer to the problem. The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, industrial-accident laws, fair-labor standard laws, and so forth. It was necessary that the protection afforded by such laws be extended to the outer Shelf area because of the fact that ultimately some 10,000 or more men might be employed in mineral-resource development there.

61. 46 U.S.C. § 688 (1976). The act provides in part:

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 the 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.

seaman or his personal representative. However, the statute fails to define "seaman." Therefore, the issue of who has standing to maintain an action under the Jones Act has been decided by the courts.

The Jones Act offers numerous advantages over traditional maritime tort actions and all forms of workmen's compensation. Perhaps the most advantageous aspect of the Jones Act is the reduced burden of proof on the plaintiff. Claims brought under the Jones Act are submitted to a jury and require a very low evidentiary threshold; even marginal claims are properly left for jury determination. Further, there is no statutory limitation on recovery and seamen are allowed, upon proving negligence, a lump sum recovery for pain and suffering, loss of past earnings, and residual disability. Another advantage of the Jones Act is that conscious pain and suffering are recoverable items of damage in a death action.

Since the principle dangers of life in offshore operations are accidents involving heavy equipment, fires, explosions, or drownings,
the possibility of severe pain and suffering between injury and death has become an important consideration in a death action under the Jones Act. 69

Another generous facet of the Jones Act is the doctrine of comparative negligence incorporated from the Federal Employer's Liability Acts (FELA). 70 This provision provides that contributory negligence on the part of the injured employee "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 71 Also, under the FELA the defense of assumption of the risk is denied "in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 72 And finally, any attempt by an employer to exempt himself from liability under the FELA by any "contract, rule, regulation, or device" is void. 73

Thus, a comparison of the benefits afforded mobile rig workers under the Jones Act with those provided fixed platform workers under federal and state compensation schemes reveals in the event of injury, that mobile rig workers are in a much better position than their counterparts on fixed platforms.

2. Legislative History and Judicial Interpretation

Analysis of the circumstances leading up to and culminating in the passage of the Jones Act warrants the conclusion that it was never the intention of Congress to apply maritime principles to offshore drilling operations. It should be noted that the era of commercial exploitation of offshore minerals had not yet commenced during Congress' formulation of the Jones Act. 74 Rather,


70. 45 U.S.C. §§ 51-60 (1976). The applicable provisions of the Federal Employers Liability Acts have been incorporated by reference in the Jones Act and have been made part of maritime law. See note 61 supra, Panama R.R. v. Johnson, 264 U.S. 375 (1924).


72. Id. § 54.

73. Id. § 55.

74. The Jones Act was enacted in 1920, while the first substantial development of offshore minerals occurred in the Gulf of Mexico in 1947. AMERICAN PETROLEUM INSTITUTE, HISTORY OF PETROLEUM ENGINEERING, supra note 2, at 67.
the Jones Act was designed to promote the growth and development of the United States shipping industry. The public policy behind this legislation was best expressed by Justice Story. Commenting on the plight of maritime workers, he reasoned:

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. Every act of legislation which secures their health, increases their comfort, and administers to their infirmities, binds them more strongly to their country. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw.

Moreover, the Jones Act was tailored to meet the needs of a particular sector of the labor force: sailors. With this purpose in mind the courts have been liberal in the application of the benefits provided by the Jones Act. As emphasized by the Supreme Court in *The Arizona v. Anelich:* "The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." However, due to this liberal stance the courts have extended the Jones Act in a manner never intended by its proponents.

Perhaps the most persuasive evidence that the Jones Act was designed solely to remedy the neglect of ocean-going sailors may be found in the Senate hearings. As stated by Senator Vardaman, one of the bill's supporters:

The prominent feature, the chief purpose, is to ameliorate the condition of that class of American citizens whose inhuman

75. 52 CONG. REC. 904 (1915).
77. See note 80 infra and accompanying text.
78. 298 U.S. 110 (1936).
79. Id. at 123.
80. Since the question of seaman status is essentially one of fact for jury resolution, marine laborers of all descriptions have sought recovery as seamen, and juries have responded sympathetically by enlarging the class of Jones Act seamen. See Noble Drilling Corp. v. Smith, 412 F.2d 952 (5th Cir.), cert. denied, 396 U.S. 906 (1969) (mud pumper); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957) (handyman); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953) (common laborer).
treatment . . . has become a national disgrace . . . Not only is this legislation designed to improve the condition of the sailor, but when this . . . bill [is] enacted into law the effect will be felt throughout the civilized world.81

Although it appears quite clear that Congress never intended the Jones Act to be applied to offshore petroleum workers, the courts have stretched the ambit of the term "seaman" to include workers assigned to movable rigs.82 In so doing, the courts have virtually ignored a class of workers as deserving of additional protection: the fixed platform worker.

III. THE EVOLUTION OF THE JONES ACT "SEAMAN"

A. The Development of the Robison Criteria

With the emergence of the offshore oil industry, courts confronted the dilemma of ascertaining the applicability of the Jones Act to this novel industry. Predictably, absent Congressional guidance, the courts were divided as to the status of offshore workers. This judicial controversy was finally settled by the Supreme Court in Gianfala v. Texas Co.83 The employee in that case was a member of a drilling crew who slept at a Texas Company oil field camp and performed his duties aboard a submersible drilling barge. He was killed while unloading drilling pipe onto a barge. The defendant contended that the drilling barge was not a vessel and that the decedent was an oil field employee whose duties were not primarily in aid of navigation.84 The trial court held that the

81. 52 CONG. REC. 4808 (1915). Senator Vardaman went on to state the intended effect of the bill:
First, [to bring about] safety at sea, the protection of the life and providing comfort for the people who patronize ships, and make the business profitable to operate them. Second, to protect from the exactions of conscienceless greed the men who do the work, who operate the ships, and give them larger liberty and make the vocation more attractive to self-respecting men; to elevate the standard of manhood, and in that way improve the efficiency of the men . . . .

Id.

82. Gianfala v. Texas Co., 350 U.S. 879 (1955); Hicks v. Ocean Drilling & Exploration Co., 512 F.2d 817 (5th Cir. 1975); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).


84. The requirement that a Jones Act seaman participate in the navigation of the vessel was liberally interpreted in Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941). There the court reasoned "that one who does any sort of work aboard a ship in navigation is a
decedent's status was a question of fact for the jury, and a verdict was rendered for the plaintiff. The Fifth Circuit reversed, stating as a matter of law that the decedent was not aboard a vessel primarily to aid in navigation. The Supreme Court, in a brief per curiam opinion which cited four cases, reversed and remanded the case to the district court with instructions to reinstate its judgment. Thus, the Supreme Court provided the impetus to convert offshore oil field workers into seamen.

Nevertheless, the per curiam opinion of Gianfala left some lingering doubts as to coverage under the Jones Act, prompting the Court to clarify its position in Senko v. LaCrosse Dredging Corp. In this case, a handyman assigned to a dredge anchored to shore was injured ashore while putting a signal lantern from the dredge into a shed. After the lower court had set aside a jury verdict in the plaintiff's favor for lack of evidence supporting a finding that he was a member of the crew, the Supreme Court reversed. The Court reasoned that although Senko had no duties connected with

'seaman' within the meaning of the Jones Act." Id. at 995. Thus, the court pointed out that even a cook or engineer is aiding in navigation. Id.

85. The court noted that when the accident took place, the vessel was not in navigation and that the decedent was not aboard in the aid of navigation. Rather, "he was aboard it, not as a member of a ship's crew but as a member of a drilling crew . . . and . . . was certainly not a 'seaman in being.'" Gianfala, 222 F.2d at 387.

86. 350 U.S. 879 (1955). Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953) (court established three requirements for determination of seaman status: (i) that the vessel be in navigation; (ii) that there be a more or less permanent connection with the vessel; and (iii) that the worker be aboard primarily to aid in navigation. The court elaborated on the third requirement stating that it is not to be confined to those who "'hand, reef and steer,' but applies to all whose duties contribute to the operation and welfare of the vessel." Id. at 388); Summerlin v. Massman Constr. Co., 199 F.2d 715 (4th Cir. 1952) (holding that a fireman on a floating derrick is a Jones Act seaman when on a vessel engaged in navigation); Cahagan Constr. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948) (court held a deckhand on a dredge was a seaman reasoning that "crew includes all those who contribute to the labors about the operation and welfare of the ship . . . and . . . each case presents a different situation . . . with . . . no single factor controlling." Id. at 305); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) (holding that whether a person is a member of the crew is a question of fact).

87. The decision was initially confusing as the Court provided little rationale for its holding.


89. 7 Ill. App. 2d 307, 129 N.E. 2d 454 (1955).

90. 352 U.S. 370 (1957).
the movement of the dredge,\textsuperscript{91} there was sufficient evidence to support a jury determination that he was a seaman.\textsuperscript{92} On reexamining the holding of \textit{Basset} the Court reasoned:

Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.\textsuperscript{93}

Thus, the Court reiterated that such cases present a question of fact which is subject to the legitimate discretion of the jury.

Reviewing the Supreme Court and other relevant federal court decisions,\textsuperscript{94} the Fifth Circuit in \textit{Offshore Co. v. Robison}\textsuperscript{95} attempted to formulate a workable test for determining when there is an evidentiary basis for a Jones Act case to go to the jury. Robison was injured while working as a roughneck\textsuperscript{96} aboard a submersible drilling rig\textsuperscript{97} resting on the sea floor. The court reasoned that it would prove impossible to fix unvarying meanings to the terms

\begin{footnotesize}
\textsuperscript{91} More precisely, Senko worked an eight-hour shift, ran errands on shore, was paid by the hour, lived at home, drove back and forth each day, and brought his own meals to work. \textit{Id.} at 376 (Harlan J., dissenting).
\textsuperscript{92} \textit{Id.} at 372-74. In a vigorous dissent Justice Harlan distinguished the holding of \textit{Basset} stating:

I do not . . . contend that men such as ship's cooks cannot be members of a crew merely because their actual jobs have nothing to do with making the vessel move. The vital distinction is that such men do contribute to the functioning of the vessel \textit{as a vessel}—as a means of transport on water. Not so Senko, whose duties had absolutely nothing to do with the dredge in its aspects \textit{as a vessel}.

\textit{Id.} at 377 n.5.
\textsuperscript{93} \textit{Id.} at 374.

\textsuperscript{94} Braen v. Pfeifer Oil Transp. Co., Inc. 361 U.S. 129 (1959), holding that the test of Jones Act remedy is whether the seaman was injured by negligence in the course of his employment; Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958) holding that the status of a pile driver drowned while assisting in the erection of a radar tower 110 miles from shore was a question for the determination of the jury; Perez v. Marine Transp. Lines, Inc., 160 F. Supp. 853 (E.D. La. 1958) stating that the real test of coverage under the Jones Act is whether the claimant is more or less permanently employed aboard the vessel by her owner in a capacity which contributes to the accomplishment of her mission.

\textsuperscript{95} 266 F.2d 769 (5th Cir. 1959).

\textsuperscript{96} The term "roughneck" is defined as a "driller's helper, a laborer in a drilling crew who does the hard general work in the rigging and drilling of a well." \textit{Id.} at 771.

\textsuperscript{97} However, the court did recognize that under the Jones Act a vessel may mean something more than a means of transport on water. \textit{Id.} at 776.
\end{footnotesize}
seaman, vessel and member of the crew. Rather, the court reasoned that there is an evidentiary basis for a Jones Act case to go to the jury:

1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and 2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

This landmark decision established broad guidelines to be used by courts to determine if a particular case falls within the ambit of the Jones Act. While going to great lengths to rationalize this holding, the court nevertheless broadened the originally narrow application of the Jones Act. In so doing, the court had opened the gates to a plethora of litigation involving offshore workers.

B. The Interpretation and Application of the Robison Criteria

The general criteria enunciated in Robison underwent significant refinement and development in subsequent cases. Early on, courts addressed the appropriateness of directed verdicts on the status of an offshore worker. In Thibodeaux v. J. Ray McDermott & Co., the court affirmed the use of a directed verdict in such cases, noting that it "is the mistaken belief of so many that merely because the status of who is a seaman may be a question of fact . . . perforce make[s] every case one of fact for jury deci-

98. See note 16 supra.
99. 266 F.2d at 779.
100. Id. (footnote omitted).
101. "The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico." Id. at 780.
102. See notes 72-79 supra and accompanying text.
103. See notes 15 & 39 supra.
104. See notes 104-62 and accompanying text.
105. See Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966); Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960).
106. 276 F.2d 42 (5th Cir. 1960).
Thus, while determination of seaman status may sometimes be a question for the jury, a court may hold that there is no reasonable evidentiary basis to support a jury finding of seaman status under the Jones Act.

The utilization of the Robison criteria enabled a variety of offshore workers permanently assigned to diverse mobile watercraft to recover under the provisions of the Jones Act. However, it soon became evident that application of the Robison criteria necessarily precluded the Jones Act coverage from any offshore worker assigned to a fixed drilling platform. The courts have reasoned that under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, offshore workers permanently assigned to fixed platforms were relegated to workmen's compensation benefits. While the alternative Jones Act-workmen's com-

107. Id. at 46. See, e.g., Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Adams v. Kelly Drilling Co., 273 F.2d 887 (5th Cir.), cert. denied, 364 U.S. 845 (1960).
110. The permanency requirement has been interpreted as denying seaman's status to those who come aboard a vessel for an isolated piece of work, "not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time." Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 631 (E.D. La. 1975).
111. The meaning of the term vessel has been clarified such that an incompletely constructed vessel does not satisfy the requirements of the Robison criteria. Hollister v. Luke Constr. Co., 517 F.2d 920 (5th Cir. 1975). The court reasoned that "[f]or there to be a seaman [for the purposes of the Jones Act], there must be a ship. And an incompletely constructed vessel not yet delivered by the builder is not such a ship." Id. at 921, quoting Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (5th Cir. 1971).
113. Sirmons v. Baxter Drilling, Inc., 239 F. Supp. 348 (W.D. La. 1965). A derrickman on platform installed on eight piles driven into the sea floor was held not to be a seaman. Id. at 350.
Compensation recovery scheme may be operative in those instances where one vessel or structure is involved, it proves unwieldy where the drilling operation is assisted by a support vessel. In *Noble Drilling Corp. v. Smith*, the employee was hired to work on a fixed platform but was subsequently assigned to operate a mud pump which was permanently affixed to the deck of a tender ship. He ate and slept on the tender and spent a substantial percentage of his working time on the tender. He was injured while aboard the platform but the court nevertheless found him to be a seaman.

In contrast, in *Keener v. Transworld Drilling Co.*, a worker employed on a fixed drilling platform who ate, slept and spent his off-duty time on a tender ship was denied Jones Act coverage. While the majority of Keener's work was performed on the drilling platform, the court acknowledged the fact that during one hitch he spent four days chipping paint and painting on board the tender. Nevertheless, the court denied seaman status, reasoning that "it must be shown that he performed a significant part of his work aboard the ship with at least some degree of regularity and continuity." The inherent defect in this reasoning lies in the fact that the court, in stressing fine line distinctions, fails to pay sufficient attention to the reality of the situation. Keener was stationed a substantial distance from shore so that daily commuting was impractical.

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118. The court reasoned that Jones Act recovery is predicated on the injury taking place in the course of employment and that the exact place of injury is not controlling. *Id.* at 957. The court went on to hold that the fact Smith did not possess seaman's papers was immaterial. Thus, "since a man does not become a seaman by papers alone, he should not be denied his statutory status as a seaman merely because he is not a paper seaman." *Id.*
119. 468 F.2d 729 (5th Cir. 1972).
120. *Id.* at 731-32. For further examples of such a holding, see Dugas v. Pelican Constr. Co., 481 F.2d 773 (5th Cir. 1973); Ross v. Mobil Oil Corp., 474 F.2d 989 (5th Cir.), *cert. denied*, 414 U.S. 1012 (1973).
121. Keener's job required him to work in hitches of seven days followed by seven days off. 468 F.2d 729, 730 (5th Cir. 1972).
122. These four days comprised approximately twenty to twenty-five percent of the total period he had worked for the drilling company. *Id.* at 731.
123. *Id.* at 732. See Doucet v. Wheless Drilling Co., 467 F.2d 336 (5th Cir. 1972), examining seaman status where claimant was temporarily not at sea. The court reasoned that "[p]laintiff's status as a seaman, by reason of being an offshore oil worker on a submersible drilling barge, was not lost because he was on temporary assignment in his employer's service to do repair work on the vessel with the intent of returning to an offshore seaman's work." *Id.* at 338-39.
Therefore, he was totally dependent on the tender for all his basic needs just as Smith. Moreover, Smith and Keener were exposed to the identical maritime risks. Keener confronted these maritime risks twenty-four hours per day for seven days at a time, a longer period than many other Jones Act seamen must endure.\textsuperscript{124}

This inequitable treatment of the fixed platform worker is even more vividly illustrated in Owens v. Diamond M Drilling Co.\textsuperscript{125} Owens was employed as a member of a drilling crew on a fixed platform and was stationed aboard a tender vessel where he lived, ate and slept. The tender was not moored to the fixed platform but was secured with numerous anchors and access was available by a device known as a "widowmaker"\textsuperscript{126} which was let down from the drilling platform onto the deck of the tender. Owens' primary duties were performed on the platform but he was occasionally given miscellaneous duties on the tender and often left the platform to fetch tools and supplies situated on the tender.\textsuperscript{127} One of his miscellaneous tasks was to aid infrequently in unloading supplies from work boats and lifting supplies from the tender to the platform. The court denied Owens seaman status on the basis of the holding in Keener.\textsuperscript{128}

Once again the court refused to recognize the gravity of the risk to which this worker is exposed.\textsuperscript{129} With frequent transfers between tender and platform, Owens encountered the possibility of rough seas, a uniquely marine hazard. It was no mistake that the ramp connecting tender and platform was referred to by the disquieting term "widowmaker," as it emphasizes the danger involved in moving from ship to platform. Nor is an argument equating the

\begin{itemize}
\item \textsuperscript{124} See, e.g., Weiss v. Central R.R., 235 F.2d 309 (2d Cir. 1956). The court held that an employee on a ferryboat who slept and ate most of his meals ashore, working an eight hour day, was a seaman for purposes of the Jones Act. \textit{Id.} at 312.
\item \textsuperscript{125} 487 F.2d 74 (5th Cir. 1973).
\item \textsuperscript{126} The term "widowmaker" refers to the ramp which runs from the drilling platform to the deck of a tender vessel. This ramp is utilized by workers to transfer supplies to and from the tender vessel, as well as providing the workers access to the tender vessel for meals, sleep and recreation. \textit{Id.} at 75.
\item \textsuperscript{127} The Supreme Court has held that an employer who hires an individual to work on the water thereby exposing him to the same hazards of marine service as those shared by all aboard may not be permitted, merely by restricting his duties, to limit his liability to such employee, in the event of disability or death alleged to have been caused by the negligence of the employer, to the extent prescribed by the Longshoremen's Act. Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 388 (6th Cir.), \textit{cert. denied}, 346 U.S. 817 (1953).
\item \textsuperscript{128} See note 119 supra and accompanying text.
\item \textsuperscript{129} See Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980).
\end{itemize}
dangers of unloading vessels at sea with the dangers of unloading vessels at a pier persuasive.\(^{130}\) A longshoreman removes cargo from a ship only after it is docked, substantially reducing the possibility of an accident. The irony of the *Owens* holding is that workers assigned to the tender who are never required to board the platform are exposed to substantially fewer marine and drilling hazards; however, they are afforded substantially greater protection than fixed platform workers in the event of an accident.\(^{131}\)

The view that fixed drilling platforms are akin to wharves and piers, and thus outside the realm of maritime principles, was advanced in *Rodrigue* v. *Aetna Casualty & Surety Co.*\(^{132}\) However, there are significant differences between a wharf and a fixed drilling platform. Primarily, a wharf is constructed in such fashion as to be fixed to the adjacent shore as well as the sea floor. Fixed platforms, on the other hand, are attached only to the sea floor and are usually constructed at a substantial distance from shore. Hence, offshore laborers are exposed to a greater likelihood of marine related casualties while longshoremen essentially are exposed to dangers incident to the loading and unloading of cargo. Furthermore, once an accident does occur on a fixed platform the seriousness is compounded by the absence of adequate aid, a factor totally absent in the case of the longshoreman. Thus, the worker on a fixed platform is deserving of more protection than the longshoreworker.

The logical basis for this conclusion was recognized by the court in *Hicks* v. *Ocean Drilling & Exploration Co.*\(^{133}\) In this case members of a labor crew for a submersible oil storage facility were injured when the facility, due to removal of ballast, shook, tilted and refloated on its side. Rejecting appellant's contention that the facility was akin to a drydock\(^{134}\) or wharf the court noted that:

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130. *But see* Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108, 1109 (5th Cir. 1980) (holding that an offshore worker unloading tender vessels onto the drilling platform was performing "classic longshoremen duties").

131. See notes 12-20 *supra* and accompanying text.

132. 395 U.S. 352 (1969). The Court reasoned that "the legislative history [of the Seas Act] shows that accidents [which occur on fixed platforms are] ... no more under maritime jurisdiction than accidents on a wharf located above navigable waters, ..." *Id.* at 366.

133. 512 F.2d 817 (5th Cir. 1975).

134. *See, e.g.*, Atkins v. Greenville Shipbuilding Corp., 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), where it was held that mere floatation is not sufficient to make a structure a vessel. Rather, the purpose for which a facility is constructed and the business in which it is engaged are the controlling considerations in determining whether or not the facility is a vessel. Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir.), *cert.*
"[t]he Round Barge was not attached to the shore and had full exposure to the risks and hazards of the sea." The same can be said of the fixed platform. Thus, laborers on such platforms are similarly situated to their mobile rig counterparts and as such should be accorded equivalent protection in the case of casualty or death.

Recent court decisions have rigidly adhered to a strict interpretation and application of the Robison criteria. In Kirk v. Land & Marine Applicators, Inc., an offshore employee who performed duties as a sandblaster and painter on a fixed platform was denied seaman status. Kirk ate and slept on the tender vessel which carried some of the equipment he used in his platform sandblasting work. He also performed various chores on the vessel, including kitchen sweeping, cleaning and unloading the vessel in port. The court reasoned that the unloading of the sandblasting equipment from the tender onto the platform in the morning and the cleaning of the equipment at the end of the work day were incidental to his duties on the fixed platform. Further, the court held that the minor chores and unloading of the vessel were equally fortuitous in nature, having been occasioned by bad weather. The court also noted that defendant maintained four vessels to support platform sandblasting work and that painters and sandblasters were not ordinarily assigned to any specific vessel. Thus, the court reasoned that Kirk could not establish a permanent connection with one vessel.

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denied, 414 U.S. 868 (1973). See also Blanchard v. Engine & Gas Compressor Servs., Inc., 575 F.2d 1140 (5th Cir. 1978) (holding that a submersible barge is not a vessel as the owner did not intend to move this structure on a regular basis, as is done with submersible drilling rigs); Leonard v. Exxon Corp., 581 F.2d 522 (5th Cir. 1978).

135. 512 F.2d 817, 823 (5th Cir. 1975).

136. Nevertheless, it has been held that Congress did not create an arbitrary or unreasonable classification by limiting workers assigned to stationary drilling platforms on the Outer Continental Shelf to benefits under the Longshoreman’s Act while allowing employees assigned to vessels the more liberal and varied benefits of the law of admiralty. Smith v. Falcon Seaboard, Inc., 463 F.2d 206 (5th Cir. 1972).


138. 555 F.2d 481 (5th Cir. 1977).

139. Id. at 482-83.

140. Id. at 483.

141. Id.

142. Id.
The reasoning in *Kirk* is questionable for several reasons. First, as the court pointed out in *Porche v. Gulf Mississippi Marine Corp.*, \(^{143}\) "[t]he requirement of a relatively permanent tie to a vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work only." \(^{144}\) Kirk therefore fulfilled this permanency requirement as he was assigned to perform sandblasting and painting duties for at least a fourteen day shift.\(^{145}\) Second, the rationale in *Kirk* is wholly inconsistent with the court's prior finding in *Davis v. Hill Engineering, Inc.*\(^ {146}\) Davis was employed as a welder's helper to assist in the fabrication of pipe on a material barge. The initial phase of the process was conducted on shore, with the fabricated pipe being welded on the barge for transportation to a fixed platform where it would then be installed. On the twenty-four hour trip to the fixed platform Davis performed some chores, including the washing down of the barge in addition to his welding duties. The barge had no living quarters or crew but rather was towed to the installation point. Temporary sleeping quarters were placed on the deck of the barge for the employees who were to install the fabricated pipe at the platform. Davis was injured when he slipped on the deck of the barge while assisting in sending a cutting torch up to the platform. The next day Davis terminated his employment over a wage dispute, thus limiting the period he worked aboard the barge to two days.\(^ {147}\) The court granted Davis seaman's status, reasoning that he met the permanency requirements as he expected to stay on the barge twenty to thirty days until the installation job was completed.\(^ {148}\)

In *Kirk*, the court distinguished the *Davis* holding, noting that Davis' connection with his vessel was more substantial than was Kirk's. The court pointed out that Davis expected to remain quartered on the vessel for twenty to thirty days while Kirk was to be quartered on his vessel for no longer than fourteen days at a time.\(^ {149}\) Further, the court pointed out that there was the possibility that Kirk would eventually be assigned housing on the plat-
The problem with the court’s distinction is that it focuses upon events that never occurred. In actuality, Kirk had been performing duties at sea for over one week while Davis’ tenure was less than two days. Therefore, Kirk was subject to maritime risks some three to four times longer than Davis yet he was denied Jones Act coverage.

Perhaps more disturbing is the court’s continuing reluctance to appraise realistically the hazards confronting all offshore workers. The court failed to recognize that an offshore installation is a self-contained community in which artificial distinctions as to job assignments are unrealistic. Regardless of whether an offshore worker is assigned to a platform or a tender vessel the occupation necessitates frequent transfers from platform to vessel for equipment, food and sleep. Thus, all workers necessarily spend the greater portion of their “hitch” on the tender vessel thereby exposing all employees to the uniquely maritime hazards involving seagoing vessels. This conclusion is evidenced by the facts of In re Dearborn Marine Service, Inc.152 There an oil platform explosion and fire extended to a vessel moored to the platform killing five of twenty employees working at the platform. Whether these employees were assigned to the platform or the vessel should not be given overriding importance in the determination of their recoveries. Rather, it seems obvious that when a disaster such as this occurs at sea, all workers involved should be accorded equivalent compensation guarantees. Simply put, exposure to similar industrial and maritime risk warrants similar compensatory benefits.153

150. Id.
151. Moreover, as decided by the Fifth Circuit an employee may claim seaman status though stationed on several vessels during the course of his or her employment. Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 432 (5th Cir. 1977), rev’d on other grounds, 436 U.S. 618 (1978).
152. 499 F.2d 263 (5th Cir. 1974).
153. Unfortunately, the Fifth Circuit has yet to accept this ideal as evidenced by its recent holding in Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980). Here, a roughneck assigned to a fixed platform sustained injuries while aboard a tender vessel. In addition to his duties on the platform he occasionally performed general maintenance work aboard the tender, moved supplies to and from the drilling platform, unloaded and loaded supply boats and fixed the pumps for the drilling operation located on the tender. Longmire was injured when he slipped leaving a room where he had spent his entire shift stowing anchor chains aboard the tender as the vessel weighed anchor in preparation of a move. The court denied Longmire seaman’s status reasoning his assignment to tasks aboard a tender was irregular and fortuitous. Once again, the court fails to perceive the fact that such injury would never have occurred but for his work on the tender. Blinded by the permanency requirement articulated
One recent indication of the court's awareness of the inequity that pervades compensatory schemes for offshore workers may be found in *Landry v. Amoco Production Co.*\(^{154}\) Plaintiff was employed as a roustabout not assigned to any particular barge and her work involved both land and water-related duties. At the time of the accident she was removing debris from a gas injection station situated on pilings and surrounded by an artificial island. The court found that Landry met the *Robison* criteria in light of the recent trend toward expanding the reach of seaman status.\(^{155}\) The novel aspect of this case lies in the fact that Landry was injured while jumping from one barge to another while they were secured to a land based station. The court dismissed respondent's claim that such barges were no more than floating drydocks emphasizing that the site could be *reached by boat only*.\(^{156}\) Does this rationale foreshadow the eventual elimination of the artificial distinctions between platform and mobile rig workers? All offshore operations necessarily involve transportation of workers to and from shore by boat or helicopter. Thus, an expansive reading of *Landry* could furnish the impetus for abandoning or radically altering the *Robison* criteria.

### IV. A PROPOSED APPROACH

The existing compensatory scheme is plagued by illusory distinctions and inequitable principles. Rather than persist in utilizing a seaman versus longshoreman's distinction, substantially greater benefit could be derived from the implementation of a comprehensive workmen's compensation program designed to meet the novel needs of the offshore laborer. Mindful of the maritime risks inherent in all offshore operations,\(^{157}\) the program should attempt to provide substantially more protection than existing state and federal workmen's compensation schemes but less than that of the Jones Act. In this manner a significant amount of needless litigation

\(^{154}\) Id. at 1073.

\(^{155}\) Id. at 1073.

\(^{156}\) Id. at 1073.

\(^{157}\) In fiscal year 1974 there were a total of 5,161 maritime personal injury cases filed in the district courts throughout the federal system. Administrative Office of U.S. Courts Annual Report A-17 (1974).
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would be circumvented, thereby promoting prompt payment of benefits to the injured employee without excessive cost and pro-
longed court disputes.

The chief risk in drafting such legislation is that recoveries would be unrealistically large, thus jeopardizing the economic viability of the entire offshore industry. Those formulating the scheme should be cognizant of the tremendous overhead costs inherent in offshore drilling. The employer would also derive significant advantages from properly drawn legislation. Primarily, the employer would be able to estimate the cost of the operation more accurately and allocate funds for industrial accidents accordingly. No longer would the employer be subject to capricious jury findings, which threaten the feasibility of such a fragile economic venture.

Such a statutory scheme is neither impractical nor without prece-
dent. The Oceanographic Research Vessels Act,158 excludes scient-
ific personnel aboard oceanographic research vessels from the clas-
sification of seamen thereby exempting the employer from liability
from maritime accidents.159 The purpose of the Act was “to en-
courage and facilitate oceanographic research by removing certain impediments which have been hampering the operation of research vessels.”160 In a similar manner Congress could enact a statute to promote the exploration and exploitation of offshore resources. In sum, a legislative scheme focused upon the equitable and efficient payment of compensation benefits is both prudent and in the na-
tional interest.

CONCLUSION

The unforeseen boom in offshore oil exploration manifested itself in a legal environment ill-prepared to safeguard the health and welfare of offshore workers. Existing maritime concepts founded upon conventional ideas provided an unsuitable legal foundation for this novel industry. Prompted by legislative inertia, however, the courts assumed the burden of administering maritime remedies to industrial accidents at sea. While some believe that the absence of legislative constraints has enabled offshore law to develop natu-

159. Id. § 443.
161. Offshore Co. v. Robison, 266 F.2d 769, 780 (5th Cir. 1959).
shore workers, have been disregarded. The inherent shortcomings in the application of the Jones Act to offshore workers cannot be rectified by an expansive reading of the recovery provisions, as this would only tend to further expand the act to situations it was not intended to cover. Rather, a comprehensive legislative scheme, designed to establish just and equitable recoveries for injured offshore workers and encourage the development of offshore resources, should be initiated.162

William W. Meier III

162. In 1897 Justice Holmes admonished the courts:
It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.
Holmes, The Path of Law, 10 Harv. L. Rev. 457, 469 (1897).