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Maritime Products Liability

By D. Thomas McCune*

Introduction

SPECTACULAR growth, abandonment of long-established precepts, constant critical attention from legal scholars and practitioners—all mark the field of products liability as a place where the action is. The development of shoreside products liability has been extensively documented, analyzed, digested, praised and lamented. Its maritime counterpart has received but scant attention. Some may be surprised to learn that a field of maritime products liability exists, while others may question whether it possesses features sufficiently distinctive from its terrene companion to warrant separate attention. This article will demonstrate that such a field does indeed exist and that the problems present therein are often of a substantially different nature than those which arise in the nonmaritime products liability context.

At the outset we need to know what is meant by “products liability.” “The phrase originated in the insurance offices, where it was considered useful to characterize the type of hazard against which manufacturers and distributors of commercial products were demanding liability insurance policies.” Whatever may be the origins of the phrase it is clear that more fact situations now are comprehended by the term than simply those associated with products as that word is understood in its ordinary sense. On the other hand, since “virtually

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1 E.g., PROSSER, TORTS §§ 98-99 (3d ed. 1964); Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119 (1958). Professor Gillam cites over one hundred books, articles and case notes dealing with products liability. Id. at 128-30. The Index to Legal Periodicals, 1961-1966, lists more than 250 publications on the subject.


3 E.g., FRIEDER, PRODUCTS LIABILITY (1966) (3 vols.).

4 E.g., Ashe, So You're Going to Try a Products Liability Case, 13 Hast. L.J. 66 (1961).


all of the activities of mankind involve the use of some product, nearly all losses in the nature of physical damage to persons or things, and a great deal of the economic losses, are factually caused by characteristics or conditions of products, or at least occur during the use of products." 9 While a definition limited to products alone is too narrow, one causally oriented so as to include "nearly all losses in the nature of physical damage to persons or things" is clearly too broad. A middle course is thus indicated. As used here the phrase means the legal liability in damages of those who deal in products or services which when defectively made or rendered cause injury to the person or property of those who use or are otherwise affected by them.10

There is no consensus concerning the proper conceptual basis for the imposition of such liability 11 On the contrary, there is a great deal of academic and judicial ferment about the matter.12 Generally, however, tort concepts of negligence, fraud and deceit, and strict liability are employed, together with contract theories of breach of express or implied warranties.13 Profound problems involved in the application of these different theories to particular factual settings are sometimes overlooked or more often are camouflaged by deft strokes of the judicial pen, and the lawyer’s gobbledygook may become the judge’s jabberwock.14 These problems are compounded when tort and contract concepts are mixed and hybrid theories result.15 The field of maritime products liability has not escaped such difficulties. Additionally, it is also subject to certain unique problems. We shall begin our survey with them.

The Meaning of “Maritime”

Jurisdictional Aspects

Earlier the phrase “products liability” was defined broadly enough to encompass a wide range of business enterprise activity Exam- 


12 Ibid.

13 See Metzger, Automobiles and Heavy Equipment, 1984 U. Ill. L.F 725.

14 "Very few writers and even fewer courts have been able to identify with any clarity the distinctions between warranty and negligence, contract and tort, and strict liability or fault as the basis of liability." Id. at 727.

15 In McKee v. Brunswick Corp., 354 F.2d 577, 1966 A.M.C. 344 (7th Cir. 1965), the retailer of a pleasure yacht was held to have breached an implied warranty of fitness for a particular purpose by negligently selling a boat in an "imminently and inherently dangerous" condition. Id. at 579, 1966 A.M.C. at 346.
nation of maritime products liability requires at the outset a brief explanation of the criteria employed in, and the significance of, designating a particular cause of action "maritime."

The Constitution extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." Congressional implementation of the constitutional grant began with the Judiciary Act of 1789. In the present statutory formulation the United States district courts "have original jurisdiction, exclusive of the courts of the States, of any civil case of admiralty or maritime jurisdiction." When a cause of action is brought in admiralty, the court must make special inquiry into the nature of the action and determine affirmatively that it is maritime. If it is not, no jurisdiction exists.

"Two grand divisions have been made in the jurisprudence by which the connotations of the words 'admiralty' and 'maritime' have been established. They are 'tort' jurisdiction and 'contract' jurisdiction." Generally, a tort is maritime when it occurs in any body of water navigable in interstate or foreign commerce, and a contract is maritime when it relates "to the navigation, business or commerce of the sea," regardless of where it was made or executed. Characterization of a cause of action as maritime means that a federal forum is

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16 U.S. CONST. art. III, § 2. Little is known about the origin of this clause. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 CORNELL L.Q. 460 (1925).
17 1 Stat. 76-77 (1854).
18 28 U.S.C. § 1333 (1964). The balance of the statute reads: "saving to suitors in all cases all other remedies to which they are otherwise entitled." Ibid. Basically, the saving clause means that a suitor who holds an in personam claim, which might be enforced by an action m personam in admiralty, may also bring, at his election, an ordinary civil action in a state court or in federal court on the civil side, given diversity of citizenship and the requisite jurisdictional amount. See GILMORE & BLACK, THE LAW OF ADMLRALT)' 33-36 (1957) [hereinafter cited as GILMORE & BLACK]. Section 1331 grants jurisdiction to the federal district courts "of civil actions wherein the matter in controversy exceeds $10,000 , and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1964). In Romero v. International Terminal Operating Co., 358 U.S. 354, 1959 A.M.C. 832 (1959), the Supreme Court held (5-4) that a cause of action based on the general maritime law does not arise, in the jurisdictional sense, under the Constitution or laws of the United States.
19 The maritime designation also has significance for an ordinary civil court (state or federal) because the law to be applied may turn on whether or not the action is maritime. See discussion under "Choice of Law Aspects," infra p. 839.
21 Robinson, "Contract" Jurisdiction in Admiralty, 10 Tul. L. Rev. 359, 360 (1936).
available to the plaintiff\textsuperscript{24} without regard to the citizenship of the parties or the amount in controversy\textsuperscript{25} and may also mean that rules of substantive law are applicable which are different from those which would apply if his action were nonmaritime.

The use of spatial and conceptual criteria as a means for determining the maritime quality of, respectively, tort and contract actions has resulted in some anomalous maritime or nonmaritime designations. For example, despite an early Supreme Court dictum that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance,"\textsuperscript{26} there remained some thought that a maritime nexus other than the mere occurrence of an injury on a jurisdictionally appropriate body of water was required for a tort action to be justiciable in admiralty\textsuperscript{27} Doubts to the contrary notwithstanding, the quoted dictum has been taken quite literally by the lower federal courts as reflected by the holdings in the recent series of admiralty cases involving aircraft.\textsuperscript{28} \textit{Weinstein v. Eastern Airlines}\textsuperscript{29} is representative. There recovery was sought in admiralty for deaths occurring when an airliner crashed into the navigable waters of Boston Harbor shortly after take-off on a scheduled flight to Philadelphia. Named as defendants were the airline, the builder of the plane and the manufacturer of its engines. The actions were challenged by the defendants on the ground that admiralty jurisdiction was dependent not only upon the locus of the tort, but upon a finding of some other maritime connection with

\textsuperscript{24} Until recently the plaintiff in an admiralty action was called the "libelant," the defendant was the "respondent" and the complaint was called the "libel." See Sur. Cr. Adm. R. 22. On July 1, 1966, the Federal Rules of Civil Procedure became applicable to "all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." Fed. R. Civ. P. 1. These rules do not retain the old admiralty designations. The terms remain useful to distinguish an admiralty action from an action brought on the civil side of the federal court and are so used in this article.


\textsuperscript{26} The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865). The court held that a ship-to-shore tort was non-maritime, a ruling which Congress has since reversed. See Act for the Extension of Admiralty Jurisdiction, 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

\textsuperscript{27} See Campbell v. H. Hackfield & Co., 125 Fed. 696 (9th Cir. 1903); see also 1 BENEDEICT, ADMIRALTY § 127, at 351 (6th ed. 1940).


\textsuperscript{29} 316 F.2d 758, 1965 A.M.C. 2258 (3d Cir. 1963).
the alleged wrong. The court of appeals rejected this contention and held that "if the tort occurred on navigable waters nothing more is required" for the assertion of admiralty jurisdiction.\textsuperscript{30}

In contrast to the operational difficulties of an airplane, few activities are more intrinsically maritime than the building and sale of ships. Nonetheless, the contracts governing such transactions are considered nonmaritime in the jurisdictional sense and thus beyond admiralty's ken.\textsuperscript{31} On the other hand, contracts for the repair of vessels are maritime,\textsuperscript{32} as are contracts involving the furnishing of supplies,\textsuperscript{33} equipment\textsuperscript{34} or other necessities\textsuperscript{35} to a ship or boat.

In the typical products liability action both tort and contract theories are often advanced in support of the defendant's alleged liability, \textit{i.e.}, negligence and breach of warranty.\textsuperscript{36} The different bases for determining the existence of tort and contract jurisdiction in admiralty here become significant. Assuming the tort is maritime, the

\textsuperscript{30} 316 F.2d at 761, 1965 A.M.C. at 2261. (Footnote omitted.) Jurisdiction in admiralty has been held to exist for injuries occurring over navigable waters. Notaran v. Trans World Airlines, Inc., 244 F Supp. 874, 1969 A.M.C. 1384 (W.D. Pa. 1965) (passenger injured while leaving airplane restroom during flight from Pittsburgh to Rome); D'Aleman v. Pan American World Airways, 259 F.2d 493, 1959 A.M.C. 2639 (2d Cir. 1958) (passenger on New York-Puerto Rico flight died four days after unscheduled but otherwise normal landing at Norfolk; plaintiff alleged death was caused from shock induced by announcement of landing). In Davis v. Jacksonville Beach, 251 F Supp. 327, 1968 A.M.C. 1231 (M.D. Fla. 1965), admiralty jurisdiction was held to include the claim of a swimmer struck by a curl-shooting surfer. The court solemnly observed that "a surfboard operates exclusively on the high seas and navigable waters, and potentially can interfere with trade and commerce. For this reason, admiralty should develop the rules of liability relating to a surfboard's operation." \textit{Id.} at 328, 1968 A.M.C. at 1232. \textit{But see} McGuire v. City of New York, 192 F Supp. 866, 1962 A.M.C. 516 (S.D.N.Y. 1961) (no admiralty jurisdiction over claim of bather who injured hand on submerged object while swimming in water adjacent to municipal beach bordering New York Harbor).


\textsuperscript{33} Munson Line, Inc. v. Vervliet, 39 F Supp. 945, 1941 A.M.C. 959 (E.D.N.Y. 1941).

\textsuperscript{34} The Mountaineer, 286 Fed. 913, 1923 A.M.C. 993 (9th Cir. 1923).


warranty action, to the extent it is considered *ex contractu* in character, may be nonmaritime and therefore jurisdictionally defective.\textsuperscript{37} *McKee v. Brunswick Corp.*\textsuperscript{38} illustrates this problem. There the owner of a yacht and his passenger-guests were injured as the result of an explosion and fire which occurred during the course of a pleasure cruise on the navigable waters of Lake Michigan near Chicago. They commenced libels against the retailer from whom the owner had purchased the boat, as well as against her manufacturer and the maker of a coil which assertedly was the cause of the explosion. Negligence on the part of each defendant was alleged by all of the libelants. Because the simplistic locality test for tort jurisdiction was clearly satisfied the negligence actions were properly brought in admiralty, and after trial the coil maker and the boat builder were found to have been negligent. The retailer, assertedly having no duty to inspect or test, was absolved from liability based on negligence. The yacht owner had, however, in addition to his negligence count, alleged a breach of warranty by the retailer. Liability was imposed under this theory upon the ground that the yacht "in the condition delivered was imminently and inherently dangerous while it was being used for the purpose expressed" by the buyer.\textsuperscript{39} Since the warranty theory was relied on only by the boat buyer and was directed solely against the retailer this cause of action was clearly conceived as one founded on the contract for the sale of the boat. We have seen, however, that such a contract is nonmaritime,\textsuperscript{40} and the court therefore had no jurisdiction of the owner's action against the retailer to the extent it was considered contractual in nature.\textsuperscript{41}


\textsuperscript{38} 354 F.2d 577, 1966 A.M.C. 344 (7th Cir. 1965).

\textsuperscript{39} Id. at 579, 1966 A.M.C. at 346.

\textsuperscript{40} In American Car & Foundry Co. v. Brassert, 61 F.2d 162, 1932 A.M.C. 1524 (7th Cir., 1932), *aff'd*, 289 U.S. 261, 1933 A.M.C. 749 (1933), recovery was sought against a yacht builder by the vessel's purchaser for injuries resulting when an explosion occurred while the boat was being operated on Lake Michigan. The Seventh Circuit observed: "It has been repeatedly held that the manufacture of boats is not a maritime enterprise. It must be borne in mind that the gist of the action is direct negligence in construction, equipment, and inspection, a failure of duty which, so far as liability is concerned, is in no way connected with maritime enterprises."

\textsuperscript{41} 61 F.2d at 165, 1932 A.M.C. at 1529 (dictum). The problem of contract jurisdiction was thus noted, but the existence of tort jurisdiction was overlooked.

\textsuperscript{41} In the tort/contract distinction see generally PROSSER, *Torts* §§ 93-95 (3d ed. 1964).
A similar jurisdictional problem was present in *Weinstein v. Eastern Airlines, Inc.*, but did not go unnoticed. Supplementary to the negligence counts, claims involving breach of contract and of warranty were made against the defendants. The court held that "a contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance," and claims arising from them "are not justiciable in admiralty." The dismissal of these causes of action was therefore affirmed.

Had the jurisdictional issue been raised in *McKee*, the operation of the ship-sale rule would have resulted in dismissal of the contract cause of action. However, either of two alternatives could have been chosen by the court to avoid this result. On the one hand, the non-maritime classification of ship-sale contracts might have been exposed as an example of jurisprudential logomachy and the rule cast overboard to join other jurisdiction-restricting jetsam. On the other hand, the easier course might have been to dissociate the owner's breach of warranty count from the contract of sale and to characterize the action as one seeking to impose strict liability in tort independent of any liability which might have been predicated on the sales contract. Once the retailer's conduct in selling a defective boat is viewed as tortious the jurisdictional question disappears because the locality test can be applied and satisfied. This approach was adopted in *Montgomery v. Goodyear Tire & Rubber Co.*, where an action for the wrongful death of several servicemen was brought against the manufacturer of a navy dirigible which crashed into the Atlantic Ocean. The crash allegedly was caused by the leaking of gas from defective seams in the inflated bag. Breach of warranty allegations were included in the libel and were challenged on jurisdictional grounds. The court acknowledged that its contract jurisdiction was doubtful be-

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42 316 F.2d 758, 1965 A.M.C. 2258 (3d Cir. 1963).
43 316 F.2d at 766, 1965 A.M.C. at 2270.
47 For example, the rule established in The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825), that admiralty jurisdiction extends only to waters within the ebb and flow of the tide was overruled in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851), and the rule that ship-to-shore torts are nonmaritime, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), was abolished by Congress, § 62 Stat. 496 (1948), 46 U.S.C. § 740 (1984).
49 The manufacturer of an allegedly defective warning device was also named as a defendant. *Ibid.*
cause of the nonmaritime nature of the contract for the construction of the dirigible, but noted that "the recent trend in personal injury and death cases based on warranty has been to treat the action as one in the nature of tort, ignoring contract considerations." Naturally, "if considered tort, admiralty clearly has jurisdiction." Something like this approach was employed in McKee to overcome a vaguely analogous problem. At the conclusion of the trial the district court refused to permit the injured passengers to amend their libel to allege that the retailer's "warranty" extended to them as well as the boat owner. Noting that the Illinois Supreme Court in Suvada v. White Motor Co. had recently decided "that product liability for a defective product sounds in tort," the court of appeals held "that the seller also is liable to all injured by the defective product." Accordingly, the judgment in favor of the retailer and against the passengers was reversed, with directions to enter judgment in their favor. The judgment in favor of the owner and against the retailer was affirmed because, although "this judgment was on implied warranty theory, we see no necessity of reversing to substitute product liability theory since there would be no need of change of proof for the latter." Solution of the jurisdictional problem in McKee would have required no more subtlety in approach than that employed in disposing of the pleading problem.

McKee illustrates a jurisdictional dilemma confronting the plaintiff in prosecuting an admiralty products liability action. However, he is not alone in this respect. The defendant also may be confronted with an analogous problem if the injured plaintiff names in his action only one of two or more potential defendants and the one selected thereafter seeks to shift liability to a third party. In Reichert Towing
Lane, Inc. v. Long Island Mach. & Marine Constr Co. the respondent had contracted to install a cylinder in libelant’s tugboat within a specified time. A contract for the cylinder’s manufacture was made by the respondent with another concern. Installation was not accomplished until after the expiration of the agreed time, and the cylinder burst soon thereafter. The frustrated tugboat owner brought an action in admiralty which named only the installer as a respondent. The manufacturer of the cylinder could also have been nominated by the libelant on the theory that it might have been negligent in the fabrication of the cylinder. The possibility of shifting liability to another was not lost on the installer, and it attempted to bring in the manufacturer as a third party respondent, alleging that the latter had impliedly warranted the cylinder to be nondefective. The court blocked this attempt, holding that the installer’s contract with the manufacturer was nonmaritime and that the breach of warranty action was not within the court’s admiralty jurisdiction. The cross-action was therefore dismissed, and the lone respondent left to seek relief in another forum. The inefficiency of requiring two separate actions is apparent, but in view of the special nature of admiralty’s jurisdiction such a result is probably unavoidable.

Choice of Law Aspects

Given the existence of a maritime tort or the breach of a maritime contract the federal admiralty court becomes an available forum. Since the jurisdictional grant is not exclusive the maritime pre-

56 287 Fed. 269 (E.D.N.Y. 1922).
57 Assuming, of course, that the customary elements of a maritime tort were present. Today a breach of warranty count would probably be included, but in 1922 the appearance of such an allegation would have been unlikely.
59 Under the new federal rules, “when a plaintiff asserts an admiralty or maritime claim . . . the defendant as a third-party plaintiff, may bring in a third-party defendant who may be liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.” Fed. R. Civ. P. 14(c). From a practical standpoint the problem in Rechert has thus been largely alleviated, except where the third-party plaintiff attempts to assert an in rem claim, in which case admiralty jurisdiction must be shown. See Fed. R. Civ. P. 14(a). Where an admiralty court has obtained jurisdiction it will not, except in a case for limitation of liability, dispose of nonmaritime matters for the purpose of doing complete justice after the manner of a court in equity. American Hawaiian Ventures, Inc. v. M. V J. Latuhanary, 257 F Supp. 622, 1966 A.M.C. 1363 (D.N.J. 1966).
61 See text at note 18 supra.
fix does not preclude, as an alternative, the bringing of a diversity action in a federal court or an ordinary civil action in a state court, and it is of course possible that all three forums may be available. Selection of the source of the substantive law to be applied is a task which must be faced sooner or later by each of these forums once their individual jurisdictional requirements have been satisfied. For present purposes a brief sketch will provide the perspective required to achieve meaningful focus in the context now under review.

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted." This law consists of two parts. One is the corpus of traditional rules and concepts governing maritime matters adopted from the European authorities and subsequently adapted to fit the needs of this country. Search for an analogy need go only as far as the American common law, rooted in English history but developed in the courts of the individual states. The second part consists of acts of Congress altering and supplementing the maritime law. If a maritime rule of law exists (judge-made or statutory) which is applicable to an issue arising in a maritime action, it must be applied regardless of the forum where the action is being litigated. If there is no applicable maritime rule, the court must apply state law or fashion a new rule of maritime law.

"In the field of maritime contracts as in maritime torts, the National Government has left much regulatory power in the states." Criteria for exercise of the choice between creation of new law and abdication in favor of existing state law are vague. "[T]he process is one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern." It is

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62 The Lottawana, 88 U.S. (21 Wall.) 558, 574 (1874).
63 Id. at 574-76. To Mr. Justice Holmes, himself an old soldier and not a man of the sea, the notion that there existed a comprehensive body of maritime law was so much bilgewater: "The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." Southern Pac. Co. v. Jensen, 244 U.S. 205, 220 (1916) (dissenting opinion).
65 Garrett v. Moore-McCormack Co., 317 U.S. 239, 1942 A.M.C. 1645 (1942) (state rule that burden is on plaintiff to overcome a release cannot be applied in face of maritime rule placing burden on defendant to sustain it).
67 Id. at 313, 1955 A.M.C. at 471. (Footnotes omitted.)
easier to illustrate the process of accommodation than to explain it. For example, state rules concerning branch banking,69 domestic relations,70 disposition of lost or abandoned property,71 the payment of overtime wages72 and the effect of warranties made by an insured in a contract of marine insurance73 have been held to apply in the absence of maritime law governing those subjects. On the other hand, state law does not control the enforceability of an oral contract between a seaman and his employer,74 the effect of indemnity provisions in a stevedoring agreement,75 the validity of an exculpatory clause in a boat repair contract,76 or the measure of the duty owed by a shipowner to a crewmember's guest.77 Nor can it be substituted for the maritime rule that contributory negligence can be considered only in mitigation of damages and not as bar to recovery.78

A maritime products liability case is essentially a species of the maritime tort or maritime contract genera, and from the standpoint of determining the source of the substantive law to be applied no particular significance attaches to such an action simply because it may involve a products liability situation. The distinctive feature of many products liability actions involves the effort to widen the range of plaintiffs who may be entitled to relief from any given defendant and at the same time to increase the number of defendants who may be liable to a specific plaintiff. To accomplish these aims established concepts of liability must often be expanded, limiting concepts re-

moved and new theories developed. For this reason a maritime rule of law adequate to cover the issues raised in a products liability action may be lacking and the court will therefore have to fashion one or rely on state law. By and large this option has been implicitly or explicitly exercised in favor of the creation of maritime law. For example, the Fourth Circuit in Whorton v. T. A. Loving & Co. had to decide whether lack of privity barred a claim against a bridge contractor which arose from the sinking of libelant’s boat on the North Carolina portion of the intercoastal waterway after it struck a submerged piling which the contractor had failed to remove. The court held that lack of privity was not a bar and observed: “North Carolina does not appear to be among the states which have adopted the ‘modern’ view applied to contractors. However, the instant case involves a maritime tort and the rights of the parties must be determined by general maritime principles and not state law.” This syllogistic approach has merit where the injury has a genuine “salty flavor.”


82 Supra note 81.

83 Id. at 745, 1965 A.M.C. at 2228.

84 This phrase was used by Mr. Justice Harlan in Kossick v. United Fruit Co., 365 U.S. 731, 742, 1961 A.M.C. 833, 842 (1961), to distinguish the fact situation there from the one in Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 346 U.S. 310, 1955 A.M.C. 467 (1959).
However, as the aircraft cases illustrate, many injuries are maritime only in the jurisdictional sense. More extreme cases will inevitably arise. The defect in the yachtsman's portable television set will cause an injury while being used aboard his vessel; the cigar in the bottle of soft drink will be consumed in the family sailboat. Clearly, there is a minimal national interest in the application of uniform federal rules to resolve liabilities customarily adjudicated in accordance with state law standards. Can this result be avoided without altering long-established jurisdictional patterns?

One solution might be to distinguish between quasi-maritime injuries and those with some genuine maritime connection; state law could be applied to the former and federal law to the latter. Against the adoption of such a distinction it can be argued that the tasks of determining what injuries are genuinely maritime and of ascertaining and applying state law to those which are not would be burdensome. These arguments are specious. Differentiation between maritime and quasi-maritime injuries could be accomplished by using conceptual criteria analogous to those employed in distinguishing maritime from nonmaritime contracts. A state court presumably would have no difficulty in applying its law\(^8\) nor in applying that of another state if customary conflict of laws principles so dictated, and the federal courts, as a result of the \textit{Erie} doctrine,\(^6\) are also accustomed to applying state law.\(^7\) It can also be argued that some state rules (such as denial of recovery to the plaintiff who has been contributorily negligent) are antagonistic and repugnant to fundamental admiralty precepts. However, these precepts were created to deal with intrinsically maritime injuries, and not with those fortuitously maritime, and the interests of persons traditionally protected by the maritime law would not be jeopardized by the application of state law.

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\(^8\)This may be a rebuttable presumption. See Franklin, \textit{When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases}, 18 \textit{Stan. L. Rev.} 974 (1966).


\(^7\)Since contracts for the sale of ships are considered nonmaritime, state law is applicable to disputes arising out of such contracts. Bulkley v. Honold, 60 U.S. (19 How.) 390 (1857); Wilken v. Holland, 343 F.2d 147, 1965 A.M.C. 1966 (4th Cir. 1965). The Supreme Court has never passed directly on the question whether ship-sale contracts are nonmaritime. See Comment, \textit{Admiralty Jurisdiction and Ship-Sale Contracts}, 6 \textit{Stan. L. Rev.} 540 (1954). The fact that state law has for so long been applied to such contracts should be no barrier to their designation as maritime, since state law could continue to be applied. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 1955 A.M.C. 467 (1955). Cf. James Stewart & Co. v. Rivara, 274 U.S. 614, 1927 A.M.C. 999 (1927).
Substantive Bases of Maritime Products Liability

For present purposes it will be assumed that jurisdictional and choice of law perils have been weathered and that a products liability fact situation exists to which maritime law is applicable. We therefore have reached consideration of the following question: by what standards is the defendant held to answer in damages to the plaintiff in a maritime products liability case?

Negligence

The basic principle that everyone must use reasonable care to minimize the risk of possible injury to others, i.e., not be negligent, has been as much a part of the maritime law as it has been of the common law. There exists no inherent limitation to the concept of negligence as a standard for the imposition of liability which prevents its application to the products liability context, although difficulties may be encountered in determining the extent of the duty of care owed and the class of persons who fall within its ambit. And yet, for reasons not clearly understood, both the common law and the maritime law employed for a time a highly artificial rule which served to limit the normal operation of negligence principles as applied to products liability cases and their analogs. The name of the rule was "privity."

The requirement of privity of contract as a condition for the maintenance of a tort action for negligence where the alleged liability of the defendant appeared to lie in the breach of an obligation assumed by contract became established in the common law primarily as a result of the widespread misinterpretation of the decision of the Exchequer Chamber in Winterbottom v. Wright. The defendant had contracted with the postmaster general to supply and maintain a mail coach. The postmaster general had a separate contract with plaintiff's employer, who had agreed to furnish a driver for the coach. Plaintiff (the driver furnished pursuant to that contract) sought to recover for personal injuries received when the coach broke down while he

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89 See Phelps, Extent of Manufacturer's Duty of Care to Persons Other Than the Immediate Purchaser, 2 John Marshall L.Q. 357 (1937).
was driving it and he was thrown from his seat. His declaration was in case and alleged that the breakdown occurred as a result of "certain latent defects and from no other cause." \textsuperscript{94} Defendant’s liability assertedly arose because he "so improperly and negligently conducted himself, and so utterly disregarded his contract [to furnish a mail coach]." \textsuperscript{95} No negligence apart from the breach of contract was alleged, nor did the declaration state that the defendant knew or ought to have known of the latent defects. Viewed in the context of a judicial system which then delighted in procedural technicalities, the court’s decision holds no more than that the declaration failed to state a cause of action because the basis of the defendant’s alleged wrong to the plaintiff lay solely in the breach of contract to which plaintiff was not a party.\textsuperscript{96} But defendant’s counsel had argued the matter on a much grander scale. He foresaw that "the most alarming consequences would follow the adoption of such a principle,"\textsuperscript{97} not the least of which would be the foundering of the courts in a heavy sea of maritime products liability litigation. "If the chain-cable of an East Indiaman were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron."\textsuperscript{98} This forensic parade of nautical horribles apparently had its effect on the court. Lord Abinger apprehended "the most absurd and outrageous consequences" would ensue "unless we confine the operation of such contracts as this to the parties who entered into them."\textsuperscript{99} Baron Alderson agreed, suggesting ominously that "if we go one step beyond , there is no reason why we should not go fifty."\textsuperscript{100}

Despite the narrowness of its actual holding, \textit{Winterbottom v. Wright} came to stand for the broad proposition that a supplier of a defective chattel was liable for injuries caused by the defect only to a person in privity of contract with him.\textsuperscript{101} So stated, the rule became

\begin{itemize}
\item \textsuperscript{94} \textit{Id.} at 110, 152 Eng. Rep. at 403.
\item \textsuperscript{95} \textit{Ibid.}
\item \textsuperscript{97} 10 M. & W at 111, 152 Eng. Rep. at 403.
\item \textsuperscript{98} \textit{Ibid.}
\item \textsuperscript{99} \textit{Id.} at 114, 152 Eng. Rep. at 405.
\item \textsuperscript{100} \textit{Id.} at 115, 152 Eng. Rep. at 405. Baron Rolfe was sympathetic toward the plaintiff, "but by that consideration we ought not to be influenced. Hard cases are apt to introduce bad law." \textit{Id.} at 116, 152 Eng. Rep. at 405-06.
\item \textsuperscript{101} See Pnoss, \textit{Torts} § 98 (3d ed. 1964).
\end{itemize}
generally applied in the United States, and seepage of the privity requirement into admiralty and maritime law was probably inevitable. In *The Germania* the maritime counterpart of the English mail coach driver was a grain bag handler employed by a stevedore company which had been engaged by the grain shipper to bag the cargo for carriage in accordance with the requirements of the shipper’s contract with the shipowner. Plaintiff performed his work in the vessel’s ‘tween decks, and he was injured when he fell through an open and unguarded hatchway. The court dismissed his libel in rem against the *Germania* on the ground that “there was no contract between any one representing the vessel and the libellant, and there was no duty to the libellant on the part of the officers and crew of the vessel.” A similar approach was adopted in *The Mary Stewart* where recovery was denied for injuries received when a cargo line, furnished by the shipowner to the charterer pursuant to the charter party, parted, and a bale of cotton dropped on the libelant, an employee of the stevedore firm hired by the charterer. *Winterbottom v. Wright* was cited for the proposition that “where a party is delinquent in a duty imposed by contract, no one but a party to the contract can maintain an action.” Libelant was therefore deprived of recourse against the vessel because he was not privy to the charter party pursuant to which the shipowner had furnished the line.

Almost as soon as the privity rule was laid down the common law courts began efforts to scuttle it. In *Thomas v. Winchester* a drug wholesaler who negligently labeled a bottle containing the poison belladonna as “dandelion extract” was held liable for injuries sustained by the ultimate consumer because such negligence had “put human life in imminent danger,” and defendant therefore owed plaintiff a duty of care not dependent on the existence of any contractual relationship. *Winterbottom v. Wright* and its progeny were distinguished on the basis that “no such imminent danger existed in those cases.” Maritime adoption of the “imminent danger” exception to

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104 Id. at 257.
105 Id. at 257.
108 6 N.Y. 397 (1852).
109 Id. at 409.
111 6 N.Y. at 409.
the privity requirement occurred in *Gerrity v. The Bark Kate Cann.*

The *Kate Cann* was an English vessel under charter to receive and transport a cargo of grain. Libelant was one of several persons who had been hired by the grain elevator company to trim the cargo as it came into the hold. During the course of loading the braces supporting a quantity of dunnage which had been stowed in the 'tween decks gave way and the dunnage fell on the libelant, seriously injuring him. The court held that the weight of the mass and its position in a space where men were at work made the structure dangerous to life. The case therefore fell “within the principle of *Thomas v. Winchester,*” and the shipowner owed libelant a duty to see that the dunnage was properly secured.

In the context of actions by stevedores for injuries received as a result of hazards encountered aboard ship, the emphasis in *Gerrity* on the shipowner’s duty harbingered not the increasing use of exceptions to the maritime privity rule, but its abolition altogether. In *Coughlin v. The Rheola* plaintiff stevedore was injured when a chain link parted, permitting a tub of iron ore to fall and strike him. Lack of privity was asserted as a defense, to which the court responded:

> [T]here was no privity but this does not in the least affect the obligation of the master [acting for the shipowner] not to be negligent towards the libelant, or the degree of care which it was incumbent upon him to exercise [The exercise of due care] implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience.

The court found negligence in the master’s failure to make a careful examination of the chain and, accordingly, sustained the libelant’s action against the vessel.

These early maritime bouts with privity were ignored in other factual contexts which arose at later times, perhaps because in the interval appeared the decision in *MacPherson v. Buick Motor Co.* Plaintiff’s negligence action against the manufacturer of an automobile sold by the maker to a dealer and then to the plaintiff for

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112 Id. at 245. For a more recent review of the vessel owner’s obligations to a grain loading longshoreman, see *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1968).
113 19 Fed. 926 (C.C.N.Y. 1884).
114 Id. at 927; accord, *The Wm. F Babcock*, 31 Fed. 418 (N.D. Cal. 1887).
115 217 N.Y. 382, 111 N.E. 1050 (1916).
injuries when a wheel spoke crumbled into fragments, throwing plain-
tiff out of the car, was challenged on the ground that an automobile
was not inherently dangerous within the principle of Thomas v. Win-
chester\footnote{6 N.Y. 397 (1852).} and that lack of privity therefore barred an action against
the manufacturer. Justice Cardozo's celebrated opinion dispatched
these contentions:

[T]he principle of Thomas v. Winchester is not limited to
things which in their normal operation are implements of destruc-
tion. If the nature of a thing is such that it is reasonably certain to
place life and limb in danger when negligently made, it is then a
thing of danger. If to the element of danger there is added
knowledge that the thing will be used by persons other than the pur-
chaser, and without new tests, then, irrespective of contract, the
manufacturer of this thing of danger is under a duty to make it care-
fully. We have put aside the notion that the duty to safeguard
life and limb, when the consequences of negligence may be foreseen,
grows out of contract and nothing else. We have put the source of the
obligation where it ought to be. We have put its source in the law.

The adoption by other courts of the philosophy expressed in the
MacPherson decision and the expansion of its holding, viewed origi-
nally as an enlargement of the field of exceptions to the privity rule,\footnote{217 N.Y. at 389-90, 111 N.E. at 1053.} into a rationale for the total abolition of the privity requirement is
well known and has been exhaustively commented upon.\footnote{See 16 COLUM. L. REV. 428 (1916); 25 YALE L.J. 679 (1916).} Adoption
of the MacPherson principle into maritime law occurred in a decision
which is known principally for its holding extending the seaworthiness
doctrine\footnote{19 E.g., Feezer, Tort Liability of Manufacturers and Vendors, 10 MINN. L. REV. 1 (1925); James, Products Liability, 34 TEXAS L. REV. 193 (1955); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960); Wilson, Products Liability, 43 CALIF. L. REV. 614, 809 (1955).} to include a longshoreman performing seaman's work:
Sieracki v. Seas Shipping Co.\footnote{120 Under the original formulation of the doctrine the shipowner was held strictly liable for injuries occurring to seamen as a result of the unseaworthiness of the vessel. See, e.g., Mahnich v. Southern S.S. Co., 321 U.S. 96, 1944 A.M.C. 1 (1944).} Plaintiff longshoreman was engaged in loading certain heavy-lift cargo into a vessel whose construction had been completed a year and a half previously. A ten-ton boom, which had not previously been used, was rigged to lift the cargo. When installed the boom had been tested by using it to lift a dead weight of twelve and a half tons. During the loading operation the
shackle which supported the boom broke because of a defect in the metal. Certain available, but unperformed, tests would have disclosed the presence of the defect before the shackle’s installation. As a result the boom and its tackle fell, and plaintiff was struck and injured. He libeled the vessel, her owner and her builder.

In affirming the negligence liability of the shipbuilder on the ground that the exercise of reasonable care required the performance of more searching tests than the one accomplished the court of appeals observed that “the principles of MacPherson are broadly applicable, that law having become so widely accepted as to be construed as a part of the general law of torts, maritime as well as common law”122

Despite such inroads defendants continued to advance the privity argument in areas where it had not clearly been rejected. Recovery for property damage resulting when a boom block broke was sought from the block maker in Todd Shipyards Corp. v. United States,123 on the ground that the block had been negligently constructed. Privity of contract was lacking, since the block had not been purchased from the manufacturer by the libelant, but had been furnished libelant by the Navy, for whom libelant was repairing a vessel. Conceding that exceptions to the privity rule had been made “from time to time,” the block maker’s proctors argued that nonetheless no case had held the rule inapplicable where property damage only was alleged.124 The court was unimpressed, finding “no reasonable ground for making a distinction between injury to property and injury to the person.”125

Another property damage case126 involved cargo which was water-soaked as a result of a shipyard’s negligent failure to blank off a waste pipe near the vessel’s water line. The court assumed without question that “the shipyard was liable to cargo owners for negligence in the repair of the vessel resulting in damage to cargo”127 More recently

124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.
129 Id. at 142, 1955 A.M.C. at 1979 (dictum); cf. Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 10 F.2d 769, 1926 A.M.C. 342 (9th Cir. 1926).
a contractor was held liable to the owner of a shrimp boat which sank after being holed by a steel piling which the contractor had negligently failed to remove from the intracoastal waterway in the course of demolishing an existing bridge and building a new one.28

The line of cases beginning with Sieracki v. Seas Shipping Co. make clear that jettison of the privity rule as applied to negligence actions has been accomplished in the maritime law.29 Determination of the negligence liability of an alleged tort-feasor to one injured in person or property is now based upon the long-established general principles of duty of care, foreseeability and proximate cause30 and is unaffected by the presence or absence of a contractual relationship.

Warranty

While the word “warranty” has achieved considerable promiscuity in its legal usage31 it is perhaps most closely associated with the law of sales. The body of rules governing the sale of goods was developed by the common law and is now largely codified.32 From

28 Whorton v. T. A. Loving & Co., 344 F.2d 739, 1965 A.M.C. 2219 (4th Cir. 1965). The court found itself in accord with “the modern trend toward acceptance of the view that there is no valid reason for drawing a distinction between a contractor and a manufacturer.” Id. at 745, 1965 A.M.C. at 2228. Cf. The Wonder, 79 F.2d 312, 1935 A.M.C. 1310 (2d Cir. 1935); but cf. D. M. Picton & Co. v. Eastes, 160 F.2d 189, 1947 A.M.C. 1742 (5th Cir. 1947).


30 “The plaintiff must prove [the defendant’s] negligence and that such negligence is a proximate cause of his injury; furthermore, he must prove that he is within the class protected, that is, one to whom the consequences of negligence may be foreseen.” Whorton v. T. A. Loving & Co., 344 F.2d 739, 746, 1965 A.M.C. 2219, 2223 (4th Cir. 1965); accord, Simpson Timber Co. v. Grace Line, Inc., 1966 A.M.C. 1081, rev’d on rehearing, 369 F.2d 324, 1966 A.M.C. 2704 (9th Cir. 1966); Cunningham v. Bethlehem Steel Co., 231 F Supp. 534, 1965 A.M.C. 340 (S.D.N.Y. 1964) (by implication); cf. Brslin v. United States, 165 F.2d 298, 1948 A.M.C. 541 (4th Cir. 1947).

31 “There is no more troublesome word in the law than the word ‘warranty.’ It is constantly used in different senses. It is a common term in the law of insurance, the law of charter parties, and the law of sales.” 1 Williston, Sales § 181 (3d ed. 1948).

32 E.g., Uniform Commercial Code §§ 2—101-725.
the products liability standpoint the most significant rules are those
dealing with express and implied warranties. An express warranty is
"any affirmation of fact or promise made by the seller to the buyer
which relates to the goods and becomes part of the basis of the barg-
ain."\textsuperscript{133} An implied warranty is a representation concerning the qual-
ity of the goods which the seller is held by the law to have made even
though he did not in fact do so.\textsuperscript{134} The courts of England began im-
posing on the seller additional obligations of this nature in the early
nineteenth century.\textsuperscript{135} For example, in \textit{Jones v. Bright}\textsuperscript{136} the defendant
manufacturer sold the plaintiff shipowner some copper sheathing for
installation on the hull of his ship, the Isabella. The copper deterio-
rated rapidly and plaintiff brought an action for breach of warranty.
Although the court found that the manufacturer had breached an
express warranty to the shipowner, Chief Justice Best desired "to put
the case on a broad principle" and delivered a succinct dictum de-
fining the warranties imposed by law: "If a man sells an article, he
thereby warrants that it is merchantable—that it is fit for some pur-
pose. . . If he sells it for a particular purpose, he thereby warrants
it fit for that purpose\textsuperscript{137} The underlying policy basis of these non-
consensual obligations was candidly stated: they "will teach manu-
facturers that they must not aim at underselling each other by pro-
ducing goods of inferior quality, and that the law will protect pur-
chasers who are necessarily ignorant of the commodity sold.\textsuperscript{138}

Reported American cases involving maritime sales of goods are
few Those extant, however, reveal that there is no clearly defined
maritime law of sales and that state law has frequently been the refer-
ence point for determining the rights and liabilities of the parties to a
maritime contract for the sale of goods. In \textit{The St. S. Angelo Tosso}\textsuperscript{139} a
libel was brought to recover the contract price of 992 tons of coal fur-
nished respondent's vessel. The respondent pleaded a warranty as to the
quality of the coal and defended on its breach. Since the contract con-
tained no express warranty "the sole question is therefore one of im-
plied warranty and turns on the Pennsylvania Sales Act of 1915.\textsuperscript{140}
Selection of state law was not preceded by a consideration of whether

\begin{footnotes}
\item[133] \textsuperscript{133} \textit{Id.} at \$ 2-313.
\item[134] \textsuperscript{134} See \textit{1 Williston, Sales} \$ 194 (3d ed. 1948).
\item[135] \textsuperscript{135} See \textit{id.} \$ 229.
\item[136] \textsuperscript{136} 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829).
\item[137] \textsuperscript{137} \textit{Id.} at 544, 130 Eng. Rep. at 1172.
999 (K.B. 1925).}
\item[139] \textsuperscript{139} 271 Fed. 245 (3d Cir. 1921).
\item[140] \textsuperscript{140} \textit{Id.} at 246.
\end{footnotes}
or not maritime rules of law were or should be applicable, and the choice of the Pennsylvania Sales Act was apparently the result of the contract having been made and performed in that state. The court of appeals noted, however, that the implied warranty provision of the Pennsylvania Act "is in the exact terms of a section of the Uniform Sales Act adopted by many states, which in turn followed quite literally a like provision of the English Sale of Goods Act of 1893."

Having thus established the ubiquity of the warranty in question, the court affirmed the trial judge's conclusion "that the coal, although of merchantable quality, was not reasonably fit for the purpose for which it was required."

Similar treatment was given the choice of law question in Linen Thread Co. v. Shaw. There the agents of the fishing vessel Sam & Priscilla had purchased at Boston a seine net from the libelant "to enable the schooner to engage in the mackerel seineing fisheries." Libelant brought its action in the Massachusetts federal district court to recover the purchase price, and the respondent schooner owner filed a cross-libel alleging the net was defective in that the purse line broke, allowing a large catch of mackerel to escape. The court stated the applicable law thusly:

Regardless of the statute of Massachusetts, there is under the common law an implied warranty that articles supplied by a manufacturer or dealer shall be reasonably fit for the purpose for which he knew they were intended, provided the purchaser relies upon his skill and knowledge. The Massachusetts statute is but declaratory of this.

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142 The coal was ordered by the shipowner at Philadelphia and delivered to the vessel when she called there. The St. S. Angelo Toso, 265 Fed. 783 (E.D. Pa. 1920).
143 271 Fed. at 246.
144 Id. at 247. The earliest admiralty case recognizing the implied warranty of fitness appears to be Moore v. The Charles Morgan, 17 Fed. Cas. 670 (No. 9754) (S.D. Ohio 1878).
145 9 F.2d 17, 1926 A.M.C. 67 (1st Cir. 1925).
146 Id. at 18, 1926 A.M.C. at 68.
147 Id. at 19, 1926 A.M.C. at 70. No citations follow the quoted passage. The implied warranty of fitness was also recognized in The Nimrod, 141 Fed. 215 (S.D. Ala. 1905), aff'd per curiam, 141 Fed. 834 (5th Cir. 1906).
In The E 270, 16 F.2d 1005, 1927 A.M.C. 386 (D. Mass. 1927) respondents owned a fishing boat engaged in flounder dragging. They purchased an engine for the boat from libelant, who knew the employment of the vessel. The engine drove the boat satisfactorily, but it would not handle the drag hoisting gear. In defense to libelant's action to recover the purchase price respondents claimed breach of warranty of fitness for a particular purpose, relying on the Linen Thread Co. and St. S. Angelo Toso decisions. The court acknowledged the argument that "on such facts a warranty of fitness should be implied under both the Massachusetts Sales Act and at common law."
Upon review of the evidence the court concluded that the warranty stated was breached and that respondent was entitled to recover damages for the lost mackerel catch.

An express warranty was involved in Condenser Service & Engineering Co., Inc. v. Compania Maritima,148 where libellant had warranted that an evaporator installed in respondent's tanker would make 12 tons of fresh water per 24 hours. Instead, it made only five tons per day. In support of the holding that libellant's breach of warranty destroyed its claim to the unpaid purchase price the district court drew on the law of Arkansas, Alabama, Pennsylvania and the District of Columbia, observing that "the agreement in this case was made and performed either in New York or New Jersey and is now sued on in Virginia in admiralty; no point has been made that there is a difference in the law in these jurisdictions."149

The choice of law problem also passes unnoticed in maritime actions brought on the civil side of the federal court. In Pabellon v. Grace Line, Inc.150 plaintiff seaman was injured aboard defendant's vessel when an explosion followed his mixing together of three common commercial cleansers. He brought an action for damages, and the defendant brought a third party complaint for indemnity against the three manufacturers and each of the suppliers who had furnished the cleansers to the vessel, alleging negligence and breach of implied warranty. Certain cross-defendants challenged the cross-complaint on the ground that the products involved were sold under their brand names, thereby precluding any implied warranty. The district court agreed and dismissed the cross-complaint.151 The court of appeals reversed, holding that even though brand-name cleansers were sold the defendant might still be able to prove the existence of the warranty claimed.152 Although the indemnity complaint clearly was based on a maritime contract, at least so far as the suppliers were

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149 Id. at 1244. Cf. The Nuska, 300 Fed. 231 (S.D. Fla. 1924), aff'd sub nom., R. R. Ricou & Sons v. Farbanks, Morse & Co., 11 F.2d 103 (5th Cir. 1926).
concerned, the district court and the court of appeals viewed the action as one involving only state law, and neither court considered the choice of law issue raised by the maritime features present.

Not surprisingly, state courts, as well as federal courts, overlook the significance of sales cases having maritime characteristics. Thus, state actions involving a marine engine, an anchor windlass, a steamboat’s boiler and a net furnished a fishing vessel have all been dealt with as though they were ordinary, non-maritime actions.

Incorporation of the widely recognized warranties of fitness and merchantability into the maritime law has been accomplished, albeit with a noticeable lack of jurisprudential finesse. However, such warranties in their common law or statutory environments exist as integral parts of a relatively complex scheme of rules carefully defining and detailing the rights of buyers and sellers. There is no equiv-

154 In Consolidated Fishenes Co. v. Fairbanks, Morse & Co., 193 F.2d 957 (3d Cir. 1953), the court stated (dictum) that Pennsylvania law governed plaintiff’s action for damages for breach of warranty arising out of the sale of a marine diesel engine for installation in plaintiff’s fishing boat. Cf. The Nuska, 300 Fed. 231, 1924 A.M.C. 1197 (S.D. Fla. 1924), aff’d sub. nom., R. R. Ricou & Sons v. Fairbanks Morse & Co., 11 F.2d 103, 1926 A.M.C. 799 (5th Cir. 1926).
161 E.g., CAL. COMM. CODE §§ 2101-2724 (1965).
alent in the maritime law, and the comparative infrequency with which maritime sales cases arise indicates that there will never be a sufficient volume of litigation out of which a comprehensive body of maritime sales law can be developed. These factors suggest that maritime contracts for the sale of goods should be governed by the state law which would be applicable under customary conflicts principles. That such a choice would be workable is attested by the fact that state sales law has long been applied to contracts for the sale of ships, which are nonmaritime more by tradition than by reason.

**Strict Liability**

Certainly the most striking development in the land law of products liability has been the broadened use of the implied warranties associated with the sale of goods as a means to achieve significant alterations in the manner in which losses from injuries resulting from the conduct of business enterprises are allocated. A similar development is now under way in the maritime law, and most of the impetus has come not from the sea, but the air.

In *Middleton v. United Aircraft Corp.*, an action in admiralty was brought under the Death on the High Seas Act (DOHSA) to recover

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165 The various fictions utilized by the courts in an effort to stay within the familiar conceptual boundaries of sales law are catalogued in Gillam, *Products Liability in a Nutshell*, 37 TEx. L. REv. 119, 153-55 (1958).
167 41 Stat. 537 (1920), 46 U.S.C. §§ 761-68 (1964). Section one of the act provides in relevant part: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty against the vessel, person, or corporation which would have been liable if death had not ensued." 41 Stat. 537, 46 U.S.C. § 761. Questions concerning the scope of the DOHSA and the relation between it and state law are complex, and consideration of them is beyond the scope of this article. At this stage we are interested in the approach of the courts to warranty and strict liability as substantive portions of the maritime law and not in the manner in which these issues arise in a particular case. For a lucid discussion of the DOHSA see Wilson v. Transocean Airlines, 121 F Supp. 85, 1954 A.M.C. 1697 (N.D. Cal. 1954), which involved the crash of an airliner in the middle of the Pacific Ocean. Among the issues presented in Wilson was whether or not the DOHSA applied to aircraft crashes. The court concluded "the scope of the [DOHSA] within the geographical area of
damages for the alleged wrongful death of a pilot and five passengers who were killed as the result of the crash of a helicopter in the Gulf of Mexico twenty-five miles off the coast of Louisiana. The libel alleged, inter alia, a cause of action for breach of implied warranty on behalf of each of the decedents against respondent, who was the manufacturer of the helicopter. A motion to dismiss the action was made by United on the ground that privity was lacking between it and libelants. The court reviewed briefly the decline in application of the privity rule in analogous negligence actions and concluded that "with liability of the manufacturer to one not in privity with him on a negligence theory established, it is but one logical step forward to allow recovery against a manufacturer on a breach of warranty theory by one not in privity with him." Respondent's motion was therefore denied.

Although United's privity contention was properly overruled by the court the rationale for its decision was defective. The privity rule as applied to actions for negligence was borrowed from the law of contracts. In the latter context the rule followed naturally from the simplistic belief that obligations arising from contract should be imposed only on those who have expressly agreed to accept them and that contrapuntal rights should accrue only to those who were expressly intended by the obligor to benefit from them. The source of the obligation not to be negligent, however, does not derive from consent, but is externally imposed by the law as a matter of social policy. Therefore, the privity requirement, although a natural outgrowth of the law of contract, was from the beginning an improper graft on the law of negligence. For this reason the disappearance of privity from negligence law cannot legitimately be used to justify elimination of the rule from the law of contracts. Moreover, the basic question in Middleton was not whether lack of privity should or should not have barred the claim of libelants, but whether the privity question had any relevance at all. When the law began to attach certain implied rights and obligations to those expressly assumed by the parties to a contract, the privity rule lost much of its logical force.

Its operation, was intended to be as broad as the traditional tort jurisdiction of admiralty." Id. at 92, 1954 A.M.C. at 1707. Since the crash occurred on navigable waters, the DOHSA was applicable.

171 See Restatement (Second), Torts § 282 (1965).
because the determination of the scope of such externally imposed terms generally does not rest with the parties to the contract but with the law which imposes them. These implied terms can therefore be supplemented, altered and expanded by the law as social needs appear to demand. As the courts respond to societal pressures which are perceived to require broadening of these obligations, judicial focus begins to shift from a specific contract, of which the implied obligations were originally a part, to the general activity of the enterprise whose conduct inevitably exposes members of the public to risk of harm. At some point a policy decision is implicitly or explicitly made concerning who should bear the irreducible risk of harm associated with nearly every commercial activity. As the growth of products liability law illustrates, the decision now is frequently that one of the enterprises involved in the conduct of the activity should bear its inherent risks rather than the individuals who may be subjected to harm by them. The nature of this decision is historically associated with the imposition of strict liability in tort and bears little relation to any question of contract.

By this kind of inexact jurisprudential piloting a passage is made from contract law to tort law. Unfortunately, the new landmarks of strict liability continue to be described in the breach of warranty language of contract, particularly where the facts are analogous to those present in Middleton. In that kind of situation, however, no genuine contract issues exist, and the relevant issue is not whether

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172 See 1 WILLISTON, SALES § 197 (2d ed. 1924).
173 See 2 HARPER & JAMES, TORTS 794-95 (1956).
174 Professor Prosser has stated: "[T]he suggestion had always been sufficiently obvious that the 'warranty,' which was not really a warranty at all, and never had been anything more than a transparent device to achieve the desired objective, was not only unnecessary but undesirable. No one denied that the 'warranty' was a matter of strict liability. No one disputed that in the absence of any contract between the parties, the liability must lie in tort. Why not jettison the contract word, and talk merely of strict liability in tort, declared in its own right—a concept familiar enough to all lawyers in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, respondeat superior, defamation, and even misrepresentation?" Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 16 (1966). Where a contract does exist between the person injured and his vendor, difficult conceptual problems arise in the necessary attempts to accommodate strict liability in tort with the provisions of the Uniform Commercial Code governing the sale of goods. See Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 STAN. L. REV. 974 (1966).
175 A somewhat similar problem exists in the negligence field. Although the basic premise of negligence law has been that there should be no liability without fault, the pressures of a modern industrial society have forced the creation of fictions (e.g. respondeat superior) and presumptions (e.g. res ipso loquitur) which lead to the im-
lack of privity bars the action but whether strict liability should be imposed.\textsuperscript{176} The \textit{Middleton} court did acknowledge that “the cause of action complained of appears to be a maritime tort,”\textsuperscript{177} and thus did not view the libelants’ warranty actions as arising from contract. The privity problem having been the principal point discussed in \textit{Middleton}, short shrift was given the ultimate question of respondent’s liability. The court stated.

It must be noted that the question here involved is not the \textit{nature} of liability; that is the province of the trial court. The sole question is whether the libelants are precluded from attempting to assert a claim against the manufacturer because of the absence of a direct contractual relationship with such a respondent. As heretofore indicated, the gravamen of the claim asserted by the libelants and attacked by the respondent is basically tort—the violation of a duty to persons such as the libelants. This motion tests solely the right of the libelants to invoke such a claim. \textit{[T]he trial court has the duty of determining the questions of proximate cause, the nature of the liability, the relationship of the manufacturer and operator, the effect of maintenance and any other relevant factual issues.}\textsuperscript{178}

What the court meant by “the nature of the liability” is unclear. If libelants were not precluded from asserting their claim because of the absence of a direct contractual relation, might they be because the manufacturer was not strictly liable to them? If so, the court’s decision is almost facetiously narrow. Libelants claimed “the violation of a duty.” When this claim is specifically described in terms of breach of warranty the duty sought to be imposed is clearly one not to expose persons such as libelant’s decedents to any risk of harm, \textit{i.e.}, strict liability. By using the term “breach of implied warranty” the assumption is made by the court that the manufacturer is strictly liable to somebody, and discussion thus tends to focus on the irrelevant privity issue. Privity is easily eliminated, as \textit{Middleton} illustrates, and strict liability follows as a result without ever having been considered as a separate issue. Whatever the \textit{Middleton} court may have thought it was deciding, the case has been interpreted as holding that admiralty

\textsuperscript{176} See Frosser, Torx $ 97 at 678-681 (3d ed. 1964).
\textsuperscript{177} 204 F Supp. at 857, 1962 A.M.C. at 1791.
\textsuperscript{178} 204 F Supp. at 860, 1962 A.M.C. at 1795.
recognizes a cause of action for strict liability in tort against a manufacturer.\textsuperscript{179}

The next admiralty case involving a manufacturer’s “warranty” liability was \textit{Noel v. United Aircraft Corp.},\textsuperscript{180} which was also an action brought under the DOHSA. In that case a propeller manufactured by United and installed in an aircraft owned and operated by a Venezuelan airline developed an overspeed during the course of a flight from New York to Caracas, tore loose and ripped into the fuselage. The plane exploded and crashed into the high seas, and all of its occupants were killed. The libel alleged that United had been negligent because it failed to perfect a safer propeller system and to warn the airline of certain weaknesses in the propeller system of the aircraft which crashed. Libelants later sought to amend by adding a claim against United for breach of implied warranty of fitness. United opposed the amendment, asserting, as in \textit{Middleton}, that privity was lacking between it and libelants’ decedent. Judge Layton, who heard the motion, wrote a lengthy opinion in which he denied libelants’ request to amend although not on the ground urged by United.\textsuperscript{181} Because this opinion contains the fullest discussion presented to date of a manufacturer’s liabilities under the maritime law, the bases of the decision are worth examining in some detail.

The court first considered the choice of law problem and, positing that Congress by enacting the DOHSA had intended to establish a uniform right of action for death on the high seas, concluded that the federal maritime law, rather than state law, should apply to cases arising under the DOHSA.\textsuperscript{182} Whether the cause of action which libelants sought to allege was comprehended by the DOHSA was the next question faced. While conceding “as an abstract matter” that the word “default” in section one of the DOHSA might include such

\textsuperscript{180} 204 F Supp. 929, 1965 A.M.C. 2305 (D. Del. 1962).
\textsuperscript{181} The court quickly dispensed with the privity issue. “[B]oth parties have misconceived the importance of the point for a reading of Seas Shipping Co. v. Sieracki [328 U.S. 85, 1946 A.M.C. 698 (1946)] indicates that the Supreme Court would abolish the requirement of privity in admiralty if the question were squarely raised.” 204 F Supp. at 935, 1965 A.M.C. at 2315. The privity question in \textit{Sieracki} arose in connection with the alleged negligence of the shipbuilder and no assertion of breach of warranty was made against it.
\textsuperscript{182} But see, Jennings v. Goodyear Aircraft Corp., 227 F Supp. 246, 1965 A.M.C. 1285 (D. Del. 1964). See also the \textit{caveat} concerning the DOHSA note 173 supra.
an action, Judge Layton nonetheless held that “breach of warranty of fitness is a ‘default’ only if it is cognizable under the general maritime law.” 183 Middleton v. United Aircraft Corp. 184 was the sole precedent discovered in this regard. Judge Layton felt the Middleton court was preoccupied with the issue of privity and that “the important and key question, namely whether admiralty should henceforth entertain suits on behalf of passengers against manufacturers of airplane or related parts based upon a breach of warranty of fitness whether or not privity was present, was not discussed.” 185 Finding no other precedent, he therefore concluded that “an implied warranty of fitness and merchantability is a phenomenon of state sales law, and, as such, is unknown to the federal maritime law.” 186

The libelant argued that such an action was inherent in the law of admiralty by analogy to the shipowner’s absolute duty to furnish a seaworthy vessel. 187 This argument was rejected because it “ignores completely the fact that the action here is not against the ship [sic] but the manufacturer of one of her parts” 188 and also because “traditionally, the admiralty has limited the right of action based upon unseaworthiness to seamen” 189 or those doing seamen’s work, a category to which libelants’ decedent did not belong. Moreover, introduction of implied warranty of fitness into admiralty would, according to the court, create confusion “as to the relationship of implied warranty of fitness to the existing admiralty doctrine of unseaworthiness.”

[This] Court has tried and failed to find any meaningful distinctions between the two doctrines. There is no substantial difference between the implied warranty that a propeller is fit and the implied warranty that a propeller is seaworthy (or airworthy) The only important difference lies in the classes of persons owing the duty, and the class of persons protected.” 189

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185 204 F Supp. at 937, 1965 A.M.C. at 2318.
186 Id. at 934, 1965 A.M.C. at 2313. “This may well be because an implied warranty of fitness is usually associated with the sale of goods, and because the sale of a ship has traditionally been deemed outside all scope of admiralty jurisdiction. Another reason why an implied warranty of fitness is unknown to admiralty may be that it has always been possible to bring actions under this theory on the civil side of the court.” Ibid.
188 204 F Supp. at 934, 1965 A.M.C. at 2314.
189 Ibid.
189 204 F Supp. at 940, 1965 A.M.C. at 2323. The court also considered and rejected libelant’s argument that admiralty should borrow state law principles of strict
Judge Layton then restated the question to be decided: "the real point in issue is whether admiralty should now incorporate what amounts to a drastically new concept into the body of its law based upon the rationale that manufacturers by means of insurance and raising prices are better able than the injured consumer to absorb losses in cases resulting from defective parts." This, according to Judge Layton, "is a conclusion based upon economic policy historically within the province of Congress or a legislature. Courts are peculiarly unfitted to make such findings." He therefore held that "a cause of action in implied warranty of fitness and merchantability (with or without privity) does not presently exist in the federal maritime law." The motion by libelants to amend their libel was, accordingly, denied.

The Noel court's treatment of the privity issue, as well as its statement concerning "the real point in issue," indicate that it regarded libelant's claim not as one for breach of warranty sounding in liability as applied in cases of poisoned foods, drugs, drinks and dangerous instrumentalities. The court held that "an airplane passenger clearly is not within the class of persons protected by the rationale of the poisoned food cases." This statement was not really a response to the argument advanced. The availability of insurance to the manufacturer is an important consideration, but not the central one. "What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance—and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes." Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1121 (1960).

The manufacturer's victory in Noel was only temporary. The case was subsequently tried before Judge Layton, who found that United had been negligent in not warning the airline of overspeed problems which occurred in similar propeller systems on other aircraft and in failing, subsequent to the installation of the system, to develop improvements to prevent the occurrence of propeller overspeed. Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963). These findings were affirmed on appeal. Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964). A petition for rehearing was denied. Ibid. One judge concurred in and two judges dissented from the denial. All three were disturbed by the finding that the manufacturer owed a continuing duty to develop improvements in the safety of his product. The concurring judge stated: "This doctrine is new and far reaching and, in my view, may well be unsound." 342 F.2d at 242. A commentator has characterized the holding as "indeed novel in imposing a heavy post-sale obligation on an initially innocent manufacturer." 40 Tul. L. Rev. 436, 443 (1966).
tract but rather as an inarticulate allegation of strict liability. The seaworthiness doctrine was an obvious parallel to the cause of action which libelant sought to allege. In *Seas Shipping Co. v. Sieracki* the Supreme Court described the shipowner's absolute obligation to furnish a seaworthy ship to seamen and those doing seamen's work as being non-contractual in nature and as "essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in nature." Judge Layton approached this doctrine seeking an analog in fact rather than one in principle. Not surprisingly, he found the factual analogy did not exist. However, the principle of the seaworthiness doctrine was analogous because it involved the same basic question presented in *Noel*: whether the risk of harm associated with an activity should be allocated to one of the enterprises participating in it rather than to those endangered by the risk. The so-called "risk-spreading" rationale was advanced in *Noel* in support of allocating the risk to the propeller manufacturer. Judge Layton felt that such a theory could not be endorsed absent economic proof of its validity. Yet the risk-spreading concept was precisely the justification given by the Supreme Court in *Sieracki* for imposing strict liability on the shipowner for injuries resulting from unseaworthiness. The Court stated: "[T]he owner is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." This statement echoed one made nearly ten years before in the *H.A. Scandrett*, the first federal case directly holding that the shipowner's liability for unseaworthiness was absolute. The court stated:

A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put. [E]verything is to be said for holding her absolutely liable to her crew for injuries arising from defects in her hull and equipment. The liability can be covered by insurance and is better treated as an expense of the business than one left to an uncertain determination of courts in actions to recover for negligence.

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196 Id. at 94, 1946 A.M.C. at 704.
198 328 U.S. at 94, 1946 A.M.C. at 704.
199 87 F.2d 708, 1937 A.M.C. 326 (2d Cir. 1937).
201 87 F.2d at 711, 1937 A.M.C. at 331.
The *Noel* court could have recognized the analogy of the seafairthness doctrine, accepted the risk-spreading theory and still have reached the same result. If the risk-spreading theory is followed, the most logical enterprise upon which to fasten strict liability is the one with which the risk is most closely associated. An airplane crash is principally an incident of the business of carrying passengers by air, and the airline is thus the most logical enterprise upon which to impose liability. The airline is also the business which directly profits from the passengers, and it is the one upon which the passengers rely. These factors weigh against imposing liability on the propeller manufacturer. In *Noel*, moreover, the air carriage was governed by the Warsaw Convention, a treaty which defines and limits the carrier's liability. If the propeller manufacturer were held strictly liable, it presumably would pass the cost of such liability on to its customers, the airlines. Libelants would therefore be able to accomplish indirectly what they could not have done directly. Thus, it could be argued, would subvert the purpose of the treaty. The *Noel* court could therefore have held that United was not the proper party upon whom to impose strict liability, assuming such liability should be imposed on anyone. In any event the decision in *Noel* was not destined to serve as the foundation of a seaward citadel capable of defending the maritime law against the numerous broadsides from the land law courts which even then were engaged in scattering strict liability in all directions.

The opportunity to choose between *Middleton* and *Noel* was presented in *Montgomery v. Goodyear Tire & Rubber Co.*, a case which also arose under the DOHSA and which involved the crash of a U.S. Navy blimp into the Atlantic Ocean off the New Jersey coast. In addition to Goodyear (the blimp's manufacturer), the Edwards Company, maker of a warning system designed to sound when the balloon began to lose gas, was named as a respondent. Libelants claimed breach of implied warranty against each respondent, asserting that the seams of the gas bag were improperly assembled and that the warning system was faulty. Respondents moved for summary judgment.

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203 Ibid.
judgment on the ground that libelants had failed to state a cause of action. The court first considered Goodyear's liability and elected to follow the Middleton precedent. Support for this election was found in the shipowner/stevedore indemnity cases in which "the absolute liability imposed under an implied warranty of workmanlike service has been analogized by the Supreme Court to the supplier's warranty of the fitness of his product." It was therefore "a short step to directly recognize implied warranties in admiralty actions" further:

A second parallel of the two types of implied warranty actions makes it requisite that they be treated similarly by admiralty courts. The theory underlying the imposition of an implied warranty of workmanlike service is an attempt to allocate losses to the enterprise most capable of minimizing the risk. The same theory underlies breach of implied warranties in a suit against the manufacturer of an airship. If the defect in the ship was due to faulty manufacture, and it was a latent defect, the maker is clearly in a better position than the purchaser of the ship to prevent or remedy it.

Having thus disposed of Goodyear's motion, the court considered that of Edwards, who relied on the decision of the New York Court of Appeals in Goldberg v. Kollsman Instrument Corp. In Goldberg, under facts similar to those in Montgomery, the court allowed a breach of warranty action against an aircraft builder, but not against the maker of an allegedly faulty altimeter installed in the airplane. The basis for denying the warranty action against the manufacturer of the component part was that "adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." The Montgomery court observed that it was "not bound by that determination," but "the similarity of facts in Kollsman and in the case at bar is so overwhelming that the reasoning of the case should be applied here."

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208 231 F. Supp. at 454, 1965 A.M.C. at 1631.
209 ibid.
210 ibid.
212 The New York Court of Appeals observed that strict liability was "surely a more accurate phrase." Id. at 436, 191 N.E.2d at 83.
213 Id. at 437, 191 N.E.2d at 83.
The breach of warranty action against Edwards was therefore dismissed.\textsuperscript{215}

Inherent in the theory that the manufacturer is better able to remedy or prevent defects and therefore should be held strictly liable for the injuries they cause, is the belief that such liability will encourage remedial or preventive measures.\textsuperscript{216} In this connection Professor Prosser has commented:

A skeptic may well question whether the callous manufacturer, who is unmoved by the prospect of negligence liability, plus \textit{res ipsa loquitur}, and by the effect of any injury whatever upon the reputation of his goods, will really be stimulated by the relatively slight increase in possible liability to take additional precautions against defects which cannot be prevented by only reasonable care.\textsuperscript{217}

The rationale of the \textit{Montgomery} decision is of doubtful conceptual utility. Because of the supposed adequacy of the libelants' remedy against Goodyear strict liability was not imposed on the Edwards Company. Yet the remedying of defects by the principal manufacturer will be of little use if the maker of a vital component part continues to supply a defective product. If the \textit{Montgomery} court's theory was valid, strict liability should also have been imposed on the Edwards Company.

The nature of the component part manufacturer's liability has been involved in two recent maritime cases, and in both strict liability was imposed. One of these, \textit{McKee v. Brunswick Corp.}\textsuperscript{218} has already been discussed in some detail. There strict liability was imposed on the retailer, the manufacturer of the boat and the maker of the coil on its engine. Since the court of appeals apparently did not view the issues before it as involving maritime law its decision is not a useful precedent. In the other case, \textit{Sevits v. McKiernan-Terry Corp.}\textsuperscript{219} plaintiff, a member of the crew of the United States aircraft carrier Constellation was injured at sea as a result of the failure of one of the vessel's arresting engines\textsuperscript{220} which had been manufactured by the defendants. The carrier had been built in a United States naval shipyard, and the Government, in its capacity as ship-
builder, was immune from suit.\textsuperscript{221} Defendants, in reliance upon the \textit{Noel},\textsuperscript{222} \textit{Montgomery}\textsuperscript{223} and \textit{Goldberg}\textsuperscript{224} decisions, moved to dismiss plaintiff's third cause of action which pleaded the breach of "an implied warranty of fitness for use, allegedly running to the plaintiff, arising out of the sale of the engine by defendants to the Navy."\textsuperscript{225} The court declined to follow \textit{Noel} because "there is no logical reason which justifies the position that implied warranties are not and should not be recognized in admiralty."\textsuperscript{226} Moreover, "if the plaintiff can make out an action based on implied warranty, the fact that admiralty law is involved should not be a bar to his recovery on that theory."\textsuperscript{227} \textit{Montgomery} and \textit{Goldberg} were "distinguished" on the ground that plaintiff Sevits "has no right to sue the manufacturer of the entire ship" and if forbidden to sue the manufacturer of the component part, "the theory of implied warranty which he has a right to assert under admiralty law would become meaningless."\textsuperscript{228} The court therefore found "that in the interest of justness and fairness, the plaintiff has a right to assert the theory of implied warranty against the manufacturer of the arresting engine."\textsuperscript{229} In \textit{Sevits} the judicial humanitarian instinct, always influential but seldom controlling, was the paramount factor in the result reached. The "interest of justness and fairness" was thus brought into collision with the frail product of the \textit{Montgomery}\textsuperscript{230} and \textit{Middleton}\textsuperscript{231} efforts to construct the necessary conceptual framework required if strict liability is to be imposed on a rational and predictable basis, and their work was perhaps rendered a total loss as a result.

Defendants in maritime products liability cases have not been limited to manufacturers. An effort to impose strict liability on the shipper of a cargo of sulphur was made by plaintiffs in \textit{Cunningham v. Bethlehem Steel Co.},\textsuperscript{232} but was so well disguised in the pleadings

\textsuperscript{221} \textit{Id.} at 811, 1966 A.M.C. 1954.
\textsuperscript{225} 264 F Supp. at 812, 1966 A.M.C. at 1954.
\textsuperscript{226} \textit{Id.} at 814, 1966 A.M.C. at 1957.
\textsuperscript{227} \textit{Ibid.}.
\textsuperscript{228} \textit{Id.} at 814, 1966 A.M.C. at 1958.
\textsuperscript{229} \textit{Ibid.}.
that the court did not pass directly on the question. The S.S. Marine Sulphur Queen disappeared at sea and no trace of the vessel or her crew was ever found. The action brought on behalf of the missing crew members was prosecuted against Bethlehem, the owner of the ship, and against Texas Gulf Sulphur Co., the shipper of the cargo. As to the latter the claim was made that the cargo was unseaworthy and that the cargo owner owed a duty to supply a seaworthy cargo to the crewmen of the vessel. This claim was dismissed by the court because “nowhere have we been cited to any authority which would indicate that there is such a duty upon the cargo owner.”

It is clear that plaintiffs were seeking to impose strict liability on the shipper. Phrasing the complaint in terms of unseaworthiness, however, suggested that the decedents’ status as seamen was alone sufficient to support the liability sought. As the decision in Noel illustrates, the utility of the seaworthiness doctrine as a factual analog is questionable, and focus on its factual aspects tends to preclude consideration of the larger issues which are recognized and discussed when the more typical products liability allegation of breach of implied warranty or strict liability are employed.

A shipper’s responsibility was more generally discussed in China Union Lines, Ltd. v. A. O’Andersen & Co. Two ships collided in the Houston ship channel, and heavy loss of life, severe personal injuries and property damage followed. One of the vessels was a chemical carrier and had stowed in its skin tanks a quantity of acrylonitrile which, as a result of the collision, caught fire and burned. This chemical when burning gives off highly toxic fumes. Some of the injured parties filed libels against American Cyanamid, the shipper-manufacturer “on the theory that the acrylonitrile was of such a dangerous nature and propensity as to render [Cyanamid] liable to said parties.” The trial court dismissed the libels against Cyanamid. The dismissal was affirmed on appeal on the ground that the evidence showed that the toxicity of acrylonitrile had not caused any of the injuries claimed. Justice Brown dissented on this issue because in his view the question of causation had not been satisfactorily dealt with by the trial judge. His observations concerning the liability of Cyanamid are of interest:

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233 Id. at 938, 1965 A.M.C. at 344.
235 364 F.2d 769, 1966 A.M.C. 1653 (5th Cir. 1966).
236 Id. at 774, 1966 A.M.C. at 1656.
237 Id. at 789-92, 1966 A.M.C. at 1691-93.
Cyanamid is the manufacturer and supplier of a chemical that it knows can and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It owed a duty literally to the world. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid has the liability of an insurer, but when the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability.

The comments of Justice Brown illustrate that the policy issues which underlie a products liability action may be reached directly and that deviations involving consideration of privity and warranty can be avoided. As Professor Gillam has observed.

There is nothing wrong with fictions, if they work. The test is purely pragmatic. Any one of these [fictional] approaches might work, but none of them squarely faces the real issue: as a matter of economic policy, should the manufacturer be liable without fault? The policy decision should be faced and made, and, if absolute liability is found to be called for, it should be imposed directly, without fiction or analogy, upon simple grounds of policy.

**Conclusion**

In the preceding sections an effort has been made to disclose and discuss some of the basic problems which can arise in a maritime products liability case. Failure to maintain a proper lookout for these problems has been a recurring error in the cases which have arisen to date. Even when such problems have been detected and recognized as potential hazards the complex jurisprudential methods of navigation employed to avoid them have occasionally resulted in conceptual strandings. Courts of admiralty have long prided themselves on their ability to deal creatively with novel legal issues. The present state of the law of maritime products liability presents an opportunity for them to engage in such creative action.

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