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THE PRIMARY DUTY RULE IN ADMIRALTY

Comparative negligence as a partial defense to a personal injury action is rapidly displacing the old judge-made complete defense of contributory negligence. In April 1974, Professor Victor Schwartz counted twenty-six states which have adopted comparative negligence schemes, and in March 1975, California joined the growing majority of American jurisdictions in the comparative negligence camp.

While the changeover to comparative negligence has accelerated only recently, admiralty practitioners have been working with the concept for over a century. As far back as 1855, the Supreme Court of the United States declared that when two vessels collide and both are at fault, the owners of each vessel ought to share equally in the damages of the other. Comparative negligence was introduced into maritime personal injury law in 1890 in the celebrated case of The Max Morris, in which the Court said that comparative negligence would promote "more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good." Since then, admiralty practitioners have been scrupulously protective of their comparative negligence tradition. For example, Justice Hugo Black remarked:

The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

To practitioners of maritime law who are proud of their comparative negligence heritage, two recent decisions may prove disconcerting.

2. V. Schwartz, Comparative Negligence 3 (1974).
4. See V. Schwartz, Comparative Negligence 1-3 (1974).
6. 137 U.S. 1 (1890).
7. Id. at 14.
Reinhart v. United States

Robert Reinhart was chief mate aboard the *SS Queen's Victory*, which transported munitions to Vietnam. Because the ammunition was exceedingly dangerous, longshoremen in the United States installed wooden sheathing in the hold of the vessel to prevent contact between the bombs and the vessel's metal hull. Reinhart, as chief mate, had the duty to oversee working conditions on the vessel; accordingly, he had inspected the sheathing and accepted it as suitable for the intended cargo.

During unloading at Cam Ranh Bay by military crews using mechanical equipment, portions of the wooden sheathing were smashed. This occurrence was not unusual. Rough treatment was expected, and the sheathing was customarily repaired and inspected by longshoremen in the United States. The vessel itself, however, did not carry the lumber to repair the sheathing, and her carpenters had no duties regarding sheathing repair while at sea.

Immediately upon discharge of the vessel's cargo in Vietnam, Reinhart went down into the hold to supervise its cleaning. He knew the sheathing had been badly battered. Nevertheless, he had the duty to set rat traps which government regulations required to be placed in the holds. Five times Reinhart ventured into the dimly lit hold in pursuance of his duty. On his sixth descent, he took out his flashlight and began to scan along the sides of the hull. He did not use the light to illuminate his path. If he had done so, perhaps he could have avoided the hole in the sheathing through which he fell, sustaining a hernia.

Reinhart brought suit against the United States under the Jones Act and the general maritime law doctrine of unseaworthiness. Had

9. 457 F.2d 151 (9th Cir. 1972).
11. The shipowner's warranty of seaworthiness under the general maritime law is a doctrine in the nature of strict liability. Because of the special hazards involved in going to sea, a seaman has the right to expect that the hull, gear, appliances, ways, appurtenances and manning will be reasonably fit for their intended purposes. 2 M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES 1 (3d ed. 1975). In Sanford & Brooks Co. v. Columbia Dredging Co., 177 F. 878, 883 (4th Cir. 1910), for example, the court explained that "there is an obligation upon the owner of every vessel, implied by law, that his vessel is tight, staunch and fit for the purposes for which he holds it forth."

Unseaworthiness differs from negligence in that it requires no finding of fault imputable to the owner. In this respect it resembles products liability law. Nearly all types of negligence, however, are likely to render a vessel unseaworthy. For a discussion of the few remaining differences in coverage between unseaworthiness and Jones Act negligence see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 383-404 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. See note 111 infra.
the court invoked the doctrine of comparative negligence, no doubt he would have been awarded part of the damages which he claimed.\footnote{12}

The district court judge ruled, however, that Reinhart had had a contractual duty to maintain the safety of the vessel and that his breach of this duty barred recovery.\footnote{18} The Court of Appeals for the Ninth Circuit affirmed.

\textbf{Peymann v. Perini Corp.}\footnote{14}

The tug \textit{Gorham Whitney} had docked for substantial engine overhaul, and Hans Peymann, chief engineer, was responsible for the repair job, which included lifting the weighty cylinder heads off the engine block. The lifting was accomplished by securing a chain fall to the deck overhead, attaching a chain to the cylinder, and pulling the heads off. Peymann picked up the forty pound chain fall and attempted to climb to a railing from which to hook the device to the deck overhead. Oil from the cylinder head, however, had dripped onto the railing, which had become slippery. He lost his footing and fell, sustaining a back injury.

Peymann sued his employer, Perini Corporation, which owned the \textit{Gorham Whitney}, under the Jones Act and the doctrine of unseaworthiness. Again, had the doctrine of comparative negligence been applied to the case, the plaintiff would doubtless have received at least a partial recovery, in spite of a possible finding that he had failed to perform his job with enough care for his own safety.\footnote{15}

\begin{itemize}
  \item If a seaman’s injury is caused by his own negligence in conjunction with the defendant shipowner’s breach of the warranty of seaworthiness, the seaman’s recovery is reduced according to the usual procedure associated with comparative negligence. 2 M. Norris, \textit{The Law of Maritime Personal Injuries} 44-45 (3d ed. 1975).
  \item The trial court found that Reinhart’s negligence was 75% responsible for his injuries. The defendant was found not to have been negligent, but was 25% responsible under the doctrine of unseaworthiness. The trial court, however, relied on the primary duty rule to bar the plaintiff’s recovery altogether. The plaintiff elected to appeal on the unseaworthiness count only. \textit{See} 457 F.2d 151, 152-53 (9th Cir. 1972).
  \item The court noted that Reinhart had been awarded maintenance and cure. \textit{See} id. at 152. This uniquely maritime benefit adheres to seamen only. The scope of coverage is extremely broad. Generally, a seaman has a right to maintenance and cure for any sickness or injury incurred while in the service of the ship. Recovery is limited to reasonable expenses incurred and only those future expenses that are definitely ascertainable. \textit{See generally} Gilmore & Black, \textit{supra} note 11, at 281-323.
  \item It should be kept in mind that although the primary duty rule may bar recovery in a Jones Act or unseaworthiness action, it does not keep a seaman from recovering maintenance and cure; therefore, a seaman is virtually guaranteed some compensation for his injuries.
  \item Peymann testified that no ladder had been available and that his employer customarily assigned three seamen to the task which he had been expected to do by himself.
\end{itemize}
Nevertheless, the court directed a verdict against Peymann on his Jones Act count, and the jury returned an adverse verdict on his unseaworthiness claim. The jury found that Peymann had had a duty to his employer to wipe the oil off the railing before climbing up to begin his repairs.\textsuperscript{16}

In each of these cases, an exception to the doctrine of comparative negligence was applied to prevent the plaintiff from recovering on his claim. This exception is known as the primary duty rule.

The primary duty rule is an anomalous concept within maritime tort law. Briefly stated, the rule embraces the notion that if there is some negligence on the part of the plaintiff and if it can be characterized as a breach of his employment duty, the plaintiff can recover nothing in negligence and unseaworthiness actions against the defendant employer.\textsuperscript{17} It is an absolute defense, in conflict with the partial defense of comparative negligence. For that reason, and because of its questionable historical origins, it has generated considerable controversy among the several circuit courts of appeals. For a complete understanding of this controversy and of the thesis of this note that the primary duty rule has no place in admiralty personal injury law, an historical analysis of the rule's origins and development is required.

1916 to 1939: FELA Origins of the Primary Duty Rule

Attorneys unfamiliar with the vagaries of admiralty law might be surprised to learn that the maritime primary duty rule had its origins in cases under the Federal Employers' Liability Act (FELA),\textsuperscript{18} which governs suits by railroad employees against their negligent employers. The reason for this strange connection between the law of railroads in interstate commerce and the law of navigable waters can be traced to the Jones Act,\textsuperscript{19} which gives to seamen the right to sue their employers for negligence without the disability of the fellow servant rule. For reasons still clouded in mystery,\textsuperscript{20} the Jones Act provides that in any action brought under the act, federal laws "modifying or extending the common-law right or remedy in cases of personal injury to railway employ-

\textsuperscript{16} Id.
\textsuperscript{17} See text accompanying notes 140-48 infra.
\textsuperscript{20} Gilmore and Black attribute this "odd expedient" of incorporating the FELA by reference to a desire to avoid "wast[ing] any time on thinking about the special problems of maritime workers." GILMORE & BLACK, supra note 11, at 351.
es shall apply . . . ."21 Thus, courts routinely cite FELA cases in Jones Act cases and Jones Act cases in FELA cases,22 leaving for case-by-case resolution the problems which arise out of the inherent differences between travel by rail and travel by sea.

The primary duty rule in FELA cases originated from what Dean Prosser calls "a rather unaccountable series of decisions of the Supreme Court beginning in 1916."23 Its first appearance was inauspicious. In *Great Northern Railway v. Wiles*,24 the plaintiff's decedent, a flagman, was killed in a train collision. His train had suddenly become uncoupled and thus had to be stopped for repairs. As part of his employment, Wiles had the duty to drop back on such occasions and flag down oncoming trains. It appeared from the testimony that Wiles knew another train was due. The state trial court directed a verdict for the railroad, but the Supreme Court of Washington reversed, ruling that the case should have gone to the jury under the res ipsa loquitur doctrine, with the appropriate deduction made for the decedent's share of the fault.25

The United States Supreme Court reversed, holding that even if the defendant railroad had been negligent, the plaintiff was still barred from recovery because the decedent had had a duty to others as well as to himself to flag down the oncoming train.26 The Court continued:

To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.27

Initially cited incorrectly to stand for the simple notion that when the plaintiff's negligence is the sole cause of the accident, and when the defendant railroad is not otherwise at fault, the defendant is not liable,28

22. See text accompanying note 63 infra.
25. See id. at 447.
26. Id. at 448.
27. Id.

In 1932, the Missouri Supreme Court reviewed the *Wiles* case and all the principal primary duty rule decisions. The court concluded that the primary duty rule did not really exist, and that all of these cases stood for the proposition that unless the defendant was negligent, the plaintiff's negligence, if any, would be the sole cause of his injuries. Brock v. Mobile & O.R.R., 330 Mo. 918, 934-38, 51 S.W.2d 100, 106-08 (1932); accord,
the rule of the Wiles case was developed and shaped by subsequent
decisions into the proposition that "if the injured employee has contrib-
uted to his injury by the breach of a rule or an instruction ad hoc, he
cannot recover." This notion was amplified in a line of cases in which
no company rule or instruction had been violated but in which the
plaintiff was held to have had a general duty to repair or maintain, the
breach of which had caused the injury. If the breach of such an
employment duty could be attributed to the plaintiff employee, the
negligent defendant employer had a complete defense. Predictably, the
results produced by the application of the primary duty rule were often
harsh.

Soon after the primary duty rule had secured its place in American
jurisprudence, lower courts nationwide struggled to articulate plausible
rationales by which to justify its existence, but they came to no certain
conclusions. It did become clear, however, that the primary duty rule
could not, appearances to the contrary, be placed within the confines of
the doctrine of contributory negligence, since contributory negligence
was a partial defense rather than a complete bar to an FELA
action. Neither could it be said to be a form of assumption of risk. Until the
FEBA was amended in 1939, assumption of risk was in most situa-
tions a complete defense, but even before 1939, the doctrine was no
defense at all when a defendant railroad was guilty of violating "any
statute enacted for the safety of employees." In contrast, the primary
duty rule had been applied despite a defendant railroad's violation of
such statutes.

Perry v. Missouri-Kan.-Tex. R.R., 340 Mo. 1052, 1065, 104 S.W.2d 332, 338-39 (1937);
Hocking Valley Ry. v. Kontner, 114 Ohio St. 157, 150 N.E. 739 (1926).
30. See, e.g., United States Steel Prods. Co. v. Noble, 10 F.2d 89 (2d Cir. 1925).
Noble was the first maritime case to which the primary duty rule was applied. In that
case, the vessel's engineer had the general duty to repair a glass water gauge. He neg-
ligently handled the repair, and the glass burst, putting out his eye. The violation of
his duty to repair was held a complete bar to recovery.

31. See, e.g., Unadilla Valley Ry. v. Caldine, 278 U.S. 139 (1928); Frese v. Chi-
cago, B. & Q.R.R., 263 U.S. 1 (1923); Paster v. Pennsylvania R.R., 43 F.2d 908 (2d
Cir. 1930); Blunt v. Pennsylvania R.R., 9 F.2d 395 (6th Cir. 1925); Patterson v. Direc-
tor General, 115 S.C. 390, 105 S.E. 746 (1921).
33. See Act of August 11, 1939, ch. 685, §§ 1, 4, 53 Stat. 1404 (codified at 45
U.S.C. §§ 51, 54 (1970)).
34. See, e.g., Toledo, St. L. & W.R.R. v. Allen, 276 U.S. 165 (1928).
If the plaintiff can show his injury was caused by the defendant's violation of a safety
statute, he need not show that the defendant was negligent; rather, the defendant is liable
regardless of fault. See, e.g., Kernan v. American Dredging Co., 355 U.S. 426, 430-
36. See Patterson v. Director General, 115 S.C. 390, 399, 105 S.E. 746, 749
In McCalmont v. Pennsylvania Co., the district court announced a new theory which quickly won wide credence. The court in McCalmont considered the circumstances in Wiles and assumed that the defendant railroad in Wiles had violated the Safety Appliance Act, since the case involved a defective coupling between cars. There is language in Wiles which seems to describe the alleged negligence of the defendant railroad as a passive condition which had been acted upon by Wiles’s violation of his duty. Therefore, the court in McCalmont reasoned, the Supreme Court must have meant that Wiles’s violation of his employment duty had been the proximate cause of his injury, rendering any negligence of the defendant a remote cause.

This resourceful piece of interpretation, however, does not square with the Supreme Court’s earlier decision in Union Pacific Railroad v. Hadley, a case nearly identical to Wiles. In Hadley, a train had decoupled and a flagman had violated company rules by not dropping back to warn an oncoming train. The flagman was killed in the ensuing collision, but his widow was not barred from recovery. Justice Holmes, through an apparently inaccurate reading of Wiles, distinguished that case as involving a defendant railroad to which no negligence could be imputed. In upholding the plaintiff’s recovery in Hadley, Justice Holmes specifically rejected the very proximate cause theory that the court in McCalmont was to posit three years later. Justice Holmes reasoned:

But it is said that in any view of the defendant’s conduct, the only proximate cause of [plaintiff’s decedent] Cradit’s death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit’s negligence should be deemed the logical last, it would be


37. 273 F. 231 (N.D. Ohio 1921), aff’d, 283 F. 736 (6th Cir. 1922).
39. See 240 U.S. at 448. The Court said, “There is no justification for a comparison of negligence or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles.”
40. See 273 F. at 234-35.
41. The proximate cause theory was also expounded in Cooley v. New York Cent. R.R., 80 F.2d 816, 817-18 (2d Cir. 1936); Pere Marquette Ry. v. Haskins, 62 F.2d 806, 808 (6th Cir. 1933).
42. 246 U.S. 330 (1918).
43. See 240 U.S. at 448.
emptying the statute of its meaning to say that his death did not result in part from the negligence of any employees of the road.\textsuperscript{44}

The \textit{Hadley} case would appear to have overruled \textit{Wiles}. Nevertheless, the Supreme Court in later cases affirmed the primary duty rule without even mentioning \textit{Hadley}.\textsuperscript{46} These subsequent cases failed to describe a theory under which the rule could be distinguished from contributory negligence, a defense explicitly held by the FELA not to bar the plaintiff's recovery.\textsuperscript{48} The primary duty rule in FELA cases seemed to be a doctrine without a hypothesis,\textsuperscript{47} suddenly appearing and winning acceptance without any explanation.\textsuperscript{48}

\textsuperscript{44} 246 U.S. at 333. The United States Supreme Court also refuted the proximate cause theory three years before the appearance of the primary duty rule. In \textit{Grand Trunk Ry. v. Lindsay}, 233 U.S. 42 (1914), the defendant argued that the plaintiff's active negligence superseded defendant's passive negligence. The theory was rejected. \textit{Id.} at 47. If the reasoning in \textit{McCalmont} was based on a true causation theory, as it purported to be, then the plaintiff's negligence in violating a duty should have superseded the defendant's negligence no more than did Lindsay's negligence. For a decision which adopted this view see \textit{Hocking Valley Ry. v. Kontner}, 114 Ohio St. 157, 150 N.E. 739 (1926).


\textsuperscript{46} \textit{See 45 U.S.C. § 53 (1970).}

\textsuperscript{47} In 1936, Judge Learned Hand very tentatively offered the theory that there is a distinction to be drawn between "contributory negligence" and "indiscipline." He then withdrew the remark, however, noting that "it is not . . . our province to do more than ascertain the extent of the doctrine." \textit{Van Derveer v. Delaware L. & W.R.R.}, 84 F.2d 979, 982 (2d Cir. 1936). The Supreme Court described the primary duty rule as one in which "contributory negligence . . . became assumption of the risk." \textit{Tiller v. Atlantic Coast Line R.R.}, 318 U.S. 54, 63 (1943). This analysis is as perceptive as any to be found in the FELA primary duty rule cases.

\textsuperscript{48} Another interesting question is whether the primary duty rule was conceived as uniquely an FELA action or whether it was to be applied to all comparative negligence systems. The difference is that if the primary duty rule is not an FELA doctrine but is a doctrine applicable to all comparative negligence schemes, it should be found wherever comparative negligence is found. It is not. \textit{But see Morris & Co. v. Thurmond}, 262 F. 384, 385 (5th Cir. 1920).

If, on the other hand, the primary duty rule is an FELA doctrine, it should not be transferred from Jones Act actions to unseaworthiness actions. In \textit{Stewart v. United States}, 25 F.2d 869 (E.D. La. 1928), the court was presented with a fact situation identical to that presented in United States Steel Prods. Co. v. Noble, 10 F.2d 89 (2d Cir. 1925), \textit{discussed in note 30 supra}. The only difference was that the plaintiff in \textit{Noble} proceeded solely on a Jones Act count, while in \textit{Stewart}, the plaintiff relied entirely on the doctrine of unseaworthiness. In \textit{Noble}, the plaintiff was barred by the primary duty rule; the court in \textit{Stewart}, however, rejected the primary duty rule as a complete defense, applying instead the rule of proportionate fault.

Two recent cases, however, have borrowed the primary duty rule from Jones Act cases and have applied it to the theoretically distinct count of unseaworthiness. \textit{See Peymann v. Perini Corp.}, 507 F.2d 1318 (1st Cir. 1974), \textit{cert. denied}, 421 U.S. 914 (1975); \textit{Reinhart v. United States}, 457 F.2d 151 (9th Cir. 1972).
1939: The FELA Amendments

The availability of assumption of risk as a complete defense to most FELA actions, while contributory negligence was only a partial defense, posed extravagant conceptual difficulties for the courts. Finally, in 1939, Congress amended the FELA, abolishing assumption of risk as a defense.

The Supreme Court, speaking through Justice Black, responded with genuine exuberance in Tiller v. Atlantic Coast Line Railroad. Justice Black noted that the application of assumption of risk to the FELA had become "the subject of endless litigation," and that

[a]side from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the "primary duty rule" in which contributory negligence through violation of a company rule became assumption of risk.

The Court, in dictum, lumped the primary duty rule together with such bizarre-sounding doctrines as "promise to repair," "simple tool," and "peremptory order," characterizing the whole panoply as a "maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called."

Having thus interred the corpse of the primary duty rule, Justice Black sealed the tomb with a solemn curse:

The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon.

1952 to 1972: The Recrudescence of Primary Duty

Oh, keep the dog far hence that's friend to men
Or with his nails he'll dig it up again.

If these events had spelled the end of the primary duty rule, the above foray into the dead pages of FELA history would have been

51. 318 U.S. 54 (1943).
52. Id. at 63.
53. Id. at 63-64.
superfluous. In 1952, however, the primary duty rule flowered again in Judge Learned Hand's opinion for the Court of Appeals for the Second Circuit in *Walker v. Lykes Brothers Steamship Co.*

In *Walker*, the owner of a vessel negligently placed a file cabinet with defective catches in the captain's cabin. The result was that when the vessel pitched about in angry seas, the drawers often fell out of the cabinet, unceremoniously dumping the captain's papers on the floor. The captain did not know of this problem until he had put to sea, but it was sufficiently irksome that he ordered the port engineer of Lykes Brothers in New Orleans to repair the latch. He also filed a written requisition on the cabinet at Port Arthur. These efforts failed to procure a repair, and Captain Walker dropped the matter. Out at sea again, the captain was pacing about his cabin when, without warning, the cabinet drawer rolled out and struck him in the shin.

The captain brought an action under the Jones Act and obtained a jury verdict in his favor. Upon the defendant's appeal, however, the Court of Appeals for the Second Circuit set aside the verdict and ordered a new trial. In the course of its decision, the court exhumed the primary duty rule from its decisive burial in *Tiller* and re-established it as a complete defense to a Jones Act action.

Judge Hand noted that the trial court had instructed the jury that if Captain Walker had negligently failed to use sufficient effort to repair the latches on the file cabinet, his recovery should be reduced according to his fault. According to Judge Hand, this instruction was inadequate, as Captain Walker's fault was something more than contributory negligence.

Judge Hand claimed that courts were accustomed to treating contributory negligence as "a failure by the injured party to discharge a duty owed towards the wrongdoer." Although he himself was skeptical whether this characterization was proper, he believed that "it makes no practical difference whether one adopts that form of words, or says that the duty of the wrongdoer does not extend to, or is modified in its scope in the case of, those who do not look out for themselves." He therefore accepted the "conventional rubric" that contributory negligence involved a breach of a duty to the wrongdoer. Judge Hand continued:

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56. 193 F.2d 772 (2d Cir. 1952).
57. See id. at 773.
58. Id. But see W. Prosser, *The Law of Torts* 418 (4th ed. 1971). According to Dean Prosser, "Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of his own negligence."
59. 193 F.2d at 773.
60. Id.
The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty towards the wrongdoer, and a duty which the injured person has consciously assumed as a term of employment.61

The breach of a duty consciously assumed as a term of employment, Judge Hand asserted, was a complete defense to any recovery.62 For this proposition, so close to assumption of risk, if indeed it is distinguishable from it at all, Judge Hand cited63 a familiar series of FELA cases starting with Wiles.64 All of these cases predated Tiller,65 which was not mentioned.66 Moreover, Judge Hand does not discuss whether the "conscious assumption of an employment duty" notion was actually a recrudescence of assumption of risk, which had been specifically barred from all FELA (and therefore Jones Act) cases.67

Having resurrected the primary duty rule, Judge Hand concluded, "Hence, if the defendant had raised the point [on appeal], the judgment could not stand."68 Thus the trial court's failure to instruct on the primary duty rule was not the ratio decidendi in Walker. Rather, Judge Hand remanded the case to the trial court on the ground that the court had erroneously instructed the jury on the extent of a ship captain's duty of care.69

61. Id. The court proceeded to explain that courts had inferred an intent of Congress in the FELA to associate the phrase "contributory negligence" with "a momentary inattention to one's own safety—the kind of thing of which we are all guilty every day . . . ." Id. at 774. On the other hand, Judge Hand asserted, "so serious a fault as the breach of a duty assumed by the employee for the protection of others [and] incidentally . . . for his own benefit" had never been intended by Congress to constitute contributory negligence. See id. Judge Hand cited no authority for such a finding of congressional intent; he attributed this view to "the courts." A survey of the primary duty rule cases under the FELA shows a dearth of any discussion of whether Congress, by ending the defense of contributory negligence, intended that FELA plaintiffs should be barred from recovery by the primary duty rule. See, e.g., Boat Dagny v. Todd, 224 F.2d 208, 211 (1st Cir. 1955).

62. Judge Hand offered no hint as to the result in a case in which the plaintiff's breach of a consciously assumed duty to protect himself and others is also a "momentary inattention." His discussion in one case indicated that even this situation would bar recovery. Paster v. Pennsylvania R.R., 43 F.2d 908, 910 (2d Cir. 1930). But cf. Miller v. Central R.R., 58 F.2d 635, 637 (2d Cir. 1932).

63. See 193 F.2d at 773 n.1.
64. 240 U.S. 444 (1916).
65. 318 U.S. 54 (1943).
66. For the case in which the court found this fact significant see Boat Dagny v. Todd, 224 F.2d 208, 211 (1st Cir. 1955).
68. See 193 F.2d at 774.
69. Judge Hand's criticism of the lower court's instructions was that they had failed to impress upon the jurors the higher standard of care to which masters of vessels
The reappearance of the primary duty rule\textsuperscript{70} was first discussed in 1955 in \textit{Dixon v. United States},\textsuperscript{71} another Second Circuit decision, this time written by Justice John Harlan sitting in circuit. Justice Harlan's opinion in this case is well respected for its scholarly discussion of unseaworthiness as a theory of recovery for seamen's personal injuries.\textsuperscript{72} The opinion in \textit{Dixon} also failed to venture beyond dictum on the subject of the primary duty rule, since the court found that the plaintiff had violated no duty to the employer.\textsuperscript{73} Nevertheless, Justice Harlan's discussion added a new and perplexing suggestion concerning the nature of the rule and why it is distinguishable from assumption of risk and contributed negligence:

\begin{quote}
\textit{[Walker, Wiles]} and other cases of the same tenor which the appellant cites, are in no way inconsistent with the rule that assumption of risk is not a defense . . . . Those cases are only instances of the firmly established rule that an employee may not recover.
\end{quote}

were held. To charge the master with a duty of reasonable care, Judge Hand asserted, had been inadequate. \textit{See id.} at 775.

\textsuperscript{70} That Judge Hand would go well out of his way to resurrect the primary duty rule, even when the defendant had not raised it on appeal, is odd in light of his past criticism of the rule. \textit{See, e.g.,} Paster v. Pennsylvania R.R., 43 F.2d 908, 910 (2d Cir. 1930). In \textit{Miller v. Central Railway}, he refused to apply the primary duty rule to violations of “rules generally enjoining caution, or responsibility.” He explained that “[i]f it did [apply to such situations], an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation . . . . [The FELA] was designed to end that defense and cannot be so conveniently avoided . . . .” \textit{Miller v. Central R.R.}, 58 F.2d 635, 637 (2d Cir. 1932).

\textsuperscript{71} 219 F.2d 10 (2d Cir. 1955).

\textsuperscript{72} \textit{See} GILMORE \& BLACK, supra note 11, at 397-98.

\textsuperscript{73} The captain had ordered Dixon to see whether a ladder had been repaired and was in safe condition. Dixon decided to test the ladder by climbing on it. Several rungs popped out, plunging him backward. The district court held that the primary duty rule was inapposite, commenting: “Here Dixon did not fail to fulfill a duty owed to his employer—on the contrary, he was in the process of carrying one out.” 120 F. Supp. 747, 751 n.9 (S.D.N.Y. 1954). Justice Harlan's view was that Dixon had never been told not to descend the ladder. 219 F.2d at 12, 17.

In \textit{Peymann v. Perini Corp.}, a chief engineer with the duty to maintain the safety of the engine room was held to have violated an employment duty when he had negligently failed to wipe oil off a railing before standing on it. \textit{Dixon} and \textit{Peymann} can be distinguished, as Peymann neglected to take any action whatever toward the execution of his so-called employment duty, while Dixon merely executed his duty in an unintelligent fashion. Had Dixon forgotten to test the ladder at all and then later suffered injury from using it, his case would have been closer to Peymann's. Needless to say, when such distinctions spell the difference between recovery and no recovery for the plaintiff, they are fine indeed. \textit{Peymann v. Perini Corp.}, 507 F.2d 1318, 1321 (1st Cir. 1974), \textit{cert. denied}, 421 U.S. 914 (1975).

In \textit{Dixon}, however, the primary duty rule was held inapplicable for another reason. In that case, the court found that while the plaintiff was not as cautious as he might have been, he was not sufficiently careless to overturn the lower court's finding that he was not contributorily negligent. \textit{See} 219 F.2d at 17.
against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship. Their result turns really not upon any question of "proximate cause," "assumption of risk," or "contributory negligence," but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.74

Justice Harlan's explanation of the primary duty rule is difficult to untangle. He suggested that the employer has an "independent right" to recover for damages caused by the nonperformance of the plaintiff's employment duty, and that this right entitles the employer to a return of the very damages for which he was held liable to the employee. If the recognition of this right means that the primary duty rule is actually a compulsory counterclaim75 and not an affirmative defense,76 courts would be required to order juries to proceed with the calculus of comparative negligence, with consideration of the primary duty rule following in some sort of "independent" and easily distinguishable proceeding. No court, however, has followed this procedure. Instead, juries have been instructed that if the plaintiff was negligent, and if that negligence constituted a violation of an employment duty, the defendant has a complete defense, not an independent cause of action.77

Also, it is unclear whether the employer's independent right of recovery, as Justice Harlan characterized it, is based on the law of agency or on the employee's assumption of a contractual duty. Neither area of the law adequately explains Justice Harlan's view of the primary duty rule.

Agency Theory

Under an agency gloss of Justice Harlan's theory, the plaintiff would supposedly sue the defendant in negligence, with the defendant setting up his partial defense of contributory negligence. Plaintiff would be rewarded a reduced recovery. Defendant would then bring his so-called "independent action" to recover an indemnity equal to the "damage" which defendant suffered as a "result" of the plaintiff's breach of his employment duty to use care and skill.78

The agency theory, for Justice Harlan's mysterious dictum, however, runs afoul of the rule that when the indemnitee's negligence

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74. 219 F.2d at 16-17.
75. FED. R. CIV. P. 13(a).
76. FED. R. CIV. P. 8(c).
78. See Restatement (Second) of Agency § 379 (1958).
contributes to the harm, he can have no indemnity over from the indemnitor. According to Justice Harlan's formula, the defendant would enjoy not only the benefit of a partial defense under comparative negligence but also a right to recover the balance of the plaintiff's recovery, a recovery which theoretically represents only that part of plaintiff's loss caused by the fault of the defendant. The object of an indemnity action is to ensure that the defendant is not ultimately liable for fault imputed to him by mere operation of law. A comparative negligence proceeding serves the same object as the defendant pays only for that which his own fault caused. The addition of the independent action distorts agency law to permit the defendant to escape completely the consequences of his fault.

**Contractual Theory**

If, on the other hand, Justice Harlan meant that a seaman, by accepting employment, impliedly warrants in contract that he will indemnify the employer for any negligence attributable to the employer whenever the seaman's own negligence contributed to an injury, his theory is in conflict with the ancient maritime tradition against exculpatory clauses. Under a contractual gloss of Justice Harlan's "independent action" approach, the employer should also be able to recover any maintenance and cure that he is obliged to pay when the plaintiff seaman negligently injures himself, as such negligence can be deemed a violation of an employment duty. This result is contrary to the law of maintenance and cure. The suggestion that all seamen contract away the benefits afforded to them by comparative negligence is a radical departure from admiralty's solicitous posture toward seamen, who have traditionally been treated as childlike wards. Perhaps it is best to note that Justice Harlan's discussion of the primary duty rule is dictum and move on.

The next court to consider the primary duty rule was the Court of Appeals for the First Circuit in another 1955 decision, *Boat Dagny v. Todd*. In that case, a generator on a fishing vessel suddenly malfunctioned, pitching the crew into darkness. The captain slipped, fell, and was injured. He brought an action under the Jones Act and the doctrine of unseaworthiness. Although the captain admitted he had had the duty to make certain that the generator was in good operating condition, Judge Magruder, speaking for the First Circuit, refused to

79. See id. § 102.
82. 224 F.2d 208 (1st Cir. 1955).
overturn the captain's jury verdict on two grounds. First, the jury could have found that the defendant's engineer had been solely negligent and that therefore no blame adhered to the plaintiff. Second, Judge Hand's resurrection of the primary duty rule in the *Walker* decision had been contrary to the dictates of the FELA:

We cannot find in [the FELA] any suggestion that the Congress had in mind this refinement between the two species of contributory fault. It is significant that Judge Hand felt himself to be bound by cases which were decided before the 1939 amendment to the Federal Employers' Liability Act, which plugged up what Congress deemed to be a leak in the original Act, by abolishing specifically the defense of assumption of risk.

Judge Magruder then quoted at length from the portions of *Tiller* which had apparently ended the primary duty rule in 1943.

In 1956, the Fourth Circuit decided *Mason v. Lynch Brothers Co.*, in which the court declined to choose between *Walker* and *Boat Dagny*. In *Mason*, an able-bodied seaman was asked to skipper a tugboat for a short time. He negligently allowed oil to spill and then slipped on it. The owner of the tug was found to have violated statutes and regulations concerning safe working conditions and was held generally negligent in that regard. The court assumed that the primary duty rule as described in *Walker* did not apply to ordinary seamen and accordingly refused to invoke the rule. Perhaps it is fair to cite this case for the proposition that in the Fourth Circuit, the primary duty rule applies to violations of duty by captains and possibly only captains of ocean going vessels.

The Sixth Circuit considered the primary duty rule in the 1957 case of *Chesapeake & Ohio Railway v. Newman*. The court in *Newman* viewed *Walker* as standing for the proposition that when a seaman's breach of duty was the sole proximate cause of his injury, he cannot recover, but when his breach of an employment duty combined

83. *Id.* at 212.
84. *Id.* at 211.
85. *See id.*
86. *Id.* at 211, quoting *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 62-64 (1943).
87. 228 F.2d 709 (4th Cir. 1956).
88. 193 F.2d 772 (2d Cir. 1952).
89. 224 F.2d 208 (1st Cir. 1955).
90. *See 228 F.2d at 712.*
93. 243 F.2d 804 (6th Cir. 1957).
with the defendant's negligence, the plaintiff's damages should be reduced according to fault. 94

Unwelcome in the First, Fourth, and Sixth Circuits, the primary duty rule also found itself rebuffed in 1960 in its home port, the Second Circuit. In *Dunbar v. Henry Du Bois' Sons Co.*, 95 the plaintiff's decedent was the sole person aboard a steam derrick being towed about by a tugboat. The derrick capsized and Dunbar was drowned. His widow brought suit under the Jones Act and the jury awarded a verdict reduced by the 20 percent fault attributed to Dunbar. On appeal, the defendant alleged that Dunbar had violated his duty in not caulking the hull, that this omission had caused the barge to sink, and that the primary duty rule of *Walker* barred recovery.

All three judges agreed that *Walker* was inapplicable. One of them, Judge Hincks, felt *Walker* could be distinguished on the facts. 96 Ignoring the defendant's allegation that Dunbar had failed to caulk the hull, Judge Hincks decided that the jury could have found that Dunbar had been partially at fault for his inattention. Noting that Dunbar had been on duty for seventeen hours, Judge Hincks concluded that if in fact the jury had found Dunbar to have been inattentive, the primary duty rule would not apply, because under the circumstances Dunbar could not be said to have breached a duty in violation of a term of employment.

The other two judges preferred to address the issue directly rather than to change the subject. Relying on *Boat Dagny*, they overruled *Walker* altogether. Judge Clark asserted his belief that "in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby." 97 Judge Waterman simply dismissed the *Walker* doctrine as dictum. 98

### 1972: The Ninth Circuit Checks In

Since putting to sea in 1952, the primary duty rule, as has been

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94. See id. at 808. The court erroneously assumed that *Dixon* was "only an exposition of the rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship." The court in *Newman* proceeded to "redefine" the *Dixon* holding in terms of proximate cause. 243 F.2d at 808. Compare cases cited in note 28 supra.

95. 275 F.2d 304 (2d Cir. 1960).

96. See id. at 306.

97. Id.

98. See id. The Second Circuit has been left in a state of confusion as a result of this case. See, e.g., Nicroli v. Den Norske Afrika-Og Australieline, 332 F.2d 651, 654 (2d Cir. 1964) (doubt expressed as to validity of primary duty rule); Ktistakis v. United Cross Navigation Corp., 204 F. Supp. 293, 295 (S.D.N.Y. 1962) (primary duty concept rejected altogether).
discussed, had received rough treatment. In 1972, however, the Court of Appeals for the Ninth Circuit extended a red carpet welcome to the doctrine.

Only one primary duty case had previously reached this court. The issue had been sidestepped by a finding that the plaintiff had not been negligent and that he had had no duty concerning the defective machinery which had injured him. Still, the court had looked askance at the primary duty rule, suggesting that perhaps it was too close to assumption of risk to withstand close scrutiny.

In 1972, the Ninth Circuit in Reinhart v. United States reversed its course, not only affirming the primary duty rule, but greatly expanding the doctrine.

The Reinhart case, it will be remembered, concerned the chief mate aboard a vessel transporting ammunition to Vietnam. Wooden sheathing was kept in the hold to separate the bombs from the metal hull. While inspecting the hold for rats, Reinhart fell through the wooden sheathing, which the Army had battered up during the unloading of the cargo. The court ruled that since Reinhart had had the duty to render the vessel safe and was at fault for having breached this duty, he was barred from any recovery.

The Reinhart decision expanded the primary duty rule in many directions. First, the plaintiff in that case had appealed on his unseaworthiness count only. Thus, for the first time, the primary duty rule was applied to the general maritime doctrine of unseaworthiness. Herefore, the primary duty rule had never ventured beyond Jones Act cases, in which FELA law applied.

This development is of importance to seamen. There will necessarily be occasions when neither the vessel’s owner nor its employees has breached any duty to keep the vessel safe, but the vessel is nevertheless unseaworthy. If the decision in Reinhart is to be followed, a seaman may be barred from recovery by the primary duty rule even when he brings suits under the doctrine of unseaworthiness.

The spillover from Jones Act cases to unseaworthiness cases is a circumstance with which practitioners and text writers are unhappily familiar. Jones Act negligence and unseaworthiness now overlap to a very great extent. This situation has led practitioners to plead both

99. See notes 82-98 & accompanying text supra.
100. See Hudson Waterways Corp. v. Schneider, 365 F.2d 1012 (9th Cir. 1966).
101. See id. at 1016 n.1.
102. 457 F.2d 151 (9th Cir. 1972).
103. See text accompanying notes 14-16 supra.
104. 457 F.2d at 151.
105. Nevertheless, the Supreme Court has emphasized strongly “the complete divorcement of unseaworthiness liability from concepts of negligence.” Mitchell v. Traw-
Jones Act cases and unseaworthiness causes of action in virtually all personal injury suits. Because appellate courts are invariably presented with these double counts, they have come to mingle the two, applying to unseaworthiness actions doctrines unique to Jones Act actions. Reinhart may exemplify this tendency; nonetheless, at least in the Ninth Circuit, the decision establishes the applicability of the primary duty rule to the general maritime law.

The second noteworthy aspect of the decision in Reinhart is that it marks the first time the primary duty rule has successfully barred recovery in a federal court. The previous leading cases on the primary duty rule in admiralty, Walker and Dixon, dealt with the subject by way of dictum only. In the cases which followed, the rule was declared either bad law or inapplicable to the facts. Thus, until 1972, the

106. Gilmore & Black, supra note 11, at 383.
107. Thus, courts may unconsciously have transferred the liberal causation rule of the Jones Act cases to unseaworthiness actions. In Curry v. United States, the court stated: "No case cited to the court has specifically adopted the [FELA] rule of causality where the defendant's liability has been predicated solely on unseaworthiness (rather than negligence) but no good reason would call for a distinction here, and the lack of authority may be attributable to the fact that an unseaworthiness claim is invariably tied to a negligence claim.” Curry v. United States, 327 F. Supp. 155, 164 (N.D. Cal. 1971).

But in Moragne v. States Marine Lines, the Supreme Court noted that “the beneficiary provisions of the Jones Act are applicable only to a specific class of actions... based on violations of the special standard of negligence that has been imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law.” Moragne v. States Marine Lines, Inc., 398 U.S. 375, 407 (1970) (dictum). Also in Moragne, the Supreme Court borrowed the wrongful death provisions from the Jones Act and applied them to the general maritime law, but only after a careful and well-reasoned discussion of the issues involved. Id.

108. Of course, a primary duty rule as a defense to a count under the Jones Act but not to a count under the doctrine of unseaworthiness is deprived of all efficacy. Since there is extensive overlap between the two causes of action, most plaintiffs can win a verdict under either theory with equal ease. If a plaintiff is faced with a primary duty rule defense to his Jones Act count, and can rely on his unseaworthiness count in order to avoid the defense, the primary duty rule accomplishes nothing.

109. E.g., Dunbar v. Henry Du Bois' Sons Co., 275 F.2d 304, 306 (2d Cir. 1960); Chesapeake & O. Ry. v. Newman, 243 F.2d 804, 808 (6th Cir. 1957) (interpreting the primary duty rule out of existence); Mason v. Lynch Bros. Co., 228 F.2d 709, 712 (4th Cir. 1956) (limiting the doctrine to captains on ocean going vessels); Boat Dagny v. Todd, 224 F.2d 208, 211 (1st Cir. 1955).

110. See, e.g., Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1015-16 (9th Cir. 1966); Nicoli v. Den Norski Afrika-Og Australienline, 332 F.2d 651, 654 (2d Cir. 1964); Schlichter v. Port Arthur Towing Co., 288 F.2d 801, 805 (5th Cir. 1961).
primary duty rule could have been dismissed as ill-considered dictum. This alternative, of course, is no longer available.

A third important feature of Reinhart is the broad nature of the facts. Reinhart's duty to his employer included "overseeing safe working conditions on the vessel." As mentioned above, Reinhart fell through a hole in the hull's wooden sheathing. It was the duty of longshoremen back in the United States to inspect and repair the sheathing. In fact, the vessel did not even have the lumber to make repairs at sea. The court pointed out that Reinhart could have had the sheathing made safe at Cam Ranh Bay or at least could have seen to it that the hull was adequately illuminated. It was this fault—a breach of Reinhart's "contractual" duty to his employer to render the vessel safe—that barred any recovery by Reinhart. Defense counsel should be able to cite this case for the proposition that when a seaman has a duty to render the entire vessel safe, and when he is injured because of some unsafe part of the vessel which he should have rendered safe, the seaman is barred from recovery and is deprived of the benefits of the comparative negligence doctrine.

Judge Trask began his opinion in Reinhart with an intelligent discussion of the facts and a thoughtful outline of the concept of unseaworthiness. Thereafter, he appears to have misread the Walker case and three district court opinions which he asserted had applied the primary duty rule. He noted that Ninth Circuit's only precedent

111. 457 F.2d at 152.
112. Id.
113. See id.
114. Id. at 154. The court's assertion that the presence of unsafe working conditions is a breach of contract raises several questions: What would the result have been if some other seaman had suffered the injury? Would Reinhart have been liable for this same breach of contract, or did the terms of his contract cover only self-protection? If the latter, then contributory negligence has merely been relabeled an implied contractual provision for the purpose of defeating comparative negligence.
115. See id. at 152.
116. See id. at 153. Judge Trask asserted that in Walker "[the defendant shipowner] argued that the Master of the ship had the duty to make the ship safe for the voyage and could not recover damages for his own breach of that duty. Judge Learned Hand agreed." Id. Actually, in Walker, the defendant had been negligent, and if Walker had been allowed to recover it would have been on the basis of this negligence, not on the basis of his own fault. Such a reading of the case would have made Walker solely negligent and would have relieved the defendant of any independent fault.
117. See id. at 153. In the first of the three cases the court construed, a longshoreman sued not his employer but a third party, the shipowner, whose defective equipment had injured the longshoreman. The longshoreman was found not to have been negligent in any way. Cook v. MV Wasaborg, 189 F. Supp. 464 (D. Ore. 1960). Since Cook was not a Jones Act suit, it was governed by the general maritime law, to which FELA doctrines have no application.

In the second case cited by Judge Trask as having applied the primary duty rule,
on the primary duty rule, *Hudson Waterways Corp. v. Schneider*,\(^{118}\) observing correctly that in that case the rule had been held inapplicable.\(^{119}\) Nevertheless, that opinion did contain a footnote critical of the decision in *Walker*.\(^{120}\) Judge Trask dismissed the criticism with the remark: “It is not necessary to respond here in detail to the remaining comments of the note.”\(^{121}\) More striking are Judge Trask’s answers to the criticism in *Boat Dagny*\(^{122}\) of the *Walker* decision. The Court of Appeals for the First Circuit in *Boat Dagny* had rejected Judge Hand’s primary duty rule thesis, citing the opinion in *Tiller*\(^{123}\) at great length and asserting that Judge Hand had overlooked the 1939 FELA amendments.\(^{124}\) Judge Trask stated:

> We cannot accept such an over-simplified explanation of Walker v. Lykes. That case was decided in 1952, long after the Federal Employers’ Liability Act amendment and the decision in *Tiller*. It seems naive to assume that neither Judge Hand nor his associates, Chief Judge Swan and Judge Augustus Hand, were aware of either the statute or the decision.\(^{125}\)

### 1974: The First Circuit Overturns *Boat Dagny*

The Court of Appeals for the First Circuit, with its decision in

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a captain ordered a maid not to wax the floors in the cabin. The captain slipped and sued the owner of the vessel. The court found that the maid had not been negligent and hence neither had the defendant owner. Any possible negligence, the court found, was attributable to the captain for his failure to supervise the maid with more diligence. *Elliott v. Jones & Laughlin Steel Corp.*, 166 F. Supp. 731 (W.D. Pa. 1957), *aff’d*, 259 F.2d 959 (3d Cir. 1958).


Judge Trask, after citing these cases, continued: “Still other cases have followed a natural corollary of the *Walker* rule, holding that one may not recover on the basis of unseaworthiness for an injury entirely caused by one’s own negligence, although there may not have been a contractual duty.” 457 F.2d at 153 n.3. This proposition, however, is hardly a “natural corollary” to the primary duty rule any more than a general denial to a complaint is the natural corollary to a plea of confession and avoidance.

118. 365 F.2d 1012 (9th Cir. 1966).
119. *See* 457 F.2d at 154-55.
120. *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012, 1016 n.1 (9th Cir. 1966).
121. 457 F.2d at 155. In doing so, Judge Trask cited a footnote in *Du Bois’ Sons* in which the court described as spurious various distinctions and refinements of the primary duty rule. The court in *Du Bois’ Sons* included the footnote, however, to bolster its argument that the primary duty rule was beyond salvage and should be overruled. *Dunbar v. Henry Du Bois’ Sons Co.*, 275 F.2d 304, 306 n.1 (2d Cir. 1960).
122. 224 F.2d 208 (1st Cir. 1955).
123. 318 U.S. 54 (1943).
124. *See id.* See text accompanying notes 82-86 supra.
125. 457 F.2d at 154.
Boat Dagny, had been the primary duty rule's most forthright opponent. In November 1974, that court reversed itself in *Peymann v. Perini Corp.*

The facts in *Peymann* have been previously described at length. Peymann, an engineer, had the duty to repair a cylinder which dripped oil. To perform this duty, he had to hook a chain fall to the deck above the cylinder and attach the chain to the cylinder. To reach the deck overhead, he climbed up on a railing over which seeped oil from the cylinder. He slipped on the oil and fell.

Peymann brought his claim under the Jones Act and under the doctrine of unseaworthiness. The trial court directed a verdict for the defendant on the Jones Act count and submitted the unseaworthiness count to the jury with a very confusing instruction on the primary duty rule. The jury rendered a verdict for the defendant. On appeal, the verdict was affirmed in an opinion written by Judge Aldrich.

The crux of the exceedingly abstruse decision seems to be that Peymann had had the duty to render the engine room seaworthy, and that since his failure to remedy an unseaworthy condition had been involved in the accident, he was barred from recovery. This failure,
it should be noted, did not relate to the presence of the oil. Rather, Peymann’s duty went to rendering the railing safe by wiping off the oil. In the ordinary slip-and-fall case, omission of this duty would constitute

found that “the accident was due solely to the failure of plaintiff, as the one in charge, to have the engineroom seaworthy by obtaining an available ladder or, if it was proper to use the rail, to see that it was free of oil before he stepped on it.” *Id.*

Two inferences may be drawn from this conclusion. First, since the plaintiff's *omission* of his duty to make the engineroom seaworthy put him at fault, an unsatisfactory condition must have arisen independently of the plaintiff's fault. This determination alone should have been enough to bring the comparative negligence system into play but for the primary duty rule.

Second, a ladder had been available but Peymann had chosen to stand on the oily railing. The railing had been oily because of the unseaworthiness of the vessel and, as the court discussed later, Peymann had had the primary duty to remedy this condition. Therefore, he was barred from recovery. The ladder was irrelevant to this result. Nevertheless, the court indulged in a long digression explaining why Peymann would have been barred from recovery solely for his failure to get the ladder. The rationale of the court was that the "plaintiff, as the person having full freedom of decision [between the ladder and the rail], was the sole cause of his accident." *Id.* at 1322.

Thus, even though the defendant was at fault for violating its warranty of seaworthiness, the plaintiff was barred for his conscious and voluntary decision to use the rail and not the ladder. The court emphasized, however, that the result did not depend on assumption of risk. Had assumption of risk been the basis, of course, the defendant would not have had a complete defense, since the concept had long since been read out of the maritime law. See *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939). Nevertheless, Peymann was completely barred from recovery. The court explained this decision by asserting that the abolition of assumption of risk "does not mean that a seaman may not be wholly barred if he selects a method he could not reasonably think open to him." *Id.* at 1322.

Judge Aldrich supplied a few illustrations of this subtle distinction. For example, he suggested that "if the cook were given a proper bottle opener but chose to knock the head off the bottle, he could not complain." *Id.* Indeed he could not, without a showing that the defendant had also been negligent and that the defendant's negligence had caused the injury. As a further example, he suggested that "if there were two gangways and one was marked 'Do not use,' it could not be thought that a seaman insisting upon using it despite the proffered alternative could complain of the ship's unseaworthiness." *Id.* Indeed he would be barred from recovery, if assumption of risk were a defense; however, it is not. A seaman's comparative fault may be very high in such a situation, but as long as the defendant's unseaworthiness could be said to be a contributing factor, it would seem that with assumption of risk no longer available, the defendant would have less than a complete defense.

The First Circuit's failure to distinguish assumption of risk from the hypothesis that plaintiff was barred from recovery for his choice of the oily railing over a ladder was betrayed by the following statement: "So in the case at bar, if there was a ladder available which was the single means the engineer was supposed to use, as, indeed, his own testimony suggested, it would not be proper to hold the vessel responsible to any degree *if his decision not to use it was a free choice.* The court made its charge particularly clear by conditioning nonliability upon a finding that plaintiff, *as the person having full freedom of decision*, was the sole cause of his accident. This is not a case where a lower echelon employee was offered defective means, so that both he and the ship may have been at fault." *Id.* (emphasis added) (citations omitted). Judge Aldrich thus
no more than contributory negligence, a breach of the standard to which
the plaintiff should have conformed for his own safety. The addition
of the plaintiff's duty to render safe an unseaworthy engine room, made
this omission also a breach of an employment duty. The presence of
this duty promoted the shipowner's defense from a partial to a complete
defense. In contrast, if Peymann had been an ordinary seaman with no
particular duty to wipe up the oil in the absence of a direct order to do
so, he would have been contributorily negligent only, and the defendant
would have had only a partial defense.

This analysis of the holding in Peymann must be considered in
light of the court's statement about the case:

Instead of passing a rag over the rail, [Peymann] proceeded, indif-
ferently, to step on it, and then, unless the court's [jury] instruc-
tion on [the primary duty rule] was correct, would seek to hold the
ship [liable] even though the jury were to find the fault solely his.

Here the court invoked the language of sole proximate cause reminiscent
of the old FELA cases discussed earlier. It is unclear, however,
viewed the difference between assumption of risk and Peymann's conduct as a difference
in the quality of the choice between two methods of completing the job. If "a vessel
makes two means of performing an act, one of which is unsafe," it would be inappropri-
ate "to foreclose recovery completely if the seaman chose the less desirable alternative."

Id. If, however, the less desirable alternative was "not reasonably open," a plaintiff who
chose it would be barred. The proposition that assumption of risk turns on whether the
choice made involves a slight or somewhat larger lapse of judgment by plaintiff is dubi-
ous. In fact, the Supreme Court has been rather explicit on the subject: "Any rule of
assumption of risk in admiralty, whatever its scope, must be applied in conjunction with
the established admiralty doctrine of comparative negligence and in harmony with it.
Under that doctrine contributory negligence, however gross, is not a bar to recovery but


133. This statement seems fair in light of what the court had to say about Caddy
v. Texaco: "There a seaman was instructed to clean up oil and do some other work,
but was not told in what order to proceed. The court held that his doing the other work
first could only make him contributorily negligent. . . . Without deciding, we may sug-
gest that if in Caddy the seaman had been instructed to clean up the oil first, but had
gone ahead, instead, with his other work, he could not recover for slipping in the oil
because by hypothesis he had been offered a safe place to work but had taken the unsafe
place, against orders. If he followed orders he would have had a safe place to work."

Such an interpretation is not borne out by the Caddy case, which denounced the
primary duty rule as assumption of risk in disguise and refused to apply it. See Caddy

134. 507 F.2d at 1322.

135. Judge Aldrich, in one of his illustrations, said: "If a seaman had spilled oil
and then, rejecting an opportunity to wipe it up, had walked in it, it would shock the
conscience to allow him to recover. . . . We see little difference in the present case."
Id. The difference is that Peymann was guilty of an omission of a duty, which of neces-
sity implies the prior fault of another party.
whether the court meant that the defendant's fault had been rendered a remote cause or that the defendant had never been at fault. Since the court, however, never considered Paymann's fault except in terms of omission, it must of necessity implied prior unseaworthiness, and Judge Aldrich's comparison of the case to *Walker* compels the conclusion that Paymann was barred by an affirmative defense rather than by a failure to show liability attributable to the defendant.

If this conclusion is accurate, the language of proximate cause is inadequate to explain the result. The only difference between the application of comparative negligence and the application of the primary duty rule was the presence of Paymann's employment duty; however, the presence of the employment duty to wipe away the oil, which bars recovery, in place of the self-protection duty to wipe it away, which does not bar recovery, should not change the "cause" of the accident, which was the failure to wipe. The court thus used causation to label the result, not to explain it.

Judge Aldrich proceeded from this perplexing analysis of the slip-and-fall to a consideration of the discussion in *Boat Dagny* concerning the primary duty rule. He correctly described *Boat Dagny* as a case "where the plaintiff breached his duty to supervise someone else but the ship was independently at fault." This situation was not a case, wrote Judge Aldrich, in which the primary duty rule would apply. Despite this hopeful beginning, however, the court mistakenly analyzed the *Walker* case:

> We regard this as quite different from *Walker*, where the master failed to supervise himself and the fault was his alone. While we criticized some of the court's language, *Boat Dagny* does not contradict a strict reading of *Walker* that a seaman may not recover where his breach of duty constitutes the sole cause of injury.

*Walker*, however, was certainly not a case in which supervisory negligence played no part. Captains of oceangoing vessels simply do not get down on their hands and knees with monkey wrenches to repair defective file cabinets. A captain would most likely delegate this humble chore to some less august member of the ship's crew. Furthermore, as has been amply demonstrated, *Walker* was not a case in which the

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136. See text accompanying notes 82-86 *supra*.
137. 507 F.2d at 1323.
138. *Id.* at 1323. In contrast, the court in *Mason* limited the primary duty rule to captains of oceangoing vessels, persons whose rank of necessity implies almost exclusively supervisory negligence. The Fourth Circuit reached this result by purporting to read the *Walker* decision narrowly, while the First Circuit, also purporting to read *Walker* narrowly, reached precisely the opposite conclusion. Compare *Mason* v. Lynch Bros., 228 F.2d 709, 712 (4th Cir. 1956) *with* Paymann v. Perini Corp., 507 F.2d 1318, 1322-33 (1st Cir. 1974), *cert. denied* 421 U.S. 914 (1975).
139. See notes 93-94, 116 & accompanying text *supra*. 
plaintiff's negligence was the sole cause of his injury. The defendant in \textit{Walker} was also negligent but was given the complete defense of the primary duty rule.

There are several observations to be made relative to the decision in \textit{Peymann}. First, a possible explanation may be that the court was very reluctant to overturn a jury verdict for a defendant, an increasingly rare phenomenon in maritime personal injury law. Second, it is possible that the court misunderstood that the ship was unseaworthy and that the defendant was pleading an affirmative defense, and that the court therefore mistakenly viewed \textit{Peymann} as solely at fault. If the court did err in this respect, it likewise mistook the primary duty rule and the \textit{Walker} case as holding no more than that when the plaintiff is the sole cause of his injuries, he cannot recover. Third, the court concurred with the court in \textit{Reinhart} in holding that the primary duty rule is a defense not limited to Jones Act counts but applicable to unseaworthiness counts as well. Fourth, the First Circuit apparently excluded from the primary duty rule the negligent failure to supervise, but it did so only in dictum. Finally, the court seems to have held that when the plaintiff has the general employment duty to render an unseaworthy vessel seaworthy and is injured by an unseaworthy condition, the primary duty rule applies, unless the plaintiff's violation of his duty involves a failure to supervise others.

\textbf{Tallying up the Circuits}

The circuit court of appeals are in a state of disarray over the primary duty rule. No circuit has consistently rejected it, no circuit is free of cases criticizing it, and no two circuits agree as to exactly what the primary duty rule is.

A review of the aspects of the primary duty rule on which the courts agree will help to place this discussion in perspective. First of all, it should be clear that the primary duty rule is an affirmative defense and therefore is appropriate only when the defendant is somehow liable.\textsuperscript{140} The defense itself consists of two elements: the plaintiff must have been negligent, and the negligence must have constituted the breach of a duty that the plaintiff consciously assumed as a term of employment.\textsuperscript{141} The plaintiff may have breached the duty to supervise others (as in the case of ship captains),\textsuperscript{142} the duty to render safe an

\begin{footnotesize}
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\item[140.] There are, however, signs of judicial confusion on this point. \textit{See} \textit{Peymann v. Perini Corp.}, 507 F.2d 1318, 1322-23 (1st Cir. 1974), \textit{cert. denied}, 421 U.S. 914 (1975); \textit{Reinhart v. United States}, 457 F.2d 151, 153 (9th Cir. 1972).
\item[141.] \textit{See} \textit{Walker v. Lykes Bros. S.S. Co.}, 193 F.2d 772, 774 (2d Cir. 1952). The assertion that negligence is a necessary element is an inductive conclusion. No admiralty decision has ever invoked the primary duty rule in the absence of negligence.
\item[142.] \textit{See id.; Elliott v. Jones & Laughlin Steel Corp.}, 166 F. Supp. 731 (W.D. Pa.
\end{enumerate}
\end{footnotesize}
unseaworthy vessel, or the duty to follow orders. If the plaintiff has failed to obey orders, the failure must involve a conscious deviation from the black letter of the order. Performing an order in a negligent or unwise fashion does not invoke the primary duty rule. It is universally agreed by courts recognizing the primary duty rule that it is a defense to a Jones Act action. No case has specifically denied that the primary duty rule is applicable to the plaintiff's twin count of unseaworthiness, and two cases have held that it is. Beyond these generalizations the circuits diverge.

Of all the circuit courts of appeals to have considered the question of the primary duty rule, the First and Ninth Circuits are the strongest supporters. The First Circuit would remove supervisorial negligence from the reach of the primary duty rule. The Fourth Circuit, curiously, came to the opposite view, holding the primary duty rule applicable only to captains of seagoing vessels, whose negligence of necessity is primarily of a supervisorial nature. Both circuits purported to read Walker narrowly to arrive at these opposing conclusions. The Second Circuit, which is responsible for the existence of the primary duty notion in admiralty, is now the circuit least likely to apply the primary duty rule. The Third Circuit has not addressed the issue.

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143. See Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974), cert. denied, 421 U.S. 914 (1975); Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972).
145. See id.
146. See id.; Dixon v. United States, 219 F.2d 10 (2d Cir. 1955). See note 73 supra.
147. See, e.g., Walker v. Lykes Bros. S.S. Co., 193 F.2d 772, 773 (2d Cir. 1952). The Jones Act incorporates by reference the FELA, and the primary duty rule was taken from FELA cases. See text accompanying notes 18-48 supra.
149. No primary duty cases have been decided by the Eighth, Tenth and District of Columbia Circuits, largely because venue in these circuits, if possible, is extremely unlikely. In addition, the primary duty rule remains a question of first impression in the Fifth and Seventh Circuits. Critical discussion, however, did appear in Schlecter v. Port Arthur Towing Co., 288 F.2d 801, 805 (5th Cir.), cert. denied, 368 U.S. 828 (1961).
151. Reinhart v. United States, 457 F.2d 151 (9th Cir. 1972), disapproving Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1016 (9th Cir. 1966).
152. See 507 F.2d at 1322.
155. See note 98 supra.
although it approved a lower court opinion which strongly argued in
dictum in favor of the primary duty rule.\textsuperscript{156} In the Sixth Circuit, the
primary duty rule was held to have been overruled by \textit{Dixon},\textsuperscript{157} and
therefore to be no longer good law, but this holding was based on a
misreading of the \textit{Dixon} case.\textsuperscript{158} In a more recent case,\textsuperscript{159} the court
held that the primary duty rule was inapplicable to the case before it but
did not deny that the primary duty rule was the law in the Sixth
Circuit.\textsuperscript{160}

\textbf{A Critique}

If the decisions in \textit{Reinhart} and \textit{Peymann} can be taken as indicating a
trend, the primary duty rule seems to be winning acceptance in
maritime personal injury law. Nevertheless, it seems fair to say that if
only Judge Learned Hand in \textit{Walker}\textsuperscript{161} had considered the analysis in
\textit{Tiller v. Atlantic Coast Line Railroad}\textsuperscript{162} of the viability of the primary
duty rule as applied to FELA cases, the rule would not exist today in the
law of admiralty, just as it no longer exists under the FELA.\textsuperscript{163}

From a theoretical standpoint, the defense of the primary duty rule
is justifiable only to the extent that it is distinguishable from contributory
negligence and assumption of risk, both of which are proscribed as
complete defenses to Jones Act\textsuperscript{164} and unseaworthiness\textsuperscript{165} actions. In
view of the fact that the application of the primary duty rule requires the
plaintiff to have been negligent,\textsuperscript{166} however, the rule is distinguishable
from contributory negligence only by the requirement of a breach of an
employment duty which the plaintiff consciously assumed. This breach
of a contractual duty is invariably contributory negligence as well. To
paraphrase Justice Hugo Black,\textsuperscript{167} the primary duty rule is merely a
different label from the common law lexicon describing the very same

\begin{itemize}
\item \textsuperscript{156} See Elliott v. Jones & Laughlin Steel Corp., 166 F. Supp. 731 (W.D. Pa.
1957), aff'd, 259 F.2d 959 (3d Cir. 1958). \textit{But see} Yates v. Dann, 167 F. Supp. 174,
179 (D. Del. 1958).
\item \textsuperscript{157} Chesapeake & O. Ry. v. Newman, 243 F.2d 804, 808 (6th Cir. 1957).
\item \textsuperscript{158} See note 94 supra. \textit{See also} Dunbar v. Henry Du Bois' Sons Co., 275 F.2d
304, 306 n.1 (2d Cir. 1960).
\item \textsuperscript{159} Noack v. American S.S. Co., 491 F.2d 937 (6th Cir. 1974).
\item \textsuperscript{160} \textit{See id.} at 941.
\item \textsuperscript{161} Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952).
\item \textsuperscript{162} 318 U.S. 54 (1943).
\item \textsuperscript{163} See Louisiana & Ark. Ry. v. Johnson, 214 F.2d 290, 292 (5th Cir.), \textit{cert. de-

\item \textsuperscript{164} The Jones Act incorporates the FELA, including 45 U.S.C. § 53 (1970). \textit{See}
\item \textsuperscript{165} \textit{See} Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 428-29 (1939).
\item \textsuperscript{166} \textit{See note} 141 supra.
\item \textsuperscript{167} \textit{See text accompanying note} 54 supra.
concept which Congress intended to eliminate as a bar to a Jones Act suit. The intent of Congress should not be defeated by mere label switching.

The doctrine poses a serious threat to the entire comparative negligence scheme, of which admiralty courts have heretofore been so protective. Breaches of employment duties can be found almost everywhere, and no doubt maritime employers, burdened with the yoke of nearly unavoidable liability for personal injuries to their employees, would be willing to fill volume after volume with new safety regulations the violation of which would invoke the primary duty rule.

Fortunately for seamen, the courts have not yet been willing to stretch this potentially elastic defense very far. Indeed, some courts have been willing to entertain some highly dubious distinctions to avoid the harsh consequences of the primary duty rule.\(^6\) No doubt it is significant that the major primary duty cases have involved relatively minor injuries with little emotional appeal.\(^6\)

Perhaps the real source of the primary duty rule can be found in the growing indignation many jurists have for the extremely liberal plaintiff doctrines in admiralty.\(^6\) With the maritime versions of causation,\(^6\) res ipsa loquitur,\(^6\) comparative negligence, and unseaworthiness, as well as the onerous burden of care to which defendant shipowners are held,\(^6\) no plaintiff who has a genuine injury is likely to fail to

\(^6\) See Mormino v. Leon Hess, Inc., 119 F. Supp. 314 (S.D.N.Y. 1953). In Mormino, the plaintiff was ordered to fix a valve that was leaking oil. He procrastinated and later slipped on the oil that had collected. The court found that while the plaintiff had the duty to fix the valve, the duty to wipe up the oil had belonged to another crew member. Id. at 317. In a Second Circuit case, the plaintiff slipped on some wet sugar that had spilled from the cargo. The defendant argued that the primary duty rule barred recovery, since the plaintiff had the duty to sweep up the cargo. The court ruled that the plaintiff’s sweeping had been intended to salvage the sugar. To render the vessel totally free of slippery sugar required hosing down the deck, which had been the job of some other crew member. Therefore, the court reasoned, the primary duty rule was inapplicable. Nicroli v. Den Norske Afrika-Og Australielinie, 332 F.2d 651, 654 (2d Cir. 1964).

\(^6\) Compare Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2d Cir. 1952) (bruised shin; primary duty rule upheld) with Dunbar v. Henry Du Bois’ Sons Co., 275 F.2d 304 (2d Cir. 1960) (injury resulted in death; primary duty rejected).

\(^6\) See Gilmore & Black, supra note 11, at 273-74.


\(^6\) To get to the jury under maritime res ipsa loquitur, the plaintiff need show only that it was possible that the injury was caused by the defendant’s negligence. Johnson v. United States, 333 U.S. 46, 49 (1948); Gilmore & Black, supra note 11, at 378.

recover damages. Added to this seaman's arsenal is the tradition of maintenance and cure, which provides a seaman with guaranteed room and board and medical expenses,\textsuperscript{174} independent of whatever jury verdict he may recover for his injuries. Primary duty is one of the last bona fide complete affirmative defenses to which shipowners can cling. Indeed, the emotional reaction against the notion that a plaintiff can recover even though he has not done his job is powerful, but it tends to obscure the facts that in a primary duty case, the defendant, too, is at fault, if only vicariously, and that the plaintiff in such a case is almost always injured because he is doing his job.

The primary duty rule does violence to logic in its modification of the comparative negligence scheme. It suffers from a complete absence of theoretical justification, abrogating the clear language of the FELA that contributory negligence is not to bar a plaintiff's recovery. Admiraalty courts, therefore, should hesitate to permit the primary duty rule defense, in light of its questionable origins and its identity with the proscribed defenses of contributory negligence and assumption of risk.

\textit{David Gray Carlson*}

\textsuperscript{174} See Gilmore & Black, \textit{supra} note 11, at 282. The authors conclude, “The ‘poor and friendless’ seaman is thus the beneficiary of a system of accident and health insurance at shipowner’s expense more comprehensive than anything yet achieved by shorebound workers.” \textit{Id.}

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