

ALL OVER THE MAP: THE CURRENT STATE OF THE PRIMARY DUTY RULE IN MARITIME LITIGATION

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I. Introduction

The inherently dangerous conditions of an occupation at sea has always provided seamen with a unique status in the law.¹ The Law of Admiralty's traditional policy has been to favor the injured seafarer due to the natural hardship of his circumstance, resulting in seamen often being referred to as "the wards of the admiralty."² In effect, this practice provides seamen with special remedies unavailable to other workers and leaves their employers fewer defenses in personal injury actions.³

One of these defenses available to an employer is the Primary Duty Rule – a defense to a seafarer's claims for Jones Act negligence and

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¹ See *Hudson Waterways Corp. v. Schneider*, 365 F.2d 1012, 1014 (9th Cir. 1966).

² *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939).

³ See J. Patrick Geraghty, *Every Seafarer Has A Primary Duty That May Provide The Basis Of A Defense In A Personal Injury Action*, 29 J.L. & Com. 25, 27 (Fall 2010).

unseaworthiness.⁴ Since the Primary Duty Rule's inception, it has undergone various changes, interpretations, and applications. Some appellate circuits have welcomed the doctrine and still apply it today. Others have rejected it outright. Then there are some who remain in the middle, undecided as to whether the rule is compatible with basic principles that have, over time, become ingrained in the law of Admiralty. So where does the Primary Duty Rule stand today?

Over the course of this comment, the birth and life of the Primary Duty Rule will be explored. Part II will provide a brief background of legislation that preceded the creation of the Primary Duty Rule, review three fundamental concepts of negligence law, and provide a summary of the case that laid the groundwork for the creation of the rule. In Part III, the elements of the Primary Duty Rule will be presented in full, as will the application methods of the appellate circuits. For the purposes of this comment, the jurisprudence of the four major Maritime Circuits will be reviewed: the Second, Ninth, Fifth, and Eleventh Circuits. Finally, Part IV will provide potential plans for the Primary Duty Rule's future.

II. The Origin of The Primary Duty Rule

A. Background on Comparative Negligence and Its Relation to the Federal Employer's Liability Act

Justice Brown, delivering the opinion of the Supreme Court, put forth four famous propositions in *The Osceola*, an admiralty case predicated on negligence grounds.⁵ The fourth and final proposition read: "4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."⁶ For nearly two decades, this proposition in effect barred seamen who were injured by the negligence of their master or fellow crew members from bringing claims in admiralty.

The enactment of the Merchant Marine Act of 1920, or the "Jones Act," finally provided injured seamen the right to sue their employers for negligence. Through the Jones Act, Congress extended the provisions of the Federal Employer's Liability Act (FELA), a series of statutes enacted in 1908 designed to provide railroad workers with an outlet to

⁴ *Id.* at 25.

⁵ *The Osceola*, 189 U.S. 158, 168 (1903).

⁶ *Id.* at 175.

obtain compensation for their injuries.⁷ By way of the Jones Act, these provisions became applicable to seamen's claims for damages due to the employer's negligence.

To properly understand the progression from the enactment of FELA to the creation of the Primary Duty Rule, it is crucial to review the underlying principles of negligence that serve as the foundation for the Primary Duty Rule. The first is one of the most common defenses in a negligence action: Contributory Negligence.⁸ This defense will be applicable when the plaintiff's conduct both contributed as a legal cause to the harm he suffered, and fell below the standard to which he was required to conform for his own protection.⁹ In effect, the plaintiff's Contributory Negligence serves as a complete bar to his chances of recovery for any common law negligence of the defendant.¹⁰ This doctrine was based on the idea of "Why should one recover when he himself was at fault?"¹¹

Another common, albeit controversial, defense in a negligence action is Assumption of the Risk – "a defense that has been cordially disliked by friends of the plaintiff, because of its long history of barring recovery in cases of genuine hardship."¹² In order to establish an Assumption of the Risk defense, a few requirements must be satisfied.¹³ First, the plaintiff must know the risk is present, and he must further understand its nature.¹⁴ Second, the plaintiff's choice to incur the risk must be free and voluntary.¹⁵ Assumption of the Risk, like Contributory Negligence, served as a complete bar under the common law to the plaintiff's opportunity for recovery; much to many legal scholars' chagrin, who note that recovery has often been denied when it should

⁷ 60 P.L. 100, 35 Stat. 65, 60 Cong. Ch. 149.

⁸ W. Page Keeton, PROSSER AND KEETON ON TORTS 451, 5th ed. 1984.

⁹ *Id.*

¹⁰ *Id.* at 461

¹¹ § 1:1 Place of comparative negligence in law, 1 Comparative Negligence Manual § 1:1 (3d ed).

¹² Keeton, PROSSER AND KEETON ON TORTS at 493.

¹³ *See id.* at 487.

¹⁴ *Id.* "Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts...The standard to be applied is a subjective one, geared to the particular plaintiff and his situation..."

¹⁵ *Id.* "There must be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct."

not.¹⁶ Further, when the circumstances are such that the plaintiff's "negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk," the defenses of Contributory Negligence and Assumption of the Risk can possibly overlap, existing simultaneously and neither excluding the possibility of the other.¹⁷

Finally, there is the doctrine of Comparative Negligence, a fault concept that exists in multiple forms.¹⁸ This doctrine adopts a different approach of handling cases in which there is negligence on the part of both parties.¹⁹ Instead of fixating on liability, Comparative Negligence focuses its attention on the division of damages between the two parties at fault.²⁰ The most widely endorsed method of application is that of "Pure Comparative Negligence," in which "a plaintiff's Contributory Negligence does not bar his recovery altogether, but does serve to reduce his damages in proportion to his fault."²¹

B. The 1939 Amendment to the Federal Employer's Liability Act

In enacting FELA, Congress replaced the rule of Contributory Negligence with the doctrine of Comparative Negligence.²² Unfortunately, however, FELA perpetuated the defense of Assumption of the Risk, leading to an increase in its application by defendant-

¹⁶ See Keeton, PROSSER AND KEETON ON TORTS at 493. "The argument is that assumption of risk serves no purpose which is not fully taken care of by other doctrines; that it adds only duplication leading to confusion and that it results in denial of recovery in some cases where it should not be denied."

¹⁷ *Id.* at 481.

¹⁸ See *id.* at 471. (There are three types of comparative negligence systems: pure, modified, and slight-gross).

¹⁹ See *id.* at 469.

²⁰ *Id.* at 470.

²¹ Keeton, PROSSER AND KEETON ON TORTS at 472.

²² See 76 P.L. 382, 53 Stat. 1404, 76 Cong. Ch. 685. Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

employers.²³ This doctrinal struggle led to a multitude of judicial decisions that attempted to distinguish the line between Contributory Negligence and Assumption of the Risk.²⁴

In response to the ongoing judicial speculation on the continued viability of Assumption of Risk and its relation to the abolishment of Contributory Negligence, Congress amended FELA in 1939.²⁵ The amendment's primary effect was for cases tried under FELA to be handled as though no Assumption of Risk doctrine had ever existed, thereby releasing any potential employee claimant from the burden of Assumption of the Risk.²⁶

C. The Second Circuit's Interpretation of the 1939 Amendment and the Birth of the Walker Doctrine

The 1939 Amendment to FELA seemingly resolved the gray area of recovery by abolishing the Assumption of the Risk doctrine, yet judicial interpretations following its enactment continued to lead to

²³ See *Tiller v. Atl. C. L. R. Co.*, 318 U.S. 54, 62 (1943) (referencing the interpretation of Section 4 of FELA in *Seaboard Air Line v. Horton*, 233 U.S. 492, 504 (1914): Section 4 of FELA, "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Section 4, in eliminating the defense of assumption of risk in the cases indicated, quire plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.)

²⁴ *Id.* at 62.

²⁵ *Id.* at 64.

²⁶ Employer's Liability Act, amendments, Pub. L. 76-382, 53 Stat. 1404, 76 Cong. Ch. 685. Sec. 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

inequitable results.²⁷ Judge Learned Hand, writing for the Second Circuit, offered his analysis of the amendment in *Walker v. Lykes Bros. S.S. Co.*²⁸ Judge Hand's interpretation created what would become the "Walker Doctrine," more commonly known as the Primary Duty Rule.

On November 14, 1946, in Staten Island, New York, plaintiff Walker took command of the defendant's vessel, and soon discovered defects in his office.²⁹ There were two steel filing cabinets in Walker's office, each containing four steel drawers, with each drawer having a catch designed to hold the drawer in place.³⁰ According to Walker's testimony, six of the eight catches were defective and would not hold their drawers when the ship rolled.³¹ This would occasionally result in a drawer rolling out onto the floor.³² The cabinets remained in this condition until on March 11, 1947, when Walker was passing by the cabinets. The roll of the ship dislodged one of the drawers and propelled it into Walker's shin, causing severe injury to his leg.³³

Walker brought an action under the Jones Act, charging that Lykes Bros. had been negligent in allowing Walker to be struck by the steel filing cabinet.³⁴ He asserted that other employees of Lykes Bros. were aware of the faulty catches and failed to mend them.³⁵ Lykes Bros. argued that because Walker was the master of the vessel, he had the duty to repair the catches, had ample chance to do so, and there were alternative ways to prevent the drawers from leaving the cabinet.³⁶

At trial, the judge instructed the jury to decide whether it was negligent for Lykes Bros. to allow the ship to leave the port with the filing cabinet catches in a defective condition.³⁷ If the jury found Lykes

²⁷ Shaul Serban, *Evolution of A Defense in Maritime Law: A Survey of the Primary Duty Rule*, 18 U.S.F. Mar. L.J. 253, 255 (2006).

²⁸ 193 F.2d 772 (2d Cir. 1952).

²⁹ *Id.* at 773.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Walker*, 193 F.2d at 773.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (The judge refused to direct a verdict for the defendant as requested and instructed the jury that they were to decide whether it was negligent to allow the ship to break ground with the catches as they were, and not to mend them before the accident.)

Bros. negligent, they were then to determine whether Walker had contributed to his injury through his own negligence.³⁸

Judge Hand, writing for the appellate court, explained the difference between a general duty to act with reasonable care and the duty that an officer “consciously assumed as a term of his employment.”³⁹ The failure to perform the more general duty was described by Judge Hand as “a momentary inattention to one’s own safety – the kind of thing of which we are all guilty every day.”⁴⁰ Furthermore, this inattention would lead to a defense of Contributory Negligence, resulting in only a reduction to the amount which an employee recovers.⁴¹ In contrast, the failure to perform the consciously assumed duty – a duty assumed by the employee for both the protection of himself and others – should be treated much more seriously.⁴² Unlike the type of reduction seen in relation to a defense of Contributory Negligence, this failure to perform such a duty will result in a complete bar to recovery.⁴³

Judge Hand held that Walker fell within the second, more serious scenario.⁴⁴ The duties of the master of the ship are as follows:

The duty of the master in the case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous; just as it is his duty to care for the cargo, or not to overload the ship.⁴⁵

Therefore, the trial judge should have given the jury an instruction that was more in line with the assumed duties of a master.⁴⁶ The Second Circuit panel unanimously reversed the judgment of the

³⁸ *Walker*, 193 F.2d at 773. “Did he take all such steps to prevent injury to himself and others aboard the ship as a reasonably prudent and reasonably careful master would have taken under the circumstances?”

³⁹ *Id.*

⁴⁰ *Id.* at 774.

⁴¹ *Id.* at 773.

⁴² *Id.* at 773-74.

⁴³ *Walker*, 193 F.2d at 773-74.

⁴⁴ *Id.* at 774.

⁴⁵ *Id.*

⁴⁶ *Id.* at 775. The trial judge should have instructed the jury that, as master of the ship, the plaintiff had a duty to repair the damaged vessel so as to successfully conclude the voyage.

trial court and remanded the case, instructing that “the master’s negligence claim would be completely barred if the defendant could prove that the catches could have been repaired after the master learned of the defect.”⁴⁷ It is from Judge Hand’s decision that the courts have synthesized the “Walker Doctrine,” also known as “The Primary Duty Rule.”

III. The Primary Duty Rule: Doctrinal Elements and Application

A. The Elements

The basic principle of the Primary Duty Rule is such that “a ship’s captain or officer should not be able to recover for negligence or unseaworthiness against his employer where he is under a continuing duty to exercise due care to maintain safe conditions aboard the vessel and he is injured as a result of the breach of this duty.”⁴⁸ When applying the Primary Duty Rule, the circuits should follow the same basic principles in application. A successful defense under the primary duty doctrine requires that the defendant employer or vessel owner/operator establish that (1) the plaintiff-employee owed a primary duty, (2) the plaintiff negligently breached that duty, and (3) the injury to the plaintiff was caused by said breach.⁴⁹ Though each circuit follows this same framework in applying the Primary Duty Rule, there are splits between the major circuits in application of this doctrine.

B. Application of the Primary Duty Rule by the Second Circuit

In 1955, the Second Circuit addressed a case in which Judge Hand and Judge Swan had the opportunity to expand on their majority decision in *Walker* from three years prior. In *Dixon v. United States*, the plaintiff Dixon, the chief officer on board the S.S. HALTON R. CAREY, had discovered that stevedores had accidentally broken one of the three bottom rungs on an aft ladder.⁵⁰ He reported his findings to both the master and to the ship’s agent, who promptly ordered that repairs be performed the next day.⁵¹ Prior to the repairs, Dixon descended the

⁴⁷ *Id.*

⁴⁸ Thomas Schoenbaum, *Admiralty and Maritime Law*, §6:24, 6th Ed. (2019).

⁴⁹ See, e.g., *Peymann v. Perini Corp.*, 507 F.2d 1318, 1322- 23 (1st Cir. 1974).

⁵⁰ *Dixon v. United States*, 219 F.2d 10, 11 (2d Cir. 1955).

⁵¹ *Id.*

ladder twice without incident and went ashore leaving the second mate to oversee the improvements.⁵² The second mate relayed to both Dixon and the master the substance of his conversation with the foreman in charge of the repairs, explaining that the three bottom rungs of the ladder had been repaired but other rungs might need additional mending.⁵³ The master ordered Dixon to check the ladder.⁵⁴ Having not received a warning from either the master or the second mate of the ladder's potentially dangerous condition, Dixon chose to go down the ladder he was to check.⁵⁵ During his descent, two rungs gave way, along with four or five others as he fell.⁵⁶ Dixon was severely injured when he hit the ground.⁵⁷

Dixon originally sought recovery on the ground of liability for negligence under the Jones Act, or alternatively on the ground of liability for unseaworthiness.⁵⁸ However, at the beginning of the trial, all liability under the Jones Act was disclaimed and Dixon limited his cause of action to unseaworthiness.⁵⁹ The defendant contended that because it was Dixon's duty to determine whether the ladder was in seaworthy condition, he could not recover for injuries sustained in discharging that duty.⁶⁰ The defense argued further that the master's order to Dixon to "check" the ladder amounted to a temporary withdrawal of it from Dixon's use.⁶¹ The district court overruled both of these arguments, finding that the plaintiff was not guilty of Contributory Negligence and holding the defendant fully liable.⁶² The United States of America appealed.⁶³

⁵² *Id.*

⁵³ *Id.* at 12.

⁵⁴ *Dixon*, 219 F.2d at 12. Plaintiff Dixon had testified that he understood the meaning of the word "check," as used by the master, to mean "to go down and see whether it was fixed or not; whether it was in seaworthy condition; to find out whether the ladder had been repaired and repaired right." And also, "Test it in ways, go down it, inspect the rungs and see that none of them was loose or so forth."

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Dixon*, 219 F.2d at 12.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (simultaneously overruling the defense of Assumption of the Risk).

⁶³ *Id.* at 11.

The Second Circuit, on appeal, decided to remand the case for further findings as to the cause of the defective conditions of the ladder,⁶⁴ but also explained its decision in *Walker* regarding the Primary Duty Rule. Judge Harlan, writing for the court, stated that the outcomes of cases in which the Primary Duty Rule applies are not based on any question of proximate cause, Assumption of the Risk, or Contributory Negligence; rather, they are based upon “the employer’s independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer.”⁶⁵ This non-performance offsets the employee’s right to recover against the employer for a failure to provide a safe place to work.⁶⁶ The plaintiff seaman was not guilty of any breach of duty to his employer, so such cases were not applicable.⁶⁷

Since *Dixon*, the Primary Duty Rule’s continuing viability has been questioned, and it is still unclear whether *Walker* is still good law in the Second Circuit.⁶⁸ For example, in the case of *Dunbar v. Henry Du Bois’ Sons Co.*, the wife of decedent Robert Dunbar brought an action for wrongful death against Dubois’ Sons Co. (Du Bois).⁶⁹ Dunbar was the only employee onboard Du Bois’s steam derrick, the TRENTON, as it was towed to harbor.⁷⁰ As the tug turned into the harbor, the vessel capsized, and Dunbar drowned.⁷¹

Dunbar’s wife brought an action for wrongful death under the Jones Act.⁷² She maintained that Du Bois was negligent in failing to properly caulk the TRENTON’s hull, resulting in an increased leakage

⁶⁴ *Dixon*, 219 F.2d at 18 (remanding with instructions to the District Court to enter judgment in favor of the libelant...if it is found that the ladder’s condition was due to negligence for which the respondent would be liable).

⁶⁵ *Id.* at 16-17 (citing *Walker*, 193 F.2d 772 and *Great N. R. Co. v. Wiles*, 240 U.S. 444 (1916), as examples of cases using the rule).

⁶⁶ *Id.* at 17.

⁶⁷ *Id.*

⁶⁸ See *Juliussen v. Buchanan Marine, L.P.*, 2010 U.S. Dist. LEXIS 1406, *44 (S.D.N.Y. Jan. 6, 2010) (acknowledging that the Primary Duty Rule’s continuing viability has been questioned, and it is unclear whether *Walker* is still good law in the Second Circuit. However, since *Walker* has not been overruled by the Court of Appeals en banc, nor adjudicated by the Supreme Court, the court felt it must address the application of the rule).

⁶⁹ *Dunbar v. Henry Du Bois’ Sons Co.*, 275 F.2d 304, 305 (2d Cir. 1960).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

which led to the capsizing.⁷³ The jury returned a verdict for the plaintiff, awarding her \$62,000, even though they found that Dunbar was twenty percent negligent.⁷⁴

Du Bois appealed, arguing that the *Walker* doctrine ought to apply and bar any recovery for Dunbar's death.⁷⁵ Specifically, Du Bois pointed out that one of Dunbar's principal duties onboard the TRENTON was to man the pumps in the event of a leakage.⁷⁶ Further, the jury had returned a verdict for the plaintiff at trial, which meant that the jury must have accepted the idea that the TRENTON capsized due to the leakage that resulted from improper caulking.⁷⁷ Therefore, the jury's finding that Dunbar was twenty percent negligent, Du Bois asserted, could only be based upon Dunbar's failure to put the pumps to work.⁷⁸

The Second Circuit panel was in complete agreement that the holding of *Walker* was not applicable to the facts of *Dunbar v. Henry Du Bois' Sons Co.*⁷⁹ Even though Dunbar might have failed to utilize the pumps, "the principal fault was the underlying failure by appellant to furnish an adequate crew."⁸⁰ Two of the panel judges, Judge Clark and Judge Waterman, elaborated on the belief that the Primary Duty Rule is incompatible with the congressional mandate that Contributory Negligence and Assumption of the Risk shall not bar recovery in a Jones Act case.⁸¹ The *Walker* Doctrine pertains not to a breach of duty to all those foreseeably harmed, but to a breach of duty created by the employer-employee relationship.⁸² "When an employee breaches a duty

⁷³ *Id.*

⁷⁴ *Henry Du Bois' Sons Co.*, 275 F.2d at 305.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 305-06.

⁷⁸ *Id.*

⁷⁹ *Henry Du Bois' Sons Co.*, 275 F.2d at 305-06.

⁸⁰ *Id.* at 306 (distinguishable from *Walker* because at the time of the accident, Dunbar had been on continuous duty for seventeen hours. Judge Hincks addresses that the jury could have found that though Dunbar was to some extent at fault in falling asleep and thus failing to operate the pumps, the principal fault was the underlying failure by appellant to furnish an adequate crew. *Walker* does not go so far as to hold that failure to remain alert under these circumstances constituted a breach of a primary duty in violation of a term of employment consciously assumed).

⁸¹ See Geraghty, *supra* note 3 at 51.

⁸² See *id.*

owed to the employer based on their relationship, he or she is subject to reprimand or discipline, which has the effect of offsetting the employee's personal injury claim against the employer."⁸³

In addition to the panel in *Dunbar*, multiple Second Circuit cases in which the defendant asserted the applicability of the *Walker* Doctrine have seen judges address their doubts on the applicability of the Primary Duty Rule. The rule's continuing viability was deemed "doubtful" by Judge Kaplan in 1995,⁸⁴ and again by Judge Koetl that same year.⁸⁵ Despite such uncertainty, district courts within the Second Circuit have continued to address and apply the Primary Duty Rule when appropriate, though begrudgingly.⁸⁶

C. Application and Expansion of the Primary Duty Rule by the Ninth Circuit

The Ninth Circuit first addressed the Primary Duty Rule in *Reinhart v. United States*.⁸⁷ Reinhart was the chief mate on the S/S QUEENS VICTORY, which was transporting ammunition to Vietnam.⁸⁸ As Chief Mate, Reinhart had the duty to oversee safe working conditions on the ship, including inspecting the sheathing which prevented contact between the metal hull of the ship and the bombs in cargo.⁸⁹ During an unloading in Cam Rhan Bay, portions of the sheathing were broken and gouged, particularly along the sides of the ship.⁹⁰ The carpenters on board the QUEENS VICTORY had no duty to repair the sheathing while at sea, nor did the vessel carry lumber aboard for such repairs. Consequently, the ship departed Vietnam with the sheathing still

⁸³ *Id.*

⁸⁴ *McSpirit v. Great Lakes Int'l*, 882 F. Supp. 1430, 1432 (S.D.N.Y. 1995) (Judge Kaplan notes that the *Walker* doctrine is incompatible with the congressional mandate that contributory negligence and assumption of the risk shall not bar a recovery in a Jones Act case).

⁸⁵ *Lombas v. Moran Towing & Transp. Co.*, 899 F. Supp. 1089, 1096 (S.D.N.Y. 1995) (citing *McSpirit* and acknowledging the questionable continued viability of the rule – though it was not necessary to apply *Walker* in this case).

⁸⁶ *Juliussen v. Buchanan Marine*, 2010 U.S. Dist. LEXIS 1406 at *44.

⁸⁷ 457 F.2d 151 (9th Cir. 1972).

⁸⁸ *Id.*

⁸⁹ *Id.* at 152. The wooden sheathing was installed by longshoremen before the ship departed the United States.

⁹⁰ *Id.*

damaged.⁹¹ During the return voyage, Reinhart, knowing full well that some sheathing was broken and damaged, made several ventures into the holds of the ship in order to inspect for rats and place traps.⁹² The sole lighting in the hold came from a cluster of lightbulbs at the forward end, and Reinhart carried a flashlight which he used only to look on the sides of the hold for rats.⁹³ On August 23, 1968, Reinhart fell through a hole in the flooring sheathing “approximately twelve to fourteen inches long and eight inches wide, sustaining a hernia.”⁹⁴

Reinhart sued the United States, alleging that the vessel was unseaworthy because the United States had failed to maintain it “as a safe and adequate place to work.”⁹⁵ The District Court found in favor of United States, concluding that:

- (1) as Chief Mate, Reinhart was himself directly responsible for maintaining the vessel’s seaworthiness, including the safety of the sheathing on which he walked;
- (2) he had failed to fulfill his responsibility; and (3) this breach of contractual duty to the shipowner caused his injury and barred his recovery under the theory of seaworthiness.⁹⁶

On appeal, Reinhart challenged this bar of recovery, calling to the court’s attention the decision from the case of *Boat Dagny v. Todd*, which analyzed the Walker decision as “simply distinguishing between two types of Contributory Negligence.”⁹⁷ The court in *Reinhart*, however, refused to interpret *Walker* in this way, instead relying on the analysis of the *Walker* Doctrine by Judge Harlan in *Dixon v. United States*.⁹⁸ Adhering to that interpretation, the Ninth Circuit affirmed the district court determination that Reinhart violated his contractual duty to the defendant by failing to repair sheathing that he knew was damaged and

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Reinhart*, 457 F.2d at 152.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 153.

⁹⁷ *Id.* at 154 (referencing *Boat Dagny v. Todd*, 224 F.2d 208 (1st Cir. 1955)).

⁹⁸ *Reinhart*, 457 F.2d at 154 (referencing *Dixon*, 219 F.2d 10 – the rule of *Walker* is in no way inconsistent with the rule that assumption of risk is not a defense, and the result in *Walker* does not turn on any question of assumption of risk or contributory negligence).

by failing to provide sufficient lighting for a person to see the damaged sheathing and step around it.⁹⁹ Reinhart breached a duty he had consciously assumed as part of his employment – thereby barring his Jones Act Claims pursuant to the Primary Duty Rule.

Following *Reinhart*, the Ninth Circuit has shown its openness to the application of the Primary Duty Rule. This appellate court developed the rule's current form in the *Bernard v. Maersk lines, Ltd.*¹⁰⁰ Bernard was the chief cook on board the M/V FIRST LT. ALEX BONNYMAN.¹⁰¹ During the events of this case, the vessel had around 120 military personnel onboard in addition to regular crewmembers.¹⁰² The BONNYMAN had to take on more provisions than usual due to this large influx of additional passengers.¹⁰³ John Mortinger, the chief steward, directed the crew members to form a human conveyor belt in order to move the boxes of provisions from the storage deck to the appropriate food lockers.¹⁰⁴ One person was to be responsible for organizing the boxes within their assigned locker.¹⁰⁵ Bernard was in charge of the meat locker.¹⁰⁶

The crew members who made up the links of the human conveyor belt made a game of passing the boxes down the line as fast as they could, which was too quick for Bernard to properly and safely stack them in the locker.¹⁰⁷ Bernard requested several times for the crew to slow down with no success.¹⁰⁸

At some point in the loading process, Bernard was loading boxes onto a high shelf in his locker, when a crew member handed him a box that was substantially heavier than the rest.¹⁰⁹ Trying to keep up with the rapid pace of the loading, Bernard robotically hoisted the box up onto

⁹⁹ *Id.* at 155.

¹⁰⁰ *Bernard v. Maersk Lines*, 22 F.3d 903, 904 (9th Cir. 1994).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Bernard*, 22 F.3d at 904.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 904-05. Further, it was not possible to go much slower than the military personnel because boxes would then stack up to the point that one could not even move.

¹⁰⁹ *Bernard*, 22 F.3d at 904-05. Bernard was loading boxes that weighed approximately twenty-five pounds each, the heavier box weighed about sixty-five pounds.

the top shelf atop two other boxes.¹¹⁰ The heavy box crushed the two boxes beneath it, came loose, and fell from the six-foot high shelf.¹¹¹ Bernard tried to catch the box, injuring his lower back.¹¹²

Maersk sought a declaration that any claims which Bernard could bring under the Jones Act would be barred by the Primary Duty Rule.¹¹³ Bernard filed a Jones Act suit against Maersk seeking damages for personal injury caused by Maersk's negligence.¹¹⁴ The district court granted summary judgment in favor of Maersk, holding that Bernard's claims were barred by the Primary Duty Rule, and Bernard appealed.¹¹⁵

Analyzing Primary Duty jurisprudence from both the Ninth Circuit and other circuits, the appeals court instituted three limiting principles to apply to the *Walker* Doctrine.¹¹⁶

First, the "primary duty" rule will not bar a claim of injury arising from the breach of a duty that the plaintiff did not consciously assume as a term of his employment. Second, the rule does not apply where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated. Third, the rule applies only to a knowing violation of a duty consciously assumed as a term of employment. It does not apply to a momentary lapse of care by an otherwise careful seaman.¹¹⁷

The court in *Bernard* applied its newfound principles to the plaintiff's case and found that he had demonstrated that there were triable issues of fact, thus rendering the grant of summary judgment inappropriate.

First, Bernard did not consciously assume the duties he was performing at the time of his accident as a term of his employment.¹¹⁸ Under normal circumstances, Bernard's duty as chief cook was to load

¹¹⁰ *Id.*

¹¹¹ *Id.* at 905.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Bernard*, 22 F.3d at 905.

¹¹⁵ *Id.* at 904. His injury resulted from a dangerous condition caused by his own breach of a "primary duty," which he owed to Maersk pursuant to terms of his employment.

¹¹⁶ *Id.* at 908 (referencing *Walker*, 193 F.2d 772; *Dixon*, 219 F.2d 10; *Reinhart*, 457 F.2d 151; and *Dunbar*, 275 F.2d 304).

¹¹⁷ *Id.* at 907.

¹¹⁸ *Id.*

the food stores and to keep the food lockers organized.¹¹⁹ The extreme circumstances surrounding Bernard's accident, namely, an atypically large loading operation involving military personnel who overwhelmed him with boxes at a rapid pace, were not terms that the injured cook had agreed upon.¹²⁰

Second, the jury could have inferred that Bernard did not create these dangerous conditions, nor did he have the ability to control or eliminate them.¹²¹ He did not control the amount of passengers on the ship, nor the amount of food that had to be supplied to feed them.¹²² Additionally, Bernard testified that his protests had no effect on the pace of the loading line, increasing the likelihood of a finding that he was not in control of the situation.¹²³ The jury could have further deduced that chief steward Mortinger, not Bernard, was the man in control of the loading operation.¹²⁴ According to his own testimony, Mortinger took an active role in the loading by directing and monitoring the loading areas (including the meat locker).¹²⁵ "A jury could reasonably conclude that circumstances beyond Bernard's control conspired to create the dangerous condition that resulted in his injury, and that he could not have controlled or prevented the situation in the proper exercise of his employment duties."¹²⁶

Finally, the jury might have found that Bernard did not knowingly violate a duty he which he consciously assumed.¹²⁷ Rather, a reasonable trier of fact might have determined that he, at most, had a momentary lapse of care. The facts established that the plaintiff was working at a "break-neck" pace, and therefore did not have much time to think about where he should place the boxes or what he was placing them on.¹²⁸ When he was handed the sixty-five pound box, he was going through the motions of receiving a box and stacking it almost

¹¹⁹ *Bernard*, 22 F.3d at 907.

¹²⁰ *Id.* at 908. Supported by testimony from Mortinger that boxes were sometimes being passed too fast for the person stowing them in the locker to handle.

¹²¹ *Id.* at 908.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Bernard*, 22 F.3d at 908.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

automatically.¹²⁹ This "momentary inattention to his own safety," might have reduced his recovery, but it should not have barred it entirely.¹³⁰

For these reasons, the Ninth Circuit held that the Primary Duty Rule did not bar Bernard's Jones Act claims against Maersk and reversed. With this judgment, the Ninth Circuit not only welcomed the application of the Primary Duty Doctrine, but it enhanced its viability by providing further rules on to which situations it may pertain. The same cannot be said for every circuit, as documented by the jurisprudence of the Fifth Circuit.

D. Application and Rejection of the Primary Duty Rule by the Fifth Circuit

James Kelley was employed as the first mate onboard the M/V DAN C. BURNETT, a towboat owned by Sun Transportation Company (Sun).¹³¹ On August 5, 1985, Kelley and deckhand Michael Gray attempted to remove slack in a cable that was connected by a seventy-five-pound ratchet.¹³² "At the end of this ratchet, a curved hook (called a 'pelican hook') was connected to another hook of the same model. To keep the hooks in place, a metal ring ('keeper') was slipped over each one."¹³³ Kelley was aware of the potential risk this type of keeper could pose – they came loose approximately once per month (or about 3% to 4% of the time used).¹³⁴ However, because Gray was an experienced deckhand, Kelley assumed that he was monitoring the keeper.¹³⁵ Gray was standing in front of Kelley as the two men pulled on the cable.¹³⁶ As they pulled, the keeper came loose, allowing the pelican hook to open.¹³⁷ The two men fell backwards, with Gray falling on top of Kelley.¹³⁸ Kelley began to experience back pain about a month after the fall and visited a doctor.¹³⁹ He returned to work on October 4, 1985.¹⁴⁰ Unfortunately, Kelley was forced to stop working on September 20, 1986, due to severe

¹²⁹ *Bernard*, 22 F.3d at 908.

¹³⁰ *Id.* (referencing *Walker*, 193 F.2d 772).

¹³¹ *Kelley v. Sun Transp. Co.*, 900 F.2d 1027, 1028 (7th Cir. 1990).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1029.

¹³⁵ *Id.* at 1028.

¹³⁶ *Kelley*, 900 F.2d at 1028.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1029.

¹⁴⁰ *Id.*

back pain.¹⁴¹ He was later diagnosed as having a lumbar strain and possible herniated disc and had to undergo surgery in October 1986.¹⁴²

Kelley sued his employer, Sun, for his injuries based on the Jones Act.¹⁴³ The district court, sitting without a jury, found that the plaintiff, because of his position as first mate, was in the “technical lead position” in the act of removing the slack in the cable.¹⁴⁴ Gray (the deckhand) was in the “practical lead position” due to his position in front of Kelley.¹⁴⁵ The district court also found that Kelley was entitled to rely upon Gray’s known capabilities due to his vast experience as a deckhand.¹⁴⁶ Therefore, the court found Gray to be negligent in failing to check the condition of the pelican hook after the first pull, and this negligence was imputed to Sun.¹⁴⁷

The plaintiff was not entirely without blame, however. Kelley, as first mate, had the chief responsibility to monitor the actions of the deckhands at the time of the accident. Specifically, he “possessed a technical responsibility being in charge of the crew to monitor its efforts to handle the ratchets in a reasonable safe manner.”¹⁴⁸ The district court found that Kelley was contributorily negligent in the accident that led to his injury.¹⁴⁹ When apportioning damages, the court determined that Sun was responsible for seventy-five percent of Kelley’s injury, and Kelly himself responsible for the remaining twenty-five.¹⁵⁰ Kelley’s damages award was reduced proportionally, and both he and Sun appealed the decision.¹⁵¹ Sun asserted on appeal that Kelley could not claim damages from his accident because it resulted from his failure to properly perform his supervisory role – specifically, his failure to ensure that the deckhands conducted their onboard operations in a safe manner.¹⁵²

¹⁴¹ *Kelley*, 900 F.2d at 1029.

¹⁴² *Id.*

¹⁴³ *Id.* at 1028. The suit was based on the Jones Act, 46 U.S.C.S § 30104.

¹⁴⁴ *Id.* at 1029.

¹⁴⁵ *Kelley*, 900 F.2d at 1029.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Kelley*, 900 F.2d at 1029.

¹⁵¹ *Id.* Total damages were calculated to be \$237,950 and were lowered by 25% to \$178,463 to reflect Mr. Kelley’s contributory negligence.

¹⁵² *Id.*

Judge Ripple, writing for the Fifth Circuit, stated that the inquiry at trial should attempt to apportion responsibility for the injury.¹⁵³ This is not to say that a supervisory employee such as Kelley will always recover for injuries he suffered while onboard the ship.¹⁵⁴ A ship's officer can be found to be negligent with respect to his accident, and if that officer's negligence is the sole cause of his injury, his employer's non-negligence bars recovery.¹⁵⁵ Conversely, when the employer is negligent, and that negligence is based on activity other than that of the ship's officer, recovery will be permitted to the extent of the employer's negligence.¹⁵⁶

The Fifth Circuit panel noted the congressional intent embodied in the Jones Act: to give seamen an available remedy for injuries sustained in an inherently dangerous profession.¹⁵⁷ The defendant's request to acknowledge Kelley's supervisory duties and to end the inquiry there would frustrate this intent by effectively barring ship's officers from recovery for injuries caused in part by the negligence of another seaman.¹⁵⁸ The evidence in this case supported the district court's finding that Kelley's negligence was not the sole cause of his injury.¹⁵⁹ Therefore, the Fifth Circuit found that the lower court committed no error in finding that the plaintiff was not totally barred from recovery.¹⁶⁰

Kelley v. Sun Transp. Co. is just one example of the Fifth Circuit's decision to outright reject the application of the Primary Duty Rule as a complete bar to recovery. Judges on Fifth Circuit panels prefer to follow a stricter interpretation of the 1939 FELA amendment, specifically focusing on whether the employer was at all negligent instead of facing the possibility that an injured seaman may be denied recovery.¹⁶¹

The Fifth Circuit again elected not to employ the Primary Duty Rule as a bar to recovery in *Gautreaux v. Scurlock Marine, Inc.*¹⁶²

¹⁵³ *Id.* at 1031.

¹⁵⁴ *Id.*

¹⁵⁵ *Kelley*, 900 F.2d at 1031. Judge Hand noted in *Walker* that the bar of the Primary Duty Rule is not based on the contributory negligence of the officer, but on a finding of no negligence of the employer.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1032

¹⁶⁰ *Kelley*, 900 F.2d at 1032.

¹⁶¹ See Employer's Liability Act, amendments, Pub. L. 76-382, 53 Stat. 1404.

¹⁶² *Gautreaux v. Scurlock Marine*, 84 F.3d 776 (5th Cir. 1996).

Scurlock Marine, Inc. (“Scurlock”) hired plaintiff Charles Gautreaux as relief captain of the BROOKE LYNN in 1993.¹⁶³ The BROOKE LYNN and her onboard equipment were described in the opinion as follows: “a standard inland pushboat, equipped with two towing winches on her bow, which are used to secure lines joining the BROOKE LYNN to the barges in her tow. The starboard side winch is hydraulic, and the port side winch is electric.”¹⁶⁴

The BROOKE LYNN’s permanent captain, Lance Orgeron, took Gautreaux on a tour of the vessel shortly after his hiring, during which he explained the technical aspects of the winch systems.¹⁶⁵ However, Orgeron left out an important piece of information in his instruction to the plaintiff: if and when Gautreaux would use the manual crank handle, he should not leave the handle on the winch motor when attempting to engage the winch by pressing the electric ignition switch.¹⁶⁶

A few months into his employment, when Gautreaux was serving as the captain of the BROOKE LYNN, he relieved the on-duty tanker man and began the off-loading of a barge in tow.¹⁶⁷ As the weight of the cargo was removed from the barge, the vessel began to rise in the water, resulting in the towing wires which connected the barge to the BROOKE LYNN to become taut.¹⁶⁸ Gautreaux then attempted to relive the tension in the wires by unwinding them from the winches:

He released the starboard wire first, which caused that side of the BROOKE LYNN to drop and the port side towing wire to become even tighter. Gautreaux then attempted to release the port side wire, but the electric winch would not work. He attached the manual crank

¹⁶³ *Id.* at 778.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Orgeron showed Gautreaux the manual crank handle that accompanied the electric winch and told him that it was to be used to override the electric switches on the winch if they failed. Orgeron explained that, if the winch became “bound up” and would not engage by use of the electric ignition switch, the manual crank should be attached to the winch motor and turned a few times to “unbind” the winch, and then the electric ignition switch should be used to try to engage the winch.

¹⁶⁶ *Id.* at 779. The Court noted that neither Orgeron nor Scurlock issued this instruction to the plaintiff.

¹⁶⁷ *Gautreaux*, 84 F.3d at 779.

¹⁶⁸ *Id.*

handle to the winch motor, and began turning the handle while simultaneously pressing the ignition switch. It was at this time that Gautreaux's lack of instruction proved to be to his detriment – when the motor started, the manual crank flew off. It struck him on the right side of his face, crushing his right eye and inflicting other fractures and lacerations.¹⁶⁹

Gautreaux filed suit against Scurlock under the Jones Act and general maritime law, claiming that its negligence, coupled with the unseaworthiness of the BROOKE LYNN, caused his injuries.¹⁷⁰ The injured captain's primary complaint was that Scurlock had failed to properly train him in the operation of the winch system, thereby not providing him a safe working environment.¹⁷¹ In response, the defendant corporation sought exoneration from or limitation of its liability.¹⁷² The jury found in favor of Gautreaux on his Jones Act negligence claim, apportioning ninety-five percent of the fault to Scurlock, and the remaining five percent to the plaintiff.¹⁷³

The district court denied Scurlock's petition for limitation of liability by separate order; after which Scurlock moved in the alternative for judgment as a matter of law for either a new trial, or to alter, amend, or remit the judgment.¹⁷⁴ The district court denied these motions.¹⁷⁵ Scurlock put forth four arguments on appeal, one of which was the district court's error in refusing to enter judgment as a matter of law on the issue of liability,¹⁷⁶ or more specifically, the plaintiff's claim

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The jury found that the BROOKE LYNN was in fact seaworthy, and this was affirmed on appeal.

¹⁷¹ *Id.*

¹⁷² *Gautreaux*, 84 F.3d at 779.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The district court denied the motions, conditioning the denial of the motion for a new trial on the amount of lost future wages on the plaintiff's acceptance of a remitter. The plaintiff accepted the remittur, and the district court entered an amended judgment for \$736, 925 to the plaintiff.

¹⁷⁶ *Id.* Scurlock argued that the district court committed the following errors: (1) improperly charging the jury on the applicable law, (2) refusing to enter judgment as a matter of law on the issues of entitlement to lost future wages and liability, (3) failing to recognize that the awards for lost future wages and pain and suffering were

was barred by the Primary Duty Rule.¹⁷⁷ The foundation of Scurlock's Primary Duty Rule argument was that Gautreaux, as captain of the BROOKE LYNN at the time of the accident, was responsible for the safe operation of the vessel.¹⁷⁸ The defendant employer alleged that he breached this duty by incorrectly operating the winch system during the unloading of the barge, which is what led to his injury.¹⁷⁹

The Fifth Circuit panel acknowledged the possibility that jurisprudence could provide support for the defendant's argument that the plaintiff should be barred from recovery if it was solely his negligence that brought about his injury, and his employer was completely blameless.¹⁸⁰ In spite of this, a Jones Act employer will be liable for even the slightest negligence, and the seaman-employee's burden of proving causation is "featherweight."¹⁸¹ Therefore, a judgment as a matter of law is only appropriate when this featherweight burden is satisfied due to "a complete absence of probative facts supporting the nonmovant's position."¹⁸² The Fifth Circuit found that because there was evidence in the record that Scurlock was at least slightly negligent, and this negligence was a contributing factor in Gautreaux's injury, the featherweight burden of demonstrating causation had been satisfied.¹⁸³ Therefore, the district court did not err in its refusal to instruct the jury on the Primary Duty Rule.¹⁸⁴

But this was not the end of the Gautreaux case. Scurlock again appealed and moved the Fifth Circuit panel, sitting en banc, to consider "whether seamen, in Jones Act negligence cases, are bound to a standard

excessive and warranted a new trial, and (4) denying its petition for limitation of liability.

¹⁷⁷*Gautreaux*, 84 F.3d at 782.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* Description of Breach put forth by the Defendant: Gautreaux breached his duty because he forgot to release the towing wires during unloading operations, thereby creating excessive strain on the wires and causing the failure of the electric towing winch, in response to which he negligently operated the winch in such a manner as to cause himself injury.

¹⁸⁰ *Id.* (referencing *Kendrick v. Ill. C. G. R. Co.*, 669 F.2d 341, 344 (5th Cir. 1982): "The employee's negligence would only reduce, not bar recovery, unless the employer were not negligent at all, and the employee's negligence was the sole cause of his injury.")

¹⁸¹ *Gautreaux*, 84 F.3d at 782.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (The district court's judgment was affirmed in all aspects)

of ordinary prudence in the exercise of care for their own safety, or whether they are bound to a lesser duty of slight care.”¹⁸⁵ In sum, the Fifth Circuit clarified that an employer will be liable under the Jones Act if the negligence of its employees played even a small role in the plaintiff’s injury.¹⁸⁶ In addition, the standard of care to be attributed to an employer is no different than ordinary prudence under the circumstances.¹⁸⁷ The same rule applies to seamen; they too are obliged to act “with ordinary prudence under the circumstances.”¹⁸⁸

Notably absent from the Fifth Circuit’s en banc decision is any mention of the Primary Duty Rule. Rather, the court concluded that the proper inquiry is whether the employer’s negligence in any way caused the employee’s injury. The Fifth Circuit has, in essence, refused to apply the Primary Duty Rule in the vast majority of circumstances, and decided that Comparative Negligence will supersede an otherwise complete bar to recovery.

E. The Eleventh Circuit’s Hesitation to Apply the Primary Duty Rule

The Eleventh Circuit demonstrated its stance on the Primary Duty Rule in *Villers Seafood Co. v. Vest*.¹⁸⁹ Defendant-employee Vest was the captain of the VILCO III, a shrimp trawler owned and operated by his employer Villers Seafood Co., Inc. (“Villers”).¹⁹⁰ The accident at the center of this case occurred on a day in which the VILCO III was riding in calm seas and barely moving.¹⁹¹ Vest was working below decks in the engine room.¹⁹² At one point during his work, Vest attempted to climb the ladder which led to the main afterdeck.¹⁹³ As he did so, the top of the ladder separated from the deck beam which supported it, causing Vest to fall onto the engine below where he sustained multiple injuries.¹⁹⁴

¹⁸⁵ *Id.*

¹⁸⁶ *Gautreaux*, 84 F.3d at 335.

¹⁸⁷ *Id.* at 339.

¹⁸⁸ *Id.* The circumstances of a seaman’s employment include not only his reliance on his employer to provide a safe work environment; but also his own experience, training, or education.”

¹⁸⁹ *Villers Seafood Co. v. Vest*, 813 F.2d 339 (11th Cir. 1987).

¹⁹⁰ *Id.* at 340.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Villers Seafood Co.*, 813 F.2d at 340.

Vest and his wife filed suit against the VILCO III and his employer Villers.¹⁹⁵ They alleged unseaworthiness of the vessel and the ladder which caused Vest's injury, and also brought an action under the Jones Act, 46 U.S.C § 688 – stating “that the accident was proximately caused by Villers's failure to properly install, inspect and maintain the ladder.”¹⁹⁶ In response, Villers brought an action for exoneration from (or limitation of) liability under 46 U.S.C § 183(a),¹⁹⁷ alleging that it had no privity or knowledge of the ladder's condition that allegedly caused Vest's accident.¹⁹⁸ The United States District Court for the Middle District of Florida concluded that the vessel and ladder were not unseaworthy, and that “Villers Seafood Co. was [both] innocent of any negligence [and] without privity or knowledge as to the cause of the accident.”¹⁹⁹ Vest appealed, arguing that the District Court's finding for the defendants was clearly erroneous.²⁰⁰

On appeal, the Eleventh Circuit panel reviewed in detail both the specifications of the ladder at issue and Vest's duties as Captain onboard the VILCO III. The evidence showed that the ladder was originally designed to be removable, allowing access to the VILCO III's engine and transmission directly below.²⁰¹ To accomplish this, the builder secured the ladder's legs with “horseshoe-shaped wooden blocks” and attached the top of the ladder to the deck beam above with a “hook-and-eye fastener.”²⁰² When Vest had his accident, the horseshoe blocks were in place at the feet of the ladder, but the hook-and-eye fastener had been removed.²⁰³ While the District Court found that the missing fastener was “somewhat of a latent condition not readily determinable from a casual visual inspection,” a crewman testified that he knew that the ladder was not attached to the deck beam since at least two months before the accident.²⁰⁴

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 46 U.S.C.A. § 30505(b), formerly cited as 46 App. U.S.C.A § 183(a), limits an owner's liability only for those losses which were incurred “without the privity or knowledge of the owner.”

¹⁹⁸ *Villers Seafood Co.*, 813 F.2d at 340.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Villers Seafood Co.*, 813 F.2d at 340-41.

²⁰⁴ *Id.* Crewman Ginniman testified that he knew the ladder was unattached at least two months prior to the date of the accident because he began working on board the VILCO III at the time. On his

The Eleventh Circuit also noted that at the time of his injury, Vest had been captain of the VILCO III for four months.²⁰⁵ As captain, his duties were: “a daily trip to the engine room to check the engine oil and either the correction of unsafe conditions of which he was aware or the report of such unsafe conditions to a repair crew which would perform any necessary repairs or maintenance.”²⁰⁶ Vest used the same ladder every day to perform his engine check, but still denied he had any prior knowledge of the ladder’s unsafe condition.²⁰⁷

After a thorough review of the evidence, the Eleventh Circuit decided that the finding that the ladder was seaworthy was clearly erroneous.²⁰⁸ The court acknowledged that while there is no presumption that a ship is unseaworthy merely because an accident has occurred on it, the cause of Vest’s accident was not entirely unknown.²⁰⁹ The top of the ladder moved while Vest was climbing it, and he did not do so in a negligent or unusual manner.²¹⁰ “If a ship’s equipment breaks under normal use, the logical inference that follows is that the equipment was defective.”²¹¹

The panel then had to address whether there was sufficient evidence to support the district court’s conclusion that Villers was either not liable for Vest’s injuries, or that it was entitled to exoneration or limitation of liability due to its lack of privity or knowledge as to the cause of the injured seaman’s accident.²¹² Villers disclaimed liability under two theories:

- (1) the accident was not caused by the unseaworthiness of the ladder but by Vest himself when he knowingly used an unattached ladder despite the fact that there was a safe alternative available; or
- (2) Vest caused the accident by

first day he was ordered to paint the engine room deck, and in doing so, he removed the ladder, which was already missing its top fastener.

²⁰⁵ *Id.* at 341.

²⁰⁶ *Id.*

²⁰⁷ *Id.* The evidence was uncontradicted that Vest never reported any problem to Villers.

²⁰⁸ *Villers Seafood Co.*, 813 F.2d at 342.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (referencing *Satchell v. Svenska Ostasiatiska Kompaniet*, 385 F.2d 76, 78 (4th Cir. 1967)).

²¹² *Id.*

failing to perform a captain's duty to assure that his ship and its appliances were seaworthy.²¹³

In response to Villers's claims, the court determined that even if there was a finding by the district court that Vest knew that the ladder was unattached, of which there was none, it would still not bar the plaintiff's recovery because "[a]ssumption of the Risk and Contributory Negligence are not defenses to a claim for unseaworthiness but may only be proven in mitigation of damages."²¹⁴

The Eleventh Circuit further explained that Vest's failure to find and correct the ladder's deficiency would also not bar his recovery.²¹⁵ The panel noted that some courts have denied recovery under the Primary Duty Rule, but in each of the cases in which the court had denied recovery, the injured officer actually knew of the unseaworthy condition prior to the accident.²¹⁶ In addition, Villers's right to have its employment conditions and instructions followed by its employees will have been upheld by the application of "mitigation of damages according to the doctrine of Comparative Negligence."²¹⁷

The last question of this case, whether the district court erred in finding that Villers was entitled to a limitation of liability, hinged on whether the ladder was in its unseaworthy condition at the start of Vest's voyage.²¹⁸ The court found on appeal that the district court was, in fact, in error, because a shipowner cannot limit his liability under the limitation act if his ship is unseaworthy due to equipment that was defective at the outset of the voyage.²¹⁹ The evidence in this case showed that the ladder had been defective for at least two months, and the vessel

²¹³ *Villers Seafood Co.*, 813 F.2d at 342.

²¹⁴ *Id.* (referencing *Reyes v. Vantage S.S. Co.*, 558 F. 2d 238, 244 (5th Cir. 1977)).

²¹⁵ *Id.*

²¹⁶ *Id.* Vest did testify that it was his duty to keep the vessel in repair, and some courts have denied recovery under the "*Walker Doctrine*" which states that a ship's officer whose breach of duty to maintain a safe ship has caused his injury by an unseaworthy ship or appliance may not recover damages for his injuries.

²¹⁷ *Id.* at 343.

²¹⁸ *Id.*

²¹⁹ *Villers Seafood Co.*, 813 F.2d at 343 (referencing *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1563 (11th Cir. 1985)).

had only been at sea for a few days at the time of Vest's accident.²²⁰ Therefore, Villers was not entitled to limit its liability.²²¹

In deciding *Villers Seafood Co.*, the Eleventh Circuit interpreted the Primary Duty Rule similarly the Fifth Circuit. The court showed its preference for the method of apportioning fault rather than completely barring the injured plaintiff from recovery – holding that Comparative Negligence would serve to mitigate whatever damages were attributable to Vest's own negligence in failing to perform his duty to repair the vessel. Since then, the Eleventh Circuit has been relatively silent on the Primary Duty Rule, with very few defendant-employers attempting to raise it as an affirmative defense.

IV. Moving Forward: Plotting a Course For The Future of The Primary Duty Rule

Currently, of the “big four” maritime circuits, the Fifth and Eleventh Circuits have made clear their preference to apportion fault, rather than to completely bar an injured seaman from recovery through a Primary Duty Rule analysis. The Ninth Circuit has, compared to the others, welcomed the Primary Duty Rule as a defense. However, it decided to incorporate more factors into the analysis, limiting the rule's overall applicability. Finally, in the Second Circuit, the very court that created the rule, there are judges who are doubtful as to whether the Primary Duty Rule remains good law. Whether one is a proponent of this doctrine or not, it is safe to say that the Primary Duty Rule's current state is unsatisfactory. But should the circuits attempt to rectify the inconsistencies in the rule's application? It seems that a better approach might be, in keeping with the original intent of the 1939 FELA Amendment, to eliminate the Primary Duty Rule in its entirety. In the alternative, if the circuits are adamant in clinging to Judge Hand's doctrine, it might be prudent to implement the Ninth Circuit's limiting principles as a permanent part of the rule's framework.

As previously discussed, the intent of the FELA Amendment in 1939 was to relieve an injured seamen from the burden of Assumption of the Risk.²²² The drafters of the amendment did not want a plaintiff's claims to be barred in any respect – even if the plaintiff's injury was due to his own negligence. The Primary Duty Rule, however, circumvents the amendment, allowing for a defendant-employer to escape liability if

²²⁰ *Id.* at 343.

²²¹ *Id.*

²²² *See* Employer's Liability Act, amendments, Pub. L. 76-382, 53 Stat. 1404.

the plaintiff negligently breached an owed, contractual duty. This hardly seems equitable, for there are infinite injurious scenarios that can occur in the inherently dangerous profession of being a seaman. The preferable method, as seen in the Fifth and Eleventh Circuits, is to adopt a pure Comparative Negligence approach. Judges should focus on apportioning fault in those situations where the plaintiff-seaman is injured and his own negligence was a contributing factor, rather than risk barring the plaintiff from recovery entirely. This procedure allows the injured seaman some chance at recovery, while still enforcing the employer's rules and procedures by diminishing the seaman's damages award in proportion to whatever amount of his negligence is present.

Naturally, there might be those who would prefer that the Primary Duty Rule still have a place in the law of admiralty. After all, the doctrine arose long after the 1939 Amendment to FELA, and surely its creators and adopters had to have taken the amendment into consideration during the formation of the rule. However, if the Primary Duty Rule is to remain, a wise plan of action would be to institute a uniform framework to be applied across all the circuits. The Ninth Circuit's limiting principles would be a fine starting point to achieve this.²²³ Such a scheme could be a middle ground, appeasing both the rule's most fervent supporters and staunch skeptics. The Primary Duty Rule would still stand, but it would be so limited in its application that it would bar the claims of only the most grossly negligent plaintiff-seamen.

V. Conclusion

The current state of the Primary Duty Rule is disorder. There is no agreement amongst the major circuits as to whether the rule is still a viable defense, with many judges noting their concern with the conflict between the rule's bars to recovery and FELA's abolition of doctrines that lead to those same bars. Further, if the rule remains good law, there is indecision and confusion as to how and when to apply it. Discussion and legislation moving forward is essential as there must be some agreement as to the rule's operation. If that is not possible, it might be time to give the Primary Duty Rule the burial at sea it deserves.

²²³ *Bernard*, 22 F.3d at 907.