

WARRANTY OF SEAWORTHINESS— A NON-SEAMAN'S DILEMMA

I. INTRODUCTION

One of the most litigated areas in recent maritime law has been the liability of shipowners to seamen, longshoremen, and off-shore workers¹ injured on board ship. This liability is commonly referred to as the shipowner's warranty of seaworthiness.² The warranty of seaworthiness developed at common law to protect seamen from hazards present on ships.³ Because vessels at that time were simply constructed, seamen could usually ascertain hazards before

1. The term "off-shore workers" includes "harbor workers" and will be used herein to refer to all persons, who are neither seamen nor longshoremen, who board a ship to perform work. See, *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406 (1953).

2. At common law, this was a warranty *with* fault, not a warranty as it is known today. Presently, the warranty of seaworthiness, like other warranties, applies without fault in certain circumstances. See text accompanying notes 54-57, *infra*, for a discussion of the warranty of seaworthiness as it compares with general warranties.

3. 2 M. NORRIS, *THE LAW OF SEAMEN*, § 612 at 165 (3rd ed. 1970) [hereinafter cited as NORRIS]. The original remedy granted seamen was for "maintenance and cure", an obligation imposed upon a shipowner and the vessel by maritime law as incident to the contract of employment. It was not an award of compensation for disability or damages suffered, thus it was immaterial if the shipowner caused the injury or illness. It was simply a duty to provide care for sick or injured seamen aboard the vessel, primarily when the injury or sickness arose during the course of a voyage. *Id.*, §§ 545-46 at 20-24. See also Note, 7 *SAN DIEGO L. REV.* 689, 692 (1970).

boarding. Once the ship was at sea, however, seamen were helpless against the perils ever-present on the vessel,⁴ therefore the courts provided protection in the form of the seaworthiness warranty.⁵ With the advent of steam navigation, accompanied by its complex machinery, seamen became increasingly less able to personally appraise the vessel's staunchness, and had to depend more and more upon the determination of the vessel's seaworthiness by others.⁶ The hazards increased concomitantly with the complexity of the ships, and increased protection for seamen became necessary.⁷

One of the earliest cases to hold that the shipowner offered seamen increased protection was *The Osceola*.⁸

. . . [T]he vessel⁹ and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.¹⁰

Thus, the vessel and the shipowner could be liable for injuries caused by failing to discharge a duty of reasonable care. In more recent years, the duty to keep the ship and its appurtenances in order has been made absolute upon shipowners.¹¹

The current controversy in this area has arisen over the application of this absolute duty to longshoremen. A longshoreman may

4. A most important factor underlying the duty imposed upon the shipowner to provide the crew with a safe working place is that seamen (unlike landworkers who can leave their employment at will) can not walk off the job or freely object to the circumstances surrounding the work commanded. NORRIS, *supra* note 3, § 612 at 167. "[T]his remedy [seaworthiness] was designed to reimburse the seaman who suffered loss by reason of hazards which he was in no position to ward off." BAER, *ADMIRALTY LAW OF THE SUPREME COURT*, § 6.6 at 142 (2d ed. 1969).

5. See note 3 *supra*.

6. NORRIS, *supra* note 3, § 612 at 166.

7. *Id.* at 167.

8. 189 U.S. 158 (1903).

9. The vessel actually extends the warranty of seaworthiness, thus she may be sued by a libel action, which is an *in rem* action against the vessel.

10. *The Osceola*, 189 U.S. at 175.

11. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). The following cases also hold that a shipowner's duty to provide a seaworthy vessel is absolute and nondelegable: *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *United New York and N.J. Sandy Hook Pilot's Ass'n. v. Halecki*, 358 U.S. 613 (1959); *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

recover under a warranty of seaworthiness in certain circumstances, but only when the ship is determined to be "in navigation".¹² But whether a ship is "in navigation" or not has become a perplexing question, left for the district courts to determine at trial.

In *Watz v. Zapata Off-Shore Co.*,¹³ Judge Wisdom presents a well-articulated discussion pointed directly at the unsettled issue of when a ship is "in navigation". The significance of the court's determination is that the question of fact presented in this case is a close one, emphasizing an area never thoroughly considered by the Supreme Court; an area in need of further illumination.

II. STATEMENT OF FACTS

The plaintiff, John Watz, worked as a pipe fitter for a ship building company, engaged by defendant Zapata Off-Shore Co. to convert its vessel, the *Nola III*, from a drill-tender barge to an over-the-side barge.¹⁴ The ship had been dry-docked for roughly three months in order to accomplish this conversion, but was, at the time of the judgment to the plaintiff, finding that: (1) Zapata owed Watz a formed, the extent of which was not clearly set forth. The plaintiff was injured when a twenty-foot pipe he was attempting to install on one of the ship's motors, fell on his leg. The plaintiff brought suit against the vessel owner (Zapata), claiming the vessel was unseaworthy. Zapata then impleaded Eaton, who was subsequently named a party defendant by plaintiff for negligence in assembling the hoist. Eaton in turn impleaded chain manufacturer Campbell for indemnity. The district court determined that the injury resulted from a defect in the chain of the one-ton hand hoist, as it was lowering the pipe to the plaintiff. The court awarded jury, floating in navigable waters. Work still remained to be per-warranty of seaworthiness, which was breached by the defective hoist, (2) Eaton was negligent in failing to discover the defective hoist, and (3) Campbell was negligent in the manufacture of the chain. The court also awarded fifty per cent indemnity to Zapata and Eaton as pleaded. The United States Court of Appeals, Fifth Circuit, *held*: reversed in part. Zapata owed no warranty of seaworthiness where the ship was merely in navigable waters, and not "in navigation" sufficient to sustain the claim. The issue of negli-

12. *Roper v. United States*, 368 U.S. 20 (1961); *West v. United States*, 361 U.S. 118 (1959); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

13. 431 F.2d 100 (5th Cir. 1970) [hereinafter cited as *Watz*].

14. The vessel, a drill-tender barge, was purchased by Zapata in July of 1959 for \$202,500 for conversion into a floating drilling barge. The original estimate of this conversion was \$159,060, but extra work and materials increased the conversion cost to \$500,000. *Id.* at 107.

gence against Eaton was upheld by the court, sustaining the district court's finding that Eaton failed to use sufficient care in testing the hoist and chain. *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970).

The court of appeals determined that the vessel was too attenuated from maritime operations to warrant its seaworthiness to the plaintiff in this case, and that its mere presence in "navigable waters" was sufficient only to sustain the claim of negligence. This article will seek to examine when longshoremen and offshore workers will be afforded protection under the warranty of seaworthiness,¹⁵ including a consideration of the difficult question of when a ship is "in navigation".

III. SEAWORTHINESS

A. Extension

The concept of seaworthiness in personal injury matters provides that a ship's hull, gear, appliances, appurtenances, and crew will be reasonably fit for its intended purpose.¹⁶ "The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."¹⁷ Initially, the warranty of seaworthiness was owed to seamen alone.¹⁸ This protection was later extended however to include a longshoreman who performed a seaman's work and incurred a seaman's haz-

15. The scope of this note will be limited to a discussion of the shipowner's liability for unseaworthiness to longshoremen and off-shore workers on his ship, performing a seaman's task. No consideration will be given herein to a longshoreman's rights under the Longshoreman's and Harbor Workers Act, 33 U.S.C. §§ 903(a), 905 (1964), (a longshoreman's rights against *his* employer) nor a longshoreman's right as a "seaman" under the Jones Act, 46 U.S.C. § 688 (1964), (granting "seaman" recovery for a shipowner's negligence). A good discussion of both areas may be found in BAER, *ADMIRALTY LAW OF THE SUPREME COURT*, chs. 6-7 (2d ed. 1969).

16. NORRIS, *supra* note 3, § 613 at 169. See also *The Southwark*, 191 U.S. 1 (1903); and *International Navigation Co. v. Farr & Bailey Mfg. Co.*, 181 U.S. 218 (1901).

17. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

18. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. *Seas Shipping Co. v. Sieracki*, 328 U.S. at 90.

ards. The leading case is *Seas Shipping Co. v. Sieracki*.¹⁹ Longshoreman Sieracki was injured on board defendant's ship. In granting recovery (based on unseaworthiness), the court considered Sieracki's employment by an independent contractor unimportant. The loading of the vessel was work traditionally performed by seamen; the shipowner should not be relieved of liability for unseaworthiness merely because a longshoreman was performing the work rather than a seaman.²⁰

Sieracki's impact was felt immediately. The Supreme Court held that off-shore workers injured aboard a ship could also recover under the warranty of seaworthiness, as long as they were incurring hazards similar to those of seamen.²¹ Later cases determined that where the shipowner had no control over the area of the injury, he could still be liable for an unseaworthy vessel.²² Also, a ship was found to be unseaworthy where the defective equipment was brought on ship by the stevedoring company employed by the shipowner.²³ Even where the longshoreman was located on the pier, he could recover from the shipowner for the unseaworthiness of a vessel, if he was engaged in work traditionally performed by seamen.²⁴

19. 328 U.S. 85 (1946).

20. *Id.* at 95-96 where the Court said:

On principle we agree with the Court of Appeals that this policy [absolute duty of seaworthiness] is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. . . . That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

21. *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

22. *Albanese v. N.V. Nederl. Amerik. Stoomv. Maats.*, 392 F.2d 763 (2d Cir. 1968), *rev'd on other grounds, sub nom.*, *International Terminal Operating Co. v. N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74 (1968), *modified*, 393 U.S. 995 (1968). The court of appeals determined that the shipowner's lack of control over the area where the injury occurred did not reduce the shipowner's duty to keep the ship reasonably safe. 392 F.2d at 764.

23. *Petterson v. Alaska Steamship Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954).

The shipowner is normally entitled to indemnity where the injury is caused by the negligence of the stevedoring company. See *Italia Soc. v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

24. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). Plaintiff slipped on beans which escaped on the pier while he was loading vessel; the court held that the shipowner was liable for unseaworthiness, since the plaintiff was engaged in work traditionally performed by seamen. See also *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965).

Thus, the label given the employee was of little consequence in determining whether the shipowner was liable for an unseaworthy vessel; the nature and type of work in which he was engaged was the significant factor.²⁵

B. Limitations

The warranty of seaworthiness extends only to those vessels that are "in navigation".²⁶ A ship is "in navigation" when it is able to self-propel and self-direct itself,²⁷ a determination of fact.²⁸ Thus, a ship that is floating in navigable waters may not be in navigation if it is unable to propel itself.²⁹ This limitation on seaworthiness was strongly advocated in *West v. United States*.³⁰ West was an employee of a contractor engaged by the government to revive a ship from the "mothball fleet" for maritime service. The injury occurred while the ship was undergoing extensive repairs and over-

There is a split whether defective equipment located on the pier, causing injury to a longshoreman, can be the subject of an unseaworthiness claim. The more modern view is to allow recovery against the shipowner for an unseaworthy vessel, where the land-based loading equipment is defective. *Huff v. Matson Navigation Ins. Co.*, 338 F.2d 205 (9th Cir. 1964). *Contra*, *McKnight v. N.M. Paterson & Sons Ltd.*, 286 F.2d 250 (6th Cir. 1960). It is assumed in *Watz* that the hoist was aboard the ship at the time of the injury.

25. *Partridge v. Pope & Talbot, Inc.*, 257 F. Supp. 456 (N.D. Cal. 1965).

26. *Roper v. United States*, 368 U.S. 20, 23 (1961); *United New York and N.J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U.S. 613 (1959); *White v. U.S.*, 400 F.2d 74 (4th Cir. 1968); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968).

It is now authoritatively settled, if indeed it was ever in doubt, that, when a ship has been withdrawn from navigation and while she is being *reconditioned*, she does not warrant her seaworthiness to those who work aboard her until she returns to active service.

Latus v. U.S., 277 F.2d 264, 266 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960). (emphasis added).

27. *Roper v. United States*, 368 U.S. at 23. When the ship is operating at sea, then status is not an issue. A ship's navigable ability does become relevant, however, when it is docked, or being towed about by another vessel.

28. *Butler v. Whiteman*, 356 U.S. 271 (1958).

29. See *Moye v. Sioux City & New Orleans Barge Lines*, 402 F.2d 238 (5th Cir. 1968); *cf.*, *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir. 1960), *cert. denied*, 363 U.S. 844 (1960). In *Lawlor*, the vessel was moored in navigable waters undergoing an annual overhaul; the court held that seaworthiness extended to the longshoreman injured.

30. 361 U.S. 118 (1959). [hereinafter cited as *West*].

hauling for reactivation. The Supreme Court refused to allow the claim for unseaworthiness, advancing a broad standard to be applied.

It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.³¹

In effect then, this broad standard relieved the shipowner from liability for unseaworthiness if the vessel was not in navigation. In determining this, the court said it would view the character of the work performed rather than the specific job. The court seemingly departed from its willingness to extend seaworthiness protection originating under *Sieracki*. But, the character of the work in *West* involved major overhauling and repairs to the vessel, which are normally not performed by seamen. Also, the vessel in *West* had been out of navigation for a long while, and was at the time in the process of being built for sea. Thus, the impact of *West* was minimal at most. Under the facts, it was imperative for the court to view the entire project rather than the specific job. If the vessel is not in maritime service, those workers aboard it can not be seamen; thus, the entire project is relevant to the question of whether the vessel is in "maritime service" or not. Most cases granting longshoremen recovery for unseaworthiness have involved projects which seamen traditionally perform,³² but *West* involved a project totally withdrawn from seamen's duties. Also, under the *Sieracki* standard, *West* would not have been able to qualify since he was engaged in work that seamen did not traditionally perform.³³ Consequently, the impact of *West* on future cases was not great, and the lower courts have been able to distinguish it.³⁴

The Supreme Court strengthened its stand in *West* two years later in *Roper v. United States*.³⁵ The plaintiff in *Roper* was injured

31. 361 U.S. at 122.

32. In most cases extending seaworthiness to longshoremen and off-shore workers, the particular project is loading or unloading a vessel or the project involves minor repairs which seamen have traditionally performed. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir. 1960).

33. The petitioner was injured by a defectively secured plug on a water pipe in the vessel's engine room. The court found the vessel to be out of maritime service at the time, thus ". . . there could be no express or implied warranty of seaworthiness to *any* person." 361 U.S. at 122 (emphasis added).

34. *E.g.*, *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d at 599. "[H]ere we have . . . nothing in the category of major repairs or structural and extensive changes in the vessel. . . ." *Id.* at 604.

35. 368 U.S. 20 (1961). [Hereinafter cited as *Roper*].

while unloading a deactivated vessel. The vessel had been used to store goods but had never been used to tow these goods. The vessel was pushed into dock with the assistance of other seagoing vessels. The Supreme Court, relying heavily on *West*, determined that the status of the vessel was crucial; because the ship was not in active maritime service, no warranty of seaworthiness attached to it.³⁶ The similarity with *West* is factually evident, but *Roper* offers a more substantial impact. The injured plaintiff in *Roper* was engaged in work which seamen traditionally perform, thus, he would fall directly under the *Sieracki* standard.³⁷ The court refused to apply that standard in this case, impliedly asserting, as it had in *West*, that wide-spread recovery by longshoremen was to be curtailed in the future.

Standing alone, the *West* decision probably did not substantially limit the *Sieracki* doctrine. However, the effect of *Roper*, decided in reliance upon *West*, is to diminish appreciably the applicability of the unseaworthiness doctrine to longshoremen and harbor workers by reducing the number of workers covered by the warranty.³⁸

The significance of this statement is amplified by the fact that when a vessel is out of commission, the workmen on board are likely to be off-shore workers rather than seamen.³⁹ *Roper* tends to make absolute the requirement that the ship be capable of maritime service ("in navigation") before the owner will guarantee the ship's seaworthiness.

Roper, similar to *West*, involves an extreme case. The ship was

36. *Id.* at 23-24.

37. Comment, *A New Look at the Unseaworthiness Doctrine: The Roper Case*, 29 U. CHI. L. REV. 519, 529 (1962). The above comment offers a good discussion of the effect of *Roper* and *West* on the shipowner's warranty of seaworthiness to longshoremen.

38. *Id.*

39. This is a point of departure in *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d at 599.

The ship's crew was present on the vessel throughout the overhauling period, which was not the case in *West*.

The court in *Watz* distinguished *Lawlor*, because it placed too much reliance upon the crew's presence. That fact did not seem to be the *ratio decidendi* of the *Lawlor* decision, but merely a factor considered in determining whether the ship was unseaworthy or not. Certainly the presence of Zapata's vice-president throughout the conversion period is equal to the presence of the ship's crew in *Lawlor*, so that distinction does not seem to be essential to the case. See note 51, *infra*.

completely out of maritime service at the time, having no seagoing credentials.⁴⁰ The need to view the entire project undertaken was again present, as it was in *West*, to ascertain whether the vessel was in maritime service or not.

The total effect of *West* and *Roper* has been unable to curtail the extension of *Sieracki's* "humanitarian policy" to longshoremen.⁴¹ Several circuits have completely ignored applying the *West-Roper* standard in close cases.⁴² One circuit, in a post-*West* decision, used the broadened principle to determine the vessel's status, but, even so, applied the warranty of seaworthiness to a ship which had been withdrawn from maritime service for its annual overhaul.⁴³

Expansion of protection to longshoremen under seaworthiness has also taken place freely in the Supreme Court.⁴⁴ Thus, the focal point of the change brought about by *West* and *Roper* is not to eliminate recovery under *Sieracki*, but to limit actions by longshoremen for seaworthiness to cases where the ship is in navigation. Where the ship is not in navigation, being subject to such major work that control is in effect surrendered, then recovery for an unseaworthy vessel will be denied.⁴⁵ In cases where the ship remains

40. 368 U.S. at 21.

41. The Supreme Court, in *Sieracki*, described seaworthiness as, "... a form of absolute duty owing to all within range of its humanitarian policy." 328 U.S. at 95.

42. *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970): Extension of the seaworthiness warranty to injuries occurring on land to a marine clerk; *Williams v. Ocean Transport Lines, Inc.*, 425 F.2d 1183 (3d Cir. 1970): Longshoreman employed by an independent contractor, was injured while discharging cargo. The injury was sustained from a defect in a shore-based crane. The court upheld the claim for seaworthiness, citing *Sieracki*; *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F.2d 347 (4th Cir. 1968): Extension of seaworthiness protection to longshoremen, citing *Sieracki*; *McDonald v. U.S.*, 321 F.2d 437 (1st Cir. 1963): *Sieracki's* principles again invoked to extend seaworthiness to longshoreman performing work of a seaman. *McDonald* applies both *Sieracki* and *West-Roper* principles.

43. *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d at 599. The court expressed displeasure with the phrase "out of navigation", especially in close cases. *Id.* at 602-03.

44. *Albanese v. N.V. Nederl. Amerik. Stoomv. Maats.*, 392 F.2d at 763: Control is not dispositive of a shipowner's duty of seaworthiness; *Waldron v. Moore-McCormack Lines*, 386 U.S. 724 (1967): Longshoreman could claim unseaworthiness when he was injured by failure of officers to assign adequate number of personnel to perform work safely; *Italia Soc. v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964): Shipowner may be indemnified by stevedoring co., whose equipment caused unseaworthy condition-no need to show fault; *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963): Longshoreman injured on pier could recover for unseaworthy vessel; and *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

45. See *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968).

in navigation, *Sieracki* remains a viable test.

C. Further Limitations

The Fifth Circuit has been much more restrictive in granting longshoremen recovery under seaworthiness. In *Moye v. Sioux City & New Orleans Barge Lines*,⁴⁶ the court struck down a claim arising under seaworthiness, citing *West*, where the vessel had been surrendered to a contractor to make some structural repairs. The repairs took 19 hours. The court applied the *West* standard, holding that because the ship was not located in navigable waters, it was at the time out of navigation, thus could not be subject to a claim for unseaworthiness. The court did not determine when the open hatch covers, which caused the injury, became defective (whether before or after delivery for repairs).⁴⁷ This point may be significant, for if the shipowner had been in control of the vessel at the time the defect originated, and it originated while the ship was "in navigation", then he would be subject to a claim for unseaworthiness.⁴⁸ The court proceeded upon the theory that once the ship was dry-docked, it immediately came out of navigation, and thus was not subject to a claim for unseaworthiness.⁴⁹ No notice was taken of the small amount of time involved for the repairs, nor the rather routine repairs being undertaken.⁵⁰

46. 402 F.2d 238 (5th Cir. 1968).

47. *Id.* at 239.

48. *Mollica v. Compania Sud-Americana*, 202 F.2d 25 (2d Cir. 1953): the shipowner was held liable for an unseaworthy vessel where he had control of the affected area long enough to ascertain and correct the defect.

49. The court admits that there were no major repairs or structural changes involved, just a "renewal of side plating in two places, the renewal of some deck plating and the reworking of Nos. 4 and 5 roller hatch covers." The work required dry-docking in a *floating* dry dock, and control was surrendered. Under these circumstances, recovery was denied.

The ship was not out of marine service as in *West* and *Roper*; it had only been surrendered for minor repairs, lasting less than a day; cf., *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d at 602-03:

Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so that she has to be towed to a shipyard for a day or two for repairs before continuing her voyage can not fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until repairs have been completed.

50. Renewing side plating and deck plating, as well as reworking hatch covers might have been jobs which were traditionally performed by sea-

The Fifth Circuit, contrary to the trend of the Supreme Court,⁵¹ shows a rather strict construction of *West* and *Roper* in order to find the vessel in *Moye* out of navigation. The court extended the concept of *West* to include a ship only temporarily withdrawn from navigation, clearly not part of the *West* decision. The fact that the longshoreman may have been able to recover under *Sieracki*, serves to illustrate the court's reluctance in *Moye* to offer seaworthiness protection to longshoremen in these factually close cases.

In *Watz v. Zapata Off-Shore Co.*, the Fifth Circuit continued its strict interpretation of *West* and *Roper*. The *Nola* was in navigable waters at the time of the plaintiff's injury. Though extensive structural changes had been made, the court gives no indication that the ship was still undergoing this major work.⁵² If major structural changes remained to be made, they certainly were not as extensive as those in *West* and *Roper*. At the time of the injury, a representative of Zapata was aboard the vessel.⁵³ The court, concerning itself solely with *West*, found that just being in navigable waters was not sufficient to permit a claim for unseaworthiness, but held that the ship must be in "maritime service". It was determined that the *Nola* was not as yet able to enter maritime service, thus recovery was denied. Whether or not the plaintiff would have qualified under *Sieracki* is questionable; the court never reached that issue. The important point is that the court again rejected a longshoreman's claim under a questionable fact pattern. This result was not the intent of *West*, and certainly not the trend in recent cases.

The strict construction which the Fifth Circuit has applied to seaworthiness claims is not only inconsistent with the current trend under seaworthiness, but is also inconsistent with the current trend

men, with similar "risks" involved. Thus, under the *Sieracki* standard, the plaintiff should be within the limits of recovery.

51. "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by independent contractors who may be called upon to work aboard vessels." *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 124 (4th Cir. 1964).

52. The accident occurred about 3 months after the project began. There "was considerable work to be done", with no indication of its nature. Brief for Appellant at 6. The Appellee's Brief indicates that the work being done was "piping and electrical", and part of the duty of the vessel's crew. Brief for Appellee at 5. The court says, ". . . a considerable amount of work remained to be performed, and the vessel was *not yet able to operate as an over-the-side drilling barge.*" 431 F.2d at 107 (emphasis added).

53. The court dismissed the presence of the representative as insufficient indicia of shipowner control. The only evidence presented was that he was present to ascertain that the job was being performed the way Zapata wanted it, but that he did not direct any of the workmen. *Id.* at 108.

of recovery under warranties in general. A warranty normally is a guarantee that the goods will meet some commercially reasonable standard, whether express or implied. The scope of the claim under a breach of warranty includes all persons who can be foreseen as users,⁵⁴ and has now been embraced by the law of strict liability in tort, extending from the manufacturer,⁵⁵ and retailers,⁵⁶ to all persons who can foreseeably be injured.⁵⁷ The warranty of seaworthiness is a warranty along similar lines. It is a guarantee by the shipowner that the ship will be reasonably fit for its intended use. The shipowner becomes analogous to a manufacturer who guarantees that his product will not only work, but work safely and reasonably well.

The standard in *Sieracki* seeks to carry out a policy of protection for all who can foreseeably be injured while working on a ship. The purpose of *West* is to limit this protection where ships are out of maritime service. Therefore, the latter must be limited to only the most flagrant cases, in order to assure protection for longshoremen. The Fifth Circuit seems to have taken the standard in *West* and *Roper* and applied it in all cases where the ship is out of maritime service, clearly not in line with the current trend in warranty protection.

IV. CONCLUSION

There is some doubt whether *West* and *Roper* can adequately serve as limitations on *Sieracki* where the ship is not totally out of maritime service. A problem arises in applying the seaworthiness

54. *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960): Manufacturer of auto held liable to all persons within scope of use, and not just the immediate purchaser.

55. *Id.*

56. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

57. *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969): recovery was allowed for a bystander struck by an automobile. See also *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), a landmark decision for strict liability in tort for a breach of warranty, in which the court pointed out:

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.
59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

warranty to longshoremen: How to distinguish those duties on a navigable ship from those on a non-navigable ship? A seaman traditionally was required to stay with his ship and perform those menial tasks aboard the vessel which were within his capabilities. No distinction was made regarding the status of the ship, for it made little difference. A seaman was a seaman, regardless where the ship was located. He was a member of the crew, paid by the vessel owner, and thus entitled to protection. After *Sieracki*, the question of the ship's status was never an issue, because, again, it traditionally was never significant. After the *West* and *Roper* decisions, it became obvious that the vessel's status *was* important, at least as it applied to longshoremen recovering under a claim for unseaworthiness. But, as both *West* and *Roper* have indicated, when there is no ship at all (for all intents and purposes), the longshoreman could scarcely be said to rely upon a ship's seaworthiness. A ship that is undergoing major work in order to be put to sea is unlikely to employ any crew at all; the work being done on the vessel approaches work of a building contractor rather than a seaman. The same rationale exists when a deactivated ship is used to store goods. But, where the ship has had a crew on board, currently absent to allow repairs on the ship, the distinction in *West* and *Roper* is far from clear. Where a *seaman* might have performed these services parcelled out, the distinction is even less clear, since denial of relief to an off-shore worker performing traditional seaman's tasks would not serve the principles of *Sieracki*, nor the "humanitarian policy" it sought to promote.

The argument articulated then is: when the ship is out of navigation, there will be no recovery. This position begs the question without a more well-defined standard upon which to base the judgment of "in or out of navigation". Both *West* and *Roper* said it was a question of fact, but without a standard upon which to make a comparison, that judgment goes astray. Neither *West* nor *Roper* present the type of standard needed, since the fact situations in both cases leave no question as to the navigability of the vessels involved.

In *Watz*, the issue presented is close enough to meet the problem head on. There was no indication by the court of precisely how much work remained on the vessel. The vessel had undergone structural changes, but it seems unlikely that the vessel would have been set afloat had those structural changes remained. Again, it is not clear whether the project undertaken by the shipbuilding company could have been one that a seaman traditionally performed.

Finally, the court failed to satisfactorily distinguish *Lawlor*,⁵⁸ which is factually similar to the present case, but arrives at a different result. Hence, the case presented a close issue of fact concerning the ship's navigability, providing the court an opportunity to point out exactly when a ship would be found to be "in navigation". The vessel here is in navigable waters, but apparently not in "maritime service"—"in navigation". At what point the vessel would pass into navigation is not clear from the case, and certainly not clear from any previous authoritative standard. The court determined that the vessel was out of navigation *as a matter of law*.⁵⁹ The court chose to rely on *West* as authority for its determination that the ship was not "in navigation". This reliance on *West* conveniently allowed the court to avoid giving any definite determination to the problem, since the facts in *West* are so blatantly one-sided. Clearly, this area is in great need of further clarification, hopefully in a case, like *Watz*, which presents a close issue of fact, paving the way for the development of a workable standard.

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58. See text accompanying notes 29 & 39, *supra*.

59. The district court determined that the vessel was "in navigation" as a "conclusion of law". The court of appeals here disagreed with the district court's finding, determining it to be "clearly erroneous", thus reversing that part of the decision.