

## Cornell Law Review

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Volume 39  
Issue 3 *Spring 1954*

Article 1

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### Recommended Citation

Francis L. Tetreault, *Seamen Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Rev. 381 (1954)  
Available at: <http://scholarship.law.cornell.edu/clr/vol39/iss3/1>

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# CORNELL LAW QUARTERLY

VOLUME 39

SPRING, 1954

NUMBER 3

## SEAMEN, SEAWORTHINESS, AND THE RIGHTS OF HARBOR WORKERS

*Francis L. Tetreault\**

Eighty years ago American admiralty courts still regarded the work of the longshoreman in loading and unloading vessels as a shoreside, non-maritime activity.<sup>1</sup> The longshoreman has since won recognition for the maritime nature of his work, and eight years ago the admiralty court adopted the injured longshoreman as its favorite ward.<sup>2</sup> The Supreme Court in the recent case of *Pope & Talbot, Inc. v. Hawk*<sup>3</sup> dubbed as "seaman" a shoreside carpenter, and, by the accolade, extended to an indeterminable additional number of harbor workers the right it had granted longshoremen in *Seas Shipping Company v. Sieracki*<sup>4</sup> to recover damages from a fault-free shipowner for injuries resulting from "unseaworthiness." Indicative of the progress made by the harbor worker is the fact that a worker in Hawk's relation to the ship was formerly regarded as a bare licensee, to whom the shipowner owed no affirmative duty to pro-

\* See Contributors' Section, Masthead, p. 482, for biographical data.

<sup>1</sup> *Paul v. The Hex*, 18 Fed. Cas. 1346, No. 10,842, (C.C.D. La. 1876), held the work of loading and discharging a vessel to be non-maritime in nature in denying the existence of a maritime lien upon the vessel for the performance of such services.

<sup>2</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946).

<sup>3</sup> 346 U.S. 406 (1953), 1954 A.M.C. 1, affirming 198 F.2d 800 (3d Cir. 1952), 1952 A.M.C. 1708, modifying 99 F. Supp. 226 (E. D. Pa. 1951), 1951 A.M.C. 1604, and 100 F. Supp. 338 (E.D. Pa. 1951). Hawk, a shoreside carpenter, while working on shipowner Pope & Talbot's vessel, slipped on some loose grain, fell through an opening where a hatch cover was missing, and was injured. Hawk's employer, the Haenn Ship Ceiling Corporation, third party defendant, had been engaged by the United States Army, time charterer of the vessel, to install the fittings to facilitate the Army's loading of grain. The district court jury found (1) that the vessel was unseaworthy, (2) that shipowner Pope & Talbot was negligent, (3) that third party defendant Haenn Corporation was negligent and (4) that the plaintiff Hawk was 17.5% contributorily negligent. The Supreme Court held the plaintiff's contributory negligence did not bar his recovery from the shipowner, that the negligence of the shipowner, Pope & Talbot, Inc., barred its claim for contribution from Haenn Corporation, and that the plaintiff carpenter was doing "seaman's work" and was entitled to rely on an absolute warranty of seaworthiness.

<sup>4</sup> 328 U.S. 85 (1946), 1946 A.M.C. 698.

vide a "safe place to work."<sup>5</sup> The judicial process by which the Supreme Court has (1) created a doctrine enabling one group of litigants to recover damages from another group on a basis of non-fault liability, and (2) admitted additional groups to the favored class, is without parallel in American legal history. The "open sesame" to the favored class is the word "seaman." The development of the harbor worker's rights to recover for personal injuries must, therefore, be traced through the rights of the mariners who were formerly the favored wards of admiralty but have now been outstripped by their shoreside namesakes.

#### THE ORIGINS OF MARINERS' REMEDIES FOR SHIPBOARD INJURIES

The ancient origins of the harbor workers' present remedies for injuries occurring on shipboard derive from the rights of the mariners who comprised the crew and navigated the vessel. Yet none of the fragments of ancient law which have been preserved to us contain any hint that the harbor workers who were injured aboard ship possessed rights of recovery which differed in any way from the remedies available to other workers in the community who were employed in purely shoreside industrial activities.

The text writers without exception credit the tradition that the earliest codification of maritime law was that of the Island of Rhodes and that it was reputedly promulgated about 900 B.C.<sup>6</sup> A portion of the Rhodesian law may have been incorporated in the Roman codes but none of the authenticated provisions so preserved make any specific reference to the rights of mariners injured aboard ship. Much of the maritime commerce of the ancient world was carried in galleys, which by modern standards required relatively enormous crews,<sup>7</sup> but the mariners comprising such crews were largely slaves<sup>8</sup> and it is probable that their rights with respect to personal injury were too nebulous to permit codification or other clear statement.

The earliest authenticated statement of the rights of mariners in cases of injury or illness appears in the code promulgated about 1150 A.D. by Eleanor, Duchess of Guienne, for Oleron, an island lying off the southwest

<sup>5</sup> The *Germania*, 10 Fed. Cas. 255, No. 5,360 (1878), (a workman employed by the cargo owner to bag a grain cargo held a mere licensee when aboard the vessel).

<sup>6</sup> 3 Kent Comm. 3, 4 (14th ed. 1896); Radin, *Roman Law* 252 (1927). As to seamen's rights generally, see Norris, *The Law of Seamen* (1951); Robinson, *Admiralty* (1939). See also Norris, "The Seaman as Ward of Admiralty," 52 Mich. L. Rev. 479 (1954).

<sup>7</sup> 2 Mommsen, *The Provinces of the Roman Empire* 278 (1887) cites a Roman vessel which carried 200 crew, 1300 passengers and many tons of cargo; the modern cargo liner seldom carries a crew in excess of 45-50, including master and officers.

<sup>8</sup> 5 Frank, *Economic Survey of Ancient Rome* 252 (1940).

coast of France.<sup>9</sup> These laws contain what is probably the earliest formal statement of a system of workmen's compensation; provision was made that the mariner wounded or falling ill in the service of the ship should receive his wages and medical treatment at the expense of the ship<sup>10</sup> without regard to the manner in which the sickness or injury was incurred, provided it did not result from his own misconduct. On the other hand, no consequential damages or indemnity was recoverable for injury resulting from negligence or other fault on the part of the master or the vessel.

The laws of Wisbuy (modern spelling Visby, capital of Gotland, an island off the southeast coast of Sweden) are regarded as having been promulgated about 1266 A.D. and the provisions with respect to the illnesses and injuries of mariners are virtually identical with those of the laws of Oleron.<sup>11</sup> The laws of Wisbuy, like the laws of Oleron, make no provision for damages or indemnity to a mariner who is injured through the neglect or other fault of the ship. The ship-owner had no obligation to maintain and cure the injured mariner if he received his hurt while doing the merchant's business rather than the ship's.

In 1597 at Lubeck, the laws of the Hanse towns were first published in the German language. Wisbuy was a member of the Hanse (or Confederacy) and the laws promulgated by the towns of the Hanseatic League

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<sup>9</sup> The Laws of Oleron, 30 Fed. Cas. 1171 et seq. These, as well as the Laws of Wisbuy, the Laws of the Hanse towns, and the Marine Ordinances of Louis XIV, are reprinted as an Appendix at 30 Fed. Cas. 1171-1216.

<sup>10</sup> Art. VI. If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded; in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides: but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.

Art. VII. If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him and also to spare him one of the ship-boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more, unless it please the master to allow it him; and if he will have better diet, the master shall not be bound to provide it for him, unless it be at the mariner's own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick party—but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next kin shall have it.

30 Fed. Cas. at 1174-1175.

<sup>11</sup> The Laws of Wisbuy, Arts. XVIII, XIX, XXIII and LII, 30 Fed. Cas. 1191 et seq. Compare the provisions for maintenance, Article 52, with *Warren v. United States*, 340 U.S. 523 (1951), 1951 A.M.C. 416, where a seaman falling from a dance hall window after drinking "only part" of a bottle of wine was held in the ship's service and entitled to maintenance. In view of the present extent of the doctrine of "maintenance and cure" it is interesting to note that if the mariner's ailment were a "contagious distemper," Article 52 permitted the master to put the mariner ashore on the first land with no further obligation.

were patterned closely after those of Wisbuy. Maintenance and cure, and wages for the voyage, were paid to mariners who were injured or became ill in the service of the ship without their misconduct,<sup>12</sup> but for the first time an indemnity of lifetime maintenance was provided for the mariner who was maimed and disabled in defending his ship against pirates, with the provision that the cost of the indemnity should be borne jointly by the vessel and its cargo.<sup>13</sup> With the single exception of this reward for heroic services, the laws of the Hanse towns recognize no right in the mariner to indemnity for personal injuries.

The Mariue Ordinances of Louis XIV, published in 1681, likewise provided for the maintenance, cure, and voyage wages of mariners injured or falling ill in the service of the ship without their misconduct,<sup>14</sup> but the award for injuries incurred in defending the ship was limited to cure, rather than maintenance for life. The only bounty provided for wounds suffered in defending the vessel against pirates was that if death ensued full wages for the voyage would be paid to the mariner's heirs.<sup>15</sup> The expenses in connection with mariners wounded in defending the vessel were treated as a general average responsibility of the cargo and the vessel,<sup>16</sup> but there was no provision for the recovery by the seaman of damages or indemnity from the shipowner for injuries resulting from negligence or other fault.

For many years American courts regarded the ancient codes as stating the general maritime law governing the relations between the mariner and the shipowner.<sup>17</sup> As late as 1832, Circuit Judge Story<sup>18</sup> viewed the obligation of the vessel and shipowner to a mariner injured in its service as limited to maintenance and cure, with the possible exception of the unusual case where the mariner might have received his injuries in defending the vessel against some extraordinary peril. In such a case, Judge Storey said the injured mariner "may be entitled to a more ample compensation,

<sup>12</sup> Laws of the Hanse Towns, Arts. XXXIX and XLV, 30 Fed. Cas. 1200.

<sup>13</sup> Laws of the Hanse Towns, Art. XXXV, 30 Fed. Cas. 1199, provides:

The seamen are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded they shall be healed and cured at the general charge of the concerned in a common average. If any one of them is maimed and disabled, he shall be maintained as long as he lives by a like average.

<sup>14</sup> Marine Ordinances of Louis XIV, Title Fourth, Articles XI and XII, 30 Fed. Cas. 1209.

<sup>15</sup> *Id.* Art. XV.

<sup>16</sup> *Id.* Title Seventh, Article VI, 30 Fed. Cas. 1214.

<sup>17</sup> *Walton v. The Neptune*, 29 Fed. Cas. 142, No. 17,135 (D. Pa. 1800). Judge Peters said: The Laws of Oleron contain the principles of all the maritime laws of the European western nations concerned in commerce; with some particular exceptions in particular cases. They are yet in force and acknowledged in their great and leading principles by all the trading nations. . . .

*Ibid.*

<sup>18</sup> *Reed v. Canfield*, 20 Fed. Cas. 426, No. 11,641 (C.C.D. Mass. 1832).

in the nature of a salvage, to indemnify him for any wounds or injuries sustained in this extraordinary service.”<sup>19</sup>

An American mariner first recovered an indemnity in addition to the cost of maintenance and cure in 1859 in a case where the master negligently failed to secure shoreside medical attention for the mariner who had broken both legs, when such attention could have been obtained without any substantial delay to the vessel's voyage.<sup>20</sup> The case was regarded by the court as one involving a negligent breach of the vessel's duty, recognized in the ancient codes, to provide medical treatment for its injured mariners.

American courts consistently held that the mariner had no right under the general maritime law to recover compensatory damages from the ship or shipowner for injuries suffered through the negligence of the master, officers, or fellow crew members in failing to warn of temporary dangerous conditions,<sup>21</sup> in doing work carelessly,<sup>22</sup> or in issuing improvident orders.<sup>23</sup> The single known exception is *The Titan*,<sup>24</sup> decided in 1885 on the theory of the “vice principal” exception to the “fellow servant” rule, in line with the then recently announced views of the Supreme Court with respect to railroad employees.<sup>25</sup> *The Titan* was expressly considered and disapproved by the Supreme Court in *The Osceola*,<sup>26</sup> which held that under the general maritime law, neither the shipowner nor the vessel was liable for compensatory damages for injuries sustained by mariners through the negligent acts of the masters, officers, or crew members in the giving of orders or the manner in which work was performed.

The LaFollette Act of 1915<sup>27</sup> attempted to provide a remedy for seamen injured through the negligence of their superior officers through partial repudiation of the “fellow servant” doctrine. In *Chelantis v. Luckenbach S.S. Co.*,<sup>28</sup> however, the Supreme Court held that Congress'

<sup>19</sup> *Id.* at 429.

<sup>20</sup> *Brown v. Overton*, 4 Fed. Cas. 418, No. 2,024 (D. Mass. 1859).

<sup>21</sup> *The City of Alexandria*, 17 Fed. 390 (S.D.N.Y. 1883).

<sup>22</sup> *Jansen v. The Schem*, 42 Fed. 66 (E.D.N.Y. 1890). In this case Judge Benedict phrased the absence of shipowner liability in terms of the “fellow servant” doctrine but indicated that the shipowner might have been liable if the negligence had been that of the mate rather than a fellow crew member.

<sup>23</sup> *The Osceola*, 189 U.S. 158 (1903).

<sup>24</sup> 23 Fed. 413 (C.C.S.D.N.Y. 1885) (negligence of pilot in navigation contributed to collision causing mariner's injuries).

<sup>25</sup> *Chicago, N. & St. P. Ry. Co. v. Ross*, 112 U.S. 377 (1884).

<sup>26</sup> 189 U.S. 158 (1903).

<sup>27</sup> Section 20 of the Act of March 4, 1915, 38 Stat. 1185. “In any suit to recover damages for any injuries sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority.”

<sup>28</sup> 247 U.S. 372 (1918).

attempt was wholly ineffective because the shipowner's lack of liability (in excess of maintenance and cure) for injuries to a mariner resulting from "operating" negligence of other members of the crew did not depend upon the fellow servant doctrine. The case may be regarded as recognition by the Supreme Court of the absence of a doctrine of *respondeat superior* in maritime torts, at least with respect to injuries to mariners resulting from the "operating" negligence of other members of the crew.<sup>29</sup>

In 1920, Congress effectively secured for mariners a remedy against their employer for injuries resulting from the negligence of other members of the vessel's complement<sup>30</sup> by extending to them the remedies made available to railroad workers under the Federal Employers' Liability Act.<sup>31</sup> Thus, by statute, the American mariner, and the foreign mariner in some circumstances,<sup>32</sup> may recover from his "employer" for injuries resulting from the "operating" negligence of other members of the vessel's complement, in addition to his traditional remedies under the general maritime law.

#### THE MARINER'S REMEDIES FOR INJURIES RESULTING FROM "UNSEAWORTHINESS"

The terms "seaworthiness" and "unseaworthiness" appear only incidentally and infrequently in the opinions of the courts in mariners' personal injury cases prior to the decision of *The Osceola*, although Parsons, in 1869, citing a number of mariners' wage cases, indicated that the general principles of American maritime law would permit a seaman to recover from the shipowner for injuries caused by unseaworthiness.<sup>33</sup> A number of American cases<sup>34</sup> prior to *The Osceola* recognized the right of mariners to recover from the shipowner for the negligent failure of the owner, master or mate, after reasonable notice and opportunity, to provide proper appliances or rigging, or to correct dangerous conditions of the vessel or cargo. Many of these cases were considered and discussed by the Supreme Court in *The Osceola*, and should properly be viewed as "unseaworthiness" cases, although as late as 1879 text writers had failed to classify "unseaworthiness" as a basis upon which to predicate liability of

<sup>29</sup> Cunningham, "Respondeat Superior in Admiralty," 19 Harv. L. Rev. 445 (1906).

<sup>30</sup> The Jones Act of June 5, 1920, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1946).

<sup>31</sup> 53 Stat. 1404 (1939), 45 U.S.C. § 51 et seq. (1946).

<sup>32</sup> *Lauritzen v. Larsen*, 345 U.S. 571 (1953), 1953 A.M.C. 1210.

<sup>33</sup> 2 Parsons on Shipping and Admiralty 78, n. 1 (1879).

<sup>34</sup> *Brown v. The D.S. Cage*, 4 Fed. Cas. 367, No. 2002 (C.C.E.D. Tex. 1872); *Halverson v. Nisen*, 11 Fed. Cas. 310, No. 5,970 (D. Cal. 1876); *The Edith Gooden*, 23 Fed. 43 (S.D.N.Y. 1885); *The Noddleburn*, 28 Fed. 855 (D. Ore. 1886); *Olson v. Flavel*, 34 Fed. 477 (D. Ore. 1888); *The A. Heaton*, 43 Fed. 592 (C.C.D. Mass. 1890); *The Frank and Willie*, 45 Fed. 494 (S.D.N.Y. 1891); *The Julia Fowler*, 49 Fed. 277 (S.D.N.Y. 1892).

the shipowner for damages to the mariner injured in the vessel's service.<sup>35</sup>

In marked contrast, virtually every recent case involving mariner's injuries, and even those resulting from the assault of a fellow crew member,<sup>36</sup> mentions the term "seaworthiness" and is decided on the court's determination whether, in the particular case, the vessel was "unseaworthy."

There is so little resemblance between the modern doctrine of "insured seaworthiness" and its reputed predecessors, that its evolution must be traced with care.

The ancient codes imposed no duty upon the shipowner and master to take pains to provide a staunch ship for the benefit of the mariners. Contrariwise, they imposed liability on the mariners for any damage to the cargo which resulted from their failure to discover and disclose to the merchant and master any unsound gear or rigging.<sup>37</sup> Somewhat later, these codes imposed a duty on the shipowner and master to exercise due diligence to make the vessel seaworthy for the benefit of the cargo,<sup>38</sup> but the ancient laws nowhere impose any such duty for the benefit of the mariners.<sup>39</sup>

Although the English Courts in the law of insurance and carriage of goods, for the benefit of underwriters and cargo owners, gave early recognition to an implied warranty of seaworthiness which was absolute and not satisfied by the exercise of due diligence,<sup>40</sup> the English Courts have consistently denied the existence of any such warranty or absolute duty

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<sup>35</sup> Desty, *Shipping and Admiralty* 139, 161 (1879). Desty recognized the right of the mariner to recover damages from the shipowner for injuries resulting from "culpable negligence" or "neglect or misconduct of the officers," citing *The D.S. Cage*, supra note 34, and *The Ben Flint*, 3 Fed. Cas. 183, No. 1,299 (D. Wis. 1867). In *The D. S. Cage Case*, the court overruled exceptions to a libel alleging the owner's negligent failure to supply the vessel with proper licensed officers resulting in the boiler explosion causing injuries. This is an "unseaworthiness case." *The Ben Flint* denied a claim for maintenance stating that the vessel's obligation to furnish maintenance and medical treatment terminated with the end of the voyage unless the injuries resulted from the negligence of the ship. Desty regarded "maintenance and cure" beyond the end of the voyage as damages recoverable only on proof of fault.

<sup>36</sup> *Keen v. Overseas Tankship Co.*, 194 F.2d 515 (2d Cir. 1952), 1952 A.M.C. 241.

<sup>37</sup> *Laws of Oleron*, Art. X, 30 Fed. Cas. 1176; *Laws of Wisbuy*, Art. XLIX, 30 Fed. Cas. 1193.

<sup>38</sup> *Marine Ordinances of Louis XIV*, Title First, Art. VIII, 30 Fed. Cas. 1204; Title Second, Art. II, 30 Fed. Cas. 1205; Title Third, Art. XII, 30 Fed. Cas. 1208.

<sup>39</sup> It has been claimed that Article 46 of the Rhodesian Laws provided, "If the ropes break and the boat goes adrift, with mariners in it, and they perish at sea, the master shall pay their heirs one full year's wages." The authorities disputing this alleged fragment are discussed by Judge Peters in *Walton v. The Neptune*, 29 Fed. Cas. 142, No. 17,135 (D. Pa. 1800).

<sup>40</sup> *Lee v. Beach*, 1 Park Ins. 468 (1762); *Steel v. State Line Steamship Co.*, (1877) 3 A.C. 72.



with respect to seamen. In England, prior to the Merchant Shipping Act of 1876,<sup>41</sup> the shipowner by special contract or understanding with the mariners was free to engage them to serve on a known unseaworthy vessel. Even in the absence of this special understanding, the shipowner was not chargeable with liability for damages for injuries resulting from unseaworthiness caused by the neglect or default of the master or the shipowner's agents, but only for the unseaworthiness of the vessel caused by his personal neglect or within his personal knowledge, at the time she broke ground for the voyage.<sup>42</sup>

American courts, at an early date, also recognized the rights of the mariner to recover damages for personal injuries resulting from unseaworthiness which was attributable to the personal neglect of the shipowner, but the early cases followed the English rule and denied recovery where the unseaworthiness was not so chargeable.<sup>43</sup> American cases coming somewhat later, however, imposed liability upon the shipowner for the unseaworthiness of a vessel caused by the "gross, reckless," or "willful" negligence of the master. These cases were decided by applying the "vice principal" exception to the "fellow servant" rule, a mistaken analogy being drawn between this then current common law development and the admiralty situation.<sup>44</sup> Shortly thereafter, the *respondet superior*

<sup>41</sup> 39 & 40 Vict. c. 80, Sec. 5 (1877).

<sup>42</sup> *Couch v. Steel*, 3 E. & B. 402, 118 Eng. Rep. 1193 (1854). Parsons regarded this case as repugnant to the principles expressed by American authorities on the subject. 2 *Parsons on Shipping and Admiralty* 78, n. 1. (1869).

<sup>43</sup> *Halverson v. Nisen*, 11 Fed. Cas. 310, No. 5,970 (C.C.E.D. Tex. 1876). In this case a seaman fell to the deck and was seriously injured through the failure of a worn and defective rope which the mate had negligently incorporated in a triangle rig for hoisting the mariner above the deck. The court denied liability but stated in regard to the shipowner's obligation with respect to seaworthiness:

In a certain sense it is as much a part of the implied engagement of the owner with the mariner that the ship shall, at the commencement of the voyage, be furnished with all the customary requisites for navigation or, as the term is, shall be seaworthy; as that the master shall supply the mariners with good and sufficient provisions. . . . If, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from that of any other master to a servant in his employment. It is the master's duty in all cases to use ordinary care and diligence to provide sound and safe materials for his servants. But he does not warrant them to be so nor insure the servant against the consequences of their defects. The foundation of his liability is his personal negligence.

*Ibid.* In *Brown v. The D. S. Cage*, 4 Fed. Cas. 367, No. 2,002 (C.C.E.D. Tex. 1872) the court said:

It is the duty of the master and owners to employ, so far as they can do so with the use of ordinary care, servants of sufficient care and skill, to make it probable that they will not cause injury to each other. . . .

*Ibid.*

<sup>44</sup> *The Noddleburn*, 28 Fed. 855 (D. Ore. 1886); *The A. Heaton*, 43 Fed. 592 (C.C.D. Mass. 1890). The later decisions of the Supreme Court in *The Osceola* and *Chelantis* cases

doctrine was further extended to impose liability on the shipowner for injuries resulting from unseaworthiness caused by the negligence of the vessel's mate.<sup>45</sup> Despite such relaxation of the "fellow servant" rule (or, more properly, extension of *respondeat superior* to admiralty), the mariner was required in all cases to prove the unseaworthiness was caused by negligence. But later cases in the Eastern District of New York showed that "ordinary care" with respect to a vessel required the affirmative exercise of diligence by the owner and master to make the vessel staunch.<sup>46</sup>

The earliest mention in American authorities of "unseaworthiness" appears in cases in which mariners were suing for their wages. In those cases they were required to allege unseaworthiness of the vessel to excuse their desertion or misconduct, which, if unexcused, would result in a forfeiture of all wages.<sup>47</sup> All later references in the American cases to "seaworthiness" in connection with the rights of mariners in respect to personal injuries stem back to the language of Judge Peters in *The Cyrus*,<sup>48</sup> in which he stated as two of the conditions implied in every mariner's contract:

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were premised on a lack of *respondeat superior* in the maritime law in the relations between the shipowner and the mariner, and disaffirmed the "vice principal" theory as a basis for visiting liability on the shipowner. It was therefore probable, until developments subsequent to *The Osceola*, that the early American cases would have been reversed by the Supreme Court, and the American law held to be the same as the English, i.e., the shipowner's liability limited to his own personal negligence with respect to the vessel's fabric and gear.

<sup>45</sup> In *The Frank and Willie*, 45 Fed. 494 (S.D.N.Y. 1891), the libellant was injured through the falling of cargo after the mate refused to remedy its dangerous condition. Judge Addison Brown stated that there was some doubt as to whether mere neglect would visit liability on the shipowner but in view of the evidence of actual notice permitted recovery to the libellant, saying:

The principle involved, viz., the duty to provide reasonable security against danger to life and limb, by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers is manifestly a general one.

*Id.* at 496. In *The Julia Fowler*, 49 Fed. 277 (S.D.N.Y. 1892) a mariner recovered damages from shipowner where defective rope was negligently used by the mate in preparing a triangle rigging in same factual circumstances in which recovery had been denied in *Halverson v. Nisen*, 11 Fed. Cas. 310, No. 5970 (D. Cal. 1876).

<sup>46</sup> *The Columbia*, 124 Fed. 745 (E.D.N.Y. 1903) (damages allowed crewman on tug injured by the breaking of a hawser on ground that a mere general examination of the hawser which "looked fairly well on the outside" was "not the careful inspection required of the master"); *The Lyndhurst*, 149 Fed. 900 (E.D.N.Y. 1906) (where breaking of a runner dropped a block on a seaman's leg, damages were allowed where it appeared the runner had not been specially inspected after the vessel went through a heavy storm, the court stating that, "When a cable breaks in ordinary use, and it appears that there has been no adequate inspection after it has been subjected to extraordinary strain, the two facts raise a presumption of negligence that has not in this case been overcome.")

<sup>47</sup> *Dixon v. The Cyrus*, 7 Fed. Cas. 755, No. 3,930 (D. Pa. 1789); *Rice v. The Polly and Kitty*, 20 Fed. Cas. 666, No. 11,754 (D. Pa. 1789); *The Moslem*, 17 Fed. Cas. 894, No. 9,875 (S.D.N.Y. 1846).

<sup>48</sup> *Dixon v. The Cyrus*, 7 Fed. Cas. 755, No. 3,930 (D. Pa. 1789).

First, *that at the commencement of the voyage*, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy; and, secondly, that the captain shall supply the mariners with good and sufficient provisions while they are in his service. . . . When from accidental neglect or otherwise there is a *manifest and visible* deficiency, the mariners may reasonably complain and remonstrate—as in the present case, when the seamen were obliged to go to the main top to command those ropes which are usually within reach of the deck.<sup>49</sup> (Emphasis supplied)

In the context of the case, Judge Peters' use of the words "or otherwise" in apposition to the term "accidental neglect" referred to intentional or willful refusal of the shipowner to outfit the vessel properly, and had no reference to an absolute undertaking which would include latent defects. Of more significance, however, is the erroneous reliance which later cases have placed on *The Cyrus* and the other early wage cases as authority for the early recognition of a "warranty of seaworthiness" in personal injury cases. *The Cyrus*, and similar cases, did not state a warranty but a true implied condition. The manifest unseaworthiness of the vessel at the commencement of the voyage would excuse non-performance by the mariners but did not constitute a basis for damages. The shipowner's bargain to use reasonable care in "cure" was of a different nature, being a true warranty, or promise, for breach of which all courts recognized that an action for damages would lie. Failure of a condition justifies non-performance, unlike breach of a warranty, which, as such, does not excuse performance but serves as the basis of a claim for damages.<sup>50</sup>

The classic pronouncement of American maritime law relating to mariners' rights with respect to personal injuries is Mr. Justice Brown's statement of four propositions in *The Osceola*.<sup>51</sup> That case involved a suit brought by a mariner for injuries sustained as a result of an improvident

<sup>49</sup> *Id.* at 757.

<sup>50</sup> Williston on Contracts (Williston and Thompson ed. 1938).

<sup>51</sup> *The Osceola*, 189 U.S. 158 (1903). The court stated the following propositions:

1. That the vessel and her owners are liable in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
2. That the vessel 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. *Scarff v. Metcalf*, 107 N.Y. 211, 13 N.E. 796 (1887).
3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
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.

*Id.* at 175.

order negligently given by the master. The holding of the case was that there could be no recovery for such negligence.

Mr. Justice Brown's second proposition in *The Osceola* states that "both by English and American law" the shipowner is liable in damages for injuries resulting from unseaworthiness, although the seaworthiness of the vessel was not in issue in the case. The opinion further relates the American law on the subject to the English practice, stating:

It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel.<sup>52</sup>

The English Merchant Shipping Act of 1876, which was re-enacted in the Merchant Shipping Act of 1894,<sup>53</sup> imposed an obligation on the shipowner to use all "reasonable means" to make the vessel seaworthy. The British law for the benefit of the mariner holds the shipowner and his agents to a standard of due diligence; under the British law as modified by statute, and as likened to American law by the Supreme Court in *The Osceola*, the mariner was and is entitled to recover damages where the shipowner's neglect results in an unsound vessel and consequent injuries.

It is clear that the liability for "unseaworthiness" which the Supreme Court mentioned and discussed in *The Osceola* was a liability premised on negligence. *Scarff v. Metcalf*<sup>54</sup> which permitted recovery by a vessel's mate from the shipowner for aggravation of injuries due to the master's negligent failure to provide medical treatment is significantly the sole case cited by Mr. Justice Brown as authority for his second proposition

<sup>52</sup> Ibid.

<sup>53</sup> 39 & 40 Vict. c. 80, § 5 (1876) ; 57 & 58 Vict. c. 60 § 548 (1895):

Sec. 5. In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same; provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea, is reasonable and justifiable.

<sup>54</sup> 107 N.Y. 211, 13 N.E. 796 (1887). The Supreme Court was required to distinguish between two species of negligence, i.e., negligent failure to provide a seaworthy vessel, for which negligence the shipowner was liable to injured mariners, and "operating" negligence of the master, officers or crew in giving orders, performing work or the manner of using appliances for which the shipowner was not liable to the injured mariner.

that under American law the vessel is liable to indemnify a mariner injured in consequence of the vessel's unseaworthiness.

Both before<sup>55</sup> and after<sup>56</sup> the decision in *The Osceola*, the federal courts held that the shipowner was liable to a mariner injured through the unseaworthiness of the vessel only in those cases where the unseaworthiness was a consequence of the owner's failure to exercise due diligence; the shipowner was not liable for injuries resulting from latent defects or other defects in the ship's structure not avoidable or remediable through the exercise of reasonable diligence. Following the decision in *The Osceola*, the federal courts consistently treated that species of negligence which rendered a vessel unseaworthy as an exception to the general rule that a mariner could not recover from the shipowner for injuries resulting from negligence. "Unseaworthiness" *per se* was not sufficient to visit liability on the shipowner and such liability attached only where the unseaworthiness was shown to have resulted from a lack of reasonable care on the part of the shipowner or, following the earlier "vice principal" cases, the master or the officers.<sup>57</sup>

The shipowner's liability in the American courts, as in the English, was limited to cases in which he had failed to use reasonable care to provide proper appliances, and liability did not attach where mariners' injuries resulted from the failure of those aboard the vessel to make proper use of such appliances.<sup>58</sup> The federal courts, having extended the doctrine of *respondeat superior* to charge the shipowner with the defaults of the vessel's master or mate with respect to seaworthiness were soon phrasing the shipowner's obligation in terms of a "non-delegable duty" to use due diligence to make the vessel seaworthy at commencement of the voyage

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<sup>55</sup> *The Lizzie Frank*, 31 Fed. 477 (S.D. Ala. 1887); *The Robert C. McQuillen*, 91 Fed. 685 (D. Conn. 1899).

<sup>56</sup> *The Henry B. Fiske*, 141 Fed. 188 (D. Mass. 1905). The Court said:

As regards the crew employed on board a vessel, there is no warranty on her part that none of her fittings or appliances shall at any time give way, to their injury. Liability on her part, in a case of an accident of this kind, is incurred only when those who represent her have failed to exercise reasonable care to make the fitting or appliance safe, and arises only out of such defects as reasonable care on their part would have discovered and remedied.

*Id.* at 190. The case also discusses *The Osceola* with respect to maintenance. Cf. *Burton v. Greig*, 271 Fed. 271 (5th Cir. 1921); Smith, "Liability for Injuries to Seaman," 19 Harv. L. Rev. 418 (1906).

<sup>57</sup> *Storgard v. France & Canada S.S. Co.*, 263 Fed. 545, 547 (2d Cir. 1920) ("If the bolt was worn and defective, and the shipowners knew or ought to have known that fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."); *The Colusa*, 248 Fed. 21, 24 (9th Cir. 1918) ("The turnbuckle so used was defective, and known by the chief officer to be defective. . .").

<sup>58</sup> *Hedley v. The Pinkney & Sons S.S. Co. Ltd.* (C.A. 1891) VII Asp. Mar. Cas. 135 (C.A. 1891), *aff'd.*, VII Asp. Mar. Cas. 483 (H.L.).

for the benefit of the mariner.<sup>59</sup> The change in phrasing is attributable to the Harter Act adopted in 1893 to regulate the shipowner's liability to cargo.<sup>60</sup>

The first statement of the shipowner's obligation as an "absolute duty" to furnish a seaworthy ship without regard to negligence appears in Mr. Justice McReynolds' opinion in *Carlisle Packing Co. v. Sandanger*,<sup>61</sup> decided in 1922. In this case the jury found that the mariner was entitled to damages for injuries received through the negligence of the shipowner in permitting the vessel to sail with gasoline in a kerosene can. An explosion occurred when the seaman, thinking the can contained kerosene, used the gasoline to start a fire. The Supreme Court of Washington, following the *Osceola* case, affirmed a recovery by the seaman on the ground that the shipowner's negligence had caused an unseaworthy condition, for the consequences of which the seaman could recover damages.<sup>62</sup> Having first determined that there was sufficient evidence to sustain the jury's finding of negligence on the part of the shipowner, the Washington Court then considered as a separate question whether the presence of gasoline in a kerosene can was the type of impropriety in the vessel's equipment which would constitute "unseaworthiness." Solely in its exploration of this second question, the court quoted from Carver on *Carriage of Goods by Sea*<sup>63</sup> with respect to the definition of "unseaworthiness," and said that gasoline in a kerosene can was "unseaworthiness."

Mr. Justice McReynolds, in writing the opinion of the Supreme Court, stated:

We think the trial court might have told the jury that, without regard to negligence, the vessel was unseaworthy when she left the dock . . . and that, if thus unseaworthy, and one of the crew received damage as a direct result thereof, he was entitled to recover compensatory damages.<sup>64</sup>

This was an entirely unnecessary dictum in view of the shipowner's established negligence, and it apparently failed also to appreciate the limited purpose for which the Washington State Court had made reference to "seaworthiness" as defined in Carver's *Carriage of Goods by Sea*. In support of his statement, which was revolutionary in its language and unqualified in its apparent scope, Mr. Justice McReynolds cited three cargo cases<sup>65</sup>

<sup>59</sup> *Globe S.S. Co. v. Moss*, 245 Fed. 54 (6th Cir. 1917).

<sup>60</sup> 27 Stat. 445 et seq. (1893), 46 U.S.C. § 190-196 (1946).

<sup>61</sup> 259 U.S. 255 (1922).

<sup>62</sup> *Sandanger v. Carlisle Packing Co.*, 112 Wash. 480, 192 Pac. 1005 (1920).

<sup>63</sup> *Id.* at 490.

<sup>64</sup> 259 U.S. at 259.

<sup>65</sup> *The Silvia*, 171 U.S. 462 (1898) (as to cargo, a vessel is seaworthy when she leaves port if proper iron covers for the portholes are provided and readily accessible, even though not actually in place); *The Southwark*, 191 U.S. 1 (1903) (as to cargo, the shipowner's failure

and one case in which a seaman recovered damages for injuries resulting from the shipowner's negligent failure to provide a seaworthy vessel.<sup>66</sup>

In view of Mr. Justice McReynolds' inadvertent likening of the law of "seaworthiness" with respect to seamen to the doctrine of "seaworthiness" in the law of carriage of goods, the radically different bases of the two doctrines should be noted. "Seaworthiness" is a useful and much used concept in the law of carriage of goods by sea and marine insurance as well as in mariners' rights; but until Mr. Justice McReynolds' dictum, the shipowner's obligations in the three branches of maritime law had never been regarded as identical. The shipowner's implied "warranty" of seaworthiness to cargo is derived from the absolute obligation imposed on common carriers by English common law to insure the safe delivery of merchandise entrusted to them, excepting only "acts of God, and of the enemies of the King."<sup>67</sup> In the absence of express contract the shipowner was liable for loss or damage to the cargo arising from unseaworthiness at the commencement of the voyage in the same way that he was liable for loss or damage from any other cause regardless of his due diligence with the sole exceptions of "acts of God and enemies of the King." The "implied warranty of seaworthiness" in a voyage policy of marine insurance, although somewhat different in its effect, has been likened by some writers to the shipowner's "warranty" of seaworthiness of cargo.<sup>68</sup> The "implied warranty of seaworthiness" in the law of marine insurance derives from the intent of the parties to the policy of insurance, under which the underwriters agreed to pay the shipowner if his vessel were lost through the "perils of the sea" or other enumerated causes, but which protected the underwriter from liability for losses which might result from perils for which the underwriter did not accept responsibility. The Courts held that a "seaworthy vessel" was a condition precedent to the attachment of the risk of the policy as the underwriters could not be deemed to contemplate

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to furnish refrigerating apparatus in good order and repair at the commencement of the voyage is a breach of his obligation to furnish a seaworthy vessel); *The Caledonia*, 157 U.S. 124 (1895) (in absence of express contract, every contract for the carriage of goods by sea contains an implied warranty that the vessel will in fact be seaworthy, which is not satisfied by the mere exercise of due diligence).

<sup>66</sup> *Thompson Towing & Wrecking Assn. v. McGregor*, 207 Fed. 209 (6th Cir. 1913). The court there said:

The vessel as an entirety must be seaworthy; and the owners' duty in this behalf is positive and non-assignable. . . . This rule does not differ in principle from the rule which holds a master liable in damages for neglect of his positive duty to his injured servant, no matter whether such injury is due in part to neglect of fellow servants or not.

*Id.* at 211, 212.

<sup>67</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).

<sup>68</sup> 1 *Parsons on Shipping* 285, n.3 (1869).

accepting the risk of loss of "an unseaworthy vessel" through the operation of perils of the sea.<sup>69</sup>

The use and development of the term "implied warranty of seaworthiness" in the law of sea carriage of goods and of marine insurance was useful and harmless as a convenient means of expressing, for the one, a cause of loss which was not within the very limited exemptions from liability permitted the common carrier, and, for the other, a risk of loss which the underwriter was unwilling to assume. The use of the term "implied warranty of seaworthiness" in reference to mariners' personal injuries served no such convenient purpose, and was inaccurate, for the shipowner was under no absolute obligation to provide a seaworthy vessel for the seaman, but was liable to the seaman only for that limited species of negligence which resulted in an unseaworthy vessel.<sup>70</sup>

The federal courts for a decade and a half appear to have recognized Mr. Justice McReynolds' dictum in the *Sandanger* case as a mere inadvertence. Although a number of passing incidental references were made to the statement by the courts, including the Supreme Court,<sup>71</sup> in no case was the rule stated as a ground of decision. In those cases in which it was of importance to state the proper basis of the shipowner's liability for injuries resulting from unseaworthiness, the liability was stated accurately by the Supreme Court as being grounded in negligence.<sup>72</sup>

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<sup>69</sup> I Parsons on Marine Insurance 370, n.1 (1868).

<sup>70</sup> Smith, *supra* note 56, at 425 states:

It is for negligence alone that ship and owners are held. With respect to injuries resulting to seamen from latent defects not discoverable by the exercise of due care, there is no liability.

<sup>71</sup> *Engel v. Davenport*, 271 U.S. 33, 36 (1926), 1926 A.M.C. 679, 681 ("The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance without regard to negligence. . . ."); *Sabine Towing Co. Inc. v. Brennan*, 72 F.2d 490, 494 (5th Cir. 1934), 1934 A.M.C. 1122, 1129 ("This duty, as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses.") The quotation from the *Sabine Towing Co.* case is dictum, the court having found the shipowner guilty of actionable negligence in knowingly sending an unstable vessel to sea. The Fifth Circuit recognized its statement in the *Sabine Towing Co.* case as inadvertent dictum which it repudiated in a later case. Cf. *The Tawmie*, 80 F.2d 792, 793 (5th Cir. 1936), 1936 A.M.C. 110, 111 ("A shipowner is not an insurer of the safety of his seamen, nor is the owner liable for injuries caused by the breaking of apparatus if due care was used in furnishing the appliance and keeping it in safe condition and repair. The burden of establishing negligence by a fair preponderance of the evidence rests upon libellant.")

<sup>72</sup> *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), 1927 A.M.C. 946, a subsequent suit under the Jones Act alleging the negligent use of appliances by fellow servants was barred as *res adjudicata* by dismissal of a prior libel under the general maritime law alleging unseaworthiness of the appliances. The court said, at 321, 1927 A.M.C. at 950, "The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action." See *Pacific Steamship Co. v. Peterson*, 278 U.S. 130 (1928), 1928 A.M.C. 1932, where the court said:



The first federal case in which Mr. Justice McReynolds' dictum was applied deliberately as the basis of decision was *The H. A. Scandrett*.<sup>73</sup> The jury, in answer to specific interrogatories, stated that a latent defect in a door lock contributed to the accident which resulted when a door knob pulled loose, throwing the seaman backwards. Judge Augustus N. Hand, in affirming the judgment, stated, "In such a case the liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute." In stating this proposition, which is probably dictum, as a basis of decision, he quite frankly revealed that he regarded his statement of the proposition of absolute liability as a determination based on "policy" considerations and a desirable bit of judicial legislation.<sup>74</sup>

In *Mahnich v. Southern S. S. Co.*,<sup>75</sup> the Supreme Court, in an extended dictum, phrased the shipowner's obligation to his mariners in terms of a "warranty of seaworthiness" which was said to be both absolute and continuing. The only question before the court was whether the shipowner was liable for injuries sustained by a mariner in the fall of a defective staging in which the mate and boatswain had negligently incorporated patently defective rope. The shipowner's defense was that the injuries

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The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute [The Jones Act] includes several additional species not embraced in that term.

Id. at 138, 1928 A.M.C. at 1937. *Christopher v. Grueby*, 40 F.2d 8, 12 (1st Cir. 1930), 1930 A.M.C. 989, 996 ("The duty of shipowners to their seamen to see that their ship is seaworthy and their equipment in safe condition for use when she starts on a voyage is a personal one, responsibility for which they cannot escape by delegating its performance to another. In this respect, it is like the common law duty of a master to provide his servant a suitable place in which to work.") In *The Elk*, 1938 A.M.C. 714 (D. Mass. 1938), the cases on the subject are fully reviewed, and the case suggests a distinction between the term "operating" negligence and negligence causing unseaworthiness.

<sup>73</sup> 87 F.2d 708 (2d Cir. 1937), 1937 A.M.C. 326.

<sup>74</sup> The court said:

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

Id. at 711, 1937 A.M.C. at 331. Judge Augustus N. Hand's statement of the proposition of absolute liability in this case may be viewed as dictum, and unnecessary to support his affirmance of the judgment. The jury had specifically found that the door, in addition to the latent defects in the lock, had patent defects which a competent inspection would have disclosed and which proximately contributed to the injury, and accordingly reduced the gross award on the basis of the seaman's contributory negligence.

<sup>75</sup> 321 U.S. 96 (1944), 1944 A.M.C. 1, reversing 135 F.2d 602 (3d Cir. 1943).

on these facts resulted from the negligence of the mate as a fellow servant rather than from "unseaworthiness."

The odd manner in which issue was joined in the *Mahnich* case accounts in major part for the sweeping nature of the resulting dictum. The shipowner made only passing reference to the nature of a shipowner's obligation with respect to seaworthiness (making no objection to the trial court's finding that the mate negligently failed to observe a patent defect in the rope). The shipowner's prime argument was that the condition did not constitute unseaworthiness, and that, in any event, the accident was caused by the operating negligence of the mate rather than unseaworthiness.<sup>76</sup> As a result of the manner in which the case arose, there was no attempt by the shipowner to demonstrate that liability for unseaworthiness is predicated on negligence, and Mr. Justice Stone assumed the contrary proposition in his dictum.

The actual holding of the Supreme Court in the *Mahnich* case is that the negligence of the mate in furnishing or fabricating a defective appliance visits liability upon the shipowner as for unseaworthiness. This is unquestionably consonant with the doctrine of "seaworthiness" with respect to mariners which was considered and stated by the Supreme Court in *The Osceola*, and shows Supreme Court approval of the lower courts' earlier extension of *respondeat superior* in "unseaworthiness" cases to include the defaults of the master and the mate. The facts in the *Mahnich* case were virtually identical with those in *The Julia Fowler*<sup>77</sup> which was discussed and apparently approved in *The Osceola*. But the dictum in the *Mahnich* case includes the startling misstatement that the "later cases" have followed "the ruling of *The Osceola* . . . that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances."<sup>78</sup> Of the six cases cited, only the *Sandanger* and *H. A. Scandrett* cases lend verisimilitude to the stated proposition.<sup>79</sup>

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<sup>76</sup> In these contentions the shipowner relied on Mr. Justice McReynolds' statement in *Plamals v. The Pinar del Rio*, 277 U.S. 151 (1938), 1928 A.M.C. 932 which involved virtually identical facts. In that case, Mr. Justice McReynolds stated that the injury resulted from the negligence of the mate and that the vessel was not unseaworthy. He further held that a British seaman has no right in rem against a British vessel under the Jones Act. Mr. Justice McReynolds' statement in the *Pinar del Rio*, supra, improperly described as dictum, was a direct application of the English rule that *respondeat superior* does not operate to charge the shipowner with the defaults of the master or mate with respect to seaworthiness. Mr. Justice Stone, in the *Mahnich* case, supra note 75, refused to follow this holding.

<sup>77</sup> 49 Fed. 277 (S.D.N.Y. 1892).

<sup>78</sup> 321 U.S. at 100, 1944 A.M.C. at 5.

<sup>79</sup> *The Osceola*, 189 U.S. 158 (1903) (the liability for "unseaworthiness" mentioned in the dictum in this case was predicated on negligence); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922) (dictum); *The Arizona v. Anelich*, 298 U.S. 110 (1936) (assumption of the risk is not a defense in a Jones Act suit for negligent failure to furnish safe appliances);

Mr. Justice Stone in the *Mahnich* case, like Mr. Justice McReynolds in the *Sandanger* case, erroneously assumed that the shipowner's obligation to mariners, like his obligation to cargo, was predicated on warranty, and was absolute.<sup>80</sup> It was Mr. Justice Stone's assumption that shipowners insure the soundness of their vessels to all the world until relieved by statute of the insurer's obligation as to a particular group. This was not the law in general, and specifically was not the law with respect to mariners; no authority was cited in support of the proposition for there was none.

To the Court of Appeals for the Third Circuit in 1945 fell the distinction of first stating, as a doctrine necessary to support its decree, the proposition that the shipowner's obligation to furnish a seaworthy vessel is absolute and not satisfied by due diligence. This leading case, *Sieracki v. Seas Shipping Co.*,<sup>81</sup> in its progress through the district court, the circuit court, and later the Supreme Court,<sup>82</sup> demonstrates in a particularly dramatic manner the profound part which is played in the development of the law by prior dicta and the inadvertences and accidents in emphasis which result from the alignment of the parties in the individual case. Sieracki, not a mariner but a longshoreman, was injured when the shackle supporting a ten-ton cargo boom on the *S.S. Robin Sherwood* failed. He sued the shipowner, the shipowner impleaded the shipbuilder and the supplier of the shackle, and the plaintiff thereafter proceeded against all three. The defect was latent, and not discernible either visually or by any other test which shipowners customarily or reasonably give vessel's equipment. The district court, however, held that the shipbuilder and the supplier of the shackle were held to a high standard of care and in the absence of any proof of the tests actually performed by them on the shackle they were liable to plaintiff under the doctrine of *McPherson v. Buick Motor Co.*<sup>83</sup>

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*Beadle v. Spencer*, 298 U.S. 124 (1936) (assumption of the risk is not a defense to a Jones Act suit for injuries resulting from negligently piled lumber); *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 428 (1939) (assumption of the risk is no defense to a Jones Act suit for negligent failure to furnish a safe appliance); *The H. A. Seandrett*, 87 F.2d 708 (2d Cir. 1937) (probably dictum but at best a bit of judicial legislation); *The Edwin I. Morrison*, 153 U.S. 199 (1849) (a cargo damage case affirming the usual rule that in the absence of contract to the contrary the shipowner owes to cargo an absolute duty to furnish a seaworthy vessel).

<sup>80</sup> It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle. That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seamen. The defense of the fellow servant rule to suits in admiralty for negligence, a defense precluded by the Jones Act, has never avowedly been deemed applicable to the owner's stricter obligation to the seaman of the warranty of seaworthiness.

321 U.S. at 101, 1944 A.M.C. at 5.

<sup>81</sup> 149 F.2d 98 (3d Cir. 1945), 1945 A.M.C. 407, reversing 57 F. Supp. 724 (E.D. Pa. 1944).

<sup>82</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), 1946 A.M.C. 698 (1946).

<sup>83</sup> 217 N.Y. 382, 11 N.E. 1050 (1916).

With respect to the shipowner, the district court in the *Sieracki* case assumed casually and in passing that the shipowner's obligation of seaworthiness was absolute as to a seaman,<sup>84</sup> citing only *The Osceola*, but dismissed the shipowner on its holding that Mr. Sieracki was not a "seaman" and as a longshoreman was entitled only to the exercise of reasonable care on the part of the shipowner. On the appeal to the Third Circuit, the major contest was restricted to Sieracki's claim that he was a "seaman." He prevailed in this contention. The shipowner, for strategic purposes, found it desirable to concede that mariners are entitled to a "warranty of a seaworthiness" as a matter of contract, but urged that such "warranty" does not extend to a longshoreman employee of an independent stevedore contractor, since there is no privity of contract between such longshoremen and the shipowner.<sup>85</sup>

It appears clearly from the opinions that in both the district court and the court of appeals the nature of the shipowner's obligation to a "mariner" with respect to seaworthiness was assumed rather than decided and was not the point on which the case was fought. In the Supreme Court the major contest again centered on the shipowner's contention that Sieracki as a "longshoreman" was not a "seaman" and therefore not entitled to the seamen's "warranty of seaworthiness." It appears that the shipowner in the Supreme Court conceded that the shipowner's obligation to a mariner with respect to seaworthiness was absolute.<sup>86</sup> In view of the apparent concession of the parties before it on the point, the Supreme Court gave only cursory consideration to the question of the extent and nature of the shipowner's obligation to mariners. In support of its asser-

<sup>84</sup> Judge Kirkpatrick said:

The plaintiff asks the court to find that the accident occurred by reason of unseaworthiness of the vessel and I make that finding, but his contention that this fact alone entitles him to recover against the owner cannot be sustained. If he were a seaman in the employ of a vessel he would, of course, be entitled to a verdict on that showing alone. *The Osceola*, 189 U.S. 158. But he is not a seaman nor a member of the crew of the vessel.

*Sieracki v. Seas Shipping Co.*, 57 F. Supp. 724 at 727 (E.D. Pa. 1944).

<sup>85</sup> We think it is undisputed that if the falling boom had hit one of the sailors the injured seaman could have recovered from the ship's owner, or the ship, on the basis of breach of warranty of seaworthiness, that warranty not being dependent upon a showing of negligence at all. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); the *H. A. Scandrett*, 87 F.2d 708 (2d Cir. 1937). Is the longshoreman entitled to the same protection? It is clear that so far as the "warranty" depends upon contract, plaintiff was not a party to a contract with the shipowner.

*Sieracki v. Seas Shipping Co.*, 149 F.2d 98 at 101 (3d Cir. 1945).

<sup>86</sup> There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of a vessel or its appurtenant appliances and equipment has been settled law in this country ever since the *Osceola*, 189 U.S. 158; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, and authorities cited.

*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 at 90 (1946).

tion that the shipowner's obligation to seamen was absolute in nature, the Supreme Court, in addition to its own dicta in the *Osceola* and *Mahnich* cases, cited only three inapplicable cases.<sup>87</sup>

In his opinion in the *Sieracki* case, Mr. Justice Rutledge stated that the origin of the doctrine of the shipowner's absolute obligation to furnish a seaworthy vessel to mariners was perhaps unascertainable, failing to recognize that the doctrine had its origin in Mr. Justice McReynolds' misconception of the dictum in *The Osceola*, which he stated in his opinion in the *Sandanger* case, and which was later restated through inadvertence in Mr. Justice Stone's dictum in the *Mahnich* case. Mr. Justice Rutledge's discussion of the rights of mariners in the *Sieracki* case was not an analysis of the rights of mariners as such, but rather a demonstration of his view that the sociological, economic, and humanitarian incidents and results of a doctrine of absolute liability justify the extension of such a doctrine to a class of other than mariners.<sup>88</sup>

Since the *Sieracki* case, the courts have uniformly, and without further analysis, assumed that the shipowner has an absolute, continuing, non-delegable obligation to provide a seaworthy vessel for the mariners. The later cases have been concerned with determining the categories and items of the vessel's economy which the shipowner's assumed "warranty" of fitness encompasses. Recent cases have held the vessel to be unseaworthy for having aboard a mariner with a latent emotional instability which resulted in his assaulting a fellow crew member with a meat cleaver<sup>89</sup> although the vessel is not unseaworthy where the latent emotional instability results only in an assault with fists.<sup>90</sup>

In the *Mahnich* and *Sieracki* cases the Supreme Court used the terms

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<sup>87</sup> *Id.* at 90. The court cited the *Edith Goden*, 23 Fed. 43 (S.D.N.Y. 1885) (shipowner's negligent furnishing of a derrick which was inadequate for the intended use; Judge Addison Brown applied the municipal law, which he stated required the shipowner "to exercise due care in providing machinery adequate and proper for the use to which it was to be applied, and to maintain it in like condition"); *Wm. Johnson & Co. v. Johansen*, 86 Fed. 886 (5th Cir. 1898) (rope and tackle unsafe, improper and inadequate for intended use negligently supplied by master); *The Waco*, 3 F.2d 476 (E.D. Pa. 1925) (shipowner's negligent failure to provide a proper platform for cleaning boiler tubes "I am of the opinion therefore that the accident was caused partly by the negligence of the owner and partly by the negligence of the libellant.")

<sup>88</sup> These . . . have been thought to justify and to require putting their burden, insofar as it is measurable in money, upon the owner, regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its costs. . . . The liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.

328 U.S. at 93.

<sup>89</sup> *Keen v. Overseas Tankship Corporation*, 194 F.2d 515 (2d Cir. 1952), 1952 A.M.C. 241.

<sup>90</sup> *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953), 1953 A.M.C. 1010.

"absolute, continuing" and "non-delegable" in expressing its view of the nature of the shipowner's obligation with respect to seaworthiness. In affirming without opinion the decision of the Ninth Circuit in the very recent *Petterson*<sup>91</sup> case, the majority of the Supreme Court has extended to a literal and logical extreme the definitions of the nature of the shipowner's obligation appearing in its prior dicta. The Ninth Circuit had reversed the District Court and imposed liability on the shipowner for breach of an assumed absolute, continuing and non-delegable obligation to provide a seaworthy vessel to longshoremen, where a block which failed in ordinary use was owned and used exclusively by the independent stevedore contractor. The offending block had been lost overboard in the accident and the only evidence of its defective condition was the inference which might be drawn from its failure during ordinary use. Neither the Ninth Circuit nor the Supreme Court majority (despite a vigorous dissent by Justices Burton, Frankfurter and Jackson) regarded the independent stevedore contractor's assumed ownership and exclusive control of the device as sufficient to relieve the shipowner of absolute liability for injuries caused to a longshoreman through failure of the device. The *Petterson* case, like the *Sieracki* case, although concerning a longshoreman, effectively, extends the doctrine of seaworthiness with respect to seamen by reason of the assimilation of longshoremen to seamen first announced in the *Sieracki* case. The Ninth Circuit in its opinion and the dissent in the Supreme Court recognized that the holding in the *Petterson* case is contrary to the view obtaining in the Second and Third Circuits<sup>92</sup> where the shipowner's obligation is regarded as terminating upon the delivery of an appliance in good order into the exclusive control of the independent stevedore contractor.

To the extent that the Supreme Court's present doctrine of "insured seaworthiness" is based on anything other than its failure properly to limit its own prior dicta, it necessarily represents a frank excursion into legislation. The Supreme Court has frequently expressed its view that

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<sup>91</sup> *Petterson v. Alaska S.S. Co., Inc.*, 205 F.2d 478 (9th Cir. 1953), 1954 A.M.C. 1405, cert. granted, 346 U.S. 914 (1953), aff'd mem. sub nom. *Alaska S.S. Co., Inc. v. Petterson*, 74 Sup. Ct. 601 (1954).

<sup>92</sup> *Mollica v. Compania Sud-America*, 202 F.2d 25 (2d Cir. 1953), 1953 A.M.C. 299; *Lopez v. American-Hawaiian S.S. Lines*, 201 F.2d 418 (3d Cir. 1953), 1953 A.M.C. 1315; *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945), 1945 A.M.C. 1387; *Lauro v. United States*, 162 F.2d 32 (2d Cir. 1947), 1947 A.M.C. 888. In his concurring opinion in the *Lauro* case, supra, Judge Learned Hand declined to concede that the shipowner's liability would depend upon whether the oil upon which the decedent had slipped had been placed there before or after the stevedore entered upon the ship, but rested his concurrence on his view that the decision of the Supreme Court in the *Sieracki* case and its assimilation of longshoremen to seamen required the shipowner to furnish a seaworthy vessel during the entire time such "seamen" were aboard.

maritime law is subject to development and change under its guidance<sup>93</sup> except in those cases where the Court believes the legislative function can be more effectively performed by the legislative branch.<sup>94</sup> Disregarding the question which history raises concerning the suitability of the judicial process for performance of the legislative function,<sup>95</sup> the substantially important question remains whether the Supreme Court regards its quasi legislative determinations in the maritime field as within the doctrine of *stare decisis* or whether they are, like true legislative determinations, subject to continuing review, modification, reopening, amendment and repeal.

Mariners, like shipowners, longshoremen, and stevedore contractors, have little interest in refinements of legal theory or in the origins of legal doctrines. Injuries to mariners occur only infrequently through latent defects and the phrasing by the Supreme Court of the doctrine of "seaworthiness" in terms of absolute liability adds relatively few cases to those for which the shipowner would be liable on accepted theories of negligence. The practical and economic importance to mariners or shipowners of phrasing the doctrine in terms of absolute liability is that recovery by the injured mariners in the usual case is practically assured. The mariner is permitted, under the doctrine, in virtually every case, to obtain an instruction to the jury that the shipowner is liable "without fault" if the vessel is found to be "unseaworthy," as well as the usual instructions relating to liability for negligence. Thus, the presentation and discussion of the doctrine of absolute liability operates in the mariner's favor,<sup>96</sup> even in cases which are primarily based on negligence. Although there is some disagreement among the lower courts, the numeri-

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<sup>93</sup> *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) ("Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule. . ."); *Halcyon Lines v. Haenn*, 342 U.S. 282 (1942), 1952 A.M.C. 1. See also *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

<sup>94</sup> A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers. . . .  
*Halcyon Lines v. Haenn*, 342 U.S. 282 at 286 (1953).

<sup>95</sup> For example, note the promptness with which the Federal Longshoremen's & Harbor Workers' Act of 1927, 44 Stat. 1424 et seq., 33 U.S.C. § 901 et seq. (1946), was enacted following the decision of the Supreme Court in *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926) in which the Supreme Court gave longshoremen the rights of seamen under the Jones Act despite the protests of all interested groups that longshoremen were not seamen: Furuseth, "Harbor Workers are not Seamen," 11 Am. Lab. Leg. Rev. 139 (1921); T. V. O'Connor, President International Longshoremen's Association (1921): "If the justices of the Supreme Court had thoroughly understood the difference between longshoremen and ship's crews, I feel certain that they would never have included both in the same class." [Referring to the decisions in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), 11 Am. Lab. Leg. Rev. 144.]

<sup>96</sup> *Hollis v. Grace Line*, 1952 A.M.C. 1609 (N.D.Cal. 1952).

cal majority of recent decisions permit the mariner to present his case to the jury on theories of both negligence and unseaworthiness.<sup>97</sup>

Justices Jackson, Reed and Burton, in the dissenting opinion in the *Hawn* case,<sup>98</sup> recognize the practical advantage which accrues to a plaintiff in a personal injury action through the securing of jury instructions referring to absolute liability. Mr. Justice Frankfurter, in his concurring opinion, noted specifically that in the absence of timely objection to trial by jury, the question was not presented as to whether the plaintiff was entitled to a jury trial in a suit based on both "maritime and common law" causes of action.

If the Supreme Court holds to its present view that the shipowner's "seaworthiness" obligation is absolute, regardless of negligence, the question remains whether the mariner, and those harbor workers assimilated to mariners, are required to elect between a claim of "unseaworthiness" and a claim of "operating negligence" before the case is submitted to the trier of fact.

#### HARBOR WORKER VS. EMPLOYER

Early American cases indicated doubt as to whether the Admiralty Court had jurisdiction of torts occurring aboard vessels while in a harbor<sup>99</sup> and the contention that they did not was made, although unsuccessfully, as recently as 1882.<sup>100</sup> Until the Federal courts determined that the services performed by a longshoreman were maritime in nature,<sup>101</sup> longshoremen injured in their work, apparently in part because of doubt as to admiralty jurisdiction, pursued their personal injury claims against their employers in the State courts and in the Federal courts on the law side.

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<sup>97</sup> *Thomsen v. The Dorene B.*, 91 F. Supp. 549 (S.D.Cal. 1950), 1950 A.M.C. 1412; *German v. Carnegie Illinois Steel Co.*, 156 F.2d 977 (3d Cir. 1926), 1946 A.M.C. 1950; *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928); *Spangler v. Matson Navigation Co.*, 1950 A.M.C. 409 (Wash. 1950).

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute.

*Pacific S.S. Co. v. Peterson*, 278 U.S. 130 at 138 (1928).

<sup>98</sup> 346 U.S. 406, 419 (1953), 1954 A.M.C. 1.

<sup>99</sup> *Borden v. Hierne*, 3 Fed. Cas. 897, No. 1,655 (S.D.N.Y. 1832).

<sup>100</sup> *Leathers v. Blessing*, 105 U.S. 626 (1882). In view of the modern developments, it is surprising to note that the doubts as to the scope of the admiralty jurisdiction should have continued so long in the face of Judge Story's excellent dissertations in *De Lovio v. Boit*, 7 Fed. Cas. 418, No. 3,776 (C.C.D. Mass. 1815); *Reed v. Canfield*, 20 Fed. Cas. 426, No. 11,641 (C.C.D. Mass. 1832).

<sup>101</sup> *George T. Kemp*, 10 Fed. Cas. 227 No. 5,341 (D. Mass. 1876) (stevedore claiming maritime lien).



The remedies which the longshoremen and other harbor workers pursued against their employers for shipboard injuries in the common law courts, and which were granted them by the courts, were the same common law remedies and rights of recovery which the common law, in its then period of development, made available to shoreside workers generally. When the harbor workers' rights to resort to the admiralty court for personal injuries was established,<sup>102</sup> the admiralty courts followed the common law courts in granting or withholding recovery on the same principles on which the common law courts allowed or denied recovery to purely shoreside employees against shoreside employers. Thus the admiralty court,<sup>103</sup> like the common law court,<sup>104</sup> judged the employer's liability to his employee in terms of reasonable care to provide a safe place to work, modified by the doctrine of assumption of the risk with its numerous refinements. It granted recovery for the negligence of the employer, but denied it for that of a fellow servant, unless a "vice principal" and subjected the employer's liability to other refinements developed by the common law, including the doctrine of "borrowed servant." Following the trend of the times, and New York's adoption of a Workmen's Compensation Act in 1910, the State courts and State administrative bodies extended the benefits available under the State Workmen's Compensation Acts to harbor workers injured aboard ship. All interested groups ap-

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<sup>102</sup> *Leathers v. Blessing*, 105 U.S. 626 (1882) (business invitee seeking to inquire about purchase of cotton injured through collapse of negligently stowed cargo; petitioner-respondent Leathers was captain of the Natchez defeated by the Robert E. Lee in the historic 1870 river race from New Orleans to St. Louis.)

<sup>103</sup> *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914) (failure of employer to use proper diligence to provide a safe place of work); *The Elton*, 142 Fed. 367 (3d Cir. 1906) (holding that the vessel's crew member winch driver, through whose negligence the longshoreman employee of an independent stevedore contractor was injured, was a fellow servant of the longshoreman barring recovery); *Cornec v. Baltimore & O. R.R.*, 48 F.2d 497 (4th Cir. 1931) (concerning an explosion which occurred prior to the enactment of the Federal Longshoremen's Act holding that the employer had failed to exercise proper diligence to furnish a safe place to work and that employees had not assumed risk as they had no notice or knowledge of the hazard of explosion). But note that the admiralty court regarded the effect of contributory negligence as a matter of procedure determined by the choice of forum: *The Max Morris*, 137 U.S. 1 (1890); *In re Penn. R.R.*, 48 F.2d 559 (2d Cir. 1931) 1931 A.M.C. 1800.

<sup>104</sup> *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909) (action by longshoreman employee of independent stevedore contractor against shipowner but discussing principles applicable to recovery against employer); *The Hoquiam*, 253 Fed. 627 (9th Cir. 1918) (holding the Jones Act not applicable to longshoremen employed by the vessel and discussing theories applying to longshoremen endeavoring to recover from shipowner employer); *Western Fuel Co. v. Garcia*, 255 Fed. 817 (9th Cir. 1919); same case, 260 Fed. 839 (9th Cir. 1919) (discussing theories applicable to longshoremen endeavoring to recover from his shipowner employer), reversed on other grounds, 257 U.S. 233 (1921).

peared content with this arrangement<sup>105</sup> (with the sole exception of the employer, who was faced in the individual case with an employee's injury occasioned by the employee's own fault.) As authority for the legal propriety of such acts as applied to shipboard injuries, the states could look to decisions of the Supreme Court holding state death acts available for deaths occurring on navigable waters within a state<sup>106</sup> and even to deaths occurring on the high seas.<sup>107</sup>

This relatively happy adjustment of the matter was terminated in 1917 with the Supreme Court's holding in *Southern Pacific Co. v. Jensen*,<sup>108</sup> that State compensation acts, if permitted to stand, would work material prejudice to the "harmony and uniformity" of the general maritime law and therefore must fall. Congress promptly attempted to cure the difficulty resulting from this decision by amending the "saving to suitors' clause" of the Judiciary Code in order additionally to save to "claimants the rights and remedies under the Workman's Compensation Law of any state."<sup>109</sup> The Supreme Court rejected Congress' solution as soon as the question was presented in *Knickerbocker Ice Co. v. Stewart*.<sup>110</sup> Congress again attempted to cure the resulting problem by further amending the "saving to suitors' clause"<sup>111</sup> in the mistaken belief that the Supreme Court's objection to its prior endeavor was directed to the wording, which was sufficiently broad, if read literally, to encompass crew members. Again the Supreme Court held it beyond Congress' power to place harbor workers on a parity with their neighbors in their respective communities.<sup>112</sup>

In 1926, apparently having abandoned hope of Congress acting on its prior broad hints to adopt a Federal Workmen's Compensation Act, and possibly in part as a concession to Justices Holmes and Brandeis, whose dissents in the *Jensen* line of cases were vehement, the Supreme Court in *International Stevedoring Co. v. Haverty*<sup>113</sup> effectively adopted its own Federal Longshoremen's Act by extending the Jones Act to the harbor

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<sup>105</sup> For presentation of the views of the harbor workers' and seafarers' unions and State administrators, see 11 Am. Lab. Leg. Rev. 133 et seq. (1921).

<sup>106</sup> *Sherlock v. Alling*, 93 U.S. 99 (1876).

<sup>107</sup> *The Hamilton*, 207 U.S. 398 (1907) (holding Delaware Death Act properly applicable to death on high seas resulting from collision between two vessels, both of which were owned by Delaware corporations.)

<sup>108</sup> 244 U.S. 205 (1917).

<sup>109</sup> 40 Stat. 395 (1917).

<sup>110</sup> 253 U.S. 1949 (1920).

<sup>111</sup> 42 Stat. 634 (1922).

<sup>112</sup> *Washington v. Dawson & Co.*, 264 U.S. 219 (1924), 1924 A.M.C. 403. For an excellent discussion of the legislative and judicial vicissitudes attending the application of workmen's compensation legislation to harbor workers, see, Robinson, Admiralty 93 et seq. (1939).

<sup>113</sup> 272 U.S. 50 (1926), 1926 A.M.C. 1638.

worker employees of independent contractors.<sup>114</sup> Neither Congress nor the concerned groups were satisfied with the Supreme Court's legislative product and, during the next year, the Federal Longshoremen's and Harbor Workers' Act of 1927<sup>115</sup> was adopted. This Act, with relatively minor procedural amendments and a few significant substantive changes,<sup>116</sup> today furnishes the harbor worker's exclusive remedy against his employer for personal injury incurred on shipboard.

It is at least questionable whether the Supreme Court in forcing the adoption of the Longshoremen's Act achieved a meaningful "uniformity." As the law now stands, the individual harbor worker's compensation varies by the accidental circumstance of whether he is injured on shipboard or on the dock, and the compensation of the harbor worker injured on shipboard is greater or smaller than that of his shoreside, next-door neighbor dependent upon the equally accidental circumstance of whether the State or the Federal Act provides the larger benefit. Additionally, there is the ever-present hazard that the harbor worker in the multitude of close factual situations may "zig" when he should "zag," and by his initial choice of the wrong remedy, end with no remedy.<sup>117</sup>

The "uniformity" which the *Jensen* line of cases imposed on harbor workers' recoveries against their employers for injuries sustained aboard ship was solely a "uniformity," on a national scale, in transactions arising in individual localities throughout the country, and involving relations between a local shoreside worker and his local shoreside employer, except in those cases where the harbor worker was employed directly by the shipowner. The ethereal tests of jurisdiction under the "maritime but local" doctrine evolved by the *Jensen* line of cases have satisfied many writers that the primary "uniformity" achieved as a result of these cases was a uniformity in unpredictability of result,<sup>118</sup> and they have recommended that the Supreme Court overrule the *Jensen* line of cases as a necessary first step in achieving some semblance of rational predictability for the harbor worker with respect to his claims for personal injuries against his

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<sup>114</sup> Mr. Justice Holmes stated:

It is true that for most purposes, as the word is commonly used, stevedores are not "seamen" but words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship.

Id. at 52.

<sup>115</sup> 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1946).

<sup>116</sup> In 1948, for example, Congress removed all maximum limitations previously applicable to the total amounts of compensation payable in cases of death and total permanent disability. 62 Stat. 603 (1948), 33 U.S.C. § 914(m) (Supp. 1952).

<sup>117</sup> *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). See also *Grant Smith-Porter v. Rohde*, 357 U.S. 469 (1922).

<sup>118</sup> See, Comment, 57 *Yale L.J.* 243 (1947).

employer.<sup>119</sup> In any event, the requirement of mere national uniformity stated in the *Jensen* case would have flowed more naturally from the commerce clause of the Constitution<sup>120</sup> than from the "admiralty and maritime jurisdiction" clause. This latter clause was not designed to produce a national uniformity of relations between American harbor workers and their American employers, but was intended to assure tranquil relations for the several states of the union in their dealings with foreigners and foreign ships,<sup>121</sup> particularly in the exercise of the *in rem* proceeding.

Mr. Justice Holmes' 1926 decision in the *Haverty* case dubbed longshoremens "seamen" for the purpose of extending the compensation features of the Jones Act to cover all longshoremens. His reasoning that "Congress could not have intended" their recovery to depend on the accident of whether they were employed by a ship or an independent contractor, was an inaccurate reading of the legislative mind, for a year later, in 1927, the Federal Longshoremens & Harbor Workers' Act specifically excluded from its scope the "master or member of a crew of any vessel."<sup>122</sup> Thus the harbor worker's right to recover damages for his injuries in lieu of, or in addition to, the compensation provided under the 1927 Act is, as a practical matter, limited to those instances in which he is employed by an independent contractor rather than directly by the shipowner.<sup>123</sup>

<sup>119</sup> The decision of the Supreme Court in *Madruaga v. Superior Court*, 74 Sup. Ct. 298 (U.S. 1954) recognizing concurrent jurisdiction in the federal admiralty courts and in the State courts for suits for sale of a vessel for partition against suggests the possibility that the present Supreme Court would reverse the *Jensen* case if the question were again presented. Mr. Justice Black, in affirming the constitutionality of state unemployment compensation taxes as applied to seamen's wages, *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943), commented: The *Jensen* case has already been severely limited and has no vitality beyond that which may continue as to state workmen's compensation laws." *Id.* at 309.

<sup>120</sup> It should be noted that the Court never found it necessary to go so far to insure uniformity under the commerce clause in the absence of expression by Congress.

<sup>121</sup> Hamilton, "The Powers of the Judiciary," *The Federalist*, No. 80: (McLcan's ed. 1788).

It is interesting to note in this regard that the Supreme Court felt it necessary to secure uniformity as to workmen's compensation for harbor workers, but it did not find it necessary to insure uniformity as to recoveries in death actions, with the result that the heirs of a passenger negligently killed on a vessel within the three mile limit off Northern California must bring suit within one year, but may recover full compensatory damages, while, if the vessel had crossed into the waters of the State of Oregon, the heirs would have two years within which to bring their action, but their recovery would be limited to a maximum of \$20,000. See *Sherlock v. Alling*, 93 U.S. 99 (1876); *The Hamilton*, 207 U.S. 398 (1907).

<sup>122</sup> Organized seamen (mariners) have steadfastly opposed coverage by a system of workmen's compensation, *Hust v. Moore-McCormack*, 328 U.S. 707 (1946), 1946 A.M.C. 727; *Farrell v. United States*, 336 U.S. 511 (1949), 1949 A.M.C. 613.

<sup>123</sup> 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1946), stating the exclusive liability of the employer to be as provided in the Longshoremens' Compensation Act.

## HARBOR WORKER VS. SHIPOWNER

The technical jurisdictional problems which the harbor worker must solve under the "maritime but local" doctrine, in securing recovery for his personal injuries, is a major one, but the questions of greatest practical and economic importance to the harbor worker (and other groups in the shipping community) arise when the harbor worker seeks recovery from persons other than his employer. Although harbor workers in some trades are customarily employed directly by the shipowner and in other trades the work of loading cargoes and stores is wholly or partially performed by the crew, the vast majority of harbor workers are employed by local independent contractors engaged by the shipowner to load or discharge cargo or perform other work in connection with the vessel. Except in rare cases<sup>124</sup> the very fact that the work is performed on the ship restricts the harbor worker to a claim against the shipowner if he is to recover compensation in excess of that provided by the Longshoremen's Act.

The employees of the independent stevedore contractor usually work independently of the ship's crew and consequently are seldom injured by the "operating" negligence of the vessel personnel, but when such injuries occur, American courts have consistently recognized the longshoreman's claim and treated him as a business invitee of the shipowner. In some such cases, the longshoreman has been held subject to the defense that the crew member's negligence causing injury was that of a fellow employee of the longshoreman under the doctrine of "borrowed servant."<sup>125</sup> The "borrowed servant" doctrine, in a reverse form, is suggested by Mr. Justice Frankfurter's separate concurrence in the *Hawn* case, in which he expresses the view that the assimilation of harbor workers to seamen with respect to seaworthiness necessarily assimilates harbor workers to seamen with respect to crew negligence and bars harbor workers from recovery against the shipowner for "operating" negligence.<sup>126</sup> The majority rejected this view on the ground that the *Sieracki* case intended to increase rather than limit the longshoreman's remedies.

As a statistical matter virtually no harbor workers are injured through the "operating" negligence of the ship's crew and, as a result, virtually all personal injury litigation between harbor workers on the one hand and

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<sup>124</sup> *United States v. Luehr*, 208 F.2d 138 (9th Cir. 1953), 1953 A.M.C. 2189 (injury resulted from negligence of operator of floating derrick employed by charterer loading ship.)

<sup>125</sup> *United States v. Wallace*, 18 F.2d 20 (9th Cir. 1927), 1927 A.M.C. 672; *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

<sup>126</sup> *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), 1954 A.M.C. 1, 113. The theory advanced by Mr. Justice Frankfurter had previously been rejected without opinion by Judge Oliver J. Carter in overruling exceptions to a libel in *Zapien v. Royal Rotterdam Lloyd*, Admiralty no. 26527 (N.D. Cal. Aug. 28, 1953).

shipowners on the other is premised on the shipowner's alleged failure to provide a safe place to work.

Even prior to the decision in *Leathers v. Blessing*, in 1882, in which the Supreme Court affirmed the jurisdiction of admiralty over negligent injury to a business invitee on board ship, the admiralty courts had permitted longshoremen employees of independent stevedore contractors to recover from the ship or shipowner where injuries resulted from negligence in occasioning a hazardous condition aboard the ship.<sup>127</sup>

It was universally recognized that the shipowner and vessel owed some duty of care with respect to the safety of the place in which the employees of the independent contractor were required to perform their work,<sup>128</sup> but the longshoremen's independent contractor employer was held to be under a similar obligation to provide his employee with a safe place to work.<sup>129</sup> The seemingly limitless controversy and complexity that attends personal injury litigation between harbor workers and shipowners is attributable in part to a difficulty in resolving the respective scopes of the shipowner's obligation in connection with the condition of the vessel to the longshoreman as a "business invitee," and the obligation of the independent stevedore contractor as employer of the longshoreman to exercise due diligence to furnish his employee a "safe place to work." This problem has been additionally complicated by the tendency of some courts to confuse the doctrine of "safe place to work" with the doctrine of "seaworthiness." The complexity of litigation between harbor workers and shipowners has been further augmented by the startling dicta in some recent cases that the nature of the work<sup>130</sup> and the exclusive liability provision of the Federal Longshoremen's Compensation Act<sup>131</sup> relieves

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<sup>127</sup> *Leathers v. Blessing*, 105 U.S. 626 (1882). See *Gerrity v. The Bark Kate Cann*, 2 Fed. 241 (E.D.N.Y. 1880), in which a longshoreman grain trimmer, employed by a grain elevator engaged in loading a vessel for the charterer's account, was injured when a rack of dunnage broke and fell of its own weight "by reason of neglect in the manner of stowing" by the ship's officers.

<sup>128</sup> *The Helios*, 12 Fed. 732 (S.D.N.Y. 1882) (small open ladder hatch in unusual location in cargo hold which vessel's mate did not mention in telling stevedore foreman hold was ready to commence working cargo); *The Max Morris*, 24 Fed. 860 (S.D.N.Y. 1885) (small opening in ship's rail which, by location and appearance, seemed to be the access to a ladder, although no ladder was provided); *Keliher v. The Nebo*, 40 Fed. 31 (S.D.N.Y. 1889) (longshoreman injured by the collapse of a beam supplied by the ship in the face of master's knowledge that it was too weak to carry the intended burden).

<sup>129</sup> *Atlantic Transport Co. v. Imbrovck*, 234 U.S. 52 (1914); *Scaboard Stevedoring Corp. v. Sagadahoc S.S. Co.*, 32 F.2d 886 (9th Cir. 1929); *Porello v. United States*, 153 F.2d 605, 608 (2d Cir. 1946) ("The primary duty to furnish its employees a safe place to work rested with the stevedore.")

<sup>130</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95, and 12 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), 1954 A.M.C. 1.

<sup>131</sup> *Am. Mut. Liability Ins. Co. v. Matthews*, 182 F.2d 322, 325 (2d Cir. 1950) ("its [the

the independent contractor employer of all duty to his employees as to the safety of the place in which they work.

Until the Supreme Court's decision in *Pope & Talbot v. Hawk*,<sup>132</sup> personal injury litigation between harbor workers and shipowners in the common law courts was additionally unpredictable because of the uncertainty of the effect to be given the harbor workers' own contributory negligence. In 1890 the Supreme Court had held that the contributory negligence of a longshoreman who prosecuted his suit in the admiralty court would not completely bar his recovery.<sup>133</sup> Both before and after this case the Supreme Court in collision cases prosecuted in common law courts stated that recovery would be barred if there were mutual fault.<sup>134</sup> The lower Federal courts and the State courts regarded the effect to be accorded contributory negligence as a matter of procedure to be determined by the forum, and in actions prosecuted in the common law courts, cited contributory negligence as the ground for denying recovery in collision<sup>135</sup> and maritime personal injury cases<sup>136</sup> until the Supreme Court in *Garrett v. Moore-McCormack*,<sup>137</sup> in 1942, first clearly indicated its view that in maritime actions all admiralty rules which substantially affect the prospect of recovery are deemed part of the "right" and not subject to modification by the forum. Following the principles expressed in the *Garrett* case, the Supreme Court of California in the case of *Intagliata v. Shipowners & Merchants Tugboat Co.*<sup>138</sup> applied the admiralty rule of divided damages in a collision case rather than the California State rule. This decision was followed by the Second Circuit in holding that contributory negligence is no bar to recovery in maritime actions, even though brought on the law side of the court, thereby reversing its prior decisions

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independent contractor's] duty to discover patent defects in such equipment was owed only to its employees and that duty the Longshoremen's Act abolished, substituting therefor an absolute duty to pay compensation.")

<sup>132</sup> 346 U.S. 406 (1953), 1954 A.M.C. 1.

<sup>133</sup> *The Max Morris*, 137 U.S. 1 (1890).

<sup>134</sup> *Belden v. Chase*, 150 U.S. 674 (1893); see also note 130 *infra*.

<sup>135</sup> *Puget Sound Nav. Co. v. Nelson*, 41 F.2d 352 (9th Cir. 1930), 1930 A.M.C. 1386.

<sup>136</sup> *Johnson v. U.S.S.B.*, 24 F.2d 963 (2d Cir. 1928), 1928 A.M.C. 987, disaffirming dictum in *Port of N.Y. Stevedoring Corp. v. Castagna*, 280 Fed. 618 (2d Cir. 1922). See also *In re Penn. R.R.*, 48 F.2d 559, 566 (2d Cir. 1931), 1931 A.M.C. 852, 863, in which Judge Learned Hand stated:

We can see no escape therefore from concluding that as between a common law court and a court of admiralty, the question is treated as one of procedure, though in general the law is otherwise.

<sup>137</sup> 317 U.S. 239 (1942), in which the Supreme Court held that the State courts must apply the federal admiralty rule that the shipowner must carry the burden of proving fair dealing as to a seaman's release rather than the State rule in which the seaman plaintiff was required to prove fraud or mistake.

<sup>138</sup> 26 Cal.2d 365, 159 P.2d 1 (1946), 1946 A.M.C. 263.

on the subject.<sup>139</sup> In stating its clear holding in the *Hawn* case, that contributory negligence of a harbor worker injured on shipboard does not bar his recovery in a suit on the law side of the Federal court before a jury, the Supreme Court in a footnote suggested comparison of the *Garrett* case with *Belden v. Chase*.<sup>140</sup> It is possible that the Supreme Court intends its footnote reference as a caveat of its intention to disaffirm its prior statements on the subject<sup>141</sup> and in the future to treat contributory negligence as a factor in mitigation rather than as a bar in all maritime actions, including collision cases, regardless of the choice of forum.

The problem arising from the duality and partial overlapping of the duties owed by the shipowner and the stevedore employer to the harbor worker are primarily factual in nature and on the basis of a factual approach have been satisfactorily resolved in the Second and Third Circuits through the application of traditionally understood and accepted principles of law.<sup>142</sup> In general, and without regard to the theory of absolute liability evolved in the *Sieracki* case, the Second and Third Circuits have proceeded on the principle that the duty of due care with respect to the condition of the vessel is owed the harbor worker by his employer or the shipowner depending upon which one in the factual circumstances of the particular case had control of the portion of the vessel involved and was in the best position to avoid causing, or to remedy, the condition which caused the injury.<sup>143</sup> These circuits have applied much the same factual approach in imposing or withholding liability under the "seaworthiness" doctrine, holding that the shipowner has fully discharged his obligation to furnish a seaworthy vessel to the harbor worker if the vessel is seaworthy when control of the portion involved is surrendered to the master stevedore. If thereafter the vessel's fabric or equipment becomes "unsea-

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<sup>139</sup> *Hedger v. United Fruit Co.*, 198 F.2d 376 (2d Cir. 1952), 1952 A.M.C. 1469, cert. denied, 344 U.S. 896 (1952), 1952 A.M.C. 2086.

<sup>140</sup> 150 U.S. 674 (1893).

<sup>141</sup> In *Atlee v. N.W. Union Packet Co.*, 21 Wall. 389, 395 (U.S. 1875), the Supreme Court said:

By the rule of the admiralty court where there has been such contributory negligence, or, in other words, when both have been at fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and a plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum. . . . Each court has its own set of rules for determining these questions which may be in some respects the same but in others vary materially.

<sup>142</sup> *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945), 1945 A.M.C. 559; *Lopez v. Amer. Hawaiian S.S. Co.*, 201 F.2d 418 (3d Cir. 1945), 1953 A.M.C. 428; *Rogers v. United States Line Co.*, 205 F.2d 57 (3d Cir. 1953), 1953 A.M.C. 1679.

<sup>143</sup> *Cornec v. Baltimore & O. R.R.*, 48 F.2d 497 (3d Cir. 1931), 1931 A.M.C. 721, concerning an explosion which occurred in 1927 prior to the Longshoremen's Act, the court held the stevedore employer liable for negligent failure to provide a safe place to work but held the vessel and vessel owner not liable to the injured longshoreman.



worthy," the longshoreman is held without recovery against the shipowner. It is, this factual approach, sometimes referred to as the "relinquishment of control" doctrine, which the Ninth Circuit rejected in the *Petterson* case<sup>144</sup> and which the majority of the Supreme Court apparently also rejected in affirming without opinion the decision of the Ninth Circuit in the *Petterson* case.<sup>145</sup>

The major legal and practical questions in harbor workers' personal injury litigation all derive in part from the Supreme Court's classification of certain harbor workers as "seamen" with accompanying absolute right to recover from the shipowner for unseaworthiness. The practical importance of the legal questions is heightened in every instance by the Longshoremen's Act which precludes the harbor worker from suing his employer for damages. Although statistically only an infinitesimal number of harbor workers are injured as a result of "latent defects" in vessels or equipment, the assimilation of harbor workers to seamen and the phrasing of the shipowner's obligation of seaworthiness in terms of an absolute liability is a measurably valuable asset of the harbor worker, in the same sense that it is a measurably valued asset of the true mariner, primarily in that it enables the harbor worker to obtain adjudication of his suit for damages for personal injuries in an atmosphere and context of "absolute liability." The means by which the Supreme Court has achieved this favored status for harbor workers is not only dramatic but proves the efficacy of the judicial quasi-legislative function in a manner that prompts speculation whether it would be within the power of Congress to achieve a similarly favored status for any group of shoreside workers.

#### HARBOR WORKER ALIAS "SEAMAN" VS. SHIPOWNER

The mariner's "warranty of seaworthiness" with its concomitants of "absolute liability" and favored status in litigation has been held by the Supreme Court to follow the appellation "seaman,"<sup>146</sup> and the determination of which groups of harbor workers will merit the accolade is therefore a matter of great practical and economic importance.

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<sup>144</sup> *Petterson v. Alaska S.S. Co., Inc.*, 205 F.2d 478 (9th Cir. 1953), 1954 A.M.C. 1405, cert. granted, 346 U.S. 914 (1953), aff'd mem. sub nom. *Alaska S.S. Co., Inc. v. Petterson*, 74 Sup. Ct. 601 (1954).

<sup>145</sup> Affirmed without majority opinion April 5, 1954, 74 Sup. Ct. 601 (1954); the lack of a majority opinion to support the Supreme Court's affirmance of the Ninth Circuit's decision in the *Petterson* case makes it impossible to state with certainty whether the Supreme Court majority has rejected the "relinquishment of control" doctrine or whether the affirmance was based on some less controversial, factual ground appearing in the record.

<sup>146</sup> *Scas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), 1954 A.M.C. 1.

In his opinion in the *Haverty* case,<sup>147</sup> Mr. Justice Holmes conceded that as words are commonly used, longshoremen are not "seamen," but observed that longshore work was a maritime service "formerly rendered by the ship's crew"<sup>148</sup> and rested his decision on the "flexibility" of words and on his mistaken belief that Congress did not intend mariners to be treated differently from longshoremen under the Jones Act. Mr. Justice Holmes was as mistaken in his assumption that longshore work was "formerly rendered by the ship's crew," as he was in his insight into Congressional intent. But, while Congress promptly restated its actual intent through passage of the Federal Longshoremen's and Harbor Workers' Compensation Act of 1927, his other mistake, as to the nature and historical antecedents of longshore work, remained uncorrected and available for later perpetuation in the *Sieracki* case. In the *Sieracki* case the court gave longshoremen the benefit of a theory of shipowner's absolute liability for unseaworthiness on the holding that "for these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards,"<sup>149</sup> resting this holding on its factual premise that, "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew."<sup>150</sup> The premise is plausible—the mind's eye readily visualizes the ancient mariner loading

<sup>147</sup> *Int'l. Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

<sup>148</sup> Citing *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914).

<sup>149</sup> 328 U.S. 85, 99 (1946), 1946 A.M.C. 698, 708 (1946).

<sup>150</sup> 328 U.S. 85, 96, 1946 A.M.C. 698, 705. *Florez v. The Scotia*, 35 Fed. 916 (S.D.N.Y. 1888), a stevedore's lien case, in which Judge Addison Brown said, "Formerly the labor of unloading was performed by seamen, whose lien was never questioned. . . . The vessels of some nations are still discharged here by their own seamen." *Ibid.* *The Gilbert Knapp*, 37 Fed. 209 (E.D.Wis. 1889), in which Judge Jenkins, while affirming the maritime nature of stevedoring services, said, "The stevedore stands in no such relation to the ship as a mariner. He is neither bound to like control, subject to like liabilities, nor are his rights so peculiarly protected by statute. His services are not connected with the navigation of the ship." *Id.* at 214. *The Seguranca*, 58 Fed. 908 (S.D.N.Y. 1893), in which Judge Addison Brown, while denying a maritime lien to a watchman contractor, said, "These men are mere substitutes for seamen, who formerly did, and often still do, the same work, and have a lien therefor." *Id.* at 909. Judge Addison Brown's language in *The Scotia*, in 1888, which is the earliest expression of judicial view regarding the historical facts of working cargo, was rephrased in somewhat more dogmatic language in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62 (1914), where the court said, "in affirming the jurisdiction of an admiralty court to hear a longshoremen's suit for personal injury, formerly the work was done by the ship's crew. . . ." The language in the *Imbrovek* case was relied upon heavily by the Supreme Court and quoted extensively in Footnote 15 to the *Sieracki* opinion. The earliest reference to any contention that the work of loading and discharging vessels was formerly done by the ship's crew appears in *McDermott v. The S.C. Owens*, 16 Fed. Cas. 15, No. 8,748 (C.C.E.D.Pa. 1849), in which counsel, contending for a maritime lien for stevedore services, urged that formerly mariners performed the service, which argument Circuit Judge Grier dubbed "ingenious" but rejected, stating, "it wants the support of authority." *Id.* at 16.

his own ship—but mistaken. The statement would be in part true if limited to the statement that on some vessels in some trades some mariners sometimes have done some of the loading and unloading of the vessels—and so limited the statement would be equally true today. In San Francisco Harbor, for example, the great bulk of the work of loading and unloading vessels now is done by longshoremen employees of independent stevedore contractors, and proportionately more of such work is performed by the ship's crews of today than in the Gold Rush days when the crews deserted immediately on arrival and did no cargo work.

Throughout recorded history shoreside contractors and shoreside labor have performed the work of loading and unloading vessels. From the dawn of the Christian era, stevedores (*geruli*)<sup>151</sup> were organized in unions; through the earlier<sup>152</sup> and later<sup>153</sup> Middle Ages, the days of Charles I,<sup>154</sup> the birth of the American Constitution<sup>155</sup> and down to the present time shoreside labor has been and is employed to do the work of loading and discharging cargoes. When the Supreme Court's basic premise is modified as required to avoid violence to historical fact, no factual basis remains for assimilating the harbor worker to the mariner. Man may have evolved from the coelacanth, but through all of recorded history the harbor worker has been a land creature.

Following the assimilation of longshoremen to seamen by the Supreme Court in the *Sieracki* decision, the lower courts generally tended to treat

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<sup>151</sup> Roman harbor workers were organized in guilds or unions and from the ancient inscriptions prior to 100 A.D. records have been preserved establishing the existence of guilds of Ballast Loaders (*Saburrarii*), Stevedores (*Geruli*), Amphorae Porters (*Palangarii*) and Unloaders of Sacked Grain (*Saccarii*). 5 Frank, an Economic Survey of Ancient Rome 249-250 (1940).

<sup>152</sup> Laws of Oleron, Art. XXI, 30 Fed. Cas. 1180 (c. 1150 A.D.).

<sup>153</sup> Laws of Wisbuy, Arts. XXXIV, LII, 30 Fed. Cas. 1192 (c. 1266 A.D.).

<sup>154</sup> Cleirac, *Les Us. et Coutumes de la Mer* (1647), Observation to Article XI of the Laws of Oleron (30 Fed. Cas. 1177), observing that the stowage of goods was left exclusively to professional workers and also noting the antiquity of professional stowers known as "sacquiens" as referred to in the 14th Book of the Theodosian Code.

<sup>155</sup> *Dixon v. The Cyrus*, 7 Fed. Cas. 755, No. 3,930 (D.Pa. 1789):

But if the owner or captain, as is frequently the case, shall find it more for his interest to hire men on daily pay to unload the ship than to keep the crew under monthly wages and find them with provisions in port, he may certainly release the mariner from this part of his duty.

*Id.* at 757.

*Swift v. The Happy Return*, 23 Fed. Cas. 560, No. 13,697 (D.Pa. 1799):

In this port, it is the general custom to hire others than the mariners to lade and unlade vessels. The merchants find it more for their interests to do so than to depend on the mariners who are particularly ungovernable after a voyage is ended; and are, when arrived at home, impatient under confinement to the drudgery of unlading the cargo. . . . These authorities (Laws of Wisbuy) show that there is a distinction in the maritime laws between the wages for navigation and those allowed for loading and unloading; the latter being considered independent and distinct services from the former.

*Id.* at 561.

as "seamen" all harbor workers who were engaged in "ship's service,"<sup>156</sup> while the Second Circuit, following Judge Learned Hand's views, refused to extend the appellation "seamen" to harbor workers other than long-shoremen.<sup>157</sup> In the *Hawn* case the majority of the Supreme Court extended the benefits of the doctrine of "insured seaworthiness" to a carpenter employee of an independent contractor who, at the time of his injury, was engaged in adjusting a wooden chute used in the loading of grain. It cannot be determined from Mr. Justice Black's opinion whether the decision turns on the fact that *Hawn's* work was in some way related to the loading of the vessel or whether it turns on the fact that *Hawn's* mere presence on board exposed him to shipboard hazards.

If the Supreme Court has adopted "nature of work" as the test for determining whether particular groups of harbor workers should be assimilated to "seamen," it has promulgated a rule which will compare favorably with its "maritime but local" doctrine in unpredictability and impossibility of rational application. As has been frequently pointed out, the mariners who are bound by contract to the vessel and subject to the seafarer's hazards and discipline include every conceivable trade, not only the sailor, but cooks, waiters, hairdressers, manicurists, nurses, doctors and bartenders.<sup>158</sup> It may be noted that there is reputable authority that the services which even a mariner on articles may perform in working cargo are not "seamen's services," particularly if performed in the home port at the commencement of the voyage or at the final port of discharge.<sup>159</sup>

If, on the other hand, the majority proposes to treat as "seamen" and thereby extend the doctrine of "insured seaworthiness" to all who are exposed to shipboard port hazards, the infinitude of speculative possibilities precludes comment. It should be noted, however, that the Supreme

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<sup>156</sup> *Hawn v. Pope & Talbot, Inc.*, 198 F.2d 800 (3d Cir. 1952) (carpenter); *Capadona v. Lake Atlin*, 101 F. Supp. 851 (S.D.Cal. 1951) (employee of oil fuel barge on vessel temporarily); *Bochantin v. Inland Waterways Corp.*, 96 F. Supp. 234 (E.D.Mo. 1951) (employee of grain elevator company).

<sup>157</sup> *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948); *Rich v. United States*, 192 F.2d 858 (2d Cir. 1951).

<sup>158</sup> *Cassil v. U.S. Emergency Fleet Corp.*, 289 Fed. 774 (9th Cir. 1923), 1923 A.M.C. 655.

Generally speaking, a seaman is anyone who by contractual engagement with the owner, master or charterer of a vessel serves the vessel in navigation. He is not necessarily a sailor. He may be a cook, fireman, or even a bartender. A stevedore renders no service in actual navigation.

*Id.* at 776, 1923 A.M.C. at 647.

<sup>159</sup> *Laws of Wisbuy, Arts. V and XLVIII*, 30 Fed. Cas. 1190, 1193 (C. 1266); *Swift v. The Happy Return*, 23 Fed. Cas. 560, No. 13,697 (D.Pa. 1799); *Phillips v. The Thomas Scattergood*, 19 Fed. Cas. 523, No. 11,106 (E.D.Pa. 1828); *The Brookline*, 4 Fed. Cas. 236, No. 1,937 (D. Mass. 1845); *The Charles F. Perry*, 5 Fed. Cas. 508, No. 2,616 (D. Mass. 1870).

Court had previously rejected nature or the hazard of work as a test for determining the scope of admiralty jurisdiction with respect to injuries occurring on vessels in navigable waters.<sup>160</sup>

In their well-documented and forceful dissent in the *Hawn* case Justices Jackson, Reed and Burton point out that the logic which justifies special treatment of the seafaring worker bound to the vessel in her voyage does not extend to shoreside harbor workers and that neither Congressional will, maritime law, nor common sense justify mingling the two wholly separate types of labor in their remedies for personal injuries.

The decision in the *Hawn* case derives directly from the three primary propositions stated in the *Sieracki* decision:

1. That as a matter of law the mariner had an absolute right to recover damages from the fault-free shipowner for injuries resulting from "unseaworthiness" of the vessel;
2. That as a matter of historical fact the work of loading and unloading cargoes was performed until recent times by members of the crew; and
3. That as a matter of quasi-legislative policy the shipowner "is in position, as the worker is not, to distribute the loss in the shipping community. . . ."

The first proposition is a mistake of law deriving solely and directly from repetition of inaccurately-worded dicta.<sup>161</sup> The second proposition, although *a priori* attractively plausible, is opposed to the historical fact, while the third is questionable both as a matter of fact and as a matter of policy.

With respect to the third proposition that the shipowner is in an advantageous position to distribute the loss through the shipping community it may be noted preliminarily that in many instances, as in the *Hawn* case, the shipowner, although manning and navigating the vessel, has surrendered control of the vessel, as an instrumentality of commerce, to a charterer. Under time charters, which are in common usage, the shipowner has no control of the ports at which cargo is loaded, the number of times cargo will be loaded or the contractors or workmen that will be employed to do such loading. Such contingencies render it beyond scope of actuarial skill to compute a proper premium. Additionally, the modern trend of the law has been to treat the award of damages as largely a matter of fact to be determined by the jury. The practical effect of this trend has been

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<sup>160</sup> *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), (holding that work by a carpenter on a ship launched and afloat but still under construction was "maritime but local" and subject to the Workmen's Compensation Statute of the State of Oregon).

<sup>161</sup> Cf. *Brave New World*, and Aldous Huxley's observation therein that 20,000 repetitions make one truth.

that damages in personal injury cases by and large are limited only by the eloquence of the plaintiff's attorney.<sup>162</sup> This factor, in conjunction with the certainty of being confronted in the trial of every case with an atmosphere of "absolute liability," and the actuarial impossibility of computing a proper premium, in recent years have contributed to the withdrawal of one insurance company after another from the writing of liability insurance of the type that covers shipowners against claims of the kind in question.<sup>163</sup>

Those insurance companies which remain in the field now consent to write such insurance, either only at prohibitive premiums, or only on terms which require the shipowner to bear the full expense of each claim which does not exceed a specified "deductible"—which frequently is in the range of \$10,000-\$20,000 per claim. Thus, in a very practical and literal sense, the "distributive" task which the Supreme Court has assigned the shipowner must be accomplished by the shipowner individually in its commercial operation and not as a mere matter of buying insurance. All of the independent contractor employers of harbor workers carry insurance to cover their liability under the Longshoremen's Act, and the cost of such insurance is included in the rates which they charge to the shipowner or charterer engaging them. The premiums for coverage under the Longshoremen's Act run approximately \$7.00 per \$100.00 of payroll. This payment, which is more or less readily calculable, finds its way into the shipowner's rate computation, but the shipowner's rate computation must also include a substantial amount to apply against the claims of the injured harbor worker who elects to proceed against the shipowner for "unseaworthiness" in addition to his rights against his employer under the Longshoremen's Act. The inevitable result is that the shipowner pays twice for every personal injury judgment recovered against it by a harbor worker, having already paid once in the rate charged by the independent contractor. The extent to which the resultant "double charge" can be passed on to the shipping public is limited by international economic facts over which the shipowner has no control. For example, in the export trade a difference of only two or three cents in the freight rate frequently will determine whether the foreign buyer secures his goods from an American or a European source.<sup>164</sup> When the freight rate which the shipowner is required to set exceeds the economic limit, the goods are not shipped.

Although the question is impossible of accurate statistical analysis, it

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<sup>162</sup> Belli, "The Adequate Award," 39 Calif. L. Rev. 1 (1951).

<sup>163</sup> The National Underwriter, Jan. 28, 1954. Seven insurance companies have withdrawn from one trade in the past eight years and premium rates have increased 600% since 1945.

<sup>164</sup> U.S.M.C. Docket 657, 1947, Record, pp. 316-318; see also Fortune, p. 69, March, 1954.

seems certain that to a greater or lesser extent the shipowner's court-imposed task of "distributing the loss" has resulted in "distributing" the work as well as the loss from the American harbor worker to harbor workers in competing countries.

The "double payment" for many harbor worker injuries which the shipowner presently must make by reason of the two "non-fault" remedies available to the harbor worker may be avoided by the shipowner only by placing itself in the position of the direct employer of the harbor worker, which shipowners in several instances have attempted to accomplish to the extent practically possible.

The problem is a perhaps difficult one, but, as has been recognized since the *Sieracki* case first appeared,<sup>165</sup> the assimilation of harbor workers to seamen compounds rather than simplifies the problem.

A vigorous minority of the Supreme Court now recognizes that there is no rational or legal basis for classifying harbor workers as "seamen." In view of the mistake of fact upon which the Supreme Court bases its present assimilation of harbor workers to seamen, it may be predicted that eventually the court will recognize that "seamen" are those who go to sea.

#### SHIPOWNER VS. CONTRACTOR-EMPLOYER

The harbor worker can no longer recover damages from his employer,<sup>166</sup> as he could prior to the Longshoremen's Act,<sup>167</sup> and his only recourse for damages, in most factual situations, is against the shipowner. In order to establish his right to recover from the shipowner, the harbor worker in a great majority of cases must prove the "unseaworthiness" of the vessel—but, having established that his injuries were caused by "unseaworthiness" he may recover from the shipowner, even in the absence of negligence or other fault on the shipowner's part.<sup>168</sup>

Because of the physical circumstances under which the work is usually performed, the neglect or oversight of other employees of the independent contractor frequently contributes to the accident which causes injury. Even in the days when the shipowner's duty to the harbor worker was stated in terms of "due care to a business invitee," the shipowner would seek recoupment of the damages he had paid the injured harbor worker

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<sup>165</sup> Comment, "The Tangled Seine," 57 Yale L. J. 243, 272 (1947).

<sup>166</sup> 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1946).

<sup>167</sup> *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914); *Cornec v. Baltimore & O. RR.*, 48 F.2d 497 (4th Cir. 1931), 1931 A.M.C. 721.

<sup>168</sup> *United States v. Arrow Stevedore Co.*, 175 F.2d 329 (9th Cir. 1949), 1949 A.M.C. 1444 (falling of defective tank cover where shipowner had instructed stevedore contractor not to work hatch until after cover was repaired); see also *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), 1946 A.M.C. 698.

from the independent contractor employer in those cases where the independent contractor's negligence had contributed to the injury. The shipowner's interest in attempting to recoup a portion of his loss from the negligent contractor is redoubled in those cases where liability has been imposed on the shipowner under the current doctrine of "insured seaworthiness," without fault on the shipowner's part.

The duty of the independent contractor to use reasonable diligence to provide a safe place of work for his employees was universally recognized, and in those cases where the unsafe condition was caused by the independent contractor's employees and liability was visited on the shipowner solely because of a passively negligent failure in its non-delegable duty to provide a safe place to work, the shipowner would seek and recover from the independent contractor full indemnity for the damages it had been required to pay the harbor worker.<sup>169</sup>

On the other hand, where the injury was in part caused by the defective equipment supplied by the shipowner and in part by the independent contractor's negligence in overstraining or misusing the equipment or in failing to inspect and warn its employees of patent defects in equipment, the cases were treated as other "mutual fault" cases in admiralty and the shipowner was permitted to recoup a contribution, usually one-half of the damages paid, from the independent contractor.<sup>170</sup>

The cases allowing full indemnity (where liability was visited on the shipowner solely as a result of its passive failure to observe or correct a dangerous condition arising solely through the neglect of the stevedore contractor's employees), rest on principles well grounded in all branches of the law and have not been seriously questioned.<sup>171</sup> The contention has

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<sup>169</sup> *Seaboard Stevedoring Corporation v. Sagadahoc S.S. Co.*, 32 F.2d 886 (9th Cir. 1929) (employee of another stevedoring company was injured as a result of appellant stevedoring company's improper placement of hatch covers, the shipowner recovering full indemnity). Compare, *United States v. Arrow Stevedore Co.*, 175 F.2d 329 (9th Cir. 1949), 1949 A.M.C. 1444; *United States v. Rothschild Int'l. Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950), 1950 A.M.C. 1332.

<sup>170</sup> *The Tampico*, 45 F.Supp. 174 (W.D.N.Y. 1942); *The S.S. Samovar*, 72 F.Supp. 574 (N.C.Cal. 1947), 1947 A.M.C. 1046; *Rederii v. Jarka Corp.*, 82 F.Supp. 285 (D. Me. 1949); *Portel v U.S.*, 85 F.Supp. 458 (S.D.N.Y. 1949); *Am. Mut. Liability Ins. Co. v. Matthews*, 87 F.Supp. 854 (E.D.N.Y. 1949), 1950 A.M.C. 303 (patently defective rope belonging to vessel which stevedore contractor failed to inspect), reversed, 182 F.2d 322 (2d Cir. 1950), 1950 A.M.C. 1272 (on ground that under Longshoremen's Act shipowner and stevedore contractor could not be "joint" tortfeasors and that, by reason of Longshoremen's Act, stevedore contractor owed no duty to inspect equipment furnished by vessel). *Barbarino v. Stanhope S.S. Co.*, 151 F.2d 553 (2d Cir. 1945).

<sup>171</sup> *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316 (1896); *Standard Oil Co. v. Robbins Drydock & Repair Co.*, 32 F.2d 182 (2d Cir. 1929); *Burris v. Am. Chiclé*, 120 F.2d 218 (2d Cir. 1951); *States S.S. Co. v. Rothschild Int'l Stevedoring Co.*, 205 F.2d



been made, however, that even in such cases the exclusive remedy provision of the Longshoremen's Act precludes any recoupment against the employer other than that stated in the Act.<sup>172</sup>

The cases permitting contribution (where the injuries resulted from the mutual fault of the shipowner and the stevedore contractor) were first repudiated by the Second Circuit in *Am. Mut. Liability Ins. Co. v. Matthews*,<sup>173</sup> in which the court denied contribution to the shipowner from the stevedore employer of the injured longshoreman on the ground that a right of contribution can arise only where there is a common liability to the injured person and that, under the Longshoremen's Act, the stevedore employer was under no liability to pay damages to his injured employee. The court in its opinion, written by Judge Swan, further stated that the stevedore-contractor's duty to its employees to discover patent defects in equipment supplied by the shipowner had been abolished by the Longshoremen's Act which substituted a duty to pay compensation. Judge Swan's language in the *Matthews* case should be compared with his language in *Porello v. United States*<sup>174</sup> on the question of the stevedore's duty to his employees, but decided four years earlier.

The trend commenced in the Second Circuit with the *Matthews* case was continued, with modifications, by the Third Circuit in the case of *Bacille v. Halcyon Lines*,<sup>175</sup> which permitted the negligent shipowner to

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253 (9th Cir. 1953), 1953 A.M.C. 1399, noted with approval, 67 Harv. L. Rev. 884 (1954); *Westchester Lighting Co. v. Westchester Estates*, 278 N.Y. 175, 15 N.E.2d 567 (1938).

<sup>172</sup> *States SS. Co. v. Rothschild Int'l. Stevedoring Co.*, 205 F.2d 253 (9th Cir. 1953), 1953 A.M.C. 1399, noted with approval, 67 Harv. L. Rev. 884 (1954); *United States v. Arrow*, 175 F.2d 329 (9th Cir. 1949), 1949 A.M.C. 1444.

<sup>173</sup> 182 F.2d 322 (2d Cir. 1950), 1950 A.M.C. 1272. See also *Shannon v. United States*, 1954 A.M.C. 282 (S.D.N.Y. 1953).

<sup>174</sup> 153 F.2d 605 (2d Cir. 1946), 1946 A.M.C. 163. The shipowner had negligently failed to provide a lock on the "strongback" or hatch beam and the contractor, having knowledge that the lock was missing, negligently proceeded to work cargo, resulting in the dropping of the strongback causing the injuries. The court said:

The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it.

*Id.* at 608, 1946 A.M.C. at 167.

<sup>175</sup> 89 F.Supp 765 (E.D.Pa. 1950), modified by *Bacille v. Halcyon Lines*, 187 F.2d 405 (3d Cir. 1951), reversed by *Halcyon Lines v. Haenn*, 342 U.S. 282 (1952), 1952 A.M.C. 1. *Bacille*, an employee of Haenn Ship Ceiling Corp. was injured when staging left in the vessel's hold by a stevedoring company collapsed under his weight. Stipulated judgment in the amount of \$65,000 was entered against the shipowner and the trial proceeded for the sole purpose of determining the ultimate liability as between the shipowner and the Haenn Ship Ceiling Co. The accident resulted in part from the defective staging and in part from the manner in which Carpenter Bacille's employer Haenn directed him to make use of it. The jury found the negligence causing the accident was attributable 25% to the shipowner and 75% to the carpenter's employer. The District Court apportioned damages on a moiety basis and gave the shipowner judgment against Haenn for 50% of the carpenter's judgment against

recover from the negligent contractor only the amount that the contractor would otherwise have been obligated to pay as compensation under the Longshoremen's Act. On certiorari, the Supreme Court, in *Halcyon Lines v. Haenn*, reversed the Third Circuit and denied all right of contribution, resting its decision solely on the stated ground that it never previously had recognized a right of contribution in admiralty except in collision cases and that it was unwilling to attempt to fashion "new" judicial rules of contribution in the absence of being wholly convinced that such action would best serve the ends of justice.<sup>176</sup>

The right to enforce contribution in maritime tort cases had previously been affirmed so uniformly in such a variety of situations<sup>177</sup> that the decision in the *Halcyon* case was and is generally regarded as stating a radically new rule, rather than as expressing adherence to an old rule. Specifically, this decision appears to be a repudiation of the rather strong statements of admiralty principle expressed by the Supreme Court in *The Max Morris*<sup>178</sup> in which the rule of comparative negligence was an-

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it. The shipowner and Haenn Corporation both appealed, the third circuit holding that the shipowner was entitled to contribution from Haenn but only in the amount that Haenn Corporation would otherwise have been obligated to pay its injured employee under the Longshoremen's Act. Both parties applied for certiorari, the shipowner in part because it was not content to bear 90% of the burden of the stipulated judgment in view of the jury's findings that its negligence was only 25% of the total fault contributing to the accident; the employer in part because in the absence of an administrative proceeding and award under the Longshoremen's Act it was impossible to determine the amount that it would "otherwise have been required to pay under the Longshoremen's Act."

<sup>176</sup> *Halcyon Lines v. Haenn*, 342 U.S. 282 (1952), 1952 A.M.C. 1; Mr. Justice Black wrote the opinion for the Court; Justices Reed and Burton dissented with the notation that they favored the decision of the District Court, i.e., the allowance of a 50% contribution.

<sup>177</sup> *The Chattahoochee*, 173 U.S. 540 (1889) (The schooner *Golden Rule* being sunk by the steamer *Chattahoochee* in a mutual fault situation and the cargo aboard the *Golden Rule* being unable to recoup against that vessel by reason of the Harter Act and having recovered its damages from the steamer, the steamer was permitted to offset one-half the amount paid cargo against the claim for loss of the schooner); *Erie R.R. v. Erie & Western Trans. Co.*, 204 U.S. 220 (1907). The last cited case was a mutual fault collision case in which the non-carrying vessel, having paid in full for the damage to cargo aboard the carrying vessel, recouped its moiety of the damages paid to cargo from the carrying vessel. Mr. Justice Holmes stated:

. . . and it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of the cargo on board the other. . . . The right to the division of the latter element does not stand on subrogation, but arises directly from the tort.

*Id.* at 226.

The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. . . . Whatever its origin, the admiralty rule in this county is well known to be the other way.

*Id.* at 225.

<sup>178</sup> *The Max Morris*, 137 U.S. 1, 13 (1890) citing *The Palmyra*, 12 Wheat. 1, 17 (U.S. 1827) ("In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances.") The holding in the *Max Morris* was that an injured

nounced as the proper admiralty rule in personal injury cases. The lower courts have received the rule in the *Halcyon* case with apparent reluctance and there are indications that it will be limited in its application where possible.<sup>179</sup> The Supreme Court, however, cited the *Halcyon* decision in the later *Hawn* case as its authority for denying contribution to the shipowner as against the employer despite the jury's finding that the negligence of both had contributed to the accident.

The *Hawn* case denied contribution between joint tortfeasors in admiralty but also affirmed the application of the comparative negligence rule to maritime personal injuries regardless of the plaintiff's choice of forum. The affirmance in the same case of a rule of comparative negligence with respect to the injured person and denial of a right of contribution between the concurrent wrongdoers exemplifies the lack of symmetry which has characterized maritime tort law since the *Jensen*<sup>180</sup> case. A rule permitting contribution among tortfeasors is a logically necessary corollary of a rule of comparative negligence, although the complementary nature of the two rules has seldom been given express verbal recognition. The necessary relationship between the two rules finds its practical recognition in the fact that those jurisdictions which recognize the one usually recognize the other.<sup>181</sup> The rule of comparative negligence which the Supreme Court affirmatively re-endorsed in the *Hawn* case necessarily acknowledges the right of a tortfeasor to recover from other tortfeasors a portion of the damage arising from the tort. The rule of law denying recovery to a plaintiff who has been contributorily negligent and the rule of law denying contribution between joint tortfeasors both have their bases in the same policy concept that the law will not assist a wrongdoer in shifting or distributing the burden of damage where his own wrong contributed to the damage. A system of law which adopts the rule of comparative negligence and rejects contributory negligence as a defense is necessarily and inevitably a system of law which rejects the underlying concept that the wrongdoer as such is barred from recouping a portion of his loss from other contributing wrongdoers. Logic is baffled by the asymmetry of the legal system which permits the negligent *Hawn* to recoup a portion of his damage from the negligent shipowner, *Pope & Talbot*, but precludes the negligent shipowner from recouping a portion of its loss from the negligent

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longshoreman having sued in admiralty would not be barred by his contributory negligence but that his negligence would operate to reduce his recovery of damages.

<sup>179</sup> *Union Sulphur Co. v. Jones*, 195 F.2d 93 (9th Cir. 1952), 1952 A.M.C. 605; *States S.S. Co. v. Rothschild*, 205 F.2d 253 (9th Cir. 1952), 1953 A.M.C. 1399.

<sup>180</sup> 244 U.S. 205 (1917).

<sup>181</sup> E.g., See *Wisc. Stat. § 331.045* (1951); *Ellis v. Chicago & N.W.Ry.* 167 Wis. 392, 167 N.W. 1048 (1918); *Brown v. Haertel*, 210 Wis. 354, 246 N.W. 691 (1933).

contractor, Haenn Corporation. The Supreme Court apparently proposes to continue to permit contribution in collision cases with the practical result that the shipowner can secure contribution to personal injury judgments obtained against it if the other wrongdoer is a shipowner, but not otherwise.

The *Hawn* case, for the first time in any known system of law, accords practical recognition to a doctrine of "profitable negligence." Under the literal provisions of the Longshoremen's Act the injured Hawn was required, and agreed, to repay to his employer out of any judgment he recovered against the shipowner the amount of all benefits he had received from his employer under the Act. Hawn was negligent; his employer, Haenn Corporation, was negligent; and shipowner, Pope & Talbot, was negligent. But the Supreme Court rejected Pope & Talbot's plea that the judgment against it be reduced by the amounts of the compensation received by Hawn to avoid Haenn Corporation's escaping harmless from an accident its own negligence had in part caused. Since Haenn Corporation's negligence was found a contributing factor in the accident, it is possible that the accident might not have occurred but for Haenn's negligence; nonetheless, because of the interpretation placed by the Supreme Court on the operation of the Longshoremen's Act, and because of its refusal to permit contribution, Haenn Corporation found itself fully indemnified and made no financial contribution to Hawn's damages, although it would have had a relatively heavy financial burden under the Longshoremen's Act<sup>182</sup> if its employee had been injured without negligence on the part of anyone. Mr. Justice Holmes astutely observed that the life of the common law "has not been logic; it has been experience."<sup>183</sup> Neither logic nor experience rationalizes the present posture of the maritime law governing the relations between the shipowner and the independent contractor employer with respect to harbor workers' personal injuries. The rationalization can be found only in the Supreme Court's quasi-legislative determination, presaged in the language of the *Sieracki* opinion, that the shipowner should insofar as possible bear the burden of all injuries occurring on shipboard.

#### SUMMARY

The plea for legislative inquiry and action in the *Halcyon* opinion is reminiscent of the court's similar pleas for Congressional action in the

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<sup>182</sup> It will be noted that Mr. Justice Frankfurter's concurrence was premised on the finding that the vessel was "unseaworthy," which under the "non-fault" basis of liability presently attributed by the Supreme Court to the doctrine of seaworthiness would result in the negligent employer of the harbor worker remaining free of financial obligation at the expense of a shipowner wholly free of fault.

<sup>183</sup> Holmes, *The Common Law* 1 (1948 ed.).

cases following the *Jensen* decision. But it is questionable whether mere Congressional action would be capable of resolving the present major legal uncertainties and difficulties arising from harbor workers' shipboard injuries. It is submitted that in major part the legal difficulties presently attending the many faceted litigation which characteristically follows a harbor worker's shipboard injury are attributable to (1) the Supreme Court's inadvertent statement of the doctrine of "insured seaworthiness," (2) the extension of the doctrine of "insured seaworthiness" to harbor workers on a mistaken factual assumption that until recent days mariners performed harbor workers' services, (3) the Supreme Court's tentative refusal on quasi-legislative "policy grounds" in the *Halcyon* case to recognize contribution between joint tort feasons in non-collision cases, and (4) the *Jensen* case, denying the applicability of state compensation statutes to harbor workers' shipboard injuries.

The Supreme Court's reconsideration and revision of its views on the first three points is not impeded by *stare decisis* as its present views in each of the three do not appear to express direct judicial rulings on controverted questions. The *Jensen* case has been so far limited in its scope that its reversal would occasion only passing comment and no major transitional difficulty even in the field of Workmen's Compensation.

In a field where no measurable predictability presently obtains, such re-examination and restatement would be beneficial to all litigants rather than unsettling in its effect.