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THE UNSEAWORTHY INSTANT

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Now, laymen, when they think of a vessel being seaworthy or unseaworthy, probably ask themselves, "Has this vessel a hole in the hold?"[1]

THE MITCHELL CASE: SEAWORTHINESS DEFINED

Seaworthiness and its opposite are indeed terms whose application in the courts differs markedly from their use in ordinary life. In order to be seaworthy, the vessel and her appurtenances, which include "things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers,"[2] must be "reasonably fit for their intended use."[3] Thus a vessel which is, in every practical sense, soundly equipped and ready for sea will be legally unseaworthy if the trier of fact concludes that the tiny spot of grease upon which a seaman slipped rendered the ladder on which the grease lay not reasonably safe.[4] The Supreme Court, in *Mitchell v. Trawler Racer, Inc.*,[5] the case which defined seaworthiness, recognized that accidents may occur even under conditions of reasonable safety. "The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."[6] The lower courts have generally interpreted this language to mean that the mere occurrence of a shipboard accident, without more, does not constitute unseaworthiness.[7]

In fact, however, the Supreme Court language just quoted does not direct itself toward "reasonable safety." The Court is indeed discussing seaworthiness in the lay sense, *i.e.*, a vessel "reasonably fit" for navigation. The opinion explicitly denies any attempt "to suggest that the owner is obligated to furnish an accident-free ship."[8]

The questions which *Mitchell* left unanswered, and with which

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1 Logan v. Empresa Lineas Maritimas Argentinas, 353 F.2d 373, 377 (1st Cir. 1965) (Wyzanski, J., charging jury) (emphasis added).

2 Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 213 (1963).

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

4 *See* Calderola v. Cunard S.S. Co., 279 F.2d 475, 478 (2d Cir. 1960).

5 362 U.S. 539 (1960).

6 *Id.* at 550.

7 *See, e.g.*, Belships Co. v. Bilbao, 390 F.2d 642, 643 (9th Cir. 1968).

8 362 U.S. at 550.

this paper will concern itself are these: If the injury-causing circumstance comes into existence simultaneously with or momentarily before the injury itself, is the vessel less than reasonably safe and hence unseaworthy? Is the vessel less than reasonably safe and therefore unseaworthy if the injury is caused by "appurtenances reasonably fit for their intended use"[9] but used in a negligent manner?

The answers to these questions, it is submitted, do not result from a glib divorcing of "liability from concepts of negligence."[10] Such a formula presumably eliminates, first, the foreseeability aspect of liability (*i.e.*, the need for the shipowner's knowledge, actual or constructive, of the grease on the ladder). It also seems to render immaterial any inquiry into whether the accident resulted from careless use of safe equipment. Thus, taken literally, the logical result of *Mitchell's* "absolute duty" standard is that, *as to the plaintiff*, the inquiry ends if the place where he was working was, at the moment of his injury, not reasonably safe. This logic, however, conflicts squarely with *Mitchell's* explicit refusal to require "an accident-free ship." It raises further problems arising from *Mitchell's* implicit promise that if the vessel is "reasonably safe," the shipowner will be exonerated. The *Mitchell* Court, one suspects, was trying to express a formula which would permanently eliminate squabbles which had been developing in the lower court opinions over the precise amount of time which was required to elapse between birth of an injury-producing circumstance and the injury itself.[11]

Further, assembling the 5-4 majority vote appeared also to require some assurance that reasonableness of safety was all the Court would demand. Because, as has been suggested above and hopefully will be illustrated below, it is difficult if not impossible to conceive of a reasonably safe accident, the Court's illustration of its principle in terms not of personal injury but of navigability seems to be, if not a deliberate recognition of the conceptual difficulty, certainly an apt, albeit unconscious, way of highlighting it. The fictive nature of "unseaworthiness" in the typical shipboard accident situation may well have caused the Court's approach to vagueness.

The Meaning of Mitchell in the Lower Courts

Factually and legally, *Mitchell* did not involve faulty equipment. The issue was: Does it make any difference, for purposes of testing

9 *Id.*
10 *Id.*
11 *See* cases cited in the *Mitchell* opinion, 362 U.S. at 542.

seaworthiness, how long prior to the accident the offending condition — here fish gurry and slime on a trawler's rail — had existed? Because the opinion was immediately regarded as the Supreme Court's final disposition of the time-lapse question and the split it had engendered among the circuits, *Mitchell* was initially treated, in the lower courts at least, as imposing an absolute requirement of perpetual, albeit reasonable, safety. Thus, in *Grzybowski v. Arrow Barge Co.*,[12] the plaintiff had injured himself on pine jelly soap which the longshoremen had used as a lubricant while shifting cargo. In reversing an instruction that the shipowner was not required to keep the vessel free from any occasional condition, the court said that

> if the jury should find that there existed a slippery condition, even though transitory and immediate, resulting from use of soap in the loading operation, the jury should determine further whether such condition rendered the ship unseaworthy and, if so, whether the plaintiff's injury was attributable to the unseaworthy condition.[13]

Meanwhile, the Court of Appeals for the Second Circuit was holding, over protestations by the shipowner that the mere presence of grease on a ladder could not render the vessel unseaworthy, that such a condition, even if temporary, sufficed to constitute unseaworthiness.[14]

The innate contradictions of the *Mitchell* rule, however, soon became apparent. As early as 1960, a district judge was interpreting the case to mean that "a seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."[15]

Finally, in late 1961, the Second Circuit, in *Pinto v. States Marine Corp.*,[16] established a rule which in effect reestablished the relevance of the time-lapse test and suggested that transitory unseaworthiness was not unseaworthiness at all. The plaintiff in *Pinto* claimed that he had slipped on grease on a ladder leading to the engine room. Significantly, although plaintiff was a full-fledged seaman, his counsel waived the negligence count under the Jones Act[17] and went to the jury solely

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12 283 F.2d 481 (4th Cir. 1960).

13 *Id.* at 486.

14 Calderola v. Cunard S.S. Co., 279 F.2d 475, 478 (2d Cir. 1960).

15 Colon v. Trinidad Corp., 188 F. Supp. 97, 100 (S.D.N.Y. 1960). *See also* Blier v. United States Lines Co., 286 F.2d 920 (2d Cir.), *cert. denied*, 368 U.S. 836 (1961), where the jury was permitted to decide whether the emergence and temporary continuance of a slippery or other hazardous condition did or did not leave a vessel "reasonably suitable for intended service" within the *Mitchell* test.

16 296 F.2d 1 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962).

17 Merchant Marine Act, ch. 250, 41 Stat. 988, *amended and codified*, 46 U.S.C. §§ 13 *et seq. passim* (1964).

on the basis of unseaworthiness. The trial judge's charge emphasized the "relative" nature of unseaworthiness, which depends upon the circumstances drawing the ship's fitness into question. In the instant case, an important consideration subsisted in the fact that the accident was on a ladder which provided access to the engine room where the use of oil and grease was necessary for normal operation. Consequently, "the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy."[18] In order to establish unseaworthiness, the court noted, the plaintiff has the burden of proving by a clear preponderance that the oil or grease which allegedly caused his fall was allowed to accumulate to such a degree that a condition rendering the ship unseaworthy existed rather than a condition which was a mere momentary outgrowth of the normal functioning of the engine room. As the court explained,

> it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area. A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service. The essential test is whether, considering place and circumstances, the area was reasonably fit to permit Pinto to perform his tasks with reasonable safety. Absolute perfection is not required under the doctrine of seaworthiness. It requires reasonable fitness for intended use.[19]

In response to plaintiff's objection that the charge had in effect restored the supposedly discredited time-lapse concept, the Second Circuit, affirming defendant's verdict, said "[t]he charge seems to be good sense, and we are not persuaded that *Mitchell* makes it bad law."[20] Furthermore, the court pointed out that a determination indicating no legal distinction between liability for a temporary condition and liability for a permanent one would not render the condition's duration, prescribed corrective measures and the possible achievement of continuing safety irrelevant to the issue of compliance by the owner with his duty to provide "a vessel suitable for her intended service."[21]

Although the Second Circuit took particular pains to deny that it was disregarding *Mitchell, Pinto* certainly eroded the absoluteness of that case. Thus, in *Nuzzo v. Rederi, A/S Wallenco*,[22] the district judge, sitting without a jury, found that the vessel was unseaworthy because

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18 296 F.2d at 3.
19 *Id.* at 4.
20 *Id.*
21 *Id.* at 6.
22 304 F.2d 506 (2d Cir. 1962).

plaintiff had stepped into an empty space in a stow of lumber. There was not only evidence that the stow was "good" but also evidence that the "hole" should have been covered, and that it had been uncovered by plaintiff and one of his fellow workers only a few moments before the accident. In the absence of a finding that the hole was "at odds with the usual and customary standards of the calling,"[23] and because there was not sufficient evidence for such a conclusion even if it had been reached, the Second Circuit reversed with a direction to dismiss. It is this direction, tantamount to a judgment notwithstanding the verdict in a jury case, that makes *Nuzzo* such a significant landmark on the road away from *Mitchell.* The court was saying not merely that a trier of fact *need not* find the vessel unseaworthy for a recently-opened hole in the stow, but that it *could not* so find. As the late Judge Charles Clark pointed out in his dissent, the majority opinion "appears to reintroduce negligence concepts into the law of unseaworthiness."[24]

The Court of Appeals for the Fifth Circuit in *Jefferson v. Taiyo Katun K.K.*[25] was confronted with a broken-dunnage case in which the jury had answered special interrogatories somewhat peculiarly, finding that the plaintiff had been injured by the breaking of the board, but that the board was not unseaworthy at the time of the accident. The court, without citing either *Mitchell* or *Pinto,* affirmed a judgment for the shipowner, refusing to hold as a matter of law that the vessel was unseaworthy. Noting only the rareness of cases "where the issue of unseaworthiness as the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law,"[26] the court held that the jury's finding of causality did not require a finding that the vessel was unseaworthy. In the absence of the evidence, which the Fifth Circuit specifically refused to recite, it is difficult to assess the court's conclusion. Conceivably, the board might have broken under circumstances which rendered the ship reasonably safe; but it is also possible that the breaking of the dunnage resulted from a temporary condition during the discharging. The case therefore belongs in the line of contra-*Mitchell* holdings.

In *Williams v. Arrow Steamship Corp.*,[27] the libelant slipped and injured himself on grain or grain dust during a loading operation. The

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23 *Id.* at 510. The internal quote, which in a similar context will become even more significant later in this paper, see text accompanying note 95 *infra,* is from Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 339 (1955).

24 304 F.2d at 512.

25 310 F.2d 582 (5th Cir. 1962).

26 *Id.* at 583.

27 218 F. Supp. 595 (E.D. Va. 1963).

evidence was that the loading operation was entirely normal and customary and that it could not be carried out without allowing some of the grain or dust to litter the deck. At the time of the accident the amount of grain on the deck was no more than the usual amount. Specifically considering *Mitchell, Blier v. United States Lines Co.*[28] and *Pinto*, the district judge held that "the presence of grain on the deck of the vessel is not, of itself, unseaworthiness in the eyes of the law. Its *transitory* presence alone is irrelevant."[29] The factors leading to this conclusion were the use of a "proper, customary and normal method"[30] in the grain loading process and the impossibility of preventing grain spillage during the course of the operation. The court disclaimed any reliance on the length of time the kernels had been on the deck, and based its decision solely on a finding that the vessel was reasonably fit for its intended use.

Resurrection of Time-Lapse Theory

By 1964, the lower courts had apparently reworked *Mitchell* to exclude newborn unsafe conditions from the catalogue of unseaworthiness. A district court judge made the point semantically as well as conceptually:

> The test to determine unseaworthiness which should be applied to a *transitory* condition is the same as that where the condition is more permanent. . . . Under all the circumstances, including the presence of grease only a very short time before the accident, the size of the deck area in question with alternative grease-free places to walk, the stationary position of the vessel at a pier, etc., the vessel does not appear to me to have been unseaworthy.[31]

The Supreme Court has never explicitly reexamined the problem, or even recognized it, although in 1962, *Morales v. Galveston*[32] presented an ideal opportunity to rebury the time-lapse theory permanently. Plaintiff, working as a trimmer in a grain hold not equipped with proper ventilators, suffered fume poisoning when a "shot" of grain treated with chemicals momentarily filled the hatch square, thus cutting off the flow of fresh air. Initially, the district court, sitting in admiralty, found for the ship[33] and the court of appeals affirmed.[34] The

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28 286 F.2d 920 (2d Cir.), *cert. denied*, 368 U.S. 836 (1961). *See also* note 15 *supra*.

29 218 F. Supp. at 598 (emphasis added).

30 *Id.*

31 Testa v. Moore-McCormack Lines, Inc., 229 F. Supp. 154, 157-58 (S.D.N.Y. 1964) (emphasis added).

32 370 U.S. 165 (1962).

33 181 F. Supp. 202 (S.D. Tex. 1959).

34 275 F.2d 191 (5th Cir. 1960).

Supreme Court vacated and remanded for consideration in light of the recently decided *Mitchell* opinion.[35] Upon remand, the court of appeals held that *Mitchell* did not apply and again affirmed the district court.[36] On its second trip to the Supreme Court, the issue as delineated by that Court was "whether, upon the facts as found by the District Court, it was error to hold that the *Grelmarion* was seaworthy at the time the petitioners were injured."[37] In affirming the holding for the ship, the Court ruled that the findings below in no way conflicted with *Mitchell*, since the cause of the injury in the present case "was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without."[38] The trial judge having found that the vessel was not unfit for the service in which it was to be put, the Supreme Court would not "say that his determination was wrong."[39]

It should be noted that the dissenters (Chief Justice Warren and Justices Douglas and Black) agreed with the majority that the adventitious nature of an accident-cause would be relevant to the issue of seaworthiness. "A vessel without a forced ventilation system would be seaworthy," Justice Douglas admitted, "if this injury were an unexpected isolated occurrence."[40] But, he went on to say, the evidence showed that 10 percent of the grain loaded from the elevator in question was fumigated. Because the shipowner had knowledge of the presence of fumes, this particular shot, he argued, rendered the vessel unseaworthy.

One commentator has concluded that the teaching of *Morales* is simply that the conclusion of the trier of fact as to unseaworthiness *vel non* will not ordinarily be overturned.[41] But the Court's unanimous view that an "isolated occurrence," no matter how dangerous, would not render the vessel unseaworthy suggests that the Supreme Court, too, has accepted the idea that a transitory condition may, because of its very evanescence, not suffice to constitute unseaworthiness.

A feature of the concept of transitory unseaworthiness expressed in *Morales* has been the tendency of the courts, when determining whether or not a condition rendered the vessel something less than reasonably safe, to consider the length of time the accident-causing condition existed. The judges refuse to restrict their view to the moment

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35 364 U.S. 295 (1960).

36 291 F.2d 97 (5th Cir. 1961).

37 370 U.S. at 168.

38 *Id.* at 171.

39 *Id.*

40 *Id.* at 172. *See also* Dugas v. Nippon Yusen Kaisha, 378 F.2d 271, 274-75 (5th Cir. 1967).

41 *See* Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 827 (1963).

immediately preceding the accident. Of course, logically, as to *that* moment and *that* particular about-to-be-injured man, the ship is less than reasonably safe. But the issue is not stated in those terms. Instead, the courts view the problem statistically; if the condition of the ship, regarded generally, presents a reasonable chance of any given man's *not* being injured, the ship is reasonably safe, and hence seaworthy. This attitude makes practical sense, but it could be argued that it makes no statistical sense. After all, if one tosses a penny, the probability of "heads" is 50 percent on every toss; even if the first 999 tosses turn up "tails," the chance of "heads" on toss 1000 is still only 50 percent. Thus it could be said that in determining the reasonable safety of the vessel as to the plaintiff, the absence of prior accidents is really immaterial.

Instantaneous Unseaworthiness

Closely related to transitory unseaworthiness is a concept variously labeled instantaneous unseaworthiness or operational negligence. The question is simple: What obligations will be imposed upon a shipowner for injuries to a seaman or quasi-seaman resulting from misuse of sound equipment?

The first case to analyze the problem thoroughly was *Grillea v. United States.*[42] There, longshoremen improperly put down a hatch cover; injury resulted. Writing the opinion which held the vessel unseaworthy, Judge Learned Hand noted that however incongruous it might seem to allow a longshoreman to recover for an unsafe condition which had been created by himself and his fellow workers, logic did not prevent the imposition of liability, because "there is a moment, however short, during which the ship is unfit and during which her unfitness causes the injury."[43] Not every misdeed by the longshoremen would render the ship unseaworthy, however. Judge Hand distinguished between "situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy."[44] The passing of time becomes a critical ingredient in the process of transformation.[45]

Impact of Mitchell *on Operational Negligence*

After the *Mitchell* decision, which seemed to eliminate the time-lapse issue, the distinction drawn in *Grillea* was arguably irrelevant. But early post-*Mitchell* cases tended away from both *Grillea* and *Mit-*

42 232 F.2d 919 (2d Cir. 1956).
43 *Id.* at 922.
44 *Id.*
45 *See* Tarabocchia v. Zim Israel Navigation Co., 297 F. Supp. 378, 383 (S.D.N.Y. 1969).

chell, holding that a vessel is not unseaworthy if the plaintiff's injury resulted wholly from some cause other than a defect of the ship's gear. Under this line of cases, even the carelessness of the plaintiff's fellow longshoremen was insufficient to cast the vessel in unseaworthiness. The principal opinion of this genre was *Arena v. Luckenbach Steamship Co.*,[46] which involved a longshoreman who was injured when rolls of paper fell off a pallet. As the court noted, "[t]here was no evidence that any equipment failed, and no one testified, hypothetically or otherwise, to what caused the upset."[47] In affirming a directed verdict for the defendant, the Court of Appeals for the First Circuit held that the use of improper equipment, in and of itself, does not render a vessel unseaworthy unless the proper type of equipment is unavailable. In the case at bar, "[t]he board was not defective simply because the longshoreman who loaded it neglected to do so in the proper fashion."[48]

After the decision was handed down, the Supreme Court decided *Mitchell.* On petition for rehearing, the First Circuit specifically considered the *Mitchell* rationale and explicitly denied its application:

> The possible transitory nature of a condition of unseaworthiness has been accented since our opinion herein. . . . But we do not believe that unseaworthiness is to be equated with mere negligent conduct . . . . If a winchman employed by a stevedore negligently lowered a boom onto a longshoreman, it would be true, in a sense, that the longshoreman had not been working in a safe place. But absent a showing that the winchman was an unfit individual we could not say that the vessel was unseaworthy.[49]

The *Grillea-Arena* conflict seemed to crystallize as follows. If the injury occurred because the seaman or his fellow workers were doing their work improperly, the vessel would not be considered unseaworthy; or, put another way, the vessel would be considered reasonably safe. If, on the other hand, the injury resulted from an unsafe condition created by the plaintiff or his fellows, the vessel would be held unseaworthy. The distinction was participial, the difference between "doing" and "done." If the seamen were in the process of performing the task and, because of their carelessness in performing it, plaintiff was injured, *before completion of the carelessly performed task,* the vessel was seaworthy. But if the careless job had been finished and *then* the plaintiff suffered injury, the vessel was unseaworthy. This was a

[46] 279 F.2d 186 (1st Cir.), *cert. denied,* 364 U.S. 895 (1960).
[47] *Id.* at 187.
[48] *Id.* at 188.
[49] *Id.* at 189.

distinction "between operational negligence and a condition negligently created,"[50] or, as it was sometimes expressed, the difference between a cause and a condition.

The distinction was easy to state, difficult to define, and, as the courts promptly realized, almost impossible to apply with logical consistency. Why, in *Tedeschi v. Luckenbach Steamship Co.*,[51] for example, should an open batten well around a hatch, allowed by the longshoremen to remain uncovered throughout discharging, constitute "a condition recognizable as unseaworthiness,"[52] while in *Nuzzo*[53] a hole in a lumber stow first uncovered during the course of work and permitted to stay that way did not?[54] Perhaps the difference was that although in *Tedeschi* the batten hatch was uncovered for "an appreciable interval of time,"[55] the hole in the lumber stow which injured Nuzzo had been covered "until not more than fifteen minutes before the accident happened."[56] If that were the difference, it seemed to conflict squarely with *Mitchell*'s apparent elimination of the time-lapse inquiry.

Identifying the Negligent Actor

When considering cases involving operational unseaworthiness, it was and is essential to identify accurately the negligent actor. Cases in which the operating negligence was that of the injured man himself tended to blur the principle involved. True, *Holley v. The Manfred Stansfield*[57] established beyond question that the mere fact that the injured party himself had created the unseaworthiness would not, as a matter of law, bar recovery. However, when deciding cases involving plaintiff's operational negligence, the courts, particularly trial judges sitting without juries, frequently confuse the issue. Thus, for example, in *Pisano v. The S.S. Benny Skou*,[58] where the injury had resulted from the longshoreman's own faulty rigging of a preventer wire, the court found the vessel unseaworthy, but assessed contributory negligence at 100 percent and did not even consider the possibility of applying the operational unseaworthiness rule.

A somewhat more satisfactory, although still confusing, case is

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50 Note, *supra* note 41, at 828.
51 324 F.2d 628 (2d Cir. 1963).
52 *Id.* at 630.
53 Nuzzo v. Rederi, A/S Wallenco, 304 F.2d 506, 510 (2d Cir. 1962).
54 *See* notes 22-24 and accompanying text *supra.*
55 324 F.2d at 630.
56 304 F.2d at 508.
57 186 F. Supp. 212 (E.D. Va. 1960).
58 220 F. Supp. 901 (S.D.N.Y. 1963).

Rawson v. Calmar Steamship Corp.[59] There, the injured longshoreman had been in charge of the boom whose cable ran out of control; post-accident inspection revealed that both safety pins had been removed. On a finding by the trial court for respondent, the Court of Appeals for the Ninth Circuit affirmed. The appellate court was not convinced by the argument that instantaneous unseaworthiness occurs where the injury to the longshoreman has resulted from his own negligent act—although a different outcome might be reached where a non-actor is involved. "We would think unseaworthiness implies an antecedent condition, although it is quite apparent that the pre-existence of the condition may be very short. . . . Surely there must be some interval, two acts and not the same one."[60]

A perfect example of this fusing of separate concepts of operational negligence and 100 percent contributory negligence appeared in *Seitz v. The Captantonis*,[61] where a longshoreman fell from a ladder because he had improperly adjusted a turnbuckle. Admittedly, the maladjustment had rendered the turnbuckle unsafe. Nonetheless, the court exonerated the ship. From its language, however, one cannot tell whether the basis for denying recovery was the plaintiff's "negligence of a high degree" or that the "warranty of seaworthiness does not encompass the negligent use by a longshoreman of seaworthy appliances."

> It was the act of libelant in turning the barrel [of the turnbuckle] in the wrong direction which caused the separation and his resulting injuries. The large expanse of exposed thread outside of the barrel which libelant failed to observe could have been observed by a reasonably prudent person. To conduct an experiment on which way to turn the barrel under such circumstances constituted negligence of a high degree. I find that such actions on the part of libelant were the proximate cause of his fall and resulting injuries. The shipowner's warranty of seaworthiness does not encompass the negligent use by a longshoreman of seaworthy appliances.[62]

SWITCHING ONUS TO GEAR OR CARGO

The opinions best illuminating the extent to which negligent use of sound equipment constitutes unseaworthiness are those in which the negligence involved is that of someone other than the injured plaintiff. The decisions in the first few years after *Mitchell* tended to follow that case's emphasis on the material condition of the vessel.[63] If the ship-

59 304 F.2d 202 (9th Cir. 1962).
60 *Id.* at 205.
61 203 F. Supp. 723 (D. Ore. 1962).
62 *Id.* at 727.
63 *See* text accompanying note 8 *supra*.

owner's warranty of seaworthiness required him "only to furnish a vessel and appurtenances reasonably fit for their intended use,"[64] then once the evidence established that the ship's gear was in fact reasonably fit, the vessel was seaworthy, even if a seaman sustained injury because of negligent use of that gear,[65] or its employment in a service for which it was not intended.[66] Moreover, courts which focused on the soundness of the ship's gear as the measure of the shipowner's fulfillment of his warranty found it easy to conclude that a seaman injured because of a defect in the cargo which he was *loading* could not attribute unseaworthiness to a vessel which was in every other respect sound and fit.[67]

On the other hand, if the plaintiff were injured while *discharging* cargo, either because of a defect in the cargo, or an imperfection in the stowage, recovery for unseaworthiness was permitted. Cargo which is being discharged has, after all, been aboard the vessel since she left the loading port. Courts could much more easily consider stowed cargo a part of the vessel's "appurtenances" within the *Mitchell* test.[68]

In another sense, the loading-discharging distinction mirrored the cause-condition dichotomy of *Grillea* and *Arena.*[69] Incoming cargo which by its nature was injurious or which could produce injury because of the improper way in which it had been stowed was, in a sense, negligence come to rest; defective cargo coming aboard, or sound cargo in the process of being stowed incorrectly, could, in the light of these cases, be regarded as negligence which had not yet crystallized sufficiently to create the dangerous shipboard condition.

Mitchell's emphasis on material as the sole relevant subject of inquiry and the resulting relative simplicity of drawing lines made the loaded-loading distinction attractive. Of course, from the plaintiff's viewpoint it made no difference that his injury had resulted from cargo improperly stowed at the last port rather than from cargo which his fellow workers were improperly stowing. An equally relevant question might arise if longshoremen loading a vessel began to stow cargo in such a manner as to leave the stow so unsafe that when they resumed work part of it fell and injured one of them.

As early as 1961, the Third Circuit suggested the trend of subsequent developments, as well as the inherent weakness of the distinc-

64 Mitchell v. Trawler Racer, Inc., 362 U.S. at 550.

65 *See* Massa v. C.A. Venezuelan Navigacion, 332 F.2d 779, 781 (2d Cir. 1964).

66 *See* Spinelli v. Isthmian S.S. Co., 1963 A.M.C. 1814, 1821 (S.D.N.Y.), *aff'd,* 326 F.2d 870 (2d Cir.), *cert. denied,* 377 U.S. 935 (1964).

67 *See* Carabellese v. Naviera Aznar, SA, 285 F.2d 355, 359-60 (2d Cir. 1960); *see also* Annot., 90 A.L.R.2d 710 (1960).

68 *See, e.g.,* Hill v. American President Lines, 194 F. Supp. 885, 889 (E.D. Va. 1961).

69 *See* text accompanying note 50 *supra.*

tion, in *Knox v. United States Lines Co.*,[70] holding that it was up to the trier of fact to determine whether the status of the stow just before the injury "constituted an unseaworthy condition."[71] On retrial, the evidence showed that it was not the unsafe stow, but rather the method by which the longshoreman had dealt with it that caused the injury; the trial judge, hearing the case jury-waived, found for the defendant; the court of appeals, applying the not-clearly-erroneous test of *McAllister v. United States*,[72] affirmed the judgment.[73]

As the Third Circuit subsequently remarked,

> [u]nless a valid distinction can be drawn between a stevedore's unsafe breaking-down of a seaworthy stowage and its negligent (unsafe) use of a ship's equipment, a logical projection of our holding in Knox would seem to indicate our subscription to the view that a stevedore's negligent or unsafe use of a ship's seaworthy equipment makes the ship unseaworthy.[74]

A few months earlier, the Fourth Circuit had handed down *Scott v. Isbrandtsen Co.*,[75] a decision explicitly rejecting a test utilized in numerous courts for many years—*i.e.*, "mere operational negligence on the part of longshoremen resulting in injury to one of them will not create liability on the part of the shipowner"[76]—and held that the trial court should have charged the jury that the longshoremen could render the vessel unseaworthy. The court did not even consider, much less attempt to reconcile, the difference between "condition" and "cause," between "done" and "doing." Unfortunately, it further clouded the holding by noting the shipowner's right, in longshoring situations, to obtain indemnity from the stevedore,[77] which, of course, is no rationale whatsoever for the resolution of the unseaworthiness issue.

The Third Circuit shortly thereafter, in *Thompson v. Calmar Steamship Corp.*,[78] adopted the position that unseaworthiness could comport with sound ship's equipment if the equipment (the winch and a line) were used in connection with other sound equipment (freight cars on the pier) in a "dangerous" manner.[79] "There is no insulation from unseaworthiness of the ship's line and its attachments merely be-

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70 294 F.2d 354 (3d Cir. 1961).
71 *Id.* at 358.
72 348 U.S. 19 (1954).
73 320 F.2d 247, 250 (3d Cir. 1963).
74 Ferrante v. Swedish Am. Lines, 331 F.2d 571, 577 (3d Cir. 1964).
75 327 F.2d 113 (4th Cir. 1964).
76 *Id.* at 127.
77 *Id.* at 127-28.
78 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964).
79 *Id.* at 660.

cause the attachments were not in themselves defective if used in some other manner."[80]

It is worth noting that the court did not explicitly hold operational negligence to constitute unseaworthiness. As Judges Hastie and Smith pointed out in their dissent from the denial of the petition for rehearing, although the stevedores may have been guilty of active negligence, there was no structural or operational defect in the gear. Moreover, there was no unfitness which would prevent the movement of cargo-carrying cars. "If a ship is to be liable for any negligence of the stevedore or any other third person in misusing its gear, I think the courts should say so."[81] Further evidence of the Third Circuit's uncertainty will appear later in this paper.[82]

The Ninth Circuit, meanwhile, was still trying to draw meaningful distinctions. *Blassingill v. Waterman Steamship Corp.*[83] presented a simple issue: "Putting two bales in the sling was a safe method of unloading them. Putting four bales in the sling was not."[84] The longshoreman was injured during the unloading process and the trial court charged in terms of soundness of the vessel's equipment. "The case is really not one of defective equipment, but of an improper method of using it,"[85] said the court of appeals, and remanded for a new trial, insisting that this was not a case of "instant unseaworthiness."

> Thus, Blassingill might fail in this case if the only danger was brought about by himself or his fellow longshoremen in not properly placing bales in the particular slingload that injured him. The evidence, however, does not *require* a finding that that is what happened.[86]

But at about the same time, the Ninth Circuit was deciding *Beeler v. Alaska Aggregate Corp.*[87] There, plaintiff was injured when his fellow workers negligently failed to hold the ladder which he was trying to descend. The trial court found that the negligence occurred simultaneously with the accident and injury, and entered judgment for the defendant. The court of appeals affirmed, stating that "[l]iability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of

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80 *Id.*
81 *Id.* at 663.
82 *See* note 93 and accompanying text *infra.*
83 336 F.2d 367 (9th Cir. 1964).
84 *Id.* at 369.
85 *Id.* at 370.
86 *Id.* (emphasis added).
87 336 F.2d 108 (9th Cir. 1964).

injury."[88] Aside from the fact that the holding assumes its conclusion,[89] *Beeler* fails logically to reconcile with *Blassingill.* In *Blassingill,* sound gear was negligently overloaded, and the plaintiff was injured; in *Beeler* the injury resulted from negligent failure to hold an otherwise sound ladder. Both conditions seem equally "unsafe."

THE MASCUILLI ENLIGHTENMENT

With the various circuits searching for some rational approach to the problem of operational negligence, the litigation in *Mascuilli v. United States*[90] began to develop. *Mascuilli* involved a claim for death caused when careless use of admittedly sound ship's cargo-lifting equipment caused a wire to part, killing one of the longshoremen. The trial judge's findings were unusual; he found specifically that the ship's gear was sound, and that "the accident was caused solely by the negligent operation of the stevedoring crew,"[91] but he also made the following conclusion of law: "The longshoremen crew was not 'equal in disposition and seamanship to the ordinary men in the calling' at the time the ninth tank [which was on the gear at the time it failed] was being loaded."[92] The Court of Appeals for the Third Circuit affirmed in a one-paragraph opinion emphasizing the findings of fact (1) that the vessel and its equipment were at all times seaworthy and (2) that "the accident was caused solely by the negligent operation of the stevedoring crew." These findings were found to be "not clearly erroneous."[93]

Observe that the trial court could be said to have based its exoneration of the ship not merely upon the soundness of the vessel's equipment, but also upon the conclusion that the longshoremen's negligent use of sound equipment was so egregious as to brand the workers hopeless incompetents—*i.e.,* the longshoremen were so unskillful as to be unequal to "the ordinary man in the calling."[94] The concept is taken from assault cases in which vessels were held unseaworthy because the assaulting crew member was held to be more vicious than the "ordinary man in the calling."[95]

This point is emphasized because it seems crucial to an under-

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88 *Id.* at 109.

89 Is not an unheld ladder at least arguably *not* "a seaworthy appliance"? *See* Reid v. Quebec Paper Sales & Transp. Co., 340 F.2d 34 (2d Cir. 1965).

90 241 F. Supp. 354 (E.D. Pa. 1965), *aff'd,* 358 F.2d 133 (3d Cir. 1966), *rev'd per curiam,* 387 U.S. 237 (1967).

91 241 F. Supp. at 362 (finding of fact 35).

92 *Id.* at 364 (conclusion of law 17).

93 358 F.2d at 133.

94 241 F. Supp. at 364.

95 *See* Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).

standing of what the subsequent history of the *Mascuilli* litigation means. Following the Third Ciricuit opinion, the plaintiff petitioned for certiorari. In a single sentence the Supreme Court disposed of the entire matter: "The petition for a writ of certiorari is granted and the judgment is reversed."[96] Only two cases were cited in support of the opinion. The first, *Mahnich v. Southern Steamship Co.*,[97] has generally been thought to stand for the principle that if unsound gear and sound gear are available on the vessel, but the plaintiff is injured by the use of the unsound gear, the availability of the sound gear does not save the vessel from being unseaworthy. The second case, *Crumady v. The Joachim Hendrik Fisser*,[98] held a vessel unseaworthy because the longshoremen had failed to reset an improperly set cutoff on an electric winch, so that the winch was allowed to operate beyond the safe working load of the gear, thus causing an accident. In short, the principle to be gleaned from *Crumady* is that gear which is not inherently defective but is potentially defective—*i.e.*, it can be adjusted in such a manner as to make it "unsafe and dangerous for the work at hand"—renders the ship unseaworthy.[99]

Commentary and Conclusion

The pitifully inadequate *Mascuilli* opinion left the circuits in confusion. Early subsequent holdings seem to indicate a feeling by the circuit judges that the Supreme Court had affirmatively answered the question: "Can a ship be rendered unseaworthy solely on account of the negligence of a longshoreman during a loading operation?"[100] Later opinions were far less certain.[101]

Reading the "ordinary man in the calling" standard, which the district court in *Mascuilli* applied, together with the cases cited by the Supreme Court, it becomes reasonably clear that the holding is simply this: longshoremen can turn safe gear into unsafe gear by failing to make necessary mechanical adjustments; their incompetence renders the vessel unseaworthy; the fact that the gear could have been made safe and that the longshoremen could have refrained from misaligning

96 387 U.S. 237 (1967).
97 321 U.S. 96 (1944).
98 358 U.S. 423 (1959).
99 *Id.* at 427.
100 Alexander v. Bethlehem Steel Corp., 382 F.2d 963, 964 (2d Cir. 1967); *see also* Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968); Candiano v. Moore-McCormack Lines, Inc., 382 F.2d 961 (2d Cir. 1967).
101 *See, e.g.*, Grigsby v. Coastal Marine Serv., 412 F.2d 1011 (5th Cir. 1969); Tim v. American President Lines, 409 F.2d 385 (9th Cir. 1969); *see also* cases collected in Lundy v. Isthmian Lines, Inc., 423 F.2d 913, 914 (4th Cir. 1970); J. Lucas, Admiralty 998 (1969).

it is as irrelevant as the presence of the unused sound gear in *Mahnich*.[102]

In short, whatever the Supreme Court might have said in its resolution of the problem presented by *Mascuilli*, in fact, it did not say anything new. It has been suggested that the *Mascuilli* facts were so close to those of *Crumady* that possibly the Court's summary reversal was based upon the belief that *Crumady* controlled on the facts, and that the Court intended to express no opinion on the *Grillea* issue, *i.e.*, on the condition-cause dichotomy.[103] Thus *Mascuilli* has not really helped to answer the question implicit in *Mitchell*: If the shipowner supplies "a vessel and appurtenances reasonably fit for their intended use," but through careless ongoing use (as opposed to careless or deliberate conversion of safe equipment into unsafe equipment, as by failing to set the proper cutoff) a longshoreman is injured, has the shipowner furnished a place reasonably safe to work? Some courts have indicated that a plan of operation that is inherently unsafe will, if carried out with a resulting injury, cast the vessel in unseaworthiness, while a proper plan, carelessly executed and injuring the plaintiff, will not.[104] This seems, however, to be reintroducing the prohibited foreseeability concept. On the other hand, perhaps the formula of reasonable-fitness-for-*intended*-use automatically installs the foreseeability issue in any question of unseaworthiness.[105]

Consider two hypothetical cases: (1) If a longshoreman carelessly drops a perfectly sound block on another longshoreman's head, should the vessel be liable? (2) If a longshoreman trying to push a piece of cargo too heavy for him to move by himself loses control and drops the cargo upon another longshoreman's foot, can it be said that the accident resulted from an insufficiency of men, and that the vessel is thus unseaworthy? In an analogous situation, the Supreme Court answered the latter question affirmatively.[106] Considering the cases in terms of ship's equipment (including men as "appurtenances"), it seems reasonable to distinguish between the two accidents. In the first, nothing at all pertaining to the ship was amiss. In the second, the single longshore-

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102 321 U.S. at 103.

103 *See* Note, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAW. 550, 564 (1968).

104 *See, e.g.*, Radovich v. Cunard S.S. Co., 364 F.2d 149, 153 (2d Cir. 1966); Cleary v. United States Lines Co., 287 F. Supp. 601, 603 (S.D.N.Y. 1967).

105 *See* Note, *The Law of Unseaworthiness and the Doctrine of Instant Unseaworthiness*, 28 MD. L. REV. 249, 275 (1968); Comment, *The Warranty of Seaworthiness: An Appraisal of Longshoremen's Remedies for On-the-Job Injuries*, 42 N.Y.U.L. REV. 331, 347 (1967).

106 *See* Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967).

man was, by his solitude, in effect "gear" which was not reasonably fit for its intended use. He was, in fact, "gear" supplied by the stevedore; but for failure of equipment thus supplied, the ship is liable.[107] Of course as to the injured men, any distinction vanishes. Both are injured through carelessness of fellow workers. "[E]very act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it."[108]

This plaintiff-oriented analysis may be useful in suggesting a way out of the dilemma eloquently outlined by Judge Moore of the Court of Appeals for the Second Circuit in a petition for rehearing in *Candiano v. Moore-McCormack Lines, Inc.*[109] It may also render unnecessary the approach proposed by Judge Heebe in *Jackson v. S.S. Kings Point.*[110] He suggested that the true reading of *Mascuilli* is "that unseaworthiness will be *presumed* to exist whenever there is any question at all as to whether or not a 'condition' caused the longshoreman's injuries. . . . Recovery by the longshoreman may be denied only when it is crystal clear that a negligent act caused his injuries."[111] Judge Heebe, in other words, would resolve the problem by restating it in terms of proof-quanta or burden of persuasion.[112] The way out of the thicket is, like most such escape routes, clear but difficult to traverse unscratched. In order to achieve it, one must recognize a principle which the courts have been avoiding ever since the "humanitarian" principle of seaworthiness was floated into the law.[113] The idea of allowing a longshoreman to recover for unseaworthiness, followed to its logical conclusion in light of the divorce of unseaworthiness from concepts of negligence, foreseeability, and control, is that when a man is injured aboard ship through some other efficient cause than his own carelessness, the shipowner should bear the cost of the injury as a part of his cost of doing business. The area of factual inquiry should be the plaintiff's "work environment."[114]

This is not to say that every accident on board a vessel should be automatic grounds for recovery by the plaintiff. The jury should be instructed that the shipowner is not liable for every accident which oc-

107 *See* Petterson v. Alaska S.S. Co., 347 U.S. 396 (1954).

108 Reid v. Quebec Paper Sales & Transp. Co., 340 F.2d 34, 37 (2d Cir. 1965).

109 386 F.2d 444 (2d Cir. 1967).

110 276 F. Supp. 451 (E.D. La. 1967).

111 *Id.* at 453.

112 *See also* Comment, *The Doctrine of Unseaworthiness in the Law of Maritime Personal Injuries*, 21 LA. L. REV. 755, 765 (1961), wherein the author suggests that the shipowner, by proving adherence to industry standards, could raise a rebuttable inference of seaworthiness.

113 *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

114 *See* Comment, *supra* note 105, at 342-48.

curs; he is liable only for those resulting from what the jury may find to be a lack of reasonable safety. In other words, between reasonable safety and absolute safety lies a thin zone of danger. Accidents occurring in that zone are not subject to recovery. Moreover, the jury should further be instructed that it is to consider the question of reasonable safety from the viewpoint of the plaintiff. As to the *plaintiff*, was the deck on which he was walking reasonably safe? From the *plaintiff's* viewpoint, was the operation in which his fellow longshoremen were carelessly engaged reasonably safe?[115]

In reply to the objection that this analysis inevitably must bring back concepts of foreseeability and time, it is submitted that the Supreme Court itself has condoned this heresy (if heresy it be). If the finder of fact in *Morales* was entitled, as even the dissenters agreed, to consider the previous statistics of poisonous grain "shots," then the juries in other cases are certainly capable of determining whether the amount of grease on the deck and the period of time it lay there made the deck something less than reasonably safe for the plaintiff, and whether the longshoremen's mode of operation made the working area similarly unsafe for the plaintiff. The trial judges and juries will not have to engage in the impossible calculus so vividly spelled out by Judge Moore: "Is 'operational negligence' to be mentioned at all? When does the 'operation' commence? How momentary is a 'momentary interval'? Is 'instant negligence' to be added to instant unseaworthiness?"[116]

Although the same judge feared that "the very finding of operational negligence is a simultaneous finding of unseaworthiness [since t]he alchemy is instantaneous,"[117] in fact the distinction is still present. If on the facts the jury decides that the place of work was, as to the plaintiff, reasonably safe, there will be no recovery. Putting the question to the jury in those terms, and allowing the jurors to consider the circumstances in the light of their own common sense should effectively "scuttle a doctrine which requires judges to make distasteful hairsplitting distinctions unrelated to any intelligible concepts of right and wrong," and rest liability "on something more than casuistry,"[118] namely, the jury's evaluation of the work-space provided to the plaintiff.

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115 This approach was adumbrated in Rodriguez v. Coastal Ship Corp., 310 F. Supp. 38, 43 (S.D.N.Y. 1962).

116 Candiano v. Moore-McCormack Lines, Inc., 386 F.2d at 448.

117 *Id.* at 449.

118 Skibinski v. Waterman S.S. Corp., 360 F.2d 539, 544 (2d Cir. 1966) (Friendly, J., dissenting).