Louisiana Law Review

Volume 31 | Number 4
June 1971

Admiralty - Single Negligent Act of Longshoreman Causing Instantaneous Injuries Insufficient to Constitute Unseaworthiness

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NOTES

ADMIRALTY—SINGLE NEGLIGENT ACT OF LONGSHOREMAN CAUSING INSTANTANEOUS INJURIES INSUFFICIENT TO CONSTITUTE UNSEAWORTHINESS

Plaintiff, a longshoreman employed by an independent stevedoring company, was injured during loading operations when a fellow longshoreman lowered a non-defective winch too quickly. In answer to plaintiff's action based on unseaworthiness to recover for these injuries, defendant moved for summary judgment on the ground that a single negligent act by a fellow longshoreman does not render a ship unseaworthy. The motion was denied, but defendant was granted leave to take an interlocutory appeal. The United States Court of Appeals for the Fifth Circuit reversed the district court and directed that the motion be granted. The Supreme Court granted certiorari and affirmed the court of appeals, holding that the single, isolated negligent act of a longshoreman which causes injury instantaneously to a fellow longshoreman does not render a vessel unseaworthy. *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514 (1971).

Although unseaworthiness was conceived as a seaman's defense to disciplinary action for deserting a vessel,[1] it has become a basis for holding a shipowner liable for personal injuries and wrongful death of seamen. It imposes upon a shipowner the nondelegable duty[2] of providing to seamen[3] and longshoremen[4] a ship reasonably fit for her intended service.[5] The shipowner's liability for unseaworthiness has been extended to injuries which do not occur on board his vessel if an unseaworthy condition of the ship in fact caused the harm.[6] This duty encompasses furnishing seamen who are equal in ability

1. Comment, 76 HARV. L. REV. 819 (1963); Comment, 21 RUTGERS L. REV. 322 (1967).

2. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

3. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); The Osceola, 189 U.S. 158 (1903).

4. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

5. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960): "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. 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. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

and temperament to average seamen.[7] The Supreme Court has meticulously endeavored to separate the unseaworthiness doctrine from common law concepts of negligence,[8] emphasizing that a shipowner's liability for unseaworthiness is a species of liability without fault and is to be invoked regardless of whether the shipowner is aware of the dangerous condition which renders the vessel unseaworthy.[9]

Since it is a dangerous condition which renders a vessel unseaworthy, it is understandable that courts have been confused as to when a longshoreman's negligent act creates an unsafe *condition* rendering the vessel unseaworthy.[10] The question of whether the negligent acts of the ship's crew that cause instantaneous injury to other seamen or longshoremen render the vessel unseaworthy is yet to be determined. However, considering the liberal construction of the unseaworthiness doctrine by the Supreme Court and that court's holding in *Boudoin v. Lykes Bros.*,[11] it seems that if faced with this question the Court would probably hold that such acts render the vessel unseaworthy. In other words, when a crewman's negligent act causes instantaneous injury, the negligent seaman will himself probably be considered an unseaworthy *condition.*

Failure to extend like treatment to the negligent acts of longshoremen requires reasoning that is inconsistent with unseaworthiness theory. For analytical purposes the negligent acts of longshoremen can be divided into two categories. The first would include acts that create unsafe conditions that subsequently cause injuries to seamen or longshoremen. It seems that the courts have uniformly determined that since the subsequent injury is caused by an unsafe *condition,* the unseaworthiness doctrine applies.[12] The second category of acts are those that cause injury at the time they take place, or instan-

7. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).
8. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).
9. *Id.*
10. For excellent discussions of the "Act-Condition Dichotomy" *see* Comments, 76 HARV. L. REV. 819 (1963), 21 RUTGERS L. REV. 322 (1967).
11. 348 U.S. 336 (1955). The specific situation in *Boudoin* concerned a seaman with vicious proclivities who attacked a fellow seaman. The injured seaman was allowed to recover on the basis of unseaworthiness.
12. In Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) the Supreme Court held that the use of defective rope when reasonably fit rope was available created an unseaworthy condition. A defective shackle was held to produce liability for unseaworthiness in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

taneously. The theoretical stumbling block to divorcing such acts from unseaworthiness is the notion that the tort concept of notice plays no role in a finding of unseaworthiness.[13] Thus, in determining unseaworthiness, the time differential between the act and subsequent injury should, theoretically, make no difference. Apparently working against this theoretical inconsistency is the equally compelling notion that holding shipowners liable for the isolated negligent acts of third persons over whom they have no control is basically unfair. The shipowner has no voice in the hiring practices of stevedoring companies, yet the latter's services are essential to the normal conduct of the shipping industry.[14]

The Supreme Court's position on whether longshoremen's negligent acts causing injury instantaneously constitute unseaworthiness was clouded by its *per curiam* reversal in *Mascuilli v. United States*.[15] The Third Circuit Court of Appeals had upheld the district court's finding that the death of a longshoreman was due solely to operational negligence of the stevedoring crew and not the unseaworthiness of the vessel.[16] The writ of certiorari posed three questions: (1) Did a prior unseaworthy condition come into play by the handling of the equipment by the stevedores? (2) Did the negligent handling of proper equipment itself create a dangerous condition rendering the vessel unseaworthy? (3) Was the vessel unseaworthy because the longshoremen were not equal in disposition and seamanship to ordinary men in the calling? To these queries the Court replied with a reversal without opinion, merely citing *Mahnich v. Southern S.S. Co.*[17] and *Crumady v. The J. H. Fisser*.[18] If the Court were answering the first question in the affirmative it would seem that defective equipment created an unsafe *condition* producing *pro tanto* unseaworthiness. Thus, the question of negligent acts causing instantaneous injury was not reached. How-

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

14. In the 1959 case of Crumady v. The J. H. Fisser, 358 U.S. 423 (1959), the Supreme Court addressed the act-condition dichotomy problem. The Court found that a longshoreman's negligent setting of a circuit breaker at too high a load caused an unseaworthy condition even though the circuit breaker as such was not defective. Thus, at this point of the doctrine's development it might have been said that an unseaworthy condition would result when a longshoreman's negligence created an unsafe condition that subsequently caused injury.

15. 387 U.S. 237 (1967).

16. Mascuilli v. United States, 358 F.2d 133 (3d Cir. 1966).

17. 321 U.S. 96 (1944).

18. 358 U.S. 423 (1959).

ever, the second and third questions did direct themselves to the instantaneous injury issue. An affirmative answer to the second question—that a longshoreman's negligent handling of proper equipment created an unseaworthy condition—would necessarily compel a positive answer to the third. The shipowner would be liable on the same basis as he would probably be for crewmen[19]—negligent longshoremen would be unsafe *conditions* in and of themselves. A discussion of the manner in which the circuit courts have dealt with the instantaneous negligence question both before and after *Mascuilli* will illustrate the situation facing the Supreme Court in *Usner*.

Prior to *Mascuilli* the Second Circuit had attempted to distinguish between acts which were part of a continuous course of operations for which liability for unseaworthiness might be imposed and those isolated acts of negligence which would be regarded as negligence only.[20] In making this distinction the court relied upon the time during which the condition existed. Such reliance upon the time factor was attacked as merely a method of legally placing the shipowner on notice of the danger so he could act to remove it.[21] The argument was that since *Mitchell v. Trawler Racer, Inc.*[22] held notice not to be a prerequisite to a finding of unseaworthiness, time is irrelevant in determining whether a vessel is unseaworthy.[23] It is likely that the Second Circuit injected the time element in an attempt to draw a practicable delineation between an *act* and a *condition*. Considering the practical difficulties in trying to distinguish on such a basis, it is easy to understand this circuit's interpretation

19. *See* note 7 *supra* and accompanying text.

20. Grillea v. United States, 232 F.2d 919, 922 (2d Cir. 1956): "However, it is at times hard to say whether a defect in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continous course of operation, which will fasten liability upon the owner only in case it is negligent, or as an unfitness of the ship that makes her *pro tanto* unseaworthy. . . . It would be futile to try to draw any line 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. Nevertheless, it is necessary to separate the two situations, even though each case must turn on its particular circumstances. In the case at bar although the libellant and his companion . . . had been those who laid the wrong hatch cover over the 'pad-eye' only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness."

21. *See* Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752 (2d Cir. 1962) (dissenting opinion).

22. 362 U.S. 539 (1960).

23. Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752, 755 (2d Cir. 1962). *See* note 13 *supra* and accompanying text.

of *Mascuilli* to mean that negligent handling of proper equipment creates a dangerous condition constituting unseaworthiness.[24] Such an interpretation eliminated the bothersome time consideration. Therefore, in the Second Circuit if a longshoreman injured another by the negligent use of proper equipment, the vessel was considered unseaworthy.[25]

The Fourth Circuit, emphasizing the Supreme Court's deep concern for the welfare of seamen and longshoremen, has followed the Second Circuit's interpretation of *Mascuilli*.[26] However, the interpretation rendered may have extended the doctrine too far. One case held that operational negligence was subsumed under unseaworthiness so that a "trial court's instructions should no longer attempt to distinguish between the two."[27] In support of this extension it can be said that if operational negligence renders a vessel instantaneously unseaworthy, there is theoretically no basis for distinguishing between the two.[28] In the same decision, however, the court was hasty to add that every case of operational negligence would not create liability under unseaworthiness.[29] Thus, again the lower courts reflected uneasiness in attempting to differentiate between an act and a condition. Although the practical difficulties in applying the time factor are apparent, such a test does seem to be the best possible determinant. However, the Supreme Court has prohibited its consideration in unseaworthiness cases.[30] An alternative would be to examine the degree of negligence involved in the act, but such an approach would necessitate such a reliance upon tort concepts that the unseaworthiness doctrine might lose the separate identity which the Supreme Court has commanded for it.[31]

In the Ninth Circuit before *Mascuilli* there was no recognition of "instantaneous unseaworthiness."[32] To find an unsea-

24. Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2d Cir. 1967); Candiano v. Moore-McCormack Lines, Inc., 382 F.2d 961 (2d Cir. 1967).

25. Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476 (2d Cir. 1969); Cleary v. United States Lines Co., 411 F.2d 1009 (2d Cir. 1969).

26. Lundy v. Isthmian Lines, Inc., 423 F.2d 913 (4th Cir. 1970); Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968).

27. Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347, 351 (4th Cir. 1968).

28. *See* notes 13, 23 *supra* and accompanying text.

29. Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347, 355-56 (4th Cir. 1968).

30. *See* notes 13, 23, 28 *supra* and accompanying text.

31. Usner v. Luckenbach Overseas Corp., 91 S. Ct. 514 (1971); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

32. Rawson v. Calmar S.S. Corp., 304 F.2d 202 (9th Cir. 1962); Billeci v. United States, 298 F.2d 703 (9th Cir. 1962).

worthy condition the court required proof of the existence of an antecedent dangerous or unsafe *condition* as the result of an *act which had terminated.*[33] When confronted with *Mascuilli,* that court adhered to its position that liability for unseaworthiness does not attach if the act and resulting injury occur simultaneously.[34] To justify its stand the court read the *Mascuilli* decision as authority for the proposition that liability for unseaworthiness is produced by a longshoreman's negligence only if the negligence operated to create an unsafe condition which subsequently caused injury. As the Supreme Court in *Mascuilli* did not reach the question of whether "instantaneous unseaworthiness" would be recognized,[35] the position of the Ninth Circuit remained unchanged.

The Fifth Circuit has been steadfastly committed to the tenet that a longshoreman's negligence that instantaneously caused injury to a fellow longshoreman does not constitute unseaworthiness, but is, in fact, a defense available to the shipowner in an unseaworthiness action.[36] This is not to imply that this circuit found that unseaworthiness would never result from a longshoreman's negligence, but that the longshoreman's *act itself* would not constitute unseaworthiness, unless it created an unseaworthy condition that subsequently caused injury. In finding unseaworthiness as a result of negligence in one case[37] the Fifth Circuit fell into the same trap in which the other circuits found themselves—the court held that an "appreciable length of time" had passed which was sufficient to constitute an unseaworthy condition.[38] Again the lower courts were wrestling with the problem of finding a *condition* to justify a holding of unseaworthiness when the most logical gauge—time—was theoretically unavailable to them.[39]

In the instant case, the Fifth Circuit reiterated its stand on operational negligence, holding that *Mascuilli* was not intended to abolish the *defense* of operational negligence in deter-

33. *See* note 32 *supra.*
34. Tim v. American President Lines, Ltd., 409 F.2d 385 (9th Cir. 1969).
35. *Id.* at 391-92.
36. Reed v. M. V. Foylebank, 415 F.2d 838 (5th Cir. 1969); Duncan v. Transeastern Shipping Corp., 413 F.2d 1023 (5th Cir. 1969) (*per curiam*); Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447 (5th Cir. 1967); Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir. 1967).
37. *E.g.,* Grigsby v. Coastal Marine Serv., 412 F.2d 1011 (5th Cir. 1969).
38. *Id.* at 1032.
39. *See* notes 13, 23, 28, 30 *supra* and accompanying text.

mining unseaworthiness. Citing two of its cases decided in the same year as *Mascuilli*,[40] the court held that longshoremen's negligent acts that caused injury instantaneously did not render the vessel unseaworthy where all equipment and appurtenances aboard were seaworthy.[41]

In a brief opinion the Supreme Court affirmed the Fifth Circuit.[42] The Court once again emphasized the fact that the viability of the unseaworthiness doctrine depends in large part upon its complete separation from liability based on negligence; since unseaworthiness is a *condition*, how it comes into being is quite irrelevant to the shipowner's liability for personal injuries resulting therefrom.[43] As there was no question as to the fitness of the equipment involved in the operation[44] and no member of the ship's crew was involved,[45] it was stated that it was not the *condition* of the ship, her appurtenances, her cargo, or her crew, but rather the isolated, personal negligent *act* of a fellow longshoreman that *caused* Usner's injuries instantaneously. Usner had relied upon *Mascuilli* and had contended that it should control the case. This matter was disposed of in a footnote by Justice Stewart,[46] wherein the Court's ruling in *Mascuilli* was made clear. The *Mahnich* and *Crumady* cases cited in *Mascuilli* dealt with *defective equipment* and the Court there had answered the first question affirmatively[47]—*a prior*

40. Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447 (5th Cir. 1967); Antoine v. Lake Charles Stevedores Inc., 376 F.2d 443 (5th Cir. 1967).

41. Luckenbach Overseas Corp. v. Usner, 413 F.2d 984, 985-86 (5th Cir. 1969).

42. Usner v. Luckenbach Overseas Corp., 91 S. Ct. 514 (1971).

43. *Id.* at 517: "A major burden of the Court's decision spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law. More specifically, the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it."

44. Had there been a defect in the equipment, it is highly probable that the circuit court would have been reversed. *See* notes 12-14 *supra* and accompanying text. *See also* Usner v. Luckenbach Overseas Corp., 91 S. Ct. 514 (1971) (dissenting opinions).

45. Were a crewman in the shipowner's employ involved in such a way as to be liable for some negligent act, the shipowner may have been held liable under the doctrine of Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) that a ship is rendered unseaworthy by the shipowner's furnishing seamen not equal in disposition and seamanship to ordinary men of the calling. *See* note 11 *supra* and accompanying text.

46. Usner v. Luckenbach Overseas Corp., 91 S. Ct. 514, 518 n.18 (1971).

47. *See* notes 15-19 *supra* and accompanying text.

unseaworthy condition had been brought into play. Thus, since the issues of defective equipment and unsafe conditions created by negligent use of reasonably fit equipment were not before the Court in *Usner*, it easily disposed of the petitioner's reliance on *Mascuilli*.

The fact that there was nothing that could be termed an existing unseaworthy condition also effectively rebuts the dissenters in *Usner*, who felt that *Crumady* could not be distinguished on its facts from *Usner*.[48] In *Crumady* the setting of a circuit breaker at too great a load was the negligent act that created the unseaworthy *condition* that later caused injuries. In *Usner* there existed no such condition, regardless of how created, at the time the longshoreman's negligence caused the petitioner's injuries.

In light of the conflict among the circuits concerning the operational negligence theory it is regrettable that the Court did not explain its position more fully. However, it is clear that the proposition emerging from *Usner* is that a single negligent act of a longshoreman which instantaneously causes injury to a fellow longshoreman does not constitute unseaworthiness. Therefore, the "instantaneous unseaworthiness" doctrine of the Second and Fourth Circuits is no longer to be regarded as law;[49] the Fifth Circuit's refusal to allow recovery under unseaworthiness for a longshoreman's operational negligence[50] is upheld; and it seems that the approach of the Ninth Circuit regarding liability for operational negligence by longshoremen[51] is adopted.

Unfortunately, this case is not the panacea for the ills engendered by the unseaworthiness doctrine. Although it is settled that negligent acts of longshoremen which cause immediate injury to their fellows do not constitute unseaworthiness per se, there remain unanswered questions and logical difficulties with the present case. For example, if a longshoreman were to negligently drop a bucket of grease on the deck which another longshoreman *subsequently* slipped on and was injured, would

48. Justice Douglas also stated his feeling that were it not for the recent change in membership of the Court, the decision in *Usner* would have been to reverse the court of appeals. Such a contention is better left to analysis by behavioralists in the political science field and is beyond this writer's goal of legal analysis of the instant case.

49. *See* notes 20-31 *supra* and accompanying text.

50. *See* notes 36-41 *supra* and accompanying text.

51. *See* notes 32-35 *supra* and accompanying text.

the shipowner be liable under unseaworthiness? Since the injury did not occur simultaneously with the act, it seems that an unseaworthy *condition existed which caused* the injury. According to the Court in *Usner,* the shipowner is liable for an unseaworthy *condition* regardless of how it came into being.[52] Since the time factor is to be discounted,[53] any injury that occurs at any time *after* the act itself is caused by an unsafe *condition* and, logically, unseaworthiness should be found.

In summary, it seems that in all cases concerning a longshoreman's negligent operation of "reasonably fit equipment," liability based on unseaworthiness would lie only if a fellow longshoreman's injury resulted from contact with the danger created by that act *after the act has terminated. A fortiori,* when a longshoreman uses defective equipment, whether negligently or not, and a fellow longshoreman is injured, it seems that the injuries would result from an unseaworthy *condition.* The same conclusion would logically follow even if no equipment were involved, and the act might not be labeled negligent, so long as the *act* has terminated and injury is attributed to *conditions* created by that act. If a crewman were injured in the same factual situations, an identical finding would be compelled since the shipowner's liability for unseaworthy conditions does not depend on how those conditions are created,[54] but merely upon the fact that they exist.

In *Seas Shipping Co.* v. *Sieracki*[55] the Supreme Court held that the duty of seaworthiness extended to longshoremen because they performed duties traditionally done by seamen. For purposes of finding liability for unseaworthiness, then, a longshoreman was reasoned to be a seaman. As discussed earlier, it would seem that a negligent act by a seaman which instantaneously injures a fellow seaman or longshoreman would probably prompt the Supreme Court to find the shipowner liable based on unseaworthiness for providing a crew member not equal in disposition or seamanship to ordinary men of the calling.[56] Adding authority to this prediction is the fact that the Court in *Usner* was apparently influenced by the fact that no member of the ship's crew was involved in the operations which caused the

52. *See* note 43 *supra* and accompanying text.
53. *See* notes 13, 20-24, 29-31, 37-39 *supra* and accompanying text.
54. *See* notes 43, 52 *supra* and accompanying text.
55. 328 U.S. 85 (1946).
56. *See* notes 7, 11 *supra* and accompanying text.

petitioner's injuries.[57] This seems to indicate, then, that if a crewman negligently injured a longshoreman instantaneously even *without bringing into play an antecedent condition*, unseaworthiness would still be found, the *condition* being the negligent seaman himself. The logical question then becomes why is a longshoreman not a "seaman" at all times and for all purposes. Surely if a longshoreman performs the duties traditionally performed by seamen, the situation in *Usner* could be regarded as one negligent "seaman"—*an unseaworthy condition in himself*—causing injury to another "seaman," and the shipowner would be held liable under unseaworthiness. Such circuitous logic is illustrative of the heretofore unrestrained reaches of the unseaworthiness doctrine. It is submitted that the Court in *Usner* was moved more by considerations of equitable treatment for the shipowner who has no control over the competence of stevedores[58] rather than by the technical requirements of its frequently unwieldy doctrine of unseaworthiness.[59] However limited its application might be, it is hoped that the decision in *Usner* reflects a tendency toward a more practical approach to the problem of unseaworthiness when longshoremen are involved.

James Louis Williams, IV

Parol Evidence Used to Show Lack of Authenticity Necessary to Justify Executory Process

Plaintiff petitioned for seizure of immovable property owned by defendant to foreclose, via executory process, on a conventional mortgage evidenced by notarial act in authentic form. Defendant sought to enjoin the executory proceeding for insuffi-

57. *See* note 45 *supra* and accompanying text.

58. *See* note 14 *supra* and accompanying text. However, to base a decision merely on the fact that a shipowner has no control over stevedores furnished to load and unload his cargo would have meant the overruling of the Court's prior cases holding such lack of control not to be a defense at the shipowner's disposal in attempting to disprove unseaworthiness. In such instances the shipowner does have an opportunity to obtain indemnification from the stevedoring contractor.

59. Perhaps the Court looked further than the immediate liability of the shipowner. Had Luckenbach Overseas Corp. been held liable in this case, it could have sued Usner's employer for indemnity for its failure to perform in a "workmanlike manner." Ryan Stevedoring Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956). Thus, this decision may reflect a tendency to give limited recognition to the heretofore circumvented protection given stevedoring companies by the Longshoremen's and Harbor Workers' Act.