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Admiralty—Longshoreman's Personal Injuries—Unaeaworthiness Not Established by Operational Negligence of Fellow Longshoremen

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ADMIRALTY—LONGSHOREMAN'S PERSONAL INJURIES—UNSEAWORTHINESS NOT ESTABLISHED BY OPERATIONAL NEGLIGENCE OF FELLOW LONGSHOREMEN

Petitioner and fellow longshoremen were loading cargo onto the *S.S. Edgar F. Luckenbach* from a barge positioned alongside a New Orleans dock. Petitioner's job was to secure the cargo to a sling lowered from a winch aboard ship. At one point, the sling was not lowered far enough to attach the cargo, so petitioner motioned to the flagman on deck to have the sling lowered farther. The winch operator, also a longshoreman, lowered the sling too far and too fast, causing it to fall upon and injure petitioner. The winch was not mechanically defective in any way. Petitioner brought an action for damages against respondent shipowner in federal district court alleging negligence and unseaworthiness of the vessel. Respondent's motion for summary judgment was denied, but the court granted leave to take an interlocutory appeal.[1] The Fifth Circuit Court of Appeals reversed and ordered the motion for summary judgment granted, holding that "'[i]nstant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman."[2] The Supreme Court granted certiorari,[3] and affirmed in a 5-4 decision. *Held,* where a longshoreman's injuries were caused by a single and wholly unforeseeable act of negligence by a fellow longshoreman, the shipowner is not liable because of unseaworthiness of the vessel. *Usner v. Luckenbach Overseas Corp.,* 400 U.S. 494, *rehearing denied,* 401 U.S. 1015 (1971).[4]

The history by which the Supreme Court created no-fault liability for one class of litigants (seamen) and then extended it to another class of litigants (longshoremen) has been described as "without parallel in American legal history."[5] In fact, no area

1. *See* 28 U.S.C. § 1292(b) (1964).
2. 413 F.2d 984, 985-86 (5th Cir. 1969).
3. 397 U.S. 933 (1970).
4. Hereinafter cited as instant case.
5. Tetreault, *Seamen, Seaworthiness, and the Right of Harbor Workers,* 39 CORNELL L. REV. 381, 382 (1954).

of federal law better illustrates "judicial legislation" than the law of admiralty.[6] Despite this, the development of the seaman's right to recover for injuries caused by the ship's unseaworthiness is "far from clear."[7]

The concept of unseaworthiness is first mentioned in American judicial opinions involving seamen suing for wages. If the seaman could prove unseaworthiness of the vessel, his desertion was excused and he could recover his wages. Additionally, the concept was found in the early rules governing marine insurance and carriage of goods by sea.[8] Traditionally, the seaman's compensation for personal injuries was limited to "maintenance and cure," which amounted to medical treatment and wages for the duration of the voyage. But by the end of the nineteenth century, American admiralty courts allowed the seaman to recover beyond maintenance and cure if he could show that his injuries were caused by the shipowner's negligence—a failure to exercise due diligence in providing the seaman with a reasonably safe place to work.[9] Common law negligence principles determined liability; ordinary care was the standard imposed both on the shipowner and the employer of dockside workers.

In 1903, the landmark decision of *The Osceola*[10] brought the concept of unseaworthiness into seamen's personal injury litigation. The seaman in this case sustained injuries as a result of an improvident order negligently given by the ship's master. The following dictum, one of four propositions "considered as settled" by the Court, was the first clear statement of the shipowner's responsibility to the seaman to furnish a "seaworthy" ship:

> [T]he vessel and her owners are . . . 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 good order the proper appliances appurtenant to the ship.[11]

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6. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (dissent).
7. *Id.* at 543.
8. *Id.* at 544.
9. *Id.*
10. 189 U.S. 158 (1903).
11. *Id.* at 175. The other three settled propositions were: (1) that the shipowner is liable for maintenance and cure during the voyage should the seaman fall sick or be wounded; (2) that seamen cannot recover for injuries sustained as a result of other crew members' negligence (the fellow-servant rule); and (3) that seamen may not recover an indemnity for negligence of master or crew, and are entitled only to maintenance and cure, whether negligence or accident caused the injuries.

The duty imposed on the shipowner was governed by common law negligence standards of ordinary care.

In 1920, Congress passed the Jones Act[12] which gave seamen a remedy for injuries caused by the negligence of fellow crewmembers. The practical effect of this legislation was to abolish the common law fellow-servant rule[13] and allow recovery based "on negligence either by the act of any of the officers, agents or employees of the shipowner or by reason of any defect or insufficiency of the vessel's appliances, appurtenances and equipment."[14] The Jones Act immediately became and is still a primary ground of recovery for seamen's personal injuries. A limitation to recovery, however, is the use in admiralty of comparative negligence which can lessen a judgment for damages according to the ratio of fault between the shipowner and the seaman as determined by the jury.[15]

Two years later, the Supreme Court, in *Carlisle Packing Co. v. Sandanger*,[16] first distinguished unseaworthiness from the negligence standard of ordinary care and described the shipowner's duty to provide a seaworthy vessel as "absolute." Though such a determination was unnecessary to the case, as the seaman's injuries occurred while he was making a fire with gas, negligently placed in containers marked "coal oil," it was very important in influencing the interpretation of the doctrine of unseaworthiness. According to *Sandanger,* the vessel could be unseaworthy without negligence, and liability would attach if the unseaworthiness caused a crewman's injuries. Permitting unseaworthiness without negligence would in the future provide the seaman with another important ground of recovery for his injuries.

In the two decades following *Sandanger,* federal courts enunciated a concept of absolute liability for unseaworthiness and litigation was abundant.[17] Also during this period, statutory remedies for longshoremen were changed. For a time, longshoremen were covered by the Jones Act, but that situation was changed in 1927 when Congress passed the Longshoremen's and Har-

12. 41 Stat. 988, 46 U.S.C. § 688 (1964).

13. 2 M. NORRIS, THE LAW OF SEAMEN § 660 (3d ed. 1970).

14. *Id.*

15. M. NORRIS, MARITIME PERSONAL INJURIES § 44 (2d ed. 1966).

16. 259 U.S. 255 (1922).

17. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 547 (1960).

bor Worker's Compensation Act.[18] Like other workmen's compensation schemes, the Longshoremen's Act is an exchange between employer and employee whereby employers give up common law defenses (such as the fellow-servant rule, assumption of risk, contributory negligence) and employees give up their right to an action against the employer for personal injuries incurred while on the job. As a result, maximum employer's payments for employee's injuries are limited, and employees receive benefits, regardless of who was at fault, covering at least hospitalization and medical care and subsistence wages, according to schedules and rates set by statute.[19] Though compensation under the Act is the longshoreman's exclusive remedy against his employer, the Act does allow a longshoreman's suit against a third party.[20] And, since 1959, by such a third party suit, the longshoreman does not forfeit his right to compensation under the provisions of the Longshoremen's Act.[21]

In 1944, the absolute nature of shipowner liability for unseaworthiness was made conclusive by the Supreme Court's landmark decision of *Mahnich v. Southern S.S. Co.*[22] The seaman's injuries were caused when the staging upon which he was working gave way because a rotted piece of rope was used by the ship's mate to support it. Since there was plenty of good rope on board, the shipowner argued that he had met his duty to use ordinary care in providing a seaworthy ship and that he should not be held liable for the negligence of the ship's mate (in using defective rather than sound rope).[23] But the Court rejected this argument, saying: "If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contribued to its unseaworthiness."[24] The ship was found to be unseaworthy because the staging was inadequate for its intended purpose, "whether the mate's failure

18. 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (1964) [hereinafter cited as Longshoremen's Act].

19. M. NORRIS, *supra* note 15, at § 140.

20. 44 Stat. 1440, 33 U.S.C. § 933 (a) (1964).

21. Election requirement deleted by amendment, Pub. L. No. 86-171, 73 Stat. 391 (1959).

22. 321 U.S. 96 (1944).

23. *Id.* at 101.

24. *Id.* at 100.

to observe the defect was negligent or unavoidable."[25] Accordingly, the shipowner was held liable. After *Mahnich,* nearly all acts of negligence would create unseaworthiness.[26]

Shortly thereafter, in *Seas Shipping Co. v. Sieracki,*[27] the Court extended the doctrine of unseaworthiness to cover the injuries of longshoremen working aboard ship. The longshoreman, while operating a winch aboard ship, was injured when the boom and shackle fell on him during loading operations. Subsequently, a defect was discovered in the forging of the shackle. The Court found that the longshoreman was entitled to the seaman's traditional protections against unseaworthiness, because the longshoreman was "doing a seaman's work and incurring a seaman's hazards."[28] In reaching this conclusion,[29] the Court made the following, frequently quoted statement about unseaworthiness:

> It is essentially a species of liability without fault, analogous to other wellknown instances in our law . . . . [T]he 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.[30]

This very broad statement of policy, coupled with the holding of *Sieracki*—a classic example of "judicial legislation"—substantially increased the willingness of courts to hold the shipowner liable for injury to anyone working on or around the ship, no matter how the injury occurred.

The Court found unseaworthiness and imposed liability on the shipowner for injuries suffered by a painter when he fell through an uncovered hatchhole;[31] by a longshoreman whose injuries were caused by a defective breaking block brought on board by the stevedoring contractor (the longshoreman's employer);[32] by a seaman who was attacked by a drunken fellow crewman

25. *Id.* at 103.
26. M. NORRIS, *supra* note 15, at § 40.
27. 328 U.S. 85 (1946).
28. *Id.* at 99.
29. For a challenge to the accuracy of this important historical observation, see Comment, *The "Unseaworthiness" Doctrine and its Application to Longshoremen,* 22 U. MIAMI L. REV. 937, 946-51 (1968).
30. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946).
31. Pope & Talbot v. Hawn, 346 U.S. 406 (1953).
32. Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam,* 347 U.S. 396, *rehearing denied,* 347 U.S. 994 (1954).

with dangerous proclivities;[33] and by a longshoreman who slipped on beans which had fallen onto the dock from defective containers during unloading operations.[34] From these cases, it is obvious that unseaworthiness in admiralty law means something much more than what the word literally connotes. It has become a word of art—a significant doctrine of absolute liability for injuries sustained by those who work in and around ships, "acknowledged to be a device created to shift the unusually high risk inherent in maritime service from those least able to assume it and to distribute it over the industry as a whole, without regard to fault."[35]

The doctrine is not without its confusion, most of which is in the area of "operational negligence." From the very first cases, unseaworthiness resulted from the shipowner's failure to provide sound appliances appurtenant to the ship—including winches, cargo containers, ropes, hatchcovers, etc. But what of the injury caused by negligent use of a fit appurtenance by an otherwise competent seaman or longshoreman? Does such an act of negligence instantaneously create unseaworthiness? Or, is operational negligence beyond the scope of the unseaworthiness doctrine? As late as 1966, one prominent author in the area of maritime personal injuries noted the conflict among the courts on this issue and suggested that only the Supreme Court could definitively resolve the matter.[36]

Judge Learned Hand delt with this difficult question in *Grillea v. United States*.[37] A longshoreman's injury resulted from a hatchcover which he and another longshoreman had negligently replaced. In finding the vessel unseaworthy, Judge Hand realized that his conclusion might appear strange, but he noted that liability in this area is imposed regardless of fault.[38] He went on to distinguish between a negligent act causing an unseaworthy condition which continued until time of the injury (for which liability would be imposed) and an instantaneous negligent act which caused an injury (for which liability would not be im-

33. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).
34. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).
35. Comment, *Instant Unseaworthiness: Mascuilli Revisted*, 1 J. MARITIME L. & COM. 573 (1970).
36. M. NORRIS, *supra* note 15, at § 38.
37. 232 F.2d 919 (2d Cir. 1956).
38. *Id.* at 923.

posed).[39] This formulation was subsequently called the act-condition dichotomy. Since unseaworthiness is a condition and not an act, liability would only be imposed if some time had elapsed after the equipment was negligently used.

The obvious difficulty with the distinction is in deciding when the act becomes a condition. It was not long before writers seized upon this difficulty and became critical of the Judge's analysis.[40] One writer urged rejection of the act-condition dichotomy because "an injured seaman or longshoreman financially is no more able to bear the risk inherent in his trade if he is injured by an act than if he is injured by a condition."[41] And even the Second Circuit questioned the viability of Judge Hand's formulation: "[E]very act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it."[42] Another writer notes: "Of course as to the injured men, any distinction vanishes. Both are injured through carelessness of fellow workers."[43] The conflict among the courts in this area grew.

It is difficult to know whether the Supreme Court meant to decide the issue conclusively in its cryptic per curiam opinion of *Mascuilli v. United States*.[44] Mascuilli, a longshoreman, was killed when his fellow longshoremen negligently allowed cables on a winch's boom aboard ship to become taut causing one of the vangs to recoil and fall. Because the equipment was found to be in proper working condition, the district court found the vessel seaworthy, the accident having been caused solely by the negligent operation of the boom by the longshoremen.[45] The Third Circuit affirmed,[46] but the Supreme Court reversed, per curiam, citing *Mahnich v. Southern S.S. Co.*[47] and *Crumady v. The J.H. Fisser*.[48] In the *Crumady* case, a longshoreman was injured when part of a winch broke and fell on him due to his fellow longshoremen's negligent use of the winch in trying to lift twice its safe working load. The winch's "cut-off" mechanism (a circuit

39. *Id.* at 922-23.
40. M. NORRIS, *supra* note 15, at § 38.
41. Comment, *supra* note 35, at 599.
42. Reid v. Quebec Paper Sales & Transp. Co., 340 F.2d 34, 37 (2d Cir. 1965).
43. Zobel, *The Unseaworthy Instant*, 45 ST. JOHN'S L. REV. 200, 217 (1970).
44. 387 U.S. 237 (1967).
45. Mascuilli v. United States, 241 F. Supp. 354 (E.D. Pa. 1965).
46. Mascuilli v. United States, 358 F.2d 133 (3d Cir. 1966).
47. 321 U.S. 96 (1944).
48. 358 U.S. 423 (1959).

breaker) was fully operational but had been negligently set by a seaman at twice the safe working load. The district court found the vessel unseaworthy and imposed liability; but, because the longshoremen were negligent in bringing "into play the unseaworthy condition of the vessel," the stevedoring company was ordered to indemnify the shipowner for injuries to the plaintiff.[49] The Court of Appeals for the Third Circuit reversed, holding that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of petitioner's fellow longshoremen.[50] The Supreme Court reversed, endorsing the analysis of the district court.[51] If, by citing this case and *Mahnich* in *Mascuilli* the Court intended to settle the issue of whether operational negligence rendered a vessel unseaworthy, it failed to achieve its purpose, because neither case cited involved only the issue of operational negligence. Confusion followed.

On the one hand, relying on the *Mascuilli* case and lower court decisions which followed it, Norris concluded that "[n]o longer can there be any doubt that 'operational negligence' makes a vessel unseaworthy."[52] He then quoted a statement from a Fourth Circuit case: "It is settled that the negligent misuse of safe and sufficient equipment renders a vessel unseaworthy."[53] In making this statement, the Fourth Circuit Court of Appeals relied upon the language and holding of *Waldron v. Moore-McCormack Lines, Inc.*,[54] which decided the question of whether a vessel is rendered unseaworthy when its officers assign too few crewmen to perform a particular task in a safe and prudent manner. Answering in the affirmative for a Court split 5-4, Justice Black wrote:

> And in *Crumady v. The J. H. Fisser*, 358 U. S. 423, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew members renders the vessel unseaworthy.[55]

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49. Crumady v. The J.H. Fisser, 142 F. Supp. 389 (D.N.J. 1956).

50. Crumady v. The J.H. Fisser, 249 F.2d 818 (3d Cir. 1957).

51. 358 U.S. 423 (1959).

52. M. NORRIS, MARITIME PERSONAL INJURIES § 38 (Supp. 1971).

53. Venable v. A/S Det Forende Dampskibbsselskab, 399 F.2d 347, 351 (4th Cir. 1968).

54. 386 U.S. 724 (1967).

55. *Id.* at 726-27.

In addition, the Second Circuit concurred with this view in applying *Mascuilli,* thus rejecting their own Circuit's formulation by Judge Hand in *Grillea.*[56]

On the other hand, some suggested that *Mascuilli* was inadequate and only added to the already substantial confusion.[57] Both the Ninth[58] and Fifth[59] Circuits continued to think that operational negligence did not render a vessel unseaworthy. *Waldron* was distinguished because it did not consider whether longshoremen's negligence *in itself* constituted unseaworthiness.[60] *Masculli* was considered "inapposite" because it answered affirmatively only the first question posed in the petition for certiorari: whether a prior unseaworthy condition came into play because the safety devices for each winch were set far in excess of the safe working load.[61] The Ninth Circuit thought that *Mahnich* and *Crumady* were cited primarily because of factual similarity. Thus, in the view of the Ninth Circuit, the Supreme Court had not reached the other question presented regarding the negligent handling of proper equipment. But the *Usner* case of the Fifth Circuit stated the precise question:

> The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition.[62]

Though the Fifth Circuit in *Usner* held that it did not render the vessel unseaworthy, it did note that "*Mascuilli* raised serious doubt as to the continuing vitality of this holding."[63]

Whatever doubts the Fifth Circuit might have had have now been dispelled by the Supreme Court's decision affirming *Usner.*[64] Writing for the five-man majority, Mr. Justice Stewart stressed

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56. Candiano v. Moore-McCormack Lines, Inc., 382 F.2d 961 (2d Cir. 1967), *cert. denied,* 390 U.S. 1027 (1968); Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2d Cir. 1967), *cert. denied,* 393 U.S. 1064 (1969).
57. Zobel, *supra* note 43, at 214.
58. Tim v. American President Lines, Ltd., 409 F.2d 385 (9th Cir. 1969).
59. Luckenbach Overseas Corp. v. Usner, 413 F.2d 984 (5th Cir. 1969).
60. Tim v. American President Lines, Ltd., 409 F.2d 385, 389 (9th Cir. 1969).
61. *Id.* at 390-91.
62. Luckenbach Overseas Corp. v. Usner, 413 F.2d 984, 985 (5th Cir. 1969).
63. *Id.*
64. 400 U.S. 494, *rehearing denied,* 401 U.S. 1015 (1971).

that "unseaworthiness is a *condition*,"[65] whether it came about by negligence or otherwise. Thus, "liability based upon unseaworthiness is wholly distinct from liability based upon negligence."[66] This distinction was previously emphasized in the Court's decision of *Mitchell v. Trawler Racer*.[67] In that case, a seaman was injured when he slipped and fell on the ship's rail which was covered with fish gurry and slime from recently completed unloading operations. Plaintiff's action for damages alleged both negligence and unseaworthiness. The district court instructed the jury that because the shipowner is liable for an unseaworthy condition only if there is a failure to exercise reasonable care under the circumstances, an unseaworthy condition could not be found unless some time had passed during which the condition should have been discovered and corrected.[68] The First Circuit affirmed,[69] but the Supreme Court reversed, holding that constructive notice was not necessary to support liability for unseaworthiness.[70] The lower court had, in the opinion of the Supreme Court, confused liability for negligence with liability for unseaworthiness. In *Trawler Racer*, the Court said: "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."[71] But then, the Court added this caveat:

> 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 . . . .[72]

Accordingly, after this review of *Trawler Racer*, the majority viewed the *Usner* case as an accident, which does not create unseaworthiness, because the petitioner's injuries were not caused by "the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman."[73] "[N]o condition of unseaworthiness

65. Instant case at 498.
66. *Id.*
67. 362 U.S. 539 (1960).
68. Mitchell v. Trawler Racer, Inc., 167 F. Supp. 434 (D. Mass. 1958).
69. Mitchell v. Trawler Racer, Inc., 265 F.2d 426 (1st Cir. 1959).
70. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).
71. *Id.* at 550.
72. *Id.*
73. Instant case at 500.

existed . . ."[74] because everything aboard ship was reasonably fit for its intended use, including the longshoreman who had negligently operated the winch. His single, wholly unforeseeable act was not sufficient to create an unseaworthy condition.

Mr. Justice Douglas, who wrote the 6-3 majority decision in *Crumady*, was joined by Justices Black, Brennan, and Harlan in dissenting. Both Douglas, and Harlan in his short separate dissent,[75] thought that the issue had already been decided by *Crumady* and *Mascuilli*. The thrust of Douglas' dissent was directed against the change in position he feels has taken place as a result of the new membership of the Court: "Prior to the 1970 Term the judgment denying recovery would have been reversed, probably out of hand."[76]

Despite this observation about Supreme Court politics, the only question raised by the dissent is whether *Usner* represents a reversal of precedent. Though the majority states that "[t]he present case . . . offers no occasion to re-examine any of our previous decisions,"[77] its decision in *Usner* has at least reversed the expansionary trend of the last twenty-five years for the doctrine of unseaworthiness. Nevertheless, while affirming the Fifth Circuit's decision, the Supreme Court did not restate the lower court's broad conclusion that instant unseaworthiness resulting from operational negligence is not a basis for recovery by an injured longshoreman. Instead it stated that a *single* and *unforeseeable* act of negligence which causes injury to a longshoreman will not result in unseaworthiness. This decision re-establishes the much-criticized act-condition dichotomy, but the Court has offered no guidelines or discussion to aid lower courts in making this distinction. This may cause considerable confusion as lower courts attempt to apply *Usner*. But this is not the only inadequacy of the majority opinion.

The questions raised by *Mascuilli* are too perplexing to be dismissed without discussion. The Court in the instant case addresses itself to *Mascuilli* in a footnote only[78] and adopts the analysis of the Ninth Circuit which argued that the Court never reach-

74. *Id.*
75. *Id.* at 503 (Harlan, J., dissenting).
76. *Id.* at 501 (Douglas, J., dissenting).
77. Instant case at 497.
78. *Id.* at 500 n.19.

ed the questions posed regarding operational negligence, and instead answered affirmatively only the first question posed in the *Mascuilli* brief which had to do with maladjusted safety devices on the winches. Even without the help of Douglas' dissenting analysis of what the Court did in *Mascuilli,* the Ninth Circuit's interpretation seems improbable. Regarding the safety devices, the district court specifically found that "[i]n this situation, the cut-offs in the winch motor and circuit breaker will not be affected by the amperage and thus the cut-off will not trip."[79] Therefore, the safety devices were in no way relevant in causing the injury. It seems doubtful that the Supreme Court would have reversed on the sole ground that the maladjusted safety devices created an unseaworthy condition when the devices were specifically found not to have played a part in causing the injury. Absent such a finding by the lower court, *Crumady* of course would have been directly on point and good authority for summary reversal. But with the district court's finding of fact, it is more likely that the Court viewed all the questions posed in the context of the facts, and then decided to reverse.[80] *Mascuilli* should either have been overruled or explained and distinguished as involving a question different than operational negligence.

The most serious inadequacy of the *Usner* opinion, however, is the Court's failure to make a compelling argument for its position. This inadequacy has already been noted by other writers.[81] But they have apparently failed, as the Court has, to view the problem from the standpoint of remedies—to examine what remedies are being made available to seamen and longshoremen for their injuries.

The question of remedies has always been an important one in the area of maritime personal injuries. Courts have realized the need to equalize the remedies for persons being exposed to the same dangers and circumstances.[82] This is one way of looking at both the landmark decision of *Sieracki* in which the Court extended to longshoremen a cause of action against the ship-

79. Mascuilli v. United States, 241 F. Supp. 354, 360 (E.D. Pa. 1965).

80. *See* Candiano v. Moore-McCormack Lines, Inc., 382 F.2d 961 (2d Cir. 1967), *cert. denied,* 390 U.S. 1027 (1968).

81. *See* Note, 31 LA. L. REV. 650 (1971); Comment, *Narrowing the Warranty of Seaworthiness to Longshoremen,* 50 ORE. L. REV. 197 (1971); Note, 49 TEXAS L. REV. 911 (1971).

82. *See* Tetreault, *supra* note 5.

owner for unseaworthiness, and the long line of cases during the past twenty-five years which have expanded the scope of the shipowner's liability for unseaworthiness to all those performing needed services aboard ship. The question, therefore, is whether longshoremen *need* a remedy based on unseaworthiness for injuries caused by the negligence of fellow longshoremen, and whether the doctrine of unseaworthiness should be extended in order to equalize the remedies of longshoremen and seamen.

Due to the inherent confinement of the seaman aboard ship, maintenance and cure, as has already been noted,[83] has long been part of the shipowner's liability. A remedy for fellow seaman's negligence is provided by the Jones Act, while the longshoreman's remedy for negligence of a fellow worker is the Longshoremen's Act. A primary difference between the two statutes is that the Longshoremen's Act has a fixed schedule of benefits while the Jones Act allows a suit for damages based on negligence. Though Jones Act damages are potentially unlimited, it is by no means clear that recoveries are larger under the Jones Act than under the Longshoremen's Act.[84] Arguably, the injured are frequently better off under fixed compensation schemes than under negligence litigation due to the substantial attorney's fees which are commonly taken out of the awards.[85] Furthermore, benefits under the Longshoremen's Act are fixed regardless of how the accident occurred. But under the Jones Act, defenses to the action are available, most important of which is comparative negligence. In light of this, it may be appropriate that nearly all acts of negligence will cause an unseaworthy condition for which the shipowner will be held absolutely liable to the *seaman*. As a result, the shipowner could assert no defense to defeat liability. Case law has not established that the negligent act of one seaman which injures another seaman creates an unseaworthy condition. But even if that were established, it is no reason to apply the same standard for unseaworthiness to longshoremen. Longshoremen already have a fully effective remedy for a co-worker's negligent act. Likewise, longshoremen will and should continue

83. *See supra* note 9 and accompanying text.

84. *See* Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1147-48 (1963).

85. *Id.*

to have a remedy for unseaworthiness, as it has been defined in the case law, but

> [t]here is no sound reason to give them the additional right to sue a shipowner for injuries resulting from the negligent acts of their fellow employees which do not make the ship unseaworthy, but which constitute negligent operation of seaworthy equipment by the fellow employees of the plaintiff.[86]

Imposition of strict liability is most frequently justified where an unusually hazardous situation is caused by a particular service which society recognizes as necessary. In recognition of both the inherent danger and the necessity, the law imposes strict liability for injuries or damages caused by such activity.[87] The Longshoremen's Act imposes a form of strict liability on the employer. Also, absolute liability is imposed for unseaworthiness. But there seems to be no reason to extend unseaworthiness to cover situations already covered by remedial legislation. The danger has already been dealt with. If the benefits are inadequate, they should be changed by Congress.

Another important consideration is the impact strict liability has on the employer. The possibility of large awards due to injuries from defective equipment will certainly motivate the shipowner to keep his ship and its gear in the best possible condition. When injury is caused by the neglient act of a longshoreman, however, there is nothing the shipowner can do to lessen the risk of injury. He does not decide who to hire or who does what work. But, even if liability is imposed upon the shipowner for operational negligence, he can in turn recover from the longshoreman's employer.[88] Thus, imposition of strict liability on the shipowner serves no purpose. The dominant concerns are to minimize the level of risk, and to guarantee compensation for any injuries that occur. That objective can be fully met without imposition of liability on the shipowners for injuries immediately caused by isolated negligent acts of longshoremen.

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86. Blankenship v. Ellerman's Wilson Lines, New York, Inc., 159 F. Supp. 479, 483 (D. Md. 1958), *rev'd on other grounds*, 265 F.2d 455 (4th Cir. 1959).

87. W. PROSSER, LAW OF TORTS § 78 (3d ed. 1964).

88. For a criticism of this cycle which completely circumvents the Longshoremen's Act, see Amerman, *Unseaworthiness, Operational Negligence and the Death of the Longshoremen's and Harbor Worker's Compensation Act*, 43 NOTRE DAME LAW. 550 (1968).

Consequently, courts may continue to go to great lengths to find unseaworthiness and thus liability for structural or mechanical defects, but may refuse, as the Supreme Court has, to recognize liability for human defects and errors. Much of this can be traced to earlier conceptions of the shipowner's liability. Though his duty to furnish a seaworthy ship was absolute, he was required only to furnish appliances appurtenant to the ship which were reasonably suited for their intended purpose. This created a great deal of confusion. If a machine broke and caused an injury, it was obviously not suited for the intended purpose. Therefore, it was unseaworthy, and the shipowner was liable. But if an injury was caused by human error, so long as the actor met ordinary standards of competence, he was still suited for the purpose intended. Therefore, the vessel was not unseaworthy and liability did not obtain. But what is actually the difference between the two types of defects? They are both reasonably foreseeable in the sense that they can be expected to occur. They are both equally dangerous in terms of the risk they impose upon the longshoremen. They may both be difficult or impossible to discover and prevent. Though it is theoretically possible to find and correct every physical or mechanical defect, present levels of technology and cost restraints prohibit elimination of all physical deficiencies from the ship and its equipment. Further, the issue of control has also already been disposed of; that is, the shipowner cannot escape liability because he had no control over the operation which caused the injury.[89] Fault is not a distinguishing feature, because the shipowner has done no wrong in either the the case of injury caused by latent physical defect or negligent human error. Thus, there simply does not seem to be a rational, valid distinction which can be made between physical defect and human negligence for purposes of imposing liability on the shipowner. But courts may continue to act as if there is a difference. The Fifth Circuit provides an excellent example.

In *Law v. Victory Carriers, Inc.*,[90] for which the Supreme Court has recently granted certiorari,[91] a longshoreman's in-

89. *See* Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396, *rehearing denied*, 347 U.S. 994 (1954), in which shipowner was held liable for injuries caused by a defective breaking block owned and brought on board by the stevedoring contractor.

90. 432 F.2d 376 (5th Cir. 1970).

91. 401 U.S. 936 (1971).

juries were caused when the overhead protection rack on his fork-lift machine came loose and fell on him. Investigation revealed that the bolts which should have secured the rack were missing. Though at the time of the injury he was not even engaged in loading cargo onto the ship, the Fifth Circuit reversed the grant of defendants' motion for summary judgment.[92] Extension by the court of unseaworthiness to cover this accident was justified as serving the "humanitarian policy which underlies the doctrine."[93] Remembering it was the Fifth Circuit which denied recovery in *Usner*, this case seems quite anomalous—a perfect illustration of the physical defect-human error dichotomy.

It is likely, however, that the Supreme Court will apply *Usner* and reverse *Victory Carriers*. *Usner* has already been used to limit the doctrine of unseaworthiness in several cases,[94] leading one court to say: "Based upon the Supreme Court's recent holdings, this court feels that liability of a vessel is being circumscribed . . . ."[95] Given the coverage afforded longshoremen by statutory and decisional law, such a circumscription does not seem harsh or unreasonable. Though it is conceptually difficult if not impossible to distinguish between liability for mechanical or physical defect and liability for human error, it is clear that a longshoreman has adequate remedies for his injuries caused by negligent acts of fellow workers. Therefore, he does not need protection under the unseaworthiness doctrine for operational negligence. It is probable that the Court will extend *Usner* to include the situation posed in *Victory Carriers*. Such a decision could also be based on the theory that the longshoreman does not need the protection against unseaworthiness. That neither the Supreme Court nor its commentators realized the "need for a remedy" approach is unfortunate. But more important is that the decision of *Usner*, if not the opinion of the Court, is appropriate and thoroughly justifiable.

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92. 432 F.2d 376 (5th Cir. 1970).

93. *Id.* at 384.

94. *See* Debose v. MS Loppersum, 438 F.2d 642 (5th Cir. 1971); Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476 (2d Cir. 1969), *rev'd mem.*, 401 U.S. 930 (1971).

95. Sydnor v. Villain & Fassio e Compania Int. di Riunite di Nav., 323 F. Supp. 850 (D. Md. 1971).