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UNSEAWORTHINESS, OPERATIONAL NEGLIGENCE, AND THE DEATH OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

I. Remedies Available to Longshoremen

A. Introduction

Probably no worker in America is better protected from the financial losses of a work-connected injury than the longshoreman, and no industry is more obligated to pay for such protection than the American shipping industry. This situation has resulted from a long, stumbling development that has left the ordinary longshoreman who is injured in the course of his employment with not one, but three grounds for recovery. First, under the Longshoremen's and Harbor Workers' Act of 1927¹ [hereinafter referred to as "Longshoremen's Act"], he has a workmen's compensation type remedy against the stevedore, his immediate employer, for recovery of damages within certain prescribed limits. Second, he may well be able to obtain unlimited damages from the owner of the ship on which he was working on the negligence theory of failure to provide a safe place for a business invitee to work. Third, and most significantly, he quite likely will be able to recover unlimited damages from the owner of the ship under strict liability principles if he can show that his injury was caused by the unseaworthy condition of the ship. As is apparent, the longshoreman today, like the seaman of yesteryear, is certainly a favorite ward of the courts.²

The development of these remedies has been traced by a number of commentators³ so that only a brief review will be given here. However, this development is not yet complete and a number of problems still remain. One particular difficulty has been whether the "actionable negligence" of longshoremen in their use of previously sound equipment aboard ship, resulting in injury to one of their fellows, makes the vessel itself unseaworthy and the vessel's owner absolutely liable for damages to the injured party.⁴ Before analyzing some of the most recent authority on this issue, it will be necessary to again briefly trace the remedies available to an injured longshoreman in light of the underlying public policies.

B. The Employment Situation

Important to an understanding of this field of law is an appreciation of the classical relationships among the parties. A shipping firm, usually called the shipowner, will hire a stevedoring firm, normally referred to as the stevedore, to carry out the desired tasks, traditionally the loading and unloading of the

1 33 U.S.C. §§ 901-50 (1964), as amended, 33 U.S.C. § 943 (Supp. I, 1965).

2 See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 6-6 to 6-8, at 253-61 (1957); Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 *CORNELL L.Q.* 381 (1954).

3 G. GILMORE & C. BLACK, *supra* note 2, §§ 6-1 to 6-64, at 248-394; M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* (2d ed. 1966); Bue, *Admiralty Law in the Fifth Circuit — A Compendium for Practitioners: I*, 4 *Hous. L. Rev.* 347 (1966); Tetreault, *supra* note 2.

4 M. NORRIS, *supra* note 3, § 38, at 75.

ship. The stevedore will employ a number of workers, usually longshoremen, to carry out these operations. Other tasks may require the services of repairmen or other harbor workers. Either the shipowner will hire them directly or engage independent contractors who will bring aboard a crew of workers. The essential relationship is that of shipowner, stevedore and longshoreman, with the shipowner engaging the stevedoring firm to handle cargo, and the stevedore employing the longshoreman to do the actual work.

C. *The Negligence Remedy*

The longshoreman's oldest remedy is based upon the pure tort principle of negligence under which the injured worker could either sue the shipowner for failing to keep the vessel reasonably safe for business invitees⁵ or the employing stevedore for failing to provide him with a reasonably safe place in which to work.⁶ The exclusive liability provisions of the Longshoremen's Act,⁷ however, have ended direct suits by the longshoreman against his employer, the stevedore, for failure to provide a safe working place. But *Pope & Talbot, Incorporated v. Hawn*⁸ reaffirmed the right of a harbor worker to bring an action under ordinary negligence principles against the shipowner.

The duty imposed on the shipowner is said to be "a nondelegable obligation that reasonable care shall be used"⁹ to make the vessel safe for business

5 *The Helios*, 12 F. 732 (S.D.N.Y. 1882); *Gerrity v. The Bark Kate Cann*, 2 F. 241 (E.D.N.Y. 1880). In *Leathers v. Blessing*, 105 U.S. 626 (1882), the Supreme Court affirmed the jurisdiction of admiralty over a tort suit charging negligent injury to a business invitee on board ship.

6 *Atlantic Transp. Co. v. Inbrovek*, 234 U.S. 52 (1914). See *Porello v. United States*, 153 F.2d 605, 608 (2d Cir. 1946), *modified*, 330 U.S. 446 (1947), where it was said that "[t]he primary duty to furnish its employees a safe place to work rested on the stevedore."

7 § 905. Exclusiveness of liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . 33 U.S.C. § 905 (1964).

8 346 U.S. 406 (1953). The Longshoremen's Act itself makes provision for suits against third parties

§ 933. Compensation for injuries where third parties are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

. . . .

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 933 (1964).

9 *West v. United States*, 256 F.2d 671, 672 (3d Cir. 1958), *aff'd*, 361 U.S. 118 (1959).

invitees, and the traditional principles of negligence seem to apply, including the fact that the defendant shipowner, to be liable, must have possession and control of the vessel.¹⁰ A longshoreman, however, cannot assume the risk of negligence or unseaworthiness,¹¹ and while contributory negligence does not bar recovery, it can act to mitigate damages as justice requires.¹²

D. The Longshoremen and Harbor Workers' Compensation Act of 1927

In the same year that state workmen's compensation acts were first sustained on constitutional grounds, the Supreme Court ruled that they cannot be constitutionally applied to a workman injured on shipboard while performing maritime work.¹³ The result is based on the multiple grounds that the constitutional grant of admiralty jurisdiction to the federal courts is exclusive and that congressional power to modify maritime law would be defeated and the constitutionally prescribed uniformity and consistency in admiralty matters would be violated.¹⁴ Congressional opinion, however, was that the best policy would be to apply state compensation statutes to maritime workers,¹⁵ and the Congress twice tried to do so through amendments to the "saving to suitors clause"¹⁶ only to have their attempts ruled unconstitutional as invalid attempts to delegate federal power.¹⁷

It was then apparent that Congress would have to provide a federal act if it wanted maritime workers to be covered by workmen's compensation type remedies. Hastened by what appeared to be an unfavorable policy change evidenced by the Supreme Court's extension of Jones Act rights to harbor workers,¹⁸ Congress passed the Longshoremen's Act.¹⁹ This Act granted compensation for disability or death to any employee, according to fixed scales that were generally more liberal than those under state compensation acts.²⁰ The Act applied to any injury occurring upon the navigable waters of the United

10 *McDonald v. United States*, 321 F.2d 437 (3d Cir. 1963).

11 *Klimaszewski v. Pacific-Atlantic S.S. Co.*, 246 F.2d 875 (3d Cir. 1957).

Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages.

Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939). This holding in *Socony* was extended to cover longshoremen in *Pope & Talbot, Incorporated v. Hawn*, 346 U.S. 406, 409 (1953).

12 *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).

13 *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

14 *Id.*

15 G. GILMORE & C. BLACK, *supra* note 2, at 336.

16 Act of Oct. 6, 1917, ch. 97, (entitled "An Act To amend Sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any state"), 40 Stat. 395; Act of June 10, 1922, ch. 216, 42 Stat. 634.

17 *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (overruling 1917 Act) and *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924) (overruling 1922 Act).

18 *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). Today it is clear that harbor workers cannot sue shipowners under the Jones Act since it is limited to suits against employers. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949). The Longshoremen's Act limits the harbor worker to the compensation remedy against his employer, the stevedore. See notes 7 and 8 *supra* and note 22 *infra* and accompanying text.

19 33 U.S.C. §§ 901-50 (1964), as amended, 33 U.S.C. § 943 (Supp. I, 1965).

20 *Bue, supra* note 3, at 379; see 33 U.S.C. §§ 908-09 (1964).

States except for injuries that would validly come under a state compensation statute, or injuries to a master or member of the crew of a vessel, or to an officer or employee of the United States, or injuries incurred upon certain very small ships, or injuries caused solely by the intoxication or willful intention of the injured employee.²¹ As the quid pro quo for making the employing stevedore absolutely liable, the Act, as is traditional with workmen's compensation statutes, restricted the liability of the employer to the limited recovery available under its terms.²²

E. *The Unseaworthiness Remedy*

The duty of a shipowner to seamen to provide a seaworthy ship was mentioned as early as 1789 in *The Cyrus*.²³ Not until 1903, in the now classic case of *The Osceola*,²⁴ was there recognition of a right of the injured seaman to recover damages caused by the unseaworthiness of the ship. This alternative remained a relatively unimportant remedy until the 1940's since the Jones Act provided seamen a more attractive method of securing relief.²⁵ Moreover, a shipowner contesting an unseaworthiness action might defeat the claim by showing that he had exercised due diligence to maintain the ship in a seaworthy condition or by showing that the proximate cause of the injury was operating negligence, a cause of action that could be brought only under the Jones Act.²⁶

In 1944 with the case of *Mahnich v. Southern Steamship Company*,²⁷ the world turned upside down when Chief Justice Stone wrote:

[T]he exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. . . .

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 contributed to unseaworthiness.

We have often had occasion to emphasize the conditions of the seaman's employment . . . which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. . . . These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done.²⁸

This holding made it clear that the shipowner's duty to provide a seaworthy ship was not discharged by due diligence but was absolute. Regardless of whether the unseaworthy condition was caused by the operating or actionable negligence of another, the liability for injuries to seamen rested on the shipowner.

21 33 U.S.C. § 903 (1964).

22 *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129 (1956). See notes 7 and 8 *supra*.

23 *Dixon v. The Cyrus*, 7 F. Cas. 755 (No. 3,930) (D. Pa. 1789).

24 189 U.S. 158 (1903).

25 G. GILMORE & C. BLACK, *supra* note 2, § 6-3, at 250-51.

26 *Id.* § 6-3, at 250-51 and §§ 6-38 to 6-40, at 315-22.

27 321 U.S. 96 (1944).

28 *Id.* at 100, 103-04.

A very significant extension of this doctrine occurred two years later in *Seas Shipping Company v. Sieracki*²⁹ when the Supreme Court ruled that the remedy for injury caused by the unseaworthiness of a ship was available to longshoremen working aboard the ship even though they were employed by an independent stevedoring contractor. This holding was made on the basis that the liability was not contractual, but relational, in that it attached in favor of anyone doing work that was traditionally performed by seamen.³⁰ Thus seaworthiness has become an absolute nondelegable duty owed by the shipowner to seamen and to anyone doing traditional seamen's work, including longshoremen,³¹ to make the ship in every way reasonably fit for its intended purpose.³² "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."³³ The harbor worker, injured aboard ship, can recover against the shipowner if he can show in any way that his injury was caused by some man or element upon or connected with the ship that was not reasonably suitable for its intended use, regardless of who or what made it so unsuitable.

F. Indemnity and Policy

Since shipowners are liable to longshoremen for injuries caused by the unseaworthiness of the ship regardless of whose fault the unseaworthiness might have been, it was inevitable that situations would arise in which the unseaworthiness was due to some negligence or unsound device brought aboard by the contracting stevedore. In such a case the injured longshoreman's remedy against his employer is limited to that provided by the exclusive liability provisions of the Longshoremen's Act,³⁴ but he is still able to seek a judgment against the shipowner on the unseaworthiness count as the Longshoremen's Act did not disturb the employee's right to recover damages from third persons.³⁵ It was only natural that a shipowner held absolutely liable in an unseaworthiness action would in turn seek indemnity from the stevedore who was the cause of the unseaworthy condition.

In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation*³⁶ such an indemnity claim by a shipowner was refused on the ground that there could be no contribution among joint tort-feasors. It was not long, however, before

29 328 U.S. 85 (1946).

30 It [unseaworthiness] is essentially a species of liability without fault analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy. *Id.* at 94-95.

31 *Id.* at 96, 99.

32 M. NORRIS, *supra* note 3, § 29, at 57. "Simply stated, the concept of seaworthiness in personal injury matters contemplates that a ship's hull, gear, appliances, ways, appurtenances, and manning will be reasonably fit for its intended purpose."

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

34 See note 7 *supra*.

35 See note 8 *supra*; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129-30 (1956); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 102 (1946).

36 342 U.S. 282 (1952).

the fundamental unfairness of a shipowner's being absolutely liable for unseaworthiness, when the condition was actually the fault of the protected stevedore, caused the courts to find a way around *Haenn*. In *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*³⁷ the employing stevedoring firm had to indemnify the shipowner for the amount of the judgment obtained by an employee of the stevedoring firm from the shipowner. The cause of the injury had been falling cargo that struck a longshoreman who was helping unload the vessel. The cargo had been improperly stowed by the stevedoring firm when they had loaded the vessel, thus making the ship unseaworthy. The Court held the shipowner entitled to reimbursement, despite the exclusive liability provisions of the Longshoremen's Act, on the ground that the stevedore had breached an implied warranty of workmanship.³⁸ The Court stated:

While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly.³⁹

Without further laboring the issue, a brief review of the remedies available to longshoremen and their ramifications are:

1) Under the Longshoremen's Act, the injured worker can obtain workmen's compensation type recovery from his employer. 2) As always the longshoreman can sue the shipowner under ordinary negligence principles for failing to keep the vessel reasonably safe for a business invitee, but he cannot sue his employing stevedore for failing to provide him with a safe place to work because of the exclusive liability provisions of the Longshoremen's Act. 3) In a great many instances, the worker will be able to show that in some way the injury was caused by somebody or something that was not reasonably fit for its intended purpose (seaworthy) and, since the longshoreman regularly works on a ship owned by a third party shipowner,⁴⁰ his action against such a shipowner will be valid despite the Longshoremen's Act. 4) In a number of situations where the shipowner has been held absolutely liable, it will appear that the unseaworthy condition was due to the failure of the stevedore employer to fulfill his express or implied warranty to the shipowner of workmanlike performance. In such a case the shipowner will be able to obtain indemnity from the stevedore in the amount of the judgment in favor of the employee longshoreman.

It becomes apparent that in such cases the longshoreman's action for recovery for unseaworthiness followed by the action of the shipowner for indemnity is circuitous in that the final loss falls on the employer stevedore despite the exclusive liability provision of the Longshoremen's Act. In effect the compensation award to the longshoreman under the Act is merely a temporary advance while he is waiting for the jury to assess damages in his suit

37 350 U.S. 124 (1956).

38 *Id.*

39 *Id.* at 131.

40 G. GILMORE & C. BLACK, *supra* note 2, § 6-57, at 372.

against the shipowner.⁴¹ In such cases, the policy of the Longshoremen's Act imposing a limited and exclusive, but absolute, compensation burden upon stevedoring companies is completely frustrated.⁴² Regardless of the nature of the duty, the employing stevedore is bearing the cost of his employee's injury at jury-set rates rather than the statutory compensation rates.

It is suggested that, in fairness to shipowners who are not at fault but must stand the absolute liability of unseaworthiness even though the condition was created by the stevedore, *Ryan* reaches a necessary and just result. It would seem that the real culprits in causing the defeat of the policy of the Longshoremen's Act are *Mahnich* and *Sieracki*. *Mahnich*, with help from *Sieracki*, made the liability for unseaworthiness absolute and mandatory whether or not there is negligence.⁴³ *Sieracki* then extended the unseaworthiness remedy to the longshoremen⁴⁴ and set the stage for defeat of the policy of the Longshoremen's Act. It is interesting to note, however, that the exclusive liability policy of the Longshoremen's Act is defeated only in a situation in which the unseaworthy condition was occasioned by a breach of the warranty of workmanship by the stevedore. As seen above, the circuitous action resulting in indemnity by the stevedore in this instance had developed what might be said to be a duty to maintain seaworthiness on the part of the stevedore in favor of his employee. This duty would appear to be contrary to the exclusive liability policy of the Longshoremen's Act. Thus, in the light of the indemnity rule of *Ryan*, it would seem that *Mahnich* and *Sieracki* might well be reconsidered with a view to the policy of the Longshoremen's Act, by which Congress certainly did not intend to make a stevedore employer absolutely liable in tort damages to maintain the seaworthiness of a vessel for the protection of his employees.

In the meantime, however, the policy violation is avoided in any case where the court finds that the injury was not caused by the unseaworthiness of the vessel but rather by the "actionable negligence" of the stevedore. When there is no unseaworthiness recovery against the shipowner, there is no indemnity owing from the stevedore, and the exclusive liability provisions of the Longshoremen's Act restrict the injured employee's recovery to compensation only. The second part of this Note will consider the distinction between actionable or operational negligence and unseaworthiness. First it might be well to note that in this situation the negligent stevedore might escape from all but the compensation burden, whereas a stevedore, whose breach of warranty of workmanlike service resulted in a condition of unseaworthiness through no negligence of his own, would be caught up in the indemnity circle and held liable for tort damages. It would seem that the law has developed in this area so as to leave semantics in control to the extent that the innocent may pay heavily while the negligent get off lightly.

41 *Id.* § 6-57, at 373.

42 *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 326 (1964) (dissenting opinion of J. Black).

43 See notes 27-32 *supra* and accompanying text.

44 See notes 29-30 *supra* and accompanying text.

II. Operational Negligence v. Instantaneous Unseaworthiness

A. *The Stevedore's Role in the Creation of Unseaworthiness*

As seen above, the exclusive liability policy of the Longshoremen's Act is frustrated only in those cases where the stevedore has breached his warranty of workmanship and an unseaworthy condition has resulted for which the shipowner is liable and for which the shipowner in turn obtains indemnity. It is clear, as well, that in any case where the vessel is not found unseaworthy the cycle is broken and the stevedore can be liable for no more than the compensation award in the Longshoremen's Act. The question, then, becomes: What acts on the part of a stevedore or his employees result in an unseaworthy vessel?⁴⁵

Defective equipment brought aboard by a stevedore was held to make the vessel unseaworthy in *Alaska Steamship Company v. Petterson*,⁴⁶ while *Crumady v. The Joachim Hendrik Fisser*⁴⁷ held that use by the stevedore of dangerous equipment already aboard also created unseaworthiness.⁴⁸ It has also been found that the failure of a seaman or a longshoreman to conform to the usual and customary standards of their callings constitutes unseaworthiness for which the shipowner is liable if this failure causes injury.⁴⁹

In *Mitchell v. Trawler Racer, Incorporated*⁵⁰ it was made absolutely clear that *Mahnich* and *Sieracki* were definite in holding that the character of the duty of seaworthiness is absolute and that due diligence is not enough.⁵¹ The Court in overruling the doctrine that unseaworthiness liability did not attach when the condition causing the injury was transitory in nature,⁵² found that regardless of actual or constructive knowledge of the condition on the part of the shipowner, there would be liability for any lack of reasonable fitness that causes injury.⁵³ Unseaworthiness liability was thus completely divorced from

45 In *Grillea v. United States*, 232 F.2d 919, 922-23 (2d Cir. 1956), it was held that even though the stevedores themselves had rendered a ship *pro tanto* unseaworthy through their negligence, they could still recover from the vessel owner for their injuries. See *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427 (1959) (impliedly approving of *Grillea's* holding).

46 347 U.S. 396 (1954), *aff'g* 205 F.2d 478 (9th Cir. 1953).

47 358 U.S. 423 (1959).

48 *Id.* at 427-28. In this case a safety device on a winch supplied by the ship would not cut off the power until double the safe working load was reached. The "stevedores did no more than bring into play the unseaworthy condition of the vessel," *id.* at 427, in using the winch which with the improper safety device made the vessel *pro tanto* unseaworthy. The vessel was liable for unseaworthiness and the stevedore for indemnity for breach of its warranty of workmanlike service since it used the dangerous device that caused the injury in question. *Id.* 428-29.

49 *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Smith v. Lauritzen*, 201 F. Supp. 663 (E.D. Pa. 1962). In a subsequent appeal, acceptance of the reasoning of this case was impliedly recognized as law, 256 F.2d 171 (3rd Cir. 1966). See also *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967). *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), where it was said: "[U]nseaworthiness extends not only to the vessel but to the crew, [citing *Boudoin*] . . ." *Id.* at 427.

50 362 U.S. 539 (1960). This case provides an excellent history of the development of the concept of seaworthiness from the earliest times.

51 *Id.* at 549-50.

52 *Cookingham v. United States*, 184 F.2d 213 (3d Cir. 1950). In this case the transitory condition of jello on an otherwise seaworthy stairway did not create unseaworthiness.

53 *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50 (1960).

concepts of negligence.⁵⁴ In the recent case of *Waldron v. Moore-McCormack Lines, Incorporated*⁵⁵ this strict liability was re-emphasized, and the expanding doctrine of unseaworthiness justified on the grounds of its broad "humanitarian policy."⁵⁶ However, the *Mitchell* test of reasonable fitness,⁵⁷ along with the statement in *Morales v. Galveston*⁵⁸ that "the isolated and completely unforeseeable introduction of a noxious agent from without"⁵⁹ might not make a vessel unseaworthy, still left many questions for the courts and attorneys as to what actions by a stevedore would create unseaworthiness.⁶⁰

B. *When is Negligence of the Stevedore Unseaworthiness of the Vessel?*

Remembering that unseaworthiness is traditionally a condition evidencing a lack of reasonable fitness for the intended purpose, a major problem develops when a longshoreman is injured due to the negligence of the stevedore. At the present stage of development of the law, few will argue with the *Petterson* view that if a stevedore negligently brings aboard defective equipment which later injures a longshoreman, the ship is unseaworthy, *i.e.*, not reasonably fit for the purpose of loading or unloading cargo.

In a more difficult case, though, where, for example, a longshoreman is injured by negligently placing his hand through a perfectly fit glass window on the ship, the answer becomes less clear. In the hypothetical of the broken window, no one could argue that the mere existence of a window that might be broken is unseaworthiness. Add to the problem a fellow longshoreman who is hit by falling glass and injured. He may argue that for a brief moment there was an unseaworthy condition, *i.e.*, falling glass. Then, how about the longshoreman who is injured three weeks later in a fall caused by the broken glass which has been allowed to remain on deck? Surely, in regard to this last injured worker, the ship is not reasonably fit within the definition of seaworthiness. Yet, in the case of each of our longshoremen, the injury has been caused by the original negligent act. Since the Supreme Court has eliminated negligence concepts from unseaworthiness, how can the differing results be justified within a workable rule?⁶¹

In the landmark case of *Grillea v. United States*,⁶² the Second Circuit faced this type problem which has come to be known as instantaneous unsea-

54 *Id.* at 550.

55 386 U.S. 724 (1967).

56 *Id.* at 728.

57 *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). See text accompanying note 33 *supra*.

58 370 U.S. 165 (1962).

59 *Id.* at 171. Here improperly fumigated grain had injured longshoremen who were loading it in a non-ventilated hold.

60 See the discussion in *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271, 274-75 (5th Cir. 1967), where the court suggests that "intended use" or foreseeability has much to do with the reasonable fitness test of unseaworthiness. This seems to amount to re-introduction of a limited negligence standard into the concept of unseaworthiness.

61 This hypothetical of the broken window is suggested by Judge Hays' concurring opinion in *Puddu v. Royal Netherlands S.S. Co.*, 303 F.2d 752, 757 (2d Cir. 1962).

62 232 F.2d 919 (2d Cir. 1956).

worthiness or actionable or operational negligence, depending upon the approach adopted by the courts. In *Grillea* two members of a gang of longshoremen placed the wrong hatch cover over a "pad-eye" so that when the longshoreman-libellant later stepped on the cover it rocked causing him to fall and suffer injuries. Judge Learned Hand wrote:

[I]t 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 continuous 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, Di Donna, had been those who laid the wrong hatch cover over the "pad-eye"⁶³ only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness.⁶⁴

At the outset, Judge Hand recognized the difficulty in determining the point of time at which the negligence of a stevedore becomes unseaworthiness. He noted that subsequent cases would turn on their facts, but in this precedent-setting decision he seemed to look for some condition that resulted from the negligence and that existed for at least some length of time before the injury, or at least was separate from the negligence.

Despite the decision of the Supreme Court in *Mitchell* that regardless of the short duration or recent vintage of a hazard it may still constitute unseaworthiness,⁶⁵ an important element in the distinction between operational negligence and unseaworthiness is the question of whether the negligence of the worker causing the accident had yet made the workplace unsafe. In other words, a key issue is whether the injury was simultaneous with the negligence.⁶⁶ Similarly, the courts added the test of whether the "active negligence" of the longshoreman had come to rest leaving a resulting "condition" in existence.⁶⁷

An example of the application of the operational negligence-unseaworthiness distinction can be seen in *Billeci v. United States*⁶⁸ where the longshore-

63 A per curiam decision denying a petition for rehearing mentions that the opinion is incorrect in that the wrong hatch cover was placed by fellow workers rather than the libellant and Di Donna, but this correction makes no difference in the decision, and, if anything, makes the facts even stronger in support of it. *Id.* at 925.

64 *Id.* at 922-23.

65 See text accompanying notes 50-54 *supra*.

66 *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967); *Robichaux v. Kerr McGee Oil Indus., Inc.*, 376 F.2d 447 (5th Cir. 1967); *Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (9th Cir. 1964); *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964); *Billeci v. United States*, 298 F.2d 703 (9th Cir. 1962); *Puddu v. Royal Netherlands S.S. Co.*, 303 F.2d 752 (2d Cir. 1962); *Rawson v. Calmar S.S. Corp.*, 304 F.2d 202 (9th Cir. 1962); *Pinto v. States Marine Corp.*, 296 F.2d 1 (2d Cir. 1961).

67 *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967); *Robichaux v. Kerr McGee Oil Indus., Inc.*, 376 F.2d 447 (5th Cir. 1967); *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359 (2d Cir. 1966); *Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (9th Cir. 1964); *Billeci v. United States*, 298 F.2d 703 (9th Cir. 1962).

68 298 F.2d 703 (9th Cir. 1962).

man's injury was caused by a winch that came out of gear and allowed a raised hatch cover to fall and slide into the plaintiff. It was found that the winch was seaworthy and that it came out of gear solely due to the failure of the operating longshoreman to use the required safety devices to lock it in gear. The court stated:

[T]he shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances.

The instant case is distinguishable from both *Crumady* and *Grillea*. This is not a case where the negligent act had terminated and an appliance was left in an unsafe condition. As the trial court observed, the locking pin does not remain in a fixed position during stevedoring operations, but must be moved in and out whenever it becomes necessary to shift gears. . . . Plaintiff's injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. As the trial court aptly said: "The vessel was unsafe only so long as the negligence continued, whereas in *Grillea*, the negligent act terminated shortly after it began, but the unsafe situation continued to exist."⁶⁹

In contrast to this decision in *Billeci*, the doctrine did allow recovery in *Beeler v. Alaska Aggregate Corporation*⁷⁰ where a longshoreman was injured when a ladder slipped and he fell to the deck below. The ladder itself was found to be seaworthy and the usual and safe way to keep it from slipping was to have another worker hold it in place. Here, though, a walking boss and a fellow longshoreman became confused as to who would hold the ladder for *Beeler* with the result that neither did. The Ninth Circuit agreed with the trial court's finding that the applicable law was:

Liability 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 injury. It does attach if the negligent act has terminated and an appliance had been left in an unsafe condition.⁷¹

The trial court had found that the negligent act of the walking boss and fellow worker that created the unsafe condition had not terminated, but rather that it caused the unsafe condition simultaneously with the accident and injury.⁷² The Court of Appeals reversed saying that the legal principles had been wrongly applied to the facts.⁷³ The ladder did not fall due to the negligent way it was held but rather as the result of the negligent failure to hold it prior to the accident. The negligence, according to the court, had thus come to rest before the ladder fell and was thus an antecedent condition causing the ladder to become unseaworthy.⁷⁴

It is suggested that this is indeed a tricky distinction, and it is no wonder that a panel in the Second Circuit went out of its way in sustaining recovery

69 *Id.* at 705-07.

70 336 F.2d 108 (9th Cir. 1964).

71 *Id.* at 109-10.

72 *Id.* at 109.

73 *Id.* at 109-10.

74 *Id.* at 110.

in *Reid v. Quebec Paper Sales & Transportation Company*,⁷⁵ a similar ladder case, to technically avoid the *Grillea* doctrine. As was said there, "One does not have to be unduly cynical to look askance at their distinction [operational negligence v. unsafe condition], for every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it."⁷⁶ It went on to characterize the test as to whether the negligence had "terminated" or come to "rest" as being a "metaphysical inquiry."⁷⁷

Despite the criticisms,⁷⁸ courts in the Second,⁷⁹ Fifth⁸⁰ and Ninth⁸¹ Circuits generally retained the *Grillea* distinction between operational negligence and an unseaworthy condition negligently created, denying the ship's liability in the former case. The statement in *Billeci*, "the shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances,"⁸² seemed to be the general rule in these circuits.

On the other hand, the Third Circuit, having been overruled once on its transitory condition doctrine,⁸³ has become more cautious and has joined the Fourth Circuit⁸⁴ in holding that improper use by stevedores of proper equipment may render a ship unseaworthy.⁸⁵ This seems to mean that the *Grillea* distinction between operational negligence and unseaworthy condition no longer holds sway in these circuits.⁸⁶ As was said in *Scott v. Isbrandtsen Company*⁸⁷ and quoted in *Ferrante v. Swedish American Lines*:⁸⁸

In this circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and *in their method of operation* may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a longshoreman resulting from such condition.

75 340 F.2d 34 (2d Cir. 1965).

76 *Id.* at 37.

77 *Id.*

78 Dissenting opinions that are critical of this distinction for various reasons and on various theories have been the rule rather than the exception in the Second Circuit, e.g., *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 153 (2d Cir. 1966) (dissenting opinion); *Puddu v. Royal Netherlands S.S. Co.*, 303 F.2d 752, 754 (2d Cir. 1962) (dissenting opinion); *Pinto v. States Marine Corp.*, 296 F.2d 1, 8 (2d Cir. 1961) (dissenting opinion). Among the most convincing is Judge Friendly's dissent in *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539, 543-44 (2d Cir. 1966), pointing out that the hairsplitting decisions have led to different results in cases where there was no "meaningful difference either in the ship's performance or the plaintiff's desserts." *Id.* at 544. He also attacked cases that resulted in indemnity from the stevedore and destruction of the policy of the Longshoremen's Act. *Id.*

79 *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359 (2d Cir. 1966); *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 151 (2d Cir. 1966); *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966).

80 *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443 (5th Cir. 1967); *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271 (5th Cir. 1967); *Robichaux v. Kerr McGee Oil Indus., Inc.*, 376 F.2d 447 (5th Cir. 1967).

81 *Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (9th Cir. 1964); *Billeci v. United States*, 298 F.2d 703 (9th Cir. 1962); *Rawson v. Calmar S.S. Corp.*, 304 F.2d 202 (9th Cir. 1962). See *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964).

82 *Billeci v. United States*, 298 F.2d 703, 705-06 (9th Cir. 1962).

83 See text accompanying notes 52 and 65 *supra*.

84 *Scott v. Isbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964).

85 *Ferrante v. Swedish American Lines*, 331 F.2d 571 (3d Cir. 1964); *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964).

86 *Id.*; *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 127 (4th Cir. 1964).

87 327 F.2d 113 (4th Cir. 1964).

88 331 F.2d 571 (3d Cir. 1964).

This is true even though the condition be transitory and without knowledge of the ship's officers. Furthermore . . . in determining unseaworthiness no significance attaches to the fact that no one complained of the alleged unsafe condition.⁸⁹ (Emphasis added.)

Both courts also made much of the Supreme Court's emphasis on the "humanitarian policy" of the doctrine of unseaworthiness and noted that "[t]he obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen, and even others employed by independent contractors who may be called upon to work aboard vessels."⁹⁰

C. *Mascuilli v. United States and its Effect*

Regardless of the characterization of the question, *i.e.*, whether negligent use of seaworthy equipment by the longshoremen makes the ship unseaworthy or whether there is an unseaworthy condition or just continuing operational negligence, it was inevitable that the results in cases having similar factual situations were bound to vary in the different circuits and often within the same circuit. A definitive standard from the Supreme Court seemed very necessary.⁹¹

The Second Circuit in *Candiano v. Moore-McCormack Lines, Incorporated*⁹² attempted to analyze the recent three-sentence per curiam opinion of the Supreme Court in *Mascuilli v. United States*.⁹³ *Candiano* suggests that "the doctrine of operational negligence now seems to have been rejected by the Supreme Court as a factor in the determination of liability"⁹⁴ and that "*Grillea* and a long line of other decisions of this Court [Second Circuit] attempting to define where operational negligence ends and unseaworthiness begins would seem to be no longer controlling in the light of *Mascuilli*."⁹⁵

If the Second Circuit's interpretation of *Mascuilli* is correct, it would seem that the Supreme Court has laid to rest the doctrine of "operational negligence" and has instead "sanctioned the doctrine of 'instantaneous unseaworthiness,' so that a longshoreman may now recover for the negligence of his fellow workers even though no unseaworthy 'condition' has been created."⁹⁶ A number of lawyers and judges have agreed with the *Candiano* interpretation of the *Mascuilli* holding.⁹⁷

89 *Id.* at 577; *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 125-26 (4th Cir. 1964).

90 *Ferrante v. Swedish American Lines*, 331 F.2d 571, 578 (3d Cir. 1964); *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 124 (4th Cir. 1964).

91 *See M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES* § 38, at 75-80 (2d ed. 1966).

92 382 F.2d 961 (2d Cir. 1967).

93 387 U.S. 237 (1967). The opinion stated *in toto*:

The petition for a writ of certiorari is granted and the judgment is reversed. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423.

Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice White are of the opinion that certiorari should be denied.

The various stages of *Mascuilli* are found at: 188 F. Supp. 754 (E.D. Pa. 1960), *rev'd*, 313 F.2d 764 (3d Cir. 1963); 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).

94 *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961, 962 (2d Cir. 1967).

95 *Id.*

96 *Jackson v. The S.S. Kings Point, No. 7583, E.D. La., November 24, 1967, p. 3.*

97 *Id.*

In *Mascuilli* the longshoreman was killed when starboard and port vang (opposing cables used for horizontally moving an overhead boom) became taut simultaneously causing one of the vangs to break and whip back striking him. In its Finding of Fact 35, the district court stated:

In summary, the Court finds that the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or prevent its happening.⁹⁸

Thus according to *United States Law Week* and *Candiano*, the issue posed to the Supreme Court was: "Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"⁹⁹ If this was indeed the issue decided by the Supreme Court, it is apparent that their reversal of a judgment for the shipowner amounts to an affirmative answer and a refutation of the *Grillea* doctrine's distinction between operational negligence and unseaworthiness.

However, the petition in the Supreme Court for certiorari by the libellant shows that two other issues were presented to the Court.¹⁰⁰ The more important of these two,¹⁰¹ as stated by the libellant, was:

Where the safety devices on a ship's loading gear are set at one and a half and three times in excess of the safe working load of the ship's gear, . . . was the vessel not unseaworthy and the owner liable for the death of a longshoreman resulting from the fractured gear under the principle of law enunciated by this Court in *Crumady v. "Joachim Hendrik Fisser,"* 358 U.S. 423 (1959), wherein this Court held that where a dangerous condition due to the excess setting of the ship's safety devices is brought into play by the negligent operation of the stevedores, the resulting injuries must be deemed due to the unseaworthiness of the vessel?¹⁰²

The district court dismissed this condition from consideration as unseaworthiness on a technical argument that despite the fact the safety devices were set at a level in excess of the safe working load of the equipment,¹⁰³ they would have had no application in the instant case.¹⁰⁴ However, the facts remain that

98 *Mascuilli v. United States*, 241 F. Supp. 354, 362 (E.D. Pa. 1965).

99 *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961, 962 (2d Cir. 1967); 35 U.S.L.W. 3052, (U.S. July 26, 1966).

100 Petitioner's Brief for Certiorari at 2, *Mascuilli v. United States*, 387 U.S. 237 (1967).

101 The third issue brought to the Court's attention was based on the district court's Conclusion of Law 17, that "[t]he longshoremen crew was not 'equal in disposition and seamanship to the ordinary men in the calling' at the time the ninth tank was being loaded." *Mascuilli v. United States*, 241 F. Supp. 354, 364 (E.D. Pa. 1965).

The petitioner argued at page 11 of his Petition for Writ of Certiorari that, as a matter of law, this finding required the conclusion that the vessel was, for this reason alone, unseaworthy on the basis of *Boudoin v. Lykes Brothers Steamship Corporation*, 348 U.S. 336 (1955). See text accompanying note 49 *supra*. While the summary reversal by the Supreme Court does not show that it acted upon this argument, there is little more reason to believe that it meant to destroy the *Grillea* doctrine than to believe the Court felt this argument controlling.

102 Petitioner's Brief for Certiorari at 2, *Mascuilli v. United States*, 387 U.S. 237 (1967).

103 *Id.* at 2.

104 *Mascuilli v. United States*, 241 F. Supp. 354, 360-61, 363-64. (E.D. Pa. 1965).

the safety devices were set beyond the safe working load, neither operated to cut off the power, and the strain was irrefutably excessive to the point that the shackle actually shattered causing the accident.¹⁰⁵

In *Crumady v. The Joachim Hendrik Fisser*¹⁰⁶ a boom fell injuring the petitioner. The winch that served the boom had a cut-off safety device that was set to shut off the current at a load twice the safe working load of the gear. The district court found that the vessel was unseaworthy and that the stevedores acted in a negligent manner thereby creating an excess working load and thus precipitating the accident.¹⁰⁷ In reinstating the district court's finding of unseaworthiness, the Supreme Court said:

[T]here is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in the *Mahnich* case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand. . . . The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. In that case the cable or rope, in this case the winch, makes the vessel *pro tanto* unseaworthy. That was the theory of the District Court; it correctly applied the concept of unseaworthiness . . .¹⁰⁸

The fact that the Supreme Court, in its summary reversal in *Mascuilli*, cited only *Crumady* and *Mahnich*, lends credence to a belief that the Court did not consider *Mascuilli* as being within the operational negligence—unseaworthiness problem at all. The facts were as near to being on all fours with *Crumady* as they could be so that it is possible that the Court reversed in such a summary manner on the belief that *Crumady* was controlling on the facts, and that the Court intended to express no opinion on the *Grillea* doctrine.

D. Conclusion

It becomes evident, as at least one district court has pointed out,¹⁰⁹ that

¹⁰⁵ Petitioner's Reply Brief for Certiorari at 2, *Mascuilli v. United States*, 387 U.S. 237 (1967). The district court's finding was based primarily on the fact that safety cut-offs will not trip when the winch control is in a paying-out position as was the after port winch at the time of the accident. However, it appears that the tightline condition was caused by the fact that the forward starboard vang had not been slackened. We are given no insight by the district court as to whether the safety cut-off on this winch might have avoided the accident by applying the winch cut-off before the tightline condition worsened to the point of accident.

¹⁰⁶ 358 U.S. 423 (1959).

¹⁰⁷ *Id.* at 425-26.

¹⁰⁸ *Id.* at 427-28.

¹⁰⁹ [W]e are plagued by a certain amount of doubt in light of the authorities relied upon by the Supreme Court in *Mascuilli* and by the fact that *Mascuilli* was only a per curiam opinion of the briefest possible nature. Consequently, we are not prepared to hold, at this time, that this [destruction of the operational negligence—unseaworthiness distinction] was *Mascuilli's* effect.

The different possibilities of *Mascuilli's* effect, if any, upon the law operates as a signal to this Court to proceed with caution in this area in the absence of further elucidating opinions from a higher and binding source.

Jackson v. The S.S. Kings Point, No. 7583, E.D. La., November 24, 1967, pp. 3-4.

the effect of *Mascuilli* is far from certain. It may, as *Candiano* suggests, eliminate the doctrine of "operational negligence" and in its place substitute one of "instantaneous unseaworthiness," so that a longshoreman may now recover for the negligence of his fellow workers even though no unseaworthy "condition" has been created.¹¹⁰ On the other hand, *Mascuilli* may preserve the unseaworthiness — negligence dichotomy, but in so doing it may have pushed unseaworthiness to its furthest possible limit so that it will be *presumed* to exist when there is any question at all as to whether or not a "condition" caused the longshoreman's injuries. Recovery would thus be denied only when it is crystal clear that operational negligence was the cause.¹¹¹ As suggested above, a third alternative is that *Mascuilli* may leave the operational negligence — unseaworthy condition struggle right where it had been previously.

If *Mascuilli* allows recovery regardless of the existence of an unseaworthy condition, and to a lesser degree if it only creates a presumption of an unseaworthy condition, it will have done much to eliminate the unfairness and confusion spawned by the inconsistent decisions under the *Grillea* doctrine.¹¹² No longer will an actively negligent stevedore escape indemnity liability, while the faultless stevedore is obliged to pay because he has brought a latently defective appliance aboard.¹¹³ This consideration brings into play the real effect of the "holding" in *Mascuilli*, that is, if the ship is unseaworthy when the cause of an injury is solely stevedore negligence, the remaining thread of the limited liability provisions of the Longshoremen's Act is broken. When the stevedore's negligence is responsible for the unseaworthiness, he ultimately bears the damages through indemnity. The doctrine of unseaworthiness, as applied to longshoremen, has thus become a ruse for getting around the policy of Congress in the Longshoremen's Act.

This development has come about through the holdings of *Mahnich*, *Sieracki*, *Ryan*, and *Mascuilli*. Each case considered alone, especially in light of the overriding "humanitarian policy" appears just. Together, however, they create a circuitous form of action that frustrates the congressional policy of the Longshoremen's Act just as much as a direct holding against it. The Supreme Court has backed itself into a round corner and *Mascuilli* may shut the door. Even if it does not, it is time for Congress to re-evaluate the effectiveness of its policy limiting the liability of stevedores.

John E. Amerman

¹¹⁰ *Id.* at 2-3.

¹¹¹ *Id.* at 3.

¹¹² *See id.* at 4. *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966) (dissenting opinion); *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539 (2d Cir. 1966) (dissenting opinion).

¹¹³ *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).