Florida Law Review

Volume 24 | Issue 2 Article 5

January 1972

Recent Developments in the Doctrine of Unseaworthiness

Knowlton H. Shelnut

NOTES

RECENT DEVELOPMENTS IN THE DOCTRINE OF UNSEAWORTHINESS*

The doctrine of unseaworthiness is a continually growing concept, evolving with few restrictions. From an obscure beginning in 1903 it has experienced broad expansion and redefinition within admiralty law. Today it provides an extensive theory of redress for both seamen and longshoremen injured or killed while in the service of the ship.

This note will briefly trace the development of the unseaworthiness doctrine and will particularly examine three areas of current development. The United States Supreme Court recently expanded the scope of the doctrine by allowing a general maritime right of action for wrongful death. In addition, the Court recognized the shipowner's defense of operational negligence and thus sanctioned a major limitation on his liability. Moreover, the lower federal courts have played a major role in expanding maritime jurisdiction. In recent years a majority of the circuits had allowed claims for unseaworthiness where the longshoreman was injured some distance from the ship or injured by equipment not traditionally a part of the vessel. However, the Supreme Court, again limiting the doctrine's scope, held that state law rather than federal maritime law governs the longshoreman's suit for nonshipboard injuries caused by a stevedore's shorebased equipment.

SCOPE AND COVERAGE OF THE WARRANTY OF UNSEAWORTHINESS — THE HISTORICAL DEVELOPMENT

The genesis of the twentieth century development of the doctrine of unseaworthiness is traced to the obscure but now classic dictum in *The Osceola*.[1] At its inception the doctrine was greatly restricted in scope with little similarity to its later construction as "essentially a species of liability without fault."[2] Initially, most lower federal courts limited liability to those situations in which the shipowner's negligence resulted in the vessel's unseaworthiness.[3] Seamen used the doctrine for the next two decades primarily to

---

*EDITOR'S NOTE: This note received the *Gertrude Brick Law Review Apprentice Prize* for the best student note submitted in the summer 1971 quarter.

1. 189 U.S. 158, 175 (1903), where Justice Brown said: "The vessel and her owner are, both by English and American Law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

For an extensive discussion of the historical background preceding and leading up to Justice Brown's proposition, *see* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 315-32 (1957); Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 382-403 (1954). *See also* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543-45 (1960); Dixon v. United States, 219 F.2d 10, 12-15 (2d Cir. 1955).

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

3. *E.g.*, Tropical Fruit S.S. Co. v. Towle, 222 F. 867 (5th Cir. 1915); Henry B. Fiske, 141 F. 188 (D. Mass. 1905).

recover for injuries resulting from defective appurtenances.[4] Not until 1922 did the Supreme Court make its first reference to the shipowner's obligation to furnish a seaworthy vessel without consideration of the standard of ordinary care and negligence.[5]

The idea that unseaworthiness does not depend upon the negligence of the shipowners or his agents was firmly established in 1944.[6] In *Mahnich v. Southern S. S. Co.*[7] the seaman recovered on the theory of unseaworthiness for injuries sustained at sea when a defective support rope gave way, causing a portion of the ship's staging to fall. Although sound rope was available, the Court noted: "[T he staging] was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable."[8] Consequently, the seaman in performing his duties did not assume the risk of unseaworthy gear.

Perhaps the most momentous decision in the doctrine of unseaworthiness came two years after *Mahnich* in *Seas Shipping Co. v. Sieracki*.[9] The obligation of seaworthiness, traditionally owed by the shipowner to seamen, was extended to cover a longshoreman injured while aboard the vessel. In that case a longshoreman was injured when a latent defect caused a shackle supporting a boom to break and fall. Establishing that the shipowner's warranty was absolute and nondelegable, the Supreme Court stated in regard to unseaworthiness:[10]

> It 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 services 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.

As a result, the warranty of seaworthiness was extended not only to the seaman who performed the ship's services under immediate hire of the shipowner, but also to the longshoreman who rendered seaman's services with the owner's consent. The rationale for the extension was that a worker

---

4. *See* M. NORRIS, MARITIME PERSONAL INJURIES §19 (1959).

5. Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922). "[The] trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." *Id.* at 259.

6. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). "After *Mahnich* no amount of negligence on the part of the master, the officer in charge or fellow crew members was fatal, provided only that plaintiff could find some handhold of unseaworthiness to cling to." G. GILMORE & C. BLACK, *supra* note 1, at 320.

7. 321 U.S. 96 (1944).

8. *Id.* at 103.

9. 328 U.S. 85 (1946).

10. *Id.* at 94-95.

"doing a seaman's work and incurring a seaman's hazards"[11] should be entitled to the seaman's protection, regardless of the employer.[12] With this landmark decision the "floodgates of maritime personal injury litigation were opened."[13]

After five decades of maritime personal injury litigation, the obvious trend in general maritime law has been toward ever increasing protection of seamen, longshoremen, and others called to work in the ship's service. The shipowner's duty to provide a seaworthy vessel[14] has evolved into an absolute,[15] continuing,[16] and nondelegable[17] duty extending to all who perform the type of work traditionally done by members of the ship's crew.[18]

A New Federal Wrongful Death "Remedy" for Maritime Torts

In overruling a ninety-four year old precedent, the United States Supreme Court recently held that general maritime law will allow an action for wrongful death. This section will examine the confusion in admiralty law existing prior to *Moragne v. States Marine Lines, Inc.*,[19] and will note its rectifying effects.

Historical Background

American maritime law, like the common law, did not allow a cause of action for wrongful death unless expressly provided by statute.[20] While the common law rule was first explicitly stated in 1808,[21] judicial opinions had implied its existence as early as 1607.[22] It was probably derived from the felony-merger doctrine that existed in England prior to the 19th century.[23] Although some early American courts did not adopt this rule,[24] the Supreme

---

11. *Id.* at 99.
12. *Id.*
13. M. Norris, *supra* note 4, §23.
14. The Osceola, 189 U.S. 158 (1903).
15. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
16. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).
17. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).
18. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). *See also* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
19. 398 U.S. 375 (1970).
20. The Harrisburg, 119 U.S. 199 (1886).
21. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).
22. Higgins v. Butcher, 80 Eng. Rep. 61 (K.B. 1607).
23. Under this rationale, the civil wrong merged with the felony, and when the felon was executed all his property escheated to the Crown—leaving nothing to satisfy a wrongful death claim. W. Prosser, Torts 920 (3d ed. 1964).

Other possible bases for the rule are: (1) the common law maxim *actio personales moritur cum persona*; (2) that public policy prohibited human life being made subject to judicial computation. For a detailed historical development of the rule *see* 3 W. Holdsworth, A History of English Law 331-36 (5th ed. 1942); Winfield, *Death as Affecting Liability in Tort*, 29 Colum. L. Rev. 239 (1929).

24. *E.g.*, Sullivan v. Union Pac. R.R., 23 F. Cas. 368 (No. 13,599) (C.C.D. Neb. 1874); Shields v. Yonge, 15 Ga. 349 (1854); Cross v. Guthery, 2 Root 90 (Conn. 1794).

Court applied it to torts committed on land and held that "no civil action lies for an injury which results in death. . . ."[25]

The rule was extended to maritime torts in 1886 in *The Harrisburg*[26] where the Court held that no remedy for wrongful death existed in general maritime law and that courts must look to appropriate federal or state statutes for wrongful death remedies. State wrongful death acts were first used to avoid the harsh maritime rule,[27] but since this was often a limited recourse it was subsequently complemented by federal statutes permitting seamen and other designated persons to recover damages for wrongful death.[28]

The application of federally created wrongful death actions was limited, however, to the specific subject matter encompassed by the particular statutes[29] and did not contemplate a general right of action for wrongful death. The Jones Act, for example, provided a wrongful death remedy only if the seaman's death was caused by injuries attributable to the negligence of his employer.[30] As a result, wrongful death actions arising out of fact situations not specifically contemplated by federal law were remitted to state wrongful death law with its inherent limitations.[31] Thus, a remedial void existed when the state's wrongful death statute[32] did not incorporate such principles of maritime law as unseaworthiness. On the other hand, disposition of maritime law by utilization of common law concepts engendered a mass of confusing decisions that culminated in *The Tungus v. Skovgaard*.[33]

Pre-Moragne *Quagmire*

In *The Tungus v. Skovgaard*[34] an employee of an independent contractor, hired to discharge cargo, was killed when he slipped and fell into a tank of

25. Insurance Co. v. Brame, 95 U.S. 754, 756 (1878).

26. 119 U.S. 199 (1886).

27. *E.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Hamilton, 207 U.S. 398 (1907).

28. Jones Act, 46 U.S.C. §688 (1970); Death on the High Seas Act, 46 U.S.C. §§761-68 (1970).

29. The Jones Act, for example, limited recovery to a cause of action by a seaman against his employer. Since the Jones Act incorporates the Federal Employer's Liability Act (F.E.L.A.), 45 U.S.C. §51 (1970), there must also be in existence a member or members entitled to recover under the F.E.L.A. Furthermore, the Jones Act limited the right to sue for negligence only, 46 U.S.C. §688 (1970). The Death on the High Seas Act restricted its death remedy for wrongful death occurring at sea more than 3 miles from shore. 46 U.S.C. §§761-68 (1970).

30. 46 U.S.C. §688 (1970). The Jones Act incorporates the Federal Employer's Liability Act, 45 U.S.C. §51 (1970), which states: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ."

31. The Tungus v. Skovgaard, 358 U.S. 588 (1959).

32. *See, e.g.*, FLA. STAT. §768.01 (1969), *construed in* Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. 1968).

33. 358 U.S. 588 (1959).

34. *Id.*

heated coconut oil. The plaintiff, who alleged negligence and unseaworthiness, predicated recovery upon New Jersey's wrongful death act.[35] The federal district court dismissed the libel because no right of action for wrongful death by unseaworthiness existed under general maritime law and also found no duty to furnish the deceased with a safe place to work.[36] The court of appeals reversed and remanded, holding that the New Jersey wrongful death act did embrace a claim for unseaworthiness and that there was a duty owed the deceased to exercise due care for his safety.[37]

On appeal, the pivotal issue confronting the Supreme Court was whether the state or federal substantive law should apply if a state wrongful death act was broad enough to encompass an action for death caused by the vessel's unseaworthiness. The Court held that when an admiralty court adopts a state cause of action for wrongful death it "must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached."[38] Whenever the duty to furnish a seaworthy vessel is created by state law, recovery must be predicated upon the entire state wrongful death statute. In effect, the ruling in *The Tungus* required the court trying the case to utilize the state's substantive law as well as its death remedy.

The dissent argued that the duties owed a longshoreman on board the vessel were created by maritime law and, therefore, should be governed by federal substantive principles. Since maritime law allows no remedy for wrongful death occurring upon a state's navigable waters, it should utilize the state statute that generally provides a remedy for tortious death in enforcing the federal cause of action.[39]

The anomaly created by *The Tungus* in applying substantive state law became readily apparent. The primary determinant of recovery was whether the injury was fatal.[40] If fatal, the survivors had to look to applicable state law to determine recovery;[41] if nonfatal, theories under general maritime law, such as unseaworthiness, could provide a tort remedy.[42] If, for example, a longshoreman were killed within the territorial waters of New Jersey his survivors could recover on a claim of unseaworthiness, since New Jersey's act incorporated substantive admiralty principles.[43] If, however, the same longshoreman were killed as the result of the same unseaworthy condition in Florida's territorial waters, his survivors would probably be precluded from

---

35. N.J. STAT. ANN. §2A: 31-1 (1952). The Act gives a cause of action when the death of a person is caused by "a wrongful act, neglect or default . . . ."

36. Skovgaard v. The Tungus, 141 F. Supp. 653 (D.N.J. 1956).

37. Skovgaard v. The Tungus, 252 F.2d 14 (3d Cir. 1957).

38. The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959).

39. *Id.* at 597-612.

40. In dissent, Justice Brennan stated: "Today the Court announces the strange principle that the substantive rules of law governing human conduct in regard to maritime torts vary in their origin depending on whether the conduct gives rise to a fatal or a nonfatal injury." *Id.* at 611.

41. Where state substantive law was applicable, recovery for wrongful death was often dependent on such principles as contributory negligence and assumption of risk.

42. *See, e.g.*, Graham v. Lusi, 206 F.2d 223, 225 (5th Cir. 1953).

43. N.J. STAT. ANN. §2A: 31-1 (1952).

recovering, since the Florida statute does not contemplate the unseaworthiness principle.[44]

Prior to the *Moragne* decision, Florida stood alone among the major maritime states in denying to the survivors of a deceased longshoreman the benefits of general maritime substantive law, such as the warranty of seaworthiness and comparative negligence.[45] Early Florida cases interpreting Florida's wrongful death act[46] in relation to maritime torts were decided by lower federal courts.[47] In those cases, the Court of Appeals for the Fifth Circuit held that, in the absence of state authority, the Florida statute did not incorporate principles of maritime law.

Subsequently, the Florida supreme court held that contributory negligence was a complete bar to recovery for wrongful death occurring upon the state's navigable waters.[48] In addition, Florida's statute created in behalf of the statutory beneficiaries a new right of action for wrongful death based on common law principles rather than preserving the right of action, which the deceased could have prosecuted had he lived.[49] By refusing to incorporate principles of general maritime law Florida became a primary contributor to the contradictory decisions and often anomalous results engendered by *The Tungus.*

Inconsistencies were not confined to the nonstatutory aspects of maritime law, but also resulted from the piecemeal federal legislation in the area. In *Gillespie v. United States Steel Corp.*,[50] the Jones Act was construed to provide an exclusive right of action for death of a "seaman" killed in the scope of his employment, and recovery was based on proof of the employer's negligence. The Act precluded recovery predicated on a state wrongful death act, although the state act recognized unseaworthiness as a basis for recovery. Absent negligence, the Jones Act provided no remedy for wrongful death.[51]

---

44. *See, e.g.*, Moragne v. States Marine Lines, Inc., 211 So. 2d 161, 167 (Fla. 1968).

45. After *The Tungus* decision, the following states interpreted their death acts to incorporate admiralty substantive law: (California) Curry v. Fred Olsen Lines, 367 F.2d 921 (9th Cir. 1966), *cert. denied*, 386 U.S. 971 (1967); (Louisiana) Grigsby v. Coastal Marine Serv., 235 F. Supp. 97 (W.D. La. 1964), *aff'd*, 412 F.2d 1011 (5th Cir. 1969); (Maryland) Smith v. The Nabella, 176 F. Supp. 668 (D. Md. 1959); (Michigan) Hunter v. Dampsk A/S Flint, 279 F. Supp. 701 (E.D. Mich. 1967); (New Jersey) United N.J. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); (New York) Cunningham v. Rederiet Vindeggen, 333 F.2d 308 (2d Cir. 1964); (Oregon) Hess v. United States, 361 U.S. 314 (1960); (South Carolina) Antony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961); (Texas) Vassallo v. Neder/-Amerik Stoomv Maats Holland, 344 S.W.2d 421 (Tex. 1961); (Virginia) Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959); (West Virginia) Goett v. Union Carbide Corp., 361 U.S. 340 (1960).

46. FLA. STAT. §768.01 (1969).

47. *E.g.*, Emerson v. Holloway Concrete Prod. Co., 282 F.2d 271 (5th Cir. 1960); Graham v. Lusi, 206 F.2d 223 (5th Cir. 1953).

48. Bilbrey v. Weed, 215 So. 2d 479 (1968). This holding was totally contrary to admiralty principles of comparative negligence.

49. *E.g.*, Morgane v. States Marine Lines, Inc., 211 So. 2d 161, 164 (Fla. 1968); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

50. 379 U.S. 148 (1964).

51. Lindgren v. United States, 281 U.S. 38 (1930); Turcich v. Liberty Corp., 217 F.2d 495 (3d Cir. 1954); Kunschman v. United States, 54 F.2d 987 (2d Cir. 1932).

For nonfatal accidents occurring prior to *Moragne,* the nonseaman who performed work in the ship's service could recover under maritime law for injuries caused by unseaworthiness.[52] The injured seaman could maintain an action against the shipowner predicated upon either negligence under the Jones Act or upon the general maritime doctrine of unseaworthiness. In fatal injuries arising on the high seas, the Death on the High Seas Act[53] provided the representatives of seamen and longshoremen a remedy for negligence or unseaworthiness.[54] However, the representatives of a nonseaman killed within territorial waters could seek recovery based on the state's wrongful death act only if maritime principles were incorporated.[55] Moreover, the deceased seaman's survivors were limited to recovery under the Jones Act for negligently-caused death within the state's waters.[56] Consequently, recovery became largely fortuitous, depending upon three variables: the identity of the victim; the location of the accident; and the fatal or nonfatal nature of the injury.

An Action for Wrongful Death Within General Maritime Law

In *Moragne v. States Marine Lines, Inc.*[57] the United States Supreme Court created a maritime cause of action for tortious death on state territorial waters. Plaintiff's husband, a longshoreman, had been killed by a falling hatch beam while working aboard a vessel on navigable waters in Florida. The plaintiff sued the vessel's owner under Florida's Wrongful Death Act[58] and survival statute[59] on claims of negligence and unseaworthiness. The district court dismissed the claim of unseaworthiness under Florida's statute.[60] On interlocutory appeal, the Court of Appeals for the Fifth Circuit certified a question to the Florida supreme court as to whether the Florida wrongful death act incorporated substantive maritime principles.[61] The Florida court found that the statute did not incorporate substantive admiralty principles and, therefore, did not encompass a cause of action for unseaworthiness.[62] On certiorari, the Supreme Court unanimously reversed

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

53. 46 U.S.C. §761 (1970).

54. Kerman v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958).

55. *Compare* The Tungus v. Skovgaard, 358 U.S. 588 (1959), *with* Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. 1968).

56. Justice Goldberg, dissenting in *Gillespie v. United States Steel Corp.,* said: "Only the family survivors of a seaman are left without a remedy for his death within territorial waters caused by failure to maintain a seaworthy vessel. Only they are denied recourse to this rule of absolute liability and relegated to proof of negligence under the Jones Act." 379 U.S. 148, 159 (1964).

57. 398 U.S. 375 (1970).

58. FLA. STAT. §768.01 (1969).

59. FLA. STAT. §46.021 (1969).

60. *See* Moragne v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969).

61. *Id. See also* FLA. STAT. §25.031 (1969); FLA. APP. R. 4.61; Note, *Florida's Interjurisdictional Certification: A Reexamination To Promote Expanded National Use,* 22 U. FLA. L. REV. 21 (1969).

62. Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. 1968).

and held that an action lies under federal maritime law for death caused by violations of maritime duties.[63]

The immediate effects of this landmark decision are threefold. First, a federal cause of action for wrongful death is created, thus providing a remedy regardless of where the tort occurs. Now, conduct of the shipowner that breaches his warranty of seaworthiness will produce liability not only when the victim is injured but also when he is killed.[64] While an unseaworthy condition resulted in liability for death occurring outside the state's territorial waters prior to the instant case,[65] the same condition will now create liability within the state's territorial waters. Moreover, the survivors of both seamen and longshoremen fatally injured on the state's territorial waters now have a right of action for wrongful death under the general maritime doctrine of unseaworthiness.[66]

It also appears that the seaman's right to a claim of unseaworthiness under general maritime law is in addition to claims under the Jones Act[67] or a claim based on the Death on the High Seas Act.[68] The Supreme Court, in dictum, indicated that the new federal remedy "seemed to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*."[69] In deciding that the Jones Act supersedes the application of a state wrongful death statute, neither *Gillespie*[70] nor its predecessor, *Lindgren v. United States*,[71] discussed the effect of the Jones Act on other federal remedies.

Second, greater uniformity in admiralty tort actions now appears to have been achieved under general maritime law. The *Moragne* court stated:[72]

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

This decision reaffirms the constitutional principle that federal admiralty law must be "a system of law co-extensive with, and operating uniformly in, the whole country."[73] Previously this objective could not be achieved, since *The Harrisburg* invited conflicting decisions[74] by requiring reliance upon state

63. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970).
64. This corrects the inequity created by both *The Harrisburg* and *The Tungus*.
65. *See* Kerman v. American Dredging Co., 355 U.S. 426 (1958).
66. The *Moragne* case dealt specifically with the wrongful death of a longshoreman; but the new right of action created by the Supreme Court is broad enough to encompass longshoremen and seamen alike. *See* Epling v. M.T. Epling Co., 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).
67. McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).
68. Kerman v. American Dredging Co., 355 U.S. 426 (1958).
69. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12 (1970).
70. *See* text accompanying notes 50-51 *supra*.
71. 281 U.S. 38 (1930).
72. 398 U.S. 375, 401 (1970).
73. The Lottawanna, 88 U.S. 558, 575 (1875).
74. *E.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959); Moragne v. States Marine

wrongful death statutes. However, *Moragne* now provides a federal right of action for the breach of a federally created duty to furnish a seaworthy vessel, and therefore it no longer depends on the vagaries of state law. The policy — that the federal nature of admiralty law and the unique risks inherent in traveling and working upon state territorial waters requires a uniform law — has now been fully implemented.

Finally, by placing the burden upon the shipowner who has the advantage of distributing the loss over the industry,[75] the new right of action will provide relief from economic loss, which otherwise might have been sustained by the maritime worker and his dependents.[76] The growth of insurance and the highly subsidized nature of the shipping industry seem to buttress the proposition that it is more able to bear the risk than the individual seaman or longshoreman.[77]

Unanswered Questions

Although a federal right of action now exists, questions concerning its implementation, vital to future litigation, remain unanswered. The *Moragne* court suggested that personal injury cases and analogous federal maritime statutes would provide possible guidelines in solving such problems as the proper limitation period, possible defenses, the determination of beneficiaries, and the amount of damages.[78]

Limitation Period. While there is no federal statute of limitation for actions of unseaworthiness, the rule of laches has been applied in admiralty law to other maritime causes of action.[79] Since the bar to wrongful death actions has been removed from general maritime law, the equitable doctrine of laches appears to be the proper measure for determining inexcusable delay. Future courts may consider as possible guidelines the one-, two-, or three-year statutes of limitation as provided by three federal maritime statutes.[80] In addition, there is authority for applying a three-year limitation

---

Lines, Inc., 211 So. 2d 161 (Fla. 1968).

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

76. Note, *Judicial Expansion of Remedies for Wrongful Death in Admiralty: A Proposal*, 49 B.U.L. REV. 114, 143 (1969). It should be noted that the survivors of the deceased longshoreman may recover from this general maritime action, as well as the remedy under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §§901-50 (1970). In maritime personal injury cases, the Supreme Court has apparently sanctioned such double recovery, since it allowed the circumvention of the exclusive nature of the statutory remedy. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

77. *See* Note, *supra* note 76, at 139-40; *cf.* Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967).

78. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 407 (1970).

79. McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958). *See* 2 M. NORRIS, THE LAW OF SEAMEN §633 (3d ed. 1970).

80. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §909 (1970) (one year); Death on the High Seas Act, 46 U.S.C. §763 (1970) (two years); Jones Act, 46 U.S.C. §688 (1970) (three years).

period in deciding untimeliness.[81]

Perhaps the two-year limitation of the Death on the High Seas Act should be the most persuasive standard in determining the measure of laches. The Act is not only broader in scope than other federal legislation, but also is not limited to a specific class of victims as are other statutes.[82] Additionally, it is the only statute that applied specifically and exclusively to the right to bring a wrongful death action.

Defenses. Since the right created in *Moragne* is uniquely maritime in nature, all defenses available under the doctrine of unseaworthiness in personal injury cases should be applicable to the wrongful death action. Admiralty law has traditionally followed the more flexible rule of comparative negligence, which allows consideration of contributory negligence only in mitigation of damages.[83] The decedent's contributory negligence, however, will bar an action if it is the sole cause of the injury.[84] After *Moragne* the Fifth Circuit reversed a lower court's decision barring an action because of contributory negligence and applied the traditional admiralty comparative negligence standard.[85] If the vessel is seaworthy and the accident is caused solely by the negligence of the seaman or longshoreman, such negligence at the moment of the accident does not render the vessel unseaworthy; therefore, the decedent's representative is not entitled to recover from the shipowner for such negligence.[86]

The shipowner should also be precluded from avoiding liability for wrongful death due to an unseaworthy condition on the ground that the decedent assumed the risk of his employment. As with contributory negligence, the common law defense of assumption of risk has traditionally been unavailable as a bar to an unseaworthiness claim.[87] Therefore, the implementation of maritime rules with respect to comparative negligence and assumption of risk now appear to be clearly applicable in maritime wrongful death actions as they are in other causes of action based upon unseaworthiness.

Schedule of Beneficiaries. Perhaps the greatest difficulty in implementing the new remedy will be in the determination of beneficiaries. Schedules vary considerably among both the federal maritime statutes and the state sta-

---

81. Flowers v. Savannah Mach. & Foundry Co., 310 F.2d 135 (5th Cir. 1962) (The Jones Act three-year period was used by analogy).

82. Death on the High Seas Act, 46 U.S.C. §§761-68 (1970).

83. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); The Max Morris, 137 U.S. 1 (1890).

84. 2 M. NORRIS, *supra* note 79, §630. *Cf.* Chesapeake & Ohio Ry. v. Newman, 243 F.2d 804 (6th Cir. 1957); Mason v. Lynch Bros. Co., 228 F.2d 709 (4th Cir. 1956).

85. Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970).

86. For a discussion of the defense of operational negligence *see* text accompanying notes 116-208 *infra.*

87. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *See also* 2 M. NORRIS, *supra* note 79, §623.

tutes.[88] Although it is conceivable that relevant state law may be considered, this seems unlikely as the maritime duties that have been abrogated are entirely federal. In fact, a preference for congressional determination of the manner of implementation has been indicated.[89]

Congressional intent may be discerned from three federal maritime statutes. The Longshoremen's and Harbor Workers' Compensation Act predicates recovery upon a compromise or *quid pro quo* basis, characteristic of workmen's compensation acts.[90] In return for the relinquishment of certain common law defenses the survivor's recovery is limited to a scheduled loss in the event of death. This provision does not conform to general maritime principles of recovery[91] and seems, therefore, inapplicable.

Similarly, the Jones Act appears to be an inappropriate guideline since it incorporates a remedial system foreign to admiralty law.[92] Moreover, its scope is limited to seamen's claims against their employers, and recovery is based upon violations of a specific standard of negligence.[93] In determining beneficiaries the Act provides for a mutually exclusive class.[94] Under this Act a class of beneficiaries, rather than the decedent's estate, is named.[95] If the seaman leaves no survivor in any of the designated classes, his personal representative is precluded from recovery for his death.[96] A dependent relative, for example, can be barred by a prior class of nondependent relatives who have suffered no pecuniary loss.[97] These and other limitations diminish its likelihood as a guideline.

---

88. *Compare* FLA. STAT. §768.02 (1969), *with* N.J. STAT. ANN. §2A:31-2 (1952).

89. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408-09 (1970) (argument of United States as amicus curiae, which was noted by Justice Harlan in the majority opinion).

90. 33 U.S.C. §§901-50 (1970). *See* M. NORRIS, MARITIME PERSONAL INJURIES §132 (1959).

91. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408 (1970). For a discussion of the determination of compensation paid when injuries cause death *see* M. NORRIS, *supra* note 90, §177.

92. Federal Employer's Liability Act, 45 U.S.C. §51 (1970); the Jones Act incorporates by reference the F.E.L.A., which provides for liability of railroads to their employees. *See* Lindgren v. United States, 281 U.S. 38, 40 (1930); Panama R.R. v. Johnson, 264 U.S. 375 (1924).

93. 46 U.S.C. §688 (1970). Recovery for negligence is foreign to the general maritime principles of unseaworthiness, which is predicated upon a species of liability without fault.

94. 46 U.S.C. §688 (1970). The classes of beneficiaries are as follows: (a) the surviving widow or husband and children of the deceased; (b) if there is no widow or husband and children of the employee surviving, then to the employee's parents; and (c) if there are no survivors of the first classes, then to the next of kin dependent upon the employee.

95. *See* The Pan Two, 26 F. Supp. 990, 992 (D. Md. 1939).

96. Lindgren v. United States, 281 U.S. 38, 40-41 (1930); Beebe v. Moormack Gulf Lines, Inc., 59 F.2d 319 (5th Cir.), *cert. denied*, 287 U.S. 597 (1932).

97. *See, e.g.*, Whitaker v. Blidberg-Rothschild Co., 195 F. Supp. 420 (E.D. Va.), *aff'd*, 296 F.2d 554 (4th Cir. 1961) (a nondependent daughter prevented a dependent mother from recovering); The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947) (pecuniary losses to decedent's sister were not cognizable when father was alive). *See also* Poff v. Pennsylvania R.R., 150 F.2d 902 (2d Cir. 1945), *rev'd on other grounds*, 327 U.S. 399 (1946).

The federal maritime statute that appears most amenable to the principles of unseaworthiness, and favored by the *Moragne* court[98] in the determination of beneficiaries, is the Death on the High Seas Act.[99] The Act is of general application and deals exclusively with actions for wrongful death. It is the only maritime statute that applies to any "person" rather than to one specific class of maritime workers[100] and bases liability on conduct violative of general maritime law.

The Death on the High Seas Act provides that the personal representatives may bring a claim "for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative."[101] In effect, the shortcomings of the Jones Act[102] are obviated by the apportionment of damages among the possible beneficiaries. The United States, as amicus curiae in *Moragne*, argued that borrowing its schedule of beneficiaries would not only effectuate the expressed congressional preference in the area, but would also promote uniformity by ensuring that the beneficiaries would be the same for identical torts, rather than varying with the employment status of the decedent.[103]

Survival of Actions. Although the *Moragne* court made no mention of the survival of the decedent's claim for personal injuries sustained prior to his death, such a result seems consistent with the Court's broad protection of the decedent's survivors. This also appears to be supported by judicial decisions interpreting the federal maritime statutes. While the Death on the High Seas Act does not explicitly provide for the survival of actions,[104] it has been supplemented by state survival statutes.[105] Likewise, the Jones Act has been interpreted to preserve a claim for pain and suffering where death results from the employer's negligence.[106]

Damages. In regard to the measure of damages, the *Moragne* court suggested that both the Death on the High Seas Act and the numerous state

---

98. *See* 398 U.S. 375 (1970).

99. 46 U.S.C. §761 (1970).

100. The Jones Act applies exclusively to seamen, while, as the name indicates, the Longshoremen's and Harbor Workers' Compensation Act is totally for the benefit of longshoremen and harbor workers.

101. 46 U.S.C. §761 (1970).

102. 46 U.S.C. §688 (1970).

103. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970).

104. 46 U.S.C. §§761, 762 (1970). *See* Decker v. Moore-McCormack Lines, Inc., 91 F. Supp. 560 (D. Mass. 1950). *But see* Tetterton v. Arctic Tankers, Inc., 116 F. Supp. 429 (E.D. Pa. 1953).

105. *See, e.g.*, Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968); Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D.N.Y. 1965); Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959). *But see* Decker v. Moore-McCormack Lines, Inc., 91 F. Supp. 560 (D. Mass. 1950).

106. *See* Gillespie v. United States Steel Corp., 379 U.S. 157 (1964). The Court found that the Jones Act through §9 of the F.E.L.A., 45 U.S.C. §59 (1970), provided for the survival of actions.

wrongful death acts should be persuasive guidelines for future litigation.[107] However, since state laws vary in the determination of damages,[108] it is doubtful that state law will be considered; its application would not lend uniformity as required by *Moragne*. In a case decided after *Moragne*, the United States Court of Appeals for the Sixth Circuit stated:[109]

> Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote uniformity and supremacy of maritime law, the measure of recovery must be governed by the principles of that law where . . . there is a conflict between damages recoverable under the general maritime law and those recoverable under state law.

Since recovery under the Death on the High Seas Act[110] and the Jones Act[111] is limited to pecuniary loss, it appears that general maritime law should likewise be limited in ascertaining loss sustained by death. The amount of recovery then should reflect deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.[112] Where loss to survivors is the measure, the primary elements of pecuniary loss, such as the loss of the decedent's earning capacity and the value of his personal service and attention to the members of his family, should be included.[113] General maritime law, on the other hand, does not recognize awards for loss of consortium[114] or for loss of the decedent's counsel, care, and guidance.[115]

---

107. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408 (1970).

108. For example, Florida law does not limit the amount of recovery for a wrongful death action, while Massachusetts limits recovery to $50,000. *See* MASS. GEN. LAWS ANN. ch. 229, §2 (1955).

109. Petition of United States Steel Corp. v. Lamp, 436 F.2d 1256, 1279 (6th Cir. 1970) (citations omitted).

110. 46 U.S.C. §761 (1970).

111. 46 U.S.C. §688 (1970). While the F.E.L.A., 45 U.S.C. §51 (1970), merely allows recovery of damages for the benefit of surviving relatives without prescribing the measure, the Supreme Court has consistently held that the damages under this Act "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 70 (1913).

112. *See* Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622, 624 (6th Cir. 1948).

113. On remand of the *Moragne* case, the federal district court suggested the consideration of the following elements of damages in its jury instructions: (1) the reasonable expense of funeral and burial services of the decedent; (2) the loss of the decedent's support for his wife and minor children; (3) the wife's loss, by reason of her husband's death, of his services, comfort, protection, and society; (4) the loss to each minor child, prior to his attaining the age of 21 years, of his father's attention, education, nurture, and moral training. Jury Instructions on file with the *University of Florida Law Review*.

114. *E.g.*, Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964); Simpson v. Knutsen O.A.S., 296 F. Supp. 1308 (N.D. Cal. 1969); Valitutto v. D/S I/D Garonne, 295 F. Supp. 764 (S.D.N.Y. 1969). *But see* Jury Instructions, *supra* note 113.

115. *See* Petition of United States Steel Corp., 436 F.2d 1256, 1276-79 (6th Cir. 1970).

OPERATIONAL NEGLIGENCE — A DEFENSE FOR UNSEAWORTHINESS CLAIM

Another significant development in the doctrine of unseaworthiness has been the Supreme Court's sanction of the defense of operational negligence, a major limitation of the shipowner's liability.

Under the doctrine of unseaworthiness, the shipowner has a duty to provide a seaworthy vessel, equipment, and crew.[116] This warranty extends to all men who perform work in the ship's service,[117] whether injured on board the ship or on the pier.[118] The shipowner may be liable for injuries resulting from the ship's defective equipment[119] and personnel,[120] as well as defective cargo containers,[121] improperly stowed cargo,[122] and defective equipment owned and controlled by the stevedoring company.[123]

While the duty owed by the shipowner is absolute[124] and nondelegable,[125] he is not required to furnish an accident-free vessel, but one that is reasonably fit for its intended use.[126] In other words, the absolute duty is merely to provide a vessel and appurtenances reasonably safe for their intended purposes and reasonably adequate for the place and occasion directed by the owner.[127] Thus, since the shipowner is not an insurer against all accidents occurring aboard the vessel, the question arises as to what type of injury-causing circumstances are within the scope of the shipowner's liability.

Pre-Mascuilli *Situation*

A well-settled principle of maritime law is that liability for unseaworthiness is a species of liability without fault[128] and is completely distinct and separate from the concept of negligence.[129] Prior to *Usner v. Luckenbach Overseas Corp.*,[130] the Supreme Court had held that the negligence of a longshoreman could create a condition of unseaworthiness.[131] The Court had not decided until that case, however, whether operational negligence of a mari-

116. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).
117. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
118. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).
119. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).
120. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).
121. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962). *See also* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).
122. Rich v. Ellerman & Bucknall S.S. Co., 278 F.2d 704 (2d Cir. 1960).
123. Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396 (1954).
124. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).
125. Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396 (1954).
126. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). "The standard is not perfection, but reasonable fitness . . . ." *Id.* at 550.
127. *See* Morales v. City of Galveston, 370 U.S. 165 (1962).
128. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-94 (1946).
129. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). For a discussion of the difficulty in separating the two concepts, *see* Marshall v. Ove Skou Rederi A/S, 378 F.2d 193, 197 n.6 (5th Cir. 1967).
130. 400 U.S. 494 (1971).
131. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

time worker was synonymous with unseaworthiness. Thus, the lower federal courts assumed the task of determining the proper scope and function of the concept of operational negligence. Considerable conflict and varying interpretations resulted among the federal judicial circuits.

The Second Circuit in *Grillea v. United States*[132] was first to define the relationship betweeen unseaworthiness and a negligent act. There, the wrong hatch cover was placed over a pad eye[133] only a short time before it gave way when a longshoreman stepped on it. In determining that the negligent act had terminated and the unseaworthy condition had commenced, Judge Learned Hand found it necessary, although at times difficult, to separate the situations where "the defect is only an incident in a continuous operation and those in which some intermediate step is to be taken . . . ."[134] While not every negligent act would render the shipowner liable for unseaworthiness, liability would be imposed where an unsafe condition existed. The court concluded that sufficient time had elapsed between the negligent act and the injury to sustain liability.[135] Thus, the Second Circuit embraced the proposition that unseaworthiness did not result from an isolated act of negligence,[136] but rather from an act incidental to a continuous course of operation.[137]

The central issue became whether the injury occurred simultaneously with the negligent act or occurred after the act terminated — creating an unseaworthy condition. Time became a crucial factor in determining the precise point of unseaworthiness and, therefore, liability to the shipowner. To impose liability the condition must have existed for a time prior to the accident,[138] and an interval of time, however momentary,[139] must have elapsed between the act and the point of injury. In other words, two separate acts rather than one are required to create an unseaworthy condition.[140] However, the momentary time interval need not be of sufficient length to give the shipowner notice.[141]

As one commentator has aptly stated: "The distinction was easy to state, difficult to define, and, as the courts promptly realized, almost impossible

---

132. 232 F.2d 919 (2d Cir. 1956).

133. A plate or casting with an eye normal to its surface and formed solid with the plate. R. DEKERCHONE, INTERNATIONAL MARITIME DICTIONARY 270, 563 (2d ed. 1961).

134. Grillea v. United States, 232 F.2d 919, 922 (2d Cir. 1956).

135. *Id.*

136. Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962). There, no condition of unseaworthiness existed where the finding that the sole cause of the boom buckling during the loading of cargo was negligence by the longshoreman.

137. In *Puddu v. Royal Netherlands S.S. Co.*, Judge Hays illustrated this relationship: "A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness." Id. at 757 (concurring opinion).

138. *See* Titus v. The Santorini, 258 F.2d 352 (9th Cir. 1958).

139. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

140. Rawson v. Calmar S.S. Corp., 304 F.2d 202 (9th Cir. 1962).

141. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

to apply with logical consistency."[142] The reality of this statement can be illustrated by an example from the Ninth Circuit. In *Beeler v. Alaska Aggregate Corp.*[143] a longshoreman received injuries when a ladder he was descending slipped. When the ladder was to be in use only a short time the custom and practice was to have one of the group hold the ladder, rather than to latch it to the deck. On this occasion, however, neither of the plaintiff's co-workers secured the ladder, which was otherwise sound and fit for its intended use. The district court found that the proximate cause of the injury was the negligent act of the plaintiff's co-workers in the use of the seaworthy appliance; thus, no unseaworthy condition was created, as the negligent act had not terminated.[144] The court of appeals reversed and held that the ladder did not fall because of the negligent way in which his co-workers held the ladder at the moment of injury.[145] Instead, their negligence in failing to act prior to the accident had ended before the ladder fell and, therefore, was an antecedent condition in causing the ladder to become unseaworthy.[146] This case appropriately demonstrates the ostensible simplicity of the rule and the difficult and possible inconsistency of its application.

Prior to *Mascuilli v. United States*[147] in 1967, the majority of circuits followed the rule that no liability predicated on unseaworthiness resulted where the injury was sustained simultaneously with the negligent use of seaworthy equipment. Liability attached only if the negligent act had come to rest and the resulting condition was preexisting. However, the Third and Fourth Circuits followed a minority position that apparently rejected any distinction between the act and the condition.[148]

In *Arena v. Luckenbach S. S. Co.*[149] the First Circuit refused to equate unseaworthiness with mere negligent conduct. In that case no unseaworthiness was found when a roll of paper, improperly loaded by the longshoreman, fell and injured him. "The [vessel] was not defective," the court noted, "simply because the longshoremen who loaded it neglected to do so in the proper fashion."[150] The Second Circuit continued to recognize the act-condition distinction first discussed in *Grillea v. United States.*[151]

---

142. Zobel, *The Unseaworthy Instant*, 45 ST. JOHN'S L. REV. 200, 209 (1970).

143. 336 F.2d 108 (9th Cir. 1964).

144. Beeler v. Alaska Aggregate Corp., 224 F. Supp. 814, 815 (D. Ore. 1963).

145. Beeler v. Alaska Aggregate Corp., 336 F.2d 108, 110 (9th Cir. 1964).

146. *Id.*

147. 387 U.S. 237 (1967).

148. Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964); Ferrante v. Swedish Am. Lines, 331 F.2d 571 (3d Cir.), *cert. denied*, 379 U.S. 801 (1964); Scott v. Isbrandtsen Co., 327 F.2d 113 (4th Cir. 1964).

149. 279 F.2d 186 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960).

150. *Id.* at 188.

151. 232 F.2d 919 (2d Cir. 1956). *See* text accompanying notes 132-137 *supra*. *See also* Fenton v. A/S Glittre, 370 F.2d 146 (2d Cir. 1966), *cert. denied*, 387 U.S. 944 (1967); Radovich v. Cunard S.S. Co., 364 F.2d 149 (2d Cir. 1966); Skibinski v. Waterman S.S. Corp., 360 F.2d 539 (2d Cir. 1966); Norfleet v. Isthmian Lines, Inc., 355 F.2d 359 (2d Cir. 1966); Reid v. Quebec Paper Sales & Transp. Co., 340 F.2d 34 (2d Cir. 1965); Guarracino v. Luckenbach S.S. Co., 333 F.2d 646 (2d Cir.), *cert. denied*, 379 U.S. 946 (1964); Spinelli v.

The Fifth Circuit, as well as the Ninth Circuit,[152] adopted the momentary time theory as the primary determinant of liability. Its first decision in the special area of operational negligence was *Antoine v. Lake Charles Stevedores, Inc.*[153] The plaintiff, a longshoreman, was loading cargo in the hold of the ship. Unable to see his fellow longshoreman, the winch operator lowered the load, pinning the plaintiff against the bulkhead. Finding no defective equipment aboard the vessel and no functional failure of any equipment, the district court concluded that the cause of the accident was the concurrent negligence of the injured longshoreman and his co-workers.[154]

On appeal, the decision in favor of the shipowner was upheld upon the basis that the operational negligence of a co-worker at the "moment of injury" does not render a vessel unseaworthy.[155] On the other hand, the court noted in a companion case that the improper use of seaworthy equipment by an intermediate employee will render the ship unseaworthy if the injury occurred after the negligent act has terminated and the equipment has been left in an unsafe condition.[156]

Mascuilli v. United States *and Its Effect*

In 1967 the Supreme Court was presented with the opportunity to settle the existing confusion over the applicability of the defense of operational negligence. However, its brief opinion in *Mascuilli v. United States*[157] en-

---

Isthmian S.S. Co., 326 F.2d 870 (2d Cir.), *cert. denied,* 377 U.S. 935 (1964); Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752 (2d Cir.), *cert. denied,* 371 U.S. 840 (1962).

152. Alaska S.S. Co. v. Garcia, 378 F.2d 153 (9th Cir. 1967); Blassingill v. Waterman S.S. Corp., 336 F.2d 367 (9th Cir. 1964); Beeler v. Alaska Aggregate Corp., 336 F.2d 108 (9th Cir. 1964); Rawson v. Calmar S.S. Corp., 304 F.2d 202 (9th Cir. 1962); Billeci v. United States, 298 F.2d 703 (9th Cir. 1962); Morrell v. United States, 297 F.2d 662 (9th Cir. 1961), *cert. denied,* 370 U.S. 960 (1962); Titus v. The Santorini, 258 F.2d 352 (9th Cir. 1958).

153. 376 F.2d 443 (5th Cir.), *cert. denied,* 389 U.S. 869 (1967).

154. Antoine v. Lake Charles Stevedores, Inc., 249 F. Supp. 290, 291 (W.D. La. 1965).

155. Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443, 446-47 (5th Cir. 1967).

156. Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447, 449 (5th Cir. 1967). In Dugas v. Nippon Yusen Kaisha, 378 F.2d 271 (5th Cir.), *cert. denied,* 389 U.S. 1021 (1967), the minute intricacies of the momentary time theory were cogently illustrated. In that case a hookup man, a fellow longshoreman with the plaintiff, violated the safety regulations when he used one sling rather than the required two to load and secure some dunnage boards. As the second load was being loaded several pieces of dunnage came loose and struck the longshoreman on the back. The board that struck the plaintiff slid from the load just as it was being lifted. The plaintiff contended that the negligence of the hookup man created an unseaworthy condition, at least during the 10-15 seconds that elapsed between the time the sling encircling the load was hooked to the gantry line and the time the crane started to raise the load. Rejecting this argument, the court of appeals said: "So long as the load stayed at rest on the dock, there was no unsafe condition. It was only after the crane started to raise the load that it became dangerous and then there was a momentary interval of time before the dunnage fell and struck the plaintiff." *Id.* at 273-74. Even assuming that the unsafe condition preexisted for the 10-15 seconds, the shipowner incurred no liability as he was under no duty to guard against the "isolated and completely unforeseeable" event, nor did that event prove the vessel not to be reasonably fit for her intended service. *See* Morales v. City of Galveston, 370 U.S. 1675 (1962).

157. 387 U.S. 237 (1967).

gendered an even greater morass of conflict among the lower federal courts.[158]

In *Mascuilli* a libel was filed against the United States for the death of a longshoreman killed while loading a government vessel. The accident occurred when a heavy shackle, under opposing pressure of two winches, parted, recoiled, and struck the victim. The district court found his death was caused solely by the negligence of the victim's fellow longshoreman who permitted the ropes to become taut, causing the shackle to part and recoil.[159] The shackle was found to be within design specifications and seaworthy at all times prior to the fatal accident.[160] The court of appeals accordingly affirmed the judgment in favor of the shipowner.[161]

On writ of certiorari, the Supreme Court summarily reversed, citing two cases.[162] Although the lower courts had found operational negligence to be the sole cause of the fatal incident and thus denied the claim, the Supreme Court made no mention of the concept. As a result, the status of the concept as a complete bar to a claim of unseaworthiness became uncertain.

In attempting to find the correct meaning of the cryptic decision, various interpretations of *Mascuilli* followed. The Second Circuit refused to continue following *Grillea* and interpreted *Mascuilli* as eliminating the time-lapse criteria as a requisite for determining unseaworthiness.[163] In essence, the circuit committed itself to the proposition that operational negligence must be equated with unseaworthiness.[164] Since Mascuilli's accident occurred instantaneously, the Second Circuit reasoned that the Supreme Court found unseaworthiness in a soundly constructed and properly equipped vessel merely because of the negligence of the longshoremen engaged in the operation.[165]

The Fourth Circuit, like the Second Circuit, held that operational negligence was subsumed under the unseaworthiness doctrine and thereby rejected it as a defense to liability.[166] This initial post-*Mascuilli* interpretation was later clouded when the Fourth Circuit stated: "We adhere to the view that operational negligence may cause unseaworthiness, but do not intimate that

---

158. *Compare* Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476 (2d Cir. 1969), *vacated*, 401 U.S. 930 (1971), *with* Grigsby v. Coastal Marine Serv., Inc., 412 F.2d 1011 (5th Cir. 1969) *and* Tim v. American President Lines, Ltd., 409 F.2d 385 (9th Cir. 1969).

159. Mascuilli v. United States, 241 F. Supp. 354, 362, 364 (E.D. Pa. 1965).

160. *Id.* at 360, 362.

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

162. The Supreme Court decided *Mascuilli* in the following brief opinion: "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. Joachim Henrik Fisser, 358 U.S. 423 . . . ." 387 U.S. 737 (1967).

163. Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476 (2d Cir. 1969), *vacated*, 401 U.S. 930 (1971); Candiano v. Moore-McCormack Lines, Inc., 382 F.2d 961 (2d Cir. 1967); Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2d Cir. 1967).

164. Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476, 478 (2d Cir. 1969), *vacated*, 401 U.S. 930 (1971).

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

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

every instance of operational negligence necessarily creates liability under the unseaworthiness doctrine."[167]

Prior to *Mascuilli* the Fifth Circuit had categorically rejected the notion of "instant unseaworthiness."[168] Finding it unlikely that the Supreme Court would have attempted to eliminate the conflict among the circuits by such an "unilluminating pronouncement," the court declined to change its policy.[169] Furthermore, upon analysis of the cases cited by the *Mascuilli* court, the Fifth Circuit failed to find the anticipated sweeping purpose that would require equating operational negligence with unseaworthiness.[170] Thus, the circuit, following its earlier pronouncements, insisted that there must be an unseaworthy condition creating liability rather than instantaneous injury occasioned by an act.[171]

The Ninth Circuit concluded that *Mascuilli* was decided on the asserted factual similarity with *Crumady v. The Joachim Hendrik Fisser*[172] and, therefore, did not reach the question of "instant unseaworthiness."[173] It was the court's belief that the Supreme Court answered on its reversal only the first of three questions presented by the plaintiff in *Mascuilli,* excluding the issue of "instant unseaworthiness."[174]

Other possible interpretations of *Mascuilli* were given by various federal courts. The United States District Court for the Eastern District of Louisiana, for example, maintained that the Supreme Court did not eliminate completely the act-condition dichotomy, but rather extended unseaworthiness to its greatest possible limit.[175] Consequently, unseaworthiness would be presumed whenever a question was presented of whether a condition caused the maritime worker's injury.[176] Such a presumption, the court maintained, would not only preserve the dichotomy, but would also be consistent with the expansive trend in the unseaworthiness doctrine.[177]

Prior to *Usner v. Luckenbach Overseas Corp.*[178] the conflict among the

---

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

168. *See* text accompanying notes 152-56 *supra.*

169. Grigsby v. Coastal Marine Serv., Inc., 412 F.2d 1011 (5th Cir. 1969). *See also* Dillon v. M.S. Oriental Inventor, 426 F.2d 977 (5th Cir. 1970); Reed v. MV Foylebank, 415 F.2d 838 (5th Cir. 1969); Duncan v. Transeastern Shipping Corp., 413 F.2d 1023 (5th Cir. 1969).

170. Grigsby v. Coastal Marine Serv., Inc., 412 F.2d 1011, 1033 (5th Cir. 1969).

171. *Id.* at 1032.

172. 387 U.S. 237 (1967). *See* note 162 and accompanying text *supra.*

173. *See* Tim v. American President Lines, Ltd., 409 F.2d 385, 391 (9th Cir. 1969).

174. The three questions presented by the petition were: "(1) Did a prior unseaworthy condition come into play by the tightline condition? (2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy? (3) Was the vessel unseaworthy because the longshoremen were not equal in disposition and seamanship to the ordinary men in the calling, as was found in Boudoin v. Lykes Bros, S.S. Co., 348 U.S. 336 (1955)?" Petitioner's Brief for Certiorari at 2, Mascuilli v. United States, 387 U.S. 237 (1967).

175. Jackson v. S. S. Kings Point, 276 F. Supp. 451 (E.D. La. 1967).

176. *Id.* at 453.

177. *Id.*

178. 400 U.S. 494 (1971).

circuits that had considered the question of operational negligence can be summarized as follows:[179] (1) The Second, Third,[180] and Fourth Circuits committed themselves to the proposition that a single act of negligence causing injury would render the vessel unseaworthy; (2) The Fifth and Ninth Circuits rejected the theory of 'instant unseaworthiness" and embraced the concept of operational negligence as a complete bar to recovery against the shipowner.

Operational Negligence Recognized by Supreme Court

Following *Mascuilli* four years of confusion in the lower federal courts elapsed before the Supreme Court, in *Usner v. Luckenbach Overseas Corp.*,[181] held that no condition of unseaworthiness existed for a third party's single and wholly unforeseeable act of negligence. The impact of the decision, in essence, is that the shipowner has a defense that prevents him from being an absolute insurer for all injuries suffered by the maritime worker in the ship's service.

In *Usner* the plaintiff was a longshoreman employed by an independent contractor. Engaged with others in loading steel rods onto the vessel, he was to secure the rods by affixing a sling each time the cargo was lowered from the ship's boom. This procedure was carried on for some time, until the winch operator lowered the sling just out of the plaintiff's reach. After motioning to the flagman to have the sling lowered further, the plaintiff was struck and injured when the winch operator lowered the fall "too far and too fast."[182] The vessel's equipment was sound and in good condition both before and after the accident. Plaintiff brought an action for damages, alleging that his injury had been caused by the ship's unseaworthiness.

On an interlocutory appeal from denial of the shipowner's motion for a summary judgment, the Court of Appeals for the Fifth Circuit reversed and granted the summary judgment holding that operational negligence at the moment of injury did not render the vessel unseaworthy.[183] Consistent with its prior decisions interpreting *Mascuilli v. United States*,[184] the appellate court noted: " 'instant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman."[185] The Supreme Court, in a 5-4 decision, affirmed and found the shipowner not liable for the unseaworthiness of his vessel.[186]

The basis of the decision in *Usner* was predicated upon the nature and proper scope of the doctrine of unseaworthiness. The Court ruled that unsea-

179. The other federal judicial circuits have not had litigation in this area.

180. The Third Circuit rejected the act-condition distinction prior to *Mascuilli*. *See* Ferrante v. Swedish Am. Lines, 331 F.2d 571 (3d Cir. 1964).

181. 400 U.S. 494 (1971).

182. *Id.* at 495.

183. Luckenbach Overseas Corp. v. Usner, 413 F.2d 984 (5th Cir. 1969).

184. *See* text accompanying notes 152-56 *supra*.

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

186. Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971).

worthiness is a *condition*[187] that precludes the vessel from being fit for her intended use. This, for example, might arise from a defective portion of the ship itself,[188] defective gear,[189] appurtenances in disrepair,[190] or an unfit crew.[191] In addition, an inadequate number of men performing a task aboard the vessel,[192] an improper method of loading her cargo,[193] or improper stowage[194] can create a condition that breaches the shipowner's warranty of seaworthiness. The Court noted that unseaworthiness by its nature is a wholly distinct remedy against the shipowner.[195]

Once the unseaworthy condition commences, its activating force, whether negligence[196] or not,[197] is irrelevant in determining the shipowner's liability.[198] The basic determinant of unseaworthiness is whether a condition exists. To contend that operational negligence is itself unseaworthiness is to erroneously substitute the causal agent for the result. Furthermore, to equate a negligent act with unseaworthiness is contrary to the rule that the two concepts are entirely separate and distinct.[199] The Court stated: "To hold that [an] individual act of negligence renders the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence . . . . "[200]

Although the Court sustained the shipowner's defense of operational negligence, its decision did not formulate practical guidelines that the lower courts can utilize in distinguishing the act-condition dichotomy. From a practical point of view, this act-condition distinction is often difficult to draw.[201] The factfinder is confronted with such questions as: When does the "operation" commence? How momentary is a momentary interval?[202] How long is "preexistence"?[203] Did the negligent act terminate and the unseaworthy condition begin?[204] Inevitable hairline distinctions are certain to result when

---

187. *Id.* at 498.

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

189. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

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

191. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955).

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

193. Morales v. City of Galveston, 370 U.S. 165 (1962).

194. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).

195. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 (1971).

196. *See* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

197. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

198. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 (1971).

199. In discussing the relationship between the two concepts, the Court said: "What has evolved . . . is the complete divorcement of unseaworthiness liability from concepts of negligence." *Id.* at 499.

200. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971).

201. *See* Radovich v. Cunard S.S. Co., 364 F.2d 149 (2d Cir. 1966).

202. *See* Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir.), *cert. denied,* 389 U.S. 869 (1967). *See also* Candiano v. Moore-McCormack Lines, Inc., 386 F.2d 444, 448 (2d Cir. 1967).

203. *Cf.* Titus v. The Santorini, 258 F.2d 352 (9th Cir. 1958).

204. One judge notes: "I have great difficulty imagining any act of 'operational' negli-

attempting to determine the exact moment when the operational act ends and the unseaworthy condition commences.[205]

On the other hand, perhaps the most significant impact of the *Usner* decision is that it precludes the shipowner from becoming an absolute insurer for the maritime worker. However, this is not to say that the injured seaman or longshoreman is left without ample remedies by that decision. The shipowner is still bound to provide a ship, equipment, and crew reasonably fit for their intended service. In addition, negligence actions under the Jones Act[206] and compensation under the Longshoremen's and Harbor Workers' Compensation Act[207] afford adequate means of redress without the synthesis of the concepts of unseaworthiness and negligence. The expansion of the unseaworthiness doctrine has been criticized by a number of observers for its serious economic impact on the shipping industry.[208] The *Usner* decision, however, should produce favorable economic results for the shipowner, since the concept of operational negligence may be a fairly adequate method of limiting the shipowner's liability.

MARITIME JURISDICTION INVOLVING PIERSIDE INJURIES CAUSED BY SHOREBASED EQUIPMENT

The conflict among the federal judicial circuits over the proper application of the principle of operational negligence has been somewhat rivaled by the conflct concerning the extent of the shipowner's duty for nonshipboard injuries to longshoremen. The primary issue has involved the proper expansion of the warranty of seaworthiness in relation to a maritime worker injured some distance away from the vessel by equipment not traditionally a part of the ship's gear. More specifically, problems have arisen in ascertaining the legal scope of loading and unloading in regard to the shipowner's duty to

---

gence which can not by clever advocacy and hair-line distinctions render the shipowner liable for unseaworthiness," and that such a task results in a "futile effort to define catchwords which elude grasp." Radovich v. Cunard S.S. Co., 364 F.2d 149, 154 (2d Cir. 1966) (Kaufman, J., dissenting). Another judge has echoed the futility of making distasteful distinctions unrelated to any intelligible concepts of right and wrong. Skibinski v. Waterman S.S. Corp., 360 F.2d 539, 543, 544 (2d Cir. 1966) (Friendly, C.J., dissenting). Concerning the requisite time factor involved, it has been suggested that practically no loading or unloading operation could be carried on that required a separate timekeeper for every man working in the gang. Candiano v. Moore-McCormack Lines, Inc., 386 F.2d 444, 446 (2d Cir. 1967).

205. As one commentator said: "It will be most difficult to explain to the seaman cut by flying glass in Judge Hays' illustration [*see* note 137 *supra*] why he had no cause of action for unseaworthiness but his buddy who stepped on the glass after it had fallen did." H. BAER, ADMIRALTY LAW OF THE SUPREME COURT §§1-6 (1969). To the injured victim the instantaneous act makes the vessel just as dangerous at it would if the defective condition had preexisted a minute or an hour before the mishap. M. NORRIS, MARITIME PERSONAL INJURIES §85 (1959).

206. 46 U.S.C. §688 (1970).

207. 33 U.S.C. §§901-50 (1970).

208. *See* Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1148-52 (1963); Comment, *Expanding the Warranty of Seaworthiness: Social Welfare or Marine Disaster*, 9 VILL. L. REV. 422, 439-40 (1964).

the maritime worker and in formulating workable standards for determining the beginning and termination of the loading and unloading process.

It is well-settled that the shipowner's warranty covers any person actually in the service of the vessel.[209] The scope of this warranty extends to shipboard accidents involving longshoremen caused by equipment of either the stevedore[210] or the ship.[211] Although the warranty covers injuries occurring on the dock by the ship's equipment or its defective cargo,[212] uncertainty arose when shorebased equipment caused injury to a longshoreman working on the pier.

The doctrine's coverage depends primarily upon the nature of the work being performed and its relationship to the vessel.[213] Historically, the task of loading and unloading has been considered work in the ship's service.[214] Thus, the warranty of seaworthiness extended to all persons taking part in the loading process, since the longshoreman is doing a seaman's work and incurring a seaman's hazard.[215]

Expansion of Maritime Jurisdiction by Lower Federal Courts

With the advent of modern machinery and labor saving methods, the traditional notion of loading and unloading has come into question. As a result of judicial reexamination, the modern tendency among the federal judiciary was to enlarge the concept, making it consistent with technological advances in the shipping industry.

Total Operation Approach. Under the more expanded interpretation, one was considered to be loading a vessel when he was taking direct, necessary steps in the unbroken sequence of transferring cargo to and from the vessel, intimately and essentially engaged in the total loading operation.[216] This position was predicated upon the fact that the term *loading* "is not a word of art, and is not to be narrowly and hypertechnically interpreted."[217] The emphasis was on pragmatism rather than ritualism.

Illustrative of this approach was the Fifth Circuit's decision in *Law v. Victory Carriers, Inc.*[218] There, the longshoreman was driving a forklift, owned by the stevedoring company, on the dock. His work was to carry cargo

---

209. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 91 (1946).
210. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).
211. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
212. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 213 (1963).
213. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
214. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). *See also* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).
215. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
216. Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), *rev'd*, 40 U.S.L.W. 4059 (U.S. Dec. 13, 1971); McNeil v. A/S Hautor, 326 F. Supp. 226 (E.D. Pa. 1971); Byrd v. American Export Isbrandtsen Lines, Inc., 300 F. Supp. 1207 (E.D. Pa. 1969); Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812 (E.D. Pa. 1959).
217. Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812, 817 (E.D. Pa. 1959).
218. 432 F.2d 376 (5th Cir. 1970), *rev'd*, 40 U.S.L.W. 4059 (U.S. Dec. 13, 1971).

from a point about fifty yards from the vesssel to the hookup alongside the vessel. Instead of taking these loads directly from the forklift onto the ship, he would set them down to be subsequently taken aboard by other longshoremen using the ship's equipment. While the plaintiff was transporting one of the loads, the overhead protection rack of the forklift came loose and fell upon him, causing injury. He filed suit alleging unseaworthiness and negligence. The district court denied recovery and held for the shipowner.[219]

On appeal, the Fifth Circuit Court of Appeals reversed and held that the longshoreman was engaged in loading the vessel and, therefore, was within the scope of the doctrine of unseaworthiness.[220] The court reasoned that if the warranty extends to the longshoreman who physically transfers the cargo onto the vessel, then it should also extend to the longshoreman who moves the cargo from one point on the dock toward the vessel.[221] "To deny him the benefits of the doctrine of unseaworthiness," the court concluded, " . . . would be to reject the humanitarian policy that underlies the doctrine."[222]

The longshoreman's activities were viewed by the court in light of the total operation of loading the vessel.[223] His task of moving the cargo from the dock to the vessel's side was found to be "so integrally woven into the entire loading operation that the [transfer and lifting onto the vessel] cannot be separated except by erection of hypertechnical and unrealistic legal barriers."[224]

Several conditions must have been met before the longshoreman could recover on a claim of unseaworthiness for injuries sustained some distance from the vessel. First, and most important, the scope of the warranty must have been found to encompass equipment that is neither part of the traditional gear of the vessel nor attached to or touching the vessel itself. To limit the warranty to traditional equipment only would, of necessity, restrict the definition of "loading" to its narrowest sense, the physical lifting of cargo onto the ship.

While it is well-settled that the shipowner's warranty extends to equipment supplied by the stevedoring company,[225] the issue among the federal judiciary,

---

219. *See* Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), *rev'd*, 40 U.S.L.W. 4059 (U.S. Dec. 13, 1971). For a discussion of the Supreme Court's opinion *see* text accompanying notes 249-262 *infra*.

220. *Id.* at 384, 385.

221. *Id.* at 384.

222. *Id.*

223. The same rules are applicable to both loading and unloading. Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970); United States Lines Co. v. King, 363 F.2d 658, 661 (4th Cir. 1966).

224. Law v. Victory Carriers, Inc., 432 F.2d 376, 385 (5th Cir. 1970), *rev'd*, 40 U.S.L.W. 4059 (U.S. Dec. 13, 1971).

225. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Rogers v. United States Lines, 347 U.S. 984 (1954). *See* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964). Equipment must be part of the hull, gear, appliances, or appurtenances of the ship in order to be within the subject matter of the seaworthiness doctrine. *See* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). This includes all other equipment adopted as appurtenances of the ship. The Osceola, 189 U.S. 158, 175 (1903). *See also* Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).

prior to the Supreme Court's determination in *Victory Carrier,* was whether the warranty extended to shorebased equipment.[226] The Fifth Circuit[227] as well as the Third[228] and Ninth Circuits,[229] adopted the expanded position, finding the warranty to include defective shorebased loading equipment. These courts emphasized the functional use of the equipment rather than its traditional status[230] as a determinant of the warranty's coverage.[231]

The second factor in determining liability of the shipowner was whether the injury occurred while the longshoreman was taking "direct, necessary steps in the physical transfer" of cargo to the vessel.[232] Direct and necessary steps included the moving of cargo from a point on the pier to the vessel's side[233] or merely moving it from one point to another point nearer the vessel.[234] Moreover, the condition could even be met by the more remote aspects of the loading process. The shipowner's warranty, for example, covers a worker loading a vehicle in a warehouse where the vehicle would then be moved to the vessel's side.[235]

The longshoreman's work must also have had continuity with the total loading operation.[236] In other words, it must have been an essential part of

226. *E.g.,* Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir.), *cert. denied,* 385 U.S. 969 (1966); Spann v. Lauritzen, 344 F.2d 204 (3d Cir.), *cert. denied,* 382 U.S. 1000 (1965); Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir.), *cert. denied,* 380 U.S. 943 (1964).

227. Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir.), *cert. denied,* 385 U.S. 969 (1966).

228. Spann v. Lauritzen, 344 F.2d 204 (3d Cir.), *cert. denied,* 382 U.S. 1000 (1965).

229. Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir.), *cert. denied,* 380 U.S. 943 (1964). If the longshoreman was performing work in the service of the vessel, and if he was injured as a result of a defect in equipment, whether on board or shorebased, the ship was unseaworthy regardless of the relationship of the equipment to the ship. This equipment, which was unattached to the ship and standing on the pier, was considered to be appurtenant to the ship as a necessary and integral part of the loading and unloading process. *See* Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970). This view appeared to follow the "type of work" test expressed in Pope & Talbot v. Hawn, 346 U.S. 406 (1953). *See* Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970), *petition for cert. filed,* 40 U.S.L.W. 3029 (U.S. Jan. 7, 1971) (No. 70-64). The over-all result of the majority view shifted the liability back to the stevedoring company through indemnity suits and that company then has the incentive to improve its loading equipment. Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1312 (9th Cir. 1970).

230. The Second and Sixth Circuits limited the warranty of seaworthiness to equipment traditionally a part of the hull, gear, stowage, appurtenant appliances, and equipment of the vessel. The equipment must have been physically attached to the ship or touching part of the ship during the loading or unloading process. Forken v. Furness Withy & Co., 323 F.2d 638, 641 (2d Cir. 1963); McKnight v. N.M. Paterson & Sons, Ltd., 286 F.2d 250 (6th Cir. 1960).

231. Note, *Unseaworthiness — Recovery by Longshoreman for Injuries Caused by Defective Shore-Based Equipment,* 21 Sw. L.J. 381, 388 (1967).

232. Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812, 817 (E.D. Pa. 1959).

233. Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970), *petition for cert. filed,* 40 U.S.L.W. (U.S. Jan. 7, 1971) (No. 70-64).

234. Byrd v. American Export Isbrandtsen Lines, Inc., 300 F. Supp. 1207 (E.D. Pa. 1969).

235. *Cf.* Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3d Cir. 1963).

236. *Cf.* Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), *rev'd,* 40 U.S.L.W.

an unbroken sequence of moving the cargo to the ship.[237] If this sequence were interrupted, the loading or unloading operation ceased. In *Young v. Chevron Oil Co.*[238] the district court rejected the unseaworthiness claim where the injury occurred approximately one hour after the cargo had been removed from the ship and placed upon the pier. In that case, the plaintiff's work was not sufficiently connected with the unloading of the vessel to make it part of the seaman's work; thus, the actual loading had terminated.

Although spatial proximity to the vessel appeared to be a relevant factor,[239] no fixed or definite limits of proximity were set. Because this factor was relative in nature, distance alone would not preclude recovery under an unseaworthiness claim as long as the claimant's work was an essential part of the loading process.[240] In *Olvera v. Michalos*[241] the stevedore's employee was injured while removing cargo from a railroad car alongside the warehouse, about 200 yards from the vessel. The court allowed recovery and rejected the shipowner's argument that the plaintiff's distance from the vessel precluded the warranty from being applied.

Traditional Loading Approach. A minority of the lower federal courts limited the concept of loading and unloading to those activities that begin and end with the physical acts of lifting the cargo onto or off the vessel.[242] Recognizing that the liability of the shipowner is not unlimited, this view attempted to find liability according to the more traditional and technical notions of the loading process.

The leading case utilizing this approach was *Drumgold v. Plovba.*[243] Two separate actions were involved in the case, one by a longshoreman who contended he was injured while loading a vessel, the other by a longshoreman who contended he had been injured while unloading a vessel.

In the first action, the stevedoring company had been contracted to load a ship. To prevent the shifting of the cargo at sea it was necessary to place shifting boards in the ship's hold. The longshoreman was ordered by his employer, the stevedore, to go ashore, load the truck with the boards, and thereafter bring the truck onto the pier alongside the vessel so the boards

---

4059 (U.S. Dec. 13, 1971).

237. Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970), *petition for cert. filed*, 40 U.S.L.W. 3029 (U.S. Jan. 7, 1971) (No. 70-64). The sequence of the operation may be interrupted by the lapse of time, Young v. Chevron Oil Co., 314 F. Supp. 1278 (E.D. La. 1970), or the delivery to a consignee, *see* Daniel v. Skibs A/S Hilda Knudson, 253 F. Supp. 758 (E.D. Pa.), *aff'd*, 368 F.2d 178 (3d Cir. 1966), *cert. denied*, 386 U.S. 990 (1967).

238. 314 F. Supp. 1278 (E.D. La. 1970).

239. *Cf.* Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), *rev'd*, 40 U.S.L.W. 4059 (U.S. Dec. 13, 1971).

240. *See* Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968).

241. *Id.*

242. Drumgold v. Plovba, 260 F. Supp. 983 (E.D. Va. 1966); Daniel v. Skibs A/S Hilda Knudson, 253 F. Supp. 758 (E.D. Pa.), *aff'd*, 368 F.2d 178 (3d Cir. 1966), *cert. denied*, 386 U.S. 990 (1967). *See also* Partenweederei v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

243. 260 F. Supp. 983 (E.D. Va. 1966).

could be placed aboard. The vessel's crane was to lift the boards from the pier to the ship's dock. When the longshoreman attempted to put down the truck's stabilizer and lift the load, the device proved defective causing the truck to capsize and injure him.

The second action, with substantially similar facts, involved the unloading of a vessel. There, the longshoreman was struck by the stevedore's allegedly defective forklift while working on the dock alongside the vessel.

In both actions, the court acknowledged that the injured longshoreman and the equipment were necessary adjuncts to completion of the loading and unloading process. While recognizing that *Gutierrez v. Waterman S. S. Corp.*[244] extended the warranty of seaworthiness to longshoremen loading or unloading a ship, whether aboard the ship or on the pier, the court denied relief, finding that the loading operation in the first action had not commenced and that the unloading process in the second had terminated.[245] The court opined that the doctrine of unseaworthiness should not be extended to defective shorebased equipment as allowed by other court decisions.[246]

The rationale of this restricted approach was that while the longshoreman's work may technically be in the service of the ship, it was not loading or unloading in the sense that it is part of the ship's work.[247] This merely placed a reasonable limitation upon the extent of the doctrine.[248]

Supreme Court Rejection of the Total Operation Approach

The United States Supreme Court, deciding *Victory Carriers, Inc. v. Law*[249] on appeal from the Fifth Circuit, refused to expand maritime jurisdiction landward and held that state law governs nonshipboard accidents involving a longshoreman injured by defective shorebased equipment owned and operated by his stevedore employer. Thus, the Court determined that a maritime cause of action did not arise in this case, since the longshoreman was injured by equipment not traditionally a part of the ship's gear and because the accident did not occur aboard the vessel or on its gangplank.

In rejecting the Fifth Circuit's total operation approach, the Court emphasized that maritime tort jurisdiction must be determined by the locality of the accident rather than the function of the longshoreman's services. Noting that nonshipboard accidents were not historically within maritime jurisdiction, the Court stated: "Piers and docks were consistently deemed extensions

---

244. 373 U.S. 206 (1963).

245. Drumgold v. Plovba, 260 F. Supp. 983, 987 (E.D. Va. 1966).

246. As the court noted: "We find no authority which would cause us to hold that every piece of equipment and every activity leading up to or following the loading or the unloading operation must be covered under the warranty of seaworthiness. We are concerned with the ship and the ship's equipment attendant to the *ship's duty to load and unload.*" Drumgold v. Plovba, 260 F. Supp. 983, 987 (E.D. Va. 1966) (court's emphasis). *See* text accompanying notes 216-231 *supra.*

247. *Id.*

248. *Id.*

249. 40 U.S.L.W. 4069 (U.S. Dec. 13, 1971), *rev'g* 432 F.2d 376 (5th Cir. 1970). *See* text accompanying notes 218-219 *supra.*

of land; injuries inflicted to or on them were held not compensable under the maritime law."[250] Therefore, it was apparently unnecessary to define loading and unloading as a requisite for determining maritime jurisdiction.[251]

To refute the longshoreman's argument that the sole determinant of shipowner liability for unseaworthiness was the function of his services, the Court distinguished *Gutierrez*,[252] stating that an unseaworthiness cause of action did not arise in that case because the longshoreman was unloading the vessel at the time of injury, but rather because the injury was caused by the ship's appurtenance, the defective cargo container.[253] *Alaska Steamship Co. v. Petterson*[254] and *Rogers v. United States Lines*[255] were also deemed inapplicable to the instant case, since both involved shipboard injuries.[256]

In the delicate area of federal-state jurisdiction, the dividing line will continue to be the ship's gangplank.[257] Dissatisfied earlier with this line, Congress enacted the Admiralty Extension Act of 1948, which expanded maritime jurisdiction to include "all cases of damage or injury . . . caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."[258] While this statute has been utilized as a basis of recovery for a longshoreman's dockside injury resulting from a ship's appurtenances,[259] it has never been interpreted to encompass a dockside accident caused by the stevedore's shorebased equipment.[260] The Court thus did not extend admiralty jurisdiction to the latter situation, leaving any further jurisdictional expansion to Congress.

The approach adopted in *Victory Carriers* appears more amenable to the maritime principle of uniformity. By restricting the outer limits of the shipowner's warranty to the gangplank, a workable standard can now be consistently and uniformly applied in determining liability for unseaworthiness. Otherwise, it was conceivable and probable that the shipowner's warranty could have been extended to an unlimited number of situations for which

---

250. Victory Carriers, Inc. v. Law, 40 U.S.L.W. 4059, at 4061 (U.S. Dec. 13, 1971) (footnote omitted).

251. The Court stated: "Reliance upon the gangplank line as the presumptive boundary of admiralty jurisdiction, except for cases in which a ship's appurtenance causes damage ashore, recognizes the traditional limitations of admiralty jurisdiction, and decreases the arbitrariness and uncertainties surrounding amorphous definitions of 'loading.'" *Id.* at 4063 n.14 (footnotes omitted). In Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969), the Supreme Court held that the Longshoremen's and Harbor Workers' Compensation Act, which covers injuries "upon the navigable waters," would not cover injuries on a pier even though the pier extends over navigable waters.

252. The Court also found *Sieracki* inapplicable to the question of extension of maritime jurisdiction, because the accident there occurred on navigable waters. Victory Carriers, Inc. v. Law, 40 U.S.L.W. 4059, at 4062 (U.S. Dec. 13, 1971).

253. *Id.*

254. 347 U.S. 396 (1954).

255. 347 U.S. 984 (1954).

256. Victory Carriers, Inc. v. Law, 40 U.S.L.W. 4059, 5062 n.11 (U.S. Dec. 13, 1971).

257. *Id.* at 4061.

258. 46 U.S.C. §740 (1970).

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

260. *Cf.* Industrial Comm'n v. Nortenholt Co., 259 U.S. 263 (1922).

it was never intended. In dissent, however, Justice Douglas felt that if a mechanical determination was desirable, a dividing line drawn around both the ship and the dock would not only meet the objective of uniformity, but would also be more compatible with the broad humanitarian policy for protection of longshoremen who are subject to all the risks and hazards of loading and unloading ships.[261]

Another consequence of the *Victory Carriers* decision is that the shipowner can minimize his burden of risk through the use of modern divisions of labor. By contracting out the loading or unloading operation to a stevedoring company the shipowner can effectively shift his potential liability for injuries sustained by those who perform services traditionally done by seamen.

The *Victory Carriers* decision also creates a problem with respect to classification. Two longshoremen, although both loading or unloading a vessel, may be treated differently. While a longshoreman injured on a pier by the ship's defective equipment has a maritime cause of action for unseaworthiness, his cohort injured by shorebased equipment while performing similar services on the same pier does not have a cause. The injured longshoreman's available remedies are thus fortuitously determined.

It should be noted, however, that the latter longshoreman is not completely denied recovery, but he must resort to state workmen's compensation laws. This is economically significant because his recovery is often limited to an inadequate, predetermined amount from his stevedore-employer rather than the jury-determined recovery from the shipowner under the doctrine of unseaworthiness.[262]

Conclusion

Wisely or not, the United States Supreme Court has in recent years generally been slow to articulate a determinative statement concerning the proper scope of the doctrine of unseaworthiness. Innovation and interpretation have been left primarily to the lower federal courts. However, with uncommon breadth of statement, the Supreme Court has found a right of action for wrongful death within the broad confines of unseaworthiness.

The manner in which this right will be implemented will no doubt be the subject of numerous lower court decisions in the future. A well-defined body of statutory, as well as nonstatutory, admiralty law will furnish guidance in resolving these problems. Encompassed by federal admiralty law, the new wrongful death action will probably incorporate principles of general maritime law in the determination of the limitation period, defenses, and damages, while the schedule of beneficiaries will most likely be patterned after one of the federal maritime statutes. However these problems of implementation are resolved, they are merely collateral to the right created in *Moragne*.

---

261. Victory Carriers, Inc. v. Law, 40 U.S.L.W. 4059, 4066 (U.S. Dec. 13, 1971).

262. The significant aspect is the amount of recovery and not whether the shipowner or stevedore-employer will be held liable. In an unseaworthiness action the shipowner will merely shift his liability to the stevedore-employer through a third party action for indemnity. Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

Recently, the Supreme Court gave an indication of a limitation on the doctrine of unseaworthiness in *Usner*. Although the Court laid the general framework by its recognition of the shipowner's defense of operational negligence, the formulation of practical guidelines in distinguishing the act-condition dichotomy has been left to the lower federal judiciary.

These courts will no doubt draw upon earlier pronouncements in discerning the difference between the concepts of operational negligence and unseaworthiness. Regardless of these future determinations, the *Usner* decision is of tremendous economic significance to the shipping industry. This defense in maritime personal injury and wrongful death actions will preclude the shipowner from being an absolute insurer of every accident.

Of late, an area of interpretative conflict among the federal judiciary was resolved when the Supreme Court refused, in the absence of congressional approval, to expand the boundaries of maritime law to include longshoremen injured by shorebased equipment in nonshipboard accidents. In effect, the doctrine of unseaworthiness was restricted to injuries sustained by longshoremen while working aboard ship or while working on the pier if the injuries were caused by the ship's defective appurtenances. Although the Court recognized the inherent problems of classification and potentially inadequate recoveries, it placed the burden on Congress to take corrective action through appropriate legislation.

Before any congressional resolution concerning the scope of maritime jurisdiction can be made, there must be an evaluation of the competing policies — that is, broad protection of the longshoreman and reasonable limitations on the shipowner's potential liability.

KNOWLTON H. SHELNUT, JR.