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Unseaworthiness and Operating Negligence: Condition versus Cause- Usner v. Luckenbach Overseas Corp.

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UNSEAWORTHINESS AND OPERATING NEGLIGENCE: CONDITION VERSUS CAUSE—*USNER V. LUCKENBACH OVERSEAS CORP.*

Unseaworthiness is the admiralty doctrine which imposes upon a shipowner an absolute duty to maintain his ship and its appurtenances in a manner reasonably suited for their intended use.[1] Judicial expansion of the doctrine during the past fifty years has led to its recognition as a bastion of seamen's rights.[2] Recently, however, the Supreme Court, in *Usner v. Luckenbach Overseas Corp.*,[3] abruptly curtailed this expansion by excluding a single act of operating negligence, or operating negligence per se, from the scope of unseaworthiness liability. The Court stressed that unseaworthiness is a *condition*, and although a single act of operating negligence may affect the physical make-up of the ship in such a manner as to create a condition of unseaworthiness, an act of operating negligence is not itself such a condition. Initially this comment will trace the historical development of the doctrine of unseaworthiness. The *Usner* decision will then be analyzed in light of this development in order to determine its proper interpretation. Finally, related issues concerning the scope of unseaworthiness liability will be assessed in light of the *Usner* rationale.

I. The Historical Background

Until recently, tort liability was not imposed upon a shipowner for injuries suffered by a seaman and caused by the unseaworthiness of the former's vessel. The shipowner's duty under the unseaworthiness doctrine was limited to the ship's cargo and to coverage of the ship under a contract of marine insurance.[4] To the owner of the cargo the shipowner was under an absolute duty to provide a vessel which, at the start of the voyage, would be reasonably fit to meet the exigencies of the voyage.[5] In addition, under the law of marine insurance the

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[1] G. Gilmore & C. Black, The Law of Admiralty 316 (1957) [hereinafter cited as G. Gilmore & C. Black].

[2] Id. at 316.

[3] 400 U.S. 494 (1971).

[4] Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 394 (1954) [hereinafter cited as Tetreault]. The ensuing textual discussion will focus on the unseaworthiness doctrine. The *Usner* decision deals with the relationship between operating negligence and unseaworthiness; see note 46 infra. The decision, and therefore this comment, do not deal with the question of "instantaneous unseaworthiness," a purely transitory unseaworthy condition often caused by operating negligence. The issues relating to instantaneous unseaworthiness are raised by the fact that the purely transitory or instantaneous "condition" of unseaworthiness may be inseparable from the operating negligence which caused it. In *Usner* no unseaworthy condition, not even a transitory one, existed. For a complete treatment of this issue see Zobel, The Unseaworthy Instant, 45 St. John's L. Rev. 200 (1970). For a comprehensive discussion of the entire range of seamen's rights, see generally Tetreault, supra.

[5] Tetreault, supra note 4, at 394.

shipowner was held to an absolute duty to provide a seaworthy ship as a condition precedent to the attachment of a policy of marine insurance; the seaworthiness of the vessel was considered a risk not assumed by the insurer.[6] The shipowner's liability to crewmen was narrowly limited to providing "maintenance and cure" (wages and medical care)[7] to crewmen whose injuries were not the result of their own misconduct.[8] The shipowner bore no responsibility to them beyond his liability for maintenance and cure, whether the injuries resulted from the negligence of the shipowner and his employees or from the unseaworthiness of the ship.[9]

Extension to seamen of the shipowner's duty to provide a seaworthy vessel is a relatively recent development.[10] The duty of the shipowner to provide a seaworthy vessel for his seamen was originally contractual in nature.[11] The seaman's contract of employment was viewed as containing an implied condition that the vessel was seaworthy. The seaman could refuse to sail on an unseaworthy vessel and the shipowner would nevertheless be liable to the seaman for the contracted wages.[12] This implied condition was of no value, however, to the seaman injured as a result of the unseaworthiness of the vessel; his remedy against the shipowner was limited to maintenance and cure.

Expansion of the doctrine from its genesis in the wage case context to its present status was initiated by the Supreme Court in *The Osceola*.[13] The Court indicated, by way of dicta, that the shipowner could be held liable to a *seaman*[14] for an indemnity beyond maintenance and cure for injuries caused by unseaworthiness of the vessel which were attributable to the negligence of the shipowner.[15] While increasing the obligation of the shipowner to seamen with respect

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[6] Id. at 394-95.

[7] G. Gilmore & C. Black, supra note 1, at 316.

[8] Tetreault, supra note 4, at 383.

[9] Id. An exception was made in the case of injuries received in defense of the ship against pirates. The crewman so maimed or disabled was to receive an indemnity of lifetime maintenance. Id. at 384.

[10] See G. Gilmore & C. Black, supra note 1, at 315-17.

[11] Tetreault, supra note 4, at 386, 390. In this context the terms seaman and crewman are synonymous. Compare note 14 infra with note 16 infra.

[12] That is, provided that the unseaworthiness was attributable to the negligence of the ship's master or owner. The early unseaworthiness cases were really wage cases involving an implied condition to the mariner's wage contract, not a warranty on which the shipowner would be liable for personal injury damages. Tetreault, supra note 4, at 386, 390.

[13] 189 U.S. 158 (1903).

[14] This word, while originally coextensive with the word "crewman," later became a distinct class to which the shipowner's duty to provide a seaworthy ship extended. Subsequent developments in admiralty law would result in the inclusion within the class of "seamen" those who are not members of the crew.

[15] The Osceola, 189 U.S. 158, 175 (1903). "It is clear that the liability for 'unseaworthiness' which the Supreme Court mentioned and discussed in *The Osceola* was a liability premised on negligence." Tetreault, supra note 4, at 391. See Smith, Liability in the Admiralty for Injuries to Seamen, 19 Harv. L. Rev. 418, 425 (1906).

to the seaworthiness of the ship, the Court refused to expand the shipowner's liability for negligence. The Court stated that members of the *crew*[16] were fellow servants and hence the shipowner was not liable to a crew member for negligent injury caused by another crew member.[17] Left undecided were the relationships between a "seaman" and a "crewman" as well as between unseaworthiness and operating negligence. *The Osceola*'s progeny, culminating in *Usner*, sought resolution of these issues.

As stated above, the shipowner's liability for unseaworthiness under *The Osceola* was predicated upon negligence; the shipowner's duty was to exercise ordinary care to provide a ship reasonably suited for its intended voyage. In *Carlisle Packing Co. v. Sandanger*,[18] the Court modified the shipowner's obligation, holding the shipowner to an absolute duty to provide a seaworthy vessel; exercise of ordinary care no longer satisfied the shipowner's duty.[19] Thus began a trend, continued in *Mahnich v. Southern S.S. Co.*,[20] which divorced unseaworthiness liability from concepts of negligence. In *Mahnich*, a seaman was injured in the collapse of a staging rigged with defective rope which had been negligently selected while good rope was available. The Court found the ship unseaworthy and the shipowner liable on the basis of the defective rigging, without regard to the fact that the unseaworthiness had been caused by the operating negligence of a mate.[21] This trend was climaxed in *Mitchell v. Trawler Racer*,[22] where a purely transitory condition, fish gurry on a rail, rendered the shipowner liable under the unseaworthiness doctrine to a seaman injured as a result of the slippery condition.

A parallel development in the unseaworthiness decisions relevant to a discussion of *Usner* concerns the extention to the harbor worker of the seaman's remedy for unseaworthiness. The judicial process by

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[16] In this context, the word "crew" refers generally to those men who may be termed mariners. The crew "signs on" and subjects itself to the discipline of the ship. "Seaman," on the other hand, is a term which was subsequently given a broader scope than the term "crew," and refers to both actual mariners and those related workers who perform tasks historically maritime in nature. See p. 572 infra.

[17] The Osceola, 189 U.S. 158, 175 (1903). The Court stated that:

> [W]e think the law may be considered as settled . . .
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> . . . [t]hat all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

Id.

[18] 259 U.S. 255 (1922). The respondent in this case was injured because the ship had been improperly outfitted.

[19] Id. at 259. Accord, The H.A. Scandrett, 87 F.2d 708 (2d Cir. 1937). "[T]he liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute." Id. at 710.

[20] 321 U.S. 96 (1944).

[21] Id. at 100.

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

which this occurred appears to have been motivated by socio-economic and humanitarian considerations.[23] Harbor workers were left without protection for job related injuries when the Court, in *Southern Pacific Co. v. Jensen*,[24] excluded harbor workers from the jurisdiction of state workmen's compensation laws for constitutional reasons.[25] The failure of Congress to enact federal legislation designed to protect adequately the injured harbor worker[26] led the Court to act in what has been termed a "frank incursion into legislation."[27] Thus, in *International Stevedoring Co. v. Haverty*,[28] the Court defined the statutory term "seaman" as including longshoremen, thereby entitling longshoremen to recover under the Jones Act[29] against their *employer* for either the latter's negligence or that of his employees.[30] Harbor workers were thus provided with some degree of protection against job related injury.

The decision in *Haverty* was based on a misreading of congressional intent,[31] however, and a year later Congress responded with enactment of the federal Longshoremen's and Harbor Workers' Compensation Act.[32] Under the Act the longshoreman's exclusive remedy against his *employer* was limited to a statutory compensation.[33] Thus, while limiting the longshoreman's right of recovery against his employer, the Act did not affect the longshoreman's right of recovery against individuals other than his employer. Although at the time this point was moot since no right of recovery against others existed, later developments in the expansion of rights of harbor workers would be dependent upon limitation of the Act in this manner.

The right of the longshoreman to recover against one other than his employer was subsequently recognized by the Supreme Court in *Seas Shipping Co. v. Sieracki*.[34] The Court reasoned that the shipowner should not be allowed to escape his duty to provide a seaworthy

[23] Tetreault, supra note 4, at 400.

[24] 244 U.S. 205 (1917).

[25] Id. at 212.

[26] Two attempts at congressional amendment of the "saving to suitors' clause" of the Judiciary Code, 40 Stat. 395 (1917) and 42 Stat. 634 (1922), were held unconstitutional by the Court in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) and Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924), respectively.

[27] Tetreault, supra note 4, at 401-02.

[28] 272 U.S. 50 (1926).

[29] 46 U.S.C. § 688 (1970).

[30] The Jones Act made applicable the provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970), which impose liability for negligence on the carrier. Under the Jones Act the fellow servant rule is not a bar. Illinois Cent. R.R. v. Skaggs, 240 U.S. 66, 70 (1916).

[31] Mr. Justice Holmes stated that: "We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." 272 U.S. at 52.

[32] 33 U.S.C. §§ 901-50 (1970).

[33] 33 U.S.C. § 905 (1970).

[34] 328 U.S. 85 (1946).

ship by employing longshoremen to do labor which at one time would have been performed by members of the crew.[35] The Court concluded that the shipowner's obligation was not confined to seamen who perform the ship's service under his immediate hire but that it also extended to those "seamen" who render the ship's service with his consent or by his arrangement.[36] By applying to unseaworthiness actions the definition of "seaman" which had been developed in the context of Jones Act liability in *International Stevedoring Co. v. Haverty*, the Court extended to harbor workers the seaman's traditional protection against unseaworthiness.[37] The decision signaled the opportunity for harbor workers to recover full compensation for injuries from one to whom the exclusive statutory recovery provisions of the federal Longshoremen's and Harbor Workers' Compensation Act were inapplicable.

Longshoremen's rights were further expanded in *Pope & Talbot, Inc. v. Hawn.*[38] In this case, a harbor worker was injured through the negligence of a fellow servant.[39] The injured longshoreman brought a libel for damages against the shipowner, the negligent crewman's employer. In permitting recovery the Supreme Court concluded that harbor workers, although "seamen" as regards unseaworthiness actions, are not "crewmen" for purposes of negligence actions.[40] Thus the fellow servant rule announced in *The Osceola*, which, absent the Jones Act, would bar crewmen from suing the shipowner for the negligence of their fellow servants, is not a bar to an action by a harbor worker against the shipowner for the negligence of the shipowner's employee. In contrast to the majority position, Mr. Justice Frankfurter in a concurring opinion argued that *Sieracki* had placed longshoremen in the category of seamen for all purposes. Unwilling to make a distinction between the use of the words "seaman" and "crew," Justice Frankfurter argued that harbor workers should be considered members of the crew for all purposes, including application of the fellow servant rule to negligence actions.[41]

It is interesting to note that as a result of the Supreme Court's benevolent interest in protecting the rights of harbor workers, these individuals are presently graced with a wider range of remedies than those available to crewmen, the true "wards of admiralty." Thus a

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[35] Id. at 100.

[36] Id. at 95.

[37] Id. at 100.

[38] 346 U.S. 406 (1953).

[39] The fellow servant in this case was Hawn's own employer, who had been working with Hawn as an employee of the shipowner.

[40] Id. at 413.

[41] 346 U.S. 406, 414 (1953). Justice Frankfurter based his concurrence upon the lower court's express finding of unseaworthiness. He reasoned that Hawn was within the class of maritime workers denominated as seamen by *Sieracki*. However, Justice Jackson, in dissent, was unwilling to include Hawn within the class of seamen. Id. at 419.

crewman can recover for unseaworthiness and, under the Jones Act, for the negligence of a fellow servant. The harbor worker-seaman, on the other hand, can recover against the shipowner for unseaworthiness, for the negligence of a crewman under common law, and he is also entitled to a statutory compensation from his employer.[42] It was in this context that *Usner v. Luckenbach Overseas Corp.* was decided.

II. *Usner v. Luckenbach Overseas Corp.*

Usner, a longshoreman employed by an independent stevedoring contractor, was injured aboard the S.S. *Edgar F. Luckenbach* while engaged in loading cargo.[43] The ship, moored to a dock, was receiving cargo from a barge positioned alongside. The loading operations were being carried out by Usner and other longshoremen, under the direction of their employer. Usner's job was to "break out," or load, the bundles of cargo by securing the bundles to a sling attached to the fall each time the fall was lowered from the ship's boom by the winch operator, a longshoreman positioned aboard the ship. The loading proceeded in this manner for some time, until the fall was not lowered far enough by the winch operator on one occasion. Usner signaled the flagman standing on the ship to direct the winch operator to lower the fall further. The fall was lowered, but too far and too quickly. The sling struck Usner, knocking him to the deck of the barge and injuring him. Apparently the winch operator had been negligent in the operation of the winch, since neither before nor after this incident was any difficulty experienced in the operation of the winch, boom, fall, sling or other equipment of the ship.

Usner brought an action for damages against the shipowner, Luckenbach Overseas Corporation, in federal district court, alleging that his injuries had been caused by the unseaworthiness of the ship. Luckenbach moved for summary judgment on the ground that a single negligent act by a longshoreman could not render the ship unseaworthy. The district court denied the motion but granted Luckenbach leave to take an interlocutory appeal.[44] The United States Court of Appeals for the Fifth Circuit reversed the district court and directed that the motion for summary judgment be granted.[45] The Circuit Court ruled that " '[i]nstant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman."[46] The Supreme Court granted certiorari

[42] 46 U.S.C. § 688 (1970).

[43] The facts here presented are substantially as stated in the Court's opinion. 400 U.S. at 494-96.

[44] 28 U.S.C. § 1292(b) (1970).

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

[46] Id. at 985-86. Operating negligence may be defined as a momentary or transient failure to exercise due care which does not affect the physical make-up of the ship. Unseaworthiness, under long-standing law, may result from operating negligence which physically affects the ship and renders it not reasonably suited for its intended use.

to consider the issue of whether operating negligence renders a ship pro tanto unseaworthy.[47]

In denying recovery for the injury, and without reviewing in detail the development of the doctrine of unseaworthiness in admiralty law, the Court, in a five-four decision, accepted as fully settled (a) that the shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman; (b) that the shipowner is liable even though the unseaworthiness may be transitory; and (c) that the shipowner is liable even though the injury be suffered elsewhere than aboard ship.[48] The Court also observed that liability for unseaworthiness has become "wholly distinct from liability based upon negligence . . . [because] unseaworthiness is a *condition*, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it."[49] Citing *Mitchell v. Trawler Racer, Inc.*[50] as climaxing the case law evolution of the "complete divorcement of unseaworthiness liability from concepts of negligence,"[51] the Court emphasized that in all unseaworthiness cases there has existed a *condition* of unseaworthiness.[52] The condition might have arisen from a variety of circumstances, but in each instance the ship was not reasonably fit for her intended service.[53] The Court concluded, however, that:

> What caused [Usner's] injuries in the present case . . . was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of [Usner's] fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.[54]

Usner had argued that the Court's per curiam decision in *Mascuilli v. United States*[55] decided affirmatively the issue he raised concerning operating negligence; specifically, that operating negligence per se ren-

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[47] Usner v. Luckenbach Overseas Corp., 397 U.S. 933 (1970). See Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 496 (1971).

[48] 400 U.S. at 497-98.

[49] Id. at 498 (emphasis in original).

[50] 362 U.S. 539 (1960).

[51] 362 U.S. at 550.

[52] 400 U.S. at 499-500.

[53] Id. at 499. The Court noted numerous conditions which have been held to give rise to unseaworthiness. See Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) (defective gear); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (appurtenances in disrepair); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) (unfit crew); Waldron v Moore-McCormack Lines, Inc., 386 U.S. 724 (1967) (insufficient number of men assigned to perform a shipboard task); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) (improper loading or storage of ship's cargo).

[54] 400 U.S. at 500.

[55] 387 U.S. 237 (1967).

dered a ship pro tanto unseaworthy. The majority rejected this argument, stating that reliance upon *Mascuilli* was misplaced.[56]

The *Mascuilli* Court, in its per curiam treatment of the questions posed in the petition for certiorari, had cited *Mahnich v. Southern S.S. Co.*[57] and *Crumady v. The J.H. Fisser.*[58] The *Usner* Court, interpreting the significance of the citation of these cases in *Mascuilli*, viewed *Mahnich* as having involved a defective rope and *Crumady*, a defective winch. The *Usner* majority concluded, therefore, that *Mascuilli* did not support Usner's contention; *Mascuilli* had left unanswered the question of whether operating negligence per se renders a ship pro tanto unseaworthy.[59]

Usner's contention was not so quickly dismissed by the dissenters.[60] Mr. Justice Douglas considered the issue as having been settled in Usner's favor in *Crumady v. The J.H. Fisser*. Justice Douglas, who wrote the majority opinion in *Crumady*, relied on the facts of that case for support. He argued that there the winch had not been inherently defective but rather, that it was the use of the winch in a negligent and unsafe manner which had rendered the vessel unseaworthy. The conflicting interpretations placed upon *Crumady* by the *Usner* majority and dissenting opinions indicates the significance of that case with respect to the validity of the *Usner* rationale. An examination of *Crumady* is therefore necessary.

In *Crumady* the cut-off safety device of a winch had been set by members of the crew at twice the safe stress limit of the rigging. The longshoremen then negligently moved the boom in a manner that caused the stress on the rigging to exceed the maximum safe limit. The winch continued to operate, failing to shut off as it would have if the safety device had been properly set.[61] The Court found "ample evidence to support the [lower court] finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in the *Mahnich* case. But it was adjusted . . . in a way that made it unsafe and dangerous for the work at hand."[62] The Court concluded that "in this case the winch . . . makes the vessel *pro tanto* unseaworthy."[63]

It may be contended that if the boom and winch had been used as intended the stress would not have reached, let alone exceeded, the maximum safe stress. Arguably, then, the improper setting of the cut-off device would not have been a cause of unseaworthiness; rather, the unseaworthy condition resulted solely from the negligent use of

[56] 400 U.S. at 500 n.19.
[57] 321 U.S. 96 (1944).
[58] 358 U.S. 423 (1959).
[59] 400 U.S. at 500 n.19.
[60] 400 U.S. at 501.
[61] 358 U.S. at 425-26.
[62] Id. at 427.
[63] Id. at 428.

sound equipment. However, the very existence of the safety device indicates that its intended use was to prevent the stress on the boom from exceeding the safe limit, regardless of the manner in which that stress arose. Thus the safety device, once improperly set, was itself no longer reasonably fit for its intended purpose, rendering the ship pro tanto unseaworthy. Hence an unseaworthy condition existed which allowed the subsequent negligence of the longshoremen to cause the injury. The subsequent negligence of the longshoremen could not have caused the injury if the ship had not already been unseaworthy. The longshoremen's misuse of the sound winch and boom was thus immaterial since, "but for" the defective condition of the safety device, misuse of the winch and boom in this manner would not have been possible. It appears, therefore, that the *Usner* majority's view of *Crumady* as involving a *condition* rendering the ship pro tanto unseaworthy is supported by a close reading of the facts in that case.

Nonetheless, there is language in *Crumady* which may also support the dissenters' contention that stevedores may themselves render a ship pro tanto unseaworthy. In fact, *Crumady* apparently gave approval to such a statement made by the Second Circuit Court of Appeals in *Grillea v. United States*.[64] This support for the dissenters' position is mitigated, however, by the Supreme Court's refusal to decide the issue in *Crumady*.[65] Furthermore, the facts of *Grillea* involved a condition created by longshoremen rather than a single act of operational negligence.[66] Thus it would seem that the *Usner* dissenters are relegated for support to dicta in *Crumady* and, perhaps, to the unexpressed intent of Justice Douglas in that case.[67]

The *Usner* majority, in contrast, appears to have construed *Crumady* correctly. Since that case forms the basis of the decision in *Mascuilli*, the *Usner* majority's interpretation of *Mascuilli* also appears to be correct. The correctness of the interpretation placed upon *Crumady* and *Mascuilli* by the *Usner* majority does not, however, resolve the question of the validity of the Court's distinction between a condition of unseaworthiness and operating negligence. Thus, before an analysis of related issues concerning the scope of unseaworthiness can be undertaken, it must be determined whether the majority's distinction is correct.

III. Unseaworthiness as a Condition

Admiralty law has long recognized the existence of a condition of unseaworthiness when a vessel and her appurtenances are not reasonably suited for their intended use. Quite naturally, this general definition has also permitted the recognition of a wide variety of ship-

[64] 232 F.2d 919 (2d Cir. 1956).

[65] 358 U.S. at 427. The Court stated that "we need not go so far . . . ."

[66] 232 F.2d at 922-23.

[67] Much of Justice Douglas' dissent relies not upon what *Crumady* says, but upon what the Justice had intended it to say.

board circumstances as constituting conditions of unseaworthiness. Thus it has been held irrelevant that the unseaworthiness arose as a result of the "operating negligence" of a crewman.[68] In *Mahnich v. Southern S.S. Co.*, for example, a staging was negligently rigged with defective rope by the mate even though good rope had been available.[69] With the exception of an action maintainable under the Jones Act,[70] the injured crewman was precluded from recovering from the shipowner under respondeat superior for the mate's negligence, due to the bar of the fellow servant rule.[71] The Supreme Court was of the opinion, however, that the seaman should be able to recover in an unseaworthiness action.[72] Although no liability attached to the shipowner for negligent selection and use of the rope, the Court reasoned that the defective rope made the staging itself "inadequate for the purpose for which it was ordinarily used"[73] and hence, unseaworthy. The Court concluded that the shipowner was under a continuing, absolute duty to provide seaworthy appliances,[74] a duty unaffected by the fellow servant rule.[75]

Just as it is immaterial that the unseaworthy condition was caused by the operating negligence of a crew member, it is also immaterial whether the operating negligence of longshoremen contributed to the cause of the unseaworthy condition.[76] Thus the Supreme Court in *Crumady v. The J.H. Fisser* characterized the crew's setting of a safety device at twice the maximum safe stress as the unseaworthy condition which was subsequently brought into play by the longshoremen's negligent use of the boom and winch.[77]

Even if a defective appliance is brought aboard by the longshoremen after the shipowner has relinquished control of the ship, as in *Alaska S.S. Co. v. Petterson*,[78] unseaworthiness liability may still be imposed upon the shipowner. This result obtains because the duty of the shipowner is absolute, continuing and nondelegable.[79] A defective block brought aboard by the longshoremen in *Petterson* had been incorporated into the appurtenances of the ship. The shipowner's duty to provide seaworthy appliances was expanded to include responsibility

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[68] See Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

[69] Id. at 97.

[70] In *Mahnich* the statute of limitations had run. For a more detailed discussion of the procedural development and strategy used in the case see Tetreault, Seamen, Seaworthiness, and the Rights of Harborworkers, 39 Cornell L.Q. 381, 396-98; G. Gilmore & C. Black, The Law of Admiralty 317 (1957).

[71] The Osceola, 189 U.S. 158 (1903).

[72] 321 U.S. at 103.

[73] Id.

[74] Id. at 104.

[75] Id. at 102.

[76] See Crumady v. The J.H. Fisser, 358 U.S. 423 (1959).

[77] Id. at 427. See text at p. 575 supra.

[78] 347 U.S. 396 (1954), aff'g per curiam, 205 F.2d 478 (9th Cir. 1953).

[79] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 100 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96, 102, 104 (1944); Tetreault, supra note 70, at 400-01.

for this equipment. Thus, even if the longshoremen had been negligent in bringing the defective equipment aboard, the shipowner was nevertheless liable; the defective block rendered the ship pro tanto unseaworthy.[80]

Indeed, under the rationale of *Mahnich, Crumady* and *Petterson* it would appear that it is immaterial by whom or in what manner a portion of the ship is rendered defective. This view is confirmed by the opinion of the Supreme Court in *Seas Shipping Co. v. Sieracki.*[81] In this case, a longshoreman was injured when the shackle supporting a boom parted due to a latent defect. Although the contractor and subcontractor who had supplied the shackle were found liable on negligence theory for their failure to test the fitting,[82] the shipowner was also held liable on a theory of unseaworthiness.[83] Thus it appears to be irrelevant in an unseaworthiness action *how* the defective condition arose. If the condition exists and it causes injury to a seaman, the shipowner is held liable.

A further development in the shipowner's liability for unseaworthiness occurred in *Boudoin v. Lykes Bros. S.S. Co.*[84] Certiorari was granted[85] to resolve a conflict between the Fifth and Second Circuit Court decisions in *Lykes Bros. S.S. Co. v. Boudoin*[86] and *Keen v. Overseas Tankship Corp.*[87] In *Boudoin* an American seaman sued a shipowner in federal district court in order to recover for injuries received in a shipboard attack by a drunken fellow seaman. On the facts of the case, the district court had found that the assailant was "a person of dangerous propensities and proclivities"[88] at the time of the assault; that he was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults";[89] and that he was not "equal in disposition and seamanship to the ordinary men in the calling. . . ."[90] The district court held the shipowner liable but the Court of Appeals for the Fifth Circuit reversed.[91] The Supreme Court found the owner liable, holding that the warranty of seaworthiness extends to the *crew* as well as to the ship and gear.[92] The Court determined that the record sustained

[80] Petterson v. Alaska S.S. Co., 205 F.2d 478, 479-80 (9th Cir. 1953).

[81] 328 U.S. 85 (1946).

[82] Sieracki v. Seas Shipping Co., 57 F. Supp. 724 (E.D. Pa. 1944), rev'd in part and aff'd in part, 149 F.2d 98 (3d Cir. 1945), aff'd, 328 U.S. 85 (1946).

[83] Sieracki v. Seas Shipping Co., 149 F.2d 98 (3d Cir. 1945), aff'd, 328 U.S. 85 (1946).

[84] 348 U.S. 336 (1955).

[85] 348 U.S. 814 (1954).

[86] 211 F.2d 618 (5th Cir. 1954), rev'd 348 U.S. 336 (1955).

[87] 194 F.2d 515 (2d Cir. 1952). In *Keen*, the factual situation was almost identical to that in *Boudoin*. The Second Circuit held that the malevolent crewman rendered this ship pro tanto unseaworthy. The shipowner was therefore held liable to the crewman injured in the attack.

[88] Boudoin v. Lykes Bros. S.S. Co., 112 F. Supp. 177, 179 (E.D. La. 1953).

[89] Id.

[90] Id. at 180.

[91] 211 F.2d 618 (5th Cir. 1954).

[92] 348 U.S. 336, 339-40 (1955).

the district court's findings and that the findings amply supported a recovery for breach of the warranty of seaworthiness.[93] As applied to a crewman, such a warranty is not that the crewman is competent to meet all contingencies, but that he is equal, in disposition and seamanship, to ordinary men in the calling.[94] It would appear that a longshoreman injured by a crewman under circumstances similar to those in *Boudoin* would be entitled to recover for unseaworthiness, since the duty of the shipowner to provide a seaworthy crew encompasses all seamen.[95]

Just as misuse of a winch or other appliance may give rise to a condition of unseaworthiness, so too may "misuse" of the crew result in a condition in which the crew is not suited for its intended use; improperly manned, the ship therefore would be unseaworthy. In *Waldron v. Moore-McCormack Lines, Inc.*[96] two crewmen had been ordered by the third mate, during the last minute of a docking operation, to uncoil a heavy eight-inch rope and carry it fifty-six feet to the edge of the ship. One of the two was injured while uncoiling the rope and brought an action for unseaworthiness against the shipowners. There was expert evidence to the effect that three or four men, rather than two, were required to carry the line in order to constitute "safe and prudent seamanship." The injured crewman did not contend that the vessel as a whole was insufficiently manned nor that there were too few men at the stern engaged in the overall docking operation. Neither did he contend that the mate was incompetent, nor that the rope was defective.[97] The sole contention upon which he sought recovery was that "too few men assigned 'when and where' the job of uncoiling the rope was to be done"[98] constituted unseaworthiness. The Court agreed, holding that "[b]y assigning too few men to uncoil and carry the heavy rope, the mate caused both the men and the rope to be misused."[99] Citing *Boudoin*, the Court further stated that the shipowner's duty was to provide a crew competent to meet the contingencies of the voyage, thus rejecting the distinction made by the Second Circuit between a well-manned ship and a well-manned operation.[100] It would appear that *Waldron* is broad enough to grant recovery to a *longshoreman* who is injured when a rope carried by too few crewmen is dropped, since the shipowner's duty to provide a seaworthy crew encompasses all seamen.

It would also appear that *Waldron* and *Boudoin* may be viewed

[93] Id. at 338, 340.

[94] Id. at 340. Accord, Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (2d Cir. 1952).

[95] See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 100 (1946); Smith v. Lauritzen, 356 F.2d 171 (3d Cir. 1966).

[96] 386 U.S. 724 (1967).

[97] Id. at 725.

[98] Id. at 727.

[99] Id.

[100] Id. at 727 n.4. The duty, according to the Second Circuit, extended to the former but not to the latter. Compare id. with 356 F.2d 247, 251 (2d Cir. 1966).

as establishing the rule that an incompetent crewman may so affect the suitability of the crew to perform its intended service as to render the ship unseaworthy. Moreover, if a *single* act of an incompetent crewman, such as a violent attack on another crewman, may evidence the unseaworthiness of the crew, it would seem likely that a *continuous course of negligent* conduct by a crewman, when coupled with a negligent act which results in injury, could provide a basis for an unseaworthiness recovery. In this instance the course of negligent conduct engaged in by the crewman would be evidence of the incompetence of the crew to meet the contingencies of the voyage and of the crew's unsuitability for its intended service. The single negligent act which causes injury to the seaman is not evidence of unseaworthiness per se but it does serve to connect the injury with the existing unseaworthy condition. The single act would establish the requisite causal connection between the unseaworthy condition of the crew, as evidenced by the continuous course of negligent conduct on the part of a crewman, and the injury to the seaman.

At this point it may be concluded that in each instance in which a recovery for unseaworthiness has been permitted there has existed a *condition* of unseaworthiness. In each of these cases the fact that a physical part of the ship was not reasonably fit for its intended use rendered the vessel pro tanto unseaworthy, regardless of the manner in which this condition arose. Moreover, the crew, analogous to an appurtenance of the ship, may be considered to be in an unseaworthy condition when the crew members are not fit for their intended employment. In light of the Court's own precedents, the *Usner* majority's statement that unseaworthiness is a *condition* appears justifiable.

IV. Interpretation of *Usner v. Luckenbach Overseas Corp.*

A. *Two Views of the Majority Opinion*

It is proposed that *Usner* should be interpreted as holding that a single negligent act neither evidences nor constitutes an unseaworthy condition. Furthermore, it is suggested that the shipowner's duty is merely to provide a crew reasonably suited for its intended use and a single negligent act is not evidence that the crew is not reasonably fit. Central to this view is the conclusion that imposition of liability upon the shipowner, under the doctrine of unseaworthiness, for a single act of operating negligence by a crewman, would be an expansion of the shipowner's duty from that requiring him to provide a *reasonably* fit crew to one requiring him to provide an *absolutely* fit crew. A second interpretation of *Usner* is that the shipowner's duty is to provide a reasonably fit *crew*, not to provide reasonably fit *seamen* working on board, but not members of the crew. The longshoreman who was operating the winch was not a crewman and, therefore, the shipowner was under no duty to the injured seaman for the acts of a noncrewman.[101]

[101] 400 U.S. at 500 n.18.

The initial interpretation, however, does not consider this fact to be determinative. Rather, the initial interpretation relies on the Court's emphasis of the fact that unseaworthiness is a condition,[102] not an isolated act of operational negligence. The significant factor in the initial view of the case is that although the winchman was operationally negligent, his negligence cannot be viewed as affecting the suitability of the vessel or crew for their intended service, and, therefore, the single negligent act alone neither evidences nor constitutes an unseaworthy condition. In contrast, the second view of the case stresses the distinction that longshoremen are seamen but not crewmen. A detailed analysis of the two views will reveal that the shipowner's liability for unseaworthiness is limited by the nature of his duty and not by a strained reading of the word "crew."

B. *An Analysis of the Two Views*

It should be noted that the Court, by way of a footnote, indicates that the winch operator was not a member of the ship's crew.[103] This statement raises the troublesome question of whether the Court intended to limit *Usner* to cases where injury is caused by the operating negligence of one not a member of the crew, or whether the note was merely dictum. In support of the latter alternative, it must be noted that the sole issue to which the Court directed itself was whether a single act of operating negligence evidenced an unseaworthy condition;[104] the Court concluded that it did not.[105] The Court did not stress the distinction between longshoremen and crew aside from this isolated, footnote comment. It would seem logical that a more complete discussion of the attempted limitation would have been warranted had the Court intended to limit its opinion to the conclusion that a single act of negligence of a longshoreman, as contrasted to that of a crew member, does not constitute an unseaworthy condition.

Furthermore, it is well established that the shipowner owes a duty to all seamen. On the theory that longshoremen undertake the same risks as crewmen in performing similar tasks, the shipowner has not been allowed to escape liability by more efficient division of labor.[106] Correspondingly, the shipowner should not be permitted to escape liability for breach of his duty to provide a seaworthy crew by substituting longshoremen for crewmen who would otherwise perform the tasks. In addition, *Grillea* and *Crumady* indicate that a longshoreman's negligence, which affects a physical part of the ship, may cause an unseaworthy condition and impose liability upon the shipowner. Therefore it would be contrary to the rationale of *Sieracki* and its progeny

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102 Id. at 498.

103 Id. at 500 n.18. See also Smith v. Olsen & Ugelstad, 324 F. Supp. 578, 582 (E.D. Mich. 1971).

104 400 U.S. at 496-500.

105 Id. at 500.

106 Seas Shipping Co. v. Sieracki, 328 U.S. 85, 100 (1946).

to draw a distinction on the basis that a longshoreman is a seaman but not a crewman.

It is true that the crew "signs on" and does subject itself to the rigid discipline of the sea, whereas a longshoreman does not. However, the shipowner's absolute duty to provide a reasonably fit crew is not satisfied by the mere exercise of due care. He is liable for unknown and perhaps unascertainable physical and psychological defects in the crew.[107] The fact that the crew members sign on and are subject to examination by the shipowner before he accepts them and warrants their seaworthiness is largely immaterial since the shipowner is liable even though exercising due care in the selection process. Furthermore, in reality, the extent of screening is minimal, due to union hiring practices. Thus a refusal to extend the shipowner's liability to include the acts of longshoremen, on the grounds that the shipowner has no opportunity to examine the longshoremen and that he may therefore be unfairly subjected to increased liability, ignores the realities of maritime employment.[108]

The final obstacle to interpreting *Usner* as holding that a single negligent act neither constitutes nor evidences an unseaworthy condition is presented by the holding of *Pope & Talbot, Inc. v. Hawn*.[109] The case held that harbor workers, unlike crewmen, are not barred by the fellow servant rule of *The Osceola*[110] from suing the shipowner for negligence.[111] *Hawn* is readily reconcilable with the proposed interpretation of *Usner*. Although longshoremen are not "crewmen" for purposes of negligence actions brought against the shipowner, that is, they are not his employees but his invitees, longshoremen may nonetheless be crewmen for purposes of the shipowner's liability in unseaworthiness actions. As a result of this employee-invitee distinction, the shipowner is not liable for the negligence of his invitee, the longshoreman, but he is held liable for the negligence of his employee, the crewman, under the doctrine of respondeat superior, providing that the fellow servant rule does not apply.

The Court's refusal to apply the bar of the fellow servant rule to longshoremen, who are not literally fellow employees, is consonant with the narrow judicial interpretation historically given to the rule.[112] The shipowner's duty to provide a seaworthy ship, on the other hand, extends beyond his employees to a class of invitees who qualify as seamen, that is, to those who perform tasks historically performed by

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[107] Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952).

[108] In addition, the shipowner may be entitled to indemnification from the stevedoring contractor. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

[109] 346 U.S. 406 (1953).

[110] 189 U.S. 158 (1903).

[111] 346 U.S. at 413.

[112] The refusal of the courts to apply the fellow servant rule to actions brought under the Jones Act, supra note 30, and to unseaworthiness actions, supra text accompanying note 75, are illustrative of the narrow application of the rule.

the crew. Furthermore, the shipowner's duty to provide a crew reasonably fit for its intended service could logically include both crewmen-employees, for whose negligence the shipowner may be liable, and longshoremen-invitees, for whose negligence the shipowner may not be liable, because liability for unseaworthiness has become completely divorced from concepts of negligence. Unseaworthiness is a separate cause of action.[113] The duties owed in each cause of action, negligence and unseaworthiness, may differ, as may the persons to whom the duties are owed.

In the same manner, the persons for whose conduct the shipowner may be liable in negligence may differ from those who may attach liability upon him for unseaworthiness. A prime example of this distinction may be found in *Sieracki*. The contractors who supplied the defective shackle could not render the shipowner liable under negligence theory, but did impose upon him unseaworthiness liability. Thus those who are not "crew" for purposes of the fellow servant rule in negligence actions, may be crew for purposes of attaching unseaworthiness liability upon the shipowner. Any difficulty with respect to the employee-invitee distinction is one of nomenclature and not of substance. From a conceptual point of view *Usner* can only be construed as meaning that a single negligent act of a longshoreman neither evidences nor constitutes an unseaworthy condition.

V. Related Issues Analyzed in Light of the Proposed Interpretation of *Usner* and the Rationale Supporting It

Among the issues likely to arise under *Usner* is whether a single act of operational negligence by a crewman may render the ship pro tanto unseaworthy, thereby entitling an injured seaman to recover from the shipowner. At first blush the issue appears to be moot.[114] A longshoreman so injured may recover on a negligence theory under *Pope & Talbot v. Hawn*[115] since he is not a crewman barred by the fellow servant rule of *The Osceola*.[116] A crewman may sue his employer, the shipowner, for negligence under the Jones Act.[117] No procedural advantage exists for an unseaworthiness action under these circumstances, since the proof required to establish unseaworthiness would also establish negligence. However, an injured crewman might bring an unseaworthiness action rather than a negligence action under these circumstances, due to the existence in the Jones Act of a statute of limitations. No such time limitation would exist for an unseaworthiness action, and the issue, therefore, is not moot.[118] The proposed

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

114 Pope & Talbott v. Hawn, 346 U.S. 406, 418 (1953) (Frankfurter, J., concurring).

115 Id. at 406.

116 189 U.S. 158 (1903).

117 See text at p. 573 supra.

118 For an example of where the statute of limitations had lapsed, see Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). See also note 70 supra. But see Judge v. Johnston

interpretation of *Usner* makes it clear that no distinction should be made between the negligent act of a longshoreman and that of a crewman. *Usner* holds that a single negligent act of a *longshoreman* neither constitutes nor evidences an unseaworthy condition; similarly, the single negligent act of a *crewman* should neither constitute nor evidence an unseaworthy condition.

In light of the proposed interpretation of *Usner* and the reasoning supporting it, there remains the issue regarding the extent to which a longshoreman may render a ship pro tanto unseaworthy. Perhaps most significant is a factual situation, similar to that in *Usner*, in which a negligent longshoreman injures a crewman. This situation, it is submitted, would not give rise to a condition of unseaworthiness. Furthermore, the crewman could not sue the shipowner for negligence because the longshoreman is not an employee or agent of the shipowner and hence cannot impose liability upon the shipowner under the Jones Act.[119] However, the crewman would be entitled to recover from the longshoreman's employer under common law negligence theory.

It would appear, under the logic of the proposed initial interpretation, that a longshoreman with a volatile personality, who violently attacks either a fellow longshoreman or a crewman, could render the ship pro tanto unseaworthy and the shipowner liable.[120] In addition, misuse of a longshoreman, resulting in an operation being improperly manned, would impose liability upon the shipowner for unseaworthiness.[121] The same holds true for a longshoreman engaged in a continuous course of negligent conduct which would evidence his unsuitability for the service to which he is put and, hence, both his unseaworthiness and that of the ship.[122] In each case the malevolent or misused longshoreman brings about an unseaworthy *condition* in the crew, such that the crew is no longer reasonably suited for its intended service. Since the longshoreman is not equal in disposition and seamanship to ordinary men in the calling, his condition renders the ship pro tanto unseaworthy.

Conclusion

Usner v. Luckenbach Overseas Corp. may answer several questions regarding the scope of unseaworthiness liability. *Usner* should not be interpreted as turning upon the fact that the longshoreman was not a member of the crew and hence that the shipowner did not war-

Warren Lines, Ltd., 205 F. Supp. 700 (D. Mass. 1962).

[119] The doctrine of respondeat superior under the common law theory of negligence is inapplicable since a longshoreman, according to *Hawn*, is an invitee of the shipowner, not an employee.

[120] See Smith v. Lauritzen, 356 F.2d 171 (3d Cir. 1966) and textual discussion of Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) and Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952), at p. 578 supra.

[121] See discussion of Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967) at p. 579 supra. Cf. Smith v. Lauritzen, supra note 120.

[122] See discussion at p. 580 supra.

rant his seamanship. Rather, *Usner* indicates that unseaworthiness is a *condition*, and that a single negligent act, be it the act of a crewman or a longshoreman, neither evidences nor constitutes such a condition. Furthermore, longshoremen should be considered as part of the crew for purposes of the shipowner's warranty of seaworthiness given to seamen. Thus, longshoremen could cause shipowner liability for unseaworthiness by engaging in a continuous course of negligent conduct; by violently assaulting a seaman; or by being employed in a manner causing an operation to be improperly manned. In each instance the longshoreman's unsuitability for his intended service results in breach of the shipowner's absolute duty to provide a seaworthy crew equal in disposition and seamanship to ordinary men in the calling. Although possessing potential for further confusion of the unseaworthiness doctrine, upon close examination the principal case offers answers to several questions concerning the meaning of unseaworthiness. If properly interpreted by lower courts, the decision may introduce clarity into the case law by placing emphasis upon unseaworthiness as a *condition*.

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