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THE MARITIME DEFINITION OF AN UNSAFE PLACE TO WORK

WILLIAM ALPER*

The precise definition under maritime law of the shipowner's duty to provide seamen a safe place to work has been the subject of substantial, troublesome and recent litigation. Is this duty rooted in concepts of negligence, *i.e.*, a duty to exercise reasonable care to provide a safe place? Or, on the contrary, is this duty absolute, comparable to and co-extensive with the duty to provide and maintain a seaworthy vessel? If the duty is predicated upon concepts of negligence, then the shipowner must have actual or constructive notice of the unsafe place, a basic tenet of negligence liability. If the duty is absolute, then actual or constructive notice of the condition is unimportant and the shipowner may be held liable even though it had neither knowledge nor opportunity to know of the existence of the condition—a species of liability without fault not unknown in the maritime law.

A full grasp of the shipowner's responsibilities and duties to his seamen cannot be attained without understanding the special working conditions and position of seamen and the motivations of the courts and Congress toward their protection. The seaman's occupation has no real counterpart among shore employees. He travels through every climate; he is exposed to many diseases, and to extremes of weather in every part of the world; he experiences the fury and travail of heavy seas and storms; all of which the shore worker would, or could, refuse to bear. These dangers, in addition to the ship's own internal hazards, are the incidents of his employment. The seaman's occupation has always demanded of him the most rigid requirements of discipline and service to the vessel. During his employment, he surrenders his personal liberty upon pain of punishment for mutiny; the only involuntary servitude lawful under the thirteenth amendment.¹ For these reasons and many others, seafaring nations from earliest times have required the seaman's employer to maintain, care, and protect him and have imposed corresponding and sometimes stringent obligations upon the shipowner for his welfare and safety.²

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1. *Robertson v. Baldwin*, 165 U.S. 275 (1897).

2. *Seas Shipping Co. vs. Sieracki*, 328 U.S. 85 (1946); *Sims v. United States*, 186 F.2d 972 (3d Cir. 1951), *cert. denied*, 342 U.S. 816 (1951). The roots of the maritime law may be traced to biblical times, and reference thereto is found in ancient Greek and Roman laws. Its more modern foundation lies in the codes of the medieval trade towns, *LAWS OF HANSA TOWNS* arts. XXXIX (1597), reprinted 30 Fed. Cas. 1197 (1897); *LAWS OF OLERON* arts. VI, VII (circa. 1266), reprinted 30 Fed. Cas. 1171 (1897); *LAWS OF WISBUY* arts. VIII, XIX (circa. 1200), reprinted 30 Fed. Cas. 1189 (1897); *MARINE ORDINANCES OF LOUIS XIV* arts. XI, XII (1681), reprinted 30 Fed. Cas. 1203 (1897), and these roots have grown into the maritime law of the United States incorporated from English law by the federal constitution. *Panama R.R. v. Johnson*, 264 U.S. 373 (1924).

It is in this context that the true nature and the proper definition of the shipowner's duty to provide a safe place to work must be sought. The key to the solution is found in two "landmarks" of the maritime law: (1) the opinion of the Supreme Court in *The Osceola*,³ and (2) the adoption by Congress of the Jones Act.⁴ In 1902, the Supreme Court of the United States summarized the shipowner's liabilities to seamen in *The Osceola*:⁵

2. That the vessel and her owner are, . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. . . .

3. That all the members of the crew . . . are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, . . . (Emphasis added.)

The shipowner's liability in damages to his crew thus was limited to the doctrine of unseaworthiness. This was and is a duty and concomitant liability peculiar to the maritime law; the absolute and non-delegable duty to provide a safe and seaworthy vessel and to supply and keep in order the appliances appurtenant thereto,⁶ and has no relationship to concepts of negligence such as scienter and the exercise of reasonable care.⁷ Although the maritime law imposed this stringent liability for unseaworthiness, it afforded no remedy for damages to seamen caused by the negligence of the officers or fellow crew members of the vessel.⁸ This gap in the shipowner's responsibility to the seaman was not bridged until enactment of the Jones Act in 1920, which incorporated into the maritime law, for the seaman's benefit the provisions of the Federal Employers' Liability Act.⁹ The Jones Act finally made the shipowner liable to seamen for acts of negligence and abolished the defenses of fellow servant and assumption of risk.¹⁰ With this statutory modification of the maritime law in 1920, the shipowner became liable to the crew not only for defective or unsafe conditions within the concept of unseaworthiness, an absolute liability without fault,¹¹ but also for the negligence of his servants and employees.

3. 189 U.S. 159 (1902).

4. 56 U.S.C. § 688 (1920).

5. 189 U.S. 158, 175 (1902).

6. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *The Osceola*, 189 U.S. 159 (1902).

7. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922).

8. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *The Osceola*, 189 U.S. 159 (1902).

9. 45 U.S.C. § 51.

10. *Sacony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939).

11. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the injury resulted from a hidden flaw in a shackle supporting the boom of a new vessel. Although the shipowner had no opportunity to discover a hidden defect in a vessel's gear on its maiden voyage, he was held liable, nevertheless, for failure to provide a seaworthy vessel.

The fact that the seaman could not recover damages for negligence until adoption of the Jones Act is crucial in recognizing the true concept of the maritime duty to provide a safe place to work. This is so because the duty to provide a safe place was recognized by the maritime law *before* the Jones Act. Because the maritime law before 1920 did not recognize the seaman's right to recover for negligence, the maritime duty to provide a safe place could not have been cast in terms of negligence, but had to be considered analagous to and co-extensive with the doctrine of unseaworthiness, the only other basis for liability.

In *The Frank and Willie*,¹² a seaman sought damages for injuries caused by the fall of a cargo of lumber after the mate had been warned that the method of unloading had created an unsafe place to work. The shipowner contended that this constituted negligence of a fellow servant for which there could be no recovery under the then existing maritime law. The court, conceding that the libelant could not recover for negligence, nevertheless held the shipowner liable and, after pointing out that the mate had required the seaman to work in a dangerous place, stated:¹³

This was breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. *Employers are required to provide workmen with reasonably safe conditions for work*, according to the nature of the business, and to the customary provisions for the safety of life and limb. This is emphatically so as regard seamen, who are bound to obedience, and have not a landsman's option to throw up work. . . . (Emphasis added.)

Obviously, the facts in this case established not only an unsafe place of work, but also a classic case of negligence. However, recovery was allowed only for failure to provide a safe place, not negligence. Subsequently, the Supreme Court specifically discussed *The Frank and Willie* opinion in *The Osceola*,¹⁴ and, after pointing out that the mate's negligent failure to provide a safe place to work caused the injury, said that "the question was really one of unseaworthiness and not of negligence."¹⁵ In *Gerrity v. The Bark Kate Cann*,¹⁶ the court held the shipowner liable for failure to provide a reasonably safe place to work, stating:¹⁷

I proceed, therefore, to the inquiry whether the owner of this ship . . . became charged with any duty toward the libelant in respect to the stowage of the dunnage and plank that caused the injury in question. It was so arranged, that from its nature, it was dangerous to all persons who might be in that part of the between-decks. . . . The danger arose not from any use of the thing, but from the thing itself.

12. 45 Fed. 494 (2d Cir. 1891).

13. *Id.* at 496.

14. 189 U.S. 158 (1902).

15. *Id.* at 175.

16. 2 Fed. 241 (2d Cir. 1880).

17. *Id.* at 245.

Such being the character of this structure, in case the mass was not properly secured, if the libelant was in the between-decks of this ship in the exercise of a right to be there, the ship-owner owed him a duty to see that dunnage and plank were properly secured, which duty was not properly performed.

The libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to see to it that the dunnage and plank stowed above him were so secured as to prevent its falling upon him of its own weight.

Here again the failure to provide a safe place to work is spoken of in terms bearing striking resemblance to liability for unseaworthiness. These cases allowed the seamen to recover damages for the shipowner's failure to provide a safe place although the maritime law did not then permit the seaman to recover for negligence; their basis had to be the doctrine of unseaworthiness.

The Jones Act of 1920 added to the maritime law the shipowner's liability to its crew for negligence, giving the seaman a right of recovery for negligence *in addition* to the already existing remedies for failure to provide a safe place to work or a seaworthy vessel and appurtenances. The statute did not purport to cut away any of the then existing rights of the seaman or to reduce his protection for injuries caused in the service of the vessel; on the contrary, its purpose was to give seamen additional protection by permitting recovery for negligence. Notwithstanding, with the advent of the seaman's statutory right of recovery for negligence, some courts began to speak of all the seamen's rights of indemnity solely in terms of negligence, including the "negligent" failure to provide a safe place to work. Obviously, the seaman's proof of an unsafe place in many instances also established the shipowner's express or implied knowledge of the condition.¹⁸ It became easier for the courts to impose the liability on the basis of negligence, the adopted common law doctrine, without reference to the maritime concept. Finally, some opinions defined the liability for an unsafe place to work solely in terms of negligence and abandoned the concept of liability without fault in its application to the duty to provide a safe place.¹⁹ Thus, the Jones Act was unwittingly used by some courts to circumscribe the seamen's protection instead of enlarging it.

18. See *The Frank and Willie*, 45 Fed. 494 (1891), for illustration and example.

19. *Fodera v. Booth-American Shipping Corp.*, 65 F. Supp. 319 (S.D.N.Y. 1946), *aff'd.*, 159 F.2d 795 (2d Cir. 1947). This laxity in judicial reasoning also occurred in connection with the doctrine of unseaworthiness. Some of the trial courts began to hold that the shipowner's liability for unseaworthiness was predicated upon "negligence" in failing to provide a safe and seaworthy vessel and appurtenances and that the shipowner's duty was merely to exercise reasonable care to provide a seaworthy vessel, and was not absolute. See *Plamals v. The Pinar Del Rio*, 277 U.S. 151 (1928). This gave rise to *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) where the Supreme Court unequivocally disassociated the doctrine of unseaworthiness from concepts of negligence and restored this doctrine to its traditional absolute liability definition under the maritime law.

However, other courts correctly recognized that the Jones Act's addition of negligence to the seaman's remedies did not in any way affect his already existing right to a safe place to work and a seaworthy vessel. These courts construed the duty to provide a safe place and a seaworthy vessel as synonymous *absolute* liabilities, as expressed in *The Seandbee*.²⁰

A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to supply and keep in order the proper appliances appurtenant to the ship *and the same rule applies for failure to provide a safe place in which to work.*

The uncontroverted evidence in the case at bar shows that the pump with its rapidly moving and unguarded parts was located on one side of a narrow passageway directly opposite a guarded revolving fan and further shows that had the pump been guarded the libelant would not have fallen into it. *This constituted an unsafe place in which to work and made the ship unseaworthy, and was the proximate cause of his injury.* (Emphasis added.)

In *Mahnich v. Southern Steamship Co.*,²¹ Chief Justice Stone correlated the shipowner's duty to provide a safe place to work with the warranty of seaworthiness (although not squarely deciding the issue) as follows:²²

In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court [in *The Osceola*] was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with *safe appliances and a safe place to work*, is nondelegable and not qualified by the fellow servant rule. (Emphasis and material in brackets added.)

This same approach was used by the Supreme Court in *Carlisle Packing Co. v. Sandanger*,²³ where the Court imposed liability for a transitory condition creating an unsafe place to work using principles of unseaworthiness. In that case, a can, which ordinarily contained coal oil and was so labeled, was negligently filled with gasoline, and exploded while being used to start a fire. The trial court charged the jury that the seaman could recover on the basis of negligence. The Supreme Court held that the jury should have been instructed that the vessel was unseaworthy if the can marked "coal oil" contained gasoline and that liability could be imposed upon the shipowner for a transitory unsafe place without regard to concepts of negligence.

The trend toward the "negligence definition" of unsafe place to work reached its zenith in *Cookingham v. United States*,²⁴ where the seaman

20. 102 F.2d 577, 581 (6th Cir. 1939).

21. 321 U.S. 96 (1944).

22. *Id.* at 102.

23. 259 U.S. 255 (1922).

24. 184 F.2d 213 (3d Cir. 1950).

slipped on some jello but did not prove the duration prior to his accident of this unsafe condition. These facts required a determination of the exact definition of the maritime doctrine of unsafe place to work. The seaman contended that the doctrine was assimilated to and required application of principles of liability for unseaworthiness, *i.e.*, liability without fault, thus making unnecessary proof that the shipowner knew or should have known of the condition. The court of appeals rejected this view, holding that there was an absence of required proof of negligence and further that a temporarily unsafe place to work of short duration did not constitute unseaworthiness.²⁵ Seemingly, the court of appeals returned to the discarded doctrine of negligence as a prerequisite for liability for unseaworthiness,²⁶ a doctrine which already had been rejected by the Supreme Court of the United States in *Mahnich v. Southern Steamship Co.*²⁷

The *Cookingham* doctrine has since been followed in the Third²⁸ and First²⁹ Circuits, and in the California state courts,³⁰ but has been rejected and severely criticized in the Second³¹ and Ninth Circuits.³²

In *Poignant v. United States*,³³ the seaman slipped on an apple skin under circumstances where the shipowner had no actual or implied notice of the unsafe place and the trial court held that plaintiff had failed to prove negligence. The appellate court, conceding the lack of negligence, nevertheless reversed for further proceedings because the proofs sustained liability for failure to provide a reasonably safe place to work and unseaworthiness. The court relied upon recent decisions of the Supreme Court,³⁴ rejected the majority view in the *Cookingham* case and adopted the dissenting opinion of Chief Judge Biggs in that case.³⁵ Judge Frank in a

25. Note vigorous dissent by Chief Judge Biggs, *Id.* at 215.

26. *Plamals v. The Pinar Del Rio*, 277 U.S. 151 (1928).

27. 321 U.S. 96 (1944).

28. *Brabazon v. Bellships Co.*, 202 F.2d 906 (3d Cir. 1953); *Shannon v. Union Barge Line Corp.*, 194 F.2d 584 (3d Cir. 1952); *Holliday v. Pacific Atlantic S.S. Co.*, 99 F. Supp. 173 (D. Del. 1951); *Adamowski v. Gulf Oil Corp.*, 93 F. Supp. 115 (E.D. Pa. 1950).

29. *Mitchell v. Trawler Racer, Inc.*, 265 F.2d 426 (1st Cir. 1959). A petition for certiorari is presently pending in the Supreme Court in this case.

30. *Gladstone v. Matson Navigation Co.*, 269 P.2d 37 (Cal. App. 1954); *Blodow v. Penn Pacific Fisheries, Inc.*, 275 P.2d 795 (Cal. App. 1954); Although *Cookingham* was followed in *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 (E.D.N.Y. 1954), it was subsequently rejected by the Court of Appeals for the Second Circuit; see footnote 31 *infra*.

31. *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956); *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955); *Palazzolo v. Pan Atlantic S.S. Corp.*, 211 F.2d 277 (2d Cir. 1954); *DiSalvo v. Cunard S.S. Co.*, 171 F.Supp. 813 (S.D.N.Y. 1959).

32. *Johnson Line v. Maloney*, 243 F.2d 293 (9th Cir. 1957); *Pacific Far East Lines, Inc. v. Williams*, 234 F.2d 378 (9th Cir. 1956); *Lahde v. Soc. Armadora Del Norte*, 220 F.2d 357 (9th Cir. 1955), *cert. denied*, 350 U.S. 825 (1955).

33. 225 F.2d 595 (2d Cir. 1955).

34. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954).

35. 184 F.2d 213, 215 (1950).

concurring opinion rejected the *Cookingham* doctrine in the following language:³⁶

Here, the defendant owed the plaintiff an absolute duty to provide a safe place to work . . . (p. 603) the 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope Talbot, Inc., 3 Cir., 286 F. 2d 794, 789-790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that Court holds, demands reasonable care only. See Brabazon v. Bellships Co., 3 Cir., 202 F. 2d 904, 906. I think that distinction directly at odds with the Supreme Court's decisions. I read my colleagues' opinion as repudiating it also. (Emphasis added.)

The courts have justified imposition of liability without fault for unseaworthiness because of the helplessness of seamen to protect themselves from the elements, the hazards of marine service, the internal hazards of the vessel, and the ability of the shipowner, in contract with the marine worker, to distribute the loss in the shipping community.³⁷ These same considerations have equal application to the shipowner's duty to provide the seaman with a safe place to work. Both duties have their roots in the same economic and social sources and the need for their application is identical. Substantially both species of liability arise from the courts' recognition of the proposition that seamen should be free of unnecessary dangers in the performance of their duties, whether these dangers are known or unknown to the vessel or its owner. The shipowner's obligation to provide the seaman with a safe place to work is co-extensive with and identical to its obligation to provide and maintain a seaworthy vessel and appurtenances. These obligations are not only affirmative and absolute, but are continuing in character and are both inalienable and non-delegable. The shipowner's liability for unseaworthiness and failure to provide a safe place to work is effective to indemnify the seaman for any injuries caused thereby upon mere proof that these conditions existed without any proof of negligence. Both obligations existed in the maritime law before the adoption of the Jones Act in 1920 and, of necessity, they had to be predicated upon theories of absolute liability and not upon principles of negligence. Negligence, as a basis for seaman's indemnity was not then recognized in the maritime law. The tests of "foreseeability," "knowledge" and "the reasonable man," all necessary for determination of the shipowner's liability for negligence should not be factors in

36. 225 F.2d 595, 602 (1955).

37. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *The H.A. Scandredt*, 87 F.2d 708, 711 (2d Cir. 1937); *The State of Maryland*, 85 F.2d 944, 945 (4th Cir. 1936).

determining the shipowner's liability for failure to satisfy the maritime obligation to provide a safe place to work.

The definition and application of the maritime doctrine of a safe place of work has been the subject of vigorous argument and conflicting judicial viewpoints in recent years. Since *Mahnich v. Southern Steamship Co.*,³⁸ the question has not reached the Supreme Court even collaterally. The conflict between the Third and First Circuits and the Second and Ninth Circuits³⁹ indicates the strong possibility that the Supreme Court to resolve this conflict will grant certiorari in the next case raising the question.

38. 321 U.S. 96 (1944).

39. See cases cited notes 31, 32, 38, 39 *supra*.