

7-1-1955

Seaworthiness and Seamen

Terence H. Benbow

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

Recommended Citation

Terence H. Benbow, *Seaworthiness and Seamen*, 9 U. Miami L. Rev. 418 (1955)

Available at: <http://repository.law.miami.edu/umlr/vol9/iss4/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

SEAWORTHINESS AND SEAMEN

TERENCE H. BENBOW*

Practically all modern cases involving seamen's injuries cite the term "seaworthy." Decisions are made on the basis of whether or not, in the case at hand, "seaworthy" or "unseaworthy" is the proper label to attribute to the vessel.

Mr. Justice Brown's pronouncement of the four propositions of *The Osceola*¹ is the most famous statement in the admiralty law of the United States involving seamen's rights in relation to personal injuries. The Supreme Court refused a negligence recovery saying that a seaman could only collect indemnity for an injury suffered in the service of his vessel when the injury was due to the "unseaworthiness" of the vessel.²

But it was for the modern day Supreme Court to be the first to sustain a decision based on the doctrine that the shipowner's obligation to furnish a seaworthy vessel to the "seamen" is absolute, *i.e.*, not satisfied by the exercise of reasonable care. Such a decision of the Third Circuit Court of Appeals³ was upheld in 1946 by a divided Supreme Court in *Seas Shipping Co. v. Sieracki*.⁴ Sieracki was not a seaman, but a longshoreman who was injured on the S.S. Robin Sherwood when a shackle supporting a cargo boom failed.⁵ The district court assumed in passing that the shipowner's duty of seaworthiness was absolute as to a seaman.⁶ But the court found for the shipowner on its holding that Sieracki was not a "seaman."⁷ The chief issue therefore in the circuit court was the longshoreman's claim that he was a "seaman." In the light of then recent Supreme Court dictum,⁸ the shipowner probably found it preferable to admit that seamen

*B.A. University of Michigan, Instructor in Economics, Quinnipiac College, Hamden, Connecticut.

1. 189 U.S. 158 (1903). The *Osceola* involved an injury to a seaman caused through the negligent order of the master.

2. Although the seaworthiness of the vessel was not in issue before the court, this is the origin of the classic second proposition of *The Osceola* that "both by English and American law" the vessel and her owner are liable in damages for injuries resulting from unseaworthiness.

3. *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945).

4. 328 U.S. 85 (1946).

5. It was a latent defect, indiscernible visually or by any inspection which shipowners reasonably give ships' equipment. Sieracki sued the shipowner and the shipowner impleaded both the shipbuilder and the shackle supplier.

6. The court stated: "If he were a seaman in the employ of the vessel he would, of course, be entitled to a verdict on that showing alone. . . ." *Sieracki v. Seas Shipping Co.*, 57 F. Supp. 724, 727 (E.D.Pa. 1944).

7. As a longshoreman Sieracki was only entitled to the exercise of reasonable care on the part of the shipowner as determined by the common law tort concept of "business invitee." *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945); *The Etna*, 43 F. Supp. 303 (E.D.Pa. 1942); *The S.S. Anderson*, 37 F. Supp. 695 (D.Md. 1941); *The Dalhem*, 41 F. Supp. 718 (D. Mass. 1941).

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

are entitled to a "warranty of seaworthiness" by way of contract. But since there is no privity of contract between a shipowner and a longshoreman employee of an independent stevedore, the shipowner urged that a warranty of seaworthiness does not extend to such a longshoreman. The Third Circuit held *Sieracki* to be a "seaman."

In the Supreme Court the shipowner apparently admitted that a shipowner's obligation to a seaman was absolute with regard to seaworthiness. "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company."⁹ But the chief issue in the Supreme Court was the shipowner's claim that a longshoreman was not entitled to the seaman's warranty of seaworthiness. In granting recovery to the longshoreman,¹⁰ Mr. Justice Rutledge reactivated an historically understandable illusion that such workers are seamen for purposes of suit under the Jones Act.¹¹ Created in 1926 by *International Stevedoring Co. v. Haverty*,¹² this illusion served a real function when no other recovery was open to longshoremen. It had been an almost neglected doctrine, however, since it stimulated the enactment of the Federal Longshoremen's & Harbor Workers' Act of 1927.¹³

The Supreme Court's assertion in the *Sieracki* case that the shipowner's duty to "seamen" is absolute was based on three cases which are not in point¹⁴ and its own dicta in *The Osceola*¹⁵ and in a 1944 decision, *Mahnich v. Southern S. S. Co.*¹⁶ In the latter case, Mr. Justice Stone, in a lengthy

9. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, at 90 (1946).

10. Thus the eventual decision in favor of *Sieracki* went further than the manifestly dubious assertion of a shipowner's absolute warranty to mariners with respect to seaworthiness. It specifically decided that the owner of a vessel on which a longshoreman was working owed him an absolute obligation of seaworthiness. The absolute obligation arises "as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent." *Id.* at 97. As a longshoreman is not by usual contract concepts an employee of the vessel, but of the stevedore, an independent contractor, it was inevitable that a recovery against the shipowner be based upon a relational obligation arising from the injured longshoreman's status as a "seaman."

11. Merchant Marine Act, 1920, 41 STAT. 1007, 46 U.S.C. § 688 (1952).

12. 272 U.S. 50 (1926); *Jamison v. Encarnacion*, 281 U.S. 635 (1930). Mr. Justice Holmes' decision gave longshoremen the rights of mariners under the Act in spite of the apparent opposition of the interested groups that longshoremen were not seamen. For precedents to the *Haverty* case, see *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). For adverse commentary on these precedents by the President of the International Longshoremen's Association, see 11 AM. LAB. LEG. REV. 144 (1921); Furuseth, *Harbor Workers are not Seamen*, p. 11 AM. LAB. LEG. REV. 139 (1921).

13. 44 STAT. 1424-1446 (1927), 33 U.S.C. §§ 901-950 (1952). As to the neglect of the *Haverty* doctrine, see *Lawson v. Maryland Casualty Co.*, 94 F.2d 193 (4th Cir. 1938); *Noguerira v. New York, N.H. & H.R. Co.*, 32 Fed. 179 (2d Cir. 1929). ROBINSON, ADMIRALTY, § 40 (1939).

14. *The Waco*, 3 F.2d 476 (E.D.Pa. 1925); *Wm. Johnson & Co. v. Johansen*, 86 Fed. 886 ((5th Cir. 1898); *The Edith Godden*, 23 Fed. 43 (S.D.N.Y. 1885).

15. See note 2 *supra*.

16. 321 U.S. 96 (1944), reversing 135 F.2d 602 (3d Cir. 1943). The continuing impact of the *Mahnich* and *Sieracki* cases throughout the law and practice as to "seamen's" injuries cannot be stressed too strongly.

dictum, described a shipowner's duty to his seamen in terms of a warranty of seaworthiness which was said to follow cases adopting "the ruling of *The Osceola* . . . that the exercise of due diligence does not relieve the owner of his obligation to the seamen to furnish adequate appliances."¹⁷ The question really decided by Mr. Justice Stone was that the negligence of the mate in supplying defective gear brings liability, as for unseaworthiness, upon the shipowner. The decision indicates affirmation of the lower courts' extension of the shipowner's obligation into a "non-delegable duty" encompassing the negligence of the master and mate. But the decision did not require Mr. Justice Stone to pass on the question of the shipowner's liability if the mate had exercised due diligence.

Mr. Justice Rutledge stated in the *Sieracki* case that the origin of the absolute duty to indemnify any seaman injured in consequence¹⁸ of the unseaworthiness of the vessel was perhaps indeterminable. Questionable as that assertion is, there is no doubt that the origin of the doctrine of unseaworthiness itself is much more dubious.¹⁹ It is said to have originated in the ancient right of the crew to abandon an unseaworthy vessel.²⁰ To excuse misconduct or abandonment of ship, with the resultant forfeiture of wages, it was necessary for the seamen to allege that the vessel was unseaworthy.²¹ The American treatises began to indicate by 1869 that a seaman could, moreover, recover for injuries caused by unseaworthiness.²²

17. 321 U.S. at 100. On the other hand, the actual decision in the *Mahnich* case is compatible with the actual ruling of *The Osceola* as to seaworthiness based on due diligence. *The Henry B. Fiske*, 141 Fed. 188, 190 (D. Mass. 1905); *Burton v. Grieg*, 271 Fed. 271 (5th Cir. 1921); *Kahyis v. Arundel Corp.*, 3 F. Supp. 492 (D. Md. 1933); *The Cricket*, 71 F.2d 61 (9th Cir. 1934); *The Tawmie*, 80 F.2d 792 (5th Cir. 1936). *Smith, Liability in the Admiralty for Injuries to Seamen*, 19 HARV. L. REV. 418 (1906).

The less board issue of unseaworthiness before Mr. Justice Stone was whether the shipowner was liable for injuries suffered by a seaman in the fall of a defective staging in which the mate and boatswain had negligently used obviously defective rope. The shipowner's defense was that the injuries did not result from unseaworthiness, but from the negligence of *Mahnich's* fellow servant, the mate.

18. The cause of the injury must be the unseaworthiness. *Pittsburgh S.S. Co. v. Palo*, 64 F.2d 198 (6th Cir. 1933); *The Baymead*, 88 F.2d 144 (9th Cir. 1937).

19. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 91 n. 7 (1946).

20. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99 (1944); *The Arizona v. Anelich*, 298 U.S. 110, 121 n.2 (1936). The first allusion in United States cases to unseaworthiness appears in suits of seamen for their wages. The old cases include *The Moslem*, 17 Fed. Cas. 894, No. 9,875 (S.D.N.Y. 1846); *Rice v. The Polly and Kitty*, 20 Fed. Cas. 666, No. 11,754 (D.Pa. 1789); *Dixon v. The Cyrus*, 7 Fed. Cas. 755, No. 3,930 (D.Pa. 1789).

21. The seaworthy doctrine has been in the American body of maritime law since 1789, when Peters, J., in *Dixon v. The Cyrus*, note 20 *supra* at 757, stated as two of the "engagements" implied in every seaman's contract:

First, that at the commencement of the voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy; and secondly, that the captain shall supply the mariners with good and sufficient provisions whilst they are in his service. . . . When from accidental neglect or otherwise there is a manifest and visible deficiency, the mariners may reasonably complain and remonstrate—as in the present case, when the seamen were obliged to go to the main top to command those ropes which are usually within reach of the deck.

22. Parsons suggested that the principles of American maritime law would allow such a recovery from the shipowner, citing *Dixon v. The Cyrus*, note 21 *supra*, and other seamen's wage cases. 2 Shipping and Admiralty 78, n. 1 (1869).

By the 1870's, United States courts recognized the rights of seamen to indemnity for personal injuries resulting from unseaworthiness. *Brown v. The D.S. Cage*²³ includes the following: "It is the duty of the master and owners to employ . . . servants of sufficient care and skill, to make it probable that they will not cause injury to each other . . ." In *Halverson v. Nisen*,²⁴ the court, relying as all the later cases did on the language of Peters, J., in *Dixon v. The Cyrus*,²⁵ rated the implied engagement of seaworthiness towards the seaman on a par with the well established implied engagement of "good and sufficient provisions." But these cases prior to *The Osceola* followed the English courts²⁶ and denied recovery where the unseaworthiness was not attributable to the personal neglect of the shipowner. In the *D.S. Cage*, the duty of the owners and master to employ capable servants is only in "so far as they can do so with the use of ordinary care . . ." ²⁷ In the *Halverson* case, in explaining why the owner was not liable the court said:

If by the owner's negligence, the rigging or apparel are defective and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from any other master to a servant in his employment. It is the master's duty in all cases to use ordinary care and diligence to provide sound and safe materials for his servants. But he does not warrant them to be so nor insure the servant against the consequences

23. 4 Fed. Cas. 367, No. 2,002 (C.C.E.D. Tex. 1872). It is interesting to note that though the concept of a seaworthy crew was later to gain acceptance than that of a seaworthy ship and equipment, the basis for it was laid at as early a date.

24. 11 Fed. Cas. 310, No. 5,970 (D.Cal. 1876). The factual situation was very similar to that in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). A mate had negligently used a worn and defective rope in a triangle rig for hoisting a seaman above the deck.

25. 7 Fed. Cas. 755, 757, No. 3,930 (D.Pa. 1789). See note 18 *supra*.

26. The English cases had steadily denied a warranty of seaworthiness or absolute duty with respect to seamen. This rule was considered by Parsons as opposed to the principles of the American cases. See note 19 *supra*. In England, the shipowner was not liable to the seamen for injuries resulting from unseaworthiness of the vessel caused by the neglect or default of his agents or the master, but only for unseaworthiness caused by the shipowner's personal neglect or within his personal knowledge at the moment the vessel got underway. *Couch v. Steel*, 3 E. & B. 402, 118 Eng. Rep 1193 (1854). The shipowner, by understanding or contract with the seamen, was permitted to employ them on a ship which was known to be unseaworthy. The latter rule was abolished in 1876 by the Merchant Shipping Act, 39 & 40 VICT. c. 80 § 5 (1877). The Act, which was re-enacted by the Merchant Shipping Act, 1894, 57 & 58 VICT. c. 60, § 548 (1895), imposed on the shipowner and his agents a standard of "reasonable means" to make the ship seaworthy.

English cases did, however, as early as 1762, *Lee v. Beach*, 1 Park Ins. 468, give recognition to an implied warranty of seaworthiness for the benefit of merchants and underwriters in the law on carriage of goods and marine insurance, which was absolute, *i.e.*, not satisfied by the exercise of due care. *Steel v. State Line Steamship Co.*, 3 A.C. 72 (1877). The distinction between the warranty of seaworthiness in the carriage of goods prior to the Harter Act and the seaworthiness doctrine as to mariners has continued to befuddle the American courts. See, *e.g.*, *Mahnich v. S.S. Co.*, 321 U.S. 96, 101 (1944); *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259 (1922).

27. 4 Fed. Cas. 367, No. 2,002 (C.C.E.D. Tex. 1872). The court overruled exceptions to a libel alleging the owner's negligent failure to keep the steamer properly manned causing injuries sustained by a boiler explosion.

of their defects. The foundation of his liability is his personal negligence.²⁸

But the term seaworthy seldom showed up in these nineteenth century decision in seamen's personal injury suits. Even at the close of the 1870's, Desty²⁹ did not list unseaworthiness as a ground upon which to postulate damages. Citing the *D.S. Cage*, Desty did, however, state that the seaman could recover for injuries arising from culpable negligence, or neglect or misconduct of the officers.³⁰

One of the first full-fledged discussions of a shipowner's liability to a seaman for unseaworthiness is in *The Lizzie Frank*.³¹ The case presents the interesting development of an attempted, but unsuccessful, unseaworthiness recovery coming in under the allegation of negligence.³² The form in which the libelant's proctor chose to phrase his seaworthiness theory, that of an implied warranty, was an attempt to expand the implied "engagement" in *The Cyrus* case. The theory made it easy for the court to dispose of the contention by treating it as a claim *ex contractu*³³ without pleading to sustain it. Then the court cites the English law: that "there is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman."³⁴ "But," says the court, "it is said that this is repugnant to the American law."³⁵ The court accepts the view that the owner is bound to provide a seaworthy ship but "he is not an insurer or warrantor of the seaman against latent and undiscoverable defects in the vessel."³⁶ An "injury may occasion a temporary or permanent disability, but that is not a ground for indemnity from the owner, unless there has been negligence on his part."³⁷

Thus the court opens two doors. The obvious one is that a recovery for unseaworthiness may in the future be allowed if the libelant pleads it. But secondly, in disallowing the implied warranty of seaworthiness claim on the ground that it is *ex contractu*, the court finds it convenient to ignore

28. 11 Fed. Cas. 310, No. 5,970 (D.Cal. 1876).

29. DESTY, SHIPPING AND ADMIRALTY (1879).

30. *Id.* at 139, 161.

31. 31 Fed. 477 (S.D.Ala. 1887).

32. The fact that unseaworthiness was not alleged seems further to indicate that it was as yet a doctrine of little recognition in seamen's injury cases. The case involved the breaking of a chock—typical seaworthiness question as the doctrine developed.

33. This unfortunate formulation still haunts us. As the modern seaworthiness remedy has also been premised on a warranty, the Supreme Court had real difficulty in granting recovery to fringe workers, at least on the conceptual level. See note 10 *supra*. The solution which it chose of calling the right to seaworthiness an incident of performing the ship's service, similar to the right to maintenance and cure, shows the difficulty of rationale. The latter remedy has always been held to be cumulative to other rights, supposedly because of its relation to the ship's service, while the right to seaworthiness has never been so held, neither before nor after *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946).

34. 31 Fed. at 479 (S.D.Ala. 1887).

35. *Ibid.* The statement is a clear reference back to the prophetic footnote of Parsons in 1869. See note 26 *supra*.

36. 31 Fed. at 480.

37. *Id.* at 481. See *The Robert C. McQuillen*, 91 Fed. 685 (D. Conn. 1899).

its point that there must be negligence as judged by the standard of the omnipresent reasonably prudent man. On the contrary: "Assuming, for the present, that there was an implied warranty of seaworthiness, and that there has been a breach of such warranty by the breaking of the chock, it would not necessarily follow that the owner was guilty of negligence . . . it would be immaterial whether the breaking resulted from negligence or not. There may be a breach of warranty without negligence."³⁸ Once a warranty of seaworthiness should become recognized, the latter argument paves the way for a doctrine entirely divorced from the due diligence standard of negligence. This second door remained all but closed in the federal courts until 1937 when Judge Augustus N. Hand used it as the basis for his decision in *The H. A. Scandrett*.³⁹ It was only eleven years ago that the Supreme Court gave enduring recognition to an absolute and continuing warranty of seaworthiness by a shipowner to his mariners.⁴⁰

After the *Sieracki* decision in 1946, the lower courts, faced with the inutility of pursuing their own historical,⁴¹ economic⁴² or logical⁴³ analysis, have unanimously assumed that the shipowner has a continuing and absolute duty to provide a seaworthy ship for the "seamen." The only function of the lower courts has been the limiting application of the unlimited judicial

38. 31 Fed. at 479.

39. 87 F.2d 708, 711 (2d Cir. 1937). ". . . the 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."

40. *Mahnich v. Southern S.S. Co.*, 321 U. S. 96 (1944). The pursuit of the growth of the seaman's rights and the decline of the shipowner's defenses leads back through *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The H. A. Scandrett*, 87 F.2d 708 (2d Cir 1937); *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Warner v. Goltra*, 293 U.S. 155 (1934); *Cortes v. Baltimore Insular Line*, 287 U. S. 367 (1932); *Pacific Steamship Co. v. Peterson* (1928); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *The Osceola*, 189 U.S. 158 (1903).

41. See the cases both before and after *The Osceola* cited on the preceding pages, which seem to indicate clearly that previous to Mr. Justice McReynolds 1922 dictum in *Carlisle Packing Co. v. Sandanger*, note 40 *supra*, unseaworthiness in seamen's injury cases was agreed to be based on a standard of due diligence.

42. The fringe workers, including longshoremen, are perhaps better protected than mariners, the traditional "wards of the admiralty." Their remedies include the same seaworthiness right as mariners, a right to recovery for a most flexible common law negligence, and rights which mariners do not possess under the Federal Longshoremen's & Harbor Workers' Compensation Act. The reactivation by the *Sieracki* case of the *Haverty* rationale, which permitted a longshoreman to recover for negligence under the Jones Act, lays open the probability that in the future some longshoreman will once again attempt such a recovery. The only deterrent to an immediate attempt is the very effectiveness of the seaworthiness action. The advantages of a negligence action under the Jones Act over one at common law are that (1) the defense of assumption of risk is barred and (2) the defense of contributory negligence only goes to the question of damages. Under the rationale of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), it is doubtful that the second distinction has any meaning.

43. The obvious fiction of treating longshoremen as "seamen," either under the veil of "performing the ship's service" as in the *Sieracki* case, or under the word "seaman" in the Jones Act as in the *Haverty* case, defies not only logic perhaps, but, since the Harbor Workers' Act, common sense as well. The implication in both cases that the classification is reasonable because longshoremen are performing work once done by the crew is probably an historical fallacy, considering that special groups whose duty it was to perform these tasks have existed since ancient antiquity.

conscience in determining what are the contents of "seaworthy" and "seamen" as affected by the particular facts. Since the 1953 Supreme Court decision in *Pope & Talbot Inc. v. Hawn*,⁴⁴ and the 1954 decision in *Alaska S.S. Co. v. Petterson*,⁴⁵ even the particular facts take on less significance. It becomes clear that the *Sieracki* holding was not, either horizontally⁴⁶ or vertically,⁴⁷ so to speak, the outer limit of the shipowner's absolute obligation, but its hard core.⁴⁸

44. 346 U.S. 406 (1953).

45. 347 U.S. 396 (1954); rehearing denied 347 U.S. 994.

46. In the *Pope & Talbot* case, the shipowner's obligation was widened to cover a shoreside carpenter of an independent contractor.

47. In the *Petterson* case, the shipowner's obligation was extended to cover an appliance owned and exclusively controlled by an independent contractor.

48. The lower courts have been quick to recognize that it is the spirit of the new decisions which is important, and not the old factual distinctions. *Dixon v. United States*, 1954 Am. Mar. Cas. 966 (S.D.N.Y. 1954), involved a Chief Mate who was injured on a ladder which he was sent to inspect. The court rejected a distinction made on similar facts in *Bruszewski v. Isthmian S.S. Co.*, 163 F.2d 880 (2d Cir. 1948); *Byars v. Moore-McCormick Lines, Inc.*, 55 F.2d 587 (2d Cir. 1946); that the ship owner is not liable when the injury to a shoreside repairman is caused by the defective condition which he was supposed to repair. Recognizing the distinction as a limited recrudescence of the defense of assumption of risk, the court commented: "Moreover the whole drift of the law has been away from the result urged here by respondent. The Supreme Court since its historic decision in the *Osceola* case has steadily expanded the doctrine of seaworthiness to others than the immediate members of the ship's crew," citing the *Sieracki* and *Pope & Talbot* cases and the specific refusal in the latter to reverse the former. The doctrine of the *Bruszewski* and *Byars* cases has been otherwise severely restricted. *Kulukundis v. Strand*, 202 F.2d 708, 710 (9th Cir. 1953); *Becker v. Waterman S.S. Co.*, 179 F.2d 713 (2d Cir. 1950). On the appeal in *Dixon v. U.S.*, 219 F.2d 10 (2d Cir. 1955), Judge Harlan, upon a review of the turn of the century cases containing the original doctrine of seaworthiness based on negligence, remanded the case to the district court. The opinion is the first to recognize the historic development of seaworthiness in seamen's injury cases, exposing the fallacy also of the purported analogy made in *Carlisle Packing Co. v. Sandanger* between seamen's injury and cargo cases. There is more than a subtle hint that the lower court should follow suit by basing any seaworthiness recovery on negligence.

Judge Harlan justifies and perhaps weakens his attempt to limit seaworthiness by a mechanical distinction that the conditions in the *Dixon* case were ones which arose *after* the voyage had commenced. Because of the relatively short time span since the *Sieracki* case Judge Harlan does not show a lack of ardor in admitting that: "Nor have we found any case in which it has been stated that absolute liability would be imposed with respect to unseaworthy conditions arising *after* the voyage had commenced." Yet it becomes clear from the opinion itself that the distinction is a technical one, running contrary to the assumption of every appellate court since the nineteenth century wage cases: "While language in some of the cases and texts does seem to reflect the view that the warranty to seamen is limited to conditions existing *before* the vessel has begun her voyage—liability for unseaworthy conditions coming into existence thereafter being only for failure to exercise due diligence—we are unable to find that any appellate court has squarely held the warranty to be so limited." Ignoring the fact that the distinction is only a smoke screen for an invitation to Congress to limit the whole doctrine of absolute liability of unseaworthiness, the opinion at this point does not go far enough back into the history which it has been expounding. For the wage cases necessarily involved seamen who had abandoned ship prior to its leaving its home port or some port of call. Therefore the statement in the wage cases that the shipowner's engagement existed at the commencement of the voyage was probably a mere reflection of the fact situation rather than a substantive limitation which would be anomalous if applied to all injury cases, as Judge Harlan seems to admit.

In the light of the Supreme Court's unanimous tendency in *Boudoin v. Lykes Bros. S.S. Co.*, _____ U.S. _____ (1955), to maintain the vertical extension of absolute liability, it seems too early to predict how much lasting influence Judge Harlan's attempt to limit absolute liability is likely to have. See note 57 *infra*.

The warranty of seaworthiness that the ship and its equipment are not defective⁴⁹ has been extended to the adequacy and competency of the crew.⁵⁰ Just as a latent defect of a ship or its material, without notice to the shipowner,⁵¹ suffices to render a vessel unseaworthy,⁵² so defective personnel renders a vessel unseaworthy, and the owner liable, even if such defect is latent and unknown to the owner.⁵³ In the past it had been determined that a brutal mate rendered a ship unseaworthy.⁵⁴ Today's decisions distinguish between the unseaworthiness caused by the presence on board of a paranoiac cook⁵⁵ or a homosexual messman⁵⁶ who assault

49. But it is not required that it be the best possible equipment, *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952). It is only required that equipment be reasonably fit for the use for which it was intended.

50. *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1953); *Yates v. Dunn*, 11 F.R.D. 386 (D.Del.); *The Rolph*, 299 Fed. 52 (C.C.A. 9th 1924). But the warranty does not guarantee that the crew will be free from negligence, *Keen v. Overseas Tankship Corp.*, *supra*; cf. *Cookingham v. United States*, 184 F.2d 213 (3d Cir. 1950); *Larsson v. Coastwise Line*, 181 F.2d 6 (9th Cir. 1950). It guarantees only that the seamen will be equal in disposition and in seamanship to the ordinary men in the calling. If a longshoreman's injuries result solely from the manner in which the work is done under the stevedore's supervision, the shipowner is not liable, *Berti v. Cyprien Fabre*, 1954 Am. Mar. Cas. 1111 (2d Cir. 1954); *Amador v. M/S Ronda*, 1954 Am. Mar. Cas. 958 (S.D.N.Y. 1954).

51. But a confused special rule has been developing where the lack of notice is of so-called "transitory unseaworthiness" of the ship, *Cookingham v. United States*, *supra* note 50. The rule, a rather awkward attempt to limit the extension of the shipowner's obligation, holds:

While generally there is an absolute liability on a shipowner, regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness, and no fault or failure of appliance or equipment, the shipowner's liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness.

Gladstone v. Matson Navigation Co., 1954 Am. Mar. Cas. 1004 (D.C. of Appeal 1st, Cal. 1954), involving a stewardess who slipped and fell down an oily stairway. The rule is actually the original doctrine of seaworthiness with a modified name, designed to apply to only the most extreme category of cases. See, *E.G. Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941), commented on in *The Tangled Seine*, 57 Y (... L.J. 243, 254 (1947), where a seaman fell in the shower of a docked ship and was indemnified because the soapy floor made the shower unseaworthy.

52. *Dixon v. United States*, 1954 Am. Mar. Cas. 966 (S.D.N.Y. 1954). Even if the injured seaman knows of the defect, it is only important in applying the rules of comparative negligence, *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938). The *Dixon* case accepts a restricted interpretation of *Bruszewski v. Isthmian S.S. Co.*, that a shipowner is only relieved of liability when a shoreside worker is engaged to repair an obviously defective condition which is the direct cause of his injury and he is warned or chargeable with knowledge of the danger. See note 48 *supra*. *Kulukundis v. Strand*, 202 F.2d 708, 710 (9th Cir. 1953). In the attempt to limit the *Bruszewski* case to shoreside repairmen, the *Dixon* case perpetuates the supposedly rejected distinction between seamen and shoreside workers as to unseaworthiness. See also *Darlington v. National Bulk Carriers*, 157 F.2d 817 (2d Cir. 1947).

53. *Thompson v. Coastal Oil Co.*, 1954 Am. Mar. Cas. 1191 (D.C.N.J. 1954).

54. *The Rolph*, 299 Fed. 52 (9th Cir. 1924) *affirming*, 293 Fed. 269 (N.D. Cal. 1923).

55. *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1953).

56. See note 53 *supra*.

fellow crew members with a meat cleaver, from the seaworthiness where only a mariner's fists are the weapons.⁵⁷

In the Second⁵⁸ and Third⁵⁹ Circuits a shipowner's obligation to "seamen" has been regarded as terminating upon the delivery of an appliance in good order into the exclusive control of an independent contractor. But in *Alaska S.S. Co. v. Petterson*⁶⁰ the Supreme Court affirmed without opinion a decision of the Ninth Circuit that an independent stevedore's ownership and exclusive control of a block which failed in ordinary use was insufficient to relieve a shipowner of absolute liability for injuries caused to a longshoreman.

Injuries to seamen happen relatively seldom through latent defects. Phrasing the doctrine of unseaworthiness in terms of absolute liability adds comparatively few instances to those for which the shipowner would be liable for negligence⁶¹ under the Jones Act.⁶² *Cortes v. Baltimore Insular Line*⁶³ established that the Supreme Court did not consider itself bound by common law rules of negligence, reiterating that it would take into account the peculiar hazards of the seas and the traditional relations which obtain between shipowner and mariner—"ward of the admiralty." Whether the same rationale should apply to shoreside workers is questionable,⁶⁴ either as it presently does under the seaworthiness doctrine, or as it may in the future do if such workers as longshoremen once again become "seamen" under the Jones Act.

57. *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953). See also *Lykes Bros. S.S. Co. v. Boudoin*, 211 F.2d 618 (5th Cir. 1954), in which Judge Hutcheson rejects the reasoning of the *Keen* case. The Fifth Circuit reversed an unseaworthiness recovery by a seaman who was struck with a brandy bottle by a fellow crew member caught in the act of stealing it. But the Supreme Court unanimously affirmed the *Keen* doctrine in reversing the Fifth Circuit, *Boudoin v. Lykes Bros. S.S. Co.*, U.S., 75 S. Ct. 355 (1955) decided February 28, 1955 (N.Y. Times, March 1, 1955, p. 53).

58. *Mollica v. Compania Sud-America*, 202 F.2d 25 (2d Cir. 1953); *Lynch v. United States*, 163 F.2d (2d Cir. Cir. 1947); *Lauro v. United States*, 162 F.2d 32 (2d Cir. 1947); *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945).

59. *Rogers v. U.S. Lines*, 205 F.2d 57 (3d Cir. 1953), *rev'd per curiam*, 1954 Am. Mar. Cas. 1088; *Lopez v. American-Hawaiian S.S. Lines*, 201 F.2d 418 (3d Cir. 1953). 102 U. PA. L. REV. 402.

60. 347 U.S. 396 (1954).

61. "The accident having been caused by faulty equipment under the control of the 'shipowner', there is liability for the consequential injury whether we call it unseaworthiness or failure to furnish a safe place to work." *Yarbrough v. Amer. Mail Line, Ltd.*, 1954 Am. Mar. Cas. 1172 (D.C. S.D. Cal. 1954), involving a seaman hit on the head by a heel block of a boom frozen in an improper position because of rust and corrosion.

62. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952). For an unusual illustration of such an instance, see *Thompson v. Coastal Oil Co.*, 1954 Am. Mar. Cas. 1191 (D.C.N.J. 1954): "Since the elements of shipowner's 'negligence and knowledge are not essential to recovery for unseaworthiness, and the quantum of damages in either aspect is much the same, we turn to the consideration of" unseaworthiness. The Jones Act does not at present apply to shoreside workers.

63. 287 U.S. 367 (1932); cf. *Alpha S.S. Corp. v. Cain*, 281 U.S. 642 (1930).

64. See the dissenting opinion of Mr. Justice Jackson in the *Pope & Talbot* case, which further extended the category of "seamen." He argues that the decision so confuses admiralty law with common and statutory tort law as to destroy the integrity of admiralty law as a separate system based on the peculiarities and risks of seagoing labor.

But the practical importance to seamen of phrasing "unseaworthiness" in terms of absolute liability is that recovery by the injured seaman in the ordinary case is as good as certain. As adaptable as the negligence rule under the Jones Act is,⁶⁵ under the unseaworthiness doctrine the seaman has an additional advantage. In practically every case he can obtain an instruction to the jury that the shipowner is liable without fault if the vessel is found not to be seaworthy. Nor does such an instruction preclude him from obtaining the usual instructions relating to liability for negligence.⁶⁶ Under the rule of the *Cortes* case, there is almost always room for a finding of negligence.⁶⁷ But should it fail, the doctrine of an absolute obligation for unseaworthiness operates in the seaman's behalf, even in cases which are principally based on negligence.⁶⁸ Thus the attempt which failed in the *Lizzie Frank*⁶⁹—the attempt to "switch hit" from negligence to unseaworthiness—is now a recognized procedure of attack. Not only do the seaworthiness doctrine and the Jones Act negligence rule overlap, but, as seen in *Hollis v. Grace Line*,⁷⁰ they merge inscrutably.⁷¹

65. *Newery v. Smith*, 161 F.2d 732 (3d Cir. 1947). Unseaworthiness has the practical advantage that it is not limited by the three-year statute of limitations, under the 1939 amendment of the Employers Liability Act, 53 STAT. 1404 (1939), 45 U.S.C. 56 (1952).

66. For an illustration of how the supernumerary instructions as to negligence can work against the claimant's interest, see *Gladstone v. Matson Navigation Co.*, 1954 Am. Mar. Cas. 1004 (D. Cal. 1004):

While it is true that the jury under the evidence could have found for defendant [Author-plaintiff] on the unseaworthiness count, we have no way of knowing whether they did so or whether they found under the Jones Act theory. . . .

In a recent action for common law negligence and unseaworthiness, the instructions as to liability for negligence were denied. *Berti v. Cyprien Fabre*, 1954 Am. Mar. Cas. 1111 (2d Cir. 1954). See note 71 *infra*.

67. For an illustration of the confusion of both doctrines which results from the attempt to distinguish between the absolute obligation of seaworthiness and the almost absolute obligation under the Jones Act, see the trial and the appellate courts' interpretations in *Gladstone v. Matson Navigation Co.*, 1954 Am. Mar. Cas. 1004, 1006 (1954):

Either under the Jones Act or the unseaworthiness theory, the stewardess must prove notice of the defendant of the slippery condition of the stairway (such notice to be either actual or constructive and the failure of defendant within a reasonable time thereafter to remove such condition.

. . . Thus either under the Jones Act or the General Maritime Law pertaining to transitory conditions the rule is practically the same in requiring notice of the condition.

. . . When discussing the requirements under the unseaworthy count the court stressed the necessity of notice. While the court instructed the jury that they must consider the instructions as a whole, the instructions concerning notice were clearly limited to the unseaworthy cause of action and could not reasonably have been considered by the jury to apply to the Jones Act questions.

See note 51 *supra*.

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

69. 31 Fed. 477 (S.D. Ala. 1887).

70. 1952 Am. Mar. Cas. 1609 (N.D. Cal. 1952).

71. The same is true of the seaworthiness doctrine and common law negligence. In *Berti v. Cyprien Fabre*, 1954 Am. Mar. Cas. 1111 (2d Cir. 1954), a longshoreman sought a conventional charge on negligence and the standard of ordinary case which was denied by the District Court. Judge Clark, speaking for the Circuit Court, agreed:

Insofar as Cyprien had an ordinary duty to provide a safe place to work, it here completely overlapped its absolute duty to furnish a seaworthy ship. For the

The question remains whether the "seaman" is required to elect under the Jones Act⁷² or at common law⁷³ between a claim of negligence and a claim of unseaworthiness before the case is submitted to the jury. That the shoreside "seaman's" claim of common law negligence may be submitted with a claim of unseaworthiness is probably permanently settled by the *Pope & Talbot* case.⁷⁴ An ultimate resolution depends (1) on the degree to which shoreside workers' rights will be made to parallel mariners' rights, in their disadvantages as well as their advantages, and thus (2) perhaps on the Supreme Court's eventual decision as to whether "seamen" must make an election under the Jones Act. There is some understandable uncertainty as to the Jones Act in the state and lower federal courts, but the majority of recent cases seem to accurately appraise the handwriting on the wall and permit the "seaman" to present his claim to the jury on both unseaworthiness and negligence grounds.⁷⁵ In the *Pope & Talbot* case Mr. Justice Jackson frankly recognized in the minority opinion that: "The court's instruction scrambled common-law negligence doctrines with

only faults charged for which Cyprien could be held related to the condition of a cable and the absence of beam-locking devices. Either, if proved, would render the ship unseaworthy.

72. "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . ." (Emphasis supplied). 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

73. The precise question here is whether a shoreside worker "seaman", as contrasted with a traditional "seaman", is also going to be forced to make some election of remedies.

If a shoreside worker enjoys the advantages of being a "seaman" for purposes of the unseaworthiness claim, should he also be permitted to avail himself of the common law negligence claim denied to mariners. This problem was specifically decided in the affirmative by the *Pope & Talbot* case. But should he also be permitted to present the two claims simultaneously to the trier of fact?

74. 346 U.S. 406 (1953). A contrary rule requiring election had until 1946 been settled as to mariners under the Jones Act. That common law negligence may instead be assimilated into unseaworthiness. See note 71 *supra*.

Mr. Justice Frankfurter's concurring opinion in the *Pope & Talbot* case, n. 1, raises an allied question whether a shoreside worker is entitled to a jury in a suit based on both maritime and common law causes of action. The only objection to the procedure there could be that the maritime cause should not be tried to a jury. In the light of Supreme Court decisions which extend shoreside workers' rights even beyond the parallel rights of mariners, the objection seems clearly foreclosed in that the submission of the unseaworthiness claim to the jury is already an everyday occurrence in suits by mariners.

75. *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3d Cir. 1949) reaffirming *German v. Carnegie Steel Corp.*, 156 F.2d 977 (3d Cir. 1946); *Balado v. Lykes Bros.*, 179 F.2d 943 (2d Cir. 1950), deliberate dictum rejecting its position in *Skolar v. Lehigh Valley R.R.*, 60 F.2d 893, 894 (2d Cir. 1932) and *McGhee v. United States*, 165 F.2d 287 (2d Cir. 1947); *Thomsen v. The Dorene B.*, 91 F. Supp. 549 (S.D. Cal. 1950) rejecting *Reed v. Arkansas*, 88 F. Supp. 993 (S.D. Cal. 1950). *Contra*, *Boothby v. Washington Toll Bridge Authority*, 1954 Am. Mar. Cas. 479 (Sup. Ct., King County, Wash. 1954) and *Spangled v. Matson Navigation Co.*, 1950 Am Mar. Cas. 409 (Wash. 1950) relying on the rationale of *Pacific S.S. Co. v. Peterson*, 278 U. S. 130 (1928). As the unseaworthiness rationale is no longer grounded on tort, but either on a "warranty" of seaworthiness or a "relational" duty, there is no rational requirement for an election of remedies.

admiralty principles of indemnity for unseaworthiness."⁷⁶ The courts have felt it necessary to attempt to distinguish between remedies when as a practical matter it no longer serves any useful function and is extremely difficult. Election now only serves as a protection against that difficulty for claimants who do not realize that it is unnecessary to allege negligence in permitting unseaworthiness when a recovery can be based on alleging and proving the unseaworthiness alone. A forced election or a denial of the negligence charge⁷⁷ renders the claimant a service, for it serves to protect him against the likelihood of the trial court's error in distinguishing between the remedies.⁷⁸ Mr. Justice Frankfurter, in a concurring opinion in the *Pope & Talbot* case, stated that:

. . . it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness.

Mr. Justice Frankfurter seems thoroughly borne out by the cases⁷⁹ and the exceptions will be even more rare under the *Pope & Talbot* rationale.

76. 346 U.S. 406 (1953).

" . . . the charge below so scrambled two theories of recovery that the jury could not possibly have had a fair understanding of the law of the case. The jury was instructed on the one hand that negligence was not necessary to recovery because of the unseaworthiness theory and on the other that negligence itself was a basis for recovery . . . this case was begun, tried, submitted and decided as a negligence action, while it is sustained here on an admiralty doctrine of liability for breach of warranty which does not at all depend upon negligence."

The trial court's charge is set out at some length in the Third Circuit's opinion, 1952 Am. Mar. Cas. 1708, 1712-1716 (3d Cir. 1952).

77. See note 71 *supra*.

78. See note 67 *supra*.

79. *Hendricksen v. City of Chicago*, 330 Ill. App. 141, 70 N.E.2d 848 (1947); *Miller v. Wessel, Duval & Co.*, 1947 Am. Mar. Cas. 429 (S.D.N.Y. 1946); *Krey v. United States*, 123 F.2d 1008 (2d Cir. 1941); *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *American Pac. Whaling Co. v. Kristensen*, 93 F.2d 17 (9th Cir. 1937). Contrast the negligence brutality cases with the unseaworthiness brutality cases, *Thompson v. Coastal Oil Co.*, 194 Am. Mar. Cas. 1191 (D.C.N.J. 1954) (unseaworthy); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1953), *cert. denied* 343 U.S. 966 (1953) (unseaworthy); *Hong v. United States*, 59 F. Supp. 794 (S.D.N.Y. 1944) (negligence); *Koehler v. Presque-Isle Tr. Co.*, 141 F. 2d 490 (2d Cir. 1944) (negligence).