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## The "Unseaworthiness" Doctrine and Its Application to Longshoremen

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# THE "UNSEAWORTHINESS" DOCTRINE AND ITS APPLICATION TO LONGSHOREMEN

EDWARD J. WALDRON\*

I. INTRODUCTION .....	937
II. HISTORICAL BACKGROUND .....	938
A. <i>Seamen's Recoveries for Personal Injuries</i> .....	938
B. <i>The Development of the Unseaworthiness Doctrine for Seamen</i> .....	939
C. <i>Longshoremen Become "Seamen"</i> .....	940
D. <i>The Unseaworthiness Doctrine Extended to Longshoremen</i> .....	942
E. <i>Shipowner Entitled to Indemnity from the Stevedore</i> .....	943
III. THE UNSEAWORTHINESS DOCTRINE TODAY .....	944
A. <i>Longshoremen May Demand Trial by Jury</i> .....	944
B. <i>Indemnity to the Shipowner from the Stevedore</i> .....	946
C. <i>Doctrine of Operational Negligence Rejected</i> .....	946
IV. THE RATIONALE OF <i>Sieracki</i> EXAMINED .....	946
A. <i>The Characterization of Longshoremen as Seamen</i> .....	946
B. <i>Wasteful Litigation Caused by the Sieracki Doctrine</i> .....	948
V. CONCLUSION .....	949

## I. INTRODUCTION

The scope of this comment will be threefold, (1) to trace the development of the doctrine of unseaworthiness, otherwise known as the warranty of seaworthiness, (2) to examine the reasons why it was extended to longshoremen, and (3) to question the basic rationale underlying that extension.

As a preview, a recent (1967) case that exemplifies the many elements now contained in a typical action by a longshoreman for injuries will be presented. In *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*,<sup>1</sup> a longshoreman,<sup>2</sup> John Newby, was injured when he slipped and fell while descending a ladder. His hatch-boss testified that there was a slippery substance on his shoes similar to a syrup that had been spilled in an earlier unloading operation conducted by the same stevedoring contractor.

Newby brought an action against Polskie Linie Oceaniczne for damages for the personal injuries sustained. Jurisdiction was based upon diversity of citizenship and the amount involved. The complaint was based upon unseaworthiness and negligence. The defendant-shipowner impleaded Newby's employer, Old Dominion Stevedoring Corp., seeking complete indemnity, costs, and attorney's fees. The case was submitted to a jury on the unseaworthiness count, and the jury returned a verdict against the shipowner in the amount of \$4,000.

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1. 386 F.2d 193 (2d Cir. 1967).

2. "Longshoreman" usually refers to the laborer who does the actual work, whereas a "stevedore" is the contractor or boss who employs longshoremen. DE KERCHOVE, *INTERNATIONAL MARITIME DICTIONARY* 473 (1961).

The impleader action was not submitted to the jury. Instead the court directed a verdict on the motion of the shipowner against Old Dominion for indemnification, holding that if the shipowner were found liable to the plaintiff, it followed as a matter of law on the evidence presented that Old Dominion should indemnify the shipowner. Judgment was entered on the jury's verdict, and the court then entered judgment for the shipowner against Old Dominion in the amount of \$7,320.39—\$4,000 representing the plaintiff's verdict and \$3,320.39 representing costs and attorney's fees.

The plaintiff appealed on the ground that the verdict was grossly inadequate. Old Dominion cross-appealed. The Court of Appeals affirmed the decision. While the details of the reasoning will not be covered at this point since they rest upon the historical background to be developed, the salient elements of the case will be noted: (1) the action for unseaworthiness was submitted to a jury, (2) the longshoreman sued the shipowner for unseaworthiness despite the fact that the slippery condition was apparently brought about by the stevedore's negligence, (3) the shipowner was able to collect complete indemnification from the stevedore for the plaintiff's verdict and also for costs and attorney's fees, (4) the recovery by the plaintiff was relatively small.

## II. HISTORICAL BACKGROUND

### A. *Seamen's Recoveries for Personal Injuries*

A single injury may give a seaman three causes of action against his employer-shipowner: one for maintenance and cure, another for damages based upon the negligence principles of the Jones Act,<sup>3</sup> and a third for damages based on the maritime concept of unseaworthiness. Of the three, by far the most ancient is the action for maintenance and cure which can be traced back to the Laws of Oleron<sup>4</sup> which were compiled and promulgated by Richard the First on his return from the Holy Land.<sup>5</sup> This law of the sea provided for medical treatment and wages to a mariner wounded or falling ill in the service of the ship.<sup>6</sup> The Jones Act, however, is of relatively recent vintage. As passed by Congress in 1915 and amended in 1920,<sup>7</sup> it is based on negligence and incorporates

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3. 46 U.S.C. § 688 (1964).

4. M. MORRIS, *THE LAW OF SEAMEN* 578 (1962).

5. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 7 (1957).

6. "The seaman when sick or injured in the service of the vessel without wilful misbehavior on his part, is entitled to the remedy of maintenance and cure, i.e., wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached." M. MORRIS, *MARITIME PERSONAL INJURIES* 26 (1959).

7. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, *amending* Act of March 4, 1915, ch. 153, § 20, 38 Stat. 1185. This allows any seaman who suffers personal injury in the course of his employment, at his election, to maintain an action at law, with a right to trial by jury [hereinafter referred to as the Jones Act].

the provisions of the F.E.L.A.<sup>8</sup> The concept of unseaworthiness was created in the latter part of the Nineteenth Century by American admiralty courts.<sup>9</sup>

### B. *The Development of the Unseaworthiness Doctrine for Seamen*

The origin of a seaman's right to recover for injuries caused by an unseaworthy ship is far from clear. Because of the peculiar perils and hardships of maritime service, the courts very early recognized the seaman as a ward of admiralty and extended to him the protection of the unseaworthiness doctrine. When first applied to seamen, however, the doctrine allowed only the privilege of abandoning an unfit ship without suffering the forfeiture of wages or the penalties for desertion.<sup>10</sup> Early American maritime law limited the shipowner's obligation for personal injuries suffered in the ship's service to "maintenance and cure."<sup>11</sup>

It is generally conceded that the birth of the unseaworthiness concept stemmed from Mr. Justice Brown's much-quoted second proposition in *The Osceola*:<sup>12</sup>

That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

It is arguable that the import of the above-quoted second proposition in *The Osceola* was not to broaden the shipowner's liability, but rather to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness.<sup>13</sup> The first reference by the Supreme Court to the shipowner's obligation to furnish a seaworthy ship as explicitly unrelated to the standard of ordinary care in a personal injury case appeared in *Carlisle Packing Co. v. Sandanger*,<sup>14</sup> in which the court in a few lines innovated the rule of absolute liability:

[W]e think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages.

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8. Federal Employer's Liability Act, 45 U.S.C. 51 (1964).

9. See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544 (1960).

10. "The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea." *Id.*

11. Note, *The Doctrine of Unseaworthiness: Developing Restriction of The Act-Condition Dichotomy*, 21 RUTGERS L. REV. 322 (1967).

12. 189 U.S. 158, 175 (1903).

13. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 546 (1960).

14. 259 U.S. 255, 259 (1922).

Mr. Justice Frankfurter in his dissenting opinion in *Mitchell* commented on the above statement:<sup>15</sup>

No explication accompanied this dogmatic pronouncement. . . . It was strangely deemed sufficient to rely on the unelaborated citation of two cases in this Court . . . which were concerned not with the rights of seamen but with the shipowner's liability for cargo damage. . . . Neither our own investigation nor that of the parties here has disclosed a single case in an English or in an American court prior to *Sandanger* in which the absolute duty to provide a seaworthy vessel for cargo carriage and marine insurance contracts was applied to a seaman's suit for personal injury. *Sandanger* was an unilluminated departure in the law of the sea.

In 1944 came the landmark decision of *Mahnich v. Southern S.S. Co.*<sup>16</sup> Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that *The Osceola* was correctly to be understood as holding that the duty to provide a seaworthy ship does not depend at all upon the negligence of the shipowner or his agents. In *Mitchell v. Trawler Racer, Inc.*,<sup>17</sup> the Supreme Court made quite clear the fact that the doctrine of unseaworthiness is a doctrine of strict liability.

### C. Longshoremen Become "Seamen"

In the early part of the Twentieth Century workmen's compensation acts were passed to provide relief for injuries to employees. The employer is charged with the injuries without regard to any question of the employee's negligence. It is a form of strict liability. Therefore, the common law defenses of contributory negligence, assumption of the risk and the fellow servant rule are abolished. When an injury to an employee is found to be covered by a workmen's compensation act, it is uniformly held that the statutory compensation is the sole remedy, and any recovery at common law is barred.<sup>18</sup>

Since longshoremen work at a particularly hazardous trade<sup>19</sup> it would be thought that the state workmen's compensation acts as they were enacted would have covered longshoremen. New York's act did. However, the Supreme Court in *Southern Pacific Co. v. Jensen*<sup>20</sup> held that the New York act was unconstitutional as it applied to longshore-

15. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 552-53 (1960).

16. 321 U.S. 96, 101 (1944).

17. 362 U.S. 539 (1960).

18. W. PROSSER, *LAW OF TORTS* 555 (3d ed. 1964).

19. "Longshoremen have one of the highest accident-frequency rates in American industry. The rates for longshoremen in the Port of New York are higher than the rates of every other industry with the possible exception of logging." Comment, *Risk Distribution and Seaworthiness*, 75 *YALE L.J.* 1174, 1186 (1966).

20. 244 U.S. 205, 216 (1917).

men. Mr. Justice McReynolds wrote the majority opinion, in which he stated that the work of longshoremen was maritime in nature and that Congress had the paramount power to fix and determine the maritime law that prevailed throughout the country. It was difficult, if not impossible, to define with exactness the degree to which the general maritime law might be changed by state legislation. To permit the several states to apply their varying compensation laws would be to destroy the very uniformity in maritime matters that the Constitution was designed to establish. It was a five-to-four decision with Mr. Justice Holmes writing one of the dissenting opinions. The majority had admitted the applicability of state wrongful death statutes to maritime cases. Holmes said, "[I] can see no difference between [a liability] otherwise constitutionally created for death caused by accident and one for death due to fault."<sup>21</sup>

Congress amended the "saving-to-suitors clause"<sup>22</sup> to give claimants the rights and remedies under the workmen's compensation law of any state. Mr. Justice McReynolds was not appeased. In *Knickerbocker Ice Co. v. Stewart*,<sup>23</sup> he said that the "saving-to-suitors" clause conferred no substantive rights and did not authorize the states to do so. It referred only to remedies. Again the decision was five-to-four, with Justices Holmes, Pitney, Brandeis and Clarke dissenting.

Congress tried once more. Rather obviously, it did not want to go into the workmen's compensation business for itself. The plan this time was to except from the exclusive admiralty and maritime jurisdiction workmen's compensation remedies only for persons other than the master or members of the crew of a vessel.<sup>24</sup> The theory was that the idea of uniformity applied to shipboard employees and might be relaxed with respect to those who lived ashore and did not habitually move from state to state. Mr. Justice McReynolds, however, was guarding the bridge like Horatius. In *State of Washington v. W.C. Dawson Co.*,<sup>25</sup> he said: "The exception of master and crew is wholly insufficient to meet the objections to such enactments heretofore often pointed out." This decision is difficult to reconcile with a decision<sup>26</sup> two years earlier in which the Court had upheld the application of state workmen's compensation laws to a ship construction worker injured on navigable waters. The rationale applied to longshoremen did not apply to ship repairmen. Longshoremen and other maritime harbor workers injured on navigable waters had to be content with their common law remedies. Mr. Justice McReynolds, however, in *Dawson* strongly hinted that Congress had the

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21. *Id.* at 219.

22. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

23. 253 U.S. 149, 160 (1920).

24. Act of June 1, 1922, ch. 216, 42 Stat. 634.

25. 264 U.S. 219, 223 (1924).

26. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

power to enact a type of workmen's compensation act for longshoremen. He stoutly denied, however, that it could be delegated to the states.

To retrace, in 1914 the Supreme Court held that maritime injuries to longshoremen were within the admiralty jurisdiction because the service was maritime.<sup>27</sup> In *International Stevedoring Co. v. Haverty*<sup>28</sup> the Court applied the above holding and determined that a longshoreman was a seaman! Mr. Justice Holmes wrote the opinion:

It is true that for most purposes, as the word is commonly used, stevedores [longshoremen] are not "seamen." But the words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. . . . [W]e are of opinion that a wider scope should be given to the words of the [Jones] act, and that in this statute "seamen" is to be taken to include stevedores [longshoremen] employed in maritime work on navigable waters as the plaintiff was . . . .

Mr. Justice Holmes did not elaborate on the above statement, which turned out to have far-reaching repercussions, but rather he seemed intent upon having the longshoremen classified as seamen in order that they might receive the benefits of the Jones Act. If Holmes had known at the time what was to follow he might have checked more thoroughly into his statement that longshoremen's "work was a maritime service formerly rendered by the ship's crew."

It turned out to be unnecessary to find that longshoremen were seamen in order for them to receive statutory benefits for injuries, because the following year Congress followed Mr. Justice McReynolds' hint and enacted the Longshoremen's and Harbor Workers' Compensation Act.<sup>29</sup>

This act provided for payment to longshoremen and harbor workers benefits similar to those under the state workmen's compensation acts, but generally the benefits were higher than those under the state acts, and, of course, they were uniform throughout the United States. It provided for recovery only when workmen's compensation benefits may not be validly provided by state law. The liability of the employer is exclusive and in place of all other liability of the employer to his employee.

#### D. *The Unseaworthiness Doctrine Extended to Longshoremen*

The climactic case of this comment is unquestionably *Seas Shipping Co., Inc. v. Sieracki*.<sup>30</sup> In *Sieracki* a shipowner had entered into a contract with Sieracki's employer, an independent contracting stevedore. Sieracki was engaged in the loading of a piece of large equipment into the ship's

27. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914).

28. 272 U.S. 50, 52 (1926).

29. Act of March 4, 1927, ch. 509, 44 Stat. 1424, 33 U.S.C. §§ 901-950 (1960) [hereinafter referred to as the Compensation Act].

30. 328 U.S. 85 (1946).

hold. He was injured when a shackle supporting part of the ship's loading gear broke because of a flaw in its manufacture. The shipowner and the shipbuilder were co-defendants in the original litigation. The trial court held the shipbuilder liable for negligence in installing the defective shackle, but the shipowner was held not liable since a reasonable examination would not have discovered the defect. On appeal, the Court of Appeals held that the shipowner was liable even though he had not been negligent.<sup>31</sup> The Supreme Court affirmed, stating:

The principal question is whether the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore injured while working aboard the ship.<sup>32</sup>

That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since *The Osceola*. . . . And the liability applies as well when the ship is moored at a dock as when it is at sea.<sup>33</sup>

Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. . . . That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.<sup>34</sup>

An analysis of *Sieracki* will be held until after the presentation of the historical background.

#### E. Shipowner Entitled to Indemnity from the Stevedore

The next important link in what has been described as "wasteful litigation"<sup>35</sup> occurred in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*<sup>36</sup> In *Ryan* the stevedore contractor handled both the loading and unloading of the ship under contract for Pan-Atlantic but with no express indemnity agreement. Because of apparent negligence by the stevedore in loading, a longshoreman, employed by this stevedore, was injured while unloading when a heavy roll broke loose. The longshoreman received compensation of \$2,940 and medical costs of \$9,857.36 under the Longshoreman Act. Nevertheless, he sued the shipowner claiming, *inter alia*, unseaworthiness. The shipowner filed a third party complaint against the stevedore. The jury returned a verdict of \$75,000 from which sum the insurance carrier was to be reimbursed for the \$12,797.36 it had advanced to the longshoreman. Judgment was entered on the verdict, but the third party complaint was dismissed. The Court

31. 149 F.2d 98 (3d Cir. 1945).

32. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 87 (1946).

33. *Id.* at 90.

34. *Id.* at 96.

35. Comment, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174, 1190 (1966).

36. 350 U.S. 124 (1956).

of Appeals affirmed the judgment for the longshoreman but reversed the dismissal of the third party complaint and directed that judgment be entered for the shipowner.<sup>37</sup> The Supreme Court affirmed, and held that the shipowner's action for indemnity was not barred by the Longshoremen's and Harbor Worker's Compensation Act. It then raised the question of whether the shipowner was entitled to indemnity in the absence of an express agreement. The court said the essence of stevedoring contract is a warranty of workmanlike service, comparable to a manufacturer's warranty; competency and safety of stowage are inescapable elements of the service undertaken. It was a five-to-four decision with Mr. Justice Black writing the dissent: "I think the Court's holding today breaks promises the [Compensation] Act made both to employers and employees."<sup>38</sup> Black went on to say the Act had told employers that it was to be exclusive in place of all other liability to the employee. The employer had paid his premiums on his compensation policy, yet the Court allowed the employee to sue the shipowner who in turn was allowed indemnity from the employer. The result was that the employer who had been told that the recovery under the Act was exclusive was required to pay a \$75,000 verdict.

Later cases extended both the scope of the application of the unseaworthiness doctrine and the stevedore's implied warranty of workmanlike service. In *Gutierrez v. Waterman S.S. Corp.*,<sup>39</sup> a longshoreman slipped on some loose beans spilled on the dock from defective bags during the unloading of cargo. The Court reiterated *Sieracki's* position that: "Seaworthiness is not limited . . . to fitness for travel on the high seas; it includes fitness for loading and unloading"<sup>40</sup> and found that the doctrine of seaworthiness "applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier."<sup>41</sup> In *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co., Inc.*<sup>42</sup> it was held that a stevedore's implied warranty of workmanlike service was breached even though, the stevedore non-negligently supplied the defective equipment which injured one of its employees.

### III. THE UNSEAWORTHINESS DOCTRINE TODAY

#### A. *Longshoremen May Demand Trial By Jury*

Admiralty claims traditionally are not tried before a jury.<sup>43</sup> The proceedings may be either *in personam* against the employer-shipowner,

37. *Palazzolo v. Pan-American S.S. Corp.*, 211 F.2d 277 (2d Cir. 1954).

38. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 135 (1956).

39. 373 U.S. 206 (1963)

40. *Id.* at 213.

41. *Id.* at 215.

42. 376 U.S. 315 (1964).

43. FED. R. CIV. P. 38(e): "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty . . . claim . . ." There is no constitutional barrier to jury trials in admiralty, and Congress could, if it so wished, provide for jury trials. In

*in rem* against the vessel, or both.<sup>44</sup> Under the "saving to suitors" clause<sup>45</sup> the action may be brought in a state court, and if diversity of citizenship exists the action may also be taken on the "law side" of the federal court.<sup>46</sup> If a seaman were injured on the high seas because of unseaworthiness, his exclusive remedy would be in admiralty as he would not fall within the scope of the "saving to suitors" clause.<sup>47</sup>

A longshoreman, on the other hand, bringing suit in a federal court, by showing diversity of citizenship, may elect to bring his action on the "law side" and thereby demand trial by jury provided that the suit is *in personam*.<sup>48</sup> Since a suit for personal injuries caused by unseaworthiness will frequently be for damages in excess of \$10,000, if diversity of citizenship is present, a longshoreman will bring his suit in the federal court on the "law side" in order to have the benefit of trial by jury<sup>49</sup> as shown in the introductory case, *Old Dominion*.

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fact, it did so provide by the Act of Feb. 26, 1845, ch. 20, 5 Stat. 726-27. The constitutionality of this statutory trial by jury provision was upheld in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 Howard) 443, 459 (1851): "In admiralty and maritime cases there is no . . . limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury . . ."

44. *See The Osceola*, 189 U.S. 158 (1903).

45. Section 9 of the Judiciary Act of 1789, while granting original jurisdiction of civil causes in admiralty and maritime jurisdiction to the federal district courts, expressly saved to suitors the right of a common law remedy where the common law is competent to give it. The section was rewritten in the Judiciary Code of 1948, 28 U.S.C. § 1333 (1964) and the "saving" clause now reads, "saving to suitors in all cases all other remedies to which they are otherwise entitled."

46. FED. R. CIV. P. 1 states: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty . . ." FED. R. CIV. P. 2 provides that there shall be one form of action to be known as a "civil action." FED. R. CIV. P. 9(h) provides: "If the claim is cognizable only in admiralty it is an admiralty . . . claim . . ." Added Feb. 28, 1966, eff. July 4, 1966. Although we recognize that there is now one form of action, to distinguish claims cognizable at law from the claims cognizable in admiralty we shall refer to the "law side" of the federal court when referring to claims cognizable at law.

47. *Cf. Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). If a Jones Act claim is joined with claims for unseaworthiness and for maintenance and cure, there is a right to trial by jury on all of the claims even if the Jones Act claim is resolved against the seaman.

48. *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359-60 (1962) involving a suit by a long-shoreman for unseaworthiness. The Supreme Court stated:

Therefore, a suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action, since . . . it is a suit *in personam*. . . .

This suit being in the federal courts by reason of diversity of citizenship carried with it . . . the right to trial by jury.

*See also Carter v. Baltimore & O.R.R. Co.*, 166 F. Supp. 307, 311 (D.Md. 1958). Trial by jury was demanded, the amount in controversy was in excess of \$10,000, but there existed no diversity of citizenship. The court held that the plaintiff was not entitled to a trial by jury and amended the complaint from a "civil complaint" to one "in admiralty." The court stated: "I know of no case . . . where the plaintiff has been entitled to demand a jury trial in a case of exclusive admiralty jurisdiction, where there is no diversity of citizenship."

49. Recently The American Law Institute issued its Tentative Draft No. 6, dated April 30, 1968. This contains proposed changes of the division of jurisdiction between state and federal courts, including admiralty and maritime jurisdiction. The famous "saving

### B. *Indemnity to the Shipowner from the Stevedore*

The stevedore's implied warranty of workmanlike service initiated in *Ryan* now may be considered an integral part of the unseaworthiness doctrine. The shipowner's right to indemnity has been held to mean complete indemnity, including the cost of attorneys' fees and other costs, to the shipowner when he seeks indemnity from the stevedore for the amount awarded the longshoreman.<sup>50</sup> Thus, as in *Old Dominion*, although the longshoreman recovered \$4,000, the stevedore had to pay \$7,320.39 because of the addition of costs and attorney's fees.

### C. *Doctrine of Operational Negligence Rejected*

Although the doctrine of unseaworthiness is a theory of strict liability, the Courts of Appeals of the various circuits developed an exception known as the doctrine of operational negligence. A case frequently cited when the doctrine was applied was *Grillea v. United States*<sup>51</sup> in which the court held that a ship is not rendered unseaworthy by a negligent act that causes an accident during the progress of work on board so long as the act could be considered as an incident in a continuous course of operation. This doctrine of operational negligence was rejected in 1967 by the Supreme Court in *Mascuilli v. United States*.<sup>52</sup>

## IV. THE RATIONALE OF *Sieracki* EXAMINED

### A. *The Characterization of Longshoremen as Seamen*

In *Sieracki*, the Court said: "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew,"<sup>53</sup> and it then placed great emphasis on *Haverty*.<sup>54</sup> In fairness to Justice Holmes in *Haverty*, his characterization of longshoremen as seamen was motivated by the apparent desire to secure for them the benefits of the Jones Act. However, it was an unnecessary step since the Longshoremen's and Harbor Workers' Compensation Act denied the longshoremen the benefits of the Jones Act and at the same

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to suitors" clause in 28 U.S.C. § 1333 would be replaced by § 1316(b) which would give the federal courts exclusive jurisdiction in actions for limitation of liability and maritime actions in rem. The federal courts would have concurrent jurisdiction with state courts in all other actions which would include personal injury and wrongful death at sea.

The proposed § 1319 expands the right to trial by jury to admiralty actions. The section provides: (1) for jury trial if diversity or a federal question provide an independent basis of federal jurisdiction and a right to jury trial would otherwise exist; (2) for jury trial on demand for all claims within the admiralty and maritime jurisdiction in a federal court—other than those heard in a limitation of liability—if the relief sought is limited to money damages for personal injury or death; (3) that in all other actions within the jurisdiction no right to jury trial exists.

50. *DeGioia v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962).

51. 232 F.2d 919 (2d Cir. 1956).

52. 387 U.S. 237 (1967).

53. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 96 (1946).

54. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

time provided compensation similar to workmen's compensation without any need for their being classified as "seamen." In *Sieracki* the Court cited *Atlantic Transport Co. v. Imbrovek*<sup>55</sup> for the proposition that an injury to a stevedore is a maritime tort. The Court cited *Florez v. The Scotia*,<sup>56</sup> *The Gilbert Knapp*,<sup>57</sup> *The Seguranca*<sup>58</sup> and its own prior holding in *Haverty* as support for its statement that the work of loading and unloading was historically performed by members of the crew. These cases deal only with the question of whether a stevedore is entitled to a maritime lien. To grant such a lien, a court need find only that the stevedore's services were maritime in nature. This conclusion can be reached without holding that the cargo-handling operations were formerly conducted by the crew. More importantly, historical research has shown the work of loading and unloading was generally not handled by members of the crew.

Authorities tracing the historical background have reached conclusions contrary to the statement in *Sieracki*. In a book published in 1965 by Nicholas J. Healy and Brainerd Currie,<sup>59</sup> citing first the Laws of Oleron, the authors conclude that it was an ancient maritime custom to employ certain officers, (called *Sacquiers* and *Arrameurs*) of ports for the loading and unloading of vessels. Under the Theodosian Code these *sacquiers* were even found as far back as ancient Rome.

The conclusion of Healy was backed up by Leighton Shields, Jr. and Thomas E. Byrne, Jr., in a well-documented article.<sup>60</sup> Shields and Byrne found that in 1799 in the port of Philadelphia it was the general custom to hire workers other than the mariners to load and unload the vessels. The reason was that the merchants found it in their interest to do so as the mariners were apt to be ungovernable after a voyage was ended. Shields and Byrne found in *Peters' Admiralty Decisions*,<sup>61</sup> a collection of early American maritime cases, that under ancient maritime codes it was clearly indicated that sailors did not load or unload cargo. Similarly, stevedores were employed in New England in 1790 to replace the unruly mariners.<sup>62</sup> Stevedores, referred to as "porters" were long used in the Port of London and by the middle of the Eighteenth Century developed such a strong union that: "No labour in the port could be performed by any other person whilst there was a sufficient number of these men offering themselves."<sup>63</sup> However, the use of longshoremen in

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55. 234 U.S. 52 (1914).

56. 35 F. 916 (S.D.N.Y. 1888).

57. 37 F. 209 (E.D. Wis. 1889).

58. 58 F. 908 (S.D.N.Y. 1893).

59. N. HEALEY & B. CURRIE, *ADMIRALTY* 339-40 (1965) [Hereinafter referred to as Healey].

60. Shields & Byrne, *Application of the "Unseaworthiness" Doctrine To Longshoremen*, 111 U. PA. L. REV. 1137 (1963) [hereinafter referred to as Shields & Byrne].

61. *Id.* at 1140.

62. *Id.* at 1141.

63. *Id.* at 1143.

London can be traced as far back as 1282.<sup>64</sup> Shields and Byrne found, as did Healy, that in ancient Rome and also in Greece a clear distinction was made between "the men who sailed the ships" and those who performed what would today be longshoremen's work.<sup>65</sup>

This is not to imply that cases cannot be found in which seamen unloaded the ship. However, the Supreme Court in *Sieracki* did not state the work was *sometimes* performed by members of the crew. They said explicitly that until recent times the work of loading and unloading was done by members of the crew, and because of this historical "fact" the longshoreman is a seaman because he is doing a seaman's work. The writer is merely pointing out the contrary to be true; in other words, historically there has long been a division of labor, and it is a grave error to base such an important holding as *Sieracki* on a dogmatic statement that was not historically documented. Mr. Justice Holmes' characterization of longshoremen as seamen in *Haverty* is understandable as he was trying to secure for the longshoremen the benefits of the Jones Act. He made no attempt to justify the characterization historically. The characterization of longshoreman in *Sieracki* is not understandable as it has no sound historical basis.

#### B. *Wasteful Litigation Caused by the Sieracki Doctrine*<sup>66</sup>

Shields and Byrne estimated that 40 percent of the total cost of the *Sieracki* doctrine is for lawyers' fees.<sup>67</sup> In fact, cases may be found in which the court held that a "fair and reasonable compensation" for the plaintiff's attorney "is fixed at one-half of the recovery."<sup>68</sup> Benefits under the Compensation Act may be paid over a period of years depending upon the nature of the injury, whereas the recovery in a suit for unseaworthiness is paid in a lump sum.<sup>69</sup> For example, in the introductory case of *Old Dominion* the plaintiff received an award of \$4,000 which cost his employer \$7,320.39 because of the application of the *Ryan* indemnification principle that included the shipowner's cost and attorney's fees of \$3,320.39. However, the plaintiff had to pay his attorney out of his \$4,000. If calculated at the 40 per cent rate, the plaintiff's attorney would receive \$1,600, and the plaintiff \$3,400. Therefore, in that case in order to give the plaintiff \$3,400, his employer was forced to pay a judgment of \$7,320.29. The jury verdict of \$4,000 was not typical; for example, in *Ryan* the jury verdict was for \$75,000 which would naturally

64. *Id.* at 1145.

65. *Id.* at 1146.

66. Hereinafter, reference to the *Sieracki* doctrine will include the extension of the unseaworthiness doctrine to longshoremen by *Sieracki* and the shipowner's subsequent right to indemnification from the stevedoring contractor because of the contractor's implied warranty of workmanlike service created by *Ryan*.

67. Shields & Byrne at 1150.

68. *See, e.g.,* *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 809 (E.D. Va. 1960).

69. Shields & Byrne *supra* note 60, at 1148.

produce a much larger burden on the employer with the addition of costs and attorney's fees. However, in the *Old Dominion* case, since the award was undoubtedly less than what the plaintiff would receive under the Compensation Act, the plaintiff would still receive the amount to which he would otherwise have been entitled without litigation. The Compensation Act provides that if the net recovery against the third party is less than it would have been under compensation, compensation makes up the difference.<sup>70</sup> If the recovery is more than what has been paid under the Compensation Act, the insurance company is reimbursed from the jury verdict for the amount it may have advanced, as in *Ryan*. Because of the cumulative effect of benefits payable over a period of years as contrasted with a lump sum payment, Shields and Byrne show a case<sup>71</sup> where an award of \$80,000 was actually less than the total benefits payable over a period of years, under compensation, *viz.*, \$94,110.84.<sup>72</sup> The \$80,000 award, however, was reduced by costs and attorney's fees to the plaintiff by \$27,649.17 leaving a net recovery to the plaintiff of \$52,349.83. This still does not include the costs and attorney's fees paid by the employer to the shipowner under the indemnification principle! It is not surprising that the *Sieracki* doctrine has been termed wasteful litigation.

#### V. CONCLUSION

The writer feels that it was a grievous error to extend the unseaworthiness doctrine to longshoremen for the following reasons, as explained above: (1) the statement in *Sieracki* that longshoremen are performing what is traditionally seamen's work is historically inaccurate; (2) longshoremen are not members of a class that the unseaworthy doctrine was originally designed to protect; (3) a seaman injured at sea as the result of an unseaworthy condition must litigate in admiralty without a jury; whereas a longshoreman, if he meets the federal jurisdictional requirements, may sue on the "law side" with the benefits of a trial by jury;<sup>73</sup> (4) the longshoremen have the guaranteed protection of the Longshoremen's and Harbor Workers' Act, but their employers are being subjected to wasteful litigation and double liability under the *Ryan* decision.

The *Sieracki* doctrine has been upheld by many subsequent Supreme Court decisions, and it could be argued that it is hopeless to expect the Supreme Court to overturn this doctrine now. Perhaps this is true but not necessarily hopeless. The Supreme Court has been known to overturn long established doctrines; one of the more famous examples would be

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70. 33 U.S.C. § 933(g) (1964).

71. Shields & Byrne *supra* note 60, at 1148.

72. *Id.* at 1148.

73. *Cf. Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

found in the doctrine established in 1842 by *Swift v. Tyson*.<sup>74</sup> This well-ingrained doctrine was overturned ninety-six years later in 1938 by *Erie Railroad Co. v. Tompkins*.<sup>75</sup> Two factors were involved in the *Erie* decision: (1) recognition that the construction originally given by the Court was erroneous as shown by "research of a competent scholar,"<sup>76</sup> and (2) recognition that the "[c]riticism of the doctrine [had become] widespread."<sup>77</sup>

These same two factors may now be found in relation to the *Sieracki* doctrine. First, as already pointed out, authorities have examined the statement that historically loading and unloading were performed by members of the crew, and they have found that the statement cannot be supported by history.

As to the second point, criticism of *Sieracki* is likewise widespread. In a 1967 article in the *Oregon Law Review* it was stated:

[P]rior to the Jones Act, a recovery for unseaworthiness might have been justified. . . . With the advent of the Jones Act in 1920 this argument lost efficacy. The law has seen set to limit recoveries for unseaworthiness which injure shippers of cargo; it seems incongruous that there should be, at the same time, an extension of liability where the unseaworthy condition causes personal injury.<sup>78</sup>

In the *Yale Law Journal* it was stated:

The root cause of current controversy is the leading case of *Seas Shipping Co. v. Sieracki*. . . .<sup>79</sup> Congress must end the wasteful litigation which occurs when the maritime worker sues the shipper who, in turn, seeks indemnification from the employer.<sup>80</sup>

In 1966 Judge Friendly raised his voice in a dissenting opinion:

It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right or wrong. . . .<sup>81</sup>

There is no question that the *Sieracki* doctrine has resulted in wasteful litigation. The problem is, however, whether the Supreme Court

74. 41 U.S. (16 Peters) 1 (1842).

75. 304 U.S. 64 (1938).

76. *Id.* at 72.

77. *Id.* at 73.

78. Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 399 (1967).

79. Comment, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174 (1966).

80. *Id.* at 1190. See also Saari, *Crew Conduct as Unseaworthiness*, 15 CLEV.-MAR. L. REV. 265, 275 (1966), wherein it is stated: "It seems repugnant to all law that a shipowner should be liable under the doctrine of unseaworthiness for occurrences which he has no reasonable way of preventing."

81. *Skibinski v. Waterman Steamship Corp.*, 360 F.2d 539, 544 (2d Cir. 1966).

will recognize its error as it did in *Erie* and disapprove the *Sieracki* doctrine. If not, the answer lies with Congress. If it feels that the benefits of the Compensation Act are inadequate, they could expand the benefits with the stipulation that it is the exclusive remedy specifically excluding any further recovery for unseaworthiness. Certainly a somewhat higher premium for their compensation policies would be much cheaper in the long run for the stevedoring contractors than the expenses which will result from the application of the *Sieracki* doctrine.