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Admiralty - Absolute Liability For Transitory Unseaworthiness

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Notes

ADMIRALTY — ABSOLUTE LIABILITY FOR TRANSITORY UNSEAWORTHINESS

Plaintiff, a seaman,[1] was injured when his foot slipped from the vessel's rail as he was attempting to go ashore in the customary manner. The rail was covered with fish slime which had been recently deposited during unloading operations. Plaintiff sought recovery on the common law side of the federal court on three counts: maintenance and cure, negligence under the Jones Act,[2] and unseaworthiness of the vessel. The district judge charged the jury that "the plaintiff could not recover [under the Jones Act or for unseaworthiness] unless the slime had been on the rail long enough for the shipowner to be chargeable with knowledge of it."[3] The jury awarded plaintiff only maintenance and cure. The First Circuit Court of Appeals affirmed the district judge's instruction.[4] On certiorari to the United States Supreme Court, *held,* reversed, and remanded for a new trial on the issue of unseaworthiness, three Justices dissenting.[5] The duty of a shipowner to furnish a vessel and appurtenances reasonably fit for their intended use is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. Actual or constructive knowledge of the unseaworthy condition is not essential to liability. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In the early maritime codes the only remedies available to seamen were wages to the end of the voyage and maintenance

1. The Court pointed out that: "There are here no problems, such as have recently engaged the Court's attention, with respect to the petitioner's status as a 'seaman'. Cf. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406; *United Pilots Assn. v. Halecki*, 358 U.S. 613, or as to the status of the vessel itself. Cf. *West v United States*, 361 U.S. 118. The *Racer* was in active maritime operation, and the petitioner was a member of her crew." Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 542 (1960).

2. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1958).

3. "In effect I said that the plaintiff could not recover unless the slime had been on the rail long enough for the shipowner to be chargeable with knowledge of it." Mitchell v. Trawler Racer, Inc., 167 F. Supp. 434 (D. Mass. 1958).

4. Mitchell v. Trawler Racer, Inc., 265 F.2d 426, 1959 A.M.C. 1088 (1st Cir. 1959).

5. There were two separate dissenting opinions, one by Mr. Justice Frankfurter, with whom Mr. Justice Harlan and Mr. Justice Whittaker joined, and one by Mr. Justice Harlan, with whom Mr. Justice Frankfurter and Mr. Justice Whittaker joined.

and cure. The shipowner was not under a duty to provide a staunch vessel for his seamen.[6] Initially American admiralty courts adopted this position.[7] However, toward the end of the nineteenth century lower federal courts began to allow recovery of compensatory damages to seamen in factual situations which would be presently covered by the doctrine of unseaworthiness.[8] Liability was based on negligence, and in that respect the duty of the shipowner to the seaman did not differ from that of any other master to servants in his employ.[9] He, like the shore-side

6. Arts. VI & VII, *Laws of Oleron*, 30 Fed. Cas. 1174-75 (1897); Arts. XVIII, XIX, & XXXIII, *Laws of Wisbuy*, 30 Fed. Cas. 1191-92 (1897); Arts. XXXIX & XLV, *Laws of Hanse Towns*, 30 Fed. Cas. 1200 (1897); Title 4, Arts. XI & XII, *Marine Ordinances of Louis XIV*, 30 Fed. Cas. 1209 (1897).

7. Harden v. Gordon, 11 Fed. Cas. 480 (D. Maine 1823); Reed v. Canfield, 20 Fed. Cas. 426 (D. Mass. 1832); The George, 10 Fed. Cas. 205 (D. Mass. 1832); Walton v. The Neptune, 29 Fed. Cas. 142 (D. Pa. 1800).

8. The Columbia, 124 Fed. 745 (E.D.N.Y. 1903) (hawser broke on tow); Lafourche Packet Co. v. Henderson, 94 Fed. 871 (5th Cir. 1899) (broken bolt in skid for stowing barrels); The Robert C. McQuillen, 91 Fed. 685 (D. Conn. 1899) (rope on boom parted); Wm. Johnson & Co. v. Johanson, 86 Fed. 886 (5th Cir. 1898) (improper rope and toggle); The France, 59 Fed. 479 (2d Cir. 1894) (broken rope handle on ash bag); The Concord, 58 Fed. 913 (S.D.N.Y. 1893); The Julia Fowler, 49 Fed. 277 (S.D.N.Y. 1892) (parted splice on triangle); The Frank and Willie, 45 Fed. 494 (S.D.N.Y. 1891) (improperly piled cargo); The A. Heaton, 43 Fed. 592 (D. Mass. 1890) (broken upper gasket); Olson v. Flavel, 34 Fed. 592 (D. Ore. 1888) (defective wheelbarrow); The Flowergate, 31 Fed. 762 (E.D.N.Y. 1887) (broken eye-bolt); The Lizzie Frank, 31 Fed. 477 (S.D. Ala. 1887) (broken chock); The Neptuno, 30 Fed. 925 (S.D.N.Y. 1887) (broken hook); The Noddleburn, 28 Fed. 855 (D. Ore. 1886) (frayed crane-line parted); The Edith Godden, 23 Fed. 43 (S.D.N.Y. 1885) (broken derrick hook); The Wanderer, 20 Fed. 140 (E.D. La. 1884) (failure to attach ladder by cleats); The Explorer, 20 Fed. 135 (E.D. La. 1884) (failure to have winch cover); The Rheola, 19 Fed. 926 (S.D.N.Y. 1884) (broken chain); Sunney v. Holt, 15 Fed. 880 (N.D. Ohio 1883) (faulty lighting system); Halverson v. Nisen, 11 Fed. Cas. 310 (D. Calif. 1876) (parting of rope on triangle); Brown v. The D. S. Cage, 4 Fed. Cas. 367 (E.D. Tex. 1872) (failure to provide engineer and pilot where boiler exploded).

9. See, e.g., The France, 59 Fed. 479, 480 (2d Cir. 1894) ("An employer does not undertake absolutely with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all reasonable care and prudence to provide them with appliances reasonably safe and suitable."); The Concord, 58 Fed. 913, 915 (S.D.N.Y. 1893) ("The liability of the ship and owners to employes as respects the sufficiency of equipment and appliances, is not that of warranty, as it is in regard to goods, but only for the exercise of 'due diligence'."); The A. Heaton, 43 Fed. 592, 594 (D. Mass. 1890) ("But it is equally clear to our minds that the accident was caused by the master's gross, not to say reckless, neglect of the duty which he owed to the crew under his command and care."); The Lizzie Frank, 31 Fed. 477, 478 (S.D. Ala. 1887) ("The owner of this vessel was required to use and exercise in its construction and equipment the usual and customary means and care adopted by reasonably prudent persons in the construction and equipment of vessels of like character."); The Edith Godden, 23 Fed. 43, 45 (S.D.N.Y. 1885) ("If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least, to be held to the strictest rule of diligence and care."); Halverson v. Nisen, 11 Fed. Cas. 310 (D. Cal. 1876) ("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. . . . The foundation of his liability is his personal negligence."); Brown v. The D. S. Cage, 4 Fed. Cas. 367 (E.D. Tex.

employer, had to use ordinary care and diligence to provide a safe and sound place to work furnished with sound appliances. Although the fellow servant rule prevailed in admiralty law,[10] the courts created an exception and also held the owner liable where the master[11] or mate[12] failed to exercise due diligence to provide a seaworthy vessel. However, this exception was not extended to include injuries caused by the negligence of individual members of the crew.[13]

The case of *The Osceola*,[14] decided in 1903, is generally cited as the first United States Supreme Court decision approving the doctrine of unseaworthiness. In dictum[15] Mr. Justice Brown made the following statement: "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. Scarff v. Metcalf, 107 N. Y. 211."[16] Because of the reference to English law which required only reasonable care and because of the reference to the New York case dealing with negligence, it can be reasonably assumed that Justice Brown considered the terms unseaworthi-

1872) ("It is the duty of the master and owners to employ, so far as they can do so with the use of ordinary care, servants of sufficient care and skill, to make it probable that they will not cause injury.").

10. The third and fourth propositions stated in The Osceola, 189 U.S. 158, 175 (1903) summarized the rules that had applied to all injuries incurred by seamen except in case of an injury caused by the unseaworthiness of the vessel:

"That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

11. The Columbia, 124 Fed. 745 (E.D. N.Y. 1903); The A. Heaton, 43 Fed. 592 (D. Mass. 1890); Olson v. Flavel, 34 Fed. 477 (D. Ore. 1888).

12. The Julia Fowler, 49 Fed. 277 (S.D.N.Y. 1892); The Frank and Willie, 45 Fed. 494 (S.D.N.Y. 1891); Halverson v. Nisen, 11 Fed. Cas. 310 (D. Cal. 1876).

13. The France, 59 Fed. 479, 481 (2d Cir. 1894) ("If they were, as they were fellow servants of the libelant, their negligence cannot afford him a ground of recovery against the steamship."); The Robert C. McQuillen, 91 Fed. 685 (D. Conn. 1899) ("Inasmuch as it appears that this condition was due to the negligence, not of the acting master, but of the fellow servants of the libelant, and as the suggestion of unseaworthy construction is specifically disclaimed, the ship would not be liable under the settled rule. The City of Alexandria, 17 Fed. 390.").

14. 189 U.S. 158 (1903).

15. This statement was not necessary to the decision of the case. The question involved was whether or not there could be recovery for the *negligence* of the master in giving an order to hoist the gangway in a high wind on the open sea. It was stipulated that the appliances of the ship were in every respect seaworthy.

16. The Osceola, 189 U.S. 158, 175 (1903).

ness and negligence to have the same meaning.[17] After *The Osceola,* lower federal courts continued to allow indemnity only where the owner, or those responsible to him,[18] failed to use due diligence in furnishing a seaworthy vessel.[19] The owner was not held liable for injuries caused by latent defects[20] or injuries resulting from improvident orders given by the ship's officers.[21] The United States Supreme Court first indicated that the shipowner's duty to furnish a seaworthy vessel was "absolute"[22] in

17. For an excellent discussion of this particular point see Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381, 391 (1954).

18. Patton-Tully Transp. Co. v. Turner, 269 Fed. 334 (6th Cir. 1920); Globe S.S. Co. v. Moss, 245 Fed. 54 (6th Cir. 1917); Carter v. Brown, 212 Fed. 393 (5th Cir. 1914).

19. Adams v. Bortz, 279 Fed. 521 (2d Cir. 1922); Burton v. Greig, 271 Fed. 271, 273 (5th Cir. 1921) ("The evidence was not such as to call for a finding that the shipowner was chargeable with any negligence with reference to the pipe which burst [and] we understand that under the American law the shipowner is not an insurer of such an appliance as the pipe in question, and is not liable for the consequences of the bursting of it, if due care was used in furnishing the appliance and in keeping it in safe condition and repair."); Patton-Tully Transp. Co. v. Turner, 269 Fed. 334, 339 (6th Cir. 1920) ("Proceeding to this question of fact, whether the master used reasonable care in maintaining the boat's appliances in seaworthy condition, we conclude that he did not."); Storgard v. France & Canada S.S. Corp., 263 Fed. 545, 546 (2d Cir. 1920) ("The charge of negligence was that the owner permitted the bolt to become worn and defective, so that the vessel was unseaworthy as to him."); Cricket S.S. Co. v. Parry, 263 Fed. 523 (2d Cir. 1920); Hanrahan v. Pacific Transport Co., 262 Fed. 951 (2d Cir. 1919); John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986 (2d Cir. 1919); The Colusa, 248 Fed. 21, 24 (9th Cir. 1918) ("The defect in the turnbuckle, if not obvious, was discernible by the exercise of reasonable care"); Globe S.S. Co. v. Moss, 245 Fed. 54, 57 (6th Cir. 1917) ("We agree with the conclusion of the District Judge that appellant did not use due care with respect to ascertaining and remedying the actual defects in the pump."); Tropical Fruit S.S. Co. v. Towle, 222 Fed. 867 (5th Cir. 1915); Carter v. Brown, 212 Fed. 393 (5th Cir. 1914); Thompson Towing & Wrecking Ass'n v. McGregor, 207 Fed. 209 (6th Cir. 1913); The Nyack, 199 Fed. 383 (7th Cir. 1912); Cornell Steamboat Co. v. Fallon, 179 Fed. 293, 294 (2d Cir. 1909) ("if the seaman's injury is due to the personal negligence or default of the shipowners, as, for instance, to the unseaworthiness of the vessel or her tackle . . . he may recover full indemnity"); The Drumelton, 158 Fed. 454 (S.D.N.Y. 1907); The Lyndhurst, 149 Fed. 900 (E.D.N.Y. 1906); The Henry B. Fiske, 141 Fed. 188, 190 (D. Mass. 1905) ("Unless the owners or masters were negligent in regard to the condition of the rider, neither they nor the vessel are liable for the injury to the libelant caused by its breaking. . . . Liability on her part, in the case of an accident of this kind, is incurred only when those who represent her have failed to exercise reasonable care to make the fitting or appliance safe, and arises only out of such defects as reasonable care on their part would have discovered and remedied.").

20. Burton v. Greig, 271 Fed. 271 (5th Cir. 1921); The Henry B. Fiske, 141 Fed. 188, n. 19 (D. Mass. 1905).

21. John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986 (2d Cir. 1919).

22. Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259 (1922) ("We think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages.") Although the courts speak of the duty of the shipowner to provide a seaworthy vessel as being absolute and therefore not predicated on negligence principles, nevertheless, the owner is not an *insurer* of the safety of his seamen.

Carlisle Packing Co. v. Sandanger,[23] decided in 1922. However, in subsequent cases the Supreme Court did not seem to follow the *Sandanger* pronouncement,[24] and the lower federal courts continued, with one exception,[25] to base recovery for unsea-

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The duty of the owner under the so-called "absolute" liability concept is to provide a vessel *reasonably* fit for its intended use. (In determining whether or not vessels or their appliances are reasonably fit for their intended use the courts admit evidence to show what is the standard or custom in the industry. This standard is used as the basis for finding the ultimate fact.) Under the duty, as is stated above, the owner would be liable for injuries caused by latent defects, but, seemingly, would not be liable for injuries caused by the failure of an appliance used in a manner in which it was not intended to the used. Thus, if the owner provided a hawser for pulling a tow that was rotten and deficient it would seem that the hawser would not be reasonably fit for its intended use. However, if the owner provided a seaworthy hawser, but the master ordered the tow to be pulled by a small line obviously insufficient for the job, the owner would not be liable under the doctrine of unseaworthiness. He would be liable only for the negligent and improvident order of the master. It must be noted, though, that if the owner provisioned a vessel intended for pulling tows with only a small line, not adequate for the intended use, the vessel would be unseaworthy.

23. 259 U.S. 255 (1922). It would seem that the pronouncement of absolute liability was not necessary to reach a decision in the *Sandanger* case. Even the majority in the instant case admit this. "This characterization of unseaworthiness as unrelated to negligence was probably not necessary to the decision in that case, where the respondent's injuries had clearly in fact been caused by failure to exercise ordinary care (putting gasoline in can labeled 'coal oil' and neglecting to provide the vessel with life preservers)." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 547 (1960).

24. In Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939), the Court spoke of using the doctrine of comparative negligence to mitigate damages in an unseaworthiness case. If liability is absolute then it would logically seem to follow that there could be no comparative negligence. The Arizona v. Anelich, 298 U.S. 130 (1936); Pacific S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928) ("Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term."); Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 321 (1927) ("Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. . . . The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action."). *Cf.* Engel v. Davenport, 271 U.S. 33, 36 (1926) ("The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by defective appliance, without regard to negligence").

25. The H. A. Scandrett, 87 F.2d 708, 710-711 (2d Cir. 1937) ("The libelant is invoking a remedy based on unseaworthiness or defective condition of the vessel or her equipment. In such a case 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 [and] it seems to us that everything is to be said for holding her absolutely liable to her crew for injuries arising from defects in her hull and equipment."). It is interesting to note that after establishing this duty the court then went on to mitigate damages using the comparative negligence doctrine. Comparative negligence is seemingly inconsistent with the idea of absolute liability. See also Sabine Towing Co. v. Brennan, 72 F.2d 490, 494 (5th Cir. 1934) ("This duty, as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses. . . . Too, failure to make a ship seaworthy in respect of a matter as important to the lives of the crew as its stability, is prima facie evidence of negligence."). This case was overruled by The Tawmie, 80 F.2d 792 (5th Cir. 1936).

worthiness on negligence.[26] Apparently during the period from the passage of the Jones Act to the decision in *Mahnich v. Southern S.S. Co.*[27] it was assumed that unseaworthiness was predicated on negligence.[28] In the *Mahnich* case the Supreme Court

26. In The Seeandbee, 102 F.2d 577 (6th Cir. 1939) the court seemed confused as to what the law was. "In determining whether libelant's injuries were due to the unseaworthiness of the ship, it was the duty of the trial court to take into account the fact and nature of the accident in connection with all other circumstances in the case; notwithstanding negligence is not ordinarily assumed from the mere fact of accident. Globe S.S. Company v. Moss, [6 Cir., 245 F. 54, 58]." *Id.* at 581. And "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute." *Id.* at 581. The court then used comparative negligence to mitigate the damages. The Tawmie, 80 F.2d 792, 793 (5th Cir. 1936): "A shipowner is not an insurer of the safety of his seamen, nor is the owner liable for injuries caused by the breaking of apparatus if due care was used in furnishing the appliance and keeping it in safe condition and repair. The burden of establishing negligence by a fair preponderance of the evidence rests upon libelant. . . . The defect must be of such nature as would lead an ordinarily prudent man to apprehend danger of injury from it."

See Christopher v. Grueby, 40 F.2d 8, 12 (1st Cir. 1930) ("Was the fire caused by the negligence of the owners or any of them in failing to provide and equip a seaworthy vessel? . . . The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work."). See also The Rolph, 299 Fed. 52, 55 (9th Cir. 1929) ("a ship is not properly equipped for a voyage where the mate is a man *known* to be of a most brutal and inhuman nature one *known* to give vent to a wicked disposition by violent, cruel, and uncalled for assaults upon sailors." (Emphasis added.)); The Birkenhead, 51 F.2d 116 (E.D. Pa. 1930); The Navarino, 7 F.2d 743 (E.D.N.Y. 1925).

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

28. During the period from 1920 to 1944 the Jones Act "was the principal vehicle for personal injury recoveries by seamen against shipowners . . . [S]uits under the Jones Act were counted by the hundreds while the unseaworthiness actions fell off to a trickle." GILMORE & BLACK, THE LAW OF ADMIRALTY 251 (1957).

Why was it that lawyers throughout the country chose to use the Jones Act rather than the unseaworthiness action during this period? First, it must be noted that during this time it was thought that prior to bringing the case to the jury the plaintiff had to decide upon which of the two actions he was predicating liability. See *id.* § 6-23. Thus, it would seem only logical that as a practical matter an attorney would choose that remedy that was least complicated in proof and most likely to yield recovery. Under the absolute liability theory of unseaworthiness a case would have been very simple to prove. One need only show that the appliance was not reasonably fit for its intended use and that this unfitness was the case in fact of the injury. If the bar at this time had thought that liability for unseaworthiness was absolute, it is very doubtful that they would have brought so many cases of obvious unseaworthiness under the Jones Act. E.g., Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939); Plamals v. Pinar Del Rio, 277 U.S. 151 (1928); Panama R.R. v. Johnson, 289 Fed. 964 (2d Cir. 1923); Grimberg v. Admiral Oriental S.S. Line, 300 F. Supp. 619 (W.D. Wash. 1924).

It would seem to be more practical to avoid complications which would arise in trying to prove negligence. Certainly that the bar found it more expedient to use the absolute liability theory to prove a case rather than the Jones Act is borne out by the fact that since the *Mahnich* decision "the unseaworthiness doctrine has become the principal vehicle for personal injury recovery." GILMORE & BLACK, THE LAW OF ADMIRALTY 315 (1957). Seemingly this method of prosecuting a case has so many more practical advantages that "it is safe to predict, unless the Supreme Court reverses its field a second time, that in another ten years the

clarified the *Sandanger* statement by holding that the duty of the shipowner to supply a vessel and appurtenances adequate for the purposes of ordinary use was not based on negligence principles but was absolute.[29] Subsequent cases have only been concerned with refinements and application of the doctrine of unseaworthiness to unique factual situations.[30]

Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone." *Id.* at 316. However, if negligence is an element to be proved to predicate liability under the doctrine of unseaworthiness, then any action that could be brought under that doctrine could also be brought under the Jones Act. Thus, there would be no practical advantage to choosing either one action or the other as far as *proving* a case. However, there are two definite reasons why as a matter of practicality it would have been preferable to use the Jones Act rather than the doctrine of unseaworthiness during this period. "The Jones Act provided for jury trial; if plaintiff brought an unseaworthiness action he could have his jury by bringing suit in a non-admiralty court under the saving to suitors clause, but it was by no means clear how much of the maritime law followed him when he sued outside the admiralty. The Jones Act abolished contributory negligence as a defense; it was possible that contributory negligence might bar plaintiff in an unseaworthiness action brought in state court." *Id.* at 251.

29. Mahnich v. Southern S.S. Co., 321 U.S. 96, 100 (1944) ("the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. . . . If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness").

It is interesting to note that where a mate used bad rope to make a rigging (as in the *Mahnich* case) two older cases would have allowed recovery under the doctrine of unseaworthiness. However, recovery was only allowed when the *negligence* of the mate was shown. The Julia Fowler, 49 Fed. 277 (S.D. N.Y. 1892); Halverson v. Nisen, 11 Fed. Cas. 310 (D. Cal. 1876).

30. The cases of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) and Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) followed the *Mahnich* decision and extended its rule to cover injuries incurred by all who perform work traditionally done by seamen.

In Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), the Court held that a shipowner was also absolutely liable for injuries caused by unseaworthy equipment brought aboard the vessel by third persons.

In Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955), it was held that the owner is absolutely liable for injuries caused by seamen who were not equal in disposition with ordinary men in the calling. This case, in effect, formulates the rule for determining the extent of liability of the owner for the personnel on the vessel under the absolute liability concept.

For excellent commentaries on the history and development of the modern doctrine of unseaworthiness, see GILMORE & BLACK, THE LAW OF ADMIRALTY 315-32 (1957); NORRIS, MARITIME PERSONAL INJURIES 62-129 (1959); Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954).

For all practical purposes the Court has litigated the Jones Act into obsolescence. Only a few vestiges of the act remain. The survival action and the wrongful death action may still be useful, but such remedies may also be available under the doctrine of unseaworthiness in state courts. Although traditionally recovery was not allowed where injury was caused by an unseaworthy condition created by a fellow member of the crew (not a boatswain, mate, or master), it would seem that liability has now been extended this far. See Grillea v. United States, 232 F.2d 919 (2d Cir. 1956). The only defenses seemingly available to the shipowner are that (1) the appliances were not properly used, or (2) the appliances were used for purposes for which they were not intended to be used. See NORRIS, MARITIME PERSONAL INJURIES § 36 (1959).

One area where the courts have been hesitant to impose absolute liability has been where injury was caused by a "transient" or transitory condition.[31] Thus if an ordinarily sound and seaworthy deck or staircase on a vessel was covered with oil,[32] water,[33] or jello[34] and a seaman fell and sustained injury, recovery for unseaworthiness was generally denied. This line of authority originated from the decision of *Cookingham v. United States*.[35] In that case, the plaintiff, a cook, slipped on some jello while descending a stairway. The court denied recovery for unseaworthiness. It was admitted that the duty of the owner to provide a seaworthy vessel and appliances existed both *before*[36] and *during*[37] the voyage. It was also admitted that this duty was at all times absolute.[38] However, the court found that "the doctrine of unseaworthiness *does not extend* so far as to require the owner to keep appliances which are *inherently sound and seaworthy* absolutely free at all times from transitory unsafe con-

31. Morales v. City of Galveston, 275 F.2d 191 (5th Cir. 1960) (fumes in wheat); Mitchell v. Trawler Racer, Inc., 265 F.2d 426 (1st Cir. 1959); Ross v. Steamship Zeeland, 240 F.2d 820 (4th Cir. 1957); Cookingham v. United States, 184 F.2d 213 (3d Cir. 1950); Hernandez v. The S.S. Nancy Lykes, 175 F. Supp. 829 (D.C. Puerto Rico 1959) (grease on deck); Sloan v. The S.S. Alcoa Pennant, 168 F. Supp. 571 (S.D. Ala. 1958) (banana on deck); Borgersen v. Skibs, A/S Abu, 156 F. Supp. 282 (E.D. N.Y. 1957) (oil on deck); Spero v. Steamship The Argodon, 150 F. Supp. 1 (E.D. Va. 1957) (oil on engine room floor); Oakes v. Graham Towing Co., 135 F. Supp. 485 (E.D. Pa. 1955) (grease on ladder); McDonald v. Dingwall Shipping Co., 135 F. Supp. 374 (S.D. Tex. 1954) (grease on gangway); Garrison v. United States, 121 F. Supp. 617 (N.D. Cal. 1954) (film of water on deck); Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D.N.Y. 1954) (oil on wheelhouse floor); Shannon v. Union Barge Line Corp., 100 F. Supp. 13 (W.D. Pa. 1951) (oil on floor); Holliday v. Pacific Atlantic S.S. Co., 99 F. Supp. 173 (D. Del. 1951) (protrusion of wires from package in ice box); Adamowski v. Gulf Oil Corp., 93 F. Supp. 115 (E.D. Pa. 1950) (oil on deck); Blodow v. Pan Pacific Fisheries, 275 P.2d 795 (Cal. App. 1954) (slick oily substance on hatch cover); Gladstone v. Matson Nav. Co., 269 P.2d 37 (Cal. App. 1954) (oil on stairs); Ruffin v. United States Lines Co., 148 N.Y.S.2d 112 (1955) (wet spot on metal sill); Guthrie v. Sinclair Refining Co., 320 S.W.2d 396 (Tex. Civ. App. 1959) (short length of line on deck).

32. Borgersen v. Skibs, A/S Abu, 156 F. Supp. 282 (E.D.N.Y. 1957); Spero v. Steamship The Argodon, 150 F. Supp. 1 (E.D. Va. 1957); Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D.N.Y. 1954); Shannon v. Union Barge Line Corp., 100 F. Supp. 13 (W.D. Pa. 1951); Adamowski v. Gulf Oil Corp., 93 F. Supp. 115 (E.D. Pa. 1950); Gladstone v. Matson Nav. Co., 269 P.2d 37 (Cal. App. 1954).

33. Garrison v. United States, 121 F. Supp. 617 (N.D. Cal. 1954); Ruffin v. United States Lines Co., 148 N.Y.S.2d 112 (1955).

34. Cookingham v. United States, 184 F.2d 213 (3d Cir. 1950).

35. *Ibid.*

36. "Undoubtedly the owner has a duty at the commencement of the voyage to furnish a vessel and appliances which are seaworthy in all respects." *Id.* at 214.

37. "It is equally settled that he has a continuing duty to keep the vessel's appliances in order and to maintain the vessel itself in a seaworthy condition during the voyage." *Id.* at 214.

38. "His liability for failure to perform these duties is a species of liability without fault not limited by conceptions of negligence." *Id.* at 214.

ditions resulting from their use."[39] (Emphasis added.) The rationale of this holding was that it was the *foreign substance* and not the *inherently dangerous condition of the appliance or vessel* that created the unsafe condition.[40] This basic doctrinal enunciation seems to have been distorted by several courts to mean that where the condition arose after the vessel "broke ground,"[41] or where the condition was only temporary,[42] recovery for the transitory condition could be had under the doctrine of unseaworthiness if negligence was shown. These decisions seem to manifest the confusion existing in the minds of some judges between the concept of absolute liability for unseaworthiness and the duty of the owner under the Jones Act to provide his seamen with a reasonably safe place in which to work.

The case usually cited as being in opposition to the *Cookingham* case is *Poignant v. United States.*[43] Actually there is no disagreement between the two cases. In *Poignant* the plaintiff, a stewardess, slipped on an apple skin left in a pasageway after the garbage was hauled to the side of the ship. The court stated that whether or not the unseaworthy condition arose *before* or *after* the voyage, or whether or not it was only temporary did not affect liability for unseaworthiness.[44] The court refused to

39. *Id.* at 215.

40. "In the present case the stairway upon which the libellant slipped was perfectly sound, its unsafe condition being the sole result of the temporary presence of a foreign substance upon it." *Id.* at 215. This holding has been echoed by many of the cases following *Cookingham.* See, e.g., Ross v. Steamship Zeeland, 240 F.2d 820, 822 (4th Cir. 1957) ("The doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use."); McDonald v. Dingwall Shipping Co., 135 F. Supp. 374, 376 (S.D. Tex. 1954) ("It was the grease, rather than any inherent condition of the gangway which precipitated the dangerous condition.").

41. Mitchell v. Trawler Racer, Inc., 265 F.2d 426, 432 (1st Cir. 1959) ("It may be that in the present state of the law, as declared by controlling authority, a distinction must be made between (1) initial unseaworthiness, existing at the outset of the voyage, where perhaps we have to say that the obligation of the shipowner to furnish a seaworthy vessel is 'absolute,' and (2) an unseaworthy condition which arises only during the progress of the voyage, in which latter case we take it to be the law that the shipowner's obligation is merely to see that reasonable care is used under the circumstances.").

42. Mitchell v. Trawler Racer, Inc., 167 F. Supp. 434 (D. Mass. 1958); Sloan v. The S.S. Alcoa Pennant, 168 F. Supp. 571 (S.D. Ala. 1958); Adamowski v. Gulf Oil Corp., 93 F. Supp. 115 (E.D. Pa. 1950).

43. 225 F.2d 595 (2d Cir. 1955). There have also been cases that followed *Poignant* in the second circuit. Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir. 1956); Di Salvo v. Cunard Steamship Co., 171 F. Supp. 813 (S.D.N.Y. 1959); Vastano v. The Partownership Brovigtank, 158 F. Supp. 477 (E.D.N.Y. 1957). Although the issue has never been squarely considered, the ninth circuit has also seemed to be in accord with the *Poignant* case. Johnson Line v. Maloney, 243 F.2d 293 (9th Cir. 1957); Pacific Far East Lines v. Williams, 234 F.2d 378 (9th Cir. 1956).

44. "We hold, therefore, that although the condition here complained of did not

hold that the mere presence of the apple skin in the passageway constituted unseaworthiness.[45] It held that in order to constitute unseaworthiness the vessel must have been not as "fit for service as similar vessels in similar service"[46] and remanded the case to the jury to determine if "the absence of garbage chutes on the vessel was the proximate cause of the accident" and if "comparable vessels generally are provided with such chutes."[47] This expression by the court in effect directs the trial court to employ a "standard of the industry" test to determine whether or not the vessel in that particular case is *reasonably fit* for its intended use. Since the standard of the industry test would have no usefulness in deciding the merits of the *Cookingham* case, there is seemingly no inconsistency between the two decisions.

The narrow holding of the instant case is that under no circumstances is notice, constructive or actual, necessary to predicate liability for an unseaworthy condition.[48] Rather the only issue to be decided in predicating liability for unseaworthiness is whether or not the vessel or appurtenance is reasonably fit for the use intended.[49] It was also indicated in dictum that it was irrelevant in finding unseaworthiness that the condition arose after the vessel "broke ground" or that the condition was only temporary.[50] However, it would seem that the majority in the instant case intended for its decision to have much broader implications than the narrow holding would indicate. Mr. Justice

arise until after the voyage began and the vessel was in a foreign port, recovery was not barred on that account." Poignant v. United States, 225 F.2d 595, 597 (2d Cir. 1955).

45. "Nevertheless, that opinion does not go so far as to hold that unseaworthiness arises from every defect in a vessel or in its equipment and maintenance, whether consisting of a transitory substance or otherwise." *Id.* at 598.

46. "We think the import of the Boudoin case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, so it does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service." *Id.* at 598.

47. *Id.* at 598.

48. "An appeal was taken upon the sole ground that the district judge had been in error in instructing the jury that constructive notice was necessary to support liability for unseaworthiness." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 542 (1960).

49. "The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." *Id.* at 550.

50. "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary." *Id.* at 549.

Stewart framed the issue to be considered as "whether with respect to so-called 'transitory' unseaworthiness the shipowner's liability is limited by concepts of common-law negligence,"[51] "a question of maritime law upon which the Courts of Appeals have expressed differing views."[52] It is obvious that the dissenters were of the opinion that the majority intended to overrule the line of cases that stems from the *Cookingham* holding.[53]

On the face of the narrow decision, it can be argued that there is no liability for transitory unseaworthiness, the decision standing only for the proposition that, as a requisite for unseaworthiness in general, knowledge is not a necessary element to be proved.[54] Such an interpretation would not overrule the *Cookingham* case which held that the transitory unsafe condition does not amount to unseaworthiness. That, however, the Supreme Court intended to make such distinctions, appears to be amply refuted by the spirit of the Court's decision. If it is the import of the present decision to extend absolute liability to include injuries arising from unsafe conditions created by foreign substances not a part of the vessel or her appliances, then the author is constrained to agree with Mr. Justice Harlan and Judge Magruder that such a doctrine is "startlingly opposed to principle."[55]

Walter I. Lanier, Jr.

51. *Id.* at 542.
52. *Ibid.*
53. Mr. Justice Frankfurter argued that to impose liability in this area would be to indemnify for injuries occasioned by the unavoidable consequences of the proper operation of the vessel, that the creation of this duty will not increase the caution of shipowners, and the owner will not be able to pass along the risk to suppliers or service companies. He maintained that the only rational justification for the imposition of this duty is that the owner will be an insurer. But, he said, since the majority offers no reasons of history or policy why vessel owners should be insurers of their employees, and since the duty to provide maintenance and cure has traditionally served to remedy injuries incurred in the service of the ship, there is no justification for the extension. Mr. Justice Harlan seems to support the proposition that a dangerous condition created by a foreign substance on an otherwise seaworthy appliance does not constitute unseaworthiness. He indicated that the proper analysis of the issue of unseaworthiness would be to determine whether a properly outfitted trawler should have had either (1) a particular device for unloading fish so that the slime would not have gotten on the rail or (2) an alternative method for leaving the ship so that the seaman would not have been required to use a slippery rail. It might be noted that this is a "standard of the industry test." He concluded by saying that the sole interest to be served by extending absolute liability into this area would be compensation and that such a determination is better left to the legislative branch.
54. This would mean that the majority was concerned over the misstatement of the law that was made in both the trial and appellate courts, wherein it would seem that liability was being predicated for unseaworthiness on negligence principles, a concept incompatible with the concept of absolute liability.
55. If the *Cookingham* case is overruled by the instant case, and if the analysis