The Doctrine of Unseaworthiness in the Law of Maritime Personal Injuries

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There are three principle causes of action available to a seaman who suffers personal injury: maintenance and cure,1 unseaworthiness, and the Jones Act.2 The purpose of this Comment is

1. Maintenance and cure is available under the general maritime law. It is a relational duty, incident to the seaman's status, sounding in neither tort nor contract. It is composed of three elements: wages, maintenance, and cure. The injured seaman is entitled to his salary, earned and unearned, for the period of time coincident with the length of the voyage. The seaman is entitled to the food and lodging that he ordinarily would have received had he remained aboard the vessel. Cure means that the owner must provide medical treatment until there is full recovery, or, as in the case of an incurable injury or disease, until further medical aid is unable to improve the condition. See GILMORE & BLACK, THE LAW OF ADMIRALTY 253-71 (1957); ROBINSON, HANDBOOK OF ADMIRALT LAW IN THE UNITED STATES 291-301 (1939); Comments, 30 TEXAS L. REV. 489 (1952), 57 YALE L.J. 243 (1947).

to analyze pertinent developments in the doctrine of unseaworthiness. The foundation case for the modern conception of unseaworthiness is *Mahnich v. Southern S.S. Co.* Since that decision the United States Supreme Court has determined the following to be the classic statement of that doctrine: *a shipowner has an absolute duty to furnish his seamen with a vessel and its appurtenances which are reasonably fit for their intended use.* This Comment will undertake an exploration of each of the elements of this duty.

**Scope of Application of the Doctrine of Unseaworthiness**

The purpose of this section is to determine to what objects the doctrine of unseaworthiness applies and to what persons the duty is owed.

**What Is a Vessel?**

The word vessel designates a particular physical environment, and so whether or not an object is considered a vessel depends on the context in which the question is raised. During its period of construction a ship is generally not considered a vessel. It acquires that status only after it is launched. Even though an object is on navigable waters, it will not be classified a vessel

*seaman may recover compensatory damages for injury caused by the negligence of the shipowner or his employees. See Gilmore & Black, *The Law of Admiralty* 279-315 (1937); Robinson, *Handbook of Admiralty Law in the United States* 309-40 (1939).*

3. 321 U.S. 96 (1944). The *Mahnich* decision resolved a conflict among the lower courts as to whether unseaworthiness was liability without fault or liability based on personal negligence. The majority view prior to *Mahnich* apparently was to the effect that the shipowner's liability for an unseaworthy vessel or appurtenance was based on personal negligence. The Tawmie, 80 F.2d 792 (5th Cir. 1936); The Cricket, 71 F.2d 61 (9th Cir. 1934); Christopher v. Grueby, 40 F.2d 8 (1st Cir. 1930); The Rolph, 299 Fed. 52 (9th Cir. 1924); Henry Gillen's Sons Lighterage v. Fernald, 294 Fed. 520 (2d Cir. 1923); Kahyis v. Arundel Corp., 3 F. Supp. 492 (D. Md. 1933); The Birkenhead, 51 F.2d 116 (E.D. Pa. 1930); The Navarino, 7 F.2d 743 (E.D. N.Y. 1925). The minority view seemed to be that liability for unseaworthiness was liability without fault. The Seeandbee, 109 F.2d 377 (6th Cir. 1939); The H. A. Scandrett, 27 F.2d 705 (2d Cir. 1927); Sabine Towing Co. v. Brenan, 71 F.2d 490 (5th Cir. 1934) (overruled by *The Tawmie*, supra); The Alpha, 44 F. Supp. 800 (E.D. Pa. 1942).


5. For a short discussion of what is a vessel for unseaworthiness purposes, see Norris, *Maritime Personal Injuries* 126-29 (1959).

unless it possesses a certain physical structure. In making this determination each case must turn on its own facts. Thus, a raft of logs, a float, a barge without a sail or rudder, and a floating pontoon have been classified vessels. But floating cranes and floating drydocks have not been given that status. However, it must be noted that in none of the cases abovementioned was the court dealing with questions of unseaworthiness. But, there would seem to be no rational basis for making a distinction between the rules determining when an object becomes a vessel during its construction or what requisite physical structure it must have in the above instances and the same determinations for unseaworthiness purposes.

In a third situation an object may very clearly be a ship, but its status in doubt because of its surroundings, purpose, and manner of use, the doubt arising in the factual situations of drydocking, major reconstruction, non-usage, de-activation, rebuilding or conversion. Under these conditions, the courts have

8. The Robert W. Parsons, 191 U.S. 17 (1903).
13. For collections of cases determining what physical structure constitutes a vessel, see Peters, What Is a "Vessel" in the Admiralty Law?, 6 CLEVELAND-MARSHALL L. REV. 139 (1957); 44 WORDS AND PHRASES 148 (1940); 2 C.J.S., Admiralty § 18 (1936).
14. It is in this type of factual situation that the question of what is a vessel most often arises. However, in this context, there has been a marked absence of cases deciding what is a vessel for the purposes of unseaworthiness. This is perhaps attributable to the impact which those cases dealing with the question of who are seamen had on the theory and development of the doctrine. In most instances where the issue of what was a vessel arose, the issue of who was a seaman was factually interrelated. However, since the decisions delineating seamen were well known to the bench and bar, seemingly every attempt was made to dispose of each case on the issue of who is a seaman. In some instances it was much more apparent that the object was not a vessel than that the person was not a seaman. Several courts adopted a rather novel and obtuse approach to this problem by finding that the person could not benefit from the doctrine of unseaworthiness because he was not a seaman since the ship was not a vessel. Union Carbide Corp. v. Goett, 256 F.2d 449 (4th Cir. 1958); Berge v. National Bulk Carriers Corp., 251 F.2d 717 (2d Cir. 1958); Berryhill v. Pacific Far East Line, 238 F.2d 385 (9th Cir. 1956); Lyon v. United States, 163 F. Supp. 206 (E.D. N.Y. 1958). An example of such a case is Raidy v. United States, 153 F. Supp. 777 (D. Md. 1957), aff'd per curiam, 252 F.2d 117 (4th Cir. 1958). There it was said that the injured person was performing duties not within the competence of the traditional or customary activities of the crew. However, the nature of Raidy's work was never really discussed. Instead, it was found that the ship was in drydock and not subject to the perils of navigation; that the work being done aboard could not be performed by the crew; and that the owner had no control of the work being done or of the ship. It would seem that the above findings would not have
generally applied two different tests. Title 1, Section 3, of the United States Code of 1958 defines a vessel as "every description of water craft or other artificial contrivance used or capable of being used, as a means of transportation on water." This definition has been utilized to determine the scope of coverage of an insurance policy and to determine whether a maritime lien for repairs applied to an object. However, it has been said that in order for the admiralty court to obtain jurisdiction over a repair lien or for the purposes of the Jones Act and the Great Lakes Jury Statute the ship must be in navigation to be considered a vessel. What is in navigation is a question of fact. A ship is no longer in navigation when it is put away for the winter, or is used solely as a floating warehouse, or is on blocks on land. If there is no present hope or intention of a vessel going to sea or if it would take a long time to put the vessel in shape to make a voyage, then it is not in navigation. However, if a ship is in dry-dock being repaired in order to make another voyage, or is idle and awaiting repairs it is considered as still in navigation.

In *West v. United States* it would seem that the Supreme Court propounded a third test, separate and distinct from the other two, for determining what is a vessel for unseaworthiness purposes in a similar factual context. West was injured aboard the *Mary Austin*, a vessel owned by the United States, which had been in the "moth-ball" fleet but was being re-activated.

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20. *Seneca Washed Gravel Corp. v. McManigal*, 65 F.2d 779 (2d Cir. 1933); *Gonzales v. United States Shipping Board, Emergency Fleet Corp.*, 3 F.2d 168 (E.D. N.Y. 1924).
23. *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941).
26. *West* seems to be the first case under the modern doctrine of unseaworthiness to focus attention on the meaning of the term vessel.
27. The Court expressly stated that the decision pivoted *not* on whether West was a seaman, but on whether the object was a vessel for unseaworthiness purposes. *West v. United States*, 361 U.S. 118, 122 (1959).
Three factors were considered in determining the status of the *Mary Austin*: (1) Who had control of the vessel? (2) Were the members of the crew aboard and performing their usual tasks? (3) What was the nature, magnitude, and pattern of the work to be done? It was found that the complete control of the ship and the repairing was in the contractor, that the only persons representing the United States aboard the ship at any time were not crewmen but inspectors, that the work involved was a complete overhaul and reactivation, and that in order to accomplish this work special equipment had to be employed. Because of these factual findings the Court held that the ship was not a vessel for unseaworthiness purposes.

Subsequently in *Lawlor v. Socony-Vacuum Oil Co.* it was expressly held that the *in navigation* test was not appropriate for defining the term vessel, and that the mere presence of the ship on navigable waters was not determinative of its status. The same three questions posed by the Supreme Court in *West* were applied to determine whether the object was a vessel. It was found that the repairs to be made were “only a large number of relatively small miscellaneous items . . . generally included in an annual overhaul,” that the crew of the ship were still aboard performing their usual tasks, and that the principal control of the vessel was in the hands of the shipowner. It was therefore held that the object was a vessel for unseaworthiness purposes. The analytical approach utilized in both *West* and *Lawlor* has also been adopted by the Fourth Circuit Court of Appeals.

As to where the final line will be drawn between *West*, where all three questions of analysis were resolved in favor of the object not being a vessel, and *Lawlor*, where all three determinations were resolved in favor of the object being a vessel, only time and litigation will tell. It is only speculative whether the test used in *West* will be extended to apply in areas other than unseaworthiness. However, it might be suggested that determining what is a vessel would be greatly facilitated if only one test were appropriate in all instances where the object’s status

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28. 275 F.2d 599 (2d Cir. 1960). The court here conceded that the plaintiff was performing work traditionally done by members of the crew when he was injured.
29. *Id.* at 602: “Moreover, we do not think resort to a mere phrase such as ‘out of navigation’ gets us very far.”
30. *Id.* at 604.
is in doubt because of its surroundings, purpose, and manner of use.

**What Is an Appurtenance of the Vessel?**

Just as the shipowner warrants the seaworthiness of the hull of the vessel, so also does he warrant the reasonable fitness of at least some of the gear and appliances aboard the vessel. Seamen also are considered appurtenances for the purposes of unseaworthiness. It is not necessary that the appurtenance be owned or controlled by the shipowner, nor must it be an actual part of the vessel. It has been held that equipment owned, brought aboard, and controlled by third persons is covered by the doctrine of unseaworthiness. It is not even necessary that the appurtenance be common or "ship-type" equipment. However, it is essential that the appurtenance be physically present aboard the vessel, for it has been held that appurtenances on shore are not subject to the warranty of seaworthiness, even though they are used to further the ship's purpose.

The courts have not as yet established a complete formula for determining what objects aboard a vessel will be considered appurtenances. Where the items are clearly being used to aid in the operation of the vessel, such as a ship's winch, rope, and so forth, it is generally thought that the duty of the shipowner to furnish a seaworthy vessel was implied in the crew member's contract. The duty was thus contractual and not delictual. See Hughes, HANDBOOK OF ADMIRALTY LAW 205 (1920); Smith, Liability in the Admiralty for Injuries to Seamen, 19 HAB. L. REV. 418 (1906). Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) refuted the idea that the duty was contractual and declared that it was delictual in nature.

32. The word warrants is not here used in its traditional sense. For a time it was generally thought that the duty of the shipowner to furnish a seaworthy vessel was implied in the crew member's contract. The duty was thus contractual and not delictual. See Hughes, HANDBOOK OF ADMIRALTY LAW 205 (1920); Smith, Liability in the Admiralty for Injuries to Seamen, 19 HAB. L. REV. 418 (1906). Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) refuted the idea that the duty was contractual and declared that it was delictual in nature. 33. Boudoin v. Lykes Brothers Steamship Co., 345 U.S. 336, 340 (1955): "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect."

34. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Fox v. The S.S. Moremacwind, 285 F.2d 222 (4th Cir. 1960); Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), aff'd per curiam, 347 U.S. 396 (1954).


shackle\textsuperscript{39} or ladder,\textsuperscript{40} the courts have had little problem in finding them to be appurtenances. However, that this is intended to be the controlling factual determination is far from clear. There are decisions which hold that cargo is an appurtenance for the application of the doctrine of unseaworthiness.\textsuperscript{41} However, it would seem that cargo does not aid in the performance of the ship's mission; rather the carriage and delivery of cargo is the ship's mission. It might well be urged that the cargo cases stand for the proposition that an appurtenance for the purposes of unseaworthiness is \textit{any object that is physically present aboard the vessel}. If this is all that is necessary to classify an object as an appurtenance, it would seem that the duty resting on a shipowner would be unduly burdensome. Thus, if a seaman were shocked by a short-circuited radio belonging to a fellow seaman, there would be recovery. Conceivably, if a homicidal maniac wandered aboard a vessel and injured a seaman the owner would have to indemnify. Even if the extension of the unseaworthiness doctrine to objects not used in aid of the operation of the vessel is limited only to cargo, the owner would have

\textsuperscript{39} Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

\textsuperscript{40} Pedersen v. United States, 224 F.2d 212 (2d Cir. 1955).

\textsuperscript{41} In Reddick v. McAllister Lighterage Line, 258 F.2d 297 (2d Cir. 1960), cert. denied, 355 U.S. 908 (1958), the court indicated that the owner would be responsible for the seaworthiness of cargo aboard his vessel. However, in Carabello v. Naviera Aznar, S.A., 255 F.2d 355 (2d Cir. 1960), cert. denied, 31 Sup. Ct. 907 (1961) and McMahan v. The Panamolga, 127 F. Supp. 659 (D. Md. 1955), it was indicated that the shipowner could not be held for the seaworthiness of cargo. That improper stowage of cargo is an element of seaworthiness has been affirmed by the following decisions: W. J. Jones & Sons, Inc. v. Calmar Steamship Corp., 284 F.2d 499 (9th Cir. 1960); Morales v. City of Galveston, 275 F.2d 101 (5th Cir.), judgment vacated and remanded per curiam, 364 U.S. 195 (1960); Gindville v. American-Hawaiian Steamship Co., 224 F.2d 748 (3d Cir. 1955); Amador v. A/S J. Ludwig Mowinckels Rederi, 224 F.2d 437 (2d Cir.), cert. denied, 350 U.S. 901 (1955); Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277 (2d Cir. 1954); Knox v. United States Lines Co., 186 F. Supp. 688 (E.D. Pa. 1960); Holley v. The Manfred Stansfield, 136 F. Supp. 212 (E.D. Va. 1960); Robillard v. A. L. Burbank & Co., 136 F. Supp. 195 (S.D. N.Y. 1956). In these cases, although the cargo was inherently safe and sound, an unsafe condition was caused by the improper placement of the individual elements of cargo. Since it is the shipowner's duty to furnish his seamen with a vessel and its appurtenances that are reasonably fit for their intended use, it would seem that the courts in these decisions must consider cargo an appurtenance. Perhaps these decisions will not stand if the question of whether or not cargo is to be considered an appurtenance is more dramatically brought to issue where the injury is caused by an actual defect in the cargo. It is curious to note, however, that the cases which hold that the warranty of seaworthiness does not apply to cargo do hold that proper stowage is an element of seaworthiness. Whether cargo is to be considered an appurtenance has never directly been before the Supreme Court. In Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), the original plaintiff, Palazzolo, was injured by a dangerous condition created by the improper stowage of cargo. However, the issues of whether cargo can be considered an appurtenance or whether the doctrine of unseaworthiness only applied to those objects aboard the vessel which aid in its operation were not before the court.
a large responsibility, at least with respect to luxury vessels, where the cargo consists of passengers, luggage, and pets.\textsuperscript{42}

\textbf{Who Is a Seaman?}\textsuperscript{43}

Originally, it was held that the doctrine of unseaworthiness was available only to members of the ship's crew who had signed the ship's articles.\textsuperscript{44} However, in \textit{Seas Shipping Co. v. Sieracki}\textsuperscript{45} the class to whom the duty was owed was expanded to include those persons who \textit{performed work or duties traditionally done by members of the ship's crew}. The policy consideration for this extension is that persons performing this type of work are subject to the same hazards and dangers as members of the crew and, therefore, should receive the same degree of protection.\textsuperscript{46} Thus, longshoremen, stevedores,\textsuperscript{47} and carpenters\textsuperscript{48} have been considered seamen while they were working on a vessel.\textsuperscript{49} In the lower federal courts those who have been classified as seamen include tank and boiler cleaners,\textsuperscript{50} employees of the shipper,\textsuperscript{51} and an Army officer assisting in loading operations.\textsuperscript{52} Those performing work found not to be traditionally done by members of the crew have been marine painters,\textsuperscript{53} shipyard riggers,\textsuperscript{54}

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\item \textsuperscript{42} Thus, if a seaman were bitten by a passenger's pet that were found not to be reasonably fit, seemingly there would be liability.
\item \textsuperscript{43} It is important that a plaintiff or libelant in an admiralty suit be classified as a "seaman." If he is a seaman, then all he need prove to recover indemnity is that the vessel or appurtenance which caused his injury was not reasonably fit for its intended use. If he is not considered a seaman, then the shipowner only owes him a duty of reasonable care. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). If the injured person is considered a seaman for the purposes of unseaworthiness, but is not a member of the ship's crew, the shipowner also owes him a duty to provide a safe place in which to work. This is the same duty that is owed to the common law business visitor. See Norris, \textit{Maritime Personal Injuries} 91, n.2 (1959).
\item \textsuperscript{44} The Howell, 273 Fed. 513 (2d Cir. 1921); Weldon v. United States, 9 F. Supp. 347 (D. Mass. 1934); The Mercier, 5 F. Supp. 511 (D. Ore. 1933), \textit{aff'd per curiam}, 72 F.2d 1008 (9th Cir. 1934); The Concord, 58 Fed. 913 (S.D. N.Y. 1883); The Dago, 31 Fed. 574 (E.D. La. 1887).
\item \textsuperscript{46} Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93, 99 (1946).
\item \textsuperscript{47} Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423 (1959); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
\item \textsuperscript{48} Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
\item \textsuperscript{49} A person cleaning the ship's generators with carbon tetrachloride has been found not to be doing work traditionally done by crewmen. United New York & N.J.S.H.P. Ass'n v. Halecki, 358 U.S. 613 (1959).
\item \textsuperscript{50} Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953).
\item \textsuperscript{51} Bochantin v. Inland Waterways Corp., 96 F. Supp. 234 (E.D. Mo. 1951).
\item \textsuperscript{52} Caudill v. Victory Carriers, 149 F. Supp. 11 (E.D. Va. 1957).
\item \textsuperscript{53} Santiago v. United States, 102 F. Supp. 425 (S.D. N.Y. 1952).
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firemen,\textsuperscript{55} bread salesmen,\textsuperscript{56} and "custom inspectors, inspectors aboard vessels for the purpose of making recommendations for repairs or improvements, and other shoreside specialists whose sole duty it is to survey and inspect."\textsuperscript{57} The Supreme Court has yet to set a definite standard for determining what is work traditionally done by the crew. Each case seemingly must stand on its own findings of fact.\textsuperscript{58}

It has been suggested that a "common-sense application of the unseaworthiness rule should call for its extension to all \textit{those who perform services on behalf of the vessel and who are dependent on a reasonably safe, sound and seaworthy ship.}\textsuperscript{59} (Emphasis added.) This suggestion has special merit in that such an approach would eliminate the confusion inherent in attempting to determine the limits of the present test and also is in accord with the basic policy considerations behind extending protection to non-members of the ship's crew.

It should be noted that once a person is considered a seamen under the doctrine, his status is not lost by being ashore, if the cause of his injury was an unseaworthy condition that existed aboard the vessel.\textsuperscript{60} Thus, if unseaworthy tackle aboard the ship breaks and falls upon a seaman who is standing on a dock, recovery will be allowed.\textsuperscript{61}

\textbf{RISKS WITHIN THE AMBIT OF PROTECTION AFFORDED BY THE DOCTRINE OF UNSEAWORTHINESS}

Under the original doctrine of unseaworthiness the shipowner only had to use reasonable care to provide a seaworthy vessel.\textsuperscript{62} A plaintiff had to show two faults to obtain recovery:

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\item 55. McDaniel v. The M/S Lisholt, 282 F.2d 816 (2d Cir. 1960).
\item 56. Lee v. Pure Oil Co., 218 F.2d 711 (6th Cir. 1955).
\item 58. For other discussions of who are seamen for unseaworthiness purposes see the following sources: Norris, \textit{Maritime Personal Injuries} 113-26 (1959); Annot., 3 L. Ed.2d 1764 (1959); Note, 13 \textit{Miami L. Rev.} 465 (1959); Comment, \textit{N.Y.U.L. Rev.} 173 (1957).
\item 60. 62 Stat. 496 (1948), 46 U.S.C. 740 (1958): "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." See Pope & Talbot, Inc. v. Cordray, 268 F.2d 214 (9th Cir. 1966); Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950); Robillard v. A. L. Burbank & Co., 186 F. Supp. 193 (S.D. N.Y. 1960).
\item 61. Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950).
\item 62. For a discussion of the historical development of the doctrine of unsea-
the personal fault of the owner and the fault of the vessel. The Supreme Court, however, has removed the requirement of proving fault on the part of the shipowner, and made his duty to provide a seaworthy vessel absolute. In theory absolute or strict liability is liability without personal fault. Yet the term absolute liability does not mean that the shipowner is an insurer as to all risks incident to the activity in which he is engaged, but merely means that in certain instances he will have to indemnify for injuries regardless of his own personal negligence. Deciding what risks are included within the ambit of protection of any given duty is the “proximate cause” determination. Whether the particular duty involved be based on negligence or is absolute, in either case, the courts must determine if the rule was designed to protect against the risk which caused the injury. A decision of this nature is generally based solely on policy considerations. Incident to this policy determination, the courts have evolved as the essence of the duty imposed on the shipowner under the unseaworthiness doctrine the requirement that the vessel be reasonably fit for its intended use.

**What Is Reasonable Fitness?**

A shipowner complies with his duty to supply seaworthy equipment when it is reasonably safe and proper for its intended purpose. As in the determination of liability for personal negligence in general tort law, the standard of reasonableness in

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63. PROSSER, TORTS 315 (2d ed. 1955).

64. *Ibid.*; The H. A. Scandrett, 57 F.2d 708, 711 (2d Cir. 1937) (“A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put. 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. The liability can be covered by insurance and is better treated as an expense of the business than one left to an uncertain determination of courts in actions to recover for negligence.”). See also Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93 (1946).

65. Determining whether there is liability for unseaworthiness is strikingly analogous to finding liability for personal negligence. Instead of the shipowner being required to conform to the standard of conduct of a reasonable man, the vessel and its appurtenances must conform to a standard of quality or excellence, i.e., reasonable fitness. As in a determination of liability for negligence, if the vessel or appurtenance does not conform to the standard, liability is a consequence. If the suit alleging unseaworthiness is brought on the common law side of the federal court, then the duty of determining the standard of quality to be applied in each case is, as in negligence cases, a finding of fact devolving upon the jury. “Conceivably, seaworthiness could be a law question, as where a vessel, denied a certificate of inspection by the Coast Guard because of defective conditions never-
the unseaworthiness area is somewhat nebulous. In many cases, the custom of the trade, community, or industry has been vital in determining whether a vessel or appurtenance has met the required standard. However, as in the personal negligence determination, conformity with the community standard creates only an inference of reasonableness, which may be rebutted by finding that the standard exposes those protected by the duty to unreasonable risks. Where there is no evidence of a custom in the industry or community of shipowners, the reasonable fitness determination rests upon whether the condition of the vessel or appurtenance creates an unreasonable risk to seamen.

Reasonable fitness of the vessel in general. Even though the vessel and its appurtenances are otherwise inherently safe and sound, an unseaworthy condition may be created by the placement, positioning or arrangement of the vessel's component parts or appurtenances. Thus, a ship's deck will be made unseaworthy if an ordinarily seaworthy pad-eye is placed in the center of a walkway commonly used by seamen.

66. It has been said that the "seaworthiness of a ship, her equipment and appurtenance is a relative concept, dependent in each instance on the circumstances in which her fitness is drawn in question" (Ross v. Steamship Zeeland, 240 F.2d 820, 822 (4th Cir. 1957)) and that "seaworthiness is another of those terms in the law which by reason of its appearance in different contexts has developed an elusiveness making impossible an omnisufficient definition." (Mesle v. Kea Steamship Corp., 260 F.2d 747, 750 (3d Cir. 1958)) These statements are true because of the appearance of the words "reasonably fit" in the phrasing of the duty of the shipowner to provide a seaworthy vessel. Because of these words, the shipowner is not held to a standard of perfection and made an insurer against any and all injury occasioned aboard the vessel; nor is he obliged to furnish the best, most modern and most convenient appliances or machinery. Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952).


of the pad-eye in relation to the physical plan of the vessel creates an unreasonable risk. Most cases in this area have arisen from accidents occurring during the discharge of cargo. Where the cargo, though originally stowed properly, becomes unsafe and dangerous due to its positioning, liability for unseaworthiness has been imposed.\textsuperscript{70}

*Failure of a shipowner to provide a necessary appurtenance.* A vessel may be unseaworthy if it does not have the necessary appurtenances aboard to carry out its intended purpose.\textsuperscript{71} The owner should know or anticipate what activities take place aboard his vessel, and his failure to provide proper equipment to perform these tasks and thus minimize hazards generally creates an unreasonable risk for seamen. Custom plays an important part in deciding whether the vessel was reasonably fit in not having a particular appurtenance aboard.\textsuperscript{72} Another important factor to consider in this area is the seriousness of the risk involved. Thus, the risk is too great to permit an owner to escape liability where he fails to provide life saving equipment.\textsuperscript{73} But, a hatch without a cover is not necessarily unseaworthy if it is surrounded by a combing and there is a safe means of passage around it.\textsuperscript{74}

*Fitness of furnished appurtenances.* Where the failure of a furnished appurtenance is dramatically obvious, as for example where a piece of equipment breaks,\textsuperscript{75} the inference of unseaworthiness is quite strong. Seemingly, the mere fact that the failure occurs is sufficient evidence to support a finding of un-

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seaworthiness. It is with respect to this type of appurtenance failure that the shipowner's liability most closely approximates that of an insurer. Even if the appurtenance fails because of a latent defect, the owner cannot be absolved, since absence of personal fault is not a relevant consideration.

In those cases dealing with the mere inadequacy of an appurtenance to accomplish the purpose for which furnished, the inference of seaworthiness is by no means as great. Here, resort will often be made to a balancing process, with pertinent considerations being the custom of the industry, the probability of injury, and the seriousness of the risk. Thus, liability may be found where a hawser is too heavy for use as a dock line or a cargo hook is improper for handling certain cargo. But where a seaman is injured simply because a rug slipped or a winch worked stiffly, no seaworthiness has been found.

Fitness of seamen. Since a seaman is considered to be an appurtenance for the purposes of the doctrine of unseaworthiness, he also must conform to a standard of reasonable fitness. The standard as enunciated requires the seaman to be equal in disposition and seamanship to the ordinary man in the calling. With respect to disposition, it has been held that a seaman who strikes another with a bottle or a cleaver, or who is known to beat other seamen savagely, has dangerous and vicious propensities and is not reasonably fit. A seaman who merely engages in a fist fight is not an unseaworthy appurtenance, on the theory that members of the community of seamen are more prone to violence than other persons. Although there has been

76. Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960); Thorson v. Inland Navigation Co., 270 F.2d 432 (9th Cir. 1959); Pettersen v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), aff'd per curiam, 347 U.S. 396 (1954); Williams v. Lykes Bros. Steamship Co., 132 F. Supp. 732 (E.D. La. 1955). Only one case was found in which it was indicated that the failure of the appurtenance alone would not support a finding of unseaworthiness. Doucette v. Vincent, 194 F.2d 884 (1st Cir. 1952).
86. The Rolph, 299 Fed. 52 (9th Cir.), cert. denied, 266 U.S. 614 (1924).
little litigation defining the standard of seamanship required, several cases have indicated that a seaman who has been negligent in his duties is nevertheless reasonably fit. However, it seems that since a seaman has been considered as an appurtenance, and since the enunciated test requires him to be as reasonably fit as the ordinary man in the calling, there appears no reason why the seaman should not be required to be equal in ability to the ordinary seaman. Likewise it would seem that a seaman's physical condition must be reasonably fit. Thus, a seaman who has a venereal disease creates an unreasonable risk and is unseaworthy, whereas one who merely has some type of contact dermatitis is not.

Transitory unseaworthiness. In an attempt to temper the obligation incumbent on a shipowner under the doctrine of unseaworthiness, several courts have found that where an unseaworthy condition is only temporary, or arises instantaneously, or arises after the vessel "breaks ground," the owner will be liable for indemnification only if negligence on his part can be shown. It has been said in these situations that the owner must have had actual or constructive knowledge of the condition and an opportunity to remedy it in order for there to be recovery. The incorrectness of these holdings was indicated recently by the Supreme Court in Mitchell v. Trawler Racer, Inc. Since the duty of the shipowner to provide a seaworthy vessel is absolute, he will be liable for injury regardless of his personal fault. Thus knowledge of the owner or his ability to remedy the unseaworthy condition are irrelevant in determining his liability, the only requisite of the duty being that the unseaworthy condition exist at the instant of injury.


89. Thus, seemingly if a seaman were grossly negligent, he might be considered unfit. Also, if a seaman with little experience and ability were ordered to operate dangerous and complex machinery, he would be unfit and unseaworthy for his intended purpose.


91. Peterson v. United States, 224 F.2d 748 (9th Cir. 1955).

92. Mitchell v. Trawler Racer, Inc., 265 F.2d 426 (1st Cir. 1959); Cookingham v. United States, 184 F.2d 213 (3d Cir. 1950).


95. 362 U.S. 539 (1960).

Still remaining after the Mitchell decision is the question of when will a transitory condition constitute unseaworthiness. If the transitory condition is a defect or dangerous situation in the appurtenance itself, the only necessary determination to be made is whether it is reasonably fit for its intended use. However, in the factual situation where an appurtenance or the hull of the vessel is inherently fit, but has a foreign substance on it, as for example a deck or stairway is coated with water or oil, there would seem to be two possible methods of analysis. The first is to consider the appurtenance or the vessel and the foreign substance as separate and distinct entities. If the appurtenance or vessel is found to be reasonably fit, then in order to obtain recovery it must be shown that the foreign substance is an appurtenance of the vessel and that it is not reasonably fit. If it is found that the foreign substance is not an appurtenance, the analysis need be carried no further. Although the validity of


99. It is said that any object aboard the vessel is to be considered an appurtenance, then seemingly it would make no difference whether the appurtenance and the foreign substance are considered as separate entities or not. However, if the proper test is that the object must be one which is used in aid of the operation of the vessel, then such a determination is critical. Under this approach, it would seem that the separate entity approach is the most logical. For, although the distinction is not so great where a mere spot of grease is on a deck, if a large tree branch were to...
this approach has never been before the Supreme Court directly, the tenor of its decision in *Mitchell* indicates disapproval. The second approach in analyzing this type of transitory unseaworthiness case is to treat the appurtenance and foreign substance as an entity. The inquiry is then limited to whether the condition—the stairway coated with oil—amounts to an unseaworthy condition. Proof that the foreign substance was present and was a cause in fact of the seaman’s injury is not sufficient to support recovery. It must be affirmatively established that the appurtenance with the foreign substance on it is not reasonably fit. Thus, recovery has been allowed where an icy and oily condition existed on a deck or where there was a dangerous accumulation of grease on a ladder, but has been denied where there was only a puddle of rain water on the deck.

Reasonable fitness and cause in fact. There is a series of decisions holding that if the negligence of a third person or the injured party himself caused an unseaworthy condition the shipowner will not be liable under the doctrine of unseaworthiness. These decisions have been subject to criticism by many courts, and have been overruled, at least in dictum, by the Supreme Court. It would seem that the better rule is that the shipowner does not need to be on board for it to be classified as an appurtenance, the use of the separate entity approach would make it difficult to ascertain what the intended use of the tree branch was.


105. Crumady v. The J. H. Fisser, 358 U.S. 423, 427 (1959): “And to appliances the duty of the shipowner does not end with supplying them; he must keep them in order. . . . The shipowner is not relieved of these responsibilities
owner remains liable even though the negligence of a third person or of the injured party himself creates the unseaworthy condition. Under the traditional reasonable fitness analysis, this would seem a sound position, since the general rule fixes liability if there is a finding that the offending appurtenance was not reasonably fit and caused injury. Whether the unfit condition was caused by the shipowner, the injured party, a third person, or an Act of God would seem to be of no consequence.

Negligent Use of Seaworthy Equipment

Most courts are in accord in holding that where injury is caused solely by the negligent use of reasonably fit equipment there is no liability under the doctrine of unseaworthiness. Thus, if a winch operator fails to observe the approach of a seaman and negligently lowers a boom on him there is no liability if the winch, boom, and operator are in all respects seaworthy. If the appurtenances are in fact found to be reasonably fit, the standard of excellence required by the duty has been satisfied, and there is no unseaworthiness to cause injury. However, in many instances the distinction between an unseaworthy condition created by negligence and a dangerous condition created by the negligent use of seaworthy equipment is a fine one. Thus, where a seaworthy appliance is equipped with a safety device which is not used, it is difficult to determine into which category the situation falls. Several courts have held

by turning control of the loading or unloading of the ship over to a stevedoring company. It was held in Grillea v. United States ... that stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them."


that the failure to employ available safety devices amounts to negligent use of seaworthy equipment. However, it would seem equally sound to reason that whether there is a failure to furnish the safety device — in which event the situation would clearly fit under the unseaworthy appurtenance category — or a failure to use a safety device does not alter the actual existence of a dangerous condition. All that is necessary for liability is that the appurtenance be unfit at the time of injury.

What Is the Intended Use?

The concept of intended use could possibly be referred to as an affirmative defense to unseaworthiness. Thus, even though an appurtenance is found in fact to be unreasonably fit, an owner may not be liable, since he is only required to warrant the seaworthiness of his equipment for a suitable, intended use.

It is unclear exactly how the use intended by the owner may be determined. Perhaps it is the initial use to which the appurtenance is put. However, the initial use would seem to be capable of change by those in positions of authority aboard the vessel and be still attributable to the owner. It would also seem equally possible to hold that if an officer directed that an appurtenance be used in a manner clearly not contemplated by the owner, or for which it was obviously not suitable, the owner might not be held liable. It is at least clear that an individual seaman, without authority, cannot alter or change the use intended by the owner and still obtain recovery.

If an owner intends to use an appurtenance for a purpose for which it is not reasonably suitable, he will be liable. Even if a seaman uses an appurtenance in a manner not intended by

109. From the cases it would seem that it is the intended use of the owner that is controlling. The use intended by the manufacturer has not been considered. A possible interpretation is that the intended use is that to which the appurtenance is actually put. However, to adopt this position would be to emasculate the meaning of the word’s intended use, since any use would be the intended use.
111. Thus, as in the Mahnich decision, where the initial use of the rope was in connection with a Lyle gun, that use could be changed if a master, mate, or boatswain used it to rig a staging. See also Wyborski v. Bristol City Line of Steamships, Ltd., 191 F. Supp. 884 (D. Md. 1961).
112. See cases cited in note 110 supra.
the owner, but for which it is still suitable, seemingly there would be no liability because the appurtenance is reasonably fit. But if that seaman uses it for a purpose for which it is neither suitable nor intended, there is no liability.\textsuperscript{113} This is true even though the condition created by the seaman constitutes an unreasonable risk. Thus, if the shipowner provides platforms for protecting a wooden deck during loading operations, and they are used as windbreaks, the vessel is not unseaworthy.\textsuperscript{114} If an owner supplies battens for cargo, he is not liable if they are used as ladders.\textsuperscript{115} It would seem, though, that the fact that an appurtenance has been put to an unintended use should defeat liability only where the vessel is also equipped with the proper equipment for the performance of that task. If no appropriate equipment is aboard, then the vessel is unseaworthy under the theory that the shipowner has failed to furnish a necessary appurtenance, and the fact that another appurtenance was used in an unintended manner in an attempt to accomplish the task seems irrelevant.\textsuperscript{116}

Under the section on \textit{reasonable fitness and cause in fact} it was indicated that a majority of cases hold that it is \textit{no} defense that an unseaworthy condition is created by the negligence of a third person or by the injured party himself. There appears, however, to be the possibility of a defense in this situation under the intended use analysis. The argument would be that although the appurtenance in such a case is being used for its intended purpose, it is not being used in its intended manner. Such a defense would present a more clearly drawn policy determination for the court — whether the shipowner's duty to provide a reasonably fit vessel is designed to protect against the risk of injury caused by the use of an appurtenance in a manner not intended by the owner. At least one case has held that the duty does not extend this far, holding that a seaman who used a sea-

\textsuperscript{113} See cases cited in note 110 \textit{supra}.


\textsuperscript{116} The following example demonstrates these concepts. A tug is contracted to pull a tow. There are two ropes aboard the tug: One is a sound seven-inch hawser which is designed and intended to be used in pulling tugs and the other is a one-half inch line used to hoist the tug's flag. If the hawser were used, the tow could be pulled in safety. But if the seaman selects the one-half inch line to pull a tow, a purpose for which it is clearly not designed nor intended, then seemingly there is no liability on the part of the vessel owner. However, if the vessel were furnished only with the smaller line, it is clear the vessel is unseaworthy because it would not be reasonably fit to pull the tow. See Arena v. Luckenbach Steamship Co., 279 F.2d 186, 188 (1st Cir.), \textit{cert. denied}, 364 U.S. 895 (1960).
worthy ladder in such an unintended manner as to create an unseaworthy condition could not recover from the owner under the unseaworthiness doctrine. With such an analysis it would seem that the use of an appurtenance without its furnished safety device is also a use in a manner not intended so as to preclude recovery.

Very often a determination of what is reasonable fitness is controlled by what is the intended use. A vessel may be properly equipped for one type of service and, yet, be unseaworthy for others. Thus, it has been stated that a vessel without a railing is unseaworthy for performing activities on the open sea, but is reasonably fit for performing tasks on the quiet waters of a harbor. Likewise it has been held that a qualified person directed to repair an unseaworthy condition cannot recover for injuries caused by that condition. This rule seems in accord with a basic policy consideration underlying the unseaworthiness doctrine — that the ordinary seaman is unable to appraise properly the dangers incident to the complex equipment of a modern vessel. Where the danger has been pointed out to a seaman who is qualified to repair it, the reason for holding the owner to the rigid requirements of the doctrine disappears. The rule that a qualified repairer cannot rely on the unseaworthiness doctrine is also sound from the standpoint of the logic of the intended use analysis. When an appurtenance is broken or unfit and the shipowner seeks to have it repaired, the intended use of the appliance has changed. The new intended use is repair.

117. In Bishop v. United States, 173 F. Supp. 273 (E.D. N.Y. 1958), a seaman was attempting to remove a frozen plug from an overhead drain pipe. In order to reach the plug he secured an “A” frame-type ladder. However, instead of opening it he rested it against a blower or motor in its closed position. The court found that the ladder was in all respects seaworthy. In nonsuiting the libellant the court made the following observation: “It is evident from the proof that the libellant did not use this “A” type ladder in a proper manner. It was his duty to open the ladder into an “A” position, the manner in which it was intended to be used.” Id. at 275.

118. Norris, Maritime Personal Injuries 73, and cases cited in nn. 15, 16, 17 (1959).


120. See The State of Maryland, 85 F.2d 944, 945 (4th Cir. 1936).

121. However, possibly a contrary decision might be reached if an inexperienced person were directed to remedy an unseaworthy condition in complex equipment. The lack of knowledge, inexperience, and inability to cope adequately with the dangerous condition on the part of the seaman would seem to involve an unreasonable risk, even though he were aware of the danger.
This reasoning would also seem applicable in the situation where an unseaworthy appliance is sought to be removed from the reach of the crew. Under the reasonable fitness approach alone, it would seem that the attempted isolation of the appurtenance would not preclude recovery. However, a better approach would appear to be that the intended use of the appliance has become non-use. A defense should be available to the owner in this situation. For example, suppose that a ship's ladder was damaged during unloading operations. The owner became aware of the situation and warned the seamen of the condition and posted guards and warning signs around it. Nevertheless, a seaman attempted to use the ladder and was injured. That the ladder was unseaworthy to use for ascending and descending between decks is apparent. But, it would seem that the actions on the part of the shipowner of prohibiting the ordinary use of the appurtenance manifests an intention to relegate it to a status of non-use. The remaining inquiry would thus be what is reasonable fitness during non-use. Seemingly a ladder in the condition above described would not constitute an unreasonable risk.

**Absolute Liability and Comparative Negligence**

The doctrine of comparative negligence was first applied in admiralty to mitigate damages in collision cases, and was later extended to the field of maritime personal injuries in *The Max Morris* decided in 1890. During the period when recovery for unseaworthiness was allowed only if the personal fault of the shipowner could be shown, the corollary doctrine of comparative negligence was theoretically harmonious. However, this harmony was seemingly destroyed with the development of the modern unseaworthiness, since comparative negligence would seem to have no application to an absolute liability situation.

122. Under the doctrine of contributory negligence, there can be no recovery if the plaintiff's own negligence or substandard conduct contributes factually to his own injury. *Prosser, Torts* 283 (2d ed. 1955). There was dissatisfaction with this rule, since even though the defendant's negligence was gross and plaintiff's slight, very often the plaintiff would be precluded from recovery because of his contributory negligence. The doctrine of comparative negligence arose as an attempt to mitigate the hardships caused by the doctrine of contributory negligence. Under this doctrine the fault of the plaintiff is compared to the fault of the defendant, and the amount of damages reduced proportionately. *Id.* at 296.


124. 137 U.S. 1 (1890).

125. By definition, comparative negligence means a comparing or proportioning of the degrees of fault of the parties litigant. However, absolute liability connotes an absence of personal fault consideration. To allow comparative negligence to be
The only Supreme Court case which seems to mention comparative negligence with respect to the modern doctrine of unseaworthiness is *Pope & Talbot, Inc. v. Hawn*. However, the lower federal courts have consistently employed the doctrine to mitigate damages, presumably either because the theoretical inconsistency has never been squarely presented to them, or because in certain cases the inclination is to shift the burden of loss away from the shipowner. The courts might well feel that where a seaman caused his own injury, he should partially bear the burden of that loss as an added incentive to preserve his own personal safety.

Regardless of why, the doctrine of comparative negligence appears to be firmly entrenched. Rather than compare the degrees of negligence of the parties litigant, the courts compare the absolute liability of the defendant with the degree or magnitude of fault of the plaintiff. This is very analogous to the doctrine of "comparative causation" that prevails in French automobile tort law. What such a determination amounts to is that if the appurtenance is not reasonably fit the shipowner will have to fully indemnify unless he can show some degree of fault on the part of the injured plaintiff.

An interesting problem is to what extent an injured seaman's damages should be reduced when his own negligence is the sole cause of an unseaworthy condition. One court has introduced fault as a concept into the theory of absolute liability. This is contrary to the basic policy consideration supporting strict liability, i.e., the burden of risk or loss is best shifted onto the industry or onto society as a whole.

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dicated that in this situation by virtue of comparative negligence there can be no recovery.\textsuperscript{129} Another indicated under similar circumstances that the seaman's recovery should be reduced fifty per cent.\textsuperscript{130} Such determinations point to a problem inherent in all comparative negligence decisions, i.e., what percentage reduction should be assigned to any particular degree or magnitude of fault.

CONCLUSION

Under the modern doctrine of unseaworthiness seamen are given a more advantageous action for indemnity for injury than is afforded passengers and shoreside workers.\textsuperscript{131} This cause of action has become firmly entrenched in the law. But like any other form of judge-made law, it has had to evolve and develop decision by decision. The resolution of old problems has created new ones. It is hoped that this Comment will focus attention on some of these problems and furnish an analytical process for reaching logical and consistent solutions.

\textit{Walter I. Lanier, Jr.}

Inter-Sovereign Certification as an Answer to the Abstention Problem

Under the rule of \textit{Erie Railroad v. Tompkins},\textsuperscript{1} when jurisdiction is predicated upon diversity of citizenship, federal courts are required to apply state law. In general, the necessary determination of applicable state law will be made by the federal court itself, with recourse to such sources as are available. However, in a significant area of cases, the doctrine of "equitable abstention" has been applied,\textsuperscript{2} whereby a federal action will be

\begin{itemize}
  \item \textsuperscript{130} Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960).
  \item \textsuperscript{131} For this reason the Supreme Court has been severely criticized in some circles. See Boner, \textit{One If By Land, Two If By Sea: A Comparative Study of Remedies Available to Injured Seamen and Land Workers}, 30 \textit{Texas L. Rev.} 489 (1952); \textit{The Tangled Seine: A Survey of Maritime Personal Injury Remedies}, 57 \textit{Yale L.J.} 243 (1947); Lovitt, \textit{Things Are Seldom What They Seem: The Jolly Little Wards of the Admiralty}, 46 \textit{A.B.A.J.} 171 (1960).
  \item \textsuperscript{1} 304 U.S. 64 (1938).
  \item \textsuperscript{2} The case generally cited as establishing the abstention doctrine is \textit{Railroad Commission v. Pullman Co.}, 312 U.S. 496 (1941).
\end{itemize}