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# Admiralty Law--Actionable Unseaworthiness Not Precluded as a Matter of Law (Radovich v. Cunard S.S. Co., 364 F.2d 149 (2dCir. 1966))

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# RECENT DECISIONS

ADMIRALTY LAW — ACTIONABLE UNSEAWORTHINESS NOT PRECLUDED AS A MATTER OF LAW. — Libelant, a longshoreman, was injured when an automobile fell while he and other longshoremen were unloading it from the hold of a ship. At the time of the accident, a single purchase [1] rigged with sound rope was being employed. The district court, in dismissing the libel, relied upon a dichotomy between unseaworthiness and operational negligence. Considering precedent binding, the court determined that, as a matter of law, a condition of unseaworthiness did not exist. The Court of Appeals for the Second Circuit, in reversing and remanding for new trial, *held* that the trial court erroneously regarded itself as bound to apply the operational negligence doctrine and stated that a finding of actionable unseaworthiness could not be precluded as a matter of law. *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966).

The warranty of seaworthiness imposes an absolute liability upon shipowners for injuries incurred by seamen and longshoremen while doing work traditionally performed by seamen when the injury is caused by a condition found to be "not reasonably fit." The doctrine's origins lie in the obligation of the shipowner to provide a safe working place for his crew. This duty was rigorously imposed since seamen could not "quit the vessel at sea or object to the circumstances surrounding the work commanded." [2] Under normal circumstances the hazards of the sea were great, and imperfections in the ship could greatly increase these dangers.[3]

Among the earliest cases recognizing this duty of the shipowner were *The Moslem* [4] and *Dixon v. The Cyrus*,[5] wherein seamen who refused to embark on unseaworthy vessels were held entitled to their wages and immune from prosecution for desertion. At this time, however, seamen could not recover damages for personal injuries

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[1] A single purchase is a single length of manila rope attached to the wire fall on the boom which lifted the automobiles. A double purchase consists of two pulleys and two lengths of rope. The use of a double purchase, while making the rigging stronger, decreases the speed of the operation.

[2] 2 NORRIS, THE LAW OF SEAMEN § 610 (1962).

[3] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 557 (1960) (dissenting opinion).

[4] 17 Fed. Cas. 894 (No. 9875) (S.D.N.Y. 1846).

[5] 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

suffered as a result of the unseaworthiness of the vessel; [6] their remedy was limited to maintenance and cure.[7]

In 1903, the landmark Supreme Court decision, *The Osceola*,[8] gave injured seamen an effective remedy against the ship. Although the Court need not have discussed the question, its dictum regarding a shipowner's liability upon a finding of unseaworthiness lies at the heart of present-day maritime personal injury actions. The theory of unseaworthiness was the basis of much litigation following *The Osceola*. However, with the passage of the Jones Act in 1920, emphasis was shifted to the existence of a cause of action in negligence.[9]

The Jones Act [10] created a remedy for seamen for injuries which were proximately caused by the negligence of the employer or his shipmaster, officers, agents or employees.[11] Under the act, a seaman was given the right to a jury trial and to bring his suit in courts other than admiralty.[12] Additionally, the use of the "fellow servant" rule as a bar to an action was abolished.[13] Furthermore, the draftsmen of the Jones Act followed the traditional principle that the contributory negligence of a seaman would not bar his recovery.[14] It should be noted that recovery could be obtained under the Jones Act though the ship and its appurtenant appliances were sound.

In 1944, the United States Supreme Court took a major step in the development of the unseaworthiness doctrine. In *Mahnich v. Southern S.S. Co.*,[15] the Court held that an act of negligence by a ship's officer could create a condition of unseaworthiness. A seaman was injured when the staging upon which he was standing gave way. A defective rope had been used to support the structure. The Court held that the negligence of the mate and the boatswain in failing to observe the defect "could not relieve the [shipowner] . . . of the duty to furnish a seaworthy staging." [16] Liability was imposed despite the shipowner's lack of knowledge that an unseaworthy condition existed, and despite the fact that sound rope,

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[6] NORRIS, MARITIME PERSONAL INJURIES § 19 (2d ed. 1966).

[7] *Ibid.*

[8] 189 U.S. 158 (1903).

[9] NORRIS, *op. cit. supra* note 6.

[10] Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. § 688 (1964). See GILMORE & BLACK, ADMIRALTY 250-51 (1957).

[11] Engel v. Davenport, 271 U.S. 35 (1926).

[12] Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. § 688 (1964).

[13] NORRIS, *op. cit. supra* note 6, at § 21. The Jones Act expressly incorporated the rights and remedies granted to railroad employees under the Federal Employees Liability Act. Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. § 688 (1964).

[14] Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 429 (1939); The Max Morris, 137 U.S. 34 (1890).

[15] 321 U.S. 96 (1944).

[16] Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944).

which could have cured the condition, was available. It was stated that "the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances." Nor, said the Court, does the presence of sound rope on board, excuse the owner's duty to furnish a sound staging.[17]

The *Mahnich* decision substantially affected the law in maritime personal injury cases. Prior to *Mahnich,* operational negligence on the part of an officer or crew member gave rise *only* to a Jones Act cause of action. After the decision, it appeared that no amount of negligence on the part of the master, the officer in charge or a fellow crew member was fatal to the plaintiff's cause of action provided only that he could find some handhold of unseaworthiness to cling to.[18] The gates were thus opened to the voluminous number of unseaworthiness claims that followed.[19]

An important question which was not discussed in *Mahnich* was the applicability of the unseaworthiness doctrine to shoreside personnel doing the work of seamen. Previously, in *The Max Morris,*[20] the work of longshoremen had been recognized as maritime service. However, it remained for the Supreme Court, in *Seas Shipping Co. v. Sieracki,*[21] to apply the doctrine of unseaworthiness to longshoremen. The Court stated that the liability imposed for a breach of the warranty of seaworthiness was not limited by "conceptions of negligence," nor was it contractual in character. The duty to provide a seaworthy vessel extended "to all within the range of its humanitarian policy."[22] *Mahnich* and *Sieracki* unequivocally pointed out the absolute liability which would be imposed upon shipowners once it was found that the personal injuries of a seaman or a longshoreman were proximately caused by a condition of unseaworthiness.[23]

Subsequent to *Sieracki,* a doctrine based on relinquishment of control was adopted by a number of circuits.[24] Under this rule, the owner of a vessel was absolved from liability when he relinquished control of a portion of his ship to a stevedoring company which was to load or unload. The owner's duty to provide a

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[17] *Ibid.*

[18] GILMORE & BLACK, *op. cit. supra* note 10, at 320.

[19] See *id.* at 317-20.

[20] The Max Morris, *supra* note 14.

[21] 328 U.S. 85 (1946).

[22] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946). *Accord,* Norfleet v. Isthmian Lines, Inc., 355 F.2d 359 (2d Cir. 1966); Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam,* 347 U.S. 396 (1954).

[23] Seas Shipping Co. v. Sieracki, *supra* note 22, at 90; Mahnich v. Southern S.S. Co., *supra* note 16, at 99.

[24] *E.g.,* Lopez v. American-Hawaiian S.S. Co., 201 F.2d 418 (3d Cir. 1953); Lauro v. United States, 162 F.2d 32 (2d Cir. 1947).

seaworthy vessel as to the part of the ship over which control had been relinquished extended only to the time of surrender.[25] However, this exception was severely limited when in *Alaska S.S. Co. v. Petterson*,[26] the Supreme Court, in a *per curiam* opinion, affirmed an opinion of the ninth circuit overruling the doctrine. Chief Judge Denman of the circuit court had held that the absolute and nondelegable duty of shipowners to provide a safe ship was inconsistent with the "relinquishment of control" doctrine. *Petterson*, it would seem, re-emphasized the nondelegability of liability for unseaworthiness, regardless of whether the condition is brought about by the employees of the shipowner or those of his contractor.[27] In the 1956 case of *Grillea v. United States*,[28] the Second Circuit Court of Appeals interpreted the doctrine of unseaworthiness so as to allow a seaman or a longshoreman to recover for injuries caused by an unseaworthy condition which he had created by his own negligent acts.

The question of when an act of negligence by a seaman or a longshoreman turns into a condition of unseaworthiness was raised in *Grillea*. In that case, the court held that enough time had elapsed between the placing of the wrong hatch cover over a pad-eye by the libelant and his companion and the occurrence of the libelant's injuries, to create an unseaworthy condition.[29] The *Grillea* decision was subsequently cited by the Supreme Court in a decision which held that liability for a temporary unseaworthy condition is no different from that imposed when the condition is permanent.[30]

A major problem in this area is the difficulty in distinguishing between operational negligence and unseaworthiness. A number of second circuit decisions have endeavored to settle this problem. In many of the cases it was found that the libelant's injuries were caused by operational negligence. Two such leading decisions are *Puddu v. Royal Netherlands S.S. Co.*[31] and *Spinelli v. Isthmian S.S. Co.*[32] In both cases the injuries were incurred when equipment, otherwise sound, broke or malfunctioned due to overloading. Similarly, in both cases the appellate court affirmed the decisions of the district courts. It is important to note that in neither case did the court of appeals preclude a finding of unseaworthiness. Rather, it was merely held that the decisions of the district courts were not clearly erroneous. *Massa v. C.A. Venezuelan Navigación* [33]

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[25] NORRIS, *op. cit. supra* note 6, at § 24.
[26] 347 U.S. 396 (1954).
[27] NORRIS, *op. cit. supra* note 6, at § 24.
[28] 232 F.2d 919 (2d Cir. 1956).
[29] *Id.* at 922.
[30] Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).
[31] 303 F.2d 752 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962).
[32] 326 F.2d 870 (2d Cir. 1964).
[33] 332 F.2d 779 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964).

is another case in which operational negligence was held to be the cause of the plaintiff's injuries. In that case longshoremen improperly used seaworthy equipment. Plaintiff was injured when his co-workers failed to insert lifting tongs into the proper slots in the pallets they were unloading. The court, affirming the district court, held that the ship was not rendered unseaworthy by the longshoremen's acts.[34] Equally persuasive are the second circuit decisions wherein contrary results were obtained.

Most recently, in *Skibinski v. Waterman S.S. Co.*[35] and *Norfleet v. Isthmian Lines, Inc.*,[36] the circuit court again affirmed lower court determinations of unseaworthiness. In the former, plaintiff's injuries were the result of improper use of seaworthy equipment. There the longshoremen used an open "S" hook to lower a one ton steel ladder into a hold. When the bottom of the ladder reached the floor of the hold the line slacked off and the hook slipped allowing the ladder to fall. The court distinguished *Puddu, Massa* and *Spinelli* stating that in those cases, transitory situations which had not yet ripened into unseaworthiness were involved.[37] However, here the use of the apparatus took a substantial amount of time, so that the apparatus had become part of the ship's equipment.[38] The dissent, arguing for a more restricted concept of unseaworthiness, would allow a recovery only when it could be shown that there was a defect in the equipment used and then, only if safe equipment were not available.[39]

In *Norfleet*, a piece of equipment, a pad-eye collar, broke and caused the rigging to fall and injure the plaintiff. The circuit court held:

> where the failure of a furnished appurtenance, aboard ship, is dramatically obvious, as for example where a piece of equipment breaks, the inference of unseaworthiness is quite strong. . . . [T]he mere fact that the failure occurs is sufficient evidence to support a finding of unseaworthiness.[40]

The distinction between *Norfleet* and *Puddu* is that in the latter the court found that the equipment broke as a result of plaintiff's negligent practice, while in *Norfleet* there was no finding of negligence in the use of the equipment.

It is apparent from the court's holding in *Skibinski* that the problem of determining when sufficient time has elapsed to create

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[34] *Id.* at 781.
[35] 360 F.2d 539 (2d Cir. 1966).
[36] 355 F.2d 359 (2d Cir. 1966).
[37] Skibinski v. Waterman S.S. Corp., 360 F.2d 539, 542 (2d Cir. 1966).
[38] *Ibid.*
[39] *Id.* at 543-44.
[40] Norfleet v. Isthmian Lines, Inc., *supra* note 22, at 362.

a condition of unseaworthiness was considered by the court, but no general rule was put forth. This problem arose again in *Reid v. Quebec Paper Sales & Transp. Co.*[41] There a longshoreman assigned to hold an aluminum ladder being used by fellow workers, entering and exiting from a hold, temporarily left the ladder unsecured. A strong wind caused the ladder to fall and strike the plaintiff. The court held that a condition of unseaworthiness had been created. Commenting on the distinctions made by other courts between an unsafe condition—unseaworthiness —and an act of negligence, the court stated: "one does not have to be unduly cynical to look askance at this distinction, for every act of negligence, no matter how short-lived, creates an unsafe condition for those exposed to it." [42] The *Reid* decision would appear to follow the rationale developed in other circuits which deny recognition to an operational negligence - unseaworthiness dichotomy.[43]

As has been shown, the second circuit, in most instances, has recognized the distinction between unseaworthiness and operational negligence. In the principal case, libelant, Radovich, was injured while unloading automobiles from the hold of the respondent's vessel. The trial court found that a single purchase was adequate to lift and unload smaller cars but inadequate to lift larger ones. This inadequacy caused the rope to break when a heavier car was lifted. The Second Circuit Court of Appeals, after discussing prior case law, stated: "if anything emerges from these cases other than the difficulty of applying the act-condition (or operational negligence-unseaworthiness) dichotomy, it is that the findings of the trier of fact should be left undisturbed, if the law to be applied to the facts is properly understood." [44]

However, Judge Feinberg, writing for the majority, indicated that the law had been incorrectly determined by the lower court. The district judge considered the decisions in *Puddu* and *Spinelli* factually indistinguishable from *Radovich*.[45] As a result, it was held, as a matter of law, that a finding of operational negligence was required. Judge Feinberg's majority opinion interpreted *Puddu* and *Spinelli* as merely upholding decisions of the lower courts which were not clearly erroneous and not as precluding a finding of unseaworthiness.[46] Moreover, the majority argued, the

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[41] 340 F.2d 34 (2d Cir. 1965).

[42] *Id.* at 37.

[43] *E.g.*, Ferrante v. Swedish American Lines, 331 F.2d 571 (3d Cir.), *cert. denied*, 379 U.S. 801 (1964); Scott v. Isbrandtsen Co., 327 F.2d 113 (4th Cir. 1964). *But see* Beeler v. Alaska Aggregate Corp., 336 F.2d 108 (9th Cir. 1964); Billeci v. United States, 298 F.2d 703 (9th Cir. 1962); Titus v. The Santorini, 258 F.2d 352 (9th Cir. 1958).

[44] Radovich v. Cunard S.S. Co., 364 F.2d 149, 152 (2d Cir. 1966).

[45] *Ibid.*

[46] *Ibid.*

facts of *Radovich* more closely resembled those in *Strika v. Netherlands Ministry of Traffic* [47] and *Skibinski*,[48] wherein determinations of unseaworthiness were sustained.[49]

The Court suggested, that upon retrial, the district court could determine precisely what the act of operational negligence in the principal case was, and whether that act had come to a stop before the injury occurred. The majority, cognizant of the difficulties of this area, suggested, as an aid to lower courts, that a distinction be made between "an unsafe plan of operation, which creates a dangerous condition from the beginning of its execution, and a faulty execution of a proper plan." [50] Applying this guide to *Radovich*, the Court indicated that if the plan initially adopted by the longshoremen, *i.e.*, to lift both the small and the large automobiles with a single purchase, was faulty, then a condition of unseaworthiness was created when the plan was put into operation. If, however, the plan was adequate but the manner in which it was carried out was improper, this would be an act of operational negligence.

The dissenting opinion espoused the rationale of the dissent in *Skibinski*. The majority was characterized as "toiling to impose" liability upon an innocent shipowner, thereby providing a source of a substantial recovery for a longshoreman, whose relief would otherwise be monetarily limited by the Longshoremen's and Harbor Workers' Compensation Act.[51] The dissent, further contended that to differentiate between operational negligence and unseaworthiness is to put "our imprimatur on trivial, meaningless and confusing distinctions."[52] It was believed that only through additional legislation could the injustices confronting shipowners be remedied, since judicial decisions had only served to obscure the law.[53] In light of the majority opinion, it was difficult for the dissent to imagine any act of operational negligence which could not, "by clever advocacy and hair-line distinctions render the shipowner liable for unseaworthiness."[54]

The guide suggested by the majority is clearly an attempt to aid the courts in making the "hair-line" decisions which will be required if the courts are to pursue the practice of distinguishing between operational negligence and unseaworthiness. Adopting

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[47] 185 F.2d 555 (2d Cir. 1950), *cert. denied*, 341 U.S. 904 (1951), where the court affirmed a jury determination that the manner in which two bridles, used to lift a heavy hatch cover, were attached rendered the vessel unseaworthy.

[48] 360 F.2d 539 (2d Cir. 1966).

[49] *Supra* note 44, at 153.

[50] *Ibid.*

[51] 44 Stat. 1424-46 (1927), as amended, 33 U.S.C. §§ 901-50 (1964).

[52] *Supra* note 44, at 153 (dissenting opinion).

[53] *Ibid.*

[54] *Supra* note 44, at 154 (dissenting opinion).

this suggestion, it will no longer be necessary for a court to determine whether sufficient time had elapsed so that the negligent act had come to rest, thereby creating a condition of unseaworthiness. Under the rule proposed in *Radovich,* the trial court need only determine whether the plan used was faulty. If the answer is in the affirmative, then a condition of unseaworthiness existed the moment the plan was put into operation.

It does not appear, however, that the rule developed by the majority will facilitate solving the operational negligence-unseaworthiness problem. The rule creates, in many cases, equally difficult problems of determining what the plan was and whether a certain act was a departure from the plan. In cases such as *Massa* and *Skibinski* the determination will be relatively easy. In the former there was certainly no plan to negligently place the lifting tongs, while in the latter there was obviously a plan to use a particular method of operation that can be shown to be inadequate as a consequence of its subsequent failure and infliction of harm. However, in a case such as *Spinelli* the question becomes more difficult. We can ask if the order given by the head stevedore to increase the size of loads being hauled from the hold of the ship was a negligent departure from the original plan which contemplated lighter loads, or if it was the adoption of a new plan which thus created a condition of unseaworthiness. The difficulty may be observed again in a consideration of *Puddu.* Did the plan used in unloading the vessel contemplate the act which created excessive horizontal pressure on the booms and caused them to buckle, or were these acts an innovation of the winchman? Additionally, we must also determine whose plan is to be considered. As an illustration, suppose that the head stevedore formulates a safe plan and orders that the job be done pursuant to it, but the winchman proceeds upon an unsafe plan of his own. Were the acts of the winchman a departure from a sound plan or the execution of a faulty plan? Numerous complicated problems can be foreseen.

It is important to note that the proposed test is not available for use by the trial court in distinguishing operational negligence from unseaworthiness, *as a matter of law,* but rather is put forth to provide criteria upon which a factual determination of the issues can be made. Re-emphasizing this point, the Court was careful to state that upon retrial it would not necessarily reverse a determination of operative negligence by a trial court not mistaken as to its power under the applicable law, despite its belief that a condition of unseaworthiness existed.[55]

It seems that, in the final analysis, *Radovich* has made only a small contribution toward the delineation of the distinctive ele-

[55] *Supra* note 44, at 153.

ments present in operational negligence and unseaworthiness situations.[56] In addition, it appears that the courts have completely disregarded the position of the shipowner. As stated in the dissent in *Skibinski*, the courts are using shipowners as a conduit for imposing the liability on the stevedore companies, which are regularly impleaded.[57] However, where the stevedore company is judgment proof, the innocent shipowner must suffer the judgment without any effective recovery over.

An aim of the Longshoremen's and Harbor Workers' Compensation Act is to limit the liability of the longshoreman's employer. Section 905 provides that the employer's liability under the act is exclusive and in place of all other liability.[58] It is possible that the courts are motivated by a belief that the compensation, which ranges downward from a maximum of two-thirds of the employee's average weekly wage for total disability, is inadequate;[59] however, the remedy provided by statute is clear and it is beyond the scope of the courts' functions to attempt to circumvent this legislation. It appears that it is time for a legislative review of this entire area, emphasizing the interrelationships between the unseaworthiness doctrine and the Harbor Workers' Compensation Act. Without such legislative action the Supreme Court should examine the ill-defined distinctions of the unseaworthiness doctrine in the same context.

CRIMINAL LAW — SEARCH AND SEIZURE — NEW YORK'S "STOP AND FRISK" LAW HELD NOT VIOLATIVE OF THE FOURTH AMENDMENT DESPITE LACK OF "PROBABLE CAUSE" REQUIREMENT. — Appellant was apprehended in an apartment house by a tenant, an off-duty policeman, who had observed appellant and his companion tiptoeing around the hallway. Upon receiving an unsatisfactory answer as to their presence in the hallway, the officer "frisked" the appellant for a weapon. He felt something hard "which could have been a knife," and withdrew from appellant's pocket an opaque plastic envelope which, upon examination, was found to contain burglar's tools. This evidence was used to secure an indictment against appellant for unlawful possession of burglar's tools. Appellant's pretrial motion to suppress the evidence as constitutionally inadmissible was denied and he was convicted upon

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[56] The court carefully indicated that no determination had been made as to the validity of the distinction.

[57] *Supra* note 37, at 544.

[58] This is provided so that the employer secures payment for his injured employees. Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

[59] Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1427 (1927), 33 U.S.C. § 908(a) (1964).