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Crew Conduct as Unseaworthiness

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TODAY'S SEAMEN are often referred to as the wards or favorites of our admiralty courts.[1] In 1823 Mr. Justice Story depicted the unique character of maritime law and the seamen it seeks to protect by saying,

> I am not bold enough to desert the steady light of maritime jurisprudence for the more doubtful guide of general reasoning.[2]

The U. S. Supreme Court in *McMahon v. U. S.*[3] said that legislative regulations should be construed liberally in favor of seamen in order to accomplish the beneficial purposes such legislation intends. Such thinking may suggest the somewhat biased approach an admiralty court might take when faced with a seaman's claim.

The shipowner, on the other hand, is under an absolute duty to seamen to provide them with a seaworthy ship on which to work.[4] Judicially described, a seaworthy ship is one with hull, gear, appliances, ways, appurtenances, and manning reasonably fit for their intended purposes so as to prevent the occurrence of personal injuries.[5] The shipowner's warranty that his vessel is seaworthy has its roots deeply planted in general

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1 Aguilar v. Standard Oil Co., 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943).

2 Harden v. Gordon, 11 Fed. Cas. 480, No. 6047 (C. C. Me. 1823) at 483.

3 342 U. S. 25, 72 S. Ct. 17, 96 L. Ed. 26 (1951).

4 Connorton v. Harbor Towing Corp., 237 F. Supp. 63 (D. Md. 1964); Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

5 The Silvia, 171 U. S. 462, 19 S. Ct. 7 (1898); Amador v. A/S J. Ludwig Mowinckels Rederi, 224 F. 2d 437 (2nd Cir. 1955), cert. den. 350 U. S. 901, 76 S. Ct. 179, 100 L. Ed. 791 (1955); Mesle v. Kea Steamship Corp., 260 F. 2d 747 (3rd Cir. 1958), cert. den. 359 U. S. 966, 79 S. Ct. 875, 3 L. Ed. 2d 834 (1959).

maritime law.[6] In the *Osceola*[7] Mr. Justice Brown in his famous dictum established the duty to provide a seaworthy vessel and that a breach of such duty would render a vessel unseaworthy and give rise to an action for damages. In *Mahnich v. Southern S. S. Co.*[8] the Supreme Court restated the obligation of a shipowner to furnish a seaworthy vessel. Since the *Mahnich* case it has been settled that the duty of a shipowner to furnish a seaworthy ship is not dependent upon negligence but is imposed by law and is absolute and non-delegable.[9]

The warranty of seaworthiness does not run merely to the crew of the vessel itself. In *Seas Shipping Co. v. Sieracki*[10] the U. S. Supreme Court brought longshoremen within the protective arms of the warranty. This extension of the warranty has been the guiding light in other cases involving shore workers.[11]

The seaman's right to recover damages for injuries caused by unseaworthiness was rarely used until the mid 1940's.[12] Until this time the Jones Act[13] and the right of maintenance and cure were the favored methods of recovery by seamen against ship-

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[6] Detailed discussions of the historical development of the doctrine of seaworthiness and consequent unseaworthiness are found in Gilmore and Black, Law of Admiralty 315-332 (1957); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); Benbow, Seaworthiness and Seamen, 9 U. Miami L. Rev. 418 (1955); Norris, Law of Maritime Personal Injuries § 27-48 (1959); Weathers, Admiralty-Seamen's Personal Injuries-Transitory Unseaworthiness and Owner's Absolute Liability, 15 Southwestern L. J. 328 (1961); Sandlund, Longshoremen's Actions for Unseaworthiness and Negligence, 14 Clev-Mar L. R. 563 (1965).

[7] 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903). The Osceola involved an injury to a seaman caused through a negligent order of the master of the vessel. The court, though not dealing with the issue of seaworthiness, stated that the vessel and owner were liable for injuries resulting from unseaworthiness.

[8] 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944). In the Mahnich case the libelant was injured by a fall from a collapsed staging which was rigged with defective line. One of the defenses raised by the shipowner was that there was a sufficient supply of good line aboard and that the negligent election of the mate of the defective line caused the collapse. The court held that the negligence of the mate did not relieve the owner of liability.

[9] Connorton v. Harbor Towing Corp., *supra* n. 4.

[10] 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[11] Christiansen v. U. S., 192 F. 2d 199 (1st Cir. 1951), affg. 94 F. Supp. 934 (D. Mass. 1951); Pope and Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); Spann v. Lauritzen, 344 F. 2d 204 (3rd Cir. 1965), appeal pending.

[12] Gilmore and Black, *op. cit. supra* n. 6 at 315.

[13] 41 Stat. 1007 (1920), 46 USC 688 (1965).

owners.[14] The Jones Act provides that seamen injured in the course of their employment by negligence of the owner, master or fellow crew members may recover damages for their injuries from the shipowner. The right of maintenance and cure is a part of general maritime law. It provides a seaman who has become sick or injured in the service of the vessel with wages to the end of the voyage, and subsistence, lodging and care thereafter to the point where the maximum cure attainable has been reached.[15] Today a claim based on unseaworthiness is the favored method of pleading, with the Jones Act with maintenance and cure being pleaded in the alternate. The burden of proof of unseaworthiness, or negligence under the Jones Act is on the injured seaman. The seaman must prove that the unseaworthy condition or the negligence of the shipowner was the proximate cause of his injury.[16]

The Crew

Who shall be liable in damages to a seaman who has been viciously assaulted by another member of the crew? Under the doctrine of seaworthiness the shipowner is more often than not held liable for unseaworthiness caused by the presence of any vicious and unreasonably belligerent member of the crew. In *Clevenger v. Star Fish and Oyster Co.*[17] the libellant was a deckhand and fisherman on a small fishing vessel owned by the respondent. While unloading a catch at the respondent's dock, a delay occurred due to trouble with the lifting machinery. The first mate, who was down in the hold of the vessel, began to exchange seamen's unpleasantries with the libellant who was on deck. At a time when the libellant was facing away from the hold, the mate ascended the ladder and drove a devil's fork deep into the libellant's back. The devil's fork was a steel bar, one inch thick, four feet long, and ground to a sharp point at one

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[14] Mallano, Seamen's Injuries: The Jones Act, Unseaworthiness, and Maintenance and Cure—The Siamese Triplets, 51 Calif. L. Rev. 412 (1963).

[15] See Gilmore and Black, *op. cit. supra* n. 6, § 6-6 through 6-19, for text material on maintenance and cure along with a discussion of its peculiarities of application and pleading.

[16] Goodrich v. Cargo Ships and Tankers Inc., 241 F. Supp. 332 (E. D. La. 1965); Grillo v. U. S., 177 F. 2d 904 (2d Cir. 1949); The Baymead, 88 F. 2d 144 (9th Cir. 1937); Freitas v. Pacific-Atlantic Steamship Co., 218 F. 2d 562 (9th Cir. 1955); Reynolds v. Royal Mail Lines, 254 F. 2d 55 (9th Cir. 1958), cert. den. 358 U. S. 818, 79 S. Ct. 28, 3 L. Ed. 2d 59 (1958).

[17] 325 F. 2d 397 (5th Cir. 1963).

end. It severed two of the libellant's ribs and punctured a lung. In a libel brought by the injured seaman alleging unseaworthiness of the ship, the shipowner's negligence under the Jones Act, and a plea for maintenance and cure, the District Court for the Southern District of Alabama denied recovery. The district judge held that the owner through its agents had used due care in the selection of the crew and had not been negligent in that regard so that the burden of proving unseaworthiness or negligence had not been sustained. Judge Wisdom for the Fifth Circuit Court of Appeals reversed the judgment, holding as a matter of law that the first mate's attack on the libellant was a breach of the warranty of seaworthiness, with instructions that the district court determine the amount of the damages and enter a judgment for the libellant. Judge Wisdom in his opinion said,

> When the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived. We see no need, therefore, to discuss negligence.[18]

The *Clevenger* case, which was decided in 1963, established the clear standard that a defective crew member renders a vessel as unseaworthy as defective equipment.

In an older case,[19] a seaman was assaulted by a particularly vicious and brutal mate. The Ninth Circuit Court of Appeals in that case based recovery upon unseaworthiness of the vessel saying that where the mate was known to be of a brutal nature his presence on board rendered the vessel unseaworthy. The court appears to have intended to limit the shipowner's liability to situations where the owner had knowledge of a seaman's wicked disposition, whereas in the *Clevenger* case knowledge was not even considered as an element of the shipowner's liability.

In *Keen v. Overseas Tankship Corp.*[20] one seaman attacked another seaman with a meat cleaver on board the ship. The district judge in that case instructed the jury that unless the shipowner knew, or should have known, of the attacker's vicious nature he should not be held liable. The Second Circuit re-

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[18] *Ibid.* at 402.

[19] The Rolph, 299 F. 52 (9th Cir. 1924), affg. 293 F. 269 (N. D. Cal. 1923).

[20] 194 F. 2d 515 (2d Cir. 1952), cert. den. 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363 (1952).

versed and remanded the case holding that the doctrine of seaworthiness does not require that an owner have knowledge of an attacker's savage disposition as a condition of liability. In the *Keen* case Judge Learned Hand developed what has become known as the "Keen test." This standard requires that in order to be "seaworthy" seamen must merely be equal in disposition and seamanship to the ordinary men in the calling.

Judge Hand in *Jones v. Lykes Bros. S. S. Co. Inc.*[21] reaffirmed the Keen test but reversed a finding of unseaworthiness by the lower court. In the *Jones* case a seaman attacked another seaman without a weapon and continued beating his shipmate after he was down. Judge Hand in his opinion said,

> Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter is not the measure of the "disposition" of "the ordinary men in the calling".[22]

One of the leading cases in the area of the shipowner's liability for unseaworthiness caused by unfit crew members is *Boudoin v. Lykes Bros. S. S. Co. Inc.*[23] In *Boudoin* a seaman recovered damages from the shipowner for injuries inflicted upon him by a drunken crew member armed with a brandy bottle. The court in that case held that the attack was a breach of the warranty of seaworthiness and reaffirmed the view that if a ship is not seaworthy the owner is liable, irrespective of any fault on his part. The *Boudoin* case also applied the Keen test in the reasoning saying that the problem of measuring a seaman's disposition is one of degree according to the standard of the calling.

The Shipowner's Dilemma

The law is clear that if a crew member possesses a vicious disposition or savage nature, his presence on board a ship will support a jury finding that the shipowner has breached his warranty of seaworthiness. In the cases previously mentioned it is evident that the use of a dangerous weapon in a seamen's brawl will usually take the case out of the "ordinary man of the calling"

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[21] 204 F. 2d 815 (2d Cir. 1953), cert. den. 346 U. S. 857, 74 S. Ct. 72, 98 L. Ed. 370 (1953).

[22] *Ibid.* at 817.

[23] 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354 (1955).

category. What about a case where an unarmed seaman of a violent nature assaults another? In *Walters v. Moore-McCormack Lines, Inc.*[24] the majority held that evidence of an assault sustained by several hard blows with the fists to the face followed by a "karate" blow to the neck was insufficient to take to the jury a question of whether the shipowner had breached his warranty of seaworthiness. Future trends may be indicated by Judge Friendly's vigorous dissent in the *Walters* case which could open a new door for claims against the shipowner. In his dissent the judge said,

> Appellate prescience can hardly anticipate all the syndromes whence the conclusion of "a savage and vicious" nature may properly be drawn. The same reason that makes it legitimate for a jury to draw such a conclusion from the mere fact that the assault is with a dangerous weapon—namely, the permissible inference that the intent was not merely to brawl but to maim or even kill—may likewise apply when the assault bears other indicia of viciousness.[25]

Judge Friendly went on to concede that if a recovery were allowed in the *Walters* case the practical effect would be to send every case to the jury when one seaman inflicts injury upon another. However, qualifying this concession he further stated,

> But that is no basis for our refusing to follow announced principles to their logical conclusion, even though it may increase the need for Congress' accomplishing the revision of the law in this area that is so long overdue.[26]

Considering that a breach of the warranty of seaworthiness by a shipowner is a species of liability without fault, a workable defense to a claim based on unseaworthiness is rare. In *McConville v. Florida Towing Corp.*[27] the libellant being the aggressor was struck by a seaman who armed himself with a piece of iron called a "dog" to ward off the libellant's attack. In that case the court found that the libellant had returned to the ship following an afternoon of heavy drinking and without just cause

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[24] 309 F. 2d 191 (2d Cir. 1962). Petition denied for *in banc* consideration of the judgement of the district court's dismissal of the plaintiff's complaint on the ground that there was no evidence of unseaworthiness in 312 F. 2d 893 (2d Cir. 1963), which had been affirmed in the principal case.

[25] *Ibid.* at 196.

[26] *Ibid.* at 197.

[27] 321 F. 2d 162 (5th Cir. 1963).

provoked a fight with the other seamen. In its denial of a recovery for a breach of warranty of unseaworthiness and negligence, the court held that the proximate cause of the injuries sustained by the libellant was his own misconduct and drunkenness.

In some cases a release of liability entered into by a shipowner and a seaman has been held valid. It has been said that a release of liability fairly entered into and fairly safeguarding the rights of a seaman should be sustained.[28] A release of all present and future claims for damages arising out of an accident on shipboard was held valid in *Sitchon v. American Export Lines Inc.*[29] In *Sitchon* the court would not permit the release to be set aside on the grounds of mistake after the injured seaman had made a full investigation of the matter with independent advice prior to signing. In another case[30] the court declared a release of liability "fairly arrived at." Here the injured seaman rejected all offers of legal and medical advice and was induced through innocent representations by the owner's agents that he had practically recovered, to accept a settlement of $4,000 for permanent brain damage.

Shipowners have on occasion tried to employ the defense of assumption of risk on the part of a seaman. To the shipowner's dismay, it has been held that, in a sense, a seaman does assume the risk of encountering other seamen whose disposition may be more violent than his own, but not those deemed so savage that shipboard life becomes a menace.[31]

In *States Steamship Co. v. Featherstone*[32] a shipowner filed a bill for declaratory judgment stating he was under no liability to two seamen who had sustained injuries from a fight between themselves and were contemplating a suit for damages against him for unseaworthiness. The district court in denying the judgment said that a shipowner's purpose in filing for such declaratory judgment was an attempt to stop the growing practice among seamen of indulging in personal fights on shipboard and then turning to the shipowner through the courts for relief and

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[28] The S. S. Standard, 103 F. 2d 437 (2d Cir. 1939).

[29] 113 F. 2d 830 (2d Cir. 1940).

[30] Thompson v. Coastal Oil Co., 221 F. 2d 559 (3rd Cir. 1955) revg. 119 F. Supp. 838 (D. N. J. 1954).

[31] Walters v. Moore-McCormack Lines, Inc., *supra* n. 24.

[32] 240 F. Supp. 830 (D. Ore. 1965).

that it was not one of the purposes of the declaratory judgment act to enable a prospective defendant to obtain a declaration of nonliability.

As was said earlier, the duty of a shipowner to provide a seaworthy ship is non-delegable. In this connection, it is no defense for the shipowner to assert that the selection of the crew was left to the discretion of the master and that he had used due care.[33]

When a seaman's personal injury claim arises from injuries resulting from an assault by another crew member, the shipowner probably will not be able to assert with any success that he lacked knowledge of the vicious propensities of the assailant, delegated the duty of selection of the crew, or claim that all of his sailors are ordinary men of the calling as far as he knows.

Federal Protection of Shipowners

An important branch of the U. S. Government which has as one of its major functions the regulation of the operations and personnel of the American merchant marine, is the U. S. Coast Guard. The Commandant of the Coast Guard is empowered by various statutes to establish regulations with regard to most phases of shipping, operations, safety rules, and the quality and fitness of material and manpower.[34] The safety regulations of the Coast Guard setting, as they do, an accepted standard of care pertaining to water transportation,[35] are sometimes largely instrumental in a finding of unseaworthiness when violated by a vessel.

The physical preparation of a ship for service is a matter which is closely supervised by government agencies. The same may be said of the fitting out of a crew. The Coast Guard establishes and enforces manning scales by setting out the minimum complement requirements for officers and crew.[36] Personnel manning ships must all be licensed, certified or documented by the Coast Guard.[37]

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[33] Clevenger v. Star Fish and Oyster Co., *supra* n. 17.

[34] 46 USC 375 & 416 (general powers); 46 USC 170 (explosive and dangerous substances); 46 USC 672 & 224 (manning).

[35] Petition of Skibs A/S Jolund, 250 F. 2d 777 (2d Cir. 1957).

[36] Gilmore and Black, *op. cit. supra* n. 6 at 780.

[37] 46 USC 672 (seamen); 46 USC 224 (officers).

Title 46, Code of Federal Regulations, Section 12.02-7, provides that every seaman employed on any merchant vessel of the United States which is of 100 gross tons or more shall be issued at the option of the seaman, a continuous discharge book, a certificate of identification, or merchant mariner document representing certificate of identification which shall be retained by him. Ordinary seamen or unskilled crew members need not meet any Federal physical requirements for certification or documentation excepting foodhandlers, who must be free from communicable diseases.[38]

Character checks and personal references are required before radiotelegraph operators' licenses,[39] and all deck and engineering officers' licenses,[40] are issued. No character checks or references are required prior to the certification or documentation of ordinary seamen under current regulations.

The only basis for denying the issuance of a merchant mariner's document is on the grounds of violation of the narcotic drug laws of the United States.[41] However according to a Coast Guard official, the Coast Guard as a matter of policy will not issue a merchant mariner's document or certificate to a person who has demonstrated vicious propensities.[42]

Once issued, a license, certificate or document, may be suspended or revoked by the Coast Guard.[43] Revocation is mandatory in cases of possession, use, sale, or association with narcotic drugs,[44] but revocation is sought in cases involving assault with a dangerous weapon, murder or attempted murder, misconduct resulting in loss of life or serious injury, and other offenses affecting the safety of life at sea.[45] Title 46, U. S. Code, Section 239 and 239B provide for a hearing in suspension and revocation proceedings to insure that seamen are afforded due process of law before revocation or suspension of their licenses or documents. The court in *In Re Merchant Mariners Documents*

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38 46 CFR 12.25-20.

39 *Id.* at § 10.13-17.

40 *Id.* at § 10.02-5.

41 *Id.* at § 12.02-4.

42 Taken from an interview with Lieutenant Commander W. D. Andrews, Senior Inspector Personnel of the U. S. Coast Guard Marine Inspection Office, Cleveland, Ohio.

43 46 CFR 137.

44 *Id.* at § 137.03-3.

45 *Id.* at § 137.03-5.

Issued to Dimitratos[46] said that even where the charge is that the seaman's conduct endangered life or public safety, he must be afforded such a hearing and an opportunity to be heard in his own defense before being deprived of his documents. In cases involving assault with a dangerous weapon, misconduct resulting in loss of life or serious injury, and murder or attempted murder, revocation of a license or document is usually the result.[47]

Regarding Federal punishment of seamen guilty of assault, Title 46, United States Code, Section 701, provides that for assaulting any master, mate, pilot, engineer, or staff officer a seaman shall be punished by imprisonment for not more than two years. The Code makes no provision for seamen's assaults on other seamen. In *Isbrandtsen Co. v. Johnson*[48] a seaman unjustifiably attacked another member of the crew and stabbed him. The question before the U. S. Supreme Court was whether an employer may set off the expenditures for the medical care and hospitalization of the injured crew member against a seaman's wages. The court said that the employer could not do so; but more important is the dictum which said that the assailant was not guilty of such "willful disobedience to lawful command at sea" or of "willfully damaging the vessel" and that such attack was not such an "assault" as prescribed by Title 46, United States Code, Section 701.

As may be gathered from the foregoing Federal Regulations and cases, the shipowner is afforded some protection against unknowingly employing a seaman of vicious propensities. However, seamen who are employed on vessels of registry other than the United States, are not required to be documented or certified nor are those who are employed on vessels of less than 100 gross tons.

Present Situation—Conclusion

Today, the American Merchant Marine is almost completely unionized except for a small number of holdout shipowners and a very large and intensely controversial fleet of ships sailing under foreign "flags of convenience."[49] These ships are operated

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[46] 91 F. Supp. 426 (N. D. Cal. 1949).

[47] 46 CFR 137.20-165.

[48] 343 U. S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294 (1952).

[49] See Hohman, Work and Wages of American Merchant Seamen, 15 Ind. and Lab. Rel. Rev. 221 (Jan., 1962).

by American owned companies, but manned by mixed crews and registered under Liberian, Panamanian, or Honduran flags in order to escape American labor, tax, and safety legislation. Shipowners operating under "flags of convenience" are not afforded the protection which is offered under Coast Guard Regulations pertaining to the licensing and documenting of crew members.

Seamen are most often employed or shipped through hiring halls operated by maritime unions. In *Texas Co. v. NLRB*[50] the circuit judge stated in his opinion that when seamen have been supplied by a hiring hall and not chosen by the master, the master must promptly weed out any who constitute a menace to his general discipline or to the safe navigation of his ship. Failure to do so is negligence. However, once a seaman is shipped from a union hiring hall would it be feasible to reject him from the crew on suspicion of his having a savage nature?

Despite the fact that shipowners are insured against liability for unseaworthiness and receive government subsidies yearly to defray operational expenses, the costs of fighting and paying unseaworthiness claims further hinders them from competing with shippers of other nations who are generally able to maintain lower operating expenses.

It seems repugnant to all law that a shipowner should be held liable under the doctrine of unseaworthiness for occurrences which he has no reasonable way of preventing. The shipowner may be best protected by incorporating his knowledge of a crew member's dangerous propensities as an element of proof in assault cases based on unseaworthiness. Should general maritime law continue to offer legal barriers to shipowners, a seaman's workmen's compensation statute or a general redraft of the Jones Act could enable the shipowner to set up stronger defense in an unseaworthiness action.

Following Judge Friendly's plea for Congressional action in dissent in the *Walters* case, the needed change in the law seems more likely to come by way of statute. The views of the Supreme Court and the Federal Courts do not seem so inflexible as to forestall a re-examination and a restatement of the doctrine of seaworthiness and consequent unseaworthiness which would be beneficial to all concerned.

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[50] 120 F. 2d 186 (9th Cir. 1941).