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Longshoremen's Actions for Unseaworthiness and Negligence

Peter G. Sandlund*

PRIOR to the enactment of the Longshoremen's and Harbor Worker's Act¹ in 1927 the injured longshoreman's remedies for personal injuries were sharply restricted by the common law defenses of contributory negligence, assumption of the risk and the fellow servant rule. In order to afford the injured longshoreman a remedy the Supreme Court in *International Stevedoring Co. v. Haverty*² decided to treat longshoremen as sailors, thus allowing them to recover under the Jones Act, though it should be noted that the longshoreman's action was against his employer, the master stevedore, and not against the vessel owner.

After passage of the Longshore Act the longshoreman could no longer proceed against his employer under the Jones Act. This was decided by the Supreme Court in *Swanson v. Marra Bros., Inc.*³ In this period the concept of unseaworthiness as the basis for recovery by a longshoreman, which first had been advanced by Mr. Justice Holmes in the *Haverty* case, was not followed.

The modern era in longshoremen's actions for recovery for personal injuries may be said to begin with *Seas Shipping Co. v. Sieracki*.⁴ This decision revived the theory of the *Haverty* case in that longshoremen were again allowed to recover for breach of the warranty of seaworthiness.⁵ This time, however, the doc-

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¹ 33 U.S.C.A. Sec. 901.

² 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).

³ 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946).

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

⁵ *E.g.*, *Mollica v. Compania Sud-Americana de Vapores*, 202 F. 2d 25 (2d Cir. 1953), cert. denied 345 U.S. 965, 73 S.Ct. 952, 97 L.Ed. 1384 (1953); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Boudoin v. Lykes Bros. Steamship Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955); *Pacific Far East Line, Inc. v. Williams*, 234 F. 2d 378 (9th Cir. 1956), cert. denied 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed. 2d 76 (1956); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960).

Also see Notes, 50 Mich. L. Rev. 141-146 (1951), and 29 Tex. L. Rev. 367-369 (1951) for detailed discussion of this development.

trine was applied in holding the vessel owner liable rather than the stevedore-employer. The case actually extends the vessel owner's absolute warranty to include longshoremen temporarily on board to handle cargo, on the theory that longshoremen perform a service that is traditionally seamen's work. The concurrent remedy of the longshoreman afforded by the Longshore Act was held to be conclusive only against the stevedore-employer and not against the vessel owner. Once the stage was set by the *Sieracki* decision a steady trend towards holding the shipowner liable without fault was established.

In order to obtain a proper perspective of the cases it is necessary to draw a distinction between the cases governed by common law negligence rules as extended by the Jones Act, which in turn incorporate the negligence rules of the Federal Employer's Liability Act, and those controlled by the general maritime law of unseaworthiness. The latter remedy was left intact after passage of the Jones Act,⁶ which simply added a remedy for sailors without making the same exclusive against the vessel owner.⁷ These remedies form the basis for the shipowner's liability to seamen within the field where the owner is also faced with liability to longshoremen and other maritime workers. Other remedies available to sailors, such as the general maritime law remedy of *maintenance and cure* and the statutory remedy afforded under the Death on the High Seas Act, are beyond the scope of this article, as these remedies are not yet available to longshoremen and harbor workers.⁸

Simultaneously, and particularly because of the decision in *Southern Pacific Co. v. Jensen*⁹ which held state wrongful death statutes inapplicable to maritime deaths, the Longshoremen's and Harbor Worker's Act was enacted to offer protection to longshoremen and other maritime workers. The Act establishes schedules of benefits for various types of injury and for death and it also establishes classes of survivors entitled to death benefits.¹⁰

⁶ 46 U.S.C.A. 688 (1920).

⁷ *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 63 L.Ed. 466 (1923). Also see *Machnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

⁸ *Weiss v. Central R. Co. of New Jersey*, 235 F. 2d 309, 1956 A.M.C. 1473 (2d Cir. 1956).

⁹ 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

¹⁰ 33 U.S.C.A. Secs. 908-910.

In order to properly analyze the most recent developments in the decisions involving a vessel owner's liability for injuries to longshoremen, it must be borne in mind that recent awards have been based on a merger of the various causes of action. That the Jones Act and Longshore Act each within their respective fields of application created new remedies, goes without saying. What has added to the development reflected in these statutes is the additional impact of the courts' interpretation of the general maritime law action for unseaworthiness. Actions under both statutes basically sound in negligence with common law defenses eliminated by incorporation of the Federal Employer's Liability Act into both statutes. On the other hand actions for unseaworthiness are primarily actions for breach of warranty.

While *Sieracki* is the landmark case that opened the door for longshoremen to recover for unseaworthiness, it by no means settled all the questions that arise in applying the concept to shore based maritime workers. Just as there is a long line of cases starting with *O'Donnell v. Great Lakes Dredge and Dock Co.*,¹¹ under which the Jones Act can literally be said to have gone ashore with the sailor, there is a parallel development in the application of the concept of unseaworthiness as applied to longshoremen. *Strika v. Holland American Line*¹² extended the vessel owner's liability for an unseaworthy condition to a longshoreman who was injured on the dock due to defective ship's gear (use of a defective bridle in lifting ship's pontoons from the dock). This development is strikingly illustrated by *Hagans v. Ellerman & Bucknall Steamship Co.*¹³ wherein unseaworthiness of the vessel due to improper stowage was held to have contributed to plaintiff's injury when he slipped on sand that had spilled from bags that had been discharged from the vessel and had been removed to the pier over 100 feet distant from the vessel. This question was settled by the Supreme Court in *Gutierrez v. Waterman Steamship Corp.*¹⁴ wherein plaintiff was allowed to recover against the vessel owner for injuries suffered when he

¹¹ 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943).

¹² 185 F. 2d 555 (2d Cir. 1950), cert. denied 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 (1950).

¹³ 196 F. Supp. 593 (D.C., E.D. Pa. 1961), reversed and remanded on other grounds, 318 F. 2d 563 (3d Cir. 1963).

¹⁴ 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed. 2d 297 (1963).

slipped on beans scattered on the dock from broken bags recently unloaded from the vessel.

The development and effect of the cases starting with *Sieracki* and ending with *Gutierrez* points out a situation whereby shore workers first figuratively climbed on board and were treated as seamen entitled to recover from the owner for unseaworthiness. Hence the longshoremen returned ashore and brought the protection afforded by the action of breach of the warranty of seaworthiness with them. The ultimate effect of these cases is to neutralize the effect of the decision in *Swanson v. Marra Bros., Inc.*¹⁵ The *Swanson* case is still the law in that a longshoreman still cannot proceed against his employer under the Jones Act. Also, technically the longshoreman's remedy towards his employer is restricted to compensation under the Longshoremen's and Harbor Worker's Act. Ultimately the master stevedore's liability extends further, as in those cases where the ship owner is found liable for an unseaworthy condition without fault, he may recover an indemnity from the stevedore for breach of the latter's warranty to perform his service in a workmanlike manner. This issue was settled by *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,¹⁶ and the theory of such indemnification was further clarified in *Weyerhauser Steamship Co. v. Nacirema Operating Co.*¹⁷ wherein the court pointed out that the vessel owner's liability to longshoremen is imposed without fault whereas the stevedore is only liable when he is negligent. Therefore a judgment against the vessel owner in a longshoreman's suit will not preclude him from recovering indemnification from a negligent stevedore causing the injury.

The issue as to the ship owner's liability for an unseaworthy condition is frequently obscured by cases involving injuries caused by negligent acts of the stevedoring contractor. Early cases held that the stevedore was liable for any unseaworthy condition that arose on the part of the vessel over which he took constructive possession, provided the condition arose after he had taken possession. However, after the *Sieracki* decision the own-

¹⁵ *Supra* n. 3.

¹⁶ 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). See also *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed. 2d 413 (1959); and *Italia Societa per Azioni v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed. 2d 732 (1964).

¹⁷ 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 491 (1958).

er was under a liability to keep a seaworthy ship regardless of fault and it became highly doubtful that the owner could escape liability. In 1950 the Third Circuit, in *Cookingham v. United States*,¹⁸ followed the earlier cases, but subsequently the Supreme Court decided *Alaska Steamship Co. v. Petterson*¹⁹ which established the owner's liability without fault for the portion of the vessel constructively surrendered to the stevedore. This decision and subsequent cases²⁰ base the vessel owner's liability on his absolute duty to furnish a seaworthy vessel. His actual or constructive notice of such unseaworthy condition is not necessary.²¹

The perplexing intermingling of unseaworthiness and active negligence is well illustrated in *Di Salvo v. Cunard Steamship Co.*,²² wherein the court found operational unseaworthiness by improper use of proper gear. Another area in which the interrelationship between the vessel owner and the stevedore may easily be confused arises in those situations where the operator of the vessel is also the stevedore. In denying the owner the benefit of the limitations of the Longshore Act the Supreme Court looked to the substance of the relationship rather than the form.²³

*Ferrante v. Swedish American Lines*²⁴ and *Thompson v. Calmar Steamship Corp.*²⁵ represent the most recent development in the interrelated field of operating negligence by a stevedore and the ship owner's absolute liability to furnish a seaworthy vessel. *Ferrante* involved an injury caused by negligent use of a fit rope furnished by the vessel to the stevedore for discharge of ply-

¹⁸ 184 F. 2d 213 (3d Cir. 1950), cert. denied 340 U.S. 935, 71 S.Ct. 495, 95 L.Ed. 675 (1951).

¹⁹ 205 F. 2d 478 (9th Cir. 1953), affd. 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 (1953).

²⁰ E.g., *Tarkington v. United States Lines Co.*, 222 F. 2d 358 (2d Cir. 1955); *Gindville v. American-Hawaiian Steamship Co.*, 224 F. 2d 746 (3d Cir. 1955); *Pacific Far East Line, Inc. v. Williams*, 234 F. 2d 378 (9th Cir. 1956); *Considine v. Black Diamond Steamship Corp.*, 163 F. Supp. 107 (D.C. Mass. 1958).

²¹ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960).

²² 171 F. Supp. 813 (D.C., S.D.N.Y. 1959).

²³ 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963).

²⁴ 331 F. 2d 571 (3d Cir. 1964), cert. dismissed 379 U.S. 801, 85 S.Ct. 10 (1964).

²⁵ 331 F. 2d 657 (3d Cir. 1964), cert. denied 379 U.S. 913, 85 S.Ct. 259 (1964).

wood. *Thompson* on the other hand involved an accident causing personal injuries by negligent use of the vessel's gear to hump railroad cars on the dock. In *Knox v. United States Lines Co.*²⁶ an attempt had been made to draw a distinction between an existing condition causing injury and a negligent act causing instantaneous injury, but this theory was abandoned in *Ferrante* and *Thompson* to the extent that they in fact overrule *Knox*. Rather than adopting the distinction based on the argument that unseaworthiness must be a condition in that it must have duration and must exist for a time before the accident, the Court followed the sweeping theories spelled out in *Alaska Steamship Co. v. Petterson*²⁷ and *Mitchell v. Trawler Racer Inc.*²⁸ The soundness of these decisions must rest on policy grounds to justify this broad extension of the application of the doctrine of seaworthiness. The decisions follow the reasoning of a recently preceding line of cases decided in the Second Circuit.²⁹

The soundness of the *Ferrante* and *Thompson* decisions has already been questioned,³⁰ and before the merger of unseaworthiness and negligence will be accepted doctrine this issue will no doubt be raised again in the Supreme Court. In *Morales v. City of Galveston*³¹ the high court found a vessel seaworthy when plaintiff inhaled noxious fumes from grain just released into the vessel's hold. Here the Court reasoned that the cause of the injury was not any defect in the ship, but rather the isolated and completely unforeseeable introduction of a noxious agent from without. The case readopts the transitory hazard doctrine

²⁶ 294 F. 2d 354 (3d Cir. 1961), on remand 201 F. Supp. 131 (E.D. Pa. 1962), affd. 320 F. 2d 247 (3d Cir. 1963).

²⁷ *Supra* n. 19.

²⁸ *Supra* n. 21.

²⁹ *Grillea v. United States*, 232 F. 2d 919 (2d Cir. 1956); *Paddu v. Royal Netherlands Steamship Co.*, 303 F. 2d 752 (2d Cir. 1962), cert. denied 371 U.S. 840, 83 S.Ct. 67, 9 L.Ed. 2d 75 (1962); *Spinelli v. Isthmian Steamship Co.*, 326 F. 2d 870 (2d Cir. 1964), cert. denied 377 U.S. 935, 84 S.Ct. 1333, 12 L.Ed. 2d 298 (1964).

However, note *Blier v. United States Lines Co.*, 286 F. 2d 920 (2d Cir. 1961), cert. denied 368 U.S. 836, 82 S.Ct. 32, 7 L.Ed. 2d 37 (1961); and *Pinto v. States Marine Corp.*, 296 F. 2d 1 (2d Cir. 1961), cert. denied 369 U.S. 843, 82 S.Ct. 874, 7 L.Ed. 2d 874 (1961), wherein the Second Circuit drew a distinction between negligence and unseaworthiness.

³⁰ *Guarracino v. Luckenbach Steamship Co.*, 333 F. 2d 646, 648 (2d Cir. 1964), cert. denied 379 U.S. 946, 85 S.Ct. 439 (1964).

³¹ 370 U.S. 165, 82 S.Ct. 1266, 8 L.Ed. 2d 412 (1961).

from *Cookingham v. United States*³² and *Poignant v. United States*.³³ The *Morales* decision has since been subjected to attempts at harmonizing.³⁴

In attempting to synthesize the issues involving unseaworthiness and negligence and their interrelation, one is left with the definite impression that the question will again have to be presented to the courts for determination, as present decisions are both conflicting and confusing. Ultimately it is to be hoped that a distinction will be drawn between the two classes of cases and that the present trend of merging the two remedies into one will be reversed. Seaworthiness within the field of the general maritime law, and negligence as applied under the Jones Act and the Longshoremen's and Harbor Worker's Act afford ample remedies to the parties covered by the respective acts and by the strict liability imposed upon the owner of an unseaworthy vessel. But by allowing recovery under theories that mix the two remedies the courts are creating an additional remedy not granted by Congress when it adopted the Jones Act and the Longshore Act. If future decisions follow the *Ferrante* and *Thompson* cases, longshoremen will be in a position to expand their remedy against their employer by indirection, thus obtaining what they are not allowed by direct suit against the stevedore employer. The fact that the *Morales* decision was not overruled or directly affected by the *Ferrante* and *Thompson* decisions may hold the answer to the solution of this issue.

³² *Supra* n. 18.

³³ 225 F. 2d 595 (2d Cir. 1955).

³⁴ See *Castro v. Moore-McCormack Lines*, 325 F. 2d 72, 74 (2d Cir. 1963). Also *Gainor v. Longview Victory*, 226 F. Supp. 912, 916 (D.C. Va. 1963), *affd.* 338 F. 2d 959 (4th Cir. 1964).