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INSUFFICIENCY OF CREW AT TIME AND PLACE AS UNSEAWORTHINESS

Under the doctrine of unseaworthiness a seaman may recover compensatory damages against his ship[1] for personal injuries sustained as a result of the shipowner's failure to provide an adequate crew.[2] Overall sufficiency of crew has been the only standard required in the past. However, in view of Supreme Court holdings[3] concerning seamen's recovery for injuries resulting from defective equipment, it is possible that the shipowner will, in the future, be required to allocate sufficient manpower to particular tasks as well as to have a sufficient crew for the ship as a whole.

Overall sufficiency of crew was required by a majority of the court in the recent case of *Waldron v. Moore-McCormack Lines, Inc.*[4] During the docking of defendant's vessel, S.S. Mormacwind, the third mate directed James Waldron and Walter Chowaniec, able-bodied seamen, to let out an additional mooring line. This line was a fit eight-inch manila rope weighing over 100 pounds. While Waldron and Chowaniec were hauling the line across the steel deck Waldron fell and injured his back.[5]

There was expert testimony[6] in the district court to the effect that

[1]As stated in *The Osceola*, the source of the modern unseaworthiness doctrine: "[T]he vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. 158, 175 (1903).

[2]A shipowner's general duty with respect to seamen is to furnish a vessel, equipment, and crew reasonably fit for their intended use. The duty is independent of the exercise of due care. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939); Beadle v. Spencer, 298 U.S. 124, 128 (1936); The Arizona v. Anelich, 298 U.S. 110 (1936); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); The Osceola, 189 U.S. 158 (1903); The H.A. Scandrett, 87 F.2d 708 (2d Cir. 1937). The shipowner's actual or constructive knowledge or control over the unseaworthy condition is not essential to his liability. Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953); Balado v. Lykes Bros. S.S. Co., 179 F.2d 943 (2d Cir. 1950); *cf.*, Misurella v. Isthmian Lines, Inc., 215 F. Supp. 857 (S.D.N.Y. 1963). The duty is nondelegable, Dixon v. United States, 219 F.2d 10 (2d Cir. 1955); continuous, Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); and noncontractual, LeGate v. The Panamolga, 221 F.2d 689 (2d Cir. 1955); Poignant v. United States, 225 F.2d 595 (2d Cir. 1955). However, "while the duty to furnish a seaworthy vessel is an absolute, inalienable, nondelegable and continuing duty of the shipowner it does not make him an insurer of the safety of his crew." Provenza v. American Export Lines, Inc., 324 F.2d 660, 662-63 (4th Cir. 1963).

[3]See, Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

[4]356 F.2d 247 (2d Cir. 1966), *cert. granted*, 385 U.S. 810 (1966).

[5]The Mormacwind was adequately manned overall. Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247, 248 (2d Cir. 1966).

[6]Waldron's maritime expert, Dewey Darrigan, a licensed captain for 25 years, testified that the job of carrying the line required 3 or 4 men. *Ibid.*

three or four men rather than two were required to carry the line in order to constitute "safe and prudent seamanship." But the trial judge refused to submit to the jury Waldron's claim of unseaworthiness[7] based on the evidence that the defendant failed to provide adequate manpower for the *particular* task in which Waldron was injured.

On appeal the Court of Appeals for the Second Circuit, in a two-to-one decision, affirmed. The majority said that "if the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries" caused by a nonnegligent order of an officer of the ship.[8] It is implicit in the court's holding that in the absence of proof of an officer's incompetence or negligence, overall sufficiency of manpower aboard ship is a complete defense to liability for unseaworthiness for an injury arising out of shortage of personnel in the performance of a particular task.

The dissenting judge rejected the view that overall sufficiency is the only test for unseaworthiness based on sufficiency of crew. The dissent argued that insufficiency of crew at the *time and place* of the injury also establishes a ship's unseaworthiness, regardless of whether or not the ship as a whole is adequately manned.[9]

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[7]Waldron's claims of negligence and unseaworthiness apart from the one discussed in the text were submitted to the jury, which returned a verdict for the shipowner. Claims of negligence under the Merchant Marine Act of 1920 (Jones Act), 41 Stat. 1007, 46 U.S.C. § 688 (1958) are customarily tied to claims of unseaworthiness. See, Madsen v. United States, 186 F. Supp. 577 (E.D. Pa. 1960). The Jones Act applied the provisions of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1954), to seamen's personal injury actions (in personam); the fellow servant rule and the defenses of contributory negligence and assumption of the risk are eliminated as complete bars to recovery. Different statutes of limitation apply to claims of negligence under the Jones Act and to claims of unseaworthiness. See, Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Cummings v. Redeeriaktieb Transatlantic, 144 F. Supp. 422 (E.D. Pa. 1956).

[8]*Supra* note 4, at 251.

[9]The dissent also argued that the shipowner has a duty to prevent the use of his equipment in a negligent or unintended manner. This "improper use" theory has been accepted in certain cases involving longshoremen as a method of circumventing the Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1957), which would otherwise prohibit direct action by a longshoreman against his employer. See, Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959); Skibinski v. Waterman S.S. Corp., 360 F.2d 539 (2d Cir. 1966); Reid v. Quebec Paper Sales & Trans. Co., 340 F.2d 34 (2d Cir. 1965); Blassingill v. Waterman S.S. Corp., 336 F.2d 367 (9th Cir. 1964); Scott v. Isbrandtsen Co., 327 F.2d 113 (4th Cir. 1964).

The "improper use" theory is not accepted universally even in cases dealing with longshoremen. *E.g.*, Mascuilli v. United States, 358 F.2d 133 (3d Cir. 1966); Puddu v. Royal Neth. S.S. Co., 303 F.2d 752 (2d Cir. 1962); Billeci v. United States,

The requirement of overall sufficiency originated when cargo owners were the chief beneficiaries of the unseaworthiness doctrine.[10] The doctrine provided cargo owners, who were obviously unable to oversee the actual transit of their cargo, with a remedy for loss or damage to cargo which did not require proof of negligence. Because of the predominant concern for overall adequacy aboard ship, the unseaworthiness doctrine focused on the ship as a whole rather than on crewmen's particular tasks.[11] Dictum in *The Osceola*,[12] adopted by a long line of subsequent cases,[13] established crewmen as the principal beneficiaries of the unseaworthiness doctrine. The change of emphasis from cargo owner to crewman brought about a shift in the focus of the doctrine from the ship as a whole to particular tasks aboard ship, especially those involving equipment.[14]

The overall sufficiency standard with respect to equipment was first attacked in *Mahnich v. Southern S.S. Co.*,[15] in which the Supreme Court held a shipowner liable for his failure to furnish reasonably fit gear at the time and place of its use. As stated in *Mahnich*, "[T]he exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise requires that safe appliances be furnished when and where the work is to be done." [16] In *Mahnich*, the Court expressly rejected the defense that defendant's ship was adequately equipped overall.[17] Mahnich was injured when he fell from staging that collapsed upon the parting of defective rope selected by the mate. Sufficient supplies of proper

298 F.2d 703 (9th Cir. 1962); Arena v. Luckenbach S.S. Co., 279 F.2d 186 (1st Cir. 1960); Goodrich v. Cargo Ships & Tankers, Inc. 241 F. Supp. 332 (E.D. La. 1965).

[10]See, The Caledonia, 157 U.S. 124 (1895); The Ethel, 8 Fed. Cas. 798 (No. 4540) (D.E.D.N.Y. 1871); Work v. Leathers, 97 U.S. 379 (1878); The Gentleman, 10 Fed. Cas. 190 (No. 5324) (D.S.D.N.Y. 1845). For historical background, see generally, Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORN. L.Q. 381 (1954); Lucas, *Flood Tide: Some Irrelevant History of the Admiralty*, 1964 SUP. CT. REV. 249, 299.

[11]Judge Peters in Walton v. The Neptune, 29 Fed. Cas. 142 (No. 17135) (D. Pa. 1800), discusses the ancient codes and concludes that they imposed no duty upon the shipowner to furnish a fit ship for the benefit of seamen, and that those codes governed American maritime law.

[12]189 U.S. 158 (1903).

[13]*E.g.*, Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); The H. A. Scrandrett, 87 F.2d 708 (2d Cir. 1937).

[14]*Supra* note 2. By statute the shipowner's obligation to the cargo owner, however, is merely "to exercise due diligence . . . to make [the] vessel seaworthy. . . ." Harter Act, 27 Stat. 445 (1893), 46 U.S.C. § 190 (1958).

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

[16]*Id.* at 103.

[17]*Ibid.*

quality rope were aboard ship, but because such proper rope was not used when and where rope of that quality was required, the ship was rendered unseaworthy. The significant fact is that the ship was rendered unseaworthy because Mahnich was given defective rope irrespective of whether proper rope could have been given him. Just as cargo owners did not have to prove how their goods were lost or damaged, the seaman in *Mahnich* was not required to prove how the rope became defective or in what manner he acquired it. *Mahnich* represented a giant step towards enlarging the shipowner's duty to crewmen, but the rationale of its holding that the owner is liable for defects at a particular "time and place" has been confined to cases involving defective equipment, and has not been extended to cases involving crew.[18] Such a narrow construction of the time and place doctrine is hardly in keeping with the Supreme Court's consideration of the unseaworthiness doctrine as derived from and shaped to meet the hazards of the seaman's employment. In *Reed v. Yaka* the Supreme Court referred to "[T]he hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of unseaworthiness. . . ." [19]

Aside from consideration of the humanitarian policy there is no clear case precedent for applying the time and place test to cases involving crew. There are only two other reported cases, besides *Waldron*, involving the question of the allocation of insufficient crew at a particular time and place. Neither case adopted the time and place rationale suggested by the *Waldron* dissent, although the more recent of the two reached what might be called a time and place result. *The Magdapur*,[20] a pre-*Mahnich* case, was given primary weight by the majority in *Waldron* because it decided the precise question presented in *Waldron*. In *The Magdapur*, one of three crewmen ordered to take in a mooring wire was injured when a turn of the wire flipped up and struck him. The court stated that:

> Seaworthiness doubtless comprehends the providing of an adequate and competent crew, and it has always been the rule that a seaman who suffers personal injuries from unseaworthiness may recover damages. . . . But the facts here show that at the time the

[18]Mr. Justice Douglas stated that there is "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 339 (1955).

[19]Reed v. The Yaka, 373 U.S. 410, 413 (1963).

[20]3 F. Supp. 971 (S.D.N.Y. 1933).

> libelant was hurt there were men enough on the vessel to do the work at hand. . . . The error was that of the chief officer in assigning to the particular task too few of the men available for work. It cannot be said that the ship was undermanned at the time.[21]

In *American President Lines, Ltd. v. Redfern*,[22] the watch officer ordered Redfern to open the large manual gate valves near the bottom of the hull, an operation that normally required two men.[23] In struggling alone to open one of the valves, Redfern "popped his shoulder." The ship as a whole was adequately manned.[24] But Redfern recovered in the lower court, and his recovery was affirmed on appeal to the Ninth Circuit, which held that defendant's ship "was not reasonably fit for service because she was improperly manned—'a classic case of an unseaworthy vessel.'" [25] The court relied exclusively on *June T., Inc. v. King*,[26] but that case merely held that *overall* insufficiency of manpower aboard ship renders the ship unseaworthy. No issue as to insufficiency of crew at a particular task was presented in *June T.*[27] Although its holding was obscured by a misinterpretation of the "classic" case, *Redfern* reached a time and place result. The court intimated that Redfern had been given a defective crew: "A stuck sea valve . . . is suitable only if operated by 2 men; otherwise, it constitutes a dangerous condition." [28] The court further observes that "Redfern sustained personal injuries because of the dangerous condition." [29] These cryptic statements virtually made the shipowner an insurer of the safety of the crew members. Whether the court intended to go that far is not clear, especially in view of its muddled interpretation of *June T.* Nevertheless, *Redfern*'s holding, that an insufficient allocation of crewmen to perform a particular task renders the ship unseaworthy, is compatible with *Mahnich* and its "humanitarian" thrust.

If the unseaworthiness doctrine is to apply to crewmen at all, they,

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21*Id.* at 972.

22345 F.2d 629 (9th Cir. 1965).

23*Id.* at 631.

24There was no claim of any overall shipboard shortage of manpower.

25345 F.2d at 632.

26290 F.2d 404 (5th Cir. 1961) (one crew member left the ship, leaving only 2 men to handle the cables in which plaintiff lost 3 fingers).

27See, DeLima v. Trinidad Corp., 302 F.2d 585 (2d Cir. 1962); Madsen v. United States, *supra* note 7; Scheffler v. Moran Towing & Trans. Co., 68 F.2d 11 (2d Cir. 1933); In re Pacific Mail S.S. Co., 130 Fed. 76 (9th Cir. 1904); The Gentleman, *supra* note 10.

28345 F.2d at 631.

29*Ibid.*