Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster

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EXPANDING THE WARRANTY OF SEAWORTHINESS: SOCIAL WELFARE OR MARITIME DISASTER

I. INTRODUCTION

It is not uncommon for the Supreme Court to place its mantle of protection over certain groups within our society. One such group, a favorite of long standing with the Court, consists of the merchant seamen and the longshoremen. The mantle for their protection is the so-called "warranty of seaworthiness." This "warranty," a remedy for the maritime worker injured in his employment, is the subject of this comment. An attempt is made to trace its development, fathom its true nature, and discover its elusive limitations. Of chief importance will be to decide if the Court, in creating the warranty, is not somewhat like the hapless Dr. Frankenstein in that its initially noble experiment has grown out of proportion into a monster which places its victims, the shipowners, in fear of where it will strike next.

II. THE COURT CREATES THE WARRANTY OF SEAWORTHINESS

It would not be unwarranted to analogize the attitude of the courts toward seamen and other maritime workers, with their attitude toward young children. In the same spirit that courts have developed such humane rules of law as the "playground" and "attractive nuisance" doctrines\(^1\) which frequently impose the responsibility for a child's natural carelessness upon a landowner, they have made shipowners virtual insurers of the physical safety of their work gangs and crews. Judicial concern for the maritime worker is deeply rooted in the history of the law. In 1823, Mr. Justice Story admonished the courts to "watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached."\(^2\)

A contemporary of Story, Judge Ware, also cautioned that "the spirit of the law is accommodated to the character of the sailor..."\(^3\)

\(^1\) Restatement, Torts § 339 (1934).
\(^3\) The Nimrod, 18 Fed. Cas. 250, 253 (No. 10267) (D. Me. 1822).
The "accommodation" of which the judge spoke was not begun in earnest until the present century. Throughout the nineteenth century the claims of injured seamen were subjected to traditional tort principles, and recovery could not be had even though the ship or its gear was defective ("unseaworthy" in maritime parlance) and in fact caused the injury, unless there was a showing of personal negligence on the part of the shipowner. Eventually, however, the fellow servant rule, a frequent bar to recovery in shipboard accidents, was partially abrogated so as to impose liability on the owner for the negligence of the ship's master. Finally, the doctrine of respondeat superior was brought aboard to allow recovery for injuries stemming from unseaworthiness created by the negligence of a mate. In the midst of these advances, however, there was no mention that the shipowner had any absolute legal duty to provide for his seamen a ship with proper appliances and rigging free from any dangerous conditions. Such a duty, or "warranty" as it is called, is supposed to have been born from dictum in The Osceola, an opinion written by Mr. Justice Brown in 1903, wherein it was stated, as one of four maritime rubrics, that "the 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."

This rule did not, however, determine the result in The Osceola, and it has been recognized that Mr. Justice Brown merely intended to apply a standard of ordinary care to the shipowner, and not to create any warranty or absolute duty running to the seaman from the ship. The Osceola dictum next appeared in 1922 in Carlisle Packing Co. v. Sandanger, a case which allowed a seaman to recover for injuries sustained in an explosion when he poured gasoline into the ship's stove from a can incorrectly labeled coal oil. Basing the decision on this dictum, Mr. Justice McReynolds stated that "without regard to negligence, the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline. . . ."

8. The four "propositions" of Mr. Justice Brown were a codification of the existing English and American authorities regarding a seaman's rights against the vessel and its owners for injuries incurred during his employment.
10. The plaintiff was denied recovery since he was injured due to an order improvidently given by the master. The controlling proposition was number four, to the effect that an injured seaman could not recover for his injuries, except to the extent of maintenance and cure, if, in fact, they were caused by a negligent act of the master or crew. Ibid.
11. Note, 76 HARV. L. REV. 819 (1963). The only authority cited by Mr. Justice Brown in support of his second proposition is Scarff v. Metcalf, 107 N.Y. 211, 13 N.E. 796 (1887), in which a shipowner was held liable to a ship's mate because of the owner's negligent failure to provide medical attention.
13. Id. at 259, 42 S.Ct. at 477.

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This statement has been heralded as the first precise declaration by the Court that a shipowner is liable for injuries caused by defects aboard, even in the absence of negligence. It is more reasonable, however, to interpret Mr. Justice McReynolds' statement as meaning that, although the seaman could maintain no action under notions of common law negligence (since maritime law should have governed in the state court below) he could still have recovered upon maritime principles.\(^4\) Furthermore, the Court had no need to resort to any theory of strict liability since the shipowner's negligence was quite apparent and satisfactorily proven.\(^5\) Therefore, looking to dicta in *The Osceola* and *Carlisle Packing* cases as authority for the proposition that a shipowner is liable without fault to seamen injured aboard his vessel is to stand on dangerous ground.

After a considerable lapse of time, the Court in *Mahnich v. Southern S.S. Co.*\(^6\) unequivocally stated that a shipowner was bound by an absolute duty to indemnify his seamen for injury caused aboard ship, under a "warranty of seaworthiness." In *Mahnich*, a seaman was injured in a fall from a staging which gave way when a line of patently defective rope split. The rope had been put into use by the mate and the boatswain in negligent disregard of its obviously rotted condition. At this point the Court could have imposed liability on the shipowner through the doctrine of respondeat superior, which had been incorporated into the maritime law.\(^7\) They went much farther, however, and declared that the shipowner was liable for injuries caused by defective or unseaworthy appliances although he had exercised due care. They also decried the applicability of the fellow servant rule and the defense, assumption of the risk in shipboard accidents. The Court rested its decision upon *The Osceola* and *Carlisle Packing Co. v. Sandanger* cases which, as previously noted, are not reliable support for a rule of absolute liability. The Court came closer to the real basis for their decision in pointing out that the seaman’s safety was the responsibility of the shipowner because of the nature of the former’s work and the rigorous discipline the seaman is subjected to because of life at sea.\(^8\) Such humane considerations, which give rise to a greater duty on the part of the shipowner, compare favorably with the concern voiced more than a century earlier by Judges Story and Ware, although based upon the modern realities of a unique and dangerous occupation. The Court in *Mahnich*, no doubt, was further motivated to construct some sort of remedy since the statute of limitations under the Jones Act had expired, barring the

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\(^{14}\) The trial court explained to the jury that the plaintiff's action was based on negligence, and further instructed them according to the common law rules. This was error, since the general rules of the maritime law should have been applied at the trial level, although the action was in a state court. Since a verdict for the plaintiff would still have resulted had the correct law been used, the error in no way prejudiced the defendant, and the verdict was allowed to stand. *Ibid.*

\(^{15}\) *Gilmore & Black, Admiralty* § 6-40 (1957).

\(^{16}\) 321 U.S. 96, 64 S.Ct. 455 (1944).

\(^{17}\) The Julia Fowler, 49 Fed. 277 (S.D.N.Y. 1892); The Frank & Willie, 45 Fed. 494 (S.D.N.Y. 1891).

\(^{18}\) 321 U.S. 96, 103, 64 S.Ct. 455, 459 (1944).
plaintiff's statutory claim. This is additional evidence that the Court was primarily concerned with promulgating a new, humanitarian social policy to benefit the injured seaman by transferring his loss to the shipowner, and therefore, to the insurance carrier, in every case.

The doctrine that came from *Mahnich* was singular in several respects. To begin with, there is no comparable remedy for accidents ashore, with the exception of workmen's compensation which, though also resulting in absolute liability, is subject to limitations on the amount recoverable. No such limitations attach to a recovery under the warranty of seaworthiness. Perhaps the attractive nuisance doctrine relating to children's accidents comes closest to the warranty in imposing strict liability, but even there, a landowner's liability is based upon a far less stringent standard than that applied to the shipowner for accidents resulting from defective conditions aboard his vessel. Secondly, the Court's conception of a seaworthy ship, used in constructing the warranty, appears to be considerably broader than the classic definition given to that term in construing marine insurance policies, that is, a seaworthy ship is one competent to weather the ordinary perils of the sea with the cargo aboard. It was to be nearly twenty years until the Court expounded a test for seaworthiness that would be realistic and reasonable to the shipowners.

Two years after *Mahnich* the Court reaffirmed their rule that a shipowner has an absolute duty to furnish a seaworthy ship in *Seas Shipping Co. v. Sieracki*. The Court buttressed this conclusion by citing the *Mahnich* case and, once again, the dicta from *The Osceola* and *Carlisle Packing* taken out of context. The unique feature of *Sieracki*, however, is that the plaintiff therein was not a seaman, but a longshoreman injured aboard ship during the loading operation when a shackle supporting the cargo boom broke. The Court sustained recovery, ruling that a shipowner's warranty of seaworthiness extended not only to seamen, but to longshoremen as well. To support this somewhat surprising conclusion, the Court stated that historically the work of loading and unloading the ship was done by the crew. Therefore, since the longshoreman was performing the seaman's work, and subjecting himself to the ship's hazards, he was entitled to use the seaman's tort remedies.

Few decisions have been so vulnerable to criticism as *Sieracki*. Research has shown that the Court's historical scholarship was quite inaccurate and that, in fact, the loading and unloading of a ship was from

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19. The Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), gave the seaman a cause of action against his employer for negligence. All of the federal statutes applicable in cases of personal injury to railway employees were also made applicable to seamen's actions under the Jones Act. Note, however, that a seaman's action under the maritime law based on unseaworthiness is separate and distinct from the cause of action given him under the Jones Act. In practice, a seaman suing for personal injuries will plead both a count for unseaworthiness and a count under the Jones Act. GILMORE & BLACK, ADMIRALTIES § 6–23 (1957).
23. *Id.* at 99, 66 S.Ct. at 880.
the earliest days of shipping not the work of the crew, but the task of the longshoremen, or their historical counterparts. In addition, there is evidence that Congress disapproved of an expanded definition of seaman which would include shoreworkers and make available to them a seaman’s remedies. In 1926, in International Stevedoring Co. v. Haverty,25 the Court broadly interpreted the word “seaman” so as to give a longshoreman a cause of action under the Jones Act. In the next year Congress discredited the Haverty case by enacting the Longshoremen’s and Harbor Workers’ Compensation Act26 which made the longshoreman’s remedies under that act exclusive as against his employer, thereby negating any rights he might claim as a “seaman” under the Jones Act. It would seem to follow that if a longshoreman is not a seaman for the purposes of the Jones Act, he is not a seaman under the maritime law generally, and cannot claim the benefits of a seaman’s rights thereunder, including the warranty of seaworthiness. Finally, one senses that it is unfair to equate the longshoreman with the seaman, since the former is not subject to the perils of the sea, but goes aboard the ship when it is safe in port; yet he is given the same extraordinary remedy as is the seaman who is exposed to a more rigorous life and discipline. No doubt the Court in Sieracki was aware that the legal basis for their decision was unsure and open to controversy, but the desire to make a ruling that would reflect a humanitarian policy was overriding. The Court flatly stated that the shipowner was in a better position “to distribute the loss over the industry,”27 and thereby justified a decision primarily based on their own notions of good social policy. At this point, one may chastise the Court for legislating in the area of public welfare and deciding a case without good precedent, but one must realize that the Court had adopted a new role more deeply concerned with the misfortunes that may beset the workers in the maritime industry, than adherence to common law negligence principles and stare decisis. At any rate, the seaman was no longer the sole “ward of the admiralty”;28 he had to make room for the longshoreman.

26. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958). The purpose of the Longshoremen’s Act was to provide for compensation to maritime workers who were injured on the navigable waters of the United States where recovery of compensation might not validly be provided by state law. Several decisions prior to the passage of this act had held that seamen and longshoremen who were injured aboard a ship in navigable waters could not constitutionally have the benefit of state workmen’s compensation acts, even if Congress had so provided, for this would be an unlawful delegation of Congressional legislative power to the states. Consequently, Congress set about drafting a federal compensation act to cover maritime workers where state acts could not. The coverage under the Longshoremen’s Act was limited so as to exclude seamen who preferred to remain outside of its provisions, having unique remedies of their own. Noguiera v. New York, N.H. & H. R.R., 281 U.S. 128, 50 S.Ct. 303 (1930).
28. After recounting the hardships incumbent upon seamen, Mr. Justice Story added, “They are emphatically the wards of the admiralty. . . .” Harden v. Gordon, 11 Fed. Cas. 480, 485 (No. 6047) (C.C. Me. 1823).
In the wake of Sieracki, the courts moved to extend the shipowner's absolute liability. He was made liable for injuries caused by unseaworthy equipment brought on board by the stevedoring company to whom the owner had surrendered control of the ship. Furthermore, he was made liable even if the unseaworthiness was caused by the negligence of the injured longshoreman himself. As the coup de grâce, he was made liable on the theory of unseaworthiness for injuries received by a longshoreman who was assaulted by a fellow worker during the unloading of the owner's vessel. Thus, virtually any failure in the ship's equipment or personnel was enough to make the shipowner liable under his warranty for injuries caused thereby.

III.

THE SEARCH FOR LIMITATIONS

It should be apparent at this point that the warranty of seaworthiness was in need of precise limitation. From Mahnich and Sieracki one could theoretically argue that the warranty encompassed all shipboard accidents, that the shipowner's responsibility was that of an insurer, and that common law notions of what is actionable negligence had been driven from personal injury actions in admiralty. Obviously, such a doctrine would be revolutionary, and it was predictable that the lower courts, less concerned with making law than with giving practical interpretations to nebulous Supreme Court decisions, would attempt to carve out exceptions to the warranty based upon traditional negligence law. Such an exception was termed "transitory unseaworthiness," best described by the leading case of Cookingham v. United States. In that case, the ship's cook sued the shipowner for injuries received when he slipped on some Jello while descending a stairway to the chill box. His allegation that the presence of the Jello made the stairway unseaworthy was rejected by the Third Circuit which readily distinguished Mahnich, since there, the injury-causing defect was inherent in an essential part of the ship's gear, whereas the Jello in Cookingham was a foreign substance which had temporarily intruded upon a perfectly sound stairway. The court went on to reject the notion that the shipowner was an insurer against fortuitous occurrences aboard ship which result in temporarily unsafe appliances where the owner had no knowledge of, or control over, their happening, and did not have a reasonable opportunity

30. See, e.g., Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960), wherein a longshoreman was using a payloader to unload cargo, and by his own negligence, and contrary to the instructions of his superior created an overhang of solidified potash which fell on him causing his death. Recovery against the shipowner was allowed although the unseaworthiness was caused by the decedent himself.
31. Smith v. Lauritzen, 201 F. Supp. 663 (E.D. Pa. 1962). See also, Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 75 S.Ct. 382 (1955), wherein it had already been held that a shipowner's liability for an assault by one violent crewman upon another was encompassed by the seaman's remedy for unseaworthiness.
32. 184 F.2d 213 (3d Cir. 1950).
to correct them.\textsuperscript{33} \textit{Cookingham} was, without doubt, a "just" decision in that it used the traditional standard that a man without fault should not pay, but was it contrary to the prevailing Supreme Court policy of assigning the loss to him who could best afford it? Ten years later the Court answered that question by discrediting \textit{Cookingham} in \textit{Mitchell v. Trawler Racer, Inc.},\textsuperscript{34} the case which began the current confusion surrounding the nature of the warranty. \textit{Mitchell} was also a case of transitory unseaworthiness quite similar on its facts to \textit{Cookingham}. The libelant, a seaman, in attempting to reach a ladder which was hung over the side, slipped on the ship's rail and was injured. It was later discovered that the rail was covered with slime \textit{from} the earlier unloading operations. At the trial level, the judge instructed the jury that there could be no recovery unless the slime had been on the rail for a period of time long enough for the owner to have been able to discover and remove it.\textsuperscript{35} The jury found for the shipowner on the unseaworthiness claim, and the plaintiff appealed alleging error in the charge. The Supreme Court reversed, reiterating that the duty to furnish a seaworthy ship is absolute and unmitigated by a showing of due care. The crux of their decision, however, was that actual or constructive notice of a temporarily unseaworthy condition is not essential to a shipowner's liability.\textsuperscript{36} A superficial interpretation of this holding would be that the length of time an unsafe condition was present before the accident is of no significance, and should not be considered in determining the shipowner's liability. Although this reading of \textit{Mitchell} would represent an extreme departure from traditional negligence principles, it would be consistent with the Court's humanitarian policy, as expressed in \textit{Mahnich} and \textit{Sieracki}. If the shipowner is to be visited with absolute liability for seamen's injuries because of his ability to "spread the loss," then it would seem to follow that lack of reasonable notice of an unsafe condition is no defense. However, one senses an opposite current in the \textit{Mitchell} opinion, for although the Court speaks of liability without fault, they also disclaim that the owner's duty is to furnish an accident-free ship. He need only provide a vessel reasonably fit for its intended use.\textsuperscript{37} This language suggests that the Court at least considered the common law standard for liability. In any event, \textit{at least} one lower federal court subsequently rejected what we have termed the superficial interpretation of \textit{Mitchell}, and continued to consider the duration of a temporarily unsafe condition prior to the accident as relevant. Indeed, the Second Circuit evolved a sort of "reasonable fitness" test out of \textit{Mitchell} and allowed the "duration factor" to go to the jury along with the other facts to see if the injured seaman had been provided a place to work in reasonable safety.\textsuperscript{38} To codify the statement of the law as expressed in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 215.
\item 362 U.S. 539, 80 S.Ct. 926 (1960).
\item 362 U.S. 539, 549, 80 S.Ct. 926, 933 (1960).
\item \textit{Ibid.}
\item Pinto v. States Marine Corp., 296 F.2d 1 (2d Cir. 1961); Blier v. United States Lines Co., 286 F.2d 920 (2d Cir. 1961).
\end{enumerate}
\end{footnotesize}
Mitchell into such a precise test is certainly a *tour de force*, for the Mitchell opinion lacks clarity. But to eliminate the "duration factor" from consideration on the issue of unseaworthiness would be to demand extraordinary safety measures aboard ship — both impractical and impossible, if damage claims are to be avoided. To do so would expose the Court as repudiating the whole law of negligence as it developed at common law in favor of bald policy decisions, a role better suited for the legislature.

The Court in Mitchell hinted that a more flexible standard may be used to determine a ship's seaworthiness, rather than holding its owner strictly liable for all shipboard accidents. In the next important case in the seaworthiness series, *Morales v. City of Galveston*, the Court not only put its new test into practice, but placed precise limitations on the scope of the shipowner's warranty. In *Morales*, the plaintiffs were longshoremen who had been working in the hold of a ship which was receiving a cargo of grain. This grain had been fumigated ashore and gave off vapors which, because of the lack of ventilation, became noxious and injured the plaintiffs. The trial court found for the shipowner on the unseaworthiness claim, and the Supreme Court affirmed. The Court concluded that the ship had not been rendered unseaworthy from the concentrated fumes, and remained "reasonably fit for her intended service" because the injuries were caused by the "isolated and completely unforeseeable introduction of a noxious agent from without," and not by "the ship, its appurtenances or its crew." (Emphasis added.) Since Morales would appear to be a case of transitory unseaworthiness, one immediately senses that it is inconsistent with the holding in Mitchell. The Court, however, pointed out that in Mitchell they were not concerned with the ultimate question of liability, that is, the unseaworthiness of the trawler, Racer. Rather, the only issue before them in that case was the correctness of the instruction given by the trial judge. Conceivably then, the jury on remand could still have found for the shipowner on the facts, but under the proper criteria. By this distinction, the Court convinces us that they were not imposing absolute liability for the transitory unseaworthiness in Mitchell, but were merely objecting to instructions that were too inflexible. These instructions thereby prevented the jury from giving equal weight to all the facts, including the duration of the unsafe condition, in deciding whether the ship was reasonably fit for her intended service. Indeed, it has been pointed out that since the Court in Morales did not focus solely upon one point in time — the moment of the injuries — in determining whether the presence of the vapors made the hold unseaworthy, it was tacitly confirming that the "duration factor" can be relevant on the issue of unseaworthiness.

42. Id. at 168-69, 82 S.Ct. at 1229.
43. Note, 61 Mich. L. Rev. 982, 985-86 (1963). Such reasoning would show that the interpretation given to Mitchell by the Second Circuit in the *Pinto* and *Biter* cases was correct.
The real thrust of the *Morales* opinion is that a shipowner's warranty of seaworthiness is confined to the ship or the ship's services. The Court listed circumstances which might render a ship unseaworthy, such as defective gear, appurtenances in disrepair, or an unfit crew — defects which would be in the ship. Alternatively, an improper method of loading or stowing cargo would also render the vessel unseaworthy, for these are defects in the ship's services. The contaminated grain was not appurtenant to the ship, nor did the noxious fumes arise from improper loading. To the contrary, the grain was cargo, and its defect was inherent. Therefore, the cause of the injury, the contaminated grain, was not within the scope of the warranty, and if liability was to be found at all, it would have to be on the theory that the lack of a forced ventilation system in the hold made the ship unseaworthy. To decide this question, the Court apparently used the test of foreseeability, a notion borrowed from traditional negligence law. Not only did they describe the introduction of the noxious fumes into the hold as "completely unforeseeable" and an "isolated" occurrence, but earlier in the opinion, listed certain facts found at trial on the basis of which the owner could be reasonably convinced that the grain would not become contaminated in the hold. In the light of these facts, the Court concluded that the absence of a forced ventilation system in the hold did not render the vessel unseaworthy. Therefore, without saying so directly, the Court reasoned that the accident was not within the purview of foreseeable risk. This interpretation of the majority opinion is buttressed by the rationale of the dissenters who used the same test — foreseeability — but concluded that the owner had sufficient knowledge of similar injuries to have been able to anticipate the accident.

If this analysis of *Morales* is correct, is it not running counter to the Court's statement in *Mitchell* that there is "a complete divestment of seaworthiness liability from concepts of negligence"? *Mahnich* and *Sieracki* are deeply ingrained in the maritime law, and these cases refer to the shipowner as liable without fault for unseaworthiness. In this light, one cannot seriously interpret *Morales* as rejecting the policy rule of strict liability in favor of a form of liability based on negligence. The cases can be reconciled by retaining the rule that a shipowner is absolutely liable for unseaworthiness, but then determining the basic issue of whether a ship is unseaworthy according to traditional negligence law. Using this approach, a jury could decide if a ship were reasonably fit for her intended use by including in their consideration the element of foreseeability to determine

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45. Id. at 171, 82 S.Ct. at 1230.
46. Id. at 169-70, 82 S.Ct. at 1229. The trial court had found that Galveston (where the grain was loaded) used certain safety measures which rendered harmless grain which it had fumigated; that incidents such as that in the *Morales* case had been unknown in the city during recent years, and finally that the injury-causing chemical used to spray the grain had never before been used in Galveston. 181 F. Supp. 202, 205 (S.D. Tex. 1959).
whether the shipowner could have added certain safeguards to the ship (or its services) in order to prevent an unsafe condition. If the ship were then found unseaworthy, the owner would be held absolutely liable, meaning that he could not raise the defenses of contributory negligence, assumption of the risk, or the fellow servant rule in mitigation of his total responsibility. Neither could he protest that he was without personal or constructive fault, nor that he acted with all due care in, for example, subjecting the ship and its gear to reasonable inspection or tests. This approach would afford the shipowner some measure of relief in cases such as Morales, where no man could reasonably detect the injury causing defect. This is, not to say that by the introduction of one scintilla of traditional negligence law into unseaworthiness cases, one can condone the policy which gave rise to the warranty. A rational approach is sorely needed to limit the occasions when a ship may be considered unseaworthy, lest the burden on the shipowner become crushing.

Although Morales seems to be a "good" decision in that it puts some equities on the shipowner's side, it may be unwise to rely on any conclusions from that case, for it seems that the Court has forgotten what it said there. If that case represented a new policy, favorable to the shipowner, or, at least informed him of his obligations under the warranty, then there has been a sharp and sudden reversal in the Court's attitude in light of Gutierrez v. Waterman S.S. Corp.49 In that case, the plaintiff, a longshoreman, was injured on the dock when he slipped on some beans which had been spilled during the unloading operation. It was shown that the beans had been packed in defective bags, some of which were torn at the time of discharging. The First Circuit denied the plaintiff's claim that the ship was unseaworthy because the shipowner had no control over the pier, and did not warrant the condition of the cargo containers.50 The Supreme Court reversed on both points, deciding that defective cargo containers were within the shipowner's warranty of seaworthiness. As authority for this result, so surprising in light of Morales, the Court relied upon Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.51 wherein a longshoreman was injured when a bale of burlap fell on him. The bale was being hoisted by a hook and winch when one of the metal bands around the bale broke, releasing the bale. The defendant shipowner impleaded the stevedoring contractor, alleging that he was liable over for indemnity under his contractual warranty of workmanlike service. The jury found both negligence and unseaworthiness, but failed to hold the stevedoring contractor liable over on his warranty. The Third Circuit considered these findings inconsistent, and reversed that part of the judgment in favor of the stevedore.52 The Supreme Court reversed the court of appeals stating that they had a duty to make the two findings consistent in order to avoid a collision with

50. 301 F.2d 415 (1st Cir. 1962).
52. 289 F.2d 201 (3d Cir. 1961).
the Seventh Amendment's command that disputed questions of fact be left to the jury to decide.\textsuperscript{53} The Supreme Court did so by noting that the Court of Appeals had given two separate bases on which the jury could have found the shipowner liable for negligence and then adding, "so far as we know the jury may have found respondents [shipowners] liable not on either of those two grounds but solely on a third, namely because of defective bands — a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so."\textsuperscript{54}

In the Court's reasoning if the cause of the injury had been the unseaworthiness of the ship (specifically, unseaworthy cargo bands), the owner would have been liable, but could not have collected indemnity from the stevedore — precisely what the jury had held. Thus, a constitutional problem was avoided, but in the process, the Court summarily extended the scope of the shipowner's warranty to cover defective cargo containers. The issue of unseaworthiness was not argued before the Court, nor did they explain their reason for incidentally expanding the shipowner's liability. Since the Court was quite obviously preoccupied with avoiding the possible constitutional problem, their total reliance on \textit{Ellerman} to support the decision in \textit{Gutierrez} seems somewhat unjustified. An even stronger basis for criticizing the result in \textit{Gutierrez} is the fact that the \textit{Ellerman} case was decided prior to \textit{Morales}. It would seem to follow that if the Court was conscious of the fact that they had extended the shipowner's warranty to cargo containers in \textit{Ellerman}, they could not have decided \textit{Morales} the way that they did. In the latter case, unseaworthiness was viewed in terms of the ship only,\textsuperscript{55} and the Court did not hold that defective cargo in itself could make a ship unseaworthy. One writer has stated, "It seems unlikely that the Court would have stretched the doctrine to include cargo containers and then boggled at covering cargo as well."\textsuperscript{56}

The majority in \textit{Gutierrez} blithely includes cargo containers along with parts, appliances, and services, such as the hull, decks, machinery, tools, and stowage, holding them all within the scope of the shipowner's warranty.\textsuperscript{57} Yet one year earlier, the Court in \textit{Morales} drew a neat distinction between contaminated cargo on one hand, and the ship, its appurtenances, or its crew on the other, characterizing the former as "a noxious agent from without"\textsuperscript{58} and excluding it per se from the warranty. Had the shipowner in \textit{Morales} been held liable, it would have been on the basis that his hold

\textsuperscript{53} 369 U.S. 355, 364, 82 S.Ct. 780, 786 (1962). The Court also stated that it is the Seventh Amendment which fashions the federal policy favoring jury decisions of disputed fact questions, citing with approval \textit{Byrd v. Blue Ridge Rural Elec. Co-op.}, 356 U.S. 525, 537, 78 S.Ct. 893, 901 (1958). The factual question in \textit{Ellerman} was whether the stevedoring contractor should be liable over to the shipowner, because the injury was caused by his negligence.

\textsuperscript{54} 369 U.S. 355, 364, 82 S.Ct. 780, 786 (1962).

\textsuperscript{55} That is, the shipowner's liability hinged on whether or not the lack of a forced ventilation system in the hold made the ship unseaworthy. See text accompanying notes 38-40 supra.

\textsuperscript{56} \textit{The Supreme Court, 1962 Term}, 77 HARV. L. REV. 95, 97 (1963).

\textsuperscript{57} 373 U.S. 206, 213, 83 S.Ct. 1185, 1190 (1963).

\textsuperscript{58} 370 U.S. 163, 171, 82 S.Ct. 1226, 1230 (1962).
lacked a ventilation system, not solely because of the presence of contaminated grain aboard. Surely, if we are to have consistency, the same result should be reached in the case of a defective cargo container brought in from outside the ship. Furthermore, Gutierrez now places the shipowner in a dilemma, for under the Carriage of Goods by Sea Act\(^{59}\) he may not reject cargo brought to him for transport, but may only take exception on the bill of lading to cargo which is not in apparent good order and condition. Once the defective cargo has been thrust upon him, he runs the sole risk of liability for any injury it causes to a longshoreman, and cannot recover indemnity over from the cargo owner since the latter is not held to warrant the condition of his cargo or its containers.\(^{60}\)

The Court in Gutierrez also expanded the scope of the warranty geographically, for they held that it covered maritime injuries ashore, as well as aboard ship.\(^{61}\) This result is not revolutionary, but represents a logical development in the law. It is highly artificial to maintain that a longshoreman injured aboard ship may avail himself of the warranty of seaworthiness, while his fellow worker injured on the pier cannot, particularly since the scope of his job includes activity ashore as well as on the vessel. Furthermore, the Court has been given the jurisdiction to deal with personal injuries ashore that have been caused by the vessel.\(^{62}\) To be sure, one can argue that the injury in Gutierrez was not caused by the ship, but rather by the initial negligence of the shipper and the subsequent failure of the stevedoring contractor to clean up the spilled beans from the pier. The Court, however, has dispelled this argument by the strange conclusion that defective cargo containers alone, may render the ship that carries them unseaworthy.

If nothing else, Gutierrez convinces us that the warranty of seaworthiness is not a static concept, but, in the hands of the Court, has considerable vitality and propensity for change. Indeed, the warranty undergoes a periodic metamorphosis at which time its boundaries are shifted about, and its basic nature altered. After the warranty was created in Mahnich, its growth pattern could be reduced to a series of expansions and contractions. In Sieracki, it was expanded to encompass injuries to longshoremen, and in Mitchell, it was expanded further to include some cases of transitory unseaworthiness. But in Mitchell, there is a glimpse of its true nature when the Court instructs that it does not arise for every shipboard accident, but only for those that render the ship not reasonably fit. In Morales, the warranty was contracted, or, at least, its growth was stopped, for the Court held that it referred only to the ship and did not

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cover injuries received from defective cargo alone. Also in Morales, it is
seen that the warranty was, in fact, related to negligence, for if the ship-
owner could not reasonably foresee a certain defective condition his ship
would not be considered unseaworthy (at least in transitory unseaworthi-
ness cases), and the warranty lay dormant. In Gutierrez, however, it
expanded again, to include defective cargo containers (but not cargo, says
Morales!) and could no longer be viewed solely in terms of the ship.
Furthermore, in Gutierrez, the warranty jumped ashore!

The Court is obviously flexible in their thinking, and may freely
alter the scope and nature of the warranty as current policy dictates. But
at the same time, the warranty emerges as some sort of amorphous blob,
the composition and extent of which is really undiscernible. The ship-
owners are afforded little protection, for what is the extent of their risk?
If they study the Court's opinions, glaring inconsistencies reveal them-
selves, as for example, how can a defective cargo container render the ship
unseaworthy, while defective cargo itself cannot? How, then, can the
shipping companies, and their insurance carriers, effectively anticipate the
situations in which they will be called upon to pay for injuries to their
employees? Also, what is the role of common law negligence in unsea-
worthiness cases? Morales would seem to indicate that it plays a large
part in determining the basic issue of whether a ship is seaworthy, at least
in cases of transitory unseaworthiness. But Morales is unclear, and
generates only speculation on this point. Since the shipowners must live
with the warranty, what is needed is clarity of expression and a set of
precise limitations on the warranty. It might also be suggested that if the
Court's criterion in unseaworthiness cases is a sound public policy, then the
needs of those in the maritime industry have so shifted about that the
shipowners may now be deserving of a little of the Court's bounty.

IV.

REED V. THE S.S. YAKA: THE COURT VERSUS CONGRESS

One facet not yet examined is the Court's reaction to legislative attempts
to eliminate the warranty of unseaworthiness in a given employment rela-
tionship. This was revealed in Reed v. The S.S. Yaka, 63 perhaps the most
controversial of all cases in this area. The plaintiff in Reed was a long-
shoreman injured aboard a ship which had been demised to his employer
under a "bareboat charter." 64 Reed's employment relationship was some-
thing other than the usual. Rather than being employed by a stevedoring
company which, in turn, is hired by an owner or charterer to load or unload
his ship, Reed worked for a company that not only operated ships, but

64. "Demise or Bareboat Charter: In this form the charterer takes over the ship,
lock, stock and barrel, and mans her with his own people. He becomes the owner
pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer
is analogous." GILMORE & BLACK, ADMIRALTY § 4-1 (1957).
also maintained its own force of longshoremen. Given this situation, the employer's liability for Reed's injury should have been easily determined under workmen's compensation, that is, the Longshoremen's Act,\(^65\) the pertinent section of which reads:

The liability of an employer prescribed in section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .  

Since it was apparent that Reed could get no more than compensation from his employer, he resorted to an old admiralty fiction and filed a libel in rem against the ship, naming neither his employer nor the shipowner. The trial court found the Yaka unseaworthy and liable in rem,\(^67\) but the Court of Appeals for the Third Circuit reversed, holding that a vessel could not be liable in rem absent any personal liability of one having an interest in the vessel.\(^68\) Since the unseaworthiness had been solely caused by the charterer, the shipowner was not liable. Nor was the charterer liable who, as Reed's employer, was responsible only for compensation payments, which was Reed's exclusive remedy under the express terms of the Longshoremen's Act. So reasoned the Court of Appeals. The case was appealed to the Supreme Court to determine whether some personal liability is a prerequisite for liability in rem. That issue was never resolved, for the Court concluded that the charterer's compensation liability was not exclusive, and that he could be held personally liable to Reed for unseaworthiness despite the fact that he was also his employer. This result cannot be reconciled with section 5 of the Longshoremen's Act. To arrive at their conclusion, the Court relied upon Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.\(^69\) which held that a shipowner who was liable to a longshoreman for unseaworthiness could recover indemnity from the latter's employer (the stevedore) if he, in fact, had caused the unsafe condition resulting in injury. Thus, a negligent stevedore could be liable in addition to his obligations under the compensation statute. The Court saw no economic difference between this situation and that in Reed.\(^70\) This approach disregards form for expediency. The additional liability in a case like Ryan runs from the stevedore to the shipowner only, and is based on indemnity; the shipowner does not become subrogated to any rights the longshoreman would have against the stevedore in addition to his right to compensation, for there are none. Therefore, it is impossible to cite

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68. 307 F.2d 203 (3d Cir. 1962).
Ryan as authority for giving the longshoreman an extra-statutory right of action against his employer except by viewing the end result in Ryan in a vacuum, disregarding how it was reached. To the contrary, there is language in Ryan flatly stating that under the Longshoremen's Act, an employer's liability is strictly limited to compensation.\(^71\) To be sure, the Court in Reed reaffirmed that a shipowner's obligation to provide a seaworthy ship could not be shifted about or disposed of by contracts,\(^72\) but the Longshoremen's Act is a contract imposed upon him by the will of Congress, and he is entitled to rely on the exclusiveness of liability provision in exchange for becoming absolutely liable for payments on the compensation scale. Surely Congress has the power to supersede any maritime rules by enacting a statute.

The Court, in effect, refused to consider the defendant in Reed an "employer" within the scope of section 5, the exclusiveness of liability provision of the Longshoremen's Act. The apparent reason for this is that the defendant was not only an employer of longshoremen, but also an owner and charterer of ships. The Court, no doubt, viewed this dual relationship as a devious attempt by a shipowner to qualify for limited liability, and divest himself of his absolute duty under the warranty of seaworthiness merely by doing his own stevedoring. To assume, however, that Congress meant to exclude such a unified operation from section 5 of the Longshoremen's Act is presumptuous indeed, for there is nothing in the body of the act to indicate any distinctions between a stevedoring contractor, and a shipowner, or charterer, who hires his longshoremen directly. The Court itself in Sieracki had anticipated that shipowners would do their own stevedoring, and thereby become entitled to limited liability in longshoremen's suits. Referring to the Longshoremen's Act generally, it had said, "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner."\(^73\) (Emphasis added.)

Furthermore, the factual situation in Reed was not novel; it had already been posed in at least two circuit court cases which had been relied on by the Third Circuit in denying Reed's claim against the Yaka. In the most recent of these, Smith v. The Mormacdale,\(^74\) the court had held that a longshoreman's libel in rem against a vessel was effectively a suit against his employer, who was also the shipowner, and that such an action could not be allowed since the benefits provided for the employee under the

\(^{71}\) Referring to § 5 of the act the Court stated:

The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment.


\(^{73}\) 328 U.S. 85, 102, 66 S.Ct. 872, 881 (1946).

\(^{74}\) 198 F.2d 849 (3d Cir. 1952).
Longshoremen's Act constituted the limit of his employer's liability. Such long standing interpretation of the act was described by the Supreme Court in Reed as "blind adherence to the superficial meaning of the statute"; in light of this indictment, the naive must marvel at the lack of insight displayed by two learned circuit courts.

To resolve the issue of whether Congress intended to exclude a combination shipowner-stevedore from the exclusiveness of liability provision of the Longshoremen's Act, some evidence can be found in the reported hearings before a special subcommittee of the House Committee on Education and Labor held in 1956. The purpose of this subcommittee was to reappraise the Longshoremen's Act in light of the Ryan decision. One of those who testified was Arthur Larsen, then Undersecretary of Labor. He explained why an injured longshoreman already entitled to compensation should still be able to avail himself of an action under the maritime law as follows:

Occasionally in a workman's compensation situation a stranger will be involved, a stranger to the compensation, the third-party wrong-doer, and there is no reason why his liabilities should be affected in the slightest by the existence of a workmen's compensation relationship between two other people. (Emphasis added.)

Therefore, in Mr. Larsen's analysis, there must be three actual parties involved before the longshoreman can bring an unseaworthiness claim. In Reed, however, there were only two, the longshoreman and his employer, and the latter was no "stranger to the compensation" since Reed was hired by him directly.

At the same hearings, Albert E. Rice, counsel for the American Merchant Marine Institute testified on behalf of the shipowners. Of particular interest in his testimony was his concern over a case which was then pending in a Washington state court, Ginnis v. Southerland. In this case an injured longshoreman hired directly by the shipowner sued the

75. Referring to the employee's claim against the vessel, the Third Circuit stated: "To impose this additional liability on the employer in the situation where he is also shipowner would radically distort the intent of Congress in enacting the Longshoremen's Act." Id. at 850; accord, Samuels v. Munson S.S. Line, Inc., 63 F.2d 861 (5th Cir. 1933).


77. Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act Before a Special Subcommittee of the Committee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. (1956) [hereinafter cited as Hearings].

78. Id. at 15–16.

79. 1956 Am. Mar. Cas. 2272 (Wash. Super. Ct. 1956), affirmed, 1957 Am. Mar. Cas. 1894 (Wash. Sup. Ct. 1957). The decision in Ginnis came down some four months after the close of the hearings. The anxiety of the ship companies was put to rest for it was held that a suit against the master of a ship is effectively a suit against the shipowner, himself, and cannot be allowed, since the shipowner's liability to the plaintiff is limited to compensation because of the employer-employee relationship between them. It will be noted that this case is in line with the other authorities prior to Reed which held that a longshoreman could get no more than compensation from his employer, even if the latter also happens to be a shipowner.
master of the ship for negligence, instead of accepting compensation under the Longshoremen's Act. Rice stated that:

The plaintiff in this case is attempting to circumvent the limitations of the Act which prevent him from suing his employer directly, and seeks a recovery which would eventually be paid by the employer. This result would occur because, if it is found that the master himself was not personally and principally at fault, he has a present legal right to indemnification from the employer, the shipowner.80 (Emphasis added.)

Mr. Rice advocated an amendment to the act that would bar a suit by a longshoreman against the officers, or agents of his employer, arguing that this was a devious and circuitous route by which to get more than compensation from his employer. How surprised he and the subcommittee would have been to learn that in the case he posed, the longshoreman would not have had to resort to this circuitous route, but could have waived compensation and sued his employer directly because the latter also happened to be a shipowner.

Robert E. Mayer, President of Pacific American Steamship Association, also testified in support of Mr. Rice's position. He described the Ginnis case as follows:

The steamship line in this case is the Grace Line, which happens in Seattle to do its own stevedoring, it doesn't hire a contractor. . . . So, when it came time to try to find another remedy there wasn't anybody there, there wasn't any third party because the employer and the ship were the same men. And clearly, under the Longshoremen's and Harbor Workers' Compensation Act you couldn't sue them. So they sued the captain of the ship.81

No other testimony was offered, nor any remarks made by the subcommittee to indicate that anyone, at that time, understood that a longshoreman hired by a shipowner could sue the latter (his employer) directly, but this is the interpretation urged by the Court in Reed, and not to comprehend it is to "blindly adhere to the superficial meaning of the Longshoremen's Act."82

No matter what tenuous distinctions the Court tried to draw in Reed, they uncategorically allowed a longshoreman to sue his employer, instead of being limited to compensation. This is an outright overruling of section 5 of the Longshoremen's Act, and it is now arguable, in light of Reed, that any longshoreman can sue his employer directly in tort whether the latter is a shipowner, or merely a stevedoring contractor. Quite obviously, this is not what Congress intended, and the Court in vindicating the rights of one longshoreman against a charterer who was attempting to avoid unseaworthiness liability has very definitely opened Pandora's box.

80. Ibid.
81. Id. at 82.
82. For a thorough discussion of the legislative history to the Longshoremen's Act, see Bue, The Enigma of Reed v. The S.S. Yaka, 1 Houston L. Rev. 97, 113 (1963).
V.

CONCLUSION

What is needed to remedy the situation created by Reed is legislation, a clear expression of the Congressional intent that will restore to the Longshoremen’s Act its proper meaning and operation. Of greater concern, however, is the future availability of the warranty of seaworthiness to seamen and particularly longshoremen. This doctrine is policy-based; therefore, it should be reappraised to determine if the original policy should not be revised in light of shifting needs. A seaman’s lot today is hardly what it was aboard the H.M.S. Bounty, due in the main to remedial legislation, the efforts of labor organizations, and the twentieth century’s technical advances. Still, however, there is much to be said for demanding the highest standards of the shipowner in outfitting and maintaining his ships because of the dangers inherent in life at sea, and the rigorous discipline which is a necessity aboard. The warranty, therefore, if precisely defined, is still of value in regard to seamen, but is extremely difficult to justify in the case of longshoremen. It has been pointed out that, “Loading and unloading ships is not as hazardous as many other occupations. Steel erection, mining, and logging are examples which come readily to mind.” 83 Furthermore, to say that a longshoreman is entitled to a seaman’s remedies because of some historical link between the two occupations is to indulge in medieval logic. We are left then with the suggestion that a shipowner is in a much better position to take the loss. Many times this shipowner will get indemnity over from the stevedoring contractor, under the Ryan procedure, and is it fair for the courts to place the full burden on the stevedore in light of the fact that Congress has limited his direct liability to his longshoremen to compensation? 84 The shipowners who pay in full, however, may not be in a position to do so. It has been pointed out that since Sieracki, forty-four American steamship companies directly involved


84. In a very recent decision the Supreme Court imposed liability without fault upon the stevedoring contractor under the latter’s warranty of workmanlike service — just as they had done to the shipowner under his warranty of seaworthiness. In Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 84 S.Ct. 748 (1964), a longshoreman was injured aboard ship when a tent rope snapped. The rope, attached to a hatch tent used to protect cargo from rain, had been supplied by the stevedoring contractor as necessary gear for the performance of his stevedoring services. The longshoreman sued the shipowner, alleging negligence and unseaworthiness, and recovered. The shipowner, in turn, sued the stevedoring contractor for indemnity under the latter’s warranty of workmanlike service, as provided by Ryan. The Ninth Circuit disallowed this claim, holding that since the stevedoring contractor had not been shown to have been negligent — in that the defective condition of the tent rope was not apparent — his warranty was not breached. 310 F.2d 481 (9th Cir. 1962). The Supreme Court reversed, stating that the stevedore’s warranty arises by implied contract, and the issue of whether or not it has been breached does not turn on a showing of negligence, but on whether the equipment used by him was, in fact, safe and fit for its intended use. This case is strong evidence that the Court in dealing with the several maritime warranties is anxious to purge any negligence standards or “tests” from their operation, and to view them solely from the point of contract.