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COMMENTS

ADMIRALTY — RIGHT OF SEAMEN TO INDEMNITY — DUTY OF SHIPOWNER TO WARN AND INSTRUCT INEXPERIENCED SEAMEN — In the recent case of *The State of Maryland*,[1] the United States Circuit Court of Appeals of the Fourth Circuit held that a seaman could recover indemnity against a vessel in an in rem proceeding in admiralty, for burns received when oil-burning equipment of the vessel exploded. The explosion occurred while the libellant was attempting to light the oil burner in the pit furnace beneath the boilers without having first opened the lower draft. It was a part of the libellant's duties to light the oil burner. He was inexperienced, and no one had instructed him as to the proper method to follow in lighting the furnace, nor as to the danger involved. The court ruled that the owner of the steamship was

[1] The State of Maryland, 1936 Am. Mar. Cas. 1515.

under a duty to instruct the seaman as to the nature of his duties and to warn him against the dangers to be encountered. The opinion stated that this duty to instruct and warn the seaman is based upon the same principle as that which makes the owners and the vessel liable to seamen for damages arising out of the unseaworthiness of the vessel or the failure to furnish proper appliances.

The general maritime law as adopted in this country has implied, in the contract between the owner and the seaman, the promise of the owner to provide the seaman, in case of his injury or illness, with his wages at least until the end of the voyage, his maintenance, and cure or care, including medical attention for a reasonable time.[2] This contract includes wages, maintenance, and cure for illness or injury suffered by the seaman while in the service of the ship, whether the injury or illness was the result of accident, or due to negligence of third parties or of the suffering seaman himself,[3] but it does not cover illness or injury suffered through the seaman's own wanton and wilful misconduct.[4] In addition, the general maritime law has placed a duty on the owner of the vessel, in favor of the seamen, to use due diligence to make the ship seaworthy, and to provide it with proper appliances; and for an injury to a seaman arising out of a failure to perform this duty, the owner and the vessel are subject to payment of damages to the injured seaman as well as wages, maintenance, and cure.[5] It has also been recognized by the general maritime law that the owner and the vessel may be liable in damages for subsequent injury and harm to a seaman resulting from a refusal or failure of the master or owner to provide proper maintenance and cure when the seaman falls ill or is injured.[6]

The rights of seamen arising out of injuries or illness have been extended by congressional action. Congress has provided for actions for damages against the employer when the seaman is injured or

[2] The Osceola, 189 U. S. 158, 23 S. Ct. 483 (1903); Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501 (1918); Pacific S. S. Co. v. Peterson, 278 U. S. 130, 49 S. Ct. 75 (1928); Carlisle Packing Co. v Sandanger, 259 U. S. 255, 42 S. Ct. 475 (1922); Cortes v. Baltimore Insular Line, 287 U. S. 367, 53 S. Ct. 173 (1932); Harden v. Gordon, (C. C. 1st, 1823) 2 Mason 541.

[3] The Osceola, 189 U. S. 158, 23 S. Ct. 483 (1903); The Vildfugl, (C. C. A. 5th, 1921) 271 F. 271.

[4] The Truro, (D. C. N. Y. 1887) 31 F. 158; Meyer v. Dollar S. S. Line, (D. C. Wash. 1930) 43 F. (2d) 425; The City of Alexandria, (D. C. N. Y. 1883) 17 F. 390; Walton v. The Neptune, (D. C. Pa. 1800) 29 Fed. Cas. No. 17,135, 1 Pet. Adm. 142; Chandler v. The Annie Buckman, (D. C. N. Y. 1853) 5 Fed. Cas. No. 2,591a; The Alector, (D. C. Va. 1920) 263 F. 1007; The Ben Flint, (D. C. Wis. 1867) 1 Biss. 562.

[5] The Osceola, 189 U. S. 158, 23 S. Ct. 483 (1903).

[6] The Iroquois, 194 U. S. 240, 24 S. Ct. 640 (1904).

killed by the negligence of the employer or of any of the other seamen, officers, or employees.[7] Judicial expansion of the general maritime law in favor of seamen has been accomplished through a broad interpretation of the concept of "unseaworthiness," rather than through additions to the accepted principles of ship and owner liability. In addition to the usual meaning of "unseaworthiness" as relating to some physical defect in the vessel making it unfit for the contemplated voyage, the courts have held that a vessel may be unseaworthy if the crew is not competent in all respects; [8] and if the mate is brutal and inflicts great physical injury upon the members of the crew he is not competent and his presence makes the vessel unseaworthy.[9]

In the principal case the court said that there is a duty on the part of the owner to instruct and warn the seaman as to his employment around dangerous machinery, and that this duty is based "On the same principle that the vessel and owners are held to liability for failure to make her seaworthy, or to supply and keep in order proper appliances." [10] The court added, "Both duties arise out of the same general principle of liability." [11] The opinion indicates that the court considered the duty to provide a seaworthy vessel and proper appliances and to instruct and warn as sounding in tort, for the court emphasized the principles of common law relative to master and servant and indicated that it thought those principles ought to be and had been applied in the maritime law in working out the rights of seamen against shipowners. The court said:

> "The scope of the ancient maritime lien was unquestionably broadened when liability to seamen for injuries arising on account of unseaworthiness and defective appliances was recognized. As

[7] United States Merchant Marine Act, § 33, 41 Stat. L. 1007, 46 U. S. C., § 688 (1920) (the Jones Act). See Robinson, "The Seaman in American Admiralty Law," 16 Bost. L. Rev. 283 (1936).

[8] In re Pacific Mail S. S. Co., (C. C. A. 9th, 1904) 130 F. 76, certiorari denied 195 U. S. 632, 25 S. Ct. 790 (1904). This case allowed recovery for damages in favor of the wife and children of a seaman who lost his life when the vessel struck a sunken rock outside San Francisco. The Chinese crew, because of inability to understand the English language, were unable to handle life boats and to take adequate measures to get the passengers and other members of the crew off the ship before she foundered. The court held that the presence of a crew which was unable to understand orders given to them by the officers made the vessel unseaworthy. National Shipbuilding Co. of Texas v. Mallia, (Tex. Civ. App. 1922) 243 S. W. 757; Holland v. Seven Hundred Twenty-five Tons of Coal, (D. C. Wis. 1888) 36 F. 784; Draper v. Commercial Insurance Co., 21 N. Y. 378 (1860).

[9] The Rolph, (D. C. Cal. 1923) 293 F. 269, affd. (C. C. A. 9th, 1924) 299 F. 521, certiorari denied 266 U. S. 614, 45 S. Ct. 96 (1924).

[10] The State of Maryland, 1936 Am. Mar. Cas. 1515 at 1518.

[11] Ibid. at 1521.

thus broadened it covers liability arising from failure to discharge most of the non-assignable duties of the master recognized at common law, i.e. failure to provide a safe place to work, failure to provide safe and suitable appliances to work with, failure to keep machinery and appliances in safe order and condition, failure to provide a sufficient number of competent fellow servants to perform the work, etc. . . ."[12]

It appears, however, that the seamen's right to indemnity for injury due to unseaworthiness and improper appliances grew out of an undertaking which was read into the owner's contract with the seamen. In England, before 1876, there was no warranty by the owner that the vessel was seaworthy, according to the decision in *Couch v. Steel.*[13] But the Merchants Shipping Act of 1876[14] provided that in every seaman's contract there was an implied obligation that all reasonable means would be used to insure seaworthiness of the vessel and to keep her in a seaworthy condition during the voyage. There is no similar statute in the United States, but as early as 1789 it was held by Judge Peters in the federal district court of Pennsylvania, in the cases of *Dixon v. The Cyrus*[15] and *Rice v. The Polly and Kitty*,[16] that there is implied in the contract between the seaman and the owner an engagement on the part of the owner "that at the commencement of a voyage, the ship shall be furnished with all necessary and customary requisites for navigation, or, as the term is, shall be found *seaworthy*."[17] Professor Parsons considered the decisions in these two cases to be the law of the United States admiralty courts.[18] Mr. Fitz-Henry Smith, Jr., was of the same opinion.[19]

The Osceola[20] laid down the general principles of the seaman's rights against the owner, and pointed out that there is implied in the seaman's contract a right to wages, maintenance, and cure, and remarked on the English statute reading into the contract an undertaking by the owner to provide a seaworthy vessel and proper appliances. The Court then went on to point out that the tenor of the cases in the lower federal courts was to the effect that a seaman has a right to indemnity against the owner for injuries due to his failure to use

[12] Ibid. at 1521-1522.

[13] 3 El. & Bl. 402, 118 Eng. Rep. 1193 (1854).

[14] 39 and 40 Vict., c. 80, § 5 (1876).

[15] (D. C. Pa. 1789) 2 Pet. Adm. 407.

[16] (D. C. Pa. 1789) 2 Pet. Adm. 420.

[17] Dixon v. The Cyrus, (D. C. Pa. 1789) 2 Pet. Adm. 407 at 411.

[18] 2 PARSONS, SHIPPING AND ADMIRALTY 78, note (1869).

[19] Smith, "Liability in the Admiralty for Injuries to Seamen," 19 HARV. L. REV. 418 at 423, note 5 (1906).

[20] 189 U. S. 158, 23 S. Ct. 483 (1903).

due diligence to make the vessel seaworthy, or for failure to provide proper appliances. None of the cases in the lower federal courts which were cited and which sustain this principle say that this duty is implied in the seaman's contract, with the exception of the case of *The Noddleburn.*[21] In that case the libellant and vessel were British. The defense argued that the English case of *Couch v. Steel* applied, denying an implied warranty of seaworthiness. The court cited Mr. Parson's statement that, "This decision is clearly repugnant to the principles of the American authorities on this subject, independent of statute provisions,"[22] and referred to *The Cyrus* and *The Polly* with apparent approval. However, the decision of the court was based upon a finding of wilful negligence and wanton indifference on the part of the vessel owner in the failure to remedy the unseaworthy condition.

In *Pacific S. S. Co. v. Peterson*,[23] the Court remarked, as dictum, that a seaman would have to choose between suing for damages on the ground of unseaworthiness or improper appliances and suing under the Jones Act, for, said the Court, both actions sound in tort. But a footnote to part of the opinion of the United States Supreme Court in *The Arizona v. Anelich*[24] gives a summary of the development of the seaman's rights to indemnity for unseaworthiness or defective appliances, pointing out that the shipowner's duty was originally implied by law in the owner's contract with the seaman.

The decision in the principal case is an innovation in the general maritime law of this country.[25] The court itself pointed out that there was no such duty on the shipowner in early times when the young sailor knew as well as the owner of the dangers of the comparatively simple machinery used on the sailing vessels. It may also be said that in early maritime law there was no duty on the part of the owner to refrain from shipping a brute of a mate, and that the principle enunciated in *The Rolph* was also an innovation into the general maritime law, but in that case the court chose to place the presence of the brutal

[21](D. C. Ore. 1886) 28 F. 855.

[22] 2 PARSONS, SHIPPING AND ADMIRALTY 78, note (1869).

[23] 278 U. S. 130, 49 S. Ct. 75 (1928).

[24] 298 U. S. 110, 56 S. Ct. 707 (1936).

[25] Cook v. Smith, (C. C. A. 3rd, 1911) 187 F. 538, which was relied upon by the majority of the court in the principal case as authority for holding the owner under a duty to instruct and warn the inexperienced seaman, clearly held that there was such a duty upon the shipowner. The court so found without argument and without citation of authority. The case was heard on a petition for limitation of liability and the question of whether or not the violation of this duty gave the seaman a lien on the vessel was not involved nor discussed. However, there is some authority for the proposition that for every maritime tort committed on a vessel for which the owner is liable, the injured party has a lien on the vessel. The Anaces, (C. C. A. 4th, 1899) 93 F. 240.

mate within the category of those factors which make the vessel unseaworthy, rather than to expand by judicial decision the general principles of seamen's rights. The court in the principal case did not place its decision on the ground of unseaworthiness. Although the presence of the inexperienced seaman would very likely make the vessel unseaworthy as to other seamen or to cargo owners, it would be difficult to hold the owner and vessel liable for unseaworthiness in favor of the injured seaman whose presence alone made the vessel unseaworthy.

However, the court could have said with no great strain upon established principles that the duty to instruct and warn an inexperienced hand in operating the appliances of the vessel was part and parcel of the duty to provide proper appliances, and that the basis of liability was the failure to carry out its duty to provide proper appliances in this larger sense. The court did speak very definitely of the close relation between the duty to provide proper appliances and the duty to instruct and warn the seamen in the use of such appliances.

It is possible that this seaman has a cause of action against the shipowners in personam in admiralty, for damages, under the Jones Act.[26] This act gives a seaman injured in the course of his employment an action in accordance with the Federal Employers' Liability Act of 1908,[27] giving actions to railway employees for negligent injury to them by fellow employees or through the negligence of employers. The Federal Employers' Liability Act has been construed as giving a right of recovery for damages to an inexperienced youthful employee against his employer if the employer failed to warn and instruct him as to the dangers of his work.[28] However, the Jones Act has been construed by the Supreme Court as not giving a lien on the vessel and consequently this act cannot be the basis for a libel in rem.[29] This in personam remedy, although not as convenient as an action in rem, protects the seaman and ordinarily will be adequate. Consequently there seems to be no great need for judicial expansion of the category of seamen's rights to cover injuries received in the manner giving rise to this action.

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[26] The Merchant Marine Act of 1920, § 33, 41 Stat. L. 1007, 46 U. S. C., § 688 (1920).

[27] Act of April 22, 1908, 35 Stat. L. 65, 45 U. S. C., § 51.

[28] Helton v. Cincinnati, N. O. & T. P. Ry., 214 Ky. 392, 283 S. W. 395 (1926); Erie Ry. v. Collins, (C. C. A. 2d, 1919) 259 F. 172, affirming (D. C. N. Y. 1917) 245 F. 811, and affd. 253 U. S. 77, 40 S. Ct. 450 (1920).

[29] Plamals v. The Pinar Del Rio, 277 U. S. 151, 48 S. Ct. 457 (1928).