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Admiralty--Liability--Transitory Unseaworthiness

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ADMIRALTY—LIABILITY—TRANSITORY UNSEAWORTHINESS—While loading grain aboard a ship, the petitioners, longshoremen, were injured when they inhaled noxious fumes from a shot of grain released into the vessel's hold, the grain having been treated with a chemical insecticide by unknown parties at an inland point. Petitioners brought suit against the city, which owned the grain elevators, and the shipowner, alleging, among other things,[1] that the vessel was unseaworthy. The district court found the ship to be seaworthy,[2] and the circuit court of appeals affirmed the judgment for the

1 Petitioners also claimed that the City of Galveston and the shipowner were liable on the basis of negligence. The district court, in finding that the city had not applied the chemical to the grain and that neither party knew or should have known in the exercise of reasonable care that the grain had been improperly fumigated by unknown parties at an inland point, held that neither was negligent. Morales v. City of Galveston, 181 F. Supp. 202 (S.D. Tex. 1959). The finding was examined and affirmed twice by the circuit court of appeals. 275 F.2d 191 (5th Cir. 1960), and 291 F.2d 97 (5th Cir. 1961). The Supreme Court, not finding the facts clearly erroneous under the principle laid down in McAllister v. United States, 348 U.S. 19 (1954), affirmed the circuit court's decision.

2 Morales v. City of Galveston, 181 F. Supp. 202 (S.D. Tex. 1959).

defendant.[3] On certiorari[4] the Supreme Court vacated the judgment and remanded the case to the court of appeals for consideration in light of *Mitchell v. Trawler Racer, Inc.*,[5] which had been decided in the interim. However, the circuit court again affirmed the district court's decision.[6] On certiorari, *held*, affirmed, three Justices dissenting.[7] 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. *Morales v. City of Galveston*, 370 U.S. 165 (1962).

Seamen are afforded three types of actions to recover for personal injuries: maintenance and cure,[8] negligence,[9] and breach of the warranty of seaworthiness.[10] Before the 1940's the doctrine of unseaworthiness was virtually unused in personal injury cases, but since that time it has been utilized to such an extent that it threatens to make the other two modes of recovery obsolete.[11] In 1946, with its decision in *Seas Shipping Co. v. Sieracki*,[12] the Supreme Court transformed the unseaworthiness doctrine from one involving a duty to exercise ordinary care to that of an absolute duty to provide a seaworthy vessel.[13] A statement of the doctrine which has been

3 Morales v. City of Galveston, 275 F.2d 191 (5th Cir. 1960).

4 Morales v. City of Galveston, 364 U.S. 295 (1960).

5 362 U.S. 539 (1960).

6 Morales v. City of Galveston, 291 F.2d 97 (5th Cir. 1961). The court, considering *Mitchell* inapplicable to the facts of the principal case, stated: "This is not a case, as Mitchell's was, where it was conceded that the ship was unseaworthy but the seaworthiness was excused, in the Court of Appeals, because it was only temporary. This is a case where the district judge found as a fact that the vessel was seaworthy." *Id.* at 98.

7 Mr. Justice Frankfurter took no part in the consideration or decision of the case.

8 Maintenance and cure is not a general compensatory remedy. It is limited to medical care, living expenses during the recuperation period, and wages for the duration of the employment contract if employed in coastal trade, or for the duration of the voyage if employed on an ocean-going vessel. Longshoremen are not covered by the maintenance and cure remedy, but they can receive compensation under the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1958). See GILMORE & BLACK, THE LAW OF ADMIRALTY 265-71 (1957).

9 Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

10 The shipowner's absolute duty to provide a seaworthy vessel for his seamen was extended by Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), to cover longshoremen, and by Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), to cover other harbor workers who perform tasks traditionally done by seamen.

11 GILMORE & BLACK, *op. cit. supra* note 8, at 316.

12 328 U.S. 85 (1946). The defendant had actually conceded the point that the shipowner's duty to provide a seaworthy vessel was absolute, and the case turned on the issue of whether or not longshoremen were covered by the doctrine.

13 The first mention of the doctrine by the Supreme Court as a basis for recovery was in The Osceola, 189 U.S. 158 (1903); however, such liability was clearly premised on the shipowner's negligence. In Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922), the Supreme Court, in confusing the shipowner's absolute obligation of seaworthiness as to cargo with his obligation toward his seamen, stated in dictum that a shipowner's duty to furnish a seaworthy vessel for his seamen was absolute. Twenty-two years later in Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944), the Supreme Court again stated that a shipowner's duty to his seamen to furnish a seaworthy ship was absolute and not predicated on negligence and not satisfied by the exercise of due care. However, because the injury was in fact attributable to the negligence of the shipowner's employees, this general statement was dictum.

repeatedly followed by the Supreme Court was expounded in that case, where the Court stated that a shipowner has an absolute duty to furnish his seamen with a vessel and appurtenances which are reasonably fit for their intended use.[14] After *Sieracki* the only questions remaining concerned the categories of persons and types of situations to which the doctrine was to be applied. While the courts rapidly extended the doctrine,[15] this extension met a serious curtailment in the area of temporary or transitory defects. In *Cookingham v. United States*[16] the Third Circuit developed the "transitory hazard" doctrine, which declared that a condition which temporarily makes an inherently seaworthy vessel unsafe does not constitute unseaworthiness, unless the shipowner had actual or constructive notice of the condition and a reasonable opportunity to correct it. The Third Circuit thus refused to extend the expanding duty of seaworthiness so as to require the shipowner to keep inherently sound and seaworthy appliances free from temporarily unsafe conditions resulting from their use.[17] The theory behind the approach taken in the *Cookingham* decision was not unopposed. In *Poignant v. United States*[18] the Court of Appeals for the Second Circuit stated that actual or constructive notice of the unseaworthy condition was not essential to the existence of a cause of action. However, the court held that a ship does not become unseaworthy by reason of a temporary condition caused by a transient substance, if the vessel was as fit for service as similar vessels in similar service.[19] Despite *Poignant, Cookingham's* influence was felt in a substantial number of decisions,[20] until the Supreme Court in *Mitchell v. Trawler Racer,*

14 See, *e.g.*, Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

15 See, *e.g.*, Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), where the Court declared that a shipowner's warranty of seaworthiness was non-delegable and thus his absolute duty was not affected by relinquishing control to another; and Boudoin v. Lykes Bros. S.S. Co., *supra* note 14, where the Court extended the scope of the seaworthiness doctrine to include activity by a ship's personnel.

16 184 F.2d 213 (3d Cir. 1950).

17 In *Cookingham* the plaintiff had slipped on some jello which had been accidentally deposited on the ship's stairway.

18 225 F.2d 595 (2d Cir. 1955). The plaintiff had slipped on an apple skin in the passageway through which garbage cans were pulled for dumping because of the absence of garbage disposal chutes on the vessel.

19 Judge Frank, although in favor of reversing the lower court, stated in his concurring opinion that "the period during which the stairway [referring to *Cookingham*] was in an unsafe state is immaterial under the circumstances of the instant case. If the stairway was in a condition dangerous for the use for which it was intended, however 'transitorily', it was unseaworthy. It remained so while the unsafe condition persisted. The element of time which has intruded itself in this case in both the opinion of this court and that of the court below is irrelevant under the doctrine of the shipowner's absolute liability." *Id.* at 603.

20 *E.g.*, Shannon v. Union Barge Line Corp., 194 F.2d 584 (3d Cir.), *cert. denied*, 344 U.S. 846 (1952); McMahan v. The Panamolga, 127 F. Supp. 659 (D. Md. 1955); Garrison v. United States, 121 F. Supp. 617 (N.D. Cal. 1954); Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D.N.Y. 1954); Adamowski v. Gulf Oil Corp., 93 F. Supp. 115 (E.D. Pa. 1950), *aff'd*, 197 F.2d 523 (3d Cir.), *cert. denied*, 343 U.S. 906 (1952).

Inc.[21] overruled the *Cookingham* doctrine, and declared that a shipowner's actual or constructive knowledge of an unseaworthy condition is not essential to his liability.

In light of the *Mitchell* decision and the general discussion in the principal case, it seems quite clear that the Supreme Court intended to impose the same strict liability upon shipowners for unseaworthiness caused by transitory defects as was imposed for unseaworthiness caused by permanent defects, or conditions arising before commencement of the voyage. Since both *Mitchell* and *Morales* involved transitory conditions, it might appear that they are in conflict, if one attempted to distinguish them on their facts. But, because they decided basically different questions, they are not really inconsistent. In *Mitchell* the Supreme Court did not decide the unseaworthiness issue but rather, since the lower court had erroneously instructed the jury on the law, reversed and remanded the case for a new trial under the proper criteria. Hence, the *Mitchell* case could have still been decided for the defendant on the facts. In the principal case the Supreme Court supported the lower court's decision based upon a finding of fact that the ship was seaworthy. Thus, since different issues were involved in the two cases, a reconciliation of the decisions upon their facts is not required to make them consistent.

Although the general discussions in the two cases indicate that the Supreme Court intended to impose the same strict liability upon shipowners for transitory unseaworthiness as for permanent conditions of unseaworthiness, the peculiar problem involved in cases of defects of a transitory nature remains unresolved—namely, as of what moment in time should a court pose the decisive question: *was the ship reasonably safe for its intended use*? If attention is focused only upon the exact moment of the accident, all other factors become irrelevant, and the specific question in the principal case becomes: *when the hold of the ship was filled with noxious fumes was the ship reasonably fit for its intended use*? With the seaworthiness test framed in this way, there would almost certainly be liability.[22] By this approach it is reasoned that since constructive or actual knowledge is not a prerequisite for unseaworthiness, the amount of time during which the condition has existed is irrelevant to the question of whether the ship was unseaworthy.[23] The Supreme Court did not take

21 362 U.S. 539 (1960). The plaintiff had slipped on the ship's rail where slime and fish gurry had been deposited during an earlier unloading of fish. The district court had instructed, and the court of appeals affirmed, that the liability for unseaworthiness could attach only if the alleged condition was "there for a reasonably long period of time so that a shipowner ought to have seen that it was removed." The Supreme Court reversed on this basis.

22 This has been the approach favored by such men as Judge Clark [See dissent in Paddu v. Royal Netherlands S.S. Co., 303 F.2d 752 (2d Cir. 1962).], Judge Frank [See concurring opinion in Poignant v. United States, 225 F.2d 595, 599 (2d Cir. 1955).], and Judge Rives [See dissent in Morales v. City of Galveston, 291 F.2d 97, 98 (5th Cir. 1961).]. See NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 36, at 85 (1959).

23 For cases that have held this way, see Grzybowski v. Arrow Barge Co., 283 F.2d

this approach; it took into consideration a number of factors, including the length of time during which the defect existed. Even though the Court did not specifically discuss how the duration of the defect affected the unseaworthiness question, the fact that it did not focus its attention solely upon the exact moment of injury shows that the Court intended that, in deciding the question of reasonable fitness, the factor of duration of time should be taken into consideration.[24] Unfortunately, the Court gave no indication of the rationale behind its approach of drawing distinctions with respect to the length of time that a defect may exist, nor did the Court indicate how it intends to use the time factor in a positive fashion in helping to solve the transitory unseaworthiness question. Significantly, the Court, by refusing to determine the unseaworthiness question as of the exact moment of injury, nevertheless indicated the basic method or approach it intends should be followed. The principal case is thus a clarification of the test of reasonable fitness laid down as a generality in *Mitchell* —reasonableness is to include the factor of the duration of the defect.[25]

The Court considered it significant that the introduction of the contaminated grain was an "isolated" and "completely unforeseeable" incident. The Court's use of the words "isolated" and "completely unforeseeable," without further explanation, is unfortunate. The concept of foreseeability has special significance in the common law of negligence, and it might appear that the Supreme Court is incorporating negligence concepts into the seaworthiness doctrine. However, it can be confidently asserted that the Court had no such intention. Since the time of *Sieracki* the Supreme Court has consistently rejected the incorporation of common-law concepts of negligence into the seaworthiness doctrine, and in *Mitchell* the Court specifically overruled a lower court's decision for what it thought constituted such an incorporation. However, in using the test of reasonable fitness, as it consistently has, the Court must implicitly involve itself in problems of foreseeability. The determination of reasonableness must necessarily be arrived at on the basis of experience, and this means that similar experiences are foreseen for the future which, within the bounds of business practicality, will, if dangerous, be guarded against. Thus the

481 (4th Cir. 1960); Calderola v. Cunard S.S. Co., 279 F.2d 475 (2d Cir. 1960); Gentry v. States S.S. Co., 229 Ore. 233, 366 P.2d 880 (1961).

24 See Pinto v. States Marine Corp., 296 F.2d 1, 6 (2d Cir. 1961), where the court said, "A conclusion that liability for a temporary condition is not different in legal nature from liability for a permanent one does not mean that the duration of the condition, the measures prescribed for dealing with it, and the feasibility of achieving perfect safety at all times, are irrelevant. . . ."

25 The Court's statement that it supported the lower court's finding of fact that the absence of a forced ventilation system in the hold did not constitute unseaworthiness goes to the heart of the problem of determining whether there was a structural or permanent defect, but seemingly is a separate problem from the transitory defect question. However, it might be argued that focusing part of its attention upon the structure of the ship is a method or device whereby the Court took the duration of the defect factor into consideration without specifically discussing it.

very definition of reasonableness implies foresight. This seems to be the sense in which the Court uses "foreseeable" in the principal case. It is also consistent with the Court's stating that it is not imposing an insurer's liability,[26] since insurers do not need to foresee an accident in order to be liable. The line between this sort of foreseeability and negligence is extremely difficult to draw, and the distinction perhaps rests on the degree to which foreseeability is used as a measure of the shipowners' care or as a measure of what is reasonably fit and the degree to which business practicality forbids consideration of slight possibilities.

Underlying this entire problem are certain policy considerations that must have exerted their influence upon the Court. There already is one strict liability type cause of action for maritime workers—maintenance and cure for injured seamen and the Longshoremen's and Harbor Workers' Compensation Act for other maritime workers. Should a second strict liability type cause of action be established so that workers can obtain larger recoveries such as those in negligence actions, bearing in mind that the Jones Act is available to seamen injured by negligence? The Court has already seen fit to establish such a second cause of action through the seaworthiness doctrine, so the pertinent question presently is whether the factors which dictated its establishment also call for going farther and imposing an insurer's liability. There are seemingly no relevant factors to justify the imposition of this liability upon shipping alone among all of the nation's industries. In electing to follow the narrower of the two possible approaches, namely, taking many factors into consideration, the duration of the defect being just one such factor, rather than focusing upon the exact moment of the injury with no other factors being relevant, the Court rejected the opportunity to expand greatly the scope of the unseaworthiness concept, refusing to take what would have been an enormous step toward making shipowners insurers of personal injuries.

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[26] See, *e.g.*, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 338-39 (1955).