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## Admiralty - Unseaworthiness - Instantaneous Operational Negligence. *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514 (1971)

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## CURRENT DECISIONS

**Admiralty—UNSEAWORTHINESS—INSTANTANEOUS OPERATIONAL NEGLIGENCE.** *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514 (1971).

Petitioner, a longshoreman, brought suit in a federal district court in admiralty to recover damages for injuries caused by the alleged unseaworthiness of a vessel. He had been engaged in loading operations from a lighter alongside the *S.S. Edgar F. Luckenbach* when, as a consequence of the negligent operation of cargo gear by fellow longshoremen, he was struck by a cargo sling. The district court denied respondent's motion for summary judgement, predicated upon the ground that a single negligent act by a fellow longshoreman could not render the ship unseaworthy, but granted him leave to take an interlocutory appeal.<sup>1</sup> The Court of Appeals for the Fifth Circuit reversed, holding that "[i]nstant unseaworthiness" resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman."<sup>2</sup>

The United States Supreme Court affirmed the Fifth Circuit's position, holding that this "isolated" and "wholly unforeseeable act of negligence" did not render the vessel unseaworthy.<sup>3</sup> This decision is tantamount to holding that an instantaneous act of operational negligence, in itself, is insufficient to breach the warranty of seaworthiness<sup>4</sup> owed to "seamen"<sup>5</sup> by the shipowner.

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1. 28 U.S.C. § 1292(b) (1964).

2. *Luckenbach Overseas Corp. v. Usner*, 413 F.2d 984, 985-86 (5th Cir. 1969).

3. *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514, 518 (1971).

4. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946), wherein the Court states that the warranty of seaworthiness

is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within its humanitarian policy.

*See also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1959), defining the extent of the absolute duty to which *Sieracki* referred.

What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

Despite the fact that *Mitchell* extended the scope of unseaworthiness to include "transitory" unseaworthiness, this language provides the basis for the restriction of the doctrine in *Usner*.

5. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), first extending the warranty

Martitime law is uniquely judge-made law;<sup>6</sup> nowhere is this more evident than in the development of the doctrine of unseaworthiness. From obscure origins,<sup>7</sup> the Supreme Court has fashioned a mighty weapon<sup>8</sup> in the arsenal of actions for injury and death<sup>9</sup> that are available to seamen and other restricted groups of maritime workers. This development has not taken place without difficulty, however, primarily in the area of fixing the perimeters of a cause of action founded upon a pure policy decision.<sup>10</sup>

Although the present seaworthiness doctrine was clearly announced in the 1944 decision of *Malmich v. Southern S.S. Co.*,<sup>11</sup> it was the decision in *Seas Shipping Co. v. Sieracki*<sup>12</sup> two years later that established the basic elements of the cause of action<sup>13</sup> and gave rise to numerous questions regarding the scope of the doctrine. In *Sieracki*, a longshoreman was injured when a defective shackle broke, causing a boom and tackle to fall upon him. Visual inspection would not have prevented this occurrence because the defect was later determined to have been in the forging. By concluding that the injured longshoreman was a "seaman" for the purpose of recovery under the seaworthiness doctrine,<sup>14</sup> and that the shipowner's duty to provide a seaworthy ship was absolute and not predicated upon negligence,<sup>15</sup> the Court committed itself to a policy

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to longshoremen. *Sieracki* formulated a test to establish the classes of maritime workers to whom the shipowner owed the duty of providing a seaworthy vessel:

It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.

*Id.* at 99.

6. See, e.g., *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963).

7. See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 315-17 (1957); Benbow, *Seaworthiness and Seamen*, 9 *MIAMI L.Q.* 418, 418-23 (1955); Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 *CORNELL L.Q.* 381, 386-96 (1954).

8. In reflecting on the growth of the doctrine, G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 315 (1957) indicates that "[t]oday the unseaworthiness doctrine has become the principal vehicle for personal injury recovery."

9. See *Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970), recently authorizing a recovery in the general maritime law for wrongful death under the doctrine of unseaworthiness.

10. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 91-100 (1946).

11. 321 U.S. 96, 99-100 (1944).

12. 328 U.S. 85 (1946).

13. See note 4 *supra*.

14. 328 U.S. at 99.

15. *Id.* at 94.

that threatened the continued viability of both the Jones Act<sup>16</sup> and the Longshoreman's and Harbor Workers' Compensation Act.<sup>17</sup> It remained for the Court in subsequent cases to determine the classes of maritime workers to whom the shipowner's duty of a seaworthy ship was owed, the party who would bear the cost of a breach of the duty, and what defects would constitute an unseaworthy condition. The Court addressed the last issue in *Usner*, restricting further expansion of the negligence-defect coverage within the unseaworthiness doctrine.

Conditions of unseaworthiness have included defects in the vessel arising through the actions of incompetent personnel,<sup>18</sup> defects in the ship's structure<sup>19</sup> and equipment,<sup>20</sup> defects in cargo containers,<sup>21</sup> improper stowage of cargo,<sup>22</sup> and faulty equipment brought aboard from without the ship.<sup>23</sup> The warranty of seaworthiness is breached even when these defects arise as inherent characteristics of the personnel or equipment without negligence or knowledge on the part of the shipowner.<sup>24</sup> While it is clear that operational negligence on the part of the crew<sup>25</sup> or an independent contractor<sup>26</sup> can also give rise to a defect constituting unseaworthiness, it has not been clear whether a single, isolated act of operational negligence can, of itself, give rise to a cause of action for unseaworthiness.

In *Plamals v. S.S. Pinar Del Rio*,<sup>27</sup> a deck officer negligently selected

16. 46 U.S.C. § 688 (1964). This section was formerly section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, popularly known as the Jones Act, which authorizes recovery for wrongful injury and death as provided under the Federal Employers' Liability Acts. See 45 U.S.C. §§ 51-60 (1964).

17. 33 U.S.C. §§ 901 *et seq.* (1964).

18. See, e.g., *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 338-40 (1955); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515, 517-18 (2d Cir. 1952).

19. See, e.g., *Crumady v. The J. H. Fisser*, 358 U.S. 423, 426-28 (1959); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 87-88 (1946).

20. See, e.g., *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103 (1944).

21. See, e.g., *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 212-14 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

22. See, e.g., *Palazzolo v. Pan-Atlantic S.S. Corp.*, 211 F.2d 277, 279 (2d Cir. 1954). See also *Morales v. City of Galveston*, 370 U.S. 165, 170 (1962) (*dictum*).

23. See, e.g., *Petterson v. Alaska S.S. Co.*, 205 F.2d 478, 478-80 (9th Cir. 1953), *aff'd per curiam*, 374 U.S. 396 (1954).

24. Cf. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *Petterson v. Alaska S.S. Co.*, 205 F.2d 478, 480 (9th Cir. 1953).

25. See, e.g., *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103-04 (1944); *Mollica v. Compania Sud Americana De Vapores*, 202 F.2d 25, 26-27 (2d Cir. 1953).

26. See, e.g., *Mascuilli v. United States*, 387 U.S. 237 (1967), *rev'g per curiam*, 358 F.2d 133 (3d Cir. 1966); *Grillea v. United States*, 232 F.2d 919, 922-23 (2d Cir. 1956).

27. 277 U.S. 151 (1928).

defective rope, when good rope was available, resulting in an injury when the rope parted. The Court found that this type of operational negligence did not constitute an unseaworthy condition.<sup>28</sup> This facet of *Plamals* was subsequently overruled in *Mabnich*,<sup>29</sup> and questions therefore arose as to precisely when operational negligence would amount to a breach of the warranty of seaworthiness. In *Mitchell v. Trawler Racer, Inc.*,<sup>30</sup> the Supreme Court resolved this confusion, holding that a "transitory" unseaworthy condition, occurring after the inception of a voyage, whether caused by operational negligence or otherwise, constituted a cause of action.<sup>31</sup> The Court saw a "complete divorce-ment of unseaworthiness liability from concepts of negligence."<sup>32</sup> While ruling out the necessity of negligence and knowledge on the part of the shipowner, the Court implemented a standard of reasonableness in its definition of the shipowner's duty to supply a seaworthy ship.

The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.<sup>33</sup>

This standard is important in the evaluation of instantaneous operational negligence because, despite the dangerous condition brought about by the act of negligence, the ship, her personnel, structure, and appurtenances may retain a quality of reasonable fitness for intended service.<sup>34</sup>

In *Crumady v. The Joachim Hendrik Fisser*,<sup>35</sup> the Court found that operational negligence of the longshoremen aboard brought into play an unseaworthy condition of the vessel; the circuit breaker on the winch was set at twice the safe working load of the gear. The Third Circuit Court of Appeals had found that "the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred."<sup>36</sup> In light of the cir-

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28. *Id.* at 155.

29. 321 U.S. at 104-05.

30. 362 U.S. 539 (1959).

31. *Id.* at 549. Cf. *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954); *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955).

32. 362 U.S. at 550.

33. *Id.*

34. This is precisely the theory utilized to deny recovery in the principal case. See *Usner v. Luckenbach Overseas Corp.*, 91 S. Ct. 514, 518 (1971).

35. 358 U.S. 423 (1959).

36. 249 F.2d 818, 820-21 (3d Cir. 1957).

cuit court's factual resolution, *Crumady*, as decided by the Supreme Court, might well have supported the proposition that operational negligence in itself could constitute an unseaworthy condition. The Court's per curiam decision in *Mascuilli v. United States*,<sup>37</sup> reversing the Third Circuit's finding that "the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations, and that the accident was caused solely by the negligent operation of the stevedoring crew . . ." <sup>38</sup> seemed to substantiate this view. In the absence of an inherent defect in the vessel or its gear, and in light of the sudden development of the incident resulting from the negligence of the longshoremen, *Mascuilli* can be seen in terms of at least the indorsement of the principle that operating negligence alone could constitute an unseaworthy condition.

Prior to the *Mascuilli* decision, the virtually unanimous position of the lower federal courts was that operational negligence alone did not give rise to such a condition.<sup>39</sup> However, in the wake of *Mascuilli* a sharp split developed in the circuits<sup>40</sup> over whether the decision was a broad expansion of the seaworthiness doctrine.<sup>41</sup> The standard of a vessel "reasonably suited for her intended service" appeared to have been superseded by a determination by the Court to further develop the *Sieracki* policy of treating shipboard injury as an expense of the maritime industry. If instantaneous operational negligence was to be equated to unseaworthiness, then the maritime industry was to bear strict liability for the injury or the death that occurred when the duty of seaworthiness existed.

The *Sieracki* extension of the seaworthiness doctrine to the longshore-

37. 387 U.S. 237 (1967). See 42 TUL. L. REV. 648 (1968) raising doubts as to the precise meaning of *Mascuilli* and calling for clarification.

38. 358 F.2d 133 (3d Cir. 1966).

39. See, e.g., *Grant v. Cia Anonima Venezolana de Navegacion*, 343 F.2d 757, 757-58 (5th Cir. 1965); *Massa v. C.A. Venezuelan Navigacion*, 332 F.2d 779, 781 (2d Cir. 1964); *Spinelli v. Isthmian S.S. Co.*, 326 F.2d 870, 871 (2d Cir. 1964); *Neal v. Lykes Bros. S.S. Co.*, 306 F.2d 313, 316 (5th Cir. 1962); *Morrell v. United States*, 297 F.2d 662, 663-64 (9th Cir. 1961); *Green v. Skibs A/S Mandeville*, 292 F.2d 393, 393-94 (4th Cir. 1961); *Ventrone v. United States*, 239 F.2d 862 (2d Cir. 1957). *Contra*, *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 151-53 (2d Cir. 1966); *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 124-25 (4th Cir. 1964); *Ferrante v. Swedish American Lines*, 331 F.2d 571, 577-78 (3d Cir. 1964). See also 42 TUL. L. REV. 648, 649 (1968).

40. See 91 S. Ct. 516 n.2.

41. See, e.g., *La Capria v. Compagnie Maritime Belge*, 427 F.2d 244, 246 n.1 (2d Cir. 1970); *Tarabocchia v. Zim Israel Navigation Co.*, 417 F.2d 476, 478 (2d Cir. 1969); *Cleary v. United States Lines Co.*, 411 F.2d 1009, 1010 (2d Cir. 1969); *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F.2d 347, 350-51 (4th Cir. 1968).

man has drawn extensive academic criticism<sup>42</sup> stemming from the unfairness of the additional financial burden imposed upon the maritime industry, shipowner, and stevedore, and the siphoning off of a high percentage of the claimant's recovery by administrative and attorney costs.<sup>43</sup> In addition, it was unclear whether the Longshoreman's and Harbor Workers' Compensation Act was, on the average, as protective of the interests of these workers as was the *Sieracki* extension.<sup>44</sup>

The *Usner* decision reflects an element of rethinking in this area. Mr. Justice Stewart, who had opposed certiorari in *Mascuilli*,<sup>45</sup> indicated that certiorari had been granted<sup>46</sup> because of a conflict among the circuits on the basic issue presented.<sup>47</sup> As he described it, the issue presented went "to the very definition of what unseaworthiness is and what it is not."<sup>48</sup> The opinion reemphasized the standard of reasonableness in determining the condition of unseaworthiness as enunciated in *Mitchell* and found that "[w]hat caused the petitioner's injuries in the present case . . . was not the condition of the ship, her appurtenances, her cargo or her crew, but the isolated personal negligent act of the petitioner's fellow longshoreman."<sup>49</sup> *Usner*, in limiting the logically anticipated expansion of the *Sieracki* doctrine and vindicating the reasonableness standard of *Mitchell*, has presented a definitive statement that instantaneous operational negligence does not equate to unseaworthiness.<sup>50</sup> Thus, in only

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42. See Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1147-52 (1963); Foley, *A Survey of the Maritime Doctrine of Seaworthiness*, 46 ORE. L. REV. 369, 398, 407, 420-21 (1967); Mank, *The Stevedore: Hope for Rescue*, 56 A.B.A.J. 254, 256 (1970); Comment, *The "Unseaworthiness" Doctrine and Its Application to Longshoremen*, 22 MIAMI L. REV. 937, 946-51 (1968); Comment, *Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster*, 9 VILL. L. REV. 422, 427-40 (1964). See also *Skibinski v. Waterman S.S. Corp.*, 360 F.2d 539, 543-44 (2d Cir. 1966) (Friendly, J., dissenting). But see Note, *Risk Distribution and Unseaworthiness*, 75 YALE L.J. 1174 (1966) evaluating the criticism leveled at *Sieracki* and proposing retention of the seaworthiness doctrine coupled with a locality test to determine high risk eligibility.

43. See, e.g., Shields & Byrne, *Application of the Seaworthiness Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1147-51 (1963).

44. *Id.* at 1147-48.

45. 387 U.S. at 237.

46. *Usner v. Luckenbach Overseas Corp.*, 397 U.S. 933 (1970).

47. 91 S. Ct. at 516 n.2.

48. *Id.* at 517.

49. *Id.*

50. *Usner* represents a new policy decision restricting the growth of the seaworthiness doctrine and appears to negate the equation of instantaneous operational negligence and unseaworthiness. Nevertheless, *Crumady* and *Mascuilli*, although not overruled, stand very close to the dividing line between unseaworthiness and instantaneous opera-

two situations may ordinary operational negligence create an unseaworthy condition: by bringing into play a previously unseaworthy condition, or by creating an unseaworthy condition which, after a break in the continuity of events, subsequently causes injury.

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**Constitutional Law—RACIAL DISCRIMINATION IN EMPLOYMENT.**  
*Griggs v. Duke Power Co.*, 91 S. Ct. 849 (1971).

Griggs and twelve other black employees brought this class action under Title VII of the Civil Rights Act of 1964<sup>1</sup> to enjoin Duke Power Company from discriminating against them.<sup>2</sup> Prior to 1965, when the Act went into effect, Duke employed negroes only in its labor department. Thereafter, Duke required a high school diploma and satisfactory scores on two aptitude tests for all new employees—black and white—who wished to transfer to any other department.<sup>3</sup> The district court found no violation, holding that the tests were probably related to necessary job skills.<sup>4</sup> The court of appeals agreed that there was no violation, holding that such tests need not be job-related.<sup>5</sup>

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tional negligence. The Court in *Usner* distinguished the earlier decision of *Crumady* in terms of a defective winch and *Mascuilli* in terms of a prior unseaworthy condition arising from the tightline condition. In following *Mitchell's* standard of reasonableness, *Usner* is technically on firm ground, but Mr. Justice Harlan, in his dissent also appears correct in stating that "*Crumady* cannot justly be distinguished" from *Usner*. 91 S. Ct. at 520. While litigation on the question of whether instantaneous operational negligence equates to unseaworthiness should abate as a consequence of *Usner*, the voluminous and costly litigation on the other aspects of unseaworthiness will continue.

1. 42 U.S.C. § 2000e-2(a)(2) (1964) provides that:

It shall be unlawful employment practice for an employer— . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

*Id.* § 2000e-2(h) provides:

Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race. . . .

2. *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 244 (M.D. N.C. 1968).

3. *Griggs v. Duke Power Co.*, 91 S. Ct. 849, 852 (1971).

4. 292 F. Supp. at 250.

5. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1235 (4th Cir. 1970).