Unseaworthiness - Recovery by Longshoremen for Injuries Caused by Defective Shore-Based Equipment

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ing the Common Purchaser Act still exist, the act's jurisdictional base is all but gone—quite a different matter. Perhaps, this is a new species of situation in which courts should refuse to enforce a statute so emasculated and should return the problem to the legislature, by analogy to what courts do with a statute that is unintelligible as written.[31] Though the Texas Common Purchaser Act itself remains intelligible, the means of effecting its intended purpose are rendered unintelligible by the intervention of the federal government.

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The plaintiff, a stevedore employed by Continental Grain Co., was injured while unloading grain from a barge which was owned by Federal Barge Lines, Inc. and chartered by Gulf-Canal Lines, Inc. The plaintiff sued Federal and Gulf for damages based on unseaworthiness[1] and the defendants filed a third-party complaint against Continental. The injury resulted from an alleged defect in a marine leg, a mechanical elevator device, owned by Continental. The leg was permanently attached to the dock and power for operating it was supplied by shore-based facilities.[2] The district court

[31] An unintelligible statute is invalid and will not be enforced. Weeds, Inc. v. United States, 255 U.S. 109 (1921); Christy-Dolph v. Gragg, 59 F.2d 766 (W.D. Tex. 1932); Eubanks v. State, 203 S.W.2d 339 (Tex. Civ. App. 1947) *error ref.*; Railroad Comm'n v. Fort Worth & D.C. Ry., 161 S.W.2d 560 (Tex. Civ. App. 1942) *error ref. w.m.*

[1] The plaintiff also alleged that the failure of Continental to supply goggles in compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. § 9.1 (1958), rendered the barge unseaworthy. This Note, however, will deal only with the allegation of unseaworthiness based on the defective marine leg. It is interesting to note that the exact question of whether a defective marine leg can cause a vessel to be unseaworthy has previously been before the Supreme Court. The question, however, was avoided by holding that the old ship used to store grain was not a vessel, but a "mobile warehouse" and therefore not warranted to be seaworthy. Roper v. United States, 368 U.S. 20 (1961). A barge, the vessel in this case, is within the warranty of seaworthiness. The Robert v. Parsons, 191 U.S. 17 (1903).

[2] The unloading operation, as described by the court of appeals in *Deffes*, is performed in four stages:

> (1) The marine leg is introduced through the open hatch of the barge into the grain, and grain is, in effect, 'dug' out by buckets on the conveyor belt. During this stage, there is no contact with the barge. (2) Large scoops, generally called "air buckets," operated by means of pulleys and cables, are utilized to bring the grain from the ends of the barge to the marine leg. The pulleys are attached to the barge at various places by means of hooks and are connected with the marine leg by cables. All this equipment is stored in the marine leg when not in use. (3) When the grain level has been lowered sufficiently, the air buckets are detached and stored and small bulldozers serving essentially the same purpose as the air buckets are brought into use. (4) The last phase of the process is the "sweeping up," during which stevedores sweep up the grain and shovel it into the marine leg. At this stage, the marine leg rests on the bottom of the barge. The injury occurred during the last phase of the unloading.

Deffes v. Federal Barge Lines, Inc., 361 F.2d 422, 423 (5th Cir. 1966).

decided in favor of the defendants. It found that, since the equipment was not traditionally a part of the ship's appurtenant appliances and equipment, the defect in the marine leg could not create an unseaworthy condition.[3] *Held, reversed and remanded:* A defective marine leg used in unloading grain makes a barge unseaworthy. *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (5th Cir.), *cert. denied*, 385 U.S. 969 (1966).

I. Expansion of Unseaworthiness

The originally exclusive seaman's remedy of maintenance and cure[4] has been supplemented by a statutory remedy for negligence[5] and a judicial remedy for unseaworthiness.[6] This judicial remedy places a duty on the shipowner to provide a ship reasonably fit for its purpose. The early doctrine was limited by restrictions based on contract and negligence law, analogous to the common law principles of employer's liability. Today, in spite of considerable disapproval, the shipowner's obligation to provide a ship free from unseaworthy defects is absolute and liability is "neither limited by conceptions of negligence, nor contractual in character."[7]

Seamen, the "wards of admiralty," have traditionally been treated with special concern in American courts,[8] but this paternalistic attitude has been extended during the twentieth century to a variety of maritime workers other than seamen. The right of these workers to sue for unseaworthiness developed by an interesting evolution of case law. In 1917 the Supreme Court decided that a stevedore injured on board ship could not re-

[3] Deffes v. Federal Barge Lines, Inc., 229 F. Supp. 719 (E.D. La. 1964).

[4] Maintenance and cure has been analogized to accident and health insurance. See Gilmore & Black, Admiralty 254 (1957). The following items are recoverable under maintenance and cure: (1) maintenance, which is a living expense; (2) cure, which covers nursing and medical expenses, and (3) wages. The seaman, however, is not fully compensated for his injuries because his right to maintenance and cure ends when he has been "so far cured as possible." Farrell v. United States, 336 U.S. 511, 518 (1949).

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

[6] The first applications of the unseaworthiness doctrine related to a seaman's excuse for desertion and marine insurance. As to desertion, see Dixon v. The Cyrus, 7 Fed. Cas. 755 (D.C. Penn. 1789); Rice v. The Polly & Kitty, 20 Fed. Cas. 666 (D.C. Penn. 1789); The Moslem, 17 Fed. Cas. 894 (S.D.N.Y. 1846). This early doctrine was based on an implied contractual obligation on the part of the shipowner to provide a seaworthy ship. It excused the seaman from performance under unusually dangerous conditions and allowed recovery for wages under the contract of employment. As to the doctrine in early marine insurance, see The Southwark, 191 U.S. 1 (1903); The Silvia, 171 U.S. 462 (1898); The Caledonia, 157 U.S. 124 (1895); and 1 Parsons, Marine Insurance, 367-400 (1868).

[7] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960). For a historical development of the shipowner's absolute liability, as it was divorced from negligence law, see Note, 15 Sw. L.J. 328 (1961). Opposing this extension is the dissent in *Mitchell*, 362 U.S. at 550-73, by Justices Frankfurter, Harlan, and Whittaker.

[8] Mr. Justice Story first expressed this view in Hardin v. Gordon, 11 Fed. Cas. 480 (C.C.D. Me. 1823), when he delineated: "Every court should 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 . . . . They are emphatically the wards of admiralty." *Id.* at 485.

cover workmen's compensation benefits provided by state law.[9] To compensate for the denial of this remedy, the Court held in 1926 that a stevedore injured on ship because of negligence on the part of his fellow servant was entitled to recover from his employer under the Jones Act.[10] Mr. Justice Holmes stated that the term "seaman" should be construed to include a stevedore on the theory that "the work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew."[11] The following year Congress enacted the Longshoremen's and Harbor Workers' Act[12] which provided a type of workmen's compensation for maritime workers and excluded all other remedies against their employers.[13] Though the need to call a stevedore a seaman no longer existed, this convenient twisting of words later proved disadvantageous to the shipowner.

One of the most significant developments in the law of admiralty occurred in the case of *Seas Shipping Co. v. Sieracki*.[14] The Supreme Court allowed recovery against the shipowner based on unseaworthiness for an injury caused by a defective boom on board the ship despite the following facts: (a) Sieracki's employer was not the shipowner, but rather an independent contractor; (b) Sieracki was a longshoreman, not a seaman; (c) the shipowner was not negligent; and (d) Sieracki could have recovered workmen's compensation from his employer. The Court rationalized that the shipowner's absolute liability for unseaworthiness extended "to all within the range of its humanitarian policy."[15] Since historically the work of loading and unloading a vessel was done by the ship's crew, a stevedore performing this work was within the contemplated range. As the Court noted, "for these purposes he (the stevedore) is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."[16] Having once called a stevedore a seaman, it was easy for the Court to extend to this land-based "seaman" a seaman's remedy for unseaworthiness. The dissent was based on the proposition that the real risks of unseaworthiness arise when the vessel is on the high seas and not while safely docked in port.[17]

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[9] Southern Pac. v. Jensen, 244 U.S. 205 (1917).

[10] International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926). The Jones Act was enacted in 1920, see note 5 *supra*.

[11] International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926). Commenting on *Haverty*, Mr. Justice Cardozo later remarked, "verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships." Warner v. Goltran, 293 U.S. 155, 156 (1934).

[12] 44 Stat. 1424, 1426-27, 1429, 1431-32, 1434-46 (1927), as amended, 33 U.S.C. § 901-50 (1964). Hereafter referred to as the Harbor Workers' Act.

[13] Under § 5 of the act, the statutory compensation became the maritime worker's exclusive remedy against his employer. However, under § 33 a seaman could still bring actions against third parties, such as an action for unseaworthiness against the shipowner.

[14] 328 U.S. 85 (1946), 34 CALIF. L. REV. 601.

[15] *Id.* at 95.

[16] *Id.* at 99.

[17] For a discussion of the distinctions between the risks faced by a seaman and a longshoreman, see Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 423 (1953).

II. Conflict in the Circuits

Sieracki opened the door to a continual expansion of the unseaworthiness doctrine. This expansion has caused much confusion and controversy in admiralty law. Modern humanitarian considerations and the effect of modern labor methods on the unseaworthiness doctrine have led to a division among the courts. The remedy has been extended to other types of workers,[18] provided they are performing a ship's service. A further extension which has caused considerable conflict among the circuits involves the different types of equipment used in the loading and unloading process which are subject to the warranty of seaworthiness. The myriad factual situations which can and have arisen make it difficult for any uniform principles to be established. Adding to this difficulty is the fact that there is a scarcity of definitive case law by the Supreme Court.

Aftermath of Sieracki. The two cases decided by the Supreme Court after *Sieracki* which are used in any argument involving the extension of the unseaworthiness doctrine to include different types of equipment are *Petterson v. Alaska S.S. Co.*[19] and *Rogers v. United States Lines.*[20] In *Petterson* the Court agreed with the Ninth Circuit's holding that the shipowner was liable to a stevedore who was injured when a snatch block, not part of the ship's equipment,[21] broke when put to proper use. This decision abolished a limitation established in several circuits[22] whereby the ship's owner was not liable for an injury occurring while control of the ship, or that part where unseaworthiness arose, was relinquished to an independent contractor. The Court interpreted *Sieracki* as placing an absolute duty on the shipowner whether or not he has relinquished control of his ship or a part thereof.

In *Rogers* the Supreme Court held that a defective land fall runner, used to unload cargo, caused the ship to be unseaworthy[23] in face of the facts that (a) the alleged unseaworthy condition was not created by the ship; (b) the runner was owned, produced, and operated by the independent

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[18] See Pope & Talbot, Inc. v. Hawn, *supra* note 17 (carpenters); American S.S. Co. v. Copp, 245 F.2d 291 (9th Cir. 1957) (riggers); Torres v. The Kaster, 227 F.2d 664 (2d Cir. 1955) (shipcleaners); Feinman v. A. H. Bull S.S. Co., 216 F.2d 393 (3d Cir. 1954) (electricians); Read v. United States, 201 F.2d 758 (3d Cir. 1953) (repairman).

[19] 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam,* 347 U.S. 396 (1954), 53 Mich. L. Rev. 126.

[20] 205 F.2d 57 (3d Cir. 1953), *rev'd per curiam,* 347 U.S. 984 (1954). There are many cases which, to a lesser degree, illustrate the tendency towards increasing the situations wherein the shipowner is held absolutely liable for injuries to longshoremen engaged in the "ship's service." These cases fall within the outer boundaries of liability as established by *Petterson* and *Rogers,* which have extended *Sieracki* the farthest as to what equipment is warranted to be seaworthy.

[21] This fact was one of the main reasons why Justices Burton, Frankfurter, and Jackson dissented. Alaska S.S. Co. v. Petterson, 347 U.S. 396, 401 (1954).

[22] See Lopez v. American-Hawaiian S.S. Co., 201 F.2d 418 (3d Cir. 1953); Lynch v. United States, 163 F.2d 97 (2d Cir. 1947).

[23] 347 U.S. 984 (1953) (*per curiam* opinion reversing the Third Circuit).

stevedoring company in full control of the unloading operation; (c) the shipowner did not sanction its use or even know of its existence; and (d) there was no basis for concluding that the vessel had adopted the runner as an appurtenance.[24] Three justices dissented on the ground that *Sieracki* did not justify the extension of the doctrine to cover "the unseaworthiness of equipment owned and brought on board by a stevedoring contractor,"[25] since the stevedoring company is in a better position to prevent such hazards. It should be noted, however, that while the stevedore can recover only a limited amount from his employer under the Harbor Workers' Act,[26] the shipowner is allowed indemnity from the stevedoring company when the latter's negligence causes the defect.[27]

Traditional Equipment Test. One question which has caused a division among the circuits concerns the extension of the doctrine to include equipment used in loading and unloading a vessel which is not traditionally a part of the ship. Opposing such an extension are the decisions of the Second Circuit in *Forkin v. Furness Withy & Co.*[28] and the Sixth Circuit in *McKnight v. N.M. Paterson & Sons.*[29] Obviously disagreeing with *Sieracki's* decision and underlying rationale,[30] these circuits established a test limiting the warranty of seaworthiness to equipment traditionally a part of the "hull, gear, stowage, appurtenant appliances and equipment" of the vessel. By thus limiting the doctrine[31] and distinguishing *Petterson* and

[24] Rogers v. United States Lines, 205 F.2d 57, 58 (3d Cir. 1953).

[25] This theory was used by the same Justices in Alaska S.S. Co. v. Petterson, 347 U.S. at 401-02.

[26] Note 13 *supra.* He is not, however, allowed double recovery. Under the amended section 933 of the Harbor Workers' Act, 73 Stat. 391 (1959), 33 U.S.C. § 933 (Supp. II, 1961), the stevedore's employer is guaranteed his payments under the act if recovery is made against a third party.

[27] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The Supreme Court allowed the shipowner to sue the stevedoring company for indemnity. This right of indemnity was based upon an implied contractual obligation arising out of the stevedoring contract requiring the company to perform the shipowner's stevedoring functions in a workmanlike manner. The stevedoring company warrants its service as a manufacturer warrants the soundness of his product.

[28] 323 F.2d 638 (2d Cir. 1963).

[29] 286 F.2d 250 (6th Cir. 1960), *cert. denied,* 368 U.S. 913 (1961).

[30] The court in *Forkin* challenged *Sieracki's* premise that the work of loading and unloading had historically been performed by the crew as being much too broad. Forkin v. Furness Withy Co., 323 F.2d at 640. It cited as support, Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381, 413-14 (1954) and Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen,* 111 U. PA. L. REV. 1137 (1963). Mr. Byrne was one of the losing counsel for the shipping company in *Sieracki.*

[31] The courts in *McKnight* and *Forkin* drew further distinctions to justify the limitation placed on *Sieracki.* First, they tried to introduce negligence into their consideration of the seaworthiness question—a proposition which *Deffes* recognized to be clearly erroneous. They inferred that the shipowner's power of inspection, Forkin v. Furness Withy & Co., 323 F.2d at 641, or his lack of control, McKnight v. N. M. Paterson & Sons, 181 F. Supp. at 439, have relevance to the warranty of seaworthiness. This position was analyzed and rejected completely by the Supreme Court in Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). Second, the courts contended that liability should not be imposed unless the injuring device is attached to or touching the ship, McKnight v. N. M. Paterson & Sons, 181 F. Supp. at 439 and Forkin v. Furness Withy Co., 323 F.2d at 641. Since there is no support in the Supreme Court cases for this limitation, *supra* notes 19, 20, *Deffers* refused to accept it, even though the marine leg was attached to the barge at one stage and was at the time of the injury touching the bottom of the barge, *supra* note 2.

Rogers, the courts felt that they had found a "rational stopping place" for the cases involved with questions of unseaworthiness. *McKnight* found that the defective equipment which caused the injury in both *Petterson* and *Rogers* was of the type *commonly* used as a part of the gear of both the vessel and the stevedoring company.[32] Once this duplicity of gear had been established, it was easy for the court to reason that those vessels had adopted such equipment as their own.[33] The *McKnight* court refused to allow recovery for unseaworthiness of a defective crane, because a crane is not *commonly* found among the ship's gear.[34] Consequently, although the stevedore was performing a seaman's job, he was not incurring a seaman's hazard since he was not using equipment traditionally found on board a ship. The Second Circuit in *Forkin* agreed with *McKnight* and held that equipment maintained on the pier to establish connection with the ship (in this case a baggage conveyor) was not an "appliance appurtenant to the ship" or part of the ship's "gear." However, the court conceded that regardless of the size or common nature of the equipment, if a defective conveyor had been attached to the ship, a stevedore could sue for its unseaworthiness.[35]

Traditional Work Test. Following the general trend towards greater liberality in affording to injured longshoremen recourse against the shipowner, the Ninth and Third Circuits have extended the doctrine to include equipment, not a traditional part of the ship, provided the worker is performing work traditionally performed by the crew. In the Ninth Circuit case of *Huff v. Matson Nav. Co.*[36] a longshoreman recovered for an injury in the hold of a vessel caused by a defective scraper which was part of the stevedore's dockside crane (the device was similar to a marine leg). Though no part of the ship's gear was involved, the court stated that "use of more modern equipment can no more exculpate the shipowner from his obligations than could the use of 'more modern divisions of labor' [as in *Sieracki*]."[37] Similarly, the Third Circuit in *Spann v. Lauritzen*[38] followed *Huff* and extended its holding considerably by allowing a stevedore damages for the unseaworthiness of a hopper which injured him *on the pier*.

[32] The court in *McKnight* relied on Fredericks v. American Export Lines, 227 F.2d 450 (2d Cir. 1954), which was irrelevant to the question in *McKnight*. In *Fredericks* the American Export Lines was not sued as a shipowner nor was it ever decided who owned the ship. As that court had said, "no vessel was connected with the accident." *Id.* at 452. The claim was against the Lines as a lessee in possession of the pier and was based upon a New York statute. The court held that the liability of the pier owner would not extend to a defective appliance furnished on defendant's pier by a subcontractor. This misreading of *Fredericks* possibly misled the *McKnight* court.

[33] This distinction was made by the district court, 181 F. Supp. 434 (N.D. Ohio 1960), and affirmed by the Sixth Circuit in *McKnight*, 286 F.2d 250 (6th Cir. 1960).

[34] McKnight v. N. M. Paterson & Sons, 181 F. Supp. at 439. The court stated that "its [the crane's] size and sole function rebel against any argument that a ship might 'adopt' or 'integrate' such equipment as part of its gear." *Ibid.*

[35] Forkin v. Furness Withy & Co., 323 F.2d at 641.

[36] 338 F.2d 205 (9th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965).

[37] *Id.* at 212-13.

[38] 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 939 (1965).

III. Fifth Circuit Adoption of the Liberal Test

The Fifth Circuit in *Deffes v. Federal Barge Lines, Inc.*[39] aligned itself with the decisions of the Third and Ninth Circuits by allowing recovery on the ground of unseaworthiness even though a defective marine leg is not a traditional part of a ship. The court rejected the distinction in *McKnight* that the stevedore was not incurring the hazards of a seaman because none of the traditional unloading gear of the ship (*i.e.*, winches, masts, or booms) were being used. The court felt there was no doubt that *Deffes* was within the scope of the doctrine as loading and unloading is clearly held to be work of the ship's service.[40] The following language of the Supreme Court in *Sieracki* was emphasized: "the risks themselves arise from and are incident in fact to the services . . . ."[41] If the stevedore is doing work traditionally performed by a seaman, he is, by definition, incurring the risks incident to that service, whether new or old equipment is used.

The Supreme Court had forecast choppy waters for the traditional part of the ship test when it made clear in *Sieracki* that the shipowner, "is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities."[42] By analogy, the shipowner should not be able to discard these responsibilities by securing modern techniques of loading and unloading his ship.[43] To allow the owner to escape liability in such a situation would be discriminatory against the longshoremen whose industrious employer uses faster, easier, and safer machinery for loading and unloading the vessel.

In *Deffes* the court attempted to show the invalidity of the *McKnight* test by applying it literally to the example of a seaman injured aboard an atomic-powered vessel. If the seaman were injured by a defect in the reactor, certainly not traditional ship's gear, no cause of action could arise for unseaworthiness. "Such a result," as the Fifth Circuit realized, "would be completely out of harmony with the Supreme Court's conception of the doctrine of seaworthiness."[44] The Fifth Circuit also rejected the argument in *Forkin* and *McKnight* for denying relief on the ground that the shore-based crane (marine leg in *Deffes*) was not an actual part of the hull, gear,

[39] 361 F.2d 422 (5th Cir. 1966).

[40] See Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423, 428 (1959); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[41] Seas Shipping Co. v. Sieracki, 328 U.S. at 95.

[42] *Id.* at 100.

[43] The Ninth Circuit in Huff v. Matson Nav. Co., 338 F.2d 205 (9th Cir. 1964), used this analogy to show the artificiality of the distinction in *McKnight*. See note 36 *supra* and accompanying text.

[44] Deffes v. Federal Barge Lines, 361 F.2d at 426. This strict interpretation of the traditional ship's gear test is not indicated by the language in *McKnight*. When the atomic propulsion system becomes part of the ship, obviously it would be warranted by the shipowner. However, the court's conclusion is a logical extension of the standard, if technically construed.

or stowage of the vessel and therefore was not within the warranty of seaworthiness. In reversing the court of appeals decision in *Rogers*, the Supreme Court effectively negated this limitation. As pointed out in *Deffes*, the facts in this case are not distinguishable from the *Rogers* and *Petterson* cases on any rational basis. Each case involved stevedore company equipment brought on board to help with loading or unloading the ship. "The mere fact that the marine leg is larger than a block or land fall runner should not cause a different application of the law."[45]

IV. Conclusion

At its inception the doctrine of unseaworthiness had one central point—the vessel involved. Because of the historical evolution of the vessel's warranty of its own fitness which included the type of equipment available at that time, this focal point was reasonable and logical. But with the advent of modern social philosophy and technology, the recent cases, including *Deffes*, have abandoned the ship. Instead of asking if the boat or its equipment is seaworthy, the question now asked is whether the man was performing a ship's service and then whether a defect in the equipment used by him caused the injury. If so, the vessel is unseaworthy independent of the relationship of the equipment to the boat. This test seems to be in accord with the Supreme Court's language in *Pope & Talbot v. Hawn*[46] where the Court reaffirmed *Sieracki* stating that "*Sieracki*'s legal protection was not based on the name 'stevedore' but on the *type of work* he did and its relationship to the ship . . . ."[47] Though the mere holding that a piece of equipment, not a part of the ship, can cause the ship to be unseaworthy sounds inconsistent in itself, the decision in *Deffes* is logically consistent with language and concepts thus far enunciated by the Supreme Court. If the worker performs a direct step involved in a ship's service, historically performed by seamen, he should be protected by the doctrine regardless of the type of equipment used.

In the absence of a contra indication by the Supreme Court, most courts today do not apply the "traditional part of the ship" test, but have adopted the "traditional work of a seamen" test, emphasizing the *function* of the equipment used.[48] Perhaps the reason for this change has been the con-

[45] *Ibid.*

[46] 346 U.S. 406 (1953).

[47] *Id.* at 413.

[48] Similar expressions of the doctrine as expressed in *Deffes* are found among the district courts. In Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812 (E.D. Penn. 1959), a longshoreman was injured while working in a railroad car placing wooden "chocks" under a draft of steel beams preparatory to their being hoisted aboard the ship. Rejecting the defendant's claim that plaintiff was merely preparing the cargo for loading and not doing the actual loading, the court concluded that "the term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiff's actions at the time of the accident were *direct, necessary steps* in the physical

fusion of the courts in defining the status of a longshoreman as a seaman and the status of the vessel within the doctrine of unseaworthiness in light of modern developments. As can be seen in *Deffes*, the lines between the two seem to overlap to a point where the criteria for determining whether a longshoreman is within the status of a seaman also determines the equipment warranted to be seaworthy by the shipowner.

Though consistent in its logic, the definition of the doctrine in this manner causes several problems in its applications. For example, the basic cause of the conflict over the question in *Deffes*, that of refusal to extend the doctrine beyond its traditional focal point, has also generated a conflict in the circuits in an analogous situation involving use of inadequate manpower to do maritime work. The Second Circuit, upholding the traditional threefold concept of a sound ship, proper gear, and a competent crew, has held that a shipowner is not liable for injury resulting from a non-negligent order assigning insufficient manpower to a job.[49] The Ninth Circuit, in accord with its broader coverage, has held that the same type of order creates a dangerous condition which renders the vessel unseaworthy.[50]

One major problem with the *Deffes* definition of the doctrine is that numerous situations could arise under this theory, which will undoubtedly lead to less uniformity in maritime cases unless a specific standard or guideline is set by the Supreme Court. For instance, the stevedoring company's equipment used to unload barges extends inland hundreds of feet and involves grain handlers, truckers, railroad equipment and employees, and administrative personnel, all of which, while performing their various functions, could be said to be engaged in the service of the vessel since they are assisting in various ways in the process of unloading the vessel. More specifically, employees are scooping grain inside an elevator where the marine leg terminates, as the plaintiff was doing on the barge. The machinery and inside personnel continue to operate while an empty barge is removed and a full barge is placed in position for unloading. It is settled that a long-

transfer of the steel from the railroad into the vessel, which constituted the work of loading." Litwinowicz v. Weyerhaeuser S.S. Co., *supra* at 817-18. And in Thompson v. Calmar S.S. Corp., 216 F. Supp. 234 (E.D. Penn. 1963), a longshoreman recovered on the ground of unseaworthiness when he was injured while engaged in the movement of freight cars which were propelled by the ship's line into a position where their cargo could be loaded onto the ship. The court reasoned that "it would not do to isolate from the over-all circumstances the fact that the plaintiff happened to be on a loaded freight car and then plead the seemingly strange extravagance that a workman on a freight car is held to be engaged in the traditional work of a seaman. In isolation such a plea may sound appealing. In the circumstances it is unfounded." Thompson v. Calmar S.S. Corp., *supra* at 238. After examining several cases, one district judge concluded in a case involving a seaman's unseaworthiness suit against the shipowner for injuries caused by a defective chisel-truck owned by the stevedoring company and brought on board the ship, "perhaps my ability to draw the line in this situation is no better than the Maine roofer laying shingles on a day the fog was so thick he did not realize he had gone past the edge, but I can perceive here no rational stopping place." Considine v. Black Diamond S.S. Corp., 163 F. Supp. 107, 108 (D. Mass. 1958).

[49] Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247 (2d Cir. 1966).

[50] American President Lines v. Redfern, 345 F.2d 629 (9th Cir. 1965).

shoreman, if performing a seaman's service for the ship, does not have to be on board the ship when he is injured to recover for unseaworthiness.[51] If one of the workmen in the elevator is injured while the barges are being changed, it would seem that an action for unseaworthiness would be available, but it is not clear which barge owner should be sued.

The broader view will not only cause problems in its application, but also in its economic effects. The theory adopted by the Fifth Circuit will include a wide range of non-shipboard equipment. Since most defects in this equipment will usually be caused by the negligence of its owner, the stevedoring company, in such cases the Supreme Court has allowed indemnity against the stevedore's employer.[52] But the resulting circular litigation adds expense and unnecessary delay to the settlement of the case. By making the third-party remedies more appealing, the courts are increasing this problem while at the same time slighting Congress' intent to limit compensation with the Harbor Workers Act.[53] In the past the excess litigation has been preferable to excluding maritime workers from seaworthiness protection; but, as the problem becomes more acute, a solution is demanded. One possibility could be to allow the stevedore to sue his employer directly for unseaworthiness.[54] This exception to the exclusive remedy provision would eliminate the cost of indemnification proceedings in cases where the employer is clearly at fault. In any case, the increasing number of seaworthiness damages enhances the danger of pricing the shipping industry out of its market, because these costs are recovered through higher prices.[55]

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[51] Guieterrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

[52] *Supra* note 28.

[53] *Supra* note 12.

[54] An exception to the exclusive remedy provision of the Harbor Workers' Act would have to be passed by Congress.

[55] See Comment, *Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster*, 9 VILL. L. REV. 422, 439-40 (1964).