THE "Jones Act"

Deleted 1/28/08

"§ 30104. Personal injury to or death of seamen

"(a) CAUSE OF ACTION.—A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

"(b) VENUE.—An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located.

Deleted 1/28/08

"§ 30105. Restriction on recovery by non-citizens and non-resident aliens for incidents in waters of other countries

"(a) DEFINITION.—In this section, the term 'continental shelf' has the meaning given that term in article I of the 1958 Convention on the Continental Shelf.

"(b) RESTRICTION.—Except as provided in subsection (c), a civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if—

"(1) the individual suffering the injury or death was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action;

"(2) the incident occurred in the territorial waters or waters overlaying the continental shelf of a country other than the United States; and

"(3) the individual suffering the injury or death was employed at the time of the incident by a person engaged in the exploration, development, or production of offshore mineral or energy resources, including drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment, or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces.

"(c) NONAPPLICATION.—Subsection (b) does not apply if the individual bringing the action establishes that a remedy is not available under the laws of—

"(1) the country asserting jurisdiction over the area in which the incident occurred, or

"(2) the country in which the individual suffering the injury or death maintained citizenship or residency at the time of the incident.

E-0000

**JONES ACT, 46 U.S.C. ___ (incorporating F.E.L.A., 45 U.S.C. § § 51-59)**

30104

A traditional hallmark of admiralty law has been the treatment of seamen as wards of the court. *The Sea Gull*, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865). Although the modern definition of a seaman has spread far beyond the traditional bluewater sailor and much of the harshness of the trade has been mitigated, this judicial paternalism remains evident in maritime personal injury and death litigation. Nowhere in the court opinions is this concern more apparent than in the areas of standard of care and causation.

Studying this area of maritime law can be tricky for a number of reasons. First, the courts often confuse duty and causation, or tend to use them interchangeably. Second, the standards for duty and causation differ between Jones Act and unseaworthiness actions. In addition, the shipowner's duty to the seaman and the effect of contributory negligence may vary due to the nautical experience of the injured party, *Stevens v. Seacoast Co.*, 414 F.2d 1032 (5th Cir. 1969); *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962). Perhaps the best way to approach standard of care and causation in seamen's actions is to consider Jones Act and unseaworthiness claims separately.

When a Jones Act cause of action is involved, the question of causation may go to the jury if evidence reveals that the employer's negligent conduct played any part, even the slightest, in producing the injury. *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S. 521 (1957). This low evidentiary threshold allows the jury to infer causation from any probative facts of the employer's negligence, *Sanford Brothers Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969); although some evidence of negligence must exist to support such an inference. *Perry v. Morgan Guaranty Trust Co.*, 528 F.2d 1378 (5th Cir. 1976). Accordingly, directed verdicts and judgment n.o.v.'s are permitted "only where there is a complete absence of probative facts to support a jury verdict." *Lavender v. Kern*, 327 U.S. 645 (1946). *Res ipsa loquitur* applies to Jones Act cases and the jury is entitled to appropriate instructions at the plaintiff's request. *Olsen v. States Lines*, 378 F.2d 217 (9th Cir. 1967).

Generally, the test in the Fifth Circuit for determining negligence on the part of the employer and the injured seaman is reasonable care under the circumstances. *Gautreaux v. Scurlock Marine,*

*Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc), a holding that was held to have retroactive effect. *Crawford v. Falcon Drilling Co., Inc.*, F.2d (5th Cir. 1997). A finding of comparative negligence may reduce, but not bar, recovery. 45 U.S.C. § 53. Assumption of the risk is prohibited as a defense under F.E.L.A., and hence, under the Jones Act. 45 U.S.C. § 54.

The duty of the shipowner to the seaman may be breached by acts of the owner and/or personnel aboard the vessel on which the plaintiff is employed.

In regard to statutory violations, a Jones Act employer may be liable for injury or death flowing from a statutory violation regardless of whether the statute was designed to protect against the type of injury about which the complaint is made. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). The Fourth Circuit referred to a maritime duty of care that can arise from a statute or regulation; note, this statement is made in the context of negligence and not causation. *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003). The existence of causation flowing from a statutory violation may be presumed; the courts, being reluctant to place the burden of proof on the plaintiff, instead may require the employer to prove that the violation could not have been a contributing cause of the injury. *Reyes v. Vantage Steamships, Inc.*, 609 F.2d 140 (5th Cir. 1980). *But see Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 594-96 (2d Cir. 1998), a decision holding that the violation of an OSHA regulation does not constitute negligence *per se*, preclude comparative negligence, or shift the burden of proof. It is some evidence relative to the negligence issue.

## WARRANTY OF SEAWORTHINESS

An alternative route to maritime personal injury and death recovery for seamen and some maritime workers is an action based on unseaworthiness. Unseaworthiness may be, and often is, pled in conjunction with Jones Act claims, *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), but the standards of care and causation are markedly different. The warranty of seaworthiness is a non-delegable duty of the shipowner. It is based on general maritime law rather than a statute. Although seaworthiness is often referred to as an absolute duty, it does not require an accident-free ship, but rather a ship and appurtenances reasonably fit for their intended use. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). Whether a vessel is unseaworthy is a question of fact that may be submitted to the jury if "reasonable men viewing the facts and inferences can differ as to the vessel's reasonable fitness for the voyage in question." *Lundy v. Isthmian Lines, Inc.*, 423 F.2d 913, 915 (4th Cir. 1970). The plaintiff's burden is to prove that the vessel or appliance failed at its intended purpose while subject to acceptable use, not to prove why or how. *Case v. D.J. McDuffie, Inc.*, 502 F.2d 969 (5th Cir. 1974).

Causation in an unseaworthiness action differs from the "even the slightest" test of the Jones Act, resembling the more traditional common law test of "proximate causation." The plaintiff in an unseaworthiness action must show that the unseaworthy condition was the substantial cause of the injury, uninterrupted by intervening causes, and that the injury was a reasonably probable result of the unseaworthy condition. *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037 (5th Cir. 1982). See Judge Rubin's jury charges on unseaworthiness.

A plaintiff may provide sufficient proof for a jury to infer that an unseaworthy condition was the proximate cause of the injury or death. *Landry v. Two R Drilling Co.*, 511 F.2d 138 (5th Cir. 1975). In *Petterson v. Alaska Steamship Co.*, 205 F.2d 478 (9th Cir. 1953), the Ninth Circuit used reasoning similar to the doctrine of *res ipsa loquitur* to find causation. The U.S. Supreme Court affirmed in a *per curiam* opinion that seemed to indicate approval of this seaborne version of *res ipsa loquitur*, *Alaska Steamship Co. v. Petterson*, 347 U.S. 396 (1954).

The duty to provide a seaworthy vessel is absolute to the degree that if a vessel is not reasonably fit for its intended use, then no amount of care or prudence will excuse the shipowner until the defect is remedied. *Alaska Steamship Co. v. Garcia*, 378 F.2d 153 (9th Cir. 1967). A

vessel owner's knowledge or notice of an existing or developing unseaworthy condition is not required. The warranty applies not only to the ship and appurtenances, but to the crew as well. *Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. 336 (1955). An appurtenance need not be a permanent fixture aboard ship, but may include shoreward equipment attached to, and integrally related to the function of the vessel. In *Drachenberg v. Canal Barge, Inc.*, 571 F.2d 912 (5th Cir. 1978), a shoreside loading arm temporarily attached to a barge in order to facilitate cargo operations was held to be an appurtenance covered by the warranty of seaworthiness. Perhaps *contra* is a decision by the Fifth Circuit where a shoreside conveyor belt used to load bananas onto a vessel was held not to be an appurtenance of the vessel. *David v. W. Burns & Co.*, 476 F.2d 246 (5th Cir. 1973).

David STEVENS, Plaintiff-Appellant,
v.
SEACOAST COMPANY, Inc. and M/V ELENA S, Defendants-Appellees.
No. 26852.

United States Court of Appeals
Fifth Circuit.

Aug. 13, 1969.

Before JOHN R. BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

JOHN R. BROWN, Chief Judge:

The wrinkle, not a new one, cf. Mike Hooks, Inc. v. Pena, 5 Cir., 1963, 313 F.2d 696, 697, 1963 A.M.C. 355, that differentiates this case from the run-of-the-sea claim for a seaman's personal injuries is the contention which usually strands in fact and here founders on the reef of law that the master of the fishing vessel on a lay was the bare boat charterer or a sort of seagoing independent contractor carrying on a joint venture with fellow crew members, so that the seaman was his, not the Shipowner's, employee. The Trial Court sustained this defense. Because this result affords a too-easy insulation from serious and far-reaching obligations reflected both by the Congressional policy of the Jones Act, 46 U.S.C.A. § 688, and perhaps even more so by the dynamic developments in the *Sieracki-Ryan-Yaka* era,[1] we reject it. We therefore reverse and remand to fix damages.

The cause of this nautical controversy is the injury to the seaman, a young up-country Mississippi boy who had never been to sea in his life. He was severely injured in the first half hour of his oyster dredging operations on the M/V Elena S. while she was running the oyster beds at Caliga Bay off the Gulf Coast.

The vessel was 58 feet in length with a beam of 18½ feet, fitted out for dredging oysters. It is uncontradicted that she was owned by Seacost Company, Inc., and was, as the Trial Judge's findings accurately characterized, "assigned to a master," a young man of 23 whose formal education ended at the sixth grade. There was no written contract of any kind between this young man and Shipowner. And from the young Master's testimony generally, it is quite evident that if he was, as Shipowner's proctor successfully urged, a bare boat charterer, a demise charterer, or a charterer *pro hac vice*, he did not know it, nor did he comprehend the legal significance of any such strange terminology or, worse, his obligations as a supposed employer of his fellow crew members. The vessel was worked on a lay under which, the Trial Court found, "at the end of each trip the catch was sold to the [Shipowner]". Although there was a suggestion that the Captain was free to dispose of the catch elsewhere, it is quite clear that this was limited to extraordinary situations and a Captain would not last long if he chose to sell the catch to one of Shipowner's numerous competitors in the area. For oyster dredging operations the proceeds of the catch were divided in this fashion. From the top, Shipowner was first paid a dredging hire (a stated amount per barrel) and then was reimbursed for all expenses incurred for fuel, ice, and —as so unfelicitously described in non-nautical language—groceries for the trip. After the dredge fee and trip expenses were skimmed, the remainder was divided into five equal shares, one for Shipowner and one for each of the four crew members, *i. e.*, the Captain and three seamen. Following the custom of the area, the Captain selected his own crew members and was presumably giv-

1. Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698; Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, 1956 A.M.C. 9; Reed v. The Yaka, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, 1963 A.M.C. 1373.

en full authority to hire and fire. Once the vessel got underway Shipowner could not, of course, have any control over her activities, and her control, navigation, and operation were committed to the Captain. This presumably included the manner in which the dragging for oysters was physically performed.

The Trial Judge, undertaking to distinguish this situation from that found by Judge Allred to be a shipowner-seaman relationship in Justillian v. Versaggi, S.D.Tex., 1954, 169 F.Supp. 71, not mentioning a host of other cases presumably because they were not cited by either counsel to him or for that matter to us on appeal,[2] and putting almost complete reliance on our opinion in Gulf Coast Shrimpers and Oystermans Ass'n v. United States, 5 Cir., 1956, 236 F.2d 658, held that the captain was a bare boat charterer of M/V Elena S., who, on accepted principles, see G. Gilmore & C. Black, The Law of Admiralty 218 (1957), bears the in personam liabilities for the vessel's operation and specifically those of the employer of the seamen making up the crew.

Of course, there are situations in which courts recognize that the question whether the relationship of employer-employee, shipowner-seaman exists, is one of fact to be resolved by the trier of fact. See note 2, *supra*. But in the light of overriding principles affording the utmost protection to seamen, Mitchell v. Trawler, Racer, Inc., 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 A.M.C. 1503, such situations are bound to be rare.

[1] And certainly this record does not orbit to a factual apogee. To the contrary, on the most favorable review of the findings below and the contentions of Shipowner, this arrangement does not begin to approach the perigee of the minimum requirements of a demise charter. Indeed, the only thing which resembles a bare boat charter is the barrenness of any indicia characteristic of an owner *pro hac vice*. At the outset, the so-called charterer—whether considered to be the Captain or collectively the Captain and his fellow shipmates—does not "man, victual",[3] and supply the vessel. This burden is shared by all, including Shipowner, since the division under the lay into five equal shares apportions the expenses, even though they may initially have been incurred or guaranteed by Shipowner. Next, the fact that the Captain alone hires and fires the crew is of no significance at all. For while gigantic shipping companies with their sprawling departmental hierarches including port captains, port engineers, hiring halls, union agreements, and the like, tend to

2. Osland v. Star Fish & Oyster Co., 5 Cir., 1941, 118 F.2d 772, 1941 A.M.C. 792, cert. denied, 314 U.S. 615, 62 S.Ct. 86, 86 L.Ed. 495; Osland v. Star Fish & Oyster Co., 5 Cir., 1939, 107 F.2d 113, 1940 A.M.C. 127; Southern Shell Fish Co. v. Plaisance, 5 Cir., 1952, 196 F.2d 312, 1952 A.M.C. 883; Hudgins v. Gregory, 4 Cir., 1955, 219 F.2d 255, 1955 A.M.C. 1012; Cape Shore Fish Co. v. United States, 1964, 330 F.2d 961, 165 Ct.Cl. 630, 1964 A.M.C. 2585.

3. *See, e. g.*, 46 U.S.C.A. § 186:
"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

obscure the shipmaster's role, the fact remains that under express law and tradition that spans the centuries, the engagement reflected by that most maritime of all maritime contracts—Shipping Articles—is not between shipowner and seaman, but between master and seaman.[4]

The same thing is true as to the operation, navigation, and control of the vessel once underway. Just how a remote owner could navigate a vessel from shore is not revealed. But not to be forgotten is that lowly as may be his station in the world of seafarers, homely as may be the little craft he cons, the Master is "lord of his little world",[5] and the one thing the law's Plimsoll Line demands is that no one—not even a Captain Nott[6]—can undertake swivel-chair navigation to tell a so-called Master to turn to, stay put, or seek a haven. *Cf.* Boudoin v. J. Ray McDermott & Co., 5 Cir., 1960, 281 F.2d 81, 1960 A.M.C. 1884.

At most, the only control not inherent in a shipmaster's work committed to the Captain under this arrangement was the selection for the moment of the place to dredge and the manner in which the dredges were put out, hauled in and the ship operated.

4. *See, e. g.*, 46 U.S.C.A. § 564:
"The master of every vessel bound from a port in the United States to any foreign port * * * shall * * * make an agreement in writing * * * with every seaman * * * in the manner hereinafter mentioned; and every such agreement * * * shall be signed by the master before any seaman signs the same, and shall contain [the particulars specified]." See also 46 U.S.C.A. §§ 568-575.
Of course, written articles are not required for vessels in certain coastwise trade or those on a lay. 46 U.S.C.A. § 564.

5. See United Geophysical Co. v. Vela, 5 Cir., 1956, 231 F.2d 816, 819, 1956 A.M.C. 745:
"But navigation in these circumstances is left neither to Judges nor the Elder Brethren of Trinity House nor those who, in the garb of experts, from the security of a swivel chair now lay out the course with great conviction. 'The master is the commander of the ship—lord of his little world. He is master in every sense of the word * * *'. The Balsa, 3 Cir., 10 F.2d 408, 409. Whether he has bridge or quarterdeck to stalk, as long as he commands, he is master. It is the Master, then, who must make these decisions and who, clothed with great responsibility, enjoys the greatest and widest of good faith latitude in professional judgment. 'The fundamental principle in navigating a merchantman, whether in times of peace or war, is that the commanding officer must be left to exercise his own judgment. Safe navigation denies the proposition that the judgment and sound discretion of a captain of a vessel must be confined in a mental strait-jacket. * * *' The Lusitania, D.C.S.,D.N.Y., 251 F. 715, 728."

6. See Central R.R. v. Tug Marie J. Turecamo, E.D.N.Y., 1965, 238 F.Supp. 145, 148, 1965 A.M.C. 2570, quoting from the Mary T. Tracy, S.D.N.Y., 1920, 298 F. 528, 530:
"The contrary view as testified by Capt. Nott called as an expert is but the old story of being able to tell, after the event, what should have been done, where the critics were not there, and were not confronted with the problem nor the emergency. There is always a Capt. Nott. Sometimes he sits by the cozy fireside, and sometimes he testifies in a courtroom. He recites how it could have been better managed, but, if the responsibility had been his, he would have been worried sick, and probably would not have done half as well."

[2] When there is added to all of this—or, more accurately, all of this nothing—the fact that there is no tenure or substantial duration in point of time to the arrangement between Shipowner and Master so that at the first moment the "independent" contractor displeases the shipowner the agreement can be revoked at will, it demonstrates that no real possessory rights are invested in the so-called charterer. But this is the essential requisite of a demise charter to distinguish it from time and voyage charters and the like. G. Gilmore v. C. Black, The Law of Admiralty 215–219 (1957). Under an arrangement so loose it cannot be identified, a valuable vessel is turned over to one for physical operation without regard to relative financial stability, and at the same time all of the other burdens of shipowning, including expensive maintenance, repair, insurance, and the like, are borne solely by the owner. Worse, if it is really a demise charter, then the owner exposed his vessel to unlimited maritime liens, 46 U.S.C.A. § 971, since there was no § 973 limitation on the power of the charterer, § 972, to incur them. See Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 1940, 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197, 1940 A.M.C. 647; Tampa Ship Repair & Dry Dock Co. v. Esso Export Corp., 5 Cir., 1956, 237 F.2d 506, 1957 A.M.C. 102. It is simply an illusion to call this arrangement anything other than a means of determining fair compensation to those who take the ship to sea to fish or shrimp or dredge for oysters.[7]

And no comfort can be drawn from the large collection of cases not cited but known to us concerning the status of crew members on fishing vessels for purposes of the Federal Insurance Contribution Act or the Federal Unemployment Tax Act. Analyzing the problem in the light of general maritime principles urged upon the Court by the Government, this Court in United States v. W. M. Webb Inc., 5 Cir., 1969, 402 F.2d 956, A.M.C. cert. granted, 394 U.S. 996, 89 S.Ct. 1591, 22 L.Ed.2d 774 had this to say concerning an arrangement which was substantially identical with that involved in the instant case:

"Does a realistic application of common law tests require the relationship of owners to the captains and crews be evaluated under principles of general maritime law? The '"ancient solicitude of courts of admiralty for those who labor at sea" continues unchanged, despite the progress from canvas sails to diesel engines.' In non-tort context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seaman. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the vessel is the employer unless the vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is

7. See Southern Shell Fish Co. v. Plaisance, note 2, *supra*: The "shares or lay awarded the captain and crew were merely a method of paying them for their services according to results accomplished, rather than on a daily or weekly basis." 196 F.2d at 314. See also Hudgins v. Gregory, 4 Cir., 1955, 219 F.2d 255, 258, 1955 A.M.C. 1012.

For its contribution to the legend and lore of fishing lays, it is regrettable that the fascinating opinion of the Court of Claims in Cape Shore Fish Co. v. United States, 1964, 330 F.2d 961 (see especially 967–973, conceals its gifted author as a per curiam.) From Justice Story, Coffin v. Jenkins, C.C.D.Mass., 1844, 5 Fed. Cas. p. 1188 (No. 2948) to Moby Dick, the lay has been a means of measuring compensation for crew members—wages for which maritime remedies are available for collection 330 F.2d at 969 & nn. 13, 14.

clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees."

402 F.2d at 959.

That the Court went on to hold that the relationship of employer-employee did not exist as to seamen for *tax purposes* merely highlighted the distinction between the general maritime and the common law rules. Of course, making distinctions is a regular part of the daily travail of a federal judge.[8] What makes the tax cases of no real significance here applies with double force to criminal cases[9] such as Gulf Coast Shrimpers & Oystermen's Ass'n v. United States, 5 Cir., 1956, 236 F.2d 658.

Our subsequent discussion on the merits of the claim for damages bears out the strong congressional policies which assure day-by-day protection to seamen. The Jones Act itself is in sweeping terms.[10] Incorporating as it does the Federal Employers' Liability Act, the Jones Act protects seafaring workers against all manner of contracts and agreements which undertake to lessen or avoid the strict responsibilities imposed by Congress upon the employers of seamen.[11]

8. Frequently, to effectuate the congressional will, there will be conflict and collision between two federal statutes or policies. This is articulated in Lincoln Mills v. Textile Workers, 5 Cir., 1955, 230 F.2d 81, 96, n. 17 (dissenting opinion):
"The same situation or circumstance frequently produces diverse results; e. g., direction and control of trucks, adequate to create genuine independent contractor relationship under Wage & Hour Law, 29 U.S.C.A. § 151 et seq., and Social Security Law, 42 U.S.C.A. §§ 1001 et seq. 1101 et seq., United States v. Silk (Harrison v. Greyvan Lines), 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757, is insufficient to make physical performance by owner-drivers of trucks 'transportation' under National Transportation Act, 49 U.S.C.A. § 301 et seq., United States v. N. E. Rosenblum Truck Lines, 315 U.S. 50, 62 S.Ct. 445, 86 L.Ed. 671, Thomson v. United States, 321 U.S. 19, 64 S.Ct. 392, 88 L.Ed. 513; a crew member of a non-selfpropelled dredge is a 'seaman' under the Jones Act, 46 U.S.C.A. § 688; McKie v. Diamond Marine Co., 5 Cir., 204 F.2d 132, but not a "seaman" under the Wage and Hour Act, 29 U.S.C.A. § 201 et seq.; Walling v. W. D. Haden Co., 5 Cir., 153 F.2d 196, certiorari denied 328 U.S. 866, 66 S.Ct. 1373, 90 L.Ed. 1636; Towing of barges physically performed by chartered tug is not 'transportation' by tug owner-operator under the Interstate Commerce Act, 49 U.S.C.A. §§ 901, 909(a), De Bardeleben Coal Corp. v. United States, D.C.W.D.Pa., 54 F.Supp. 643, affirming Union Barge Line Application, 250 I.C.C. 689, but is 'transportation' for transportation tax under 26 U.S.C. § 3475(a), Gulf Coast Towing Co. v. United States, 5 Cir., 196 F.2d 944."

9. See Cape Shore Fish Co. v. United States, 1964, 330 F.2d 961, 971 & n. 17, 973, 165 Ct.Cl. 630.

10. "§ 688. Recovery for injury to or death of seaman
Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *". 46 U.S.C.A. § 688.

11. "§ 55. Contract, rule, regulation, or device exempting from liability; set-off
Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury of death for which said action was brought." 45 U.S.C.A. § 55.

As reflected in the more detailed discussion on the substantive liability for damages, this case bears out the wisdom of that policy. Here, under a mistaken or hoped-for supposition that the outfitting of the vessel was to be left to the crew as it saw fit, the real owner of the vessel was either unaware of or indifferent to any obligation to supply adequate first aid equipment and medicines. Likewise, the obligation to furnish maintenance and cure was rejected altogether by Shipowner, and the Master, as the supposed employer, was unaware of his obligation or financially unable to respond to it. Similarly Shipowner, apparently feeling safe in its legalistic haven of a somehow demise charter, was unaware of or indifferent to its obligation to equip the vessel with rudimentary radio equipment. This effort to parcel out or palm off serious obligations to the immediate detriment of a seaman to whom all owed the highest duties demonstrates why arrangements, in order to be effective, have to be of the most exacting kind before they are permitted to shift the pervasive obligations of a normal, traditional shipowner onto the back of some other party.

Once the question of status of shipowner-seaman is reached as a matter of law, the rest of the case falls by reason of spectacular negligence for which Shipowner is responsible and for flagrant unseaworthiness which is its sole charge.

Only a brief description of the occurrence need be made. To outfit the vessel for dredging oysters, a vertical post with a cross bar forming a T is securely fastened into the keel at the forward end of the forward hold. Shackle blocks are fixed to each end of the cross T bar. A chain for each side runs forward from the capstan on each end of the winch, which is located just forward of the wheel house. The chains run from the capstan up through the block then downward and aft over the gunwale where it is made fast to the metal cage-like dragging structure, which is called the dredge. These are hauled in one at a time. The injury occurred when the seaman either grabbed onto, or fell against, the chain as it was being hauled in.

On the seaman's story, he was instructed by the Captain to feel the chain to detect whether the dredge was likely filling up with oysters. On the Captain's story, he had thrice warned this very, very green hand not to get near or touch the chain. Another crew member had also warned him a fourth time. Nonetheless, the Captain, busy as he was with responsibility to be both at the wheel inside the pilot house and at the lever of the winch outside the pilot house—an impossible role for one man in one place to fill—saw that the seaman was leaning against the chain. He warned him to get away from the chain and then saw that the seaman turned his back both to the Captain and to the chain. According to the Captain, the seaman's footings somehow slipped, and as he fell back into the chain while it was being hauled in, the seaman instinctively grabbed at it. This caused his hand to to be pulled up into the block, damaging his hand and severing some of his finger joints.

[3] On the Master's own story, it is uncontradicted that despite repeated warnings the seaman was still near the chain at the moment the Captain engaged the lever to haul in on the chain. At the moment he did that, the Captain saw that the seaman's back was to the Captain and to the chain. By the Master's own conduct and his repeated warnings of the hazards, it is clear that he, better than anyone else, knew of the dangers. Moreover, he knew that these were augmented by the physical position of the seaman with his back to the danger and to the operator of the winch. Under these circumstances, the responsibility for this resulting action must rest upon the Captain alone, whose act, of course, is chargeable to Shipowner. The seaman's youth, unfamiliarity, and total lack of experience put a heavier burden on the ship and relieved the victim of

responsibility. See Davis v. Parkhill-Goodloe Co., 5 Cir., 1962, 302 F.2d 489, 1962 A.M.C. 1720.

But fault does not end there. For the M/V Elena S. was unequipped with a radio. It is true that people undertook to testify that this was customary, but this is not enough. In this day when every teenager strolling the streets carries a radio of sorts, and farmers, ranchers, and sportsmen have civilian band communicating radios, and hundreds of pleasure vessels are equipped with two-way radios on standard mobile marine operator and Coast Guard channels, the law can draw on its own resources to find a need and thus to reject a custom as wanting in due care as this one. See Pure Oil Co. v. Snipes, 5 Cir., 1961, 293 F.2d 60, 71 & n.17 and cases cited therein, 1961 A.M.C. 1651; Salem v. United States Lines, 1962, 370 U.S. 31, 36 n.6, 82 S.Ct. 1119, 1123 n.6, 8 L.Ed.2d 313, 318 n.6; The T.J. Hooper, 2 Cir., 1932, 60 F.2d 737, 740, 1932 A.M.C. 1169 (lack of radio equipment established unseaworthiness); *cf.* Walker v. Harris, 5 Cir., 1964, 335 F.2d 185, 1964 A.M.C. 1759; cert denied, 379 U.S. 930, 85 S.Ct. 326, 13 L.Ed.2d 342.

[4, 5] Here the glaring deficiency in the vessel's equipment and hence her unseaworthiness is of more than academic consequence. For on a story read most favorably to Shipowner, after the M/V Elena S went from one nearby vessel to another and finally to an offshore drilling rig, at least an hour and perhaps an hour and a half elapsed before they were able to communicate with the Coast Guard, which promptly sent a helicopter to pick up the injured seaman. Without any sedation whatsoever, he suffered substantial pain described by all as acute. Compensation must be, and is to be, allowed for delay in rendering prompt medical attention. See Bass v. Warren Fish Co., 5 Cir., 1957, 245 F.2d 43, 1958 A.M.C. 404.

[6, 7] Bearing upon this is another glaring deficiencey in the ship's stores and hence her unseaworthiness. She had a first aid kit of sorts. What sorts we do not know. The record is clear, however, that it did not contain any sedation stronger than aspirin. And even these were not administered. Indeed, in making out the best they could with what obviously was a humane purpose to help their injured fellow seaman, the other crewmen made tourniquets and bandages out of bed sheets off the bed of one of the crewmen. When time—which was passing by needlessly from the failure of the vessel to have rudimentary radio communication facilities—is filled with conscious pain that cannot be reduced or alleviated from want of sedations which a vessel ought, and is permitted to carry, the damage for this element becomes augmented and is traceable to unseaworthiness and negligence of Shipowner.

[8] To cap it all off, when the man was sent ashore by helicopter the Captain gave him a couple of dollars. That's the last time he got any money from the Master (the supposed employer) or Shipowner (the real and legal employer). His counsel directed a letter demand for the payment of maintenance and cure, but this was ignored, or at least nothing was done. He was not even paid his share of the lay ($22.92). It was not until two years later in the Trial Court's decree that he got this plus maintenance and cure for approximately six months (totaling $1200). The failure to provide the necessary medical aid, care, and attention, which comprise the maritime obligation of maintenance and cure was another fault on the Shipowner's part. Murphy v. Light, 5 Cir., 1958, 257 F.2d 323, 1959 A.M.C. 625. Whether this contributed in any degree to additional pain or disability or prolonged the recovery period is a matter not reflected by this record. But, if this is established, it too is an element for which resulting damages are due. Cortes v. Baltimore Insular Line, 1932, 287 U.S. 367, 53 S.Ct. 173, 77 L. Ed. 368, 1933 A.M.C. 9; G. Gilmore & C. Black, The Law of Admiralty 269–70 (1957).

The case must therefore be reversed and remanded for further proceedings consistent with this opinion, including the allowance of damages as a result of Shipowner's negligence, the unseaworthiness of the vessel, and the undisputed failure to furnish maintenance and cure when needed.

Reversed and remanded.

107 F.3d 331 (5th Cir. 1997)

Charles D. GAUTREAUX,
Plaintiff-Appellee,

v.

SCURLOCK MARINE, INC.,
Defendant-Appellant.

Nos. 95-30250, 95-30272.

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1997.

Before POLITZ, Chief Judge, and [illegible], GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

DUHÉ, Circuit Judge:

Defendant-Appellant Scurlock Marine, Inc. moves this En Banc Court to consider whether seamen, in Jones Act negligence cases, are bound to a standard of ordinary prudence in the exercise of care for their own safety, or whether they are bound to a lesser duty of slight care. On appeal to a panel of this Court, Scurlock Marine had assigned as error, *inter alia*, the district court's instructions to the jury charging that seamen were bound only to a duty of slight care for their own safety. The panel denied Scurlock Marine relief on this point because the jury instructions were consistent with what the panel considered was the settled law of this Circuit. *Gautreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 780-81 (5th Cir.1996). A review of our Jones Act case law reveals, however, that this "settled law" obtains from doubtful parentage. We thus now overrule cases contrary to the principles embraced in this opinion and AFFIRM in part, VACATE in part and REMAND for further proceedings as to comparative fault consistent with our decision today.

BACKGROUND [1]

Archie Scurlock, as President and owner of Scurlock Marine, Inc., ("Scurlock Marine")

[1] *v. Scurlock Marine, Inc.*, 84 F.3d 776, 778-79 (5th Cir.1996).

purchased the M/V BROOKE LYNN in May, 1993, and retained Lance Orgeron as her first and permanent captain. Scurlock hired Charles Gautreaux as the BROOKE LYNN's relief captain in October, 1993. Gautreaux was qualified for the position, having worked as a tanker man since the early 1980s and having recently earned a United States Coast Guard master's license.

The BROOKE LYNN is a standard inland push boat, equipped with two towing winches on her bow, which are used to secure lines joining the BROOKE LYNN to the barges in her tow. The starboard side winch is hydraulic, and the port side winch is electric. Upon being hired, Gautreaux was taken to the BROOKE LYNN and instructed on her operation by Archie Scurlock. Orgeron took Gautreaux on a tour of the vessel, showing him her layout and familiarizing him with her equipment. Orgeron showed Gautreaux the manual crank handle that accompanied the port side electric winch and told him that it was to be used to override the electric switches on the winch if they failed. Orgeron explained that, if the winch became "bound up" and failed to engage by use of the electric ignition switch, the manual crank should be attached to the winch motor and turned a few times to "unbind" the winch, and then the electric ignition switch should be used to try to engage the winch. Neither Scurlock nor Orgeron told Gautreaux that if he needed to use the manual crank handle to unbind the winch, he should not leave it on the winch motor when attempting to engage the winch by use of the electric ignition switch.

About four months after he was hired, Gautreaux, serving as captain of the BROOKE LYNN, relieved the tanker man on duty and began off loading of the barge in tow. As the barge discharged its cargo, it began to rise in the water, eventually causing the towing wires to become taut. Noticing this, Gautreaux attempted to relieve the tension in the wires by unwinding them from the winches. He released the starboard wire first, which caused that side of the BROOKE LYNN to drop and the port side towing wire to become even tighter. Gautreaux then attempted to release the port side wire, but the electric winch would not work. He attached the manual crank to the winch motor, and began turning the crank while simultaneously pressing the electric ignition switch. When the motor started, the manual crank handle flew off and struck Gautreaux on the right side of his face, crushing his right eye and inflicting other severe injuries.

Gautreaux sued Scurlock Marine, alleging that his injuries were caused by its negligence and the unseaworthiness of the BROOKE LYNN. Gautreaux's primary complaint was that Scurlock Marine failed to properly train him in the use and operation of the electric towing winch and its manual crank handle, thereby not providing him a safe place to work. Scurlock Marine answered and sought exoneration from or limitation of its liability. After a two-day trial, the jury returned a verdict in favor of Gautreaux on his Jones Act negligence claim, but found the BROOKE LYNN seaworthy. The jury apportioned fault 95% to Scurlock Marine and 5% to Gautreaux and awarded a total of $854,000 in damages.[2]

The district court entered judgment for Gautreaux for $811,300. By separate order, the district court denied Scurlock Marine's petition for limitation of liability. Scurlock Marine moved in the alternative for judgment as a matter of law, for new trial, or to alter, amend, or remit the judgment. The district court denied these motions, conditioning its denial of Scurlock Marine's motion for new trial on Gautreaux's acceptance of a remittitur.[3] Gautreaux accepted the remitti-

2. The jury's award was:

| | |
|---|---|
| Past and future pain and suffering and disability | $300,000 |
| Past lost wages | 24,000 |
| Future lost wages | 500,000 |
| Future medical expenses | 30,000 |
| Total | $854,000 |

3. The district court found the jury's award of $500,000 for lost future wages excessive and against the great weight of the evidence, insofar as the award was premised on Gautreaux's inability to return to minimum-wage employment during the first two years after the accident. Accordingly, the district court conditioned denial of Scurlock Marine's new trial motion on this

tur, and the district court entered an amended judgment for $736,925 for Gautreaux.[4]

On appeal to this Court, Scurlock Marine argued, *inter alia*, that in its instructions regarding contributory negligence, the district court erred by charging the jury that a Jones Act seaman need exercise only "slight care" for his own safety. Scurlock Marine maintained that the standard to which Gautreaux, and all seamen, should be held is that of a reasonably prudent person exercising ordinary or due care under like circumstances. Accordingly, Scurlock Marine urged this Court to abandon the slight care standard in Jones Act cases, contending the standard "has evolved from this Court's blind adherence to an incorrect statement of the law." *Gautreaux*, 84 F.3d at 781 n. 7. The panel acknowledged that the viability of the slight care standard has recently been questioned but considered it the settled law of this Circuit. It thus refused to hold that the district court erred in giving the "slight care" instruction, noting that "settled law of this Circuit, such as the slight care standard in a Jones Act case, can only be changed, absent action by the United States Supreme Court, by this Court sitting en banc." *Id.* The panel accordingly affirmed the district court's judgment and this en banc rehearing followed.

## STANDARD OF REVIEW

[1] While trial courts are accorded substantial latitude in formulating jury instructions, "we must reverse when we have a substantial doubt that the jury has been fairly guided in its deliberations." *Bode v. Pan American World Airways, Inc.*, 786 F.2d 669, 672 (5th Cir.1986) (internal quotations and citation omitted); *see also Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir.1995).

## DISCUSSION

The district court's instruction, consistent with the Fifth Circuit's Pattern Jury Instructions,[5] informed the jurors that "[i]n determining whether the plaintiff was contributorily negligent, you must bear in mind that a Jones Act seaman does not have a duty to use ordinary care under the circumstances for his own safety. A Jones Act seaman is obliged to exercise only slight care under the circumstances for his own safety at the time of the accident." Scurlock Marine asserts that this charge is defective, maintaining that historically, Jones Act seamen had been expressly bound to a standard of ordinary prudence under like circumstances. In support of its contention, Scurlock Marine cites early Supreme Court opinions to illustrate that the phrase "slight negligence" or "slight care" stood not for the duty of care owed by employers and employees, as the phrase is now understood, but for that quantum of evidence necessary to sustain a jury verdict on review. The duty of care owed by both parties, Scurlock Marine contends, had always been, and should remain, that of the reasonable person.

We acknowledge there is much confusion in this Circuit as to the proper standard of care by which juries should measure a plaintiff's duty under the Jones Act to protect himself. While some courts have instructed juries that a plaintiff's duty is only one of slight care, as did the district court in the instant case, others charge that the duty is one of ordinary prudence. Admittedly, this Court has been less than clear in its articulation of the proper standard of care to which seamen are bound. We granted this *en banc* rehearing to eliminate the uncertainty and to consider returning, as Scurlock Marine requests, to the reasonable person standard.

### *A. The Development of the Slight Care, or Slight Negligence, Standard*

[2] The language chosen by Congress to determine the responsibility of both employers and employees under the Jones Act is simple and direct. Nothing in the statute

element of damages on Gautreaux's acceptance of an award of $400,625.

4. On June 7, 1995, the district court further amended its judgment, discovering that it had failed to reduce the remitted amount of lost future wages by Gautreaux's percentage of fault.

5. The drafters, not surprisingly, apparently relied upon our explicit statement in *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 536 (5th Cir. 1984), *modified on other grounds*, 754 F.2d 539 (5th Cir.1985), to draft this charge.

indicates that Congress intended to hold Jones Act employees to a standard of slight duty of care in the exercise of concern for their own safety. Below, we explain the statutory scheme and Supreme Court precedent interpreting it before we illustrate our departure from their clear mandates.

*1. The Statutory Scheme and Supreme Court Precedent*

[3] Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. § 688. Section 51 of the FELA provides, in pertinent part, that "[e]very common carrier by railroad ... shall be liable in damages ... for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. In their earlier articulations of § 51 liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest." In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957), the Supreme Court used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA § 51 cases. In *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957), the Court applied the same standard to a Jones Act case, writing, "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" (quoting *Rogers*, 352 U.S. at 506, 77 S.Ct. at 443).

[4] Nothing in these cases, then, supports the proposition that the duty of care owed is slight. Rather, the phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest," modifies only the causation prong of the inquiry. The phrase does not also modify the word "negligence." The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence. *See Texas Food Indus. Assoc. v. United States Dept. of Agriculture*, 81 F.3d 578, 582 (5th Cir.1996) (stating it is a "cardinal canon of statutory construction ... that [in interpreting a statute,] the words of a statute will be given their plain meaning").

Despite the clarity of the Supreme Court's decisions, the word "slightest," used initially to refer to the quantum of evidence of an employer's breach of duty necessary to sustain a jury verdict, soon took on a different referent. Once the Supreme Court had reduced the statutory language "in whole or in part" to "any part, even the slightest," it was not long before our court further reduced the phrase "any part, even the slightest" to a shorthand expression of "slight negligence" or "slight evidence of negligence." Thereafter we used the phrase "slight negligence" uncritically. Justice Frankfurter's comment on the (mis)use of the phrase "assumption of the risk" in FELA actions aptly applies to our discussion today: "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 63 S.Ct. 444, 452, 87 L.Ed. 610 (1943) (Frankfurter, J., concurring). The same holds true of our use of the phrase "slight negligence" or "slight care" in Jones Act negligence cases.

Guided by the Supreme Court, we had initially employed the phrase "slight negligence" as a shorthand expression for the standard by which we measure, in our review of a jury verdict, the sufficiency of evidence establishing a causal link between an employer's negligence and a seaman's injury. Significantly, an employer's duty of care always remained that of *ordinary* negligence. Soon, however, we began using the phrase "slight negligence" to refer not only to the sufficiency of the evidence inquiry but also to that duty of care Jones Act employers owed to their employees. A plaintiff, therefore, could now reach the jury not only with "slight evidence" of his employer's negligence, but also with slight evidence of his employer

having been only "slightly negligent." Once we had characterized the phrase "slight negligence" as shorthand to depict a duty of care owed by an employer to its employee, it was not long before we also used the phrase to represent the plaintiff's duty of care to protect himself from work-related injuries. We did so by rephrasing "slight negligence" to "slight care."

Historically, then, Jones Act employers and seamen were expressly bound to a standard of ordinary prudence; when the phrase "slight negligence" came to stand for the duty of care owed by employers and employees, however, employers were understood to be held to a higher degree of personal responsibility as to their employees, and plaintiff-seamen were understood to be held to a lower degree of personal responsibility for themselves. We hold that the historical interpretation always should have been, and should now be, applied in this Circuit. We offer the following survey of our case law, however, to illustrate just how we devolved from the Supreme Court's pronouncements in *Rogers* and *Ferguson* to our "settled law" today.

*2. Our Departure from the Standard of Reasonable Care*

In *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 823 (5th Cir.1965), we kept the standards for determining duty of care and causation distinct when we clarified that in FELA cases, the traditional standard for determining negligence applied:

> As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. So far as negligence is concerned, that standard is the same—ordinary prudence—for both Employee and Railroad alike.

In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir.1969) (en banc), however, the standards became more nebulous. We misinterpreted *Rogers*'s "any part, even the slightest" language to refer not to the evidence necessary to support a jury verdict, but to an employer's duty of care. We concluded that "[s]light negligence, necessary to support an [sic] FELA action, is defined as 'a failure to exercise *great* care,' and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions." *Id.* at 371. Thus, in *Boeing*, we broadened the scope of a FELA—and by implication Jones Act—action insofar as we exposed employers to a higher degree of care and thus more liability than they otherwise would be exposed to in ordinary negligence actions.

In the following years, we vacillated considerably in our pronunciations of the proper standard of care. In *Perry v. Morgan Guaranty Trust Co. of New York*, 528 F.2d 1378 (5th Cir.1976), we did not follow *Boeing*'s articulation of an employer's duty, applying instead the traditional standard of that of a reasonable person. In *Perry*, the defendant appealed the district court's judgment for the plaintiff, maintaining that the court's finding of Jones Act liability was unsupported by the evidence. We acknowledged that the amount of evidence required to support a jury verdict was slight, and held that an employer was guided by a duty of reasonable care. *Perry*, a case involving solely the issue of sufficiency of the evidence, was therefore properly decided under the Supreme Court's decisions in *Rogers* and *Ferguson*. In *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir.1977), *overruled on other grounds*, 688 F.2d 280 (5th Cir.1982), however, we regressed. Although we held that a finding of Jones Act liability could be sustained upon evidence of only "the slightest negligence," in the very next sentence, we affirmed the district court's use of the reasonable person standard in determining Jones Act liability. *Id.* at 329. Interestingly, we cited *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir.1969) and *Perry* to support our holding that evidence of only the slightest negligence would suffice. *Id.* As noted, however, *Perry*, dealt solely with the issue of causation and did not adopt *Boeing*'s "slight negligence" standard. Moreover, *Sanford Bros.*, which has often been cited erroneously as the progenitor of our "slight negligence" standard, neither applied the "slight negligence" standard of care nor mentioned it in the course of its opinion, as the case concerned only the

causation prong of the inquiry. That we miscited these cases, which both dealt solely with whether the evidence of the employer's negligence supported the jury verdict of Jones Act liability, demonstrates our early predilection to confuse the standard for sufficiency of the evidence and the standard of care a Jones Act employer owes to his employees.

Later, in *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir.1978), *modified on other grounds*, 606 F.2d 524 (5th Cir.1979) (en banc), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 815 (1980), we reverted back to our statement in *Perry* and held that a Jones Act employer is negligent "only if he fails to use *reasonable care* to maintain a reasonably safe place to work." We appear to have switched courses again, however, in *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 361 (5th Cir.1980), in which we held that "[t]he remedial nature of the Jones Act and its imposition of a higher standard of care on employers results in liability upon the showing of only 'slight negligence.'" (citing *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 329 (5th Cir.1977)). Thereafter, we backtracked from this position to other prior ones when we explicitly stated that "the same general negligence ('ordinary prudence') and causation standards apply to both employer and employee in Federal Employers' Liability Act (and, by extension, Jones Act) cases." *Gavagan v. United States*, 955 F.2d 1016, 1019 n. 7 (5th Cir.1992).

Our decisions imputing to Jones Act employers a higher duty of care than that imposed on all other employers stretch the Supreme Court's decisions in *Rogers* and *Ferguson* quite far. Our decisions discussing an employee's duty of care stretch farther. In *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir.1975), *clarified on other grounds*, 546 F.2d 675 (5th Cir.1977), we not only reaffirmed the high standard of care to which we had bound Jones Act employers, but we also announced that a seaman-employee owes only a slight duty to protect himself. We stated, "The duty owed by an employer to a seaman is so broad that it encompasses the duty to provide a safe place to work. By comparison, the seaman's duty to protect himself ... is slight." *Id.* at 223 (internal citations omitted).

*Spinks*, however, was not the definitive word on the issue. Just as we had done for the standard of care to be applied to maritime employers, we vacillated—often in the same opinion—as to the duty a seaman owed to look after his own safety, describing this duty as one of both reasonableness *and* slight care. For example, in *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1057 (5th Cir. 1981), we held that "the seaman has some duty to use reasonable care, even though that duty is slight." Similarly, in *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1193 (5th Cir. 1982), we wrote:

> In contrast to the broad duty imposed upon a vessel owner to supply a safe work place, the seaman's duty to protect himself is slight. Although the seaman has a duty to use reasonable care, this duty is tempered by the realities of maritime employment "which have been deemed ... to place large responsibility for his safety on the owner."

(citations omitted). One year later, in *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175 (5th Cir.1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984), we relied on *Bobb* to define a seaman's duty of care, but neglected to include *Bobb*'s element of "reasonableness" in our definition. We held that "[w]hile the seaman's duty to protect himself is slight, the duty does exist." *Id.* at 180. Within the same paragraph, however, we did point out that although a seaman generally owes no duty to find the safest way to perform his work, "where it is shown that there existed a safe alternative available of which *he knew or should have known*, a seaman's course of action can be properly considered in determining whether he was negligent." *Id.* at 181 (emphasis added). Our design in *Thezan* may have been to continue holding seamen to a standard of ordinary prudence, but we failed to clearly articulate that intention. *See also Shipman v. Central Gulf Lines, Inc.*, 709 F.2d 383, 386 (5th Cir.1983) (perpetuating the ambiguity).

We were quite explicit, however, in *Brooks v. Great Lakes Dredge–Dock Co.*, 754 F.2d 536 (5th Cir.1984), *modified on other*

*grounds*, 754 F.2d 539 (5th Cir.1985), when we expressly rejected any definition of a seaman's duty of care that sounded in ordinary prudence. We held that the district court erred by instructing the jury that the injured party had a duty of ordinary care for his own safety and emphasized, somewhat erroneously, that "[t]his court ... has consistently held that under the Jones Act, a seaman's duty to protect himself is not ordinary care, but slight care." *Id.* at 538. *Brooks*'s explicit proclamation did not last. Our clear waters were made murky in *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir.1986), *cert. denied*, 479 U.S. 1059, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987), when we reinserted the element of "reasonableness" in our definition of the standard to which seamen are bound and held that the plaintiff's "duty to protect himself is only a slight duty to use reasonable care." Again, we raise *Gavagan* to illustrate that, in 1992, we came full circle from where we began in *Page* when we stated in rather explicit terms that the standards of reasonable care guide the duties of both employers and employees under the Jones Act. *Gavagan*, 955 F.2d at 1019 n. 7.

*B. Ordinary Prudence*

[5] The above survey of our decisions shows the confused start and the diverted path leading to the "settled law" in this Circuit that a Jones Act employer is bound by a greater-than-ordinary standard of care towards its employees and that a seaman owes only a slight duty to look after his own safety. We agree with the Third Circuit that nothing in the text or structure of the FELA–Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances. *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir.1995). In addressing a seaman's duty to act with reasonable care, the Third Circuit reasoned:

> By its very terms, the FELA provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The statute does not distinguish between degrees of negligence; the statute does not say that the plaintiff only has a slight duty of care. Under the statute, a plaintiff's recovery is reduced to the extent that he is negligent and that such negligence is responsible for the injury. In such a situation, one must assume that Congress intended its words to mean what they ordinarily are taken to mean—a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances. Such a reading also is in accord with the FELA's pure comparative negligence scheme; and to adopt [plaintiff's] argument would be to abandon the clear dictate of the statute in favor of a policy decision to favor employees over employers.

*Id.*; *see also Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610 (1943) (holding that "the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation"). Our sister circuits have similarly held. *See, e.g.*, *Smith v. Tow Boat Serv. & Management, Inc.*, 66 F.3d 336 (9th Cir.1995) (unpublished) (rejecting "slight care" standard); *see also Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52–53 & n. 2 (2d Cir.1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987), (approving jury instruction informing that both employer and employee under Jones Act are charged with duty of reasonable care under the circumstances); *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir.1982) (approving jury instruction that railroad has duty to exercise reasonable care for protection of employees); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir.1981) (defining negligence as failure to use reasonable care).

We find further support for our position in Supreme Court precedent. In *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949), the Court emphasized that the term "negligence" is to be defined "by the common law principles as established and applied in the federal

courts." (internal quotations and citation omitted). Although the Court's discussion refers specifically to § 51 "negligence," it would defy logic not to extend this reasoning to the term, as used in § 53, which discusses a plaintiff's contributory negligence. *See also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542–44, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994) (holding that common law principles are entitled to great weight in FELA analysis unless expressly rejected in text of statute).

[6] A seaman, then, is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education. The reasonable person standard, therefore, and a Jones Act negligence action becomes one of the reasonable *seaman* in like circumstances. To hold otherwise would unjustly reward unreasonable conduct and would fault seamen only for their gross negligence, which was not the contemplation of Congress. *See* Robert Force, Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care"?, 25 J. Mar. L. & Com. 1, 31 (1994).

[7] By ascribing to seamen a slight duty of care to protect themselves from the negligence of their employers, *Spinks* and its progeny, specifically *Brooks*, are repugnant to the principles we espouse today and are therefore overruled. Moreover, by attributing to Jones Act employers a higher duty of care than that required under ordinary negligence, *Allen* and its progeny repudiate the reasonable person standard and are also overruled.

## CONCLUSION

In light of the foregoing discussion about the appropriate standards of care that should guide employers and employees under the Jones Act, we hold that the jurors in the instant case were improperly instructed as to Gautreaux's duty to exercise care for his own safety. We, however, express no opinion as to the proper apportionment of fault between the two parties. We accordingly AFFIRM the district court's determination of the amount of damages, VACATE the district court's judgment as to comparative fault and REMAND for proceedings to determine the comparative fault (if any) of the plaintiff and apportionment of the damages consistent with this opinion. In all other respects, we reinstate the panel's opinion.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

Ray W. LAMBERT, Sr.,
Plaintiff-Appellant,

v.

DIAMOND M DRILLING COMPANY, Diamond M Company, Marathon Oil Company and Marathon Petroleum Company, Defendants-Appellees.

No. 81-3373
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 26, 1982.
Rehearing Denied Oct. 15, 1982.
See 688 F.2d 1023.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Ray W. Lambert, Sr., was seriously injured when he slipped on drilling mud on the deck of a semi-submersible drilling rig operated by his employer, the Diamond M Drilling Companies. He sues the Diamond M Companies under the Jones Act, 46 U.S.C. § 688, claiming negligence in the maintenance and condition of the drilling rig which resulted in his injury. He also claimed unseaworthiness. The parties stipulated that the drilling rig "Diamond M Century 100" was a vessel and that Ray Lambert was a seaman as contemplated by the Jones Act.

Lambert's proof before the jury consisted of evidence showing that he was the tool pusher working the night tour, and he was in charge of the drilling operation on his tour. He had talked with the driller to make sure that the pipe stands being removed from the well at the time in question would not be "jumped" because it was necessary to remove the drill pipe "wet," *i.e.* with the drilling mud still inside the pipe. While this work proceeded, he then went below to do some other work. While out of the sight of the drilling, he heard noises which indicated that the driller might be "jumping" the pipe, and thus causing excess mud to be spread around the drill floor. He returned to the drill floor and found mud on the floor and on the lights causing the work area to be darkened. While walking across the floor to tell the driller to "shut down the rig and wash down the floor and the lights," he slipped and was injured.

Other members of the crew who were actually pulling the pipe testified as witnesses called by Lambert. They testified that they were carrying out the work in normal fashion and that the driller was not jumping the pipe. However, in the removal of a wet string it is impossible to avoid some drilling mud being spread on the floor. The testimony was that one of the roughnecks was hosing off the floor of the mud after each stand of pipe had been removed.

At the conclusion of the plaintiff's case, and considering the evidence summarized above, the district court granted a directed verdict for the defendant companies. We find this directed verdict in error in two respects and reverse for a new trial.

First, the lower court used the incorrect standard for determining whether a directed verdict should be issued against the claimant seaman in a Jones Act case. The lower court orally applied the following standard: "[V]iewing the evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all inferences, and least favorable to the mover, the Diamond M Companies, viewing the evidence in that light I find that there are no disputed issues of fact which would—from which a finder of fact could conclude anything other than the fact that the situation confronting Mr. Lambert, from which his injury has arisen, was any more than a normal risk of his occupation as a seaman."

[1, 2] This statement of the standard by

the district court is a reasonable paraphrase of the usual standard for deciding whether a directed verdict should be granted. It is applicable in this case to a verdict on the unseaworthiness claim. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 359 (5th Cir. 1980). However, as we made clear in *Robinson v. Zapata Corp.*, 664 F.2d 45, 47 (1981), "the standard to be applied to a Jones Act claim is more stringent. The court may direct a verdict or grant judgment n. o. v. on a Jones Act claim only when there is *complete absence* of probative facts supporting the non-movant's position." (Emphasis added). *See Boeing Co. v. Shipman*, 411 F.2d 365, 370 (5th Cir. 1969) (en banc) (distinguishing between the "complete absence of probative facts" test applicable to FELA and Jones Act claims, and the "reasonable minds" test applicable to other federal claims). The statement of the test applied by the district court was clearly based upon the "reasonable minds" approach by the indication that "viewing the evidence" a finder of fact could not conclude anything other than that the situation confronting Mr. Lambert was the normal situation. The wrong standard was applied to the Jones Act claim.

[3] Second, the record shows that there was at least some evidence that the defendant companies were guilty of negligence in the operation of the drilling rig by allowing mud to be on the floor and on the lights. Obviously the lights were of great importance to the operation on the night shift. The conclusion of the district court was that there was no evidence that the situation concerning the mud was any more than the normal condition of mud which had to be expected when the drill pipe was being pulled wet. In contrast to this conclusion, Lambert testified that having seen the condition of the floor and the lights covered by drilling mud he was on his way to tell the driller to shut down the operation until the mud could be washed off. This alone is evidence that at the time of his injury the mud on the floor and on the lights was in excess of what was to be expected if the operation was being carried out without negligence. The fact that one of the roughnecks testified he washed off the mud after every "wet string" was pulled does not alone establish that he had done the job adequately or that other measures were not needed to carry out the operation without negligence. The testimony of Lambert alone, if believed, would establish that the conditions were not normal and that an excess of mud was on the drilling floor and on the lights. This is enough to require the case to go to the jury. There is no "complete absence" of probative facts supporting his position.

[4] Lambert was in charge of the drilling operation on the particular tour. But the possibility of finding that he also was negligent, although an issue in the case, would not defeat his claim as a matter of law. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 221 (5th Cir. 1975).

Finding error in the granting of a directed verdict for defendant at the close of plaintiff's case, there must be a new trial.

REVERSED.

## ON PETITION FOR REHEARING

(Opinion August 26, 1982, 5 Cir., 1982, 683 F.2d 935)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Petitioner, Defendant-Appellee, Diamond M Drilling Company, raised the question of whether our prior opinion granted a new trial only as to the Jones Act claim or as to both the Jones Act and the unseaworthiness claims. Diamond M correctly understands the Court's opinion to say that the new trial was ordered only as to the Jones Act claim.

The two grounds given for granting the new trial were: (1) the failure of the district court to apply the proper standard in granting a directed verdict for defendant under the Jones Act claim, and (2) the fact that there was at least some evidence of negligence in the record for which Diamond M would be responsible, and this is enough to avoid a directed verdict against a Jones Act claim.

As we pointed out in our opinion, the district court did apply the proper standard in granting a directed verdict as to the unseaworthiness claim. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 359 (5th Cir. 1980). In *Mitchell v. Trawler Racer*, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941 (1960), the Supreme Court said there is a "complete divorcement of unseaworthiness liability from concepts of negligence." This conclusion was quoted again with approval in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S.Ct. 514, 517, 27 L.Ed.2d 562 (1971), affirming our decision granting defendant a motion for summary judgment in *Luckenbach Overseas Corp. v. Usner*, 413 F.2d 984 (5th Cir. 1969).

This is not to say that negligence cannot play a role in an unseaworthiness case. We have specifically recognized situations in which the acts and omissions which support a finding of negligence under the Jones Act can also cause an unseaworthiness condition. *Smith v. Ithaca Corp.*, 612 F.2d 215, 220 (5th Cir. 1980). But in *Usner, supra*, we said that "'[i]nstant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman." 413 F.2d at 985. The Supreme Court in affirming our decision held that to find unseaworthiness in the "isolated, personal negligent act" of petitioner's fellow employee "would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions." 400 U.S. at 500, 91 S.Ct. at 518.

Since the district court applied the proper standard in granting the directed verdict for Diamond M on the unseaworthiness claim, *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), and since, applying the same standard, we find nothing in the record to counter the "isolated instance of negligence" factual showing, we did not upset the district court's directed verdict for Diamond M on the unseaworthiness claim.

Motion for Rehearing DENIED.

Mrs. Julian Lamar DAVIS, Temporary Administratrix of the Estate of Charles Edward Davis, Deceased, Appellant,

v.

PARKHILL-GOODLOE COMPANY, Inc., Appellee.

No. 19294.

United States Court of Appeals Fifth Circuit.

May 2, 1962.

Rehearing Denied June 5, 1962.

Before TUTTLE, Chief Judge, and BROWN and BELL, Circuit Judges.

JOHN R. BROWN, Circuit Judge.

[1, 2] The question presented is whether the trial Court erred in entering judgment for the shipowner in this Jones Act case for damages sustained by the seaman and his survivors by reason of his death suffered in line of duty.[1] We hold that it did and reverse. The case was brought as a Civil Action rather than as a libel in admiralty. But the standard of review is now substantially the same since after formal demand for a jury trial, F.R.Civ.P. 38(b), 28 U.S.C.A., the parties expressly consented to a trial by the Court. This brings into play then, F.R.Civ.P. 52(a) and the concept of "clearly erroneous" now incorporated into admiralty causes. Myles v. Quinn Menhaden Fisheries, 5 Cir., 1962, 302 F.2d 146; O/Y Finlayson-Forssa A/B v. Pan Atlantic S. S. Corp., 5 Cir., 1958, 259 F. 2d 11, 13, 1958 A.M.C. 2070. Here the most critical aspect of that standard of review is that findings induced by or resulting from, a misapprehension of controlling substantive principles lose the insulation of F.R.Civ.P. 52(a) and a judgment based thereon cannot stand. McGowan v. United States, 5 Cir., 1961, 296 F.2d 252, 254.

[3] Charles Edward Davis, the decedent, was a young 24-year-old Georgia farm boy. His nautical career began on the Dredge Ideal then working in the Savannah River. Ten days later it ended with his death. He was a robust, healthy young man of good traits and mentality and had taken considerable college work in the agricultural sciences to fit him, so his parents stated without contradiction, for the life of a Georgia farmer. This is important, not alone on the damage question, but more so from the standpoint of the duty owed by the ship to this untutored, inexperienced, green-hand.

The Ideal was engaged in sweeping out a slip near the north bank of the River. As a hydraulic cutter dredge, she was equipped with the typical discharge line made up of sections of 16" pipe. The 16" discharge line was mounted on metal drum-like pontoons. The discharge line led aft (westerly) for about 100 feet from the dredge's stern and then made a substantial right angle turn to the south running approximately 600 feet to the south shore. From there, the line led ashore several hundred additional feet into the spill area. A narrow 10" plank ran along the top of the discharge line to provide a walkway. A single hand rail on vertical stanchions paralleled the pipe. Where the pipe sections joined, there was a rubber joint. This left a space, however, of two to three feet between the ends of the walkway planks.

On the afternoon of November 27, 1957, a bright, warm, sunshiny day, Davis was last seen walking toward the shore 100 feet or so shoreward from the elbow. Some time the next day his body was found floating in the water in this same general vicinity. Save for the inexplainable absence of his low cut shoes which he had been wearing, the body bore no signs of any unusual nature. The prosecutor's autopsy report and testi-

1. By previous order of this Court, the appeal was allowed without prepayment of costs as a suit to enforce laws enacted for the protection of seamen under 28 U.S.C.A. § 1916.

mony concluded the death was due to drowning.

At the time he was last seen, Davis was where he was supposed to be, doing what he was supposed to do. In accordance with authoritative instructions, he was returning to the shore to assist another crew member in repair of a leaking joint in the discharge line at a point near the spill area on land. He and others had been doing this repair work during the morning and had returned to the dredge via the walkway for the noonday meal.

[4] The plaintiff did not claim that this unexplained disappearance of Davis while in the course of his duty using facilities provided for just such purpose gave rise to any presumptions as such. The claim was urged, and properly so, Schulz v. Pennsylvania R. Co., 1956, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668, 1956 A.M.C. 737, that circumstantial evidence warranted inferences of negligent breach of duty proximately causing death by drowning.

[5] The plaintiff made out a rather formidable showing. The witnesses presented included the inspector of the company for whom the dredging work was being done by the defendant shipowner, several persons who had long experience as safety engineers on dredging operations, and some others who had observed the condition of the walkway, guard rail, etc. on the pontoon discharge line. The most significant, however, was the Master of the dredge, called properly as an adverse witness, F.R.Civ.P. 43(b), and whose testimony was not binding[2] but which, as we see it, left the shipowner's liability defense in imminent peril of foundering by establishing at least one breach of duty as a matter of law.

Much of the evidence concentrated on the condition of the walkway, the sufficiency of the width of the plank, its general condition, the presence of ropes, lines, and wires strewn across the walkway from place to place, the location, the angle and sufficiency of the single hand rail, and the like.[3] Despite this testimony, the Court chose generally to credit the controverting evidence from the shipowner. For our present purposes, we accept this under F.R.Civ.P. 52(a). In doing so, however, we do not ignore, indeed we emphasize, the undisputed physical nature, and the unusual hazardous condition, of this facility.

It was this actual setting, even though described in terms most favorable to the shipowner's cause, which made the testimony of the dredge Master so decisive. It is at one in committing the shipowner to negligence as a matter of law, and in demonstrating that the trial Judge was laboring under a significant misapprehension of legal principles.

This testimony was that relating to the availability and use of life vests and the instructions to the crew concerning their use. It does not turn on the actual availability since it is undisputed that life

2. June T., Inc. v. King, 5 Cir., 1961, 290 F.2d 404, 406, n. 1, 1961 A.M.C. 1410; Fall v. Esso Standard Oil Co., 5 Cir., 1961, 297 F.2d 411, 417.

3. The record development of some of this seems quite unusual. The plaintiff's counsel examined witnesses at great length, and they were cross examined as extensively, as to a large number of photographs identified by specific exhibit numbers. The examination and cross examination developed fully the circumstances under which they were taken, the dissimilarity or similarity of conditions existing or portrayed, or both, in contrast to those observed by the particular witnesses at or about the time of the fatal accident. The evidence from such witnesses was fully received and considered by the trial Court, and likewise by us. It was not stricken, nor was a request to do so made. But then on the formal completion of the oral testimony and the formal proffer of them into evidence, many such photographs were excluded as exhibits. To the extent photographs are identified as portraying conditions observed by witnesses subject to cross examination, the other dissimilarities in point of time, conditions, etc. go more to their weight under appropriate instructions if a jury trial rather than admissibility as such. See McCormick, Evidence, §§ 179–181, especially § 181 at 387–389.

vests were available in sufficient quantities. But indulging in favor of the shipowner every variation in the Master's testimony, it revealed that whether this essential lifesaving equipment was to be used while working on the pontoon discharge walkway was left to the sole judgment of the particular seaman at the time. Only one qualification to this policy was acknowledged: one who could not swim would be compelled to wear or use them. Otherwise it was for the seaman to determine whether such safety equipment was needed. Repeated and repeated were statements by the Master, "Well, we don't require a man to wear one if he doesn't want to * * *"; "* * * It is up to the individual himself if he wants to wear" them; life jackets are "* * * there for him to wear if he wants to. It is up to the man * * *"; as the "* * * instructions are to wear them * * * if they feel they need to wear them * * *"

But such a practice was to fly in the face of the accumulated experience of mankind in the struggle against the hazards of the cruel sea. Cf. Pure Oil Co. v. Snipes, 5 Cir., 1961, 293 F.2d 60, 65, 66, n. 6 and 9; Grimes v. Raymond Concrete Pile Co., 1958, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737, 1958 A.M.C. 1014. Moreover, it ignored this shipowner's own affirmation that this nautical wisdom required, at the very minimum, a stringent mandate to use life vests and an adequate program of enforcement to secure compliance. Posted conspicuously in the pilot house for the guidance of all officers was a formal printed "Accident Prevention Plan." Paragraph 1 expressly stated that the "Corps of Engineers' Handbook Requirements, the Associated General Contractors' Manual of Accident Prevention and other recognized standards will be used as guide in making [safety] inspections." And Paragraph 5 brought this down to the plainest terms. "The use of personal protective equipment such as goggles, welders' hoods, gloves, respirators and life preserver work vests will be enforced when and where required for the protection of workmen." And the standards thereby adopted by reference made equally plain what was meant by the words of Paragraph 5, "when and where required for the protection of workmen."[4]

[6, 7] Of course this was not offered, nor is it used by us, to establish a private standard of care as though the suit was for breach of the implied agreement to carry out these precautions. It was offered, and it is considered by us, as spectacular proof of industry-wide acceptance of the need for extraordinary care in protecting against the very hazards here prevailing. Custom and practice, especially of prudence, is, of course, relevant and significant in equating conduct with that of the law's fictional or-

4. The Corps of Engineers' Manual was explicit:

"7-16. Life preservers, vests, or belts shall be worn by all persons while—

"a. On floating pipeline, pontoons, rafts, float stages, etc.

"b. On open deck floating plant not equipped with bulwarks, guardrails, or life lines.

"c. On structures extending over or adjacent to water except where proper guardrails or safety belts and life lines are provided."

Related to this was the provision concerning ring life buoys:

"7-17. * * * In addition to location of ring buoys as required by United States Coast Guard, they will be provided so as to furnish the following coverage: * * *

"c. Pipe Line, walkways, wharves, piers, bulkheads, lock walls, scaffolds, platforms, and similar structures extending over or immediately adjacent to water shall have one ring buoy provided at intervals of not more than 200 feet."

Industry acceptance is reflected by the Associated General Contractors' Manual:

"34-3.1 Life Preserver Vests. Life preserver vests should be worn by all personnel working on floating pipe lines, barges not equipped with guard rails, structures extending over the water, while working over the side of any vessel, and while working alone at night or in small craft, except when in an enclosed cabin or cockpit."

dinarily careful shipowner. Schlichter v. Port Arthur Towing Co., 5 Cir., 1961, 288 F.2d 801, 1961 A.M.C. 1164; June T., Inc. v. King, 5 Cir., 1961, 290 F.2d 404, 1961 A.M.C. 1431; Gleason v. Title Guarantee Co., 5 Cir., 1962, 300 F.2d 813.

The shipowner's excuse, echoed by its Master, for not issuing positive instructions to an inexperienced seaman requiring compliance with this perfectly obvious safety requirement is twofold and too weak. First, it says these precautions were required on Government jobs only, and second, life vests are not needed if a man can swim. As to the first, the perils of the seas are the respecter of no person, whether sovereign or citizen. The hazard arises from the operation, not the status of the one who ultimately pays the freight. As to the second, the capacity to swim is a safeguard only so long as the unpredictable occurrence does not render the victim incapable of swimming, or this capability is inadequate to overcome the violent forces at work. The life vest, on the other hand, as the Vice President and General Manager of the Shipowner so eloquently spoke, will, as its name implies, save life.

"A. It is true that we are required to wear jackets on a Government job, but the jackets are a hindrance to you performing your duties like you should. They are bulky. They get in your way. You are liable to get caught with a jacket on, where you wouldn't without a jacket on.

"Q. Would it be a hindrance to a man that fell overboard and knocked his head and rendered him unconscious?

"A. No it wouldn't.

"Q. It would save his life, wouldn't it?

"A. Yes."

[8, 9] Whatever a shipowner might be permitted to do with respect to seasoned hands familiar with the peculiar hazards of the sea, it is plain that it could not absolve itself of the pervading obligation to furnish a seaworthy vessel and exercise a prudent care for seamen by leaving this important decision—to wear or not wear a life vest?—up to this inexperienced, untrained farm boy who had not yet begun to get his sea legs. This is but the application of the familiar principle of salt water, amphibious and land-locked jurisprudence that there is a duty to warn in an effective way of dangers not reasonably known, Pioneer Steamship Co. v. Hill, 6 Cir., 1955, 227 F.2d 262, 264, 1955 A.M.C. 1617, and a duty to take effective action in the light of the particular condition—here inexperience and ignorance of seagoing perils—of the particular seaman, Justillian v. Versaggi, S.D.Tex.1954, 169 F. Supp. 71; Reck v. Pacific-Atlantic Steamship Co., 2 Cir., 1950, 180 F.2d 866, 1950 A.M.C. 744; McDonough v. Buckeye S.S. Co., N.D.Ohio, 1951, 103 F.Supp. 473, affirmed, 6 Cir., 1952, 200 F.2d 558; Tetterton v. Artic Tankers, Inc., E.D.Pa., 1953, 116 F.Supp. 429. This was a basic fault on the part of the shipowner. It was, likewise, a fundamental error in law on the part of the trial Judge whose decision assumed that the law would permit a shipowner to take this course.

This conclusion would not necessarily require a reversal because the Court in formal findings held that no negligence of the shipowner, whether actual or assumed, proximately caused the seaman's death, and in any case the damage proof failed to show that there was such pecuniary loss as to warrant a suit by the surviving parents who are, of course, secondary beneficiaries under the Jones Act.

[10] But we cannot assume that had this careful and experienced trial Judge found, as he was compelled to do, that the shipowner was negligent as a matter of law in not giving adequate instructions to this inexperienced seaman, he would have adhered to the *arguendo* assumption of no proximate cause. It would be hard

indeed to make this assumption since had the instruction been given and enforced, Davis would have been wearing a life vest and only the most extraordinary set of circumstances would have then resulted in death by drowning.

[11] So, too, would this be true so far as damages are concerned. The oral argument before us was convincing that the District Court was led to make the adverse findings by reason of the shipowner's misapprehension of the law. The approach was that the parents had to prove a *dependency* on their son. That is not the test. The test, unlike that of dependency for "next of kin," is one of pecuniary loss, and that involves the reasonable likelihood of contributions to the parents in the future whether of money or volunteer farm labor, or both. 2 Norris, Seamen § 661. § 670

[12–14] As the case must be reversed and remanded for a new trial with the possibility that it might be tried before jury,[5] we think it appropriate to expressly state that while the evidence in this record is sufficient to warrant a finding favorable to the plaintiffs by the trier of the fact on causation and damages, we do not express any opinion as to what the decision on either one or both of those points should be. For like reasons, we think the Court, on the basis of the actual evidence submitted on that retrial, must determine whether it is sufficient to raise the question of conscious pain and suffering. Great ingenuity was exercised in putting forward a medical theory based upon expert testimony of the probable length of time it took for a person finally to expire in drowning. But there are so many unknowns in this unexplained slipping or falling of Davis into the water, that we should only say that substantial evidence will be required to sustain a finding of consciousness upon which to rest the permissible assumption of pain.

5. A jury having been timely demanded under F.R.Civ.P. 38, the trial Court has great latitude in allowing the parties to restore this to the jury calendar if desired.

Everett C. WEBB, Plaintiff-Appellee,

v.

DRESSER INDUSTRIES, Defendant-Appellant.

No. 74-4220.

United States Court of Appeals, Fifth Circuit.

Aug. 4, 1976.

Rehearing and Rehearing En Banc Denied Sept. 29, 1976.

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Dresser Industries appeals from a $40,000 district court judgment in favor of plaintiff-appellee Everett C. Webb, a seaman on Dresser's vessel the M/V CANADIAN OLYMPIC. Webb, claiming that he received injuries as a result of defendant's negligence and breach of its warranty of seaworthiness, brought this action pursuant to the Jones Act, 46 U.S.C. § 688 *et seq.*, and general maritime law. The controversy was tried without a jury. The trial judge found both negligence and unseaworthiness and rendered a verdict for the plaintiff. Appellant Dresser Industries asserts that the court erred in 1) finding negligence and unseaworthiness; 2) failing to hold that plaintiff Webb was negligent; 3) denying Dresser's motion for a continuance; and 4) calculating Webb's lost earnings. After careful consideration of these claims, we hold that except for the absence of a finding with respect to Webb's contributory fault, the judgment of the district court was proper. Therefore, we remand this cause to that court for consideration of the issue of plaintiff's negligence.

## I. Facts

Everett C. Webb served as a member of the crew [1] of the M/V CANADIAN OLYMPIC, a 199 ton vessel involved in oceanic surveying. Prior to the accident from which this suit arose, the ship was docked at Seward, Alaska, for outfitting for Alaskan operations. Plaintiff had been aboard the moored boat for approximately two weeks when supplies from Anchorage arrived at the Seward bus station. The district court found that the M/V CANADIAN OLYMPIC's party chief, David Colten, who was in administrative control of the vessel and who had responsibility for all operations including supplies and safety equipment, "order[ed] plaintiff to go ashore to pick up supplies." Webb and two other members of the crew went into town to get the ship's provisions at the local bus station. Because it was wintertime, significant amounts of snow and ice had accumulated in Seward making walking conditions very hazardous. While checking off the supplies being loaded into the crew's truck, plaintiff slipped on the snow and ice, sustaining the injuries for which damages were awarded by the district court.

At trial, Webb argued that the failure of Dresser Industries to provide him with proper footwear for journeying ashore in the ice and snow in the course of his duties as a seaman rendered the M/V CANADI-

1. The M/V CANADIAN OLYMPIC's crew included the party chief, captain, mate, engineer, deckhand, and cook as well as the scientific party charged with seismic research. Webb regularly served as the mate, but at the time of the accident he had become acting captain because of the temporary absence of the regular captain, who was on vacation.

AN OLYMPIC unseaworthy and constituted negligence under the Jones Act. He testified that he had realized that his clothing was inadequate. At the time of the fall, he was wearing the smooth soled boots that he had used in the tropics. He stated, however, that on three different occasions he had told his superior, Mr. Colten, about his need for proper boots. According to Webb, Colten had indicated "that he would try to get them, in a very noncommittal way . . . ." Colten testified that he could not recall any such request.

The court also heard statements to the effect that an individual wearing smooth soled shoes like plaintiff's would not be "properly rigged" for working on snow and ice and that wearing such shoes in the Alaskan winter was dangerous. A safety expert testified that another type of available boot, presented to the court by the plaintiff's attorney, would have been a definite aid to one working on snow and ice and would have eased the difficulty of ambulating on such surfaces.[2]

After hearing the evidence, the district court judge filed his findings of fact. He determined that plaintiff was injured while "working in the course and scope of his employment."[3] He observed:

> At the time of and prior to the date of plaintiff's injury, . . . Mr. Colten, the party chief, was aware of the very hazardous walking conditions in and around Seward, Alaska. Nevertheless, the defendant, Dresser Industries, Inc., did not provide any kind of special boots or shoes for members of the crew to use in cold weather and to enable them to better walk on the slippery surfaces ashore, nor did Mr. Colten take any steps to requisition such special boots or shoes.
>
> . . . . .
>
> At the time of his injury, plaintiff was subject to all orders given by Mr. Colten and was responsible for seeing that supplies were picked up from the bus station and loaded aboard the vessel.

On the basis of these findings, the court found the defendant negligent for failing to provide plaintiff a safe place to work and for violating the slop chest statute, 46 U.S.C. § 670, which requires that certain vessels carry clothing for sale to seamen. With respect to the claim of unseaworthiness, the court said:

> The failure of defendant, Dresser Industries, Inc., to provide plaintiff with special boots or shoes to use in cold weather and to enable him to better walk on icy or other slippery surfaces and other proper and adequate clothing, tools, devices, appliances and appurtenances that would have afforded the plaintiff the opportunity of performing his duties in a safe manner, rendered the vessel, "THE CANADIAN OLYMPIC," unseaworthy.

With these findings before us, we turn to the legal issues raised by this appeal.

2. There was also testimony that Dresser provided special wet weather gear including boots for the scientific crew. It was stated, however, that it was not customary for the boat to carry boots and other cold weather gear for crew members going ashore in the course of their duties as seamen and also that the equipment supplied to the scientific crew was not satisfactory for shore tasks performed on snow and ice.

3. On appeal, Dresser Industries does not challenge Webb's contention that when he went to the bus station he was a seaman, acting on behalf of the ship. Nor does appellant dispute the district court's conclusion that Webb falls within the scope of coverage provided by both the Jones Act and the general maritime law. Moreover, no special problems as to the scope of the maritime law are presented by the fact that the injuries sustained here actually occurred on land, and defendant makes no such contentions. *See* 46 U.S.C. § 740; *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943); *See generally* M. Norris, *The Law of Maritime Personal Injuries* § 310 (3 ed. 1975).

## II. THE LEGAL ISSUES

### A. The Standard of Review

[1] The district court's resolution of the questions of seaworthiness and negligence are considered findings of fact. *See, e. g., McAllister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 7–8, 99 L.Ed.2d 20, 24 (1954); *See* M. Norris, *The Law of Maritime Personal Injuries* §§ 131, 265, 314 (3d 1975); *See generally* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2585 (1971). As such, these determinations are to be overturned by an appeals court only if they are clearly erroneous. *Id;* Rule 52(a), Fed.R.Civ.P.

### B. Seaworthiness

[2] Under admiralty law, an absolute and non-delegable duty is imposed on the shipowner to furnish a vessel reasonably safe and fit for its intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941; *White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336; *see generally* Norris, *supra* §§ 298 *et seq.* This obligation includes the duty to provide necessary appliances, gear, and equipment. *See, e. g., Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944); *see generally* Norris, *supra* §§ 301, 305.[4]

[3] In *Walker v. Harris*, 5 Cir. 1964, 335 F.2d 185, Chief Judge Brown set forth the subsidiary questions leading to the ultimate conclusion of seaworthiness *vel non*:

> "[W]hat is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces?"

*Id.* at 191. In reference to the questions posed in *Walker*, it is clear that an integral part of the M/V CANADIAN OLYMPIC's maintenance and thus its ability to perform its Alaskan functions included the movement of provisions from shore to sea. The defendant, through its agent Colten, was fully aware of the need for such land missions. According to the district court, Colten directly ordered the plaintiff to take charge of the particular chore in question here. Moreover, Colten knew that the ice and snow, which one would reasonably expect to encounter ashore in the Alaskan winter, presented difficult and dangerous environmental conditions. He also knew or could easily have anticipated that special winter boots not available on the M/V CANADIAN OLYMPIC were necessary to carry out the boat's errands safely in such conditions. These factors, when analyzed in the context of the *Walker* criteria, lead us to the conclusion that the district court was not clearly erroneous in finding unseaworthiness.

[4] Defendant, however, calls to our attention testimony to the effect that crew members traditionally have furnished their own clothing. The importance of this custom, if it be such, is undercut in the case before us by the fact that Dresser admittedly made available to the scientific crew wet weather gear including boots. *See* note 2 *supra*. More importantly, it has long been held that the determination of reasonable fitness is not limited by custom. *E. g., White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336, 1339 (the fact that safety equipment, particularly protective boots, may not have been provided by other drillers is not controlling); *Bryant v. Partenreederei-Ernest Russ*, 4 Cir. 1974, 330 F.2d 185. In view of the "awesome obligations of seaworthiness," *Saunders v. Pool Shipping Co.*, 5 Cir. 1956, 235 F.2d 729, 730; *see* Norris, *supra* § 298; *see also, Cox v. Esso Shipping Co.*, 5 Cir. 1957, 247 F.2d 629, 636 (shipowner's "heavy obligation to provide seaworthy equipment") and the less

4. The shipowner's duty to maintain a seaworthy ship is absolute and a cause of action for breach of that duty "arises even though the unseaworthy condition was unknown to the owner." Norris, *supra* § 301 at 10.

than controlling significance of custom, we find on the record before us that the district court did not err in refusing to permit the testified-to custom set the outer limits of defendant's duties.

Thus, after careful scrutiny of the trial court proceedings, we have decided to affirm the district court's seaworthiness conclusion. The judge below obviously credited much of seaman Webb's testimony, particularly with respect to the circumstances of the accident. Given this factual background, and the above analysis, we do not find incorrect the lower court's determination that with the M/V CANADIAN OLYMPIC docked at a port where much ice and snow covered the ground, proper footgear should have been made available to plaintiff. *See, White v. Rimrock Tidelands, supra* (allegation that defendant shipowner did not provide protective boots or other safety equipment to seaman directed to enter tank containing caustic drilling mud stated a claim for unseaworthiness); *cf. Johnson v. Warrior & Gulf Navigation Co.*, 5 Cir. 1975, 516 F.2d 73 (finding stevedore's obligation to furnish longshoreman with proper shoes).

[5] In affirming the lower court's conclusion of unseaworthiness, we are not creating a general duty of a shipowner to provide all of its seamen with boots adequate for all foreseeable shore duties. Instead, the defendant need make boots available only for those crew members ordered to work under foreseeably adverse circumstances. Alternatively, the defendant can protect itself by sending ashore only those seamen who it has ascertained have the necessary footwear whether that footwear is provided by the shipowner or the sailor.

C. Negligence

The district court found as an alternative theory in support of its verdict that the plaintiff should recover under the Jones Act, 46 U.S.C. §§ 688 *et seq.* The basis of the court's decision was its determination that the defendant 1) negligently failed to maintain a safe place to work and 2) violated a safety statute, thus requiring a finding of negligence *per se*. Having affirmed the lower court's decision that the M/V CANADIAN OLYMPIC was unseaworthy, we need not rely on the district court's alternative Jones Act theories, and therefore, we pretermit any discussion of the negligence issue.[5]

D. Comparative Negligence

[6] The trial court made no finding as to whether or not the plaintiff's own negligence legally contributed to his injuries. In the circumstances of this case, we think that this failure was error necessitating that we vacate the lower court's judgment and remand the cause for consideration of the issue of Webb's negligence.[6]

[7] Neither assumption of risk nor contributory negligence is a bar to a seaman's recovery under either the doctrine of seaworthiness or the Jones Act. 45 U.S.C. § 53; *The Max Morris v. Curry*, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586 (1890); *The Arizona v. Anelich*, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075 (1936); *Beadle v. Spencer*, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082 (1936); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939); *Klimaszeuski v. Pacific-Atlantic Steamship Co.*, 3 Cir. 1957, 246 F.2d 875; *Manning v. M/V Sea Road*, 5 Cir. 1965, 358 F.2d 615;

5. Defendant contends *inter alia* that 46 U.S.C. §§ 441–445 pertaining to oceanographic research vessels precludes application of the slop chest statutes the M/V OLYMPIC. We need not reach this issue, however, in view of our disposition above.

6. Although defendant did not raise the comparative negligence issue as directly as it might have, we believe that the issue was placed before the district court in a manner sufficient to require a determination of whether or not plaintiff was at fault.

*Britt v. Corporacion Peruna de Vespores*, 5 Cir. 1975, 506 F.2d 927; *see generally* Norris, *supra* at §§ 311–13. When the plaintiff has been negligent, however, the damages otherwise awardable are mitigated in accordance with the doctrine of comparative negligence. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Socony-Vacuum Oil Co. v. Smith*, *supra*; *Stein v. Sea-Land Services, Inc.*, 5 Cir. 1971, 440 F.2d 1181; *Manning v. M/V Sea Road*, *supra*; *Cox v. Esso Shipping Co.*, 5 Cir. 1957, 247 F.2d 629.

Appellant argues that plaintiff was negligent because he made no attempt to obtain proper gear from any Seward stores—this notwithstanding his obvious knowledge of the danger from the snow and ice and his clear opportunity to make such a purchase. Appellant also contends that Webb exposed himself to the snow and ice in a manner not required by his duty to pick up supplies at the bus station—in other words, there were safer alternative means of carrying out the party-chief's order. Specifically, appellant claims that in following the defendant's orders it was not necessary for plaintiff, whose testimony clearly indicates that he understood the snow/ice hazard, to take inventory on the obviously dangerous bus lot. Moreover, Dresser contends that plaintiff's manner of walking on the ice, with his hands in his pockets, was a primary cause of his injuries.

Because of the peculiar risks and dangers as well as the rigorous discipline and obligation to follow orders which are integral parts of their profession, seamen are traditionally given special attention by the federal courts.

> [S]eamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling.

*Socony-Vacuum Oil Co. v. Smith*, 305 U.S. at 431, 59 S.Ct. at 266, 83 L.Ed. at 270. *See also Spinks v. Chevron Oil Co.*, 5 Cir. 1975, 507 F.2d 216, 223. Notwithstanding this heightened solicitude for sailors, the use of unsafe equipment and methods in the face of an available safe alternative, *see Socony-Vacuum Oil Co. v. Smith*, *supra*, 305 U.S. at 432, 59 S.Ct. at 267, 83 L.Ed. at 271; *Manning v. M/V Sea Road*, 5 Cir. 1965, 358 F.2d 615; or the failure to take available action to minimize the dangers in a necessarily risky, course of action, *see Superior Oil Co. v. Trahan*, 5 Cir. 1963, 322 F.2d 234, requires a finding of comparative fault and consequently mitigation of damages.

Assuming that Webb informed Colten of his need for boots and justifiably relied on Colten to procure the necessary shoes, then we would be reluctant to sanction a finding that plaintiff was negligent in not going into Seward to look for footwear. A finding of comparative fault for this reason would tend to undermine the boatowner's duty as affirmed in this opinion and would be contrary to the special position of the seaman in admiralty law. However, we do not conclude that there are never circumstances under which plaintiff's failure to acquire his own boots would mandate a partial mitigation of damages. If Webb was aware both that the defendant was not going to supply him with boots and that he

would have to make future trips into town on boat-related errands, and if there was sufficient time in which the necessary boots might easily and reasonably have been obtained, then Webb's inaction, in effect, constituted a failure to minimize present dangers and requires some lessening of damages. We note that the aperture for finding comparative fault on this basis is very narrow—the rule is confined to instances where there has been generous opportunities safely to correct the known dangerous situation,[7] and a heavy burden of proof rests with the defendant.

Also, if the plaintiff never mentioned his improper footwear to his chief, or, if ignoring[8] a safe method of work, plaintiff performed the bus station errand in an unnecessarily dangerous manner, then a finding that plaintiff was negligent would be proper.[9]

Ultimately the resolution of Dresser's contentions here depends on the making of basic factual determinations including findings with respect to what Webb actually told Colten, the opportunity for Webb to obtain boots, and the manner in which Webb carried out his responsibilities at the bus station.[10] This task is most properly undertaken in the first instance by the district court judge who originally heard the parties testify and can best judge their credibility. Thus, we send this case back to the lower court for its consideration of appellant's possible contributory fault. On remand, if the trial court concludes that

7. Here, the boat had been docked at Seward with the plaintiff aboard for two weeks and there is testimony that the plaintiff had been into Seward on a number of different occasions prior to the date of his accident.

8. The district court never resolved the conflicting testimony, *see* Section I *supra*, as to whether or not plaintiff Webb protested to his superior Colten about the lack of proper shoes and fairly relied on Colten to provide the necessary boots. If the court accepted plaintiff's statements that he informed the party chief three times of his footwear deficiency, then this alternative method of protecting his own well-being had been exhausted. If, however, Webb knew of the danger presented by his inadequate footgear and did not so inform his superior, then he should be viewed as having failed to take advantage of a viable avenue of safe conduct. Under the specific circumstances of this case, we believe, as noted above, that the latter finding would warrant a holding that the plaintiff was to some extent at fault. *See Mazzanti v. Lykes Brothers Steamship Co.*, 5 Cir. 1975, 524 F.2d 961; *Bohura v. Sea Land Service, Inc.*, 5 Cir. 1974, 505 F.2d 665, 670–71 (Gee, J., dissenting); *DuBose v. Matson Navigation Co.*, 9 Cir. 1968, 403 F.2d 875; *cf. White v. Rimrock Tidelands, Inc.*, 5 Cir. 1969, 414 F.2d 1336 (no comparative negligence where no knowledge of the danger and therefore no basis for protesting to superiors). These circumstances include the plaintiff's continuing personal knowledge of the absence of available proper footwear and the fact that plaintiff was aboard Dresser's boat for two weeks while it was docked at Seward—thus presenting the possibility that after notification to the party chief the equipment failure could have been remedied (or plans made for sending only adequately booted sailors into town). All of this could have occurred without impeding the crew's regular work. *Compare Mazzanti v. Lykes Bros. Steamship Co.*, *supra*. On remand, the district court should settle the remaining disputed factual questions, and then consider the effect of its conclusion on the issue of comparative negligence.

9. In *Johnson v. Warrior & Gulf Navigation Co.*, 5 Cir. 1975, 516 F.2d 77, this Court affirmed a district court determination of plaintiff's negligence where a longshoreman wore hushpuppy shoes while unloading a ship. However, we are not told whether or not the plaintiff in the *Johnson* case had easy access to a pair of work boots, informed his superior of his need for boots, or lacked alternate methods for completing his assigned task. For these reasons, among others, the *Johnson* decision is of limited usefulness to us in our examination of the present controversy.

10. Plaintiff contends that consistent with the explicit findings of fact and conclusions of law, the trial judge made an implied finding of no contributory fault. The general rule is stated by Professor Moore as follows:

> Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made.

J. Moore, *Federal Practice* § 52.06[2] at 2718. We regard plaintiff's possible negligence as a material issue, do not observe any clear indication that a finding on that issue is implicit in the district court's verdict, and consequently encounter no substantial reason to depart from the general rule as expressed above.

Webb was negligent, then that court must apportion the damages in accordance with the rules governing comparative fault in maritime cases. If, on the other hand, the facts supporting the purported negligence of plaintiff were not proved, then the original judgment in this case should be re-entered by the district court.

E. Miscellaneous Contentions

[8] Appellant argues that the trial court's denial of its motion for a continuance impaired its ability to adequately discover information about plaintiff's past earnings. As we stated in *United States v. 110 Bars of Silver*, 5 Cir. 1974, 508 F.2d 799:

> The grant or denial of a motion for continuance rests with the sound discretion of the court, and will be reversed only when an abuse of discretion is shown. *Id.* at 801.

Our examination of the record leads us to conclude that the district court did not abuse its discretion.

[9] Finally, Dresser contends that the evidence did not support the judge's findings as to lost earnings. Although complete wage information for all recent years was not made available, the record contains sufficient evidence to support the court's finding.

Our consideration of this case confines us neither to the temperate nor the tropical zone of analysis. In fact, the shodding requirements we find here bring us to a new decisional latitude and longitude. Just as meteorology has an essential role in the world of ocean travel, so also there is an inescapable responsibility on shipowners to provide seaworthy vessels and on sailors to conduct themselves, insofar as is compatible with the rigors of their calling, in a prudent and responsible manner. Although we have determined that the defendant here failed its obligation, we believe that additional findings are necessary to a fair evaluation of the plaintiff's conduct—an evaluation which, in the first instance, should be undertaken by the trial court. Thus, we remand this cause to the district court for its consideration of the issue of comparative negligence.

VACATED and REMANDED.

Darrel George PERRY,
Plaintiff-Appellee,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK et al., Defendants,

Hendy International Company,
Defendant-Appellant.

No. 74-3023.

United States Court of Appeals,
Fifth Circuit.

March 22, 1976.

Rehearing Denied May 20, 1976.

Before WISDOM, COLEMAN and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

Darrel G. Perry, a seaman, sued the tanker owner, Hendy International Company (Hendy), for personal injuries sustained by slipping on grease left on stairs, charging both negligence and unseaworthiness. The jury found the ship to have been seaworthy but agreed that Hendy had been negligent. It awarded damages in the sum of $50,000. The shipowner appeals. There being no evidence to support the verdict, we reverse.

At the time of the accident, Perry was fifty-two years old, employed as a seaman-wiper aboard the S/S ALASKAN. In May of 1973 the vessel was taking on stores and cargo in Texas City, Texas. Perry and Joseph Cerniglia, another seaman, were assigned to carry five gallon buckets of grease from the main deck to a storage area below. Each man would carry a single 35–40 pound bucket down a twenty step interior metal stairway and thence to a storage compartment. The stairs were well lighted, in new condition, and seldom used.

At 4 o'clock, P.M. the men knocked off for the evening meal. Perry testified that there was no grease on the steps when he went to supper.

After supper, the men resumed their work. Upon his return Perry saw no grease on the stairs [App. 254, 277]. When Cerniglia made his first trip down after supper he saw nothing on the stair steps [App. 213–215]. Nevertheless, on his first trip, carrying a bucket of grease, Perry slipped and fell to the bottom of the stairway, suffering a knee injury and a hernia. In the fall, Perry's grease bucket burst, splattering grease over the lower half of the stairway.

Cerniglia was standing just outside the door or hatch at the top of the stairs and did not witness the fall, but upon hearing the clatter he peered in and saw Perry at the bottom of the stairway, rubbing his leg. He helped Perry back up to the main deck and returned to clean up the grease. He testified that he saw oil in the center of the middle three steps [App. 217–218], but that he did not notice any slip marks in it [App. 220]. He stated that the grease he saw was above the heavy deposit on the steps where the bucket burst [App. 207–208]. Perry testified that he did not know what had caused him to slip until he came back up and saw "gray-looking grease" [App. 265] on the fifth or sixth step, with his footprint in it [App. 271]. Perry says that in allowing such a dangerous condition to exist Hendy breached its duty of due care.

[1, 2] Under familiar principles of negligence, in Jones Act cases, there must be some evidence from which a jury can infer that the unsafe condition existed and that the owner either knew or, in the exercise of due care, should have known of it. Neither Perry nor Cerniglia saw grease on the stairs before they went to supper. They saw none when they returned. Yet, Perry testified that he slipped on such grease on his first trip downstairs. Assuming that he did, there is absolutely no evidence to show how the grease got there, how long it had been there, or that there had been time enough for the shipowner, in the exercise of due care, to have learned of it and corrected the situation.

"Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability", *Cox v. Esso Shipping Company*, 5 Cir., 1957, 247 F.2d 629, 637.

[3] In FELA cases the standard for determining whether the plaintiff's evidence is sufficient to go to the jury is whether, viewing the evidence in the light most favorable to the plaintiff, "there is a complete absence of probative facts to support the conclusion reached", *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946). *See Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511, 513 (1957), applying the FELA standard of *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), to Jones Act cases.

Policy considerations have led to the adoption of a somewhat paternalistic attitude toward seamen, with a correlative lowering of the quantum of evidence required to support a jury verdict for such a plaintiff than is required for common law actions for negligence, *Spinks v. Chevron Oil Company*, 5 Cir., 1975, 507 F.2d 216, 223; *Sanford Brothers Boats, Inc. v. Vidrine*, 5 Cir., 1969, 412 F.2d 958, 962–965.

[4] That only the slightest negligence need be shown to uphold the award of damages in such cases does not mean, however, that the seaman may prevail on no evidence at all.

As in *Rice v. Atlantic Gulf & Pacific Company*, 2 Cir., 1973, 484 F.2d 1318, a case very similar to this one Perry adduced no evidence that in the exercise of reasonable care the shipowner had either the time or the opportunity to acquire knowledge of, or to correct, the dangerous condition, assuming, as testified by Perry, that it existed.

The motion of the defendant for a directed verdict should have been granted.

The judgment of the District Court is reversed and the case remanded to the District Court with directions to dismiss the complaint.

Reversed and remanded, with directions.

# KERNAN v AMERICAN DREDGING CO.
355 US 426, 2 L ed 2d 382, 78 S Ct 394

*[355 US 426]
*WILLIAM J. KERNAN, Admr. of the Estate of Arthur E. Milan, Deceased, Petitioner,

v

AMERICAN DREDGING COMPANY, as Owner of the Tug "Arthur N. Herron," In the Matter of the Petition for Exoneration From or Limitation of Liability

355 US 426, 2 L ed 2d 382, 78 S Ct 394

[No. 34]

Argued November 21, 1957. Decided February 3, 1958.

OPINION OF THE COURT

Mr. Justice Brennan delivered the opinion of the Court.

In this limitation proceeding brought by the respondent under §§ 183–186 of the Limited Liability Act, RS §§ 4281–4289, as amended, 46 USC §§ 181–196, the District Court for the Eastern District of Pennsylvania denied the petitioner's claim for damages filed on behalf of the widow and other dependents of a seaman who lost his life on respondent's tug in a fire caused by the violation of a navigation rule. 141 F Supp 582. The Court of Appeals for the Third Circuit affirmed. 235 F2d 618, rehearing denied, 235 F2d 619. We granted certiorari. 352 US 965, 1 L ed 2d 320, 77 S Ct 356.

The seaman lost his life on the tug Arthur N. Herron, which, on the night of November 18, 1952, while towing a scow on the Schuylkill River in Philadelphia, caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly inflammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. Several oil refineries and facilities for oil storage, and for loading and unloading petroleum products, are located along the banks of the Schuylkill River. The trial court found that the lamp was not more than three feet above the water. Maintaining the lamp at a height of less than eight feet violated a navigation rule promulgated by the Commandant of the United States Coast Guard.[1]

*[355 US 428]
The trial court found that *the vapor

1. 33 CFR § 80.16(h). "Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

The Commandant is empowered by 30 Stat 102, as amended, 33 USC § 157, to establish rules "as to the lights to be carried . . . as he . . . may deem necessary for safety . . . ." This section was contained in the Act of June 7, 1897, the purpose of which was to codify the rules governing navigation on inland waters and to conform them as nearly as practicable to the revised international rules for preventing collisions at sea adopted at the International Marine Conference in October 1889. 30 Cong Rec 1394; HR Doc No. 42, 55th Cong, 1st Sess, p. 1.

Headnote 1

would not have been ignited if the lamp had been carried at the required height.

The District Court held that the violation of the rule, "whether . . . [it] be called negligence or be said to make the flotilla unseaworthy," did not impose liability because "the Coast Guard regulation had to do solely with navigation and was intended for the prevention of collisions, and for no other purpose. In the present case there was no collision and no fault of navigation. True, the origin of the fire can be traced to the violation of the regulation, but the question is not causation but whether the violation of the regulation, of itself, imposes liability." 141 F Supp, at 585.

The petitioner urges first that the statutory violation made the flotilla unseaworthy, creating liability without regard to fault. But the remedy for unseaworthiness de-

Headnote 2

rives from the general maritime law, and that law recognizes no cause of action

*[355 US 429]

for wrongful death whether *occasioned by unseaworthiness or by negligence. The Harrisburg, 119 US 199, 30 L ed 358, 7 S Ct 140;[2] see Western Fuel Co. v Garcia, 257 US 233, 240, 66 L ed 210, 213, 42 S Ct 89. Before the Jones Act,[3] federal courts of admiralty resorted to the various state death acts to give a remedy for wrongful death. The Hamilton, 207 US 398, 52 L ed 264, 28 S Ct 133; The Transfer No. 4 (CA2 NY) 61 F 364; see Western Fuel Co. v Garcia, supra (257 US at 242); Great Lakes Dredge & Dock Co. v Kierejewski, 261 US 479, 67 L ed 756, 43 S Ct 418. The Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act. In Lindgren v United States, 281 US 38, 74 L ed 686, 50 S Ct 207, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death

2. The Harrisburg disapproved lower federal court cases, among them a decision of Chief Justice Chase at Circuit, The Sea Gull (CC Md) 21 F Cas No. 12578, which had given a right of action for wrongful death. Reliance was placed on the fact that English admiralty law did not recognize the cause of action although continental maritime law did. By statute, English admiralty courts now entertain a cause of action for wrongful death. 23 Halsbury's Laws of England (2d ed 1936), § 979.

3. "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. [I.e., Federal Employers' Liability Act, 35 Stat 65, as amended, 45 USC §§ 51-60.] Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stat 1007, 46 USC § 688.

*[355 US 430]

within territorial *waters,[4] based on unseaworthiness, whether derived from federal or state law. The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in The Osceola, 189 US 158, 175, 47 L ed 760, 764, 23 S Ct 483, based upon unseaworthiness. In view of the disposition we are making of this case, we need not consider the soundness of this assumption.

The petitioner also urges that, since the violation of the rule requiring the lights to be eight feet above the water resulted in a defect or insufficiency in the flotilla's lighting equipment which in fact caused the seaman's death, liability was created without regard to negligence under the line of decisions of this Court in actions under the FELA based upon violations of either the Safety Appliance Act[5] or the Boiler Inspection Act.[6] That line of decisions interpreted the clause of § 1 of the FELA, 45 USC § 51, which imposes liability on the employer "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The

*[355 US 431]

cases *hold that under this clause, a defect resulting from a violation of either statute which causes the injury or death of an employee creates liability without regard to negligence. San Antonio & A. P. R. Co. v Wagner, 241 US 476, 484, 60 L ed 1110, 1117, 36 S Ct 626. Here the defect or insufficiency in the flotilla's lighting equipment due to a violation of the statute resulted in the death of the seaman. The question for our decision is whether, in the absence of any showing of negligence, the Jones Act—which in terms incorporates the provisions of the FELA—permits recovery for the death of a seaman resulting from a violation of a statutory duty. We hold that it does.

Headnote 4

In denying the claim the lower courts relied upon their views of general tort doctrine. It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, "to insulate the employer as much as possible from bearing the 'human overhead'

Headnote 5

4. Where death occurs beyond a marine league from state shores, the Death on the High Seas Act, 41 Stat 537, 46 USC §§ 761–768, provides a remedy for wrongful death. Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right. See Holland v Steag, Inc. (DC Mass) 143 F Supp 203; cf. Cox v Roth, 348 US 207, 99 L ed 260, 75 S Ct 242; Just v Chambers, 312 US 383, 85 L ed 903, 61 S Ct 687. Claims for maintenance and cure survive the death of the seaman. Sperbeck v A. L. Burbank & Co. (CA2 NY) 190 F2d 449. For a discussion of the applicability of a state wrongful-death statute to an action for death of a nonseaman based upon a breach of the warranty of seaworthiness, see Skovgaard v The Vessel M/V Tungus, 252 F2d 14.

Headnote 3

5. 27 Stat 531, as amended, 45 USC §§ 1–16.

6. 36 Stat 913, as amended, 45 USC §§ 22–34.

which is an inevitable part of the cost—to someone—of the doing of industrialized business." Tiller v Atlantic Coast Line R. Co. 318 US 54, 59, 87 L ed 610, 613, 63 S Ct 444, 143 ALR 967. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the "human overhead" of doing business. For most

*[355 US 432]

industries *this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of

Headnote 6

a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general

Headnote 7

congressional intent was to provide liberal recovery for injured workers; Rogers v Missouri Pacific R. Co. 352 US 500, 508–510, 1 L ed 2d 493, 500, 501, 77 S Ct 443, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.

The FELA and the Jones Act impose upon the employer the duty of

Headnote 8

paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common-law duty, or of a breach of some statutory duty. The tort doctrine

Headnote 9

which the lower courts applied imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent.[7] However, this Court has repeatedly refused to apply such a limiting doctrine in FELA cases. In FELA cases based upon viola-

*[355 US 433]

tions of the Safety Appliance *Acts or the Boiler Inspection Act, the Court has held that a violation of either statute creates liability under FELA if the resulting defect or insufficiency in equipment contributes in fact to the death or injury in suit, without regard to whether the injury flowing from the breach was the injury the statute sought to prevent. Since it appears

Headnote 10

in this case that the defect or insufficiency of the flotilla's lighting

7. The trial court relied upon Restatement, Torts, § 286, Comment on Clause (c), h: "A statute or ordinance may be construed as intended to give protection against a particular form of harm to a particular interest. If so, the actor cannot be liable to another for a violation of the enactment unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the other."

equipment resulting from the violation of 33 USC § 157 actually caused the seaman's death, this principle governs and compels a result in favor of the petitioner's claim.

In Louisville & N. R. Co. v Layton, 243 US 617, 61 L ed 931, 37 S Ct 456, a railroad employee on one of five freight cars loaded with coal was thrown to the track and injured when an engine pushed a stock car into the last of the loaded cars and drove the five cars against a standing train. Neither the stock car nor the car which it struck was equipped with automatic couplers, as required by the Federal Safety Appliance Act. Had the cars been so equipped they would have coupled when they came together and the five cars would not have run against the standing train. The stated purpose of the automatic coupler requirement was to avoid "the necessity of men going between the ends of cars," and the railroad contended that this showed that the Congress intended the requirement only for the benefit of employees injured when between cars for the purpose of coupling or uncoupling them. The Court rejected the argument and affirmed a judgment for the plaintiff.

In Minneapolis & St. L. R. Co. v Gotschall, 244 US 66, 61 L ed 995, 37 S Ct 598, 14 NCCA 865, a brakeman walking along the tops of the cars of a moving train was thrown off and killed when the train separated because of the opening of a coupler which resulted in an automatic setting of the emergency brakes and a sudden jerk of the

*[355 US 434]

train. This Court sustained a *judgment against the railroad although the injury was not one which the Safety Appliance Act aims to prevent.

In Davis v Wolfe, 263 US 239, 68 L ed 284, 44 S Ct 64, the conductor of a moving train holding on to the grab iron directly over the sill-step on which he stood fell because the grab iron was loose and defective. It was contended that the grab iron was required to aid employees engaged in coupling or uncoupling cars or a service connected therewith, not to aid in the transportation of employees. The Court rejected this contention and held that the Layton and Gotschall Cases had settled that the employee ". . . can recover if the failure to comply with the requirements of the [Safety Appliance] act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." Id. 263 US at 243.

In Swinson v Chicago, St. P. M. & O. R. Co. 294 US 529, 79 L ed 1041, 55 S Ct 517, 96 ALR 1136, a freight brakeman was releasing a tightly set hand brake at the end of a tank car. Release of the hand brake required the application of considerable force to the brake wheel. The brakeman put his left foot on the running board and his right foot on the grab iron to set himself better to put pressure on the brake wheel. The foot pressure exerted on the grab iron caused the plank to which it was attached to split and one of the bolts securing the grab iron to be pulled through. As a result the brakeman lost his balance and was seriously injured in a fall in front of the moving car. The railroad contended, unsuccessfully, that it was not liable because the grab iron had been used by the brakeman for a purpose for which it was not intended, arguing that the duty to supply grab irons was intended by Congress in order to provide employees with an appliance to grasp with the hands, not to provide a foot brace or support to se-

cure leverage in releasing a hand brake.

*[355 US 435]

*In Coray v Southern Pacific Co. 335 US 520, 93 L ed 208, 69 S Ct 275, an employee of the railroad, riding a motor-driven track car behind a moving freight train, was killed in a crash of the track car into the freight train which stopped suddenly when its brakes locked because of a defect in its braking system. The Supreme Court of Utah affirmed the state trial court's direction of verdict for the railroad upon the ground that, in so far as brakes were concerned, the object of the Safety Appliance Act was not to protect employees from standing trains, but from moving trains. The Utah Supreme Court also reasoned that the stopping of the train in consequence of the leak in the valve was precisely what, as a safety device, it was designed to do. This Court reversed and said, id. 335 US at 524:

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. 45 USC § 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee . . . shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the . . . death of such employee.' 45 USC § 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated

*[355 US 436]

by an employee looking in *another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

Finally, in Urie v Thompson, 337 US 163, 93 L ed 1282, 69 S Ct 1018, 11 ALR2d 252, the Court considered a claim based upon an alleged violation of an Interstate Commerce Commission regulation promulgated under the Boiler Inspection Act. The regulation provided: "Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails." Id., at 195. The purpose of the requirement was to provide sand for traction. A fireman employed by the railroad for almost thirty years sued to recover damages for silicosis allegedly contracted from the inhalation of silicate dust emitted by allegedly broken or faultily adjusted sanders into the decks and cabs of the many locomotives on which he had worked. The railroad contended that the ICC rule was designed to ensure an adequate auxiliary braking system, not to protect employees against silicosis, and therefore the employee could not recover for an injury not of the kind the ICC rule sought to guard against. The Court rejected the argument as resting on general tort doctrine inapplicable to this case.

The decisive question in this case, then, is whether the principles de-

veloped in this line of FELA cases permit recovery for violation of this navigation statute or are limited, as the dissenting opinion would have it, to cases involving the Safety Appliance and Boiler Inspection Acts. Our attention is directed to the provisions of § 4 of the FELA, which makes reference to "any statute enacted for the safety of employees . . . ," and it is urged that this phrase, in some unexplained manner,

*[355 US 432]

*creates a special relationship between the FELA and the Safety Appliance and Boiler Inspection Acts. Several answers may be given to this contention.

First, § 4 relates entirely to the defense of assumption of risk, abolishing this defense where the injury was caused by the employer's negligence or by "violation . . . of any statute enacted for the safety of employees . . . ." It is § 1 of the FELA which creates the cause of action and this section, on its face, is barren of any suggestion that injuries caused by violation of *any* statute are to be treated specially. In formulating the rule that violation of the Safety Appliance and Boiler Inspection Acts creates liability for resulting injuries without proof of negligence, the Court relied on judicially evolved principles designed to carry out the general congressional purpose of providing appropriate remedies for injuries incurred by railroad employees. For Congress, in 1908, did

Headnote 11

not crystallize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.

Second, it is argued that the Safety Appliance and Boiler Inspection Acts are special safety statutes and thus may easily be assimilated to the FELA under general common-law principles. But there is no magic in the word "safety." In the cases we have discussed it was regarded as irrelevant that the defects in the appliances did not disable them from performing their intended safety function. For instance, in Gotschall the coupling defect parting the cars resulted in the automatic setting of the emergency brakes as a safety measure. In Coray the train stopped due to the operation of the very safety mech-

*[355 US 438]

anism required by the *statute. In Urie the defect in the sanders which caused sand to come into the locomotive cabs in no wise impaired the designed safety function of the sanders—to provide sand for traction. We think that the irrelevance of the safety aspect in these cases demonstrates that the basis of liability is a violation of

Headnote 12 statutory duty without regard to whether the injury flowing from the violation was the injury the statute sought to guard against. It must therefore be concluded that the nature of the Acts violated is not a controlling consideration; the basis of liability is the FELA.[8]

The courts, in developing the FELA with a view to adjusting equitably between the
Headnote 14 worker and his corporate employer the risks inherent in the railroad industry, have plainly rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred. This limiting approach has long been discarded from the FELA. Instead, the theory of the FELA is that where the employer's conduct

*[355 US 439]
falls short of the high standard *required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care, for the employer owes the employee, as much as the duty of acting with care, the duty of complying with his statutory obligations.

We find no difficulty in applying these principles, developed under the FELA, to the present ac-
Headnote 15 tion under the Jones Act, for the latter Act expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed, and the principles governing those cases clearly should apply here.

The judgment of the Court of Appeals is reversed with direction to remand to the District Court for further proceedings not inconsistent with this opinion.

Reversed.

8. The dissenters argue that the Safety Appliance and Boiler Inspection Acts were each prefaced by the statement: "An Act to promote the safety of employees and travelers . . . ." But we
Headnote 13 are not persuaded that liability under the FELA should depend on the title of the Acts whose violation is alleged. Were we to rely on such indicia we could point out that the statute here involved empowered the Commandant of the Coast Guard to establish rules "as to the lights to be carried . . . as he . . . *may deem necessary for safety* . . . ." 30 Stat 102, 33 USC § 157. (Emphasis added.)

*[362 US 539]

# *FRANK C. MITCHELL, Petitioner,

v

# TRAWLER RACER, INC.

362 US 539, 4 L ed 2d 941, 80 S Ct 926

[No. 176]

Argued January 21, 1960. Decided May 16, 1960.

## OPINION OF THE COURT

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was a member of the crew of the Boston fishing trawler Racer, owned and operated by the

*[362 US 540]

*respondent. On April 1, 1957, the vessel returned to her home port from a 10-day voyage to the North Atlantic fishing grounds, loaded with a catch of fish and fish spawn. After working that morning with his fellow crew members in unloading the spawn,[1] the petitioner changed his clothes and came on deck to go ashore. He made his way to the side of the vessel which abutted the dock, and in accord with recognized custom stepped onto the ship's rail in order to reach a ladder attached to the pier. He was injured when his foot slipped off the rail as he grasped the ladder.

To recover for his injuries he filed this action for damages in a complaint containing three counts: the first under the Jones Act, alleging negligence; the second alleging unseaworthiness; and the third for maintenance and cure. At the trial there was evidence to show that the ship's rail where the petitioner had lost his footing was covered for a distance of 10 or 12 feet with slime and fish gurry, apparently remaining there from the earlier unloading operations.

1. In accordance with tradition, the employment agreement provided that the proceeds from the sale of the fish spawn should be divided among the members of the crew, no part thereof going to the officers or to the owner of the vessel.

The district judge instructed the jury that in order to allow recovery upon either the negligence or unseaworthiness count, they must find that the slime and gurry had been on the ship's rail for a period of time long enough for the respondent to have learned about it and to have removed it.[2] Counsel for the peti-

*[362 US 541]

tioner requested that *the trial judge distinguish between negligence and unseaworthiness in this respect, and specifically requested him to instruct the jury that notice was not a necessary element in proving liability based upon unseaworthiness of the vessel. This request was denied.[3] The jury awarded the petitioner maintenance and cure, but found for the respondent shipowner on both the negligence and unseaworthiness counts.

*[362 US 542]

*An appeal was taken upon the sole ground that the district judge had been in error in instructing the jury that constructive notice was necessary to support liability for unseaworthiness. The Court of Appeals affirmed, holding that at least with respect to "an unseaworthy condition which arises only during the progress of the voyage," the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect." 265 F2d 426, 432. Certiorari was granted, 361 US 808, 4 L ed 2d 57, 80 S Ct 70, to consider a question of maritime law upon

2. The instructions on this aspect of the case were as follows: "In a case like this we have the argument presented here, which you do not have to believe, that the ship was unseaworthy because at the time of the injury there was on the rail of the ship some kind of slime. Well, if that really was there and had been there any period of time, and it caused the accident, then you would find as a matter of your conclusion of fact, that unseaworthiness caused the accident.

"I haven't told you what unseaworthiness is. You will recognize it is somewhat overlapping and alternative to, indeed quite similar to, negligence because it is one of the obligations of the owner of a ship to see to it through appropriate captains, mates, members of the crew, or someone, that there isn't left upon the rail of a ship, especially a rail which is going to be utilized for leaving the ship, to climb the ladder, any sort of substance such as slime.

"It doesn't make any difference who puts it there. As far as the owner-operator of the vessel goes, it is his job to see it does not stay there too long, if he knows it is the kind of place, as he could have known here, which is used by members of the crew in getting off the ship.

"So I think it would be fair to tell you the real nub of this case which I hope has not been clouded for you, the real nub of this case is, Was there on the rail some slime; was it there for an unreasonably long period of time; was there a failure on the part of the owner-operator through appropriate agents to remove it; and was that slime the cause of the injury which the plaintiff suffered.

. . . . .

"Was there something there and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed? That is the question."

3. "Mr. Katz: May I make a further request? In your charge you specifically said 'and was it there for a reasonably long period of time so that the shipowner could have had it removed.'

"I submit that would apply to the negligence count only but with respect to unseaworthiness, if there is an unseaworthy condition, there is an absolute situation, there is no time required. It is the only—

"The Court: Denied. Refer to the case in the Second Circuit."

which the Courts of Appeals have expressed differing views. Compare Cookingham v United States, 184 F2d 213 (CA3d Cir), with Johnson Line v Maloney, 243 F2d 293 (CA9th Cir), and Poignant v United States, 225 F2d 595 (CA2d Cir).

In its present posture this case thus presents the single issue whether with respect to so-called "transitory" unseaworthiness the shipowner's liability is limited by concepts of common-law negligence. There are here no problems, such as have recently engaged the Court's attention, with respect to the petitioner's status as a "seaman." Cf. Seas Shipping Co. v Sieracki, 328 US 85, 90 L ed 1099, 66 S Ct 872; Pope & Talbot, Inc. v Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202; United New York & N. J. S. H. P. Asso. v Halecki, 358 US 613, 3 L ed 2d 541, 79 S Ct 517, 523, or as to the status of the vessel itself. Cf. West v United States, 361 US 118, 4 L ed 2d 161, 80 S Ct 189. The Racer was in active maritime operation, and the petitioner was a member of her crew.[4]

*[362 US 543]

*The origin of a seaman's right to recover for injuries caused by an unseaworthy ship is far from clear. The earliest codifications of the law of the sea provided only the equivalent of maintenance and cure—medical treatment and wages to a mariner wounded or falling ill in the service of the ship. Markedly similar provisions granting relief of this nature are to be found in the Laws of Oleron, promulgated about 1150 A. D. by Eleanor, Duchess of Guienne; in the Laws of Wisbuy, published in the following century; in the Laws of the Hanse Towns, which appeared in 1597; and in the Marine Ordinances of Louis XIV, published in 1681.[5]

For many years American courts regarded these ancient codes as establishing the limits of a shipowner's liability to a seaman injured in the service of his vessel. Harden v Gordon (CC Me) 2 Mason 541, F Cas No 6047; The George (CC Mass) 1 Sumn 151, F Cas No 5329;

*[362 US 544]

*Reed v Canfield (CC Mass) 1 Summ

4. The trial judge instructed the jury as follows: "In this case, on the basis of rulings I made earlier, I have instructed you on the undisputed fact, Mr. Mitchell is to be regarded as being an employee of the defendant and therefore entitled to those rights if any which flow from the maritime law and flows [sic] from the act of Congress."

In a memorandum filed almost a month after the trial, the district judge, apparently relying upon the fact that the shipowner had no direct financial interest in the spawn which had been unloaded (see note 1, supra), stated that, "[T]here should have been a directed verdict for the defendant on the unseaworthiness count. If there were slime on the rail, it was put there by an associate and joint-venturer of the plaintiff and not by a stranger or by anyone acting for the defendant. If Sailor A and his wife go on board, and each of them has a right to be there, but they are engaging in a frolic of their own, not intended for the profit or advantage of the shipowner, say, for example, that they are munching taffy, and the wife drops the taffy on the deck, and the sailor slips on it, the sailor, if he is injured, is not entitled to collect damages from the shipowner. In short, absolute as is the liability for unseaworthiness, it does not subject the shipowner to liability from articles deposited on the ship by a co-adventurer of the plaintiff." But this theory played no part in the issues developed at the trial, where the district judge denied the respondent's motion for a directed verdict and instructed the jury as indicated above.

5. All of these early maritime codes are reprinted in 30 Fed Cas 1171–1216. The relevant provisions are Articles VI and VII, of the Laws of Oleron, 30 Fed Cas 1174–1175; Articles XVIII, XIX, and XXXIII, of the Laws of Wisbuy, 30 Fed Cas 1191, 1192; Articles XXXIX and XLV of the Laws of the Hanse Towns, 30 Fed Cas 1200; and Title Fourth, Articles XI and XII, of the Marine Ordinances of Louis XIV, 30 Fed Cas 1209.

195, F Cas No 11641.[6] During this early period the maritime law was concerned with the concept of unseaworthiness only with reference to two situations quite unrelated to the right of a crew member to recover for personal injuries. The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See Dixon v The Cyrus (DC Pa) 2 Pet Adm 407, F Cas No 3930; Rice v The Polly & Kitty (DC Pa) 2 Pet Adm 420, F Cas No 11754; The Moslem (DC NY) Olcott Adm 289, F Cas No 9875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. The Caledonia, 157 US 124, 39 L ed 644, 15 S Ct 537; The Silvia, 171 US 462, 43 L ed 241, 19 S Ct 7; The Southwark (Martin v The Southwark) 191 US 1, 48 L ed 65, 24 S Ct 1; I Parsons on Marine Insurance (1868) 367–400.

Not until the late nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond maintenance and cure. During that period it became generally accepted that a shipowner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence. The decisions of that era for the most part treated maritime injury cases on the same footing as cases involving the duty of a shoreside employer to exercise ordinary care to provide his employees with a reasonably safe place to work. Brown v The D. S. Cage (CC Tex) 1 Woods 401, F Cas

*[362 US 545]

No 2002; *Halverson v Nisen (DC Cal) 3 Sawy 562, F Cas No 5970; The Noddleburn (DC Or) 12 Sawy 129, 28 F 855; The Neptuno (DC NY) 30 F 925; The Lizzie Frank (DC Ala) 31 F 477; The Flowergate (DC NY) 31 F 762; The A. Heaton (CC Mass) 43 F 592; The Julia Fowler (DC NY) 49 F 277; The Concord (DC NY) 58 F 913; The France (CA2 NY) 59 F 479; The Robert C McQuillen (DC Conn) 91 F 685.

Although some courts held shipowners liable for injuries caused by "active" negligence, The Edith Godden (DC NY) 23 F 43; The Frank & Willie (DC NY) 45 F 494, it was held in The City of Alexandria (DC NY) 17 F 390, in a thorough opinion by Judge Addison Brown, that the owner was not liable for negligence which did not render the ship or her appliances unseaworthy. A closely related limitation upon the owner's liability was that imposed by the fellow-servant doctrine. The Sachem (DC NY) 42 F 66.[7]

This was the historical background behind Mr. Justice Brown's much quoted second proposition in

6. And, of course, the vitality of a seaman's right to maintenance and cure has not diminished through the years. Calmar S.S. Corp. v Taylor, 303 US 525, 82 L ed 993, 58 S Ct 651; Waterman S.S. Corp. v Jones, 318 US 724, 87 L ed 1107, 63 S Ct 930; Farrell v United States, 336 US 511, 93 L ed 850, 69 S Ct 707; Warren v United States, 340 US 523, 95 L ed 503, 71 S Ct 432.

Headnote 1

7. For a more thorough discussion of the history here sketched see Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell LQ 381, 382–403; Gilmore and Black, The Law of Admiralty (1957), pp 315–332. See also the illuminating discussion in the opinion of then Circuit Judge Harlan in Dixon v United States (CA2 NY) 219 F2d 10, 12–15.

The Osceola, 189 US 158, 175, 47 L ed 760, 764, 23 S Ct 483: "That the vessel and her owner are, both by English and American law, 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." In support of this proposition the Court's opinion noted that "[i]t will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country, in a general consensus of opinion among the Circuit and

*[362 US 546]

*District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own." 189 US, at 175.

It is arguable that the import of the above-quoted second proposition in The Osceola was not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness. Support for such a view is to be found not only in the historic context in which The Osceola was decided, but in the discussion in the balance of the opinion, in the decision itself (in favor of the shipowner), and in the equation which the Court drew with the law of England, where the Merchant Shipping Act of 1876 imposed upon the owner only the duty to use "all reasonable means" to "insure the seaworthiness of the ship." This limited view of The Osceola's pronouncement as to liability for unseaworthiness may be the basis for subsequent decisions of federal courts exonerating shipowners from responsibility for the negligence of their agents because that negligence had not rendered the vessel unseaworthy. The Henry B. Fiske (DC Mass) 141 F 188; Tropical Fruit S. S. Co. v Towle (CA5 La) 222 F 867; John A. Roebling's Sons Co. v Erickson (CA2 NY) 261 F 986. Such a reading of the Osceola opinion also finds arguable support in several subsequent decisions of this Court. Baltimore S.S. Co. v Phillips, 274 US 316, 71 L ed 1069, 47 S Ct 600; Plamals v The Pinar Del Rio, 277 US 151, 72 L ed 827, 48 S Ct 457, 28 NCCA 1; Pacific S.S. Co. v Peterson, 278 US 130, 73 L ed 220, 49 S Ct 75.[8] In any event, with the passage of the Jones Act in

Headnote 2

1920, 41 Stat 1007, 46 USC § 688, Congress effectively obliterated all distinctions

*[362 US 547]

between *the kinds of negligence for which the shipowner is liable, as well as limitations imposed by the fellow-servant doctrine, by extending to seamen the remedies made available to railroad workers under the Federal Employers' Liability Act.[9]

The first reference in this Court to the shipowner's obligation to furnish a seaworthy ship as explicitly unrelated to the standard of ordi-

8. Where it was said "[u]nseaworthiness, as is well understood, embraces certain species of negligence; while the [Jones Act] includes several additional species not embraced in that term." 272 US, at 138.

9. An earlier legislative effort to broaden recovery for injured seamen (the La Follette Act of 1915, 38 Stat 1164, 1185) had been emasculated in Chelentis v Luckenbach S.S. Co. 247 US 372, 62 L ed 1171, 38 S Ct 501, 19 NCCA 309.

nary care in a personal injury case appears in Carlisle Packing Co. v Sandanger, 259 US 255, 66 L ed 927, 42 S Ct 475. There it was said "we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 US, at 259. This characterization of unseaworthiness as unrelated to negligence was probably not necessary to the decision in that case, where the respondent's injuries had clearly in fact been caused by failure to exercise ordinary care (putting gasoline in a can labeled "coal oil" and neglecting to provide the vessel with life preservers). Yet there is no reason to suppose that the Court's language was inadvertent.[10]

During the two decades that follow the Carlisle decision there came to be a general acceptance of the view that The Osceola had enunciated a concept of absolute liability for unseaworthiness unrelated to principles of negligence law. Personal injury litigation based upon unseaworthiness was substantial. See, Gilmore and Black, The Law of Admiralty (1957), p. 316. And the standard texts accepted that theory

*[362 US 548]

of liability without question. *See Benedict, The Law of American Admiralty (6th ed., 1940), Vol. I, § 83; Robinson, Admiralty Law (1939), pp 303 et seq. Perhaps the clearest expression appeared in Judge Augustus Hand's opinion in The H. A. Scandrett (CA2 NY) 87 F2d 708:

"In our opinion the libelant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.

"The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. §§ 190–195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation." 87 F2d, at 711.

In 1944 this Court decided Mahnich v Southern S.S. Co. 321 US 96, 88 L ed 561, 64 S Ct 455. While it is possible to take a narrow view of the precise holding in that case,[11] the fact is that Mahnich stands as a landmark in the development of admiralty law. Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that The Osceola was correctly to be understood as holding that the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents. Moreover, the dissent in Mahnich accepted this reading of The Osceola and claimed no more than that the injury in Mahnich was not properly attributable to unseaworthiness. See 321 US, at 105–113.

In Seas Shipping Co. v Sieracki, 328 US 85, 90 L ed 1099, 66 S Ct 872, the Court effectively scotched any doubts that might have lingered

*[362 US 549]

*after Mahnich as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is "absolute." "It is essentially a species of

10. As one commentator has chosen to regard it. See Tetreault, op cit, supra, note 7, at 394.

11. I. e., as simply overruling the decision in Plamals v The Pinar Del Rio, 277 US 151, 72 L ed 827, 48 S Ct 457, 28 NCCA 1, that unseaworthiness cannot include "operating negligence." See Gilmore and Black, op cit, supra, at 317.

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 the range of its humanitarian policy." 328 US, at 94, 95. The dissenting opinion agreed as to the nature of the shipowner's duty. "[D]ue diligence of the owner," it said, "does not relieve him from this obligation." 328 US, at 104.

From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. Pope & Talbot, Inc. v Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202; Alaska S.S. Co. v Petterson, 347 US 396, 98 L ed 798, 74 S Ct 601; Rogers v United States Lines, 347 US 984, 98 L ed 1120, 74 S Ct 849; Boudoin v Lykes Bros. S.S. Co. 348 US 336, 99 L ed 354, 75 S Ct 382; Crumady v The Joachim Hendrik Fisser, 358 US 423, 3 L ed 2d 413, 79 S Ct 445; United New York & N. J. S. H. P. Asso. v Halecki, 358 US 613, 3 L ed 2d 541, 79 S Ct 517, 523.

Headnote 3

There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska S.S. Co. v Petterson, 347 US 396, 98 L ed 798, 74 S Ct 601, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. *That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.[12]

Headnote 4

Headnote 5

Headnote 6

*[362 US 550]

There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

Headnote 7

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

Headnote 8

12. The persuasive authority of Petterson in a case very similar to this one has been recognized by the Court of Appeals for the Second Circuit. Poignant v United States (NY) 225 F2d 595.

vessel reasonably suitable for her intended service. Boudoin v Lykes Bros. S.S. Co. 348 US 336, 99 L ed 354, 75 S Ct 382.

The judgment must be reversed, and the case remanded to the District Court for a new trial on the issue of unseaworthiness.

Reversed and remanded.

STOP

## SEPARATE OPINIONS

Mr. Justice Frankfurter, whom Mr. Justice Harlan and Mr. Justice Whittaker join, dissenting.

No area of federal law is judge-made at its source to such an extent as is the law of admiralty. The evolution of judge-made law is a process of accretion and erosion. We are told by a great master that law

*[362 US 551]

is civilized to the *extent that it is purposefully conscious. Conversely, if law just "grow'd" like Topsy, unreflectively and without conscious design, it is irrational. When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition—has just "grow'd" like Topsy—the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension.

Our law of the sea has an ancient history. While it has not been static, the needs and interests of the interrelated world-wide seaborne trade which it reflects are very deeply rooted in the past. For the most part it has not undergone the great changes attributable to the emergence and growth of industrialized society on land. In the law of the sea, the continuity and persistence of a doctrine, particularly one with international title-deeds, has special significance.

The birth of the current doctrine of unseaworthiness, now impressively challenged by Chief Judge Magruder's opinion under review, can be stated precisely: it occurred on May 29, 1922, in Carlisle Packing Co. v Sandanger, 259 US 255, 66 L ed 927, 42 S Ct 475. The action was brought in the Washington state courts by Sandanger, an employee of Carlisle, who was injured while working on its motorboat on a six- or eight-hour trip. The injury occurred when he lighted fuel from a can on board marked "coal oil" in order to start a cookstove, and it exploded. It appeared thereafter that the can had mistakenly been filled with gasoline. In a suit based on a claim of negligence, Sandanger won a verdict on a finding of negligence, which was challenged in the Supreme Court of Washington on the ground that the exclusively applicable maritime law did not afford relief by way of compensation for negligent injury of an employee. The Washington court held that an

*[362 US 552]

*injury caused by a negligently created unseaworthy condition was compensable, even when, under the rule laid down in The Osceola, 189 US 158, 47 L ed 760, 23 S Ct 483, negligent injury without unseaworthiness would not be. 112 Wash 480, 192 P 1005.

The matter was dealt with in this Court in the few lines innovating the rule of absolute liability: "we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if . . . one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 US, at 259. (The full text is quoted in