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## Unseaworthy Shore-Based Equipment

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cases<sup>106</sup> are a contemporary example of non-contractual indemnity in admiralty and lend support to the granting of relief in the shipowner-third party situation.

The strongest support for the shipowner can be found in the FELA indemnity cases.<sup>107</sup> The applicability of cases arising under the FELA in the area of personal injury to the field of maritime employment is unquestionable. The employer-third party indemnity problem which is an unavoidable consequence of this field of personal injuries should be within this scope of application.

Precedent and the equities<sup>108</sup> involved would seem to be clearly in favor of the shipowner. The third party should not be allowed to place the burden of his negligence on the shipowner merely because the seaman fails to prosecute his claim against him or because the order in which the seaman prosecutes his various claims leaves the shipowner without a right of recovery against the third party.

*Michael Cavalier Durney\**

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<sup>106</sup> *Gore v. Maritime Overseas Corp.*, 256 F. Supp. 104 (E.D. Pa. 1966); *Gooden v. Texaco, Inc.*, 255 F. Supp. 343, 1966 A.M.C. 1704 (E.D. Pa. 1966).

<sup>107</sup> Cases cited notes 72-4, 84 *supra*.

<sup>108</sup> GILMORE & BLACK 276.

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## UNSEAWORTHY SHORE-BASED EQUIPMENT

It is a well-established rule of maritime law that every shipowner warrants the seaworthiness of his vessel.<sup>1</sup> This means that the shipowner is under an absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use."<sup>2</sup> For failure to perform this duty the shipowner is strictly liable; for liability for unseaworthiness is a species of liability without fault.<sup>3</sup> Although the Supreme Court has greatly altered the concept of seaworthiness since its first application to maritime personal injuries,<sup>4</sup> the Court still has not extended the protection of

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<sup>1</sup> The classic statement of the liability for unseaworthiness appears in *The Osceola*, 189 U.S. 158 (1903). The Court said: "the vessel and her owner are 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." *Id.* at 175.

<sup>2</sup> *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 1960 A.M.C. 1503, 1512 (1960).

"A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper."<sup>3</sup>  
*Morales v. City of Galveston*, 370 U.S. 165, 170, 1962 A.M.C. 1450, 1454 (1962).

<sup>3</sup> *E.g.*, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 1946 A.M.C. 698, 704 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

<sup>4</sup> *The Osceola*, 189 U.S. 158 (1903).

the warranty to injuries caused by shore-based equipment. In the typical situation, a longshoreman or other shore-worker, while engaged in the loading or unloading of a vessel docked upon navigable waters, is injured or killed by defective shore-based equipment used in the loading or discharge operations.<sup>5</sup> Traditionally such equipment has not been within the scope of the warranty since it is neither a part of the vessel itself, nor owned by the shipowner. Rather, it is usually owned and operated by the stevedore company or another independent contractor. There is a sharp conflict of authority in the lower federal courts as to whether such equipment should be within the scope of the warranty,<sup>6</sup> and the question appears to be ripe for decision by the United States Supreme Court.

### *Treatment by the Supreme Court—The Liberal Trend*

The decisions of the Supreme Court have indicated a liberal trend in favor of increased protection against the unseaworthiness of a ship.<sup>7</sup> The traditional protection given by the warranty of seaworthiness included only "seamen," i.e., those

<sup>5</sup> E.g., Shore-based marine leg (conveyor system used in grain loading and unloading operations), *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 1966 A.M.C. 1415 (5th Cir.), cert. denied, 385 U.S. 969 (1966); shore-based hopper, *Spann v. Lauritzen*, 344 F.2d 204, 1965 A.M.C. 1192 (3d Cir.), cert. denied, 382 U.S. 938 (1965); shore-based crane, *Huff v. Matson Nav. Co.*, 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir. 1964), cert. denied, 380 U.S. 943 (1965); grain trimmer (spout used to position grain during loading), *Sherbin v. S. G. Embiricos*, 200 F Supp. 874 (E.D. La. 1962); baggage chute, *Di Salvo v. Cunard S.S. Co.*, 171 F Supp. 813 (S.D.N.Y. 1959).

<sup>6</sup> Cases extending the warranty of seaworthiness to shore-based equipment: *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 1966 A.M.C. 1415 (5th Cir. 1966); *Spann v. Lauritzen*, 344 F.2d 204, 1965 A.M.C. 1192 (3d Cir. 1965); *Huff v. Matson Nav. Co.*, 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir. 1964); *Metzger v. S.S. Kirsten Torm*, 245 F Supp. 227, 1965 A.M.C. 2271 (D. Md. 1965); *Di Salvo v. Cunard S.S. Co.*, 171 F Supp. 813 (S.D.N.Y. 1959); *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1966) (dictum); *Daniel v. Skibs A.S. Hilda Knudson*, 253 F Supp. 758 (E.D. Pa.), *aff'd*, 368 F.2d 179 (1966) (by implication); *Drumgold v. Plovba*, 260 F Supp. 983 (E.D. Va. 1966) (by implication); see *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 1966 A.M.C. 1237 (W.D. Wash. 1966); *Mosley v. Cia. Mar. Adra. S.A.*, 362 F.2d 118 (2d Cir. 1966); *Considine v. Black Diamond S.S. Co.*, 163 F Supp. 107 (D. Mass. 1958).

Cases refusing to extend the warranty of seaworthiness to shore-based equipment: *Forkin v. Furness Withy & Co.*, 323 F.2d 638, 1964 A.M.C. 356 (2d Cir. 1963); *McKnight v. N. M. Patterson & Sons*, 181 F Supp. 434, 1960 A.M.C. 1760 (N.D. Ohio), *aff'd*, 286 F.2d 250 (6th Cir. 1960), cert. denied, 368 U.S. 913 (1961); *Henry v. S.S. Mount Evans*, 227 F Supp. 408 (D. Md. 1964); *Miller v. Transandina Cia Nav. S.A.*, 1964 A.M.C. 1159 (S.D. Cal. 1964); *Sherbin v. S. G. Embiricos*, 200 F Supp. 874, 1962 A.M.C. 1013 (E.D. La. 1962); *K. A. Cockrell v. A. L. Mechling Barge Lines, Inc.*, 192 F Supp. 622 (S.D. Tex. 1961); *Fredericks v. American Export Lines*, 227 F.2d 450 (2d Cir. 1955) (dictum), cert. denied, 350 U.S. 989 (1956); see *Kent v. Shell Oil Co.*, 286 F.2d 746, 1961 A.M.C. 1671 (5th Cir. 1961).

<sup>7</sup> See, e.g., *Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. Pa. L. Rev. 1137 (1963); Note, *Extension of the Unseaworthiness Remedy to Longshoremen—Triumph of Doctrine Over Statute*, 15 W Res. L. Rev. 753 (1964).

men who actually go to sea.<sup>8</sup> In *Seas Shipping Co. v. Sieracki*,<sup>9</sup> the Court took the first significant step toward increasing the number of persons protected under the doctrine by holding that all longshoremen working in the ship's service on board the ship can recover for the ship's unseaworthiness. The plaintiff was a longshoreman who was injured while working on board the ship during the loading operations. The Court, in allowing recovery, said that "historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew" <sup>10</sup> For these purposes [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."<sup>11</sup>

In *Pope & Talbot v. Hawk*<sup>12</sup> the Supreme Court interpreted *Sieracki* broadly and extended the protection given by the warranty to all shore-workers engaged in the ship's service on board the ship. A carpenter was repairing the ship's grain loading equipment when he slipped on some loose grain and fell through an open hatch of the ship. In allowing recovery for unseaworthiness, the Court refused to distinguish *Sieracki*: "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness."<sup>13</sup> The carpenter's need for protection from unseaworthiness was no less than that of the longshoremen working with him or the seamen who were about to go to sea. "All were subjected to the same danger. All were entitled to like treatment under law."<sup>14</sup> Thus, the Court confirmed the emphasis that *Sieracki* had put upon the plaintiff's performance in the ship's service as the test for recovery for unseaworthiness. By analogy this has been applied to a large variety of shore-workers<sup>15</sup> who were injured while performing the ship's service.

In *Alaska S.S. Co. v. Petterson*,<sup>16</sup> the equipment which the shipowner warrants to be seaworthy was held to include not only the ship's equipment, which was traditionally included,<sup>17</sup> but also equipment furnished by the stevedore for use on the ship in the ship's service. The plaintiff was injured when a block, which was

<sup>8</sup> Non-seamen were regarded as "business invitees" to whom the shipowner was liable only for the failure to exercise reasonable care. *E.g.*, *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945); *The Etna*, 43 F. Supp. 303 (E.D. Pa. 1942); *The S.S. Anderson*, 37 F. Supp. 695 (D. Md. 1941).

<sup>9</sup> 328 U.S. 85, 1946 A.M.C. 698 (1946).

<sup>10</sup> *Id.* at 96, 1946 A.M.C. at 705. *Contra*, Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1140-47 (1963); *Tetreault, Seamen, Seaworthiness & the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 413-14 (1954); Note, 34 CALIF. L. REV. 601 (1946).

<sup>11</sup> 328 U.S. at 99, 1946 A.M.C. at 708.

<sup>12</sup> 346 U.S. 406, 1954 A.M.C. 1 (1953).

<sup>13</sup> *Id.* at 412-13, 1954 A.M.C. at 9.

<sup>14</sup> *Id.* at 413, 1954 A.M.C. at 9.

<sup>15</sup> *E.g.*, *The Tungus v. Skovgaard*, 358 U.S. 588, 1959 A.M.C. 813 (1959) (repairman); *Manhat v. United States*, 220 F.2d 143, 1955 A.M.C. 513 (2d Cir. 1955) (painter) (by implication); *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784, 1953 A.M.C. 1799 (3d Cir. 1953) (cleaner); see Annot., 3 L. Ed. 2d 1764 (1959).

<sup>16</sup> 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396, 1954 A.M.C. 860 (1954).

<sup>17</sup> *E.g.*, *Mahmich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

being used in the loading operations,<sup>18</sup> broke and caused some loading gear to fall upon his leg. The Supreme Court affirmed the decision of the Court of Appeals<sup>19</sup> which had held the ship unseaworthy due to the defective condition of the block even though it had been furnished by the stevedore.<sup>20</sup>

Lastly, in *Gutierrez v. Waterman S.S. Corp.*,<sup>21</sup> the location of both the injury and the equipment causing it was held to be immaterial, though both were on the shore. A longshoreman who was on the dock helping with the unloading operations slipped on some loose beans that had spilled out of defective bags unloaded from the ship. Due to the defective condition of the cargo bags, and despite their location on the dock, the ship was found unseaworthy and the longshoreman was allowed to recover.<sup>22</sup>

### *Prerequisites for Unseaworthy Shore-Based Equipment*

The preceding cases establish the groundwork for a further extension by the Supreme Court of the warranty of seaworthiness to shore-based equipment.<sup>23</sup> In order to find a ship unseaworthy and thereby hold the shipowner liable for an injury or death caused by defective shore-based equipment, the lower courts<sup>24</sup> have looked for two prerequisites: (1) the plaintiff must be engaged in the

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<sup>18</sup> To resolve a conflict in the evidence, the Court assumed it was furnished by the stevedore.

<sup>19</sup> 205 F.2d 478 (9th Cir. 1953).

<sup>20</sup> This decision was promptly confirmed in *Rogers v. United States Lines*, 347 U.S. 984, 1954 A.M.C. 1088 (1954), *reversing per curiam* 205 F.2d 57, 1953 A.M.C. 1679 (3d Cir. 1953). Plaintiff, a longshoreman, was aboard the ship engaged in an unloading operation involving one of the ship's booms, two ship's winches, the ship's runner on one winch, and the stevedore's land-fall runner on the other. The Court of Appeals held that "the statement that the vessel adopted the runner as an appurtenance is simply not justified by the record." 205 F.2d at 57, 1953 A.M.C. at 1680. The Supreme Court's reversal *per curiam* clearly confirms *Petterson*; but whether the Court meant to adopt the principle that the land-fall runner was adopted by the ship as an appurtenance is not clear.

<sup>21</sup> 373 U.S. 206, 1963 A.M.C. 1649 (1963).

<sup>22</sup> The Court held, "[T]he duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship *whether they are standing aboard ship or on the pier*," 373 U.S. at 215, 1963 A.M.C. at 1656. (Emphasis added.) This decision confirmed several lower federal court cases. *E.g.*, *Thompson v. Calmar S.S. Co.*, 331 F.2d 657, 1964 A.M.C. 2249 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964); *Pope & Talbot v. Cordray*, 258 F.2d 214, 1959 A.M.C. 603 (9th Cir. 1958); *Strika v. Netherlands Ministry of Traffic*, 185 F.2d 555, 1951 A.M.C. 84 (2d Cir. 1950), *cert. denied*, 341 U.S. 904 (1951).

<sup>23</sup> The Supreme Court had an opportunity to rule on this issue in *Roper v. United States*, 368 U.S. 20, 1961 A.M.C. 2499 (1961), where the plaintiff was injured by a land-based marine leg (gram-loading device). But the finding that the vessel was out of navigation, and that the seaworthiness of the vessel and its equipment was not warranted as a result, made it unnecessary to decide whether seaworthiness extended to the shore-based equipment.

<sup>24</sup> *E.g.*, *Daniel v. Skibs A.S. Hilda Knudson*, 253 F Supp. 758 (E.D. Pa.), *aff'd*, 368 F.2d 178 (3d Cir. 1966); *Spann v. Lauritzen*, 344 F.2d 204, 1965 A.M.C. 1192 (3d Cir. 1965); *Sherbin v. S. G. Embicos*, 200 F Supp. 874, 1962 A.M.C. 1013 (E.D. La. 1962).

service of the vessel; and (2) the equipment must be part of the hull, gear, appliances or appurtenances of the ship. Though the courts have considered these requirements separately, they seem to be based upon the same principles, since many courts have generally found an appurtenance to be anything adopted by the ship in performance of the ship's service.<sup>25</sup> Thus if the plaintiff is performing the ship's service and he is injured by equipment used in that service, the ship can be found unseaworthy and the plaintiff allowed to recover. It is not necessary to consider any other factor if these requirements are met.

### *Plaintiff in the Ship's Service*

In order to be protected by the warranty of seaworthiness, the plaintiff must perform work in the ship's service,<sup>26</sup> i.e., work that is traditionally that of the ship's crew. This was firmly established in the *Sieracki*<sup>27</sup> and *Hawn*<sup>28</sup> cases. The test is, however, not what label is given to the type of work being done, but the nature of the task being performed and its relation to the ship.<sup>29</sup> For example, in *Hawn* the plaintiff was a carpenter who was injured while repairing the ship's grain loading equipment. The Court did not consider the label given to his work, i.e., carpentry, important, but rather the nature and purposes of Hawn's duties which were in the ship's service.

Some courts, however, when faced with claims of plaintiffs whose injuries were caused by defective shore-based equipment, have looked beyond the nature of the work being done by the plaintiff and imposed additional restrictions. For example, in *McKnight v. N.M. Patterson & Sons*,<sup>30</sup> a longshoreman was denied recovery for unseaworthiness after being struck by part of the unloading gear being lowered into the ship's hold by means of a stevedore-owned and operated shore-based crane. The court held that although the plaintiff was doing traditional seaman's work, since he was injured by stevedore-equipment not usually found on the ship he was not incurring a seaman's hazards, but rather a stevedore's hazards, which were what he was being paid to incur.

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<sup>25</sup> E.g., *Rogers v. United States Lines*, 347 U.S. 984, 1954 A.M.C. 1088 (1954), *reversing per curiam* 205 F.2d 57, 1953 A.M.C. 1679 (3d Cir. 1953); *Alaska S.S. Co. v. Petterson*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396, 1954 A.M.C. 860 (1954); *Rodriguez v. Coastal Ship Corp.*, 210 F. Supp. 38 (S.D.N.Y. 1962); *Wybor-ski v. Bristol City Line of Steamships, Ltd.*, 191 F. Supp. 884, 892, 1966 A.M.C. 1885, 1895 (D. Md. 1961); *Casbon v. Stockard S.S. Corp.*, 173 F. Supp. 845, 1959 A.M.C. 1906 (E.D. La. 1959); *Considine v. Black Diamond S.S. Corp.*, 163 F. Supp. 107 (D. Mass. 1958); see *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 1964 A.M.C. 1075 (1964); *Reed v. The Yaka*, 373 U.S. 410, 1963 A.M.C. 1373 (1963).

<sup>26</sup> E.g., *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 1959 A.M.C. 580 (1959); *Pope & Talbot v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946).

<sup>27</sup> "[T]he liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent." 328 U.S. 85, 97, 1946 A.M.C. 698, 706 (1946).

<sup>28</sup> 346 U.S. 406, 1954 A.M.C. 1 (1953).

<sup>29</sup> E.g., *Pope & Talbot v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953); *Pope & Talbot v. Cordray*, 258 F.2d 214, 1959 A.M.C. 603 (9th Cir. 1958).

<sup>30</sup> 181 F. Supp. 434, 1960 A.M.C. 1760 (N.D. Ohio), *aff'd*, 286 F.2d 250 (6th Cir. 1960).

This reasoning unfortunately fails to recognize the basic theory of *Sieracki*: if the plaintiff is engaged in the loading or unloading process, he is incurring the hazards of the ship's service and should be within the scope of protection.<sup>31</sup> Stated simply, while loading and unloading a vessel, the seaman and the stevedore risk the same hazards.

Problems may arise, however, in determining exactly what the loading and unloading process includes, and hence whether the plaintiff is in the ship's service. For example, in *Spann v. Lauritzen*<sup>32</sup> a shore-based crane was being used to unload a bulk cargo of nitrate from the ship into a shore-based hopper. Each time the hopper was full,<sup>33</sup> it was the plaintiff's duty to release the nitrate from the hopper into the truck below it. He was injured by a sudden movement of the release bar of the hopper when a load of nitrate was dropped into the hopper. The court found that the plaintiff was engaged in the unloading process even though the loading of trucks was being accomplished by use of the shore-based hopper at the same time. The court said that the hopper was essential to the unloading process, as was plaintiff's duty to unload it; for if it were not emptied, the unloading process could not continue. Therefore, the plaintiff was found to be engaged in the ship's service and permitted to recover for unseaworthiness.

The beginning of the loading process<sup>34</sup> and the completion of the unloading process<sup>35</sup> have long been held to be within the traditional work of seamen. Yet, it is obvious that some limits must be placed upon the beginning of the loading process and the termination of the unloading process for the purpose of recovery for unseaworthiness.<sup>36</sup> For there are "an almost limitless variety of situations in

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<sup>31</sup> See, e.g., *Deffes v. Federal Barge Lines*, 361 F.2d 422, 426, 1966 A.M.C. 1415, 1421 (5th Cir. 1966).

If one is performing seaman's work, by definition he must be subjecting himself to a seaman's hazard, no matter what type of equipment he is using to do the work. "The risks themselves arise from and are incident in fact to the service

<sup>32</sup> 344 F.2d 204, 1965 A.M.C. 1192 (3d Cir.), cert. denied, 382 U.S. 938 (1965).

<sup>33</sup> Eight bucketfuls of nitrate from the crane filled the hopper.

<sup>34</sup> E.g., *Thompson v. Calmar S.S. Corp.*, 331 F.2 657, 1964 A.M.C. 2249 (3d Cir. 1964); *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F Supp. 812 (E.D. Pa. 1959). In *Thompson*, supra, the ship's lines were used by the longshoremen to position railroad cars near the ship so that they could be unloaded with the ship's winches. Plaintiff was injured when the cars being pulled in this manner collided with the ones that had already been unloaded. In *Litwinowicz*, supra, plaintiff was on a railroad car beside the ship in the process of breaking out steel beams to be loaded onto the ship when he was injured. But see *Partenweederei, MS Belgrano v. Weigel*, 299 F.2d 897, 1962 A.M.C. 1327 (9th Cir. 1962).

<sup>35</sup> E.g., *Hagens v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563, 1964 A.M.C. 1582 (3d Cir. 1963) (longshoreman in warehouse unloading truck loaded with cargo taken from ship held an integral part of the unloading process); *Strika v. Netherlands Ministry of Traffic*, 185 F.2d 555, 1951 A.M.C. 84 (2d Cir. 1950) (replacing hatch cover left on dock during unloading).

<sup>36</sup> In *Drumgold v. Plovba*, 260 F Supp. 983 (E.D. Va. 1966), the court in attempting to impose limits on the beginning of the loading process and the termination of the unloading process said: "We find no authority which would cause us to hold that every piece of equipment and every activity leading up to or following the loading or unloading operation must be covered under the warranty of seaworthiness. We are concerned

which a worker may make some contribution to the discharge of the vessel, and yet not be considered as doing the ship's work."<sup>37</sup> The court in *Litwincz v. Weyerhaeuser S.S. Co.*<sup>38</sup> adequately expressed the extent of the loading process:

The term loading is not a word of art, and is not to be narrowly and hyper-technically interpreted. Plaintiffs' actions at the time of the accident were *direct, necessary steps in the physical transfer* of the steel from the railroad car into the vessel, which constituted the work of loading.<sup>39</sup>

*United States Lines Co. v. King*<sup>40</sup> reaffirmed the principle that in regard to seaworthiness, "no distinction is presently justified between unloading and loading." <sup>41</sup> It therefore appears that if the quoted statement from *Litwincz* is applied to unloading as well as to loading operations, the effect is that the combined statements give a reasonable limitation to place upon these operations. It then follows that in order to find that the longshoreman is engaged in the ship's service and within the protection of seaworthiness, his work must be a direct and necessary step in the physical transfer of cargo to or from the vessel.

### *Equipment in the Ship's Service*

In order to find that equipment is within the subject matter of the warranty of seaworthiness, the courts have traditionally required that it be part of the hull, gear, appliances, ways, or appurtenances of the ship.<sup>42</sup> This is not limited, however, to the usual equipment of the ship itself, but includes all other equipment which is adopted as an appurtenance of the ship.<sup>43</sup> Although some courts have not always found it easy to determine whether the equipment was an appurtenance, equipment used in the ship's service has often been found to be an appurtenance of the ship which used it.<sup>44</sup> Thus, whenever the plaintiff is injured by equipment used in this service the ship can be found unseaworthy and recovery allowed. It is not necessary for courts to talk in terms of appurtenances, which implies the traditional equipment on the ship, when the use of the equipment in the ship's service can be the determining factor.<sup>45</sup> For example, in *Spann* the court

with the ship and the ship's equipment attendant to the *ship's duty to load and unload.*" *Id.* at 987. (Italics in original.)

<sup>37</sup> *Daniel v. Skibs A.S. Hilda Knudson*, 253 F Supp. 758, 761 (E.D. Pa. 1966). See, e.g., *Drumgold v. Plovba*, *supra* note 36, where plaintiff was injured when a specially-rigged, stevedore-owned truck capsized while he was lowering the truck's stabilizing legs to enable him to unload some shifting boards by means of the truck's boom. The boards were to be unloaded from the truck and onto the ship where they were to be used to prepare the ship for the loading of a cargo of grain. The court found this was still preparation for the loading operation.

<sup>38</sup> 179 F Supp. 812 (E.D. Pa. 1959). Case discussed note 34 *supra*.

<sup>39</sup> *Id.* at 817-18. (Emphasis added.)

<sup>40</sup> 363 F.2d 658 (4th Cir. 1966).

<sup>41</sup> *Id.* at 661. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 96, 1946 A.M.C. 698, 705 (1946).

<sup>42</sup> E.g., *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206, 1963 A.M.C. 1649 (1963).

<sup>43</sup> Cases cited note 25 *supra*.

<sup>44</sup> *Ibid.*

<sup>45</sup> "It is the use to which the equipment is put, i.e., its use in connection with the

found the ship unseaworthy due to the defective shore-based hopper because it was essential to the unloading process and was used by the ship for that purpose.<sup>46</sup>

#### *Stevedore-Furnished Equipment*

The source of the equipment also need not be a consideration in determining whether the equipment is within the subject matter of seaworthiness as long as it has been adopted into the service of the ship.<sup>47</sup> Some courts<sup>48</sup> have argued, however, that if the equipment was furnished by the stevedore, it can not be an appurtenance of the ship and will not make the ship unseaworthy if it is defective. This, however, ignores the principle established in *Alaska S.S. Co. v. Petterson*<sup>49</sup> and *Rogers v. United States Lines*,<sup>50</sup> that liability for unseaworthiness is the same whether the equipment is furnished by the stevedore or by the shipowner. The shipowner is strictly liable for all equipment used by the stevedore in the ship's service regardless of its source.

The fact that the equipment furnished by the stevedore in the *Petterson* and *Rogers* cases was used on the ship is not a basis for distinguishing a case in which the equipment is used or based on shore. *Gutierrez*<sup>51</sup> established the principle that a plaintiff engaged in the ship's service is protected by the warranty of seaworthiness even when he is working on the shore. Even though the defective cargo containers which caused the plaintiff's injury were located on the shore, the ship was found unseaworthy. Thus, for the purposes of unseaworthiness liability the Court refused to distinguish between cargo containers on ship and on shore. This case indicates that if the instrumentality causing the injury is otherwise within the warranty,<sup>52</sup> the fact that it is located on the shore need not be a consideration.

#### *Traditional v. Modern Equipment*

In attempting to delimit the subject matter of the warranty of seaworthiness some courts have looked beyond the use to which the equipment is put and have reasoned that if the injury was caused by equipment that is not part of the "traditional unloading gear of the ship, i.e., winches, masts and booms," the ship is not unseaworthy and the shipowner is not liable.<sup>53</sup> They reason that if the

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ship's cargo that should be the determining factor. "NORRIS, MARITIME PERSONAL INJURIES 69 (2d ed. 1966).

<sup>46</sup> *Spann v. Lauritzen*, 344 F.2d 204, 209, 1965 A.M.C. 1182, 1200.

<sup>47</sup> *E.g.*, *Rogers v. United States Lines*, 347 U.S. 984, 1954 A.M.C. 1088 (1954), *reversing per curiam* 205 F.2d 57, 1953 A.M.C. 1679 (3d Cir. 1953); *Alaska S.S. Co. v. Petterson*, 205 F.2d 478 (9th Cir. 1953), *aff'd*, 347 U.S. 396, 1954 A.M.C. 860 (1954); see *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 1964 A.M.C. 1075 (1964).

<sup>48</sup> *E.g.*, *Forkin v. Furness Withy & Co.*, 323 F.2d 638, 1964 A.M.C. 356 (2d Cir. 1963); *McKnight v. N. M. Patterson & Sons*, 181 F. Supp. 434, 1960 A.M.C. 1760 (N.D. Ohio 1960), *aff'd*, 286 F.2d 251 (6th Cir. 1961).

<sup>49</sup> 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396, 1954 A.M.C. 860 (1954).

<sup>50</sup> 347 U.S. 984, 1954 A.M.C. 1088 (1954), *reversing per curiam* 205 F.2d 57, 1953 A.M.C. 1679 (3d Cir. 1953).

<sup>51</sup> 373 U.S. 206, 215, 1963 A.M.C. 1649, 1656 (1963).

<sup>52</sup> See text accompanying notes 42-46 *supra*.

<sup>53</sup> *McKnight v. N. M. Patterson & Sons*, 181 F. Supp. 434, 1960 A.M.C. 1760 (N.D. Ohio), *aff'd*, 286 F.2d 250 (6th Cir. 1960). "[I]t cannot be seriously contended that the

equipment is not of the type traditionally or commonly found on the ship as part of the ship's regular gear, it cannot be an appurtenance of the ship and is not within the warranty.<sup>54</sup> However, this restriction presents an unnecessary additional consideration which has been criticized. For example, in *Deffes v. Federal Barge Lines, Inc.*<sup>55</sup> the court said:

[T]he district court would permit the shipowner to escape liability merely by substituting a more modern method for performing the traditional work of a seaman. We can find no support in the Supreme Court cases for adopting such a position. Nor can we find a rational basis for drawing this distinction.<sup>56</sup>

The courts which add this requirement of traditional ship's equipment also ignore the language of *Sieracki*: "That the owner seeks to have [the ship's work] done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection. <sup>57</sup> He is not at liberty by doing this to discard his traditional responsibilities."<sup>58</sup> The court in *Huff v. Matson Nav. Co.*,<sup>59</sup> in referring to this statement said: "Use of more modern equipment can no more exculpate the shipowner from his obligations than could use of 'more modern divisions of labor.'"<sup>60</sup> If the work being performed is in the service of the ship, it should not be removed from the area of traditional seaman's work merely because modern labor-saving methods and devices are being used to carry it out.<sup>61</sup>

It cannot be said that the need for the protection given by the warranty of seaworthiness has ended with the introduction of modern labor saving devices. It has been stressed that "modern sophisticated mechanical devices may well involve even more hazards than the ancient and more traditional ones."<sup>62</sup>

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crane used in the unloading operation is equipment commonly found among the ship's gear. Both its size and sole function rebel against any argument that a ship might 'adopt' or 'integrate' such equipment as part of its gear." *Id.* at 439, 1960 A.M.C. at 1766; *accord*, *Henry v. S.S. Mount Evans*, 227 F Supp. 408 (D. Md. 1964); *Miller v. Transandina Cia Nav.*, 1964 A.M.C. 1159 (S.D. Cal. 1964); *Sherbin v. S. G. Embircos*, 200 F Supp. 874, 1962 A.M.C. 1013 (E.D. La. 1962); *K. A. Cockrell v. A. L. Mechling Barge Lines, Inc.*, 192 F. Supp. 622 (S.D. Texas 1961).

<sup>54</sup> Cases cited note 53 *supra*.

<sup>55</sup> 361 F.2d 422, 1966 A.M.C. 1415 (5th Cir. 1966). Plaintiff was injured by a defective shore-based marine leg, which is a mechanical elevator device owned and operated by the stevedore company that is used in unloading grain.

<sup>56</sup> *Id.* at 425-26, 1966 A.M.C. at 1421.

<sup>57</sup> 328 U.S. 85, 96, 1946 A.M.C. 698, 705-06 (1946).

<sup>58</sup> *Id.* at 100, 1946 A.M.C. at 708.

<sup>59</sup> 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965). Plaintiff was struck by a scraper which was part of a conveyor system attached to a shore-based crane.

<sup>60</sup> *Id.* at 213, 1964 A.M.C. at 2230.

<sup>61</sup> See *Rodriguez v. Coastal Ship Corp.*, 210 F Supp. 38 (S.D.N.Y. 1962), which involved an experimental ship that had two cranes on board which were originally shore-based, and the plaintiff slipped on oil that had leaked from them. The court held that there is "no authority for insulating the shipowner from liability when innovations in modernizing a vessel, however timesaving and efficient they may prove to be, at the same time increase the dangers to men working thereon." *Id.* at 44.

<sup>62</sup> *Huff v. Matson Nav. Co.*, 338 F.2d 205, 213, 1964 A.M.C. 2219, 2231 (9th Cir.

The duty of a shipowner to supply a seaworthy vessel, appurtenant appliances, and equipment is absolute and non-delegable.<sup>63</sup> Yet, if the traditional equipment theory is followed, the shipowner could, in effect, delegate this duty by hiring a stevedore company which uses its own modern equipment in carrying out the loading and unloading process.<sup>64</sup> Therefore, it is reasonable to say that the courts imposing this additional requirement of traditional ship's equipment have created an unwarranted distinction in the liability for unseaworthiness.<sup>65</sup>

### *Must the Equipment Attach to or Touch the Ship?*

In looking beyond the use of the equipment in the ship's service as the only important consideration, some courts have imposed another restriction on the equipment subject to the warranty of seaworthiness. If the equipment never became physically attached to the ship or never touched part of the ship during the loading or unloading process, it has been held not to be an appurtenance of the ship and hence not within the protection of seaworthiness.<sup>66</sup> These courts reason that since the equipment was not attached to or on the ship the shipowner had no opportunity to inspect it for defects, and thereby learn of any unseaworthy conditions which existed. But the Supreme Court has held that "the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability."<sup>67</sup> Therefore, it is irrelevant whether the shipowner inspected the

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1964). The court went on to say that the hazards involved were those of the unloading process, and the job of the plaintiff involved more hazards than if he used a traditional device, such as a shovel.

<sup>63</sup> *E.g.*, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946).

<sup>64</sup> See *Huff v. Matson Nav. Co.*, 338 F.2d 205, 213, 1964 A.M.C. 2219, 2230 (9th Cir. 1964).

<sup>65</sup> "If the owner engages others who supply the equipment necessary for stevedoring operations, he must still answer to the longshoreman if the gear proves to be unseaworthy." *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 317 n.3, 1964 A.M.C. 1075, 1077 n.3 (1964). Relying on this language, the court in *Huff v. Matson Nav. Co.*, *supra* note 64, at 210, 1964 A.M.C. at 2226, said this statement "makes it plain that the shipowner's obligation of seaworthiness extends to all equipment for loading or unloading supplied by the stevedoring contractor."

<sup>66</sup> *Forkin v. Furness Withy & Co.*, 323 F.2d 638, 1964 A.M.C. 356 (2d Cir. 1963), where the court held that a shore-based conveyor was not an appurtenance until affixed to the vessel. Plaintiff was injured in the process of attaching the conveyor to the vessel for use. A more reasonable argument the court could have made is that since the conveyor was not yet ready for use as an appurtenance of the ship, and not yet carrying out the ship's service, it was not within the subject matter of the warranty of seaworthiness. Other cases that uphold the "touching" requirement: *McKnight v. N.M. Patterson & Sons*, 181 F Supp. 434, 1960 A.M.C. 1760 (N.D. Ohio 1960), *aff'd*, 286 F.2d 251 (6th Cir. 1961); *Henry v. S.S. Mount Evans*, 227 F Supp. 408 (D. Md. 1964); *Miller v. Transandina Cia Nav.*, 1964 A.M.C. 1159 (S.D. Cal. 1964); *Sherbin v. S. G. Embircos*, 200 F Supp. 874, 1962 A.M.C. 1013 (E.D. La. 1962); *K. A. Cockrell v. A. L. Mechling Barge Lines, Inc.*, 192 F Supp. 622 (S.D. Tex. 1961).

<sup>67</sup> *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 1960 A.M.C. 1503, 1512 (1960).

equipment or not.<sup>68</sup> Once the unseaworthy condition is found to exist the shipowner is strictly liable regardless of any lack of fault.<sup>69</sup>

In *Gutierrez*,<sup>70</sup> the Supreme Court held the shipowner liable for the unseaworthiness of the defective cargo bags, which were neither "touching" nor "attached to" the vessel at the time of the injury. This decision should have resolved the problem.<sup>71</sup> Whether the equipment, appurtenant appliances, or cargo containers were ever attached to or were ever on the vessel should not be a consideration,<sup>72</sup> as long as the equipment is otherwise within the subject matter of the warranty.<sup>73</sup>

### *Should the Warranty be Extended?*

The basic underlying theory of the warranty of seaworthiness is to provide recovery on an absolute liability basis against a shipowner to those workers engaged in the ship's service.<sup>74</sup> The Court in *Sieracki* stated:

It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy.<sup>75</sup>

The reason for initially bringing longshoremen within the protection of the warranty was the fact that a seaman and a longshoreman risk the same hazards when loading and unloading a vessel: the hazards imposed by the performance of the

<sup>68</sup> *E.g.*, *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 426, 1966 A.M.C. 1415, 1422 (5th Cir. 1966); *Huff v. Matson Nav. Co.*, 338 F.2d 205, 215, 1964 A.M.C. 2219, 2233 (9th Cir. 1964). See *Mitchell v. Trawler Racer, Inc.*, *supra* note 67, where shipowner was held liable for a temporary unseaworthy condition arising after the ship went to sea.

<sup>69</sup> "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 That has been shown here." *Petterson v. Alaska S.S. Co.*, 205 F.2d 478, 479 (9th Cir. 1953), *aff'd per curiam*, *Alaska S.S. Co. v. Petterson*, 347 U.S. 396, 1954 A.M.C. 860 (1954).

<sup>70</sup> 373 U.S. 206, 1963 A.M.C. 1649 (1963).

<sup>71</sup> The fact that the cargo containers were previously on the vessel should not matter since it is not necessary to show, as in negligence cases, that the shipowner had complete control of the instrumentality. *E.g.*, *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396, 1954 A.M.C. 860 (1954). See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 1960 A.M.C. 1503, 1512 (1960) where the Court said: "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."

<sup>72</sup> The courts in *Huff v. Matson Nav. Co.*, 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir. 1964), and *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422, 1966 A.M.C. 1415 (5th Cir. 1966) expressly abandoned this distinction as arbitrary even though they could have upheld it since in *Huff* the scraper was attached to the sides of the hold, and in *Deffes* the marine leg was resting on the bottom of the barge.

<sup>73</sup> See text accompanying notes 42-46 *supra*.

<sup>74</sup> Cases cited note 3 *supra*.

<sup>75</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 1946 A.M.C. 698, 704 (1946).

ship's service.<sup>76</sup> A longshoreman who is performing the ship's service faces these hazards of the loading and unloading operations regardless of the type of equipment used in carrying it out. As long as the equipment is an instrumentality of the ship's work the hazards arising from its use are the same. Neither the location of the equipment nor the fact that it is a modern labor-saving device should limit the shipowner's liability if he has adopted this equipment for use in the service.

The need for application of the warranty of seaworthiness to longshoremen is great due to the high risk of injury which is incident to the hazardous duties performed.<sup>77</sup> The statutory compensation<sup>78</sup> provided for longshoremen is obviously inadequate.<sup>79</sup> The longshoreman is the one least able to bear the additional risk of loss. Since it is he who is performing this hazardous service, and it is the shipowner who is reaping the benefits, it is only fair and just to put the cost of injuries upon the shipowner.<sup>80</sup> The true function of the warranty is the "allocation of the losses to the enterprise, and within the several segments of the enterprise to the institution or institutions most able to minimize the particular risk

<sup>76</sup> *Ibid.*

<sup>77</sup> Longshoremen, at least in the Port of New York, are subject to one of the highest accident frequency rates in the United States. See Note, 75 *YALE L.J.* 1174, 1186-87 n.55 (1966). Also, the negligence remedy is obviously inadequate. NORRIS, *MARITIME PERSONAL INJURIES* 28 (2d ed. 1966).

<sup>78</sup> Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901-50 (1964), which imposes strict liability on the stevedore employer for death or injury upon navigable waters.

<sup>79</sup> Section 33(a) of the act, 44 Stat. 1440 (1927), 33 U.S.C. § 933(a) (1964) preserves the longshoreman's right of action for damages against third parties. Thus the Court in *Sieracki* allowed recovery to a longshoreman against the shipowner for unseaworthiness even though he was entitled to his statutory compensation. By allowing this additional recovery the Court impliedly found that the statutory compensation was inadequate. Thus the act assures the longshoreman of some compensation for his injuries without the necessity of proving a cause of action while preserving for them their right of action against third persons for larger amounts.

The Supreme Court has allowed the shipowner an indemnity against the stevedore employer for accidents caused by the negligence of the stevedore, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956), and also when the unseaworthy condition results from a defect in the stevedore's gear, *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 1964 A.M.C. 1075 (1964). This takes some of the liability off of the faultless shipowner and enables the courts to more readily grant recovery for unseaworthiness to the injured longshoreman.

<sup>80</sup> "That the liability may not be limited [by contract] would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden upon the owner regardless of his fault. Those risks are available by the owner to the extent that they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93-94, 1946 A.M.C. 698, 703-04 (1946).