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NOTES AND COMMENTS

RISK DISTRIBUTION AND SEAWORTHINESS

One of the most controversial sections of admiralty law is the doctrine of seaworthiness: the strict-liability duty of care owed by shipowners to maritime employees. From its inception as a contractual duty to provide a safe ship for the crew, seaworthiness has become a generous shelter under which a wide variety of maritime workers other than seamen have won tort damages for injuries occurring both on and off ship. Because seaworthiness imposes a unique double burden on the shipping industry—strict liability plus full common-law recovery—its extension to employees other than seamen has provoked opposition from industry spokesmen and from commentators, who accuse the courts of distorting the historical basis and traditional purposes of the doctrine.

The seaworthiness controversy is more than a ripple in the backwaters of admiralty. It raises basic issues of tort policy: who is the appropriate party to bear the loss of injuries? What should be the extent of that liability? Should workers in dangerous occupations be given specially broad protection? To compose a rational theory of compensation for injured maritime workers, all these questions must be examined.

Confusion is the central feature of contemporary seaworthiness doctrine. Overlapping statutory and judicial efforts to protect injured maritime workers have created a procedural merry-go-round, in which workers bypass the statutory limits of compensation against their employers by suing third-party shipowners for much larger damages. The shipowners, in turn, recover against employers through indemnification. More important, current seaworthiness doctrine offers no coherent method for determining which workers shall benefit from its liberal recovery.

The root cause of current controversy is the leading case of Seas Shipping Co. v. Sieracki,¹ in which a longshoreman recovered against

¹. 328 U.S. 85 (1946).
a shipowner for an injury caused by a structural defect in the ship's boom. The Supreme Court permitted seaworthiness recovery despite the facts: (a) that his employer was an independent contractor, not the shipowner; (b) that Sieracki was a longshoreman, not a seaman; (c) that the manufacturer of the boom, not the shipowner, was negligent; and (d) that Sieracki could have recovered (albeit a lesser amount) under the Longshoremens' and Harbor Workers' Compensation Act, the federal workmen's compensation scheme. The long arm of Sieracki has extended seaworthiness coverage to virtually any shipboard injury suffered by any maritime employee, and to some dockside injuries as well.

The opponents of a broad seaworthiness doctrine argue that this is both economically and historically ill-advised. By singling out shipowners for strict liability, the courts have forced the shipping industry to adopt uncompetitive prices. Further, the critics attack a key historical argument in Sieracki: that seaworthiness should cover both seamen and harbor workers because the occupations were once identical, with seamen performing the duties of harbor workers. The opponents claim that seaworthiness developed in response to the unusual hazards of the sea: that harbor workers and seamen were never considered members of the same occupation; and that the expansion of seaworthiness to include harbor workers resulted from twentieth-century misreadings of prior case law.2

These critics have ignored the singular contribution of Sieracki to the problem of providing compensation for maritime injuries. Not only does Sieracki accurately reflect a historical identity between seamen and other maritime employees; it also provides the basis for incorporating risk distribution theory into maritime law. While the doctrine of seaworthiness is today both procedurally and substantively at sea, use of this risk theory will aid in resolving the dilemmas of the modern doctrine.

I. THE HISTORICAL PATTERN OF SEAWORTHINESS

A. Origins of the Doctrine

The duty of the ship's master and owner to provide a seaworthy ship was recognized by American courts as early as 1789, but only under a contract theory.3 The courts openly read implied terms into the ship's

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3. Dixon v. The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789); Rice v. The Polly and
articles, so that sailors could make reasonable complaints without risking a charge of mutiny or a forfeiture of wages for breach of rigorous shipboard discipline. In effect, the implied contractual obligations were designed to excuse the crewmen from performance under unusually harsh conditions; and recovery was sought for wages under the contract of employment rather than for physical injury.

During the late nineteenth century, however, courts were impressed by the similarity between the contractual duties of seaworthiness and the emerging common-law tort duties of the employer to provide a safe place to work. Maritime workers increasingly recovered tort damages for injuries caused by unsafe and unfit conditions on board ship. In time, federal courts jettisoned their contract theory of seaworthiness.

Kitty, 20 Fed. Cas. 666 (No. 11,754) (D. Pa. 1789); The Moslem, 17 Fed. Cas. 894 (No. 9875) (S.D.N.Y. 1846). As compensation for their physical injuries, seamen recovered only their traditional remedy of maintenance and cure. Reed v. Canfield, 20 Fed. Cas. 426, 429 (No. 11,641) (C.C.D. Mass. 1832). In addition to the duty to provide a seaworthy ship, two other obligations appear to have been imposed: (1) that mariners must be supplied with sufficient food and drink; (2) that mariners should be treated with decent humanity. Dixon v. The Cyrus, supra; Rice v. The Polly and Kitty, supra.

4. As any reader of sea stories knows, the 19th-century captain ran a tight ship. Whippings and beatings were commonplace. See Rice v. The Polly and Kitty, supra note 3; 2 Parsons, Treatise on the Law of Shipping and the Law and Practice of Admiralty 79 (1869). Dana, Two Years Before the Mast ch. XV (1911) provides an account of one such incident, under a captain of reasonably good reputation.

5. Courts do not appear to have permitted recovery of tort damages for injuries caused by an unseaworthy condition until the 1870's. Justice Story indicates in Reed v. Canfield, supra note 3, at 429, that as late as the 1830's, a seaman could recover only his traditional remedy of maintenance and cure, except in the extraordinary instance of injury while saving the ship from "impending perils." Parsons, op. cit. supra note 4, at 78, disposes of seaworthiness in one short paragraph: he describes it only as a doctrine which excuses a seaman from proceeding on a voyage. In the period 1870-1900, however, numerous cases giving tort remedies in seaworthiness actions appear in the literature. See Halverson v. Nisen, 11 Fed. Cas. 310 (No. 5970) (D. Cal. 1876); Clowes v. The Frank and Willie, 45 Fed. 494 (S.D.N.Y. 1891). Note the following standard articulated in Halverson v. Nisen, supra, at 310:

[The shipowner's] liability [in furnishing a seaworthy ship] does not differ from that of any other master to a servant in his employment. It is the master's duty in all cases to use ordinary care and diligence to provide sound and safe materials for his servants. But he does not warrant them to be so nor insure the servant against the consequences of their defects.

In adapting common-law tort principles to maritime law, federal courts failed initially to distinguish between a duty of seaworthiness and the ordinary duty of care. For example, Halverson v. Nisen, supra, The Noddleburn, 28 Fed. 855 (D. Ore. 1886), and Clowes v. The Frank and Willie, supra, all trace the source of injury to a defective piece of equipment; yet The Noddleburn speaks almost exclusively of seaworthiness, Halverson uses the term in a rather off-hand manner, and The Frank and Willie ignores the word entirely.

6. Dixon v. The Cyrus, supra note 3; Rice v. The Polly and Kitty, supra note 3; The Moslem, supra note 3.

Soon the federal judiciary expanded seaworthiness beyond the confines of common-law employer’s liability. Unhampered by conservative precedents of state courts, admiralty was free to mold tort concepts to meet the unique needs of maritime workers, who were thought to be particularly susceptible to injury. Instead of a due care standard, employers were held to something approaching strict liability. Contributory negligence and assumption of risk merely mitigated damages, instead of absolutely barring recovery.

American longshoremen were quickly attracted by the liberal awards in seaworthiness cases. Although their occupation was readily distinguishable from the seamen’s by the nineteenth century, admiralty courts exercised jurisdiction over longshoremen’s tort claims as well. Longshoremen consistently recovered from the shipowner for injuries

8. The fundamental bases of American admiralty law derive not from the English common law but from the usages and customs of international trade. Gilmore and Black note that:

Certainly the early opinions (especially those of Story) prove that the courts looked on the maritime system they were administering as international in scope, for they are replete with citations to the continental European authorities, not for persuasive analogy but “as evidence of the general maritime law.”

GILMORE & BLACK, ADMIRALTY 41 (1957).

This international common law, uncertain in origin and scope, gave federal courts an unusual amount of flexibility in developing an American maritime law of tort. See Justice Story’s remarks in The Marianna Flora, 24 U.S. 1, 52 (1826), cited infra note 11.

In England a warranty of seaworthiness was extended to seamen by statute. After the English courts denied the existence of such a warranty in Couch v. Steel, 3 E & B 402, 118 Eng. Rep. 1193 (1854), Parliament enacted the English Merchant Shipping Act of 1876, 39 and 40 Vict. c. 80, § 5 (1877). The English legislation may have influenced some American courts, but at least one American case recognized the shipowner’s tort liability before 1877. Halverson v. Nisen, supra note 5. Another disapproved Couch v. Steel, supra, as if it were the extant law of England in 1886. The Noddleburn, supra note 5, at 857.

9. Admiralty courts have been consistently solicitous of the great risks of injury seamen encounter. See Dixon v. The Cyrus, supra note 3 (dictum). Note the reasoning used to modify the fellow-servant rule in Peterson v. The Chandos, 4 Fed. 645, 650 (D. Ore. 1880).


11. The Supreme Court, analogizing to ship collision cases, upheld a comparative fault theory of assessing damages in The Max Morris, 137 U.S. 1 (1890). The opinion implicitly sounded the death of assumption of risk as a complete bar to recovery, citing with approval the dictum of Justice Story in The Marianna Flora, 24 U.S. 1, 54-55 (1826) that:

[C]ourts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law.

That assumption of risk was not an absolute bar to recovery was soon made explicit. Hansen v. The Julia Fowler, 49 Fed. 277 (S.D.N.Y. 1892). See also Socony-Vacuum Oil Co. v. Smith, 505 U.S. 424 (1989).
caused by physical defects in the ship and its equipment, despite the fact that they were employed directly by an independent contractor.\textsuperscript{12} The nineteenth-century decisions, however, left unclear whether the duty of seaworthiness also applied to non-shipowners (such as stevedore-employers) who failed to provide a safe place of employment.

After some confusion in the lower courts, the Supreme Court held in \textit{Atlantic Transportation Co. v. Imbrovek}\textsuperscript{18} that a longshoreman could sue his stevedore-employer in admiralty under a seaworthiness theory. The Court made a maritime relations test the key to seaworthiness recovery for non-seamen. If the claimant could meet this test by showing that his job was one of the duties formerly performed by seamen, and if he passed a location test, i.e., if the injury occurred while on board ship, then admiralty courts had jurisdiction.\textsuperscript{14} As seamen had at one time performed the longshoremen’s handling func-

\begin{itemize}
  \item \textsuperscript{12} From about 1880, there is a continuous line of cases granting recovery to longshoremen for injuries caused by defective ship's equipment. See, e.g., \textit{The Anaces, supra} note 7. See also \textit{Gerrity v. The Bark Kate Cann, 2 Fed. 241 (E.D.N.Y. 1880); The Hellos, 12 Fed. 732 (S.D.N.Y. 1882); The Rheola, 19 Fed. 926 (C.C.S.D.N.Y. 1884); The Max Morris, 24 Fed. 860 (S.D.N.Y. 1885); The Carolina, 30 Fed. 199 (E.D.N.Y. 1886); Kellher v. The Nebo, 40 Fed. 31 (S.D.N.Y. 1889); The Protos, 48 Fed. 919 (C.C.E.D. 1891); Steel v. McNeil, 60 Fed. 105 (6th Cir. 1894); The Elton, 83 Fed. 519 (4th Cir. 1897).}
  \item \textsuperscript{13} Though they classified the longshoreman as an invitee, early admiralty decisions did not distinguish between the duty of care owed by the shipowner to him and that owed to the seaman. In \textit{The Rheola, supra}, at 927, the court stated:
    
    As the libelant was not directly employed by the master, and could only look to the master stevedore for his pay, there was no privity of contract between him and the ship-owners. Nor did the relation of master and servant, in its technical sense, exist between the libelant and the ship-owner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libelant, or the degree of care which it was incumbent on him to exercise. The libelant was performing a service in which the ship-owners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger, that they were under to the master stevedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each. . . .

    The implied obligation . . . is to use proper care and diligence to see that such instrumentalities are safe and suitable for the purpose.

Once the courts perceived the shipowner’s duty to invitee and employee to be the same, they saw no reason to differentiate between the two groups when the duty grew stricter. The common law governing the business invitee did not inhibit judicial development of the duty of care, because once transferred to the admiralty side of the court, it became a “maritime duty.” “This neglect was the neglect of a maritime duty, and attaches to the ship herself.” \textit{Gerrity v. The Bark Kate Cann, supra}, at 247. Of course, the independence of maritime law from the common law was well-established, note 8 \textit{supra}.  
  \item \textsuperscript{14} \textit{Id.} at 61-62.
\end{itemize}
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sions, these workers were historically part of the maritime industry and thus within admiralty jurisdiction.26

*Imbrovek* was by no means the first case to extend admiralty law benefits to longshoremen,26 but its historical argument invited criticism. The Court's conclusions were unsupported by any evidence that seamen once performed the jobs of loading and stowing cargo.17

The critics' scholarship is as bad as the Court's, however, when they dismiss the historical argument for identifying seamen and other maritime workers as a single occupational class.18 Well into the nineteenth century, long after longshoremen became a distinct occupational group, seamen assisted them in loading, unloading, and stowing cargo. These duties varied with the type and size of port, ship, and cargo.19 Often, individuals moved freely between the two professions, depending on employment opportunities.20 The rigid division of function

15. Ibid. Despite the Court's ambiguous stance on the maritime relations test in *Imbrovek*, since that time it has continually repeated its assertion that admiralty jurisdiction extends over the maritime industry as it was historically structured, and in particular, that it extends to maritime workers if they perform duties once assigned to seamen. In *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Court used the historical test and the exclusive nature of the jurisdiction granted by the admiralty clause of the Constitution, U.S. Const. Art. III, § 2, to strike down attempts to apply state workmen's compensation laws to longshoremen working on the high seas or in navigable waters. In *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926), the Court found a longshoreman to be a seaman at least to the extent of including him under the provisions of the Jones Act.

16. See note 12 *supra*. The literature is not overpopulated with pre-1914 seaworthiness cases for several reasons. Defenses such as the fellow-servant rule probably inhibited the bringing of a substantial number of suits. Secondly, during the short period when it was not clear that admiralty tort doctrines offered a more open path to recovery than the common law, maritime workers had little reason to forego the advantages of a common-law jury trial in a state forum. The district court which tried *Imbrovek* noted this fact. *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229, 237 (D. Md. 1911). The same court also remarked upon the general failure to appeal this type of case, leading to unreported decisions.

17. Thus the separate occupational class of longshoremen arose before loading and stowing became a specialized function. See note 20 *infra*.

18. Shields & Byrne, *supra* note 2; Tetreault, *supra* note 2, at 413-14. Tetreault offers a more balanced view of the historical structure of the industry but fails to recognize the fluidity of its labor component.

19. During the 17th and 18th centuries, seamen commonly loaded and unloaded cargo. See A. P. Middleton, *Tobacco Coast: A Maritime History of Chesapeake Bay in the Colonial Era*, 105 n.48, 170 (1953); J. D. Phillips, *Salem in the 18th Century* 87, 88 (1937); *Dana, Two Years Before the Mast* 93, 106 (1911). See also *The Noddleburn, supra* note 5.

In larger ports, day laborers rather than sailors were generally employed simply because it was cheaper to hire men on daily pay than to keep a crew on monthly wages and provide them with provisions while in port. *Dixon v. The Cyrus, supra* note 3.

20. Unlike his English counterpart, the American seaman was one of the most highly
which later occurred as a result of unionization and technological change had only begun to make its appearance in the later nineteenth century. Thus, the Supreme Court had good reason to find a close historical relationship between the two occupations. Whether this historical identity should matter in defining the scope of seaworthiness will be examined later.

B. Congress and the Court—A Case Study in Confusion

When *Imbrovek* was decided in 1914, seaworthiness doctrine had not been completely liberalized. The fellow servant rule still was an obstacle to compensation for injuries caused by fellow employees.

paid American workers in the 18th century. The sea was also the place where a young man sought wealth and adventure. Thus, there was greater mobility into and out of the profession than in England where sailors were looked upon as a menial class. The *Trade Winds* 103 (N. Parkinson ed., 1948); S. E. Morison, *Maritime History of Massachusetts, 1783-1860* 86 (1921). The same individuals were likely to provide day labor in unloading in between voyages or after their return.

21. The Supreme Court determined the general outlines of seaworthiness in The *Osceola*, 189 U.S. 158, 175 (1903) with four propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship...

3. That all members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

Proposition (1) was a traditional statement of the seaman's rights to maintenance and cure. Propositions (2)-(4) provided a statement of seaworthiness that is less straightforward than at first glance. For the first time, the Court clearly differentiated between seaworthiness (physical defects in the ship and its equipment) and operating negligence (injuries proximately caused by officers or crew of the ship). Recovery for injuries of the latter sort was effectively barred by the fellow-servant rule.

Left unresolved by the Court were two imposing problems—the distinction between seaworthiness and operating negligence, and the precise duty of care imposed by seaworthiness. The first question proved especially tricky since a substantial proportion of maritime injuries were caused by equipment made defective by the actions of others. Uncertainty over who or what would be found the proximate cause led seamen and harbor workers to seek alternative remedies whenever they were available. See notes 22, 27, 31 infra. The standard which measured the duty of care imposed by seaworthiness was quite ambiguous. One can read an implication of an absolute duty of care into proposition (2). Courts do not appear to have picked up this reading, however. *Imbrovek* phrased the duty as one of proper diligence.
More important, the warranty of seaworthiness was limited to physical
defects in the ship, its equipment, and its appurtenances. Operating
errors of master or crew were beyond its reach.

If a seaman was injured by a captain rather than a capstan, he was
restricted to the traditional and very limited remedy of maintenance
and cure, while the harbor worker was forced to resort to state com-
mon-law courts, with their rigid defenses of contributory negligence
and assumption of risk.

Influenced by the growing concern of state legislatures with ade-
quate worker protection, Congress after 1917 began to expand the
remedies for injured maritime workers. The Jones Act of 1920 ap-
plied the provisions of the Federal Employer's Liability Act to sea-
men. The latter act granted full common-law recovery for injuries
cau sed by operating negligence and abolished the fellow-servant rule.

To protect harbor workers, Congress at first tried to place them within
state workmen's compensation schemes, but the Supreme Court
branded each of its attempts unconstitutional as an invalid delegation
of admiralty power to the states. Thus, in 1924, only seamen were
covered by any statutory compensation plan.

It was at this point that judicial and congressional attempts to pro-
vide harbor workers with protection became monumentally entangled.
In 1926 the Supreme Court held in *International Stevedoring Co. v. Haverty* that harbor workers were Jones Act “seamen.” This inter-
pretation flouted clear evidence that Congress had intended no such
reading of the Jones Act. As Justice Cardozo was later to remark of
Haverty, “[V]erbal niceties were bent to the overmastering purpose of
the act to give protection to workers injured upon ships.”

In placing harbor workers within the ambit of the Jones Act, the
Supreme Court appeared to have eliminated any need to secure ade-

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array of interesting problems unfortunately beyond the scope of this note. For an
excellent account, see GILMOR & BLACK, THE LAW OF ADMIRALTY § 6-20 et seq.
27. Of course, harbor workers injured in localities not within maritime jurisdiction
were protected by workmen's compensation under their respective state statutes.
29. That Congress did not intend any such construction of the Jones Act is apparent
from its attempts to place harbor workers entirely within state compensation schemes
note 25 supra.
quate compensation for injured maritime employees by statute. However, at the time of the *Haverty* decision, Congress had already completed committee action on a bill for federal maritime worker protection. Apparently unwilling to entrust such protection to *Haverty*'s dubious construction of the Jones Act, Congress in 1927 passed the Longshoremen's and Harbor Workers' Compensation Act.\(^1\) Congressional failure to reckon with the *Haverty* decision proved costly, because the new act effectively if unintentionally undercut the liberal benefits for harbor workers provided for in *Haverty*.

Under Section 5 of the Act,\(^2\) the statutory compensation scheme became the worker's *exclusive* remedy against his employer. Neither liberal recovery under the Jones Act, nor a seaworthiness action against employers was now available. Instead, the harbor worker had to be content with the limited, albeit certain, remedies of workmen's compensation.\(^3\)

There was one important exception to the exclusive remedy of the statute. Section 33 of the Harbor Workers' Act\(^4\) preserved the rights of action against third parties—i.e., shipowners—under any appropriate theories of liability, including seaworthiness. Yet at first, no one attempted to invoke Section 33, primarily because seaworthiness did not offer recovery for operating negligence. Section 33 became an important escape hatch from the Harbor Workers' Act when this barrier fell in *Mahnich v. Southern S.S. Co.*\(^5\) With subsequent expansion, *Mahnich* made seaworthiness remedies available for injuries caused by operating negligence as well as physical defects in the ship or its appurtenances.

*Mahnich* involved a seaman, but the new magnetism of the broadened seaworthiness doctrine soon attracted longshoremen, via the third party right of action in Section 33 of the Harbor Workers' Act. In *Seas Shipping Co. v. Sieracki*,\(^6\) the Supreme Court permitted

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33. Recovery under the Harbor Workers' Act is limited to medical expenses, 33 U.S.C. § 907 (1964); disability compensation (under which the maximum which can be received is 66 2/3% of average weekly wages over the period the disability lasts), 33 U.S.C. § 908 (1964); and some compensation in the event of death, 33 U.S.C. § 909 (1964).
35. 321 U.S. 96 (1944). For harbor workers, there is the added benefit of what in effect is a guaranteed minimum recovery. Under the Harbor Workers' Act, the harbor worker may recover from his employer the excess of what he is entitled to under the act over his recovery from a third party. 33 U.S.C. § 933(f) (1964).
longshoremen to recover under seaworthiness. Sieracki, a longshore-
man injured by a latent defect in the ship's boom, sued the shipowner
for seaworthiness damages under Section 33. Accepting the District
Court's finding that the shipowner had been duly diligent in inspecting
the boom, the Supreme Court nonetheless held the shipowner liable
for the injury, invoking the strict liability dictum of Mahnich:

[Seaworthiness] is essentially a species of liability without fault,
alogous 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 negli-
genence nor contractual in character. . . . It is a form of absolute
duty owing to all within range of its humanitarian policy.

Subsequent courts have read Sieracki expansively, and a wide range
of maritime employees have been granted the comforts of seaworthiness.
Carpenters, electricians, shipcleaners, repairmen, and riggers have
convinced courts that they performed jobs formerly done by sea-
men and have taxed shipowners with an absolute duty of care. Further,
the work area covered by the doctrine has been extended; maritime
workers have recently gained seaworthiness protection for injuries
occurring on the dock and having only the most tenuous connection to
the ship. In Spann v. Lauritzen, a longshoreman recovered from the
shipowner after he was injured by a faulty hopper owned by his em-
ployer (an independent contractor) and located entirely on the pier.
In attempting to reconcile the decision with the locality test of Im-
brokek, the court noted that "the hopper was an instrumentality in the
unloading of the cargo . . ." and that the duty of absolute care ex-
tended to a ship's appurtenances. "That some other method might
have been used does not eliminate the means used for the unloading
of the cargo as part of the appurtenances to the vessel."

In making a longshoreman's third-party remedies far more attractive
than statutory recovery against employers, Sieracki threatened to foist
the entire burden of maritime accidents on the shipowners. The Su-

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37. Id. at 87.
38. Id. at 94-95.
41. Torres v. The Kastor, 227 F.2d 664 (2d Cir. 1955); Crawford v. Pope & Talbot
Inc., supra note 39.
42. Read v. United States, 201 F.2d 758 (3d Cir. 1953).
43. Amerocean S.S. Co. v. Copp, 245 F.2d 291 (9th Cir. 1957).
44. 344 F.2d 204 (3d Cir.), cert. denied, 382 U.S. 938 (1965).
45. Id. at 209.
46. Ibid.
preme Court, to prevent this hardship, allowed faultless shipowners an indemnity against employers for employer-caused accidents. But this device, according to some critics, short-circuits the exclusive remedy provision of the Harbor Workers’ Act. A harbor worker injured by his employer cannot get full recovery directly—but he can sue the shipowner, who may in turn recover from the employer. Sieracki, they charge, has led to a nightmare of circular litigation which must be ended by limiting seaworthiness recovery to seamen alone.

The legislative intent of the statutory limit on compensation, however, is far from clear. Rather than an outright repudiation of liberal recovery, the legislators’ primary concern seems to have been to include longshoremen within some scheme of compensation for no-fault injuries. A limitation on damages was merely the common constitutional justification for such legislation. Moreover, the exclusive

47. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). Indemnification presents a further problem for the contracting parties. Founded in contract rather than tort, indemnification lies even where the shipowner as well as the independent contractor has been negligent. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958). While the Court recognized that the shipowner owes an implied contractual duty of care to the contractor, it held this duty was “not identical.” This vague language has led lower courts to find little duty at all. The shipowner’s failure to inspect, or to provide a properly seized light or properly set winch has been held not to bar recovery. Calmar S.S. Corp. v. Nacirema Operating Co., 266 F.2d 79 (4th Cir.), cert. denied, 361 U.S. 816 (1959). The parties, of course, can alter the results by express contractual provisions describing their responsibilities to one another.

On the other hand, the procedural difficulties posed by indemnification do not lend themselves to contractual resolution. Irrespective of the degree to which negligence or cause can be assigned to any party, the shipowners bear a heavy litigation burden since judicial determination of negligence and cause may well affect his right to indemnification under express or implied contract provisions.

48. See Shields & Byrne, supra note 2, at 1150; Tetreault, supra note 2, at 413; Note, 34 CALIF. L. REV. 601, 604 (1946).


Critics are wrong when they assert that the Harbor Workers’ Act indicates congressional intent to treat harbor workers separately. There is substantial evidence that seamen would have been included within the provisions of the Harbor Workers’ Act, had it not been for determined opposition by seamen’s unions (explainable by the larger measure of recovery provided by the Jones Act). Hearings on S. 3170 Before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess. 17 (1926).

50. See PROSSER, THE LAW OF TORTS 555 (3d ed. 1964);

It is recognized that this remedy is in the nature of a compromise, by which the workman is to accept a limited compensation, usually less than the estimate a
remedy provision is balanced by the clear third-party provisions in section 33, which indicate no policy of limiting injured workers to a single route of recovery. The Sieracki court had no basis on which to divine the congressional will.

Other critics have alleged that Congress never intended to give Section 33 the scope which it acquired in Sieracki. They point out that at the time of the Act all available common-law actions against third parties required a showing of fault. Congress, they argue, must have intended Section 33 to encompass only those actions, and not the strict liability remedy of seaworthiness, since the Act itself included a no-fault recovery against the employer. When the employer ultimately pays for a no-fault recovery through an elaborate series of lawsuits, the intent of the statute is being circumvented. But this line of criticism assumes that Congress intended to deny harbor workers the benefits of any subsequent expansion in the common-law remedies against third parties. There is no legislative history to support such a restrictive reading of the Act. Congress was well aware that the scope of tort remedies grows with time and that seaworthiness was a particularly expansive cause of action. If the legislators wanted to freeze the remedies for harbor workers, they knew how to say so.

From the courts' point of view, even the excess litigation under Sieracki is preferable to excluding harbor workers from seaworthiness protection. Longshoremen and seamen often receive injuries from identical causes, under conditions of comparable risk. Only a statute more explicitly restrictive than the Harbor Workers' Act could justify divergent standards of recovery for the two classes of workers.

II. Sieracki and the Risk Theory—A Definitional Modernization of Seaworthiness

There was more to the Sieracki opinion than its tale of maritime history. Prior to Sieracki, admiralty had jurisdiction only over injuries occurring on board ship. This requirement derived from the original duty imposed by the seaworthiness doctrine: the obligation to provide a safe ship. Once location was satisfied, the worker who demonstrated that he did work formerly performed by seamen could recover under seaworthiness.62

jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid.

See New York Central R. Co. v. White, 243 U.S. 188, 201 (1917).
52. Atlantic Transport Co. v. Imbrovek, supra note 13.
With Sieracki, however, came a new element as a primary purpose of the doctrine. Rather than focusing on location and historical employment patterns, the opinion emphasized the risks undertaken by maritime workers, and the need to protect those who assume a high risk of injury in their employment:

That the liability may not be . . . [limited by privity of 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 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 require putting their burden . . . upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent 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.\(^3\)

While Sieracki represents a shift in tone and emphasis, rather than an explicit revision of prior legal doctrine, it clearly alters the thrust of seaworthiness protection. The maritime relations test remains, but it is no longer primarily a means of establishing a certain historical relationship. Rather, the test allows the courts to single out the shipping industry's high-risk occupations.

As a preliminary attempt to connect the degree of liability with the risks of maritime employment, the Sieracki decision reflects a sound analysis of the industry. Whatever differences may exist between seamen and harbor workers—and, indeed, among sub-categories within these classes—it is doubtful that there is a relevant distinction from the viewpoint of industrial compensation. The common work area in itself suggests a common undertaking of risk.\(^4\) Moreover, at least in the case of longshoremen, there is substantial statistical evidence of high-risk employment. Longshoremen have one of the highest accident-frequency rates in American industry. The rates for longshoremen in the Port of New York are higher than the rates of every other major industry with the possible exception of logging.\(^5\)

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53. Seas Shipping Co. v. Sieracki, supra note 1, at 93, 94. (Emphasis added.)
54. While an individual's personal skill, education, and general awareness of his environment can markedly affect the personal risks of injury he takes, common environmental factors are likely to create similar risks of injury among groups equally exposed to them.
55. Statistics as to accident frequency rates (number of accidents per million man hours worked) are not available for the maritime industry as a whole and are difficult to obtain for other industries. The one attempt to study the problem comprehensively was made in 1954 by the National Academy of Sciences, National Research Council, the
In the year surveyed, one out of every two longshoremen was injured on the job, one out of every six suffered a disabling injury, and the average cost of a disabling injury was $3,400. If the function of an expansive seaworthiness doctrine is to protect persons peculiarly susceptible to injury, there is sound reason for including the harbor worker as well as the seaman within its folds. There is no risk distinction, on the other hand, for excluding harbor workers—only a desire to reduce costs through arbitrary classification.

Further, to the extent that workmen's compensation limits the damages paid by the employer, someone else must bear the remaining expense—either the employee, his family, private or public welfare, or other insurers. Taxing the worker with this cost is the most inequitable of these alternatives, since he is the one least likely to have the resources for self-insurance. It is, rather, the shipping industry which can most easily spread the risk of injury. It is especially important that employees not be saddled with the expense of injuries where injuries are both frequent and expensive. Given the uniquely grave risk in the longshore industry, and the high cost of the average injury, the case for shifting costs to the shipping community at large becomes that much stronger. Moreover, economic efficiency within the shipping industry would be improved by a regime of strict liability. If the price of shipping reflected its full social cost, companies and ports with low accident rates would be given their proper competitive advantage.

It has been argued that seaworthiness damages will price the shipping industry out of its market, destroying an industry vital to the study being published as the Maritime Cargo Transportation Conference Longshore Safety Survey Report (1956) [hereinafter referred to as the Longshore Safety Report].

The Longshore Safety Report 22-23, lists the following accident frequency rates for hazardous industries in 1954.

- Stevedoring ............................................................ 92.3
- Logging ................................................................. 74.3
- Structural Steel Erection ......................................... 47.5
- Saw and Planing Mills ............................................. 42.0
- General Building .................................................... 37.0

In 1954 the longshore accident frequency rate in the Port of New York was approximately 66, rising to 83 in 1957, and then declining to the present level of 66.6 (with the exception of a rather sharp rise in 1962). New York Shipping Association, Safety Bureau, Annual Accident (no page numbers) (1955).

56. Longshore Safety Report 1.

57. Accident cost differentials among different ports can be quite striking. For example, in the State of New York, the manual rate for Code 703, Stevedoring N. O. C. is currently $17.90, while the same classification for the State of New Jersey is $11.70. This manual rate is chargeable for each $100 of payroll—up to a maximum of $300 payroll per week for any one employee.
nation's defense. But this is no argument for casting the burden of saving a sick industry upon the employee, who is least able to bear the cost and least likely to insure himself against harbor accidents. If there is a genuine social interest in preserving the American shipping industry, the government, rather than the worker, should pay the subsidy.

Given the economic and social advantages of risk redistribution, Sieracki becomes a crucial case in the development of seaworthiness. It points the way to remaking seaworthiness doctrine into a broad-based strict-liability scheme, designed to protect high-risk employees against maritime injuries. This guidepost, however, has not been followed by most federal courts. They have held to the pre-Sieracki theory of seaworthiness as a doctrine extending only to those who are injured either on board ship or by its equipment or appurtenances while doing work once performed by seamen. The result has been an uneven, confused and artificial extension of seaworthiness coverage.

Technology and the Metaphysical Ship. A prime example of this confusion arises when the longshoreman's injury occurred off the ship. Under Imbrovek, seaworthiness was clearly limited to shipboard injuries; but, as we have seen, the non-shipboard injuries of longshoremen involve similar high-risk dangers, and justify similarly liberal recoveries. Since 1946, courts have reconciled the expansive protection suggested by Sieracki with Imbrovek's locational limitations, by tortuous constructions of what is and is not part of a ship.

The doctrine's gangplank to dockside injuries has been the traditional warranty that seaworthiness extends not only to the ship itself, but to its "appurtenances": the gear, stowage, appliances, and equipment. There is little problem in making a connection between the injury and the ship when, for example, a ship's hatch falls while being replaced and injures a longshoreman, or when the accident is caused by cargo falling from the ship. But when the responsible tool is a shore-based hopper or crane, the distinctions and analogies become ludicrous.

A seaworthiness claim was rejected in McKnight v. N. M. Paterson & Sons, Ltd. on the ground that a shore-based crane which caused the injury was not traditionally carried by a ship:

58. Shields & Byrne, supra note 2, at 1148-52.
It cannot be seriously contended that the crane... 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.0

The Ninth Circuit, on the same facts, reached exactly the opposite result in *Huff v. Matson Navigation Co.*, holding that seaworthiness was applicable as the work performed by the crane had traditionally been done by seamen; thus, the device was an “appurtenance” of the ship:

The well established rule that the shipowner is absolutely liable for the results of defects in unloading equipment brought on board ship by the stevedoring company should not be qualified or modified if the unloading equipment thus used happens to be newly designed and devised and involves none of the traditional unloading gear of the ship. Use of more modern equipment can no more exculpate the shipowner from his obligations than could use of “more modern divisions of labor.”

The seaworthiness doctrine can be seen to take much of its shape from the eye of the beholder rather than from any uniform standards. If an object must be carried on a ship to be an appurtenance, recovery will be limited; but if its function is the key to “appurtenancy,” a wide range of non-shipboard equipment will qualify.

The latest attempt to find conceptual links between equipment and ship is the recent Third Circuit case of *Spann v. Lauritzen*. Spann was injured by a hopper located entirely on the pier and in no way extending over the ship, unlike the cranes in the *McKnight* and *Huff* cases. Adapting *Huff’s* line of reasoning, the court granted seaworthiness recovery because the job done by the hopper was part of the traditional unloading function once performed by seamen; and the hopper was therefore an “appurtenance.”

In these cases the courts usually respond to the maritime workers’ persuasive claims to full recovery for non-shipboard injuries. By clinging to *Imbroeck’s* location requirement, however, they force themselves to construct metaphysical links with the ship. Not surprisingly, different circuits have clashing styles of shipbuilding.

The historical test, which makes seaworthiness recovery in the rapidly automating longshore industry depend on the work patterns

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63. 338 F.2d 205 (9th Cir. 1964), *cert. denied,* 380 U.S. 949 (1965).

64. Id. at 212-13.

65. 344 F.2d 204 (3d Cir. 1965).
of nineteenth-century seamen, is even less rational. It is entirely possible under current doctrine to envision clerks or helicopter pilots coming within seaworthiness, if they are injured while doing low-risk or distinctly "non-maritime" work which seamen once performed, such as unloading or inventorying. At the same time, a worker undertaking high risks in maritime employment may be unable to make out a tangible connection between injury and ship, and thus will be deprived of full recovery.68

In sum, current doctrine does not offer a seaworthiness theory bounded by the kind of work done and the kinds of risks undertaken by the employees. It fails in the two tasks such a doctrine must fulfill: to provide a workable standard for the courts, and to reflect the realities of the contemporary maritime industry. By recognizing the justice of expanded recovery without providing a definition of seaworthiness to justify that recovery, the courts have made seaworthiness a confused and unconvincing doctrine.

What is needed, then, is a seaworthiness doctrine which measures recovery as much as possible by the scope of the risk undertaken. In addition, Congress must end the wasteful litigation which occurs when the maritime worker sues the shipper who, in turn, seeks indemnification from the employer.

III. PROPOSALS

A. Location as a Measurement of the Risk—A Modest Proposal

A rational seaworthiness doctrine would protect maritime workers injured in the course of high-risk employment. If it makes no sense to limit recovery to shipboard accidents, and if it is irrational to limit the doctrine to artificial connections with the ship, how are courts to limit the scope of the doctrine? To what extent can courts measure the risk of particular maritime employment, and how does such a measure affect the traditional requirements of location and maritime relations?

Of necessity, a maritime relationship must remain the foundation of any seaworthiness doctrine. Even if the federal courts wanted to make seaworthiness amphibian, their admiralty jurisdiction stops near the water's edge. Some connection between the injured party and the maritime industry is indispensable.

The key question, however, should not be whether the maritime employee is performing work once done by seamen, but whether he

68. McKnight v. N. M. Paterson & Sons, Ltd., supra note 62, affords a particularly striking example of a high risk employee being denied recovery.
bears a high-risk relationship to the maritime industry. As Sierachi pointed out, the special remedies of seaworthiness are designed to protect those peculiarly susceptible to injury, not every employee of a shipping company.

A test most consistent with a risk-shifting approach would gauge only the activities of the employee, without regard to location. Seaworthiness would embrace all maritime employees engaged in high-risk occupations; generous protection would be directly linked with perilous work. Unfortunately, this solution is utterly impractical: maritime occupations are so varied, and statistics so poor, that a court could not competently distinguish between high- or low-risk employees. It might discriminate between longshoremen and clerks; but it could not hope to do justice to the vast number of harbor workers whose work differs from day to day.67

Rather than measure risk directly, the court could try to define conditions which produce high risk. The “location of the injury” test would serve as a workable guide to dangerous maritime employment if it were reformulated in terms of risk, instead of physical association with the ship. Statistical evidence indicates that the great bulk of high-risk maritime activity occurs at the ship and the adjoining docks.68 If courts granted seaworthiness benefits to workers injured because of human error or faulty conditions on the ship or dock, high-risk workers would receive adequate protection without forcing courts to make ad hoc distinctions beyond their capabilities.

It is true that some low-risk employees in the dock area would be covered by the doctrine, since a location test is a generalization about conditions of risk. This is unlikely to be a major cost factor, however, as the great majority of injuries in the ship and dock area will be suffered by vulnerable employees, whom any risk approach would cover. The new location test would halt the expansion of seaworthiness short of most low-risk workers and the industrial world at large.

A location test for seaworthiness would end the dispute over which shore-based facilities are “functional appurtenances” of the ship. Dock workers would be covered because their place of work is highly dangerous, not because it is conceptually assimilated to a ship. For all its merits, however, the location test remains a compromise, limited by

67. At present, neither the industry nor the government compiles accident statistics by individual job classifications. Without these statistics a court would be unable to discriminate intelligently between various classifications, e.g., between holdmen and warehousemen, though their respective accident frequency rates might vary radically.
68. LONGSHORE SAFETY REPORT 75.
judicial resources and power. Assessing compensation for risks is far more congenial to an administrative body, with the ability to make detailed studies of the risk component in a particular job. But until Congress becomes willing to entrust a full-recovery doctrine to an administrative agency, the courts must deal with seaworthiness as best they can. A ship-dock location boundary for the doctrine is the simplest and most rational judicial approach.

B. Unraveling the Procedural Tangle—A Task for Congress

A reform of seaworthiness doctrine is incomplete without a procedural clean-up. At present, Section 5 of the Harbor Workers' Act bars an injured longshoreman from recovering seaworthiness damages from responsible employers. In order to obtain those benefits, he must exercise his rights against third parties provided by Section 33 and sue the shipowner, who in turn can gain indemnification from the employer. Out of deference to the unambiguous command of the statute, the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.* rejected a plea that it apply a theory of contribution against employers and shipowners who were both negligent. If change is to come, it must be through congressional action.

One solution, proposed by the maritime industry, is to deprive longshoremen of the seaworthiness remedy by limiting that doctrine to the crew of a vessel. The industry view has certain advantages. Besides reducing present procedural confusion, it could improve the industry's competitive position without sacrificing what present social policy reflected in workmen's compensation laws normally considers adequate employee protection.

It is always dangerous, however, to extrapolate social policy from workmen's compensation legislation in which employers get limited recoveries in return for absolute liability. The "tit-for-tat" theory seems to have developed more as a response to anticipated constitutional difficulties than as a genuine attempt to balance competing interests. Thus considered, the theory becomes a rationale for legality,

rather than an expression of legislative policy. Moreover, Congress has allowed seaworthiness to expand for twenty years without any legislative alteration.

Second, the industry proposal suffers from substantive inconsistency. In essence, the industry suggests that Congress resolve a procedural problem by abolishing a remedy—a remedy which would remain available to other claimants undertaking similar risks because the claimant is a longshoreman and not a seaman. Given the soundness of risk distribution in the maritime industry, it is absurd to solve the procedural dilemma of seaworthiness by eliminating from protection a segment of the industry which undertakes risks similar to seamen. That would replace procedural confusion with substantive injustice.

The most rational solution, therefore, would be congressional repeal of the exclusive remedy provision of Section 5. By permitting a worker to sue for full seaworthiness damages from a responsible employer, the change would eliminate much of the expense of third party suits against shipowners along with the burden of indemnification proceedings. While complicated legal fights would remain where responsibility was doubtful, it would, at the least, eliminate obviously faultless shipowners from suits where employers were clearly responsible. To that extent, it would simplify the now lengthy route to proper allocation of liabilities between shipowners and employers.