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Recent Cases

RECENT CASES

HUSBAND AND WIFE—CONSORTIUM—WIFE PERMITTED TO RECOVER FOR LOSS OF HUSBAND'S CONSORTIUM

Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965).

Recently, the New Jersey Supreme Court in *Ekalo v. Constructive Serv. Corp. of America*[1] held that a wife may recover for the loss of her husband's consortium caused by the negligent act of a third party.[2] Plaintiff alleged that her husband was seriously injured when defendant's gas line exploded. Plaintiff's husband subsequently became inactive, engaged in no social activities and was totally unable to have sexual relations with his wife. The plaintiff thus sought money damages for the loss of her husband's consortium. The trial court dismissed the plaintiff's complaint for failure to state a claim upon which relief could be granted. The supreme court, however, held that if the company's *negligent* maintenance of the gas line caused the injury to the husband and consortium deprivation to the wife, it could be held liable to the wife for her losses.

Historically, any interference with the husband's right to his wife's services, custody, property or conjugal affection gave rise to a right of action for loss of consortium.[3] This was allowed whether the injury to the wife was intentional or negligent.[4] The common law, however, did not recognize any consortium action in the wife due to the medieval concept that during the marriage the legal existence of the wife was one with the husband.[5] With the adoption of the Married Women's Acts[6] some state courts began recognizing the wife's consortium action when the defendant's wrong

1. 46 N.J. 82, 215 A.2d 1 (1965).

2. The court noted that the consortium claim of the wife may be prosecuted only if joined with the husband's action.

3. See HARPER & JAMES, TORTS § 8.9 (1956); SALMOND, TORTS § 179 (12th ed. 1957); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1963).

4. See HARPER & JAMES, *op. cit. supra* note 3.

5. See 1 Blackstone, Commentories *443. Blackstone stated that the very being or logical existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything.

6. PA. STAT. ANN. tit. 48 § 111 (1965) provides: "Hereafter a married woman may sue and be sued civilly in all respects, and in any form of action, and with the same effect and results and consequences as an unmarried person. . . ."

was an *intentional* one.[7] The intentional tort limitation was harshly criticized in *Hitaffer v. Argonne*.[8] The court went on to permit the wife to maintain a cause of action for loss of consortium resulting from the *negligent* injury of her husband.[9]

The reasoning in *Hitaffer* rested on two basic premises: the husband and wife have equal rights in the marriage relation, which should receive equal protection of the law;[10] the objections to allowing recovery for negligent invasion of consortium are ill-founded, and equality of treatment should not be attained by denying the action to both spouses.[11] There is an increasing number of states which expressly follow *Hitaffer*.[12] A majority of the states, however, do not follow *Hitaffer*, denying the wife a cause of action.[13]

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7. See HARPER, LAW OF TORTS, 565 (1963); PROSSER, TORTS § 118 (3d ed. 1964).

8. 183 F.2d 811 (D.C. Cir.) *cert. denied*, 340 U.S. 852 (1950).

9. The *Hitaffer* court said:

> There can be no doubt, therefore, that if a cause of action in the wife for the loss of consortium from alienation of affections or criminal conversation is to be recognized it must be predicated on a legally protected interest. Now then, may we say that she has a legally protected and hence actionable interest in her consortium when it is injured from one of these so-called intentional invasions, and yet, when the very same interest is injured by a negligent defendant, deny her a right of action? It does not seem so to us. Such a result would be neither legal nor logical.

Id. at 817.

10. *Id.* at 816.

11. *Id.* at 814-19.

12. See Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Cooney v. Moomau, 109 F. Supp. 448 (D. Neb. 1953); Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (Super. Ct. 1961); Brown v. Georgia-Tennessee Coaches Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmitt, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Novak v. Kansas City Transit, 365 S.W.2d 535 (Mo. 1963); Ekalo v. Constructive Serv. Corp of America, 46 N.J. 82, 215 A.2d 1 (1965); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).

Oregon passed a statute giving the wife the same civil rights as the husband, "including . . . the right of action for loss of consortium of her husband." ORE. REV. STAT. § 108.010 (1955).

13. See Criqui v. Blau-Knox Corp., 318 F.2d 811 (10th Cir. 1963) (Kansas law); Smith v. United Constr. Workers, 271 Ala. 42, 122 So.2d 153 (1960); Jeune v. Del. E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Deshotel v. Atchison, T. & S. F. Ry., 50 Cal.2d 664, 328 P.2d 449 (1958); Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630, 634 (1955); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Ripley v. Ewell, 61 So.2d 420 (Fla. 1952); La Eace v. Concinnati, N. & C. Ry., 249 S.W.2d 534 (Ky. 1952); Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960); Larocca v. American Chain & Cable Co., 23 N.J. Super. 195, 92 A.2d 811 (App. Div. 1952); Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 176 N.Y.S.2d 354, 151 N.E.2d 898 (1958); Nelson v. A.M. Lockett & Co., 206 Okl. 334, 243 P.2d 719 (1952); Neuberg v. Bobowicz, 401 Pa. 146, 162

There are several arguments advanced for denying the wife a cause of action. One argument is that the wife's interest is *too remote* from the injury to her husband to warrant legal protection[14] It is argued, however, in those jurisdictions which allow the husband to recover, that the same injury to the husband's interest has never been regarded as too remote when he brings an action for loss of his wife's consortium.[15] It is inconsistent to hold that injuries to a wife are too remote and at the same time maintain that injuries to a husband are not too remote for a cause of action based on consortium to exist.[16] The wife's loss is as immediate and direct as the husband's would be if she had been the subject of the accident.[17] The *Ekalo* court noted that the absence of any claim on the wife's part for loss of *services* should not defeat her action. Such a factor would not defeat an action by her husband when he does not seek any compensaton for loss of services as such, but does seek compensation for loss of his wife's aid, comfort and conjugal fellowship.[18]

Another argument is advanced to deny the wife a cause of action. It is felt that to allow such an action would result in a "double recovery" for the same injury.[19] The wife's right to consortium, however, involves a great deal more than mere support.[20] Love, affection, comfort, sexual intercourse and other sentimental elements are parts of consortium. The wife's action would be confined to her independent loss of consortium, exclusive of any impairment of her husband's earning capacities for which he would be compensated.[21] In *Dini v. Naiditch*[22] the court noted that "double recovery" could easily be prevented by specifically restricting the wife's recovery to her own elements of loss which are in no way compensable in the husband's action.

A.2d 662 (1960); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954); Ash v. S.S. Mullen, Inc., 43 Wash.2d 345, 261 P.2d 118 (1953); Seagraves v. Legg, 127 S.E.2d 605 (W. Va. 1962); Nickel v. Hardware Mut. Cas. Co., 269 Wis. 647, 70 N.W.2d 205 (1955).

14. See Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Gambino v. Manufacturers Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Larocca v. American Chain & Cable Co., 23 N.J. Sup. 195, 92 A.2d 811 (1952); Feneff v. New York Central and H. R. Co., 203 Mass. 278, 89 N.E. 436 (1909).

15. See Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960); Montgomery v. Stephens, 359 Mich. 33, 101 N.W.2d 227 (1960).

16. See Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960).

17. See Hitaffer v. Argonne, 183 F.2d 811, 817 (D.C. Cir. 1950).

18. 46 N.J. 82, 87, 215 A.2d 1, 5 (1965).

19. See Giggey v. Gallagher Transport Co., 101 Colo. 258, 72 P.2d 1100 (1937); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918).

20. See Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950); Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106 (1959); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956).

21. 183 F.2d at 819.

22. 20 Ill.2d 406, 170 N.E.2d 881 (1960).

It was also claimed in *Ekalo* that recognition of the wife's cause of action may require the allowance of recovery to other members of the family and inordinately expand defendant liability.[23] The *Ekalo* court rejected the argument, saying that, "policy rather than logic is the determinative factor and, while persuasive arguments may be mustered in favor of the child's claim, the reciprocal recognition of the wife's claim may readily be rested on its own footing of equality and justice without any compulsion of going forward."[24]

A fourth argument for denying the wife recovery is that any remedy the wife may acquire can only come from the legislature.[25] This contention was rejected in *Dini* when the court noted that "since the obstacles to the wife's action were 'judge-invented,' there is no conceivable reason why they cannot be 'judge destroyed.' "[26]

A few courts, recognizing the inconsistency of denying the wife's claim for consortium while permitting the husband to maintain a claim for loss of his wife's consortium, have rejected both claims.[27] Other states have abolished the action for loss of consortium by statute.[28] A rationale given by these courts abolishing the husband's action is that his right was formerly based on the subservient position of the wife and the husband's common law right to her services, and therefore is now outmoded.[29]

Illustrative of a jurisdiction denying the wife a cause of action for the loss of her husband's consortium caused by the negligent act of a third party is Pennsylvania.[30] In *Neuberg v. Bobowicz*[31] the plaintiff was severely injured in an automobile accident caused

23. See Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662, 666 (1960).

24. 46 N.J. at 89, 215 A.2d at 7; See also Pleasant v. Washington Sand and Gravel Co., 104 U.S. App. D.C. 374, 262 F.2d 471 (D.C. Cir. 1958).

25. See Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960); In Potter v. Schafter, 211 A.2d 811 (Me. 1965), the court held that the proposal to allow the wife to recover merited consideration by the legislature since the court could not usurp legislative authority and judicially legislate a new cause of action.

26. 20 Ill.2d at 421, 170 N.E.2d at 892.

27. See Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898 (1958); Hawkins v. Front St. Cable Ry. Co., 3 Wash. 592, 28 Pac. 1021 (1892).

28. VA. CODE ANN. § 55-36 (1950); see Alspo v. Eastern Air Lines Inc., 171 F. Supp. 180 (E.D. Va. 1959); In West v. City of San Diego, 54 Cal.2d 469, 477, 353 P.2d 929, 934 (1960), a California statute granting the husband an action to recover for the loss of the wife's services (CAL. CODE CIV. PROC. § 427) was interpreted to *preclude* recovery of any other elements of damage.

29. See Marri v. Stamford R.R., 84 Conn. 9, 22, 78 Atl. 582, 586 (1911); Helmstetler v. Duke Power Co., 224 N.C. 821, 824, 32 S.E.2d 611, 613 (1945).

30. Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960).

31. 401 Pa. 146, 162 A.2d 662 (1960).

by the alleged negligence of the defendants. Plaintiff's wife joined in the action and based her claim solely upon the loss of her husband's consortium. A motion to strike from the complaint the prayer of the wife was sustained by the lower court and affirmed by the Pennsylvania Supreme Court. Moreover, in two recent Pennsylvania cases[32] the question has been raised as to whether Pennsylvania still allows a *husband* to sue for damages for loss of consortium.[33] It appears from these cases that Pennsylvania might deny the husband as well as the wife, any recovery.

In *Ekalo* the New Jersey Supreme Court has adopted a progressive and consistent principle by allowing the wife to recover for the loss of her husband's consortium. Perhaps this decision will encourage other states to re-evaluate their position on this issue and either recognize the wife's cause of action or adopt a consistent rule and deny both.

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32. Castelli v. Pittsburgh Ry., 413 Pa. 17, 195 A.2d 794 (1963); Bedillion v. Frazee, 408 Pa. 281, 183 A.2d 341 (1962).

33. In Castelli v. Pittsburgh Ry., 413 Pa. 17, 195 A.2d 794 (1963), Mr. Justice Jones, in concurring, said:

> In Bedillion v. Frazee, 408 Pa. 281, 183 A.2d 341, this court without any mention of *Neuberg*, continued to recognize the existence of the husband's right. However, three of the six members of the Court who sat in Bedillion concurred *only* in the result.
>
> In my opinion, the question whether this Court *now* grants recognition to the right of a husband to sue for damages for loss of consortium should be clarified for the sake of the bench and bar. However, such question should be determined only in a case where that question has been properly raised, briefed and argued. In the case at bar, such question has not been raised, briefed nor argued, and to the extent that the majority opinion *now* continues to grant recognition to the right of the husband, I dissent.

Id. at 22, 195 A.2d at 797.

ADMIRALTY — UNSEAWORTHINESS — DEFECTIVE SLING OWNED BY STEVEDORING COMPANY AND ATTACHED TO SHORE BASED CRANE RENDERS SHIP UNSEAWORTHY

Metzger v. S.S. Kirsten Torm, 245 F. Supp. 227 (D. Md. 1965)

William F. Metzger, a longshoreman, was killed while working aboard the S.S. Kirsten Torm. A wire sling, attached to a crane, was being used to lower steel billets into the ship's hold. The wire broke, and the billets struck Metzger. The sling, owned by Jarka Stevedoring Company, was attached to a shore based crane which was owned and operated by the Pennsylvania Railroad Company. The sling was new, without any apparent defects. A microscopic examination, however, showed a number of cracks which indicated that the wire was uncommonly brittle. The shore based crane was being used for loading operations because the weight of the drafts was far beyond the capacity of the ship's booms. The slings were supplied by the stevedoring company because the ship did not carry slings suitable for such loading operations. None of the stevedore's gear was attached to any part of the ship. The district court in *Metzger v. S.S. Kirsten Torm*[1] held that the sling was an appurtenance of the ship, and the vessel was unseaworthy and liable.

The decision in this case primarily rests upon an unrevealing *per curiam* opinion of the United States Supreme Court in *Alaska S.S. Co. v. Petterson*,[2] which itself was founded upon prior decisions[3] affording no justification for the result reached. This Note will analyze two lines of case law which have extended the doctrine of unseaworthiness in two different areas and analyze the result reached when these two extensions of the doctrine converge.[4]

The liability of a shipowner for the unseaworthy condition of his vessel is of fairly modern origin.[5] None of the ancient sea codes contained a warranty of seaworthiness,[6] and early American deci-

1. 245 F. Supp. 227 (D. Md. 1965).

2. 347 U.S. 396 (1954) (per curiam), *affirming*, 205 F.2d 478 (9th Cir. 1954).

3. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), rehearing denied, 328 U.S. 878 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

4. *Cf.* Note, 68 DICK. L. REV. 207 (1965), wherein the expansion of the doctrine of seaworthiness to include persons other than the ship's crew is discussed.

5. For a well documented account of the historical development of the doctrine of seaworthiness see GILMORE & BLACK, ADMIRALTY 315-32 (1957); 2 NORRIS, SEAMEN 705-889 (2d ed. 1962); Comment, 21 LA. L. REV. 755 (1961); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

6. See Laws of Oleron, Wisbuy, and Hanse Towns. 30 Fed. Cas. 1171, 1189, 1197 (Appendix 1880).

sions regarded these codes as fixing the limits of the owner's liability.[7] The *Osceola*[8] is recognized as the first American statement of the doctrine of unseaworthiness. The court said:

> [T]he vessel and her owner are . . . liable . . . 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.[9]

The extent of this obligation was first mentioned by the Supreme Court in *Carlisle Packing Co. v. Sandanger*.[10] Libelant, an employee of Carlisle, was injured when he lit fuel he had obtained from a can marked "coal oil." The can contained gasoline. Libelant recovered on a theory of negligence. The Supreme Court, affirming the recovery, added: "[W]e think the trial court might have told the jury that *without regard to negligence* the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline."[11]

The *Carlisle* dictum appeared to characterize the owner's duty as absolute. In England the owner's duty is only to exercise due care to provide and maintain a seaworthy vessel. The duty is prescribed by the Merchant Shipping Act,[12] which has been narrowly construed as to conditions arising after the start of the voyage and during the operation of the ship.[13]

Any doubts which may have lingered as to the nature of the owner's duty were dispelled in *Seas Shipping Co. v. Sieracki*[14] wherein the Court said: "It is a form of absolute duty. . . ."[15] *Sieracki's* importance, however, lies in its extension of the shipowner's warranty of seaworthiness. *Sieracki* extended to longshoremen protection previously afforded only to crew members. Libelant, an employee of a stevedoring company, was on board ship operating a winch that controlled a ten-ton boom. Both the winch and the boom were a part of the ship's equipment. A shackle supporting the boom broke and struck the libelant. The unseaworthiness of the vessel was not disputed. The principal question was whether the shipowner's warranty of seaworthiness extended to longshoremen. The Court reasoned that since the longshoreman was performing work formerly done by the ship's crew, he was to be protected by the same warranty that protected the crew.[16] *Sier-*

7. See, *e.g.*, Hardin v. Gorden, 11 Fed. Cas. 480 (No. 6,047) (D. Maine 1823); Reed v. Canfield, 20 Fed. Cas. 425 (No. 11,641) (D. Mass. 1832).
8. 189 U.S. 158 (1903) (dictum).
9. *Id.* at 175.
10. 259 U.S. 255 (1922) (dictum).
11. *Id.* at 259 (dictum). (Emphasis added.)
12. 39 & 40 Victoria, Co. 80 § 5 (1876).
13. See, Hedley v. Pickney & Sons S.S. Co, A.C. 222 (1894).
14. 328 U.S. 85 (1946).
15. *Id.* at 95.
16. The longshoreman is covered by a federal compensation statute intended to be the only remedy against the longshoreman's employer.

acki was followed in *Pope & Talbot, Inc. v. Hawn.*[17] Both cases dealt with defective equipment which was a part of the ship's equipment. The typical cases applying the *Sieracki* doctrine are those which allow non-seamen to recover from the shipowner for defects in the ship's equipment.

In *Alaska S.S. Co. v. Petterson,*[18] the Supreme Court held that the owner's warranty of seaworthiness extends to equipment supplied by a stevedoring company. Until *Petterson* it had been repeatedly held that unseaworthiness arises either from a condition of the ship itself or from an appliance of the ship.[19] *Petterson,* however, departed from the traditional and logical definition of seaworthiness. Libelant, Petterson, was injured when a snatch-block broke. The block belonged to a stevedoring company and was brought on board by them. It was not a part of the ship's equipment, but, unlike the situation in *Metzger,* it was attached to the ship and thus became an appurtenant appliance. The district court dismissed the suit. On appeal, the shipowner contended that his warranty of seaworthiness did not extend to equipment supplied by another. This argument was rejected on the authority of *Sieracki,* which was cited for the proposition that the shipowner's duty is one he cannot delegate. The shipowner then argued that he should not be liable because he had relinquished control of the vessel to the stevedore. Before *Sieracki,* the Second Circuit had held that a shipowner is not liable for unseaworthiness which arises after he surrenders control of the vessel to someone else.[20] The court reasoned, however, that this doctrine was founded upon the theory that the shipowner's liability is based upon negligence. Since *Sieracki* made it clear that the shipowner's liability is absolute, the major premise of the doctrine was incorrect and could not control Petterson.[21] Thus, the court of appeals, on the authority of *Sieracki* and *Pope & Talbot,* reversed holding that the vessel was unseaworthy. The Supreme Court, also on the authority of *Sieracki* and *Pope & Talbot,* affirmed *per curiam.*[22]

The abrupt manner in which the majority handled *Petterson* makes it impossible to determine just what the Court wants the case to stand for. An indication of what the majority may have had in mind is a reference to the discussion in *Sieracki* of the non-

Longshoremen's & Harbor Worker's Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1964). *Sieracki* interpreted this statute as not precluding recovery against a third party—in this case against a shipowner for breach of the warranty of seaworthiness.

17. 346 U.S. 406 (1953).

18. 347 U.S. 396 (1953) (per curiam).

19. 2 NORRIS, THE LAW OF SEAMEN, §§ 609-14 (1952); ROBINSON, ADMIRALTY, 301-7 (1939).

20. Grasso v. Lorentzen, 149 F.2d 127 (2d Cir. 1945); Mullica v. Compania Sud-Americana, 202 F.2d 25 (2d Cir. 1953).

21. GILMORE & BLACK, LAW OF ADMIRALTY, § 6-42 (1957).

22. 347 U.S. 396 (1954) (per curiam).

delegability of the shipowner's duty. The inference is that the majority agreed with the court of appeal's conclusion that the absolute and nondelegable duty announced in *Sieracki* was inconsistent with the relinquishment of control doctrine which the second circuit had applied.[23] A strong dissent[24] contended that *Sieracki* and *Pope & Talbot* did not justify the Court's decision. While these cases held that the shipowner's absolute liability to his crew extended to others working on the ship, the defective equipment in each case was the ship's equipment. The cases did not even suggest that liability should run beyond the seaworthiness of the vessel and its equipment. The dissent noted:

> While the doctrine of absolute liability for unseaworthiness . . . is reasonable enough when applied to a shipowner in relation to his own ship and to its equipment, there is no comparable justification for applying it to equipment owned by others and brought on board by them. Thus to extend such absolute liability would make the shipowner responsible for the result of latent dangers he cannot prevent. The burden should be upon those best able to eliminate the hazard—in this case, the stevedoring contractor.[25]

The doctrine of seaworthiness is an outgrowth of the crew's dependence upon the seaworthiness of the ship and its equipment. To protect the crew, the law imposed absolute liability upon shipowners for the unseaworthiness of either the ship or its equipment.[26] Does the crew depend upon the shipowner for the seaworthiness of equipment supplied by a stevedore? It would seem that they depend upon the stevedoring company, and, unless the shipowner agrees to substitute the stevedore's equipment for his own, the shipowner's responsibility in such cases should extend only to exercising reasonable care in selecting the stevedore. Nevertheless, the *Petterson* doctrine allows seamen to recover from the shipowner for defects in equipment supplied by others.

Since the common law doctrine of liability without fault is limited to situations where the defendant has some control over the instrumentality,[27] *Petterson* would appear to make the shipowner an insurer. There is little doubt, at least, that courts have been going to extremes in finding a ship to be unseaworthy.[28]

The question presented in *Metzger* is not well settled. It is not clear just how far the shipowner's liability is to extend. In *Italia*

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23. GILMORE & BLACK, LAW OF ADMIRALTY, § 6-42 (1957).
24. 347 U.S. 396 (dissent).
25. *Id.* at 401 (dissent).
26. *Id.* at 399 (dissent).
27. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS, 135, 186-89 (1953).
28. Krey v. United States, 123 F.2d 1008 (2d Cir. 1941) (soapy shower floor); Jones v. Lykes Bros. S.S. Co., 108 F. Supp. 323 (S.D. N.Y. 1952) (vicious crew members).

Soc'y v. Oregon Stevedoring Co.,[29] the Supreme Court said:

> [T]he ship owner is liable for unseaworthiness . . . whenever the ship or *its* gear is not reasonably fit for the purpose for which it was intended and this liability *extends to longshoremen and others* who work aboard the vessel, including those in the employ of contracting stevedoring companies.[30]

This statement does not say that defective equipment furnished by a stevedoring company renders the ship unseaworthy. Quite the contrary, the shipowner's obligation is stated as including only his ship or *its* equipment. As authority for this statement in *Italia* the Supreme Court cited *Sieracki* and *Pope & Talbot*. It would appear that the Court had finally stated the rule of these two cases correctly. Therefore, the next logical step would be to overrule *Petterson*. In *Italia*, however, the Court, by dictum, reaffirmed *Petterson*.

Forkin v. Furness Withy Co.[31] presents a contrary view. In order to unload baggage, a longshoreman was preparing to attach a conveyor belt to the side port of a recently docked vessel. He passed a rope sling around the conveyor and then stood upon it. As a crane operator moved him toward the ship the rope broke, and the longshoreman fell into the water. The crane was shore based. Both the crane and the rope were owned by the stevedoring company, and the conveyor was never attached to the ship. In a suit against the shipowner, the longshoreman alleged that the ship was unseaworthy. The district court dismissed the suit.

The second circuit, affirming said:

> Equipment maintained on a pier to establish connection with a ship is not an 'appliance appurtenant to the ship' or a part of the ship's 'gear,' at least until it has been affixed.[32]

While this is certainly a more logical approach to the problem than *Petterson*, it is submitted that both views are incorrect. Carried to its logical conclusion, *Petterson* would make the shipowner an insurer against every accident occurring on or near his ship. In effect, it will no longer be essential to prove the unseaworthiness of the vessel. *Forkin*, however, would make unseaworthy only that which is actually affixed to the ship. Under this view, the S.S. Kirsten Torm would not be unseaworthy, for neither the crane, boom or sling was even affixed to the ship.

The real test of unseaworthiness should be made to depend upon whether or not the equipment supplied by the stevedore is ever affixed to the ship, *or*, if not affixed, whether or not the equip-

29. 376 U.S. 315 (1964).
30. *Id.* at 317 (Emphasis added.)
31. 323 F.2d 638 (2d Cir. 1963).
32. *Id.* at 641.

ment used by the stevedoring company is such equipment as is generally carried on the ship. If *Petterson* is understood to hold that the shipowner's duty is non-delegable, then, if the stevedore's equipment is such as is found on the ship, the owner will be responsible for its defects. But if the stevedore's equipment is not the type ordinarily used on ships, it would seem that *Petterson* should be inapplicable. The shipowner had no duty to insure the safety of such equipment in the first place.

Where the defective equipment is shore based, not incorporated into the ship or its equipment, and is not such equipment as is generally carried on a ship, the district courts are in general agreement that such equipment does not render the ship unseaworthy.[33]

When a shipowner permits a stevedoring company to use its own equipment, thereby permitting a substitution for warranted ship's equipment, it is reasonable to conclude that the owner thereby adopts the substitute as his own. *The shipowner's duty is to insure the safety of his crew by providing seaworthy equipment.*[34] If he may escape liability by using the stevedore's equipment he will not be encouraged to provide comparable ship equipment that is safe and adequate. He should not be allowed to relieve himself of his duty so easily. The equipment of the stevedore must be considered to have been incorporated into the ship's regular gear. The shipowner, consenting to the substitution, has thereby adopted the equipment as his own and warranted it as seaworthy.

This "similar equipment rule" will confine the issue to unseaworthiness rather than questioning whether or not the equipment has become an appurtenance of the ship. When applied to *Metzger*, this rule would correctly render the S.S. Kirsten Torm unseaworthy. The equipment used by the stevedoring company was similar to the ship's equipment. In this case the owner relied upon the stevedore's equipment and, in fact, had neglected his duty to insure the safety of similar ship equipment. The Kirsten Torm's owner admitted that the ship's boom, crane, and slings were not being used because they were neither adequate nor safe for the load. Since the owner had neglected his duty to provide seaworthy equipment,[35] it follows that the ship was unseaworthy. Had safe and adequate equipment been provided it would have been unnecessary to use the stevedore's equipment and the accident

33. McKnight v. N.M. Paterson & Sons, Ltd., 181 F. Supp. 434 (N.D. Ohio 1960), *aff'd*, 286 F.2d 250 (6th Cir. 1960), *cert. denied*, 368 U.S. 913 (1961); Sherbin v. S.G. Embiricos Ltd., 200 F. Supp. 874 (E.D. La. 1962) (grain trimmer); Deffes v. Federal Barge Lines, Inc., 229 F. Supp. 719 (E.D. La. 1964) (marine leg); Cockrell v. A.L. Mechling Barge Lines, Inc., 192 F. Supp. 622 (S.D. Tex. 1961) (shore-based loading spout); Forkin v. Furness Withy & Co., 323 F.2d 638 (2d Cir. 1963) (conveyor).

34. 347 U.S. at 399 (dissent). See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

35. *Ibid.*

may not have occurred.

While the correct result was reached in *Metzger*, the court's reasoning is unsound. The district court found the Kirsten Torm unseaworthy by reasoning that the shore based crane was an appurtenance of the ship.[36] This is unwise. If this reasoning is followed, *any* equipment used by a stevedoring company, whether on ship or shore based, whether similar to ship equipment or not, may be considered an appurtenance. If such equipment then causes an accident, the ship will be considered unseaworthy. The absurdity of such a doctrine is illustrated when equipment used by the stevedore is entirely foreign to the ship. *Sherbin v. S.G. Embirices, Ltd.*[37] is an example. Libelant was injured by a grain trimmer. A grain trimmer is a large piece of equipment used to shoot grain into a ship's hold. They are owned and operated by stevedoring companies and are not found upon ships. The suit was dismissed by the district court because the grain trimmer was not such equipment as is generally carried on a ship. It is not reasonable to conclude that a shipowner warrants such equipment when it never was and never will be a part of the ship or an appurtenant appliance. If courts held shipowners responsible for defects in such equipment the courts would be encouraging negligence on the part of the stevedore. Since the stevedore is the owner he is in a better position to inspect the equipment. If the shipowner, who is not in an ideal position to make the inspection, is held responsible, the stevedore will be less inclined to inspect the equipment.

It is generally held that equipment, to be covered by the shipowner's warranty, must be of the type which is also a part of the ship's hull, gear, stowage, and appurtenant equipment.[38] However, this rule should not be so rigidly construed so as to exclude from its scope new and modern labor saving methods and machinery.[39] The test is not whether the equipment is that which has traditionally been used. The test is whether it is the type of equipment regularly found and used upon ships.

Metzger is indicative of the trend established by past decisions. This trend has been to constantly expand the shipowner's liability. The real significance of *Metzger* lies in the fact that in this case the *Sieracki* and *Petterson* doctrines have converged. The *Sieracki* cases allow stevedores, longshoremen, and other non-seamen to sue the shipowner for defects in the ship's equipment. *Petterson* al-

36. *Cf.* Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965).

37. 200 F. Supp. 874 (E.D. La. 1962).

38. Deffes v. Federal Barge Lines, Inc., 229 F. Supp. 719, (E.D. La. 1964); *accord,* McKnight v. N.M. Paterson & Sons, Ltd., 181 F. Supp. 434 (N.D. Ohio 1960), *aff'd,* 286 F.2d 250 (6th Cir. 1960), *cert. denied* 368 U.S. 913 (1961).

39. Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965), *accord,* Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964); O'Hey v. Matson Navigation Co., 135 Cal. App.2d 819, 288 P.2d 81 (1955).

lows seamen to recover from the shipowner for defects in the stevedore's equipment.[40] *Metzger* presents the rather unique situation where these two extentions of the unseaworthiness concept have combined to hold the vessel owner liable for a defect in a device *owned* by a stevedoring company *and* which has injured one of the company's *own employees*! The doctrines have crossed lines to produce an incongruous result.

The rather sad state of United States maritime affairs indicates that some of the historic protections afforded shipowners are *not* outdated and if the industry is to survive, apart from federal ownership, there ought to be a review of the rationale and application of some of the elements of protection afforded by early maritime law to encourage investment in the instrumentalities of seagoing commerce.

Carried to its logical conclusion, *Metzger* will make the owner an insurer against accident. It is submitted, however, that even the Supreme Court is unwilling to go this far. Indeed, there is some indication that a trend away from cases such as *Petterson* may be developing. What would the owner's liability be if the vessel, leaving port in a seaworthy condition, is rendered unseaworthy by an unusual storm at sea? If the ship's equipment is weakened by the storm, fails, and a seaman is injured, is the owner responsible? *Mitchell v. Trawler Racer, Inc.*[41] suggests that he is not. This case indicates a relaxation of *Petterson*. The court said:

> What had been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absloute, but it is a duty only to furnish a vessel *and appurtenances reasonably fit* for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service.[42]

Another indication of a willingness to deviate from expansion of the seaworthiness concept is *Morales v. City of Galveston.*[43] A divided court held that wheat contaminated with noxious chemicals and loaded into the ship's hold did not render the ship unseaworthy. Despite the fact that the ship's hold was not well ventilated, the court reasoned that the ship was seaworthy because her intended purpose was to take on uncontaminated grain, and for that purpose she was fit.

In view of these recent cases it is likely that future Supreme Court decisions will at least narrowly construe *Sieracki* and *Petterson*. It is submitted that the combination of these two doctrines in

40. *Cf.*, Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964).
41. 362 U.S. 539 (1960).
42. *Id.* at 550. (Emphasis added.)
43. 370 U.S. 165 (1962).

Metzger may not meet with Supreme Court approval, and it is hoped that future decisions will also repudiate *Sieracki* and *Petterson* and adopt a more logical standard. A line limiting the shipowner's liability must be drawn somewhere, no matter how difficult a task this may be.[44] Considering the trend of *Sieracki*, *Petterson* and *Metzger*, it is possible to imagine a situation where the shipowner is held responsible for injuries occurring at a considerable distance from the ship. The possibility of such a result makes it clear that the Supreme Court should clearly establish a limit beyond which the warranty of seaworthiness should not be extended.[45]

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44. The third circuit recognized this problem in Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965), wherein it was said: "subordinate federal courts have encountered difficulty in drawing the line. . . ." *Id.* at 205.

45. The Supreme Court failed to exercise an opportunity to clearly delineate the limits of the warranty in Roper v. United States, 368 U.S. 20 (1961). The court's determination of the "in navigation" question made a consideration of the unseaworthiness problem unnecessary.

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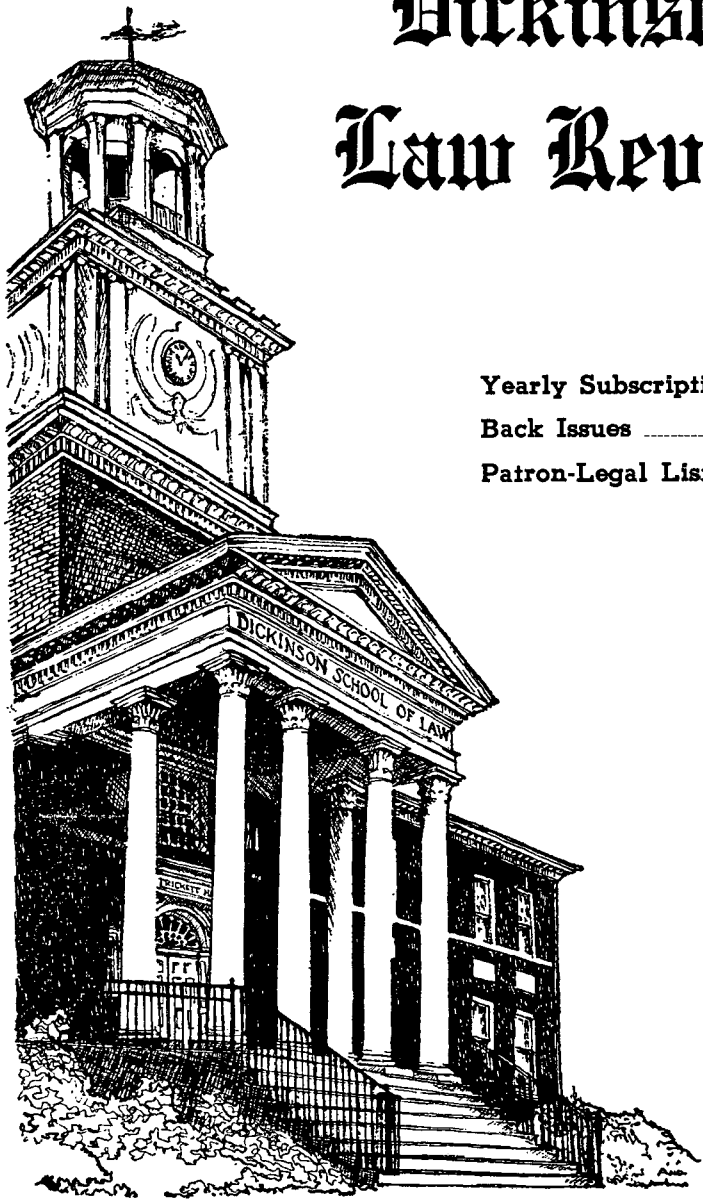

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