



## Is a ship in dry dock still a vessel?

The ship was in dry dock at the shipyard where repairs would be performed. Boatyard employees built an enclosure consisting of seven poles supporting tarps erected around the ship. Sometimes the wind caused the tarps to blow about or gather on the ground around the ship. Heavy buckets of sand held excess tarping down on the ground.

On the day of the accident, the tarp broke loose and was billowing about. A seaman on the ship, not employed by the shipyard, stopped his work to resecure the tarp. He began to step on the tarp to control it. He was unaware that the tarp lay over a hidden pothole. The seaman stepped into the pothole, fell down and was injured significantly.

In order to represent the seaman, his attorney will need to understand the unique provisions of maritime law that protect seamen. Principles of negligence under the Jones Act, 46 U.S.C. Section 688, apply to this case – even though the ship was on dry land.

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### *A look at maritime mediation and the Jones Act*

The Jones Act exists primarily to compensate “seamen” for injuries sustained at sea. Its standards are easier for plaintiffs to meet than those of traditional negligence theories. Even the definition of “at sea” is quite broad. The act defines negligence as having four elements: duty, breach, notice and causation.

#### **Duty**

The employer of a seaman has an affirmative duty to provide a safe workplace. This extends to “providing a safe place to work on the ship of a third party over whom the employer has no control, if that is where the seaman’s employer sends him to work.” *Marston Navigation Co. v. Hansen*, (9th Cir. 1942) 132 F. 2d 487. This duty arguably extends to all areas where the employer sends the employee to work, including the area surrounding a ship in dry dock.

An employer may be vicariously liable for the negligence of a contractor performing a duty that the employer owes to the seaman. A third party that sets up the seaman’s workplace (or sets up the safety equipment) assumes, at least in part, the employer’s duty to provide a safe workplace.

Therefore, under the doctrine established in *Hopkins v. Texaco* (1966) 383 U.S. 262, and *Sinkler v. Missouri Pacific R.R. Co.* (1958) 356 U.S. 326, an em-



ployer may be vicariously liable for damages caused by a third party's negligence if that negligence led to an unsafe work environment.

In this case, the employer dry-docked the ship and contracted for repairs. The dry dock used safety measures, including setting up tarps. Thus, the dry dock undertook the ship owner's Jones Act duty to work in a safe manner and not to cover up dangerous conditions or permit such conditions to encroach on the work area.

The *Hopkins/Sinkler* doctrine's goal is to protect the seaman by prohibiting the ship owner from delegating the duty to the shipyard. The shipowner may be vicariously liable for the direct negligence of the shipyard. Thus, if the shipyard goes broke, the seaman has another avenue of recovery.

The remedial nature of maritime law in general, and the Jones Act in particular, supports a joint-and-several mechanism for allocating loss. Thus, an injured seaman "may recover [his] entire damages, less that portion attributable to [his] own fault, from the [defendants] even though [one defendant] was only 20 percent at fault while another defendant was 60 percent at fault." (*Drake Towing Co. v Meisner Marine Constr. Co.* (11th Cir. 1985) 765 F.2d 1060.)

### Causation

The degree of negligence that supports Jones Act liability is less than that required for common-law negligence. The Jones Act test is called the "featherweight" standard of causation because it provides that the slightest negligence is sufficient. (*Ribitzke v. Canmar Reading & Bates Ltd.* (9th Cir. 1997) 111F.3d 658.)

The cases hold that "to reach a jury, the seaman must demonstrate only that his employer's negligence played any part, even the slightest, in producing his injury." (*Ribitzke, supra*)

### Breach

If causation is featherweight, then

breach is bantamweight. In the cases cited above, courts have held that providing a confined workspace breaches an employer's duty to provide a safe workplace. When one considers the close quarters on the open sea, this makes sense.

In *Ribitzke*, the seaman alleged that the pit room to which he was assigned was unsafe because it provided insufficient room to work. Only 24 inches of deck space existed between an open hatch and the bulkhead. The seaman turned his back to the open hatch while working on a line and fell into the hatch. The court held that this was sufficient to state a claim on the issue of the safety of the workplace.

Maritime law and the Jones Act impose other duties on the shipowner, including providing safe equipment and appliances, using a safe work method and manner, giving safe work orders and instructions, correcting hazards, adequately inspecting the workplace, instructing employees about safety rules and providing adequate safety gear.

A jury also can consider as evidence of negligence an Occupational Safety and Health Act violation. (*Robertson v. Burlington N.R.R. Co.* (9th Cir. 1944) 32 F.3d 408.)

Finally, a seaman cannot be found negligent in proceeding with a job that he recognized as dangerous unless he deliberately rejects a safer alternative given to him. The employer has the duty of showing the existence of the safer alternative. (*McCoy v. United States* (4th Cir. 1982) 689 F.2d 1196.)

### Seaworthiness

The concept of "seaworthiness" has special meaning in maritime claims. The ship owner is strictly liable to the seaman for any unseaworthy condition that causes injury. Liability does not depend on reasonable care, negligence, notice or the opportunity to correct the condition. The jury simply looks at the conditions on the ship. If they find that the condi-

tions rendered the ship unseaworthy, even if only for a few moments, then they can impose liability.

This principle does have some standards that an injured seaman must meet: The warranty of seaworthiness extends to the plaintiff; the injury must be caused by a piece of the ship's equipment or an appurtenant appliance; the equipment must not be reasonably fit for its intended use; and the condition must proximately cause the injury. (*Ribitzke, supra.*)

Essentially, to be seaworthy, the vessel, crew, appurtenances and operation must be reasonably fit for their intended purpose. Simply meeting custom and practice in the industry will not satisfy the duty to provide a seaworthy vessel. (*Smith v. Ithica* (5th Cir. 1980) 612 F.2d 215.)

Even improper operation by a subcontractor repairing a vessel may create an unseaworthy condition. (*Edynak v. Atlantic Shipping Co. Inc.* (3rd Cir. 1977) 565 F.2d 215.)

How do these cases apply to the hypothetical seaman who was not working on a ship at sea and who fell into a concealed pothole at a dry dock?

The plaintiff's argument would be that the shipowner failed to provide a safe place to work. Potholes were prevalent at the shipyard. The method of securing the tarps resulted in excess tarp and windblown tarp, and both conditions obscured the potholes. The area around the ship was too tight, forcing the seaman into zones of hidden danger.

In other words, the plaintiff would argue that the shipowner failed to provide a safe workplace, safe equipment, a safe work method (by having the crew work in and among trip hazards), safe work orders or proper supervision (by directing the seaman to secure the billowing tarp).

Vicarious liability rules govern the boatyard. The yard had a nondelegable duty to provide a safe working environment. This duty existed in addition to



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the duties of the shipowner and crew to clean up the yard, report the billowing tarp or act in a safe manner.

“The obligation to provide maintenance and the accompanying duty to provide cure, i.e. medical cure, to an ill or injured seaman is ‘among the most ancient and pervasive of all liabilities imposed on a ship owner.’” (*Caufield v. AC & D Marine, Inc.* (1981) 633 F.2d 1129, 1131-1132.) This long-held principle includes wages lost. (*The Osceola* (1903) 189 U.S. 158.)

The defendant(s) must pay for the seaman’s treatment until the seaman has reached a point of maximum cure. This

is the point where the condition will not improve with further treatment. At this point, any medical care needed to sustain health must be provided. (*Costa Crociere S.p.A. v. Rose* (1996) 939 F.Supp 1538.)

In short, both the shipyard and the shipowner may be vicariously responsible for the negligence of the other. Once found liable, they will be responsible for providing wages, medical treatment and ongoing medical care. If liability is established, the goal of maritime law, to protect the seaman, mandates this conclusion.

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