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Potential for Unseaworthiness Claims Based on COVID-19 Transmission

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The Coronavirus Disease 2019 (COVID-19) pandemic has created substantial new challenges for marine commerce. High-profile outbreaks about cruise ships, such as the *Diamond Princess*, highlighted the difficulty of containing disease aboard vessels—a signal reinforced by subsequent severe outbreaks aboard naval vessels (*USS Theodore Roosevelt*) and fishing vessels (*F/V American Triumph*).[1] Locally, recognition of the heightened risk of disease spread on board vessels has prompted the development of guidance such as screening and temperature checks before embarkation,[2] while the National Marine Fisheries Service waived requirements for fishing vessels to carry onboard observers.[3] Shipboard transmission of COVID-19 thus is a concern for crew members, vessel owners, and other persons who may be required to be aboard vessels in state and federal waters. Maritime workers who contract COVID-19 may seek compensation from the vessel owner under a variety of legal doctrines. This fact sheet considers whether and how crew members might argue that they contracted COVID-19 due to an "unseaworthy" condition aboard a vessel.

This fact sheet begins by explaining the doctrine of unseaworthiness and its elements. In part 2, it considers several ways in which COVID-19 outbreaks could result in an unseaworthy condition. These include: (i) an infected crewmember; (ii) living and working conditions on a vessel that don't allow the crew to avoid contagion; and (iii) sickness resulting in insufficient crew to safely operate the vessel. Part 4 discusses causation issues related to unseaworthiness claims based on COVID-19 transmission. Finally, part 5 concludes that the doctrine of unseaworthiness appears to apply to disease transmission only in limited circumstances. However, other maritime claims, such as

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[1] *See* Mateusz M. Plucinski et al., *Coronavirus Disease 2019 (COVID-19) in Americans aboard the Diamond Princess cruise ship*, 2020 CLINICAL INFECTIOUS DISEASES XX (2020), DOI: 10.1093/cid/ciaa1180; Matthew R. Kasper, *An Outbreak of Covid-19 on an Aircraft Carrier*, 383 New Eng. J. Med. 2417 (2020), DOI: 10.1056/NEJMoa2019375; Tess Williams, *85 crew members aboard factory trawler in Unalaska test positive for COVID-19*, ALASKA DAILY N., July 19, 2020, https://www.adn.com/alaska-news/2020/07/19/85-crewmembers-aboard-seafood-ship-in-unalaska-test-positive-for-covid-19/.

[2] Dave Monti, *Tips for fishing during COVID-19 pandemic*, CRANSTON HERALD, May 20, 2020, https://cranstononline.com/stories/tips-for-fishing-during-covid-19-pandemic,153374.

[3] *Temporary Waivers on Northeast Observers, Monitors Through August 13, Resuming Coverage August 14*, NOAA (July 30, 2020), https://www.fisheries.noaa.gov/bulletin/temporary-waivers-northeast-observers-monitors-through-august-13-resuming-coverage.

negligence or maintenance and cure, remain available to infected crew members. As a result, owners continue to have good reason to use prophylactic measures to avoid COVID-19 outbreaks on board their vessels.

1 Elements of Unseaworthiness

Seamen have long occupied a uniquely protected position in American law. Though much has changed over time, maritime law remains dedicated to protecting the rights and interests of American maritime workers.[4] One way that the law protects workers is by charging vessel owners with a duty to "furnish a vessel and appurtenances reasonably fit for their intended use" by those workers.[5] This duty allows covered workers to recover damages when they are injured due to a unseaworthy condition.

Only certain workers can bring a claim for breach of this duty to provide a seaworthy vessel.[6] Covered workers include members of a vessel's crew (e.g., fishermen and tugboat operators) who are covered by the Jones Act or case law and maritime workers who qualify for protection under the Longshore and Harbor Worker's Compensation Act.[7] Shipboard employees whose duties "contribute to the function of the vessel or to the accomplishment of its mission" are covered too—a category broad enough to cover hairdressers employed on a cruise ship, for example, as well as independent contractors doing a ship's work.[8] Nonetheless, not everyone on a vessel can bring maritime claims; for example, several courts have found that fisheries observers and other scientific personnel do not "contribute to the functioning of the vessel" and therefore cannot recover.[9] Finally, passengers and are not entitled to bring unseaworthiness claims.[10]

Qualified plaintiffs must prove two elements to prevail on an unseaworthiness claim. These include showing that: (1) the vessel or appurtenance was unseaworthy; and (2) the unseaworthy condition

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[4] There is good reason for these protections: American marine transportation workers experienced nearly six times more workplace fatalities than the rest of the U.S. work force between 2011 and 2017. *Center for Maritime Safety and Health Studies: Marine Transportation*, CDC NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, https://www.cdc.gov/niosh/programs/cmshs/marine_transportation.html.

[5] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

[6] ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 27:2 (5th ed. 2020) ("The person to whom the duty is owed to furnish a seaworthy ship in personal injury matters, is the seaman.").

[7] *Id.* § 27:3 (2020).

[8] Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99 (1946) ("the duty of seaworthiness extends to those who are not 'seamen' under the Jones Act, but who nonetheless are 'doing a seaman's work and incurring a seaman's hazards.' "); *see also* Radut v. State St. Bank & Tr. Co., 2004 WL 2480467, at *3 (S.D.N.Y. Nov. 4, 2004) ("The Sieracki doctrine was developed precisely for independent contractors who do the ship's work and are exposed to the ship's hazards, but are not members of the ship's crew or under the direction of its officers.").

[9] *See* Mason v. Alaskan Observers, Inc., 2003 WL 23181008, at *3 (W.D. Wash. Aug. 29, 2003) ("An observer is not in service to the vessel and therefore may not be considered a seaman."); Belcher v. Sundad, Inc., 2008 WL 2937258, at *2 (D. Or. July 18, 2008) ("Simply because the law requires the observer, it does not grant seaman status to plaintiff."); *but see* Schaller v. Arctic Alaska Fisheries Corp., 1995 WL 846695, at *1 (Alaska Super. Ct. Dec. 13, 1995) ("The observer's presence on board allows the vessel to comply with Alaska law and, thereby, engage in navigation.").

[10] Roberts v. Williams-McWilliams Co., 648 F.2d 255, 263 (5th Cir. 1981) ("The evidence established his presence was not as a member of the crew of that vessel but more nearly that of a "passenger" or invitee as to whom . . . the maritime law extends no warranty of seaworthiness.").

was the proximate cause of an injury.[11] Plaintiffs are *not* required to prove that their injury resulted from negligence or to show how the unseaworthy condition came to be. Rather, "unseaworthiness is a condition, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it."[12] The mere presence of an unseaworthy condition and a showing of its causal connection to the alleged injury therefore is sufficient to establish a successful unseaworthiness claim.

An unseaworthy condition can arise from a wide variety of causes. As the Supreme Court summarized:

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.[13]

While unseaworthy conditions can arise from many sources, not every injury indicates the presence of an unseaworthy condition. As Judge Sugarman famously noted, "a seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."[14] This quote highlights two important limitations of the doctrine of unseaworthiness. First, a vessel owner is not required to furnish a perfect vessel "that will weather every conceivable storm or withstand every imaginable peril of the sea."[15] Second, a vessel can be fit for certain tasks and purposes while simultaneously unfit for others.[16] For example, an unreasonably slippery deck does not make the vessel as a whole unseaworthy. Similarly, unseaworthy conditions need not be permanent.[17] Thus, the doctrine of seaworthiness allows a wide variety of claims, so long as the facts indicate that the conditions are unreasonable.

Unseaworthiness claims require an injury proximately caused by the unseaworthy condition. To meet this standard, the unseaworthy condition must have "played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness."[18] Mere speculation that the unseaworthy condition brought about a claimant's injury is insufficient. For example, in *Johnson v. Offshore Express*, the plaintiff was successful in a claim for damages resulting from a fall off a top bunk while performing

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[11] Williams v. U.S., 712 F. Supp. 1132, 1135 (S.D.N.Y. 1989); *see also* Johnson v. Offshore Exp., Inc., 845 F.2d 1347, 1354 (5th Cir. 1988).
[12] Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 (1971).
[13] *Id.* at 499 (footnotes omitted).
[14] Colon v. Trinidad Corp, 188 F. Supp. 97, 100 (S.D.N.Y. 1960).
[15] *Id.* at 100.
[16] FORCE & NORRIS, *supra* note 6, § 27:5 ("The relative concept of seaworthiness is dependent in each instance upon the circumstances in which its fitness is drawn in question. It is relative in the sense that a vessel may be said to be fit for certain purposes and unfit for others. She may be seaworthy while operating within a port and yet be wholly unfit when going out into rough waters.").
[17] Mitchel v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).
[18] Johnson v. Offshore Exp., Inc., 845 F.2d 1347, 1354 (5th Cir. 1988).

maintenance and cleaning duties because she was not given the proper equipment to safely reach the top bunk. The lack of proper equipment was an unseaworthy condition and played a substantial part in bringing about Johnson's injury.[19] On the other hand, the plaintiff in *Kennedy v. Adamo* could not recover for injury caused when the truck he was driving lacked a rear-view mirror and was rear-ended.[20] The court held that lack of a rear-view mirror was not the proximate cause of the crash: the plaintiff could not prove that a mirror would have allowed him to see the oncoming car, react in time, and find a safe place to escape the crash.[21] A claimant therefore will not recover unless he or she can show a clear causal connection between the unseaworthy condition and the resulting injury.

No unseaworthiness claims related to COVID-19 have been brought to date, and very few have been decided for communicable disease more broadly. Instead, the vast majority of unseaworthiness claims involve physical trauma such as broken bones, lacerations, or head injuries. As a result, it is impossible to determine with certainty whether and when the spread of COVID-19 infection on board vessels may violate the duty to provide a vessel reasonably fit for service. However, the sections that follow use the facts from past cases to consider the types of seaworthiness claims that might result from COVID-19 outbreaks aboard vessels.

2 Potential unseaworthy conditions related to COVID-19

This section reviews three scenarios in which COVID-19 outbreaks could give rise to claims based on an unseaworthy condition on a vessel. First, a plaintiff could argue that an infected crewmember is unreasonably hazardous. Second, a plaintiff could argue that physical conditions aboard a vessel created an unreasonable risk of disease transmission. These conditions could include, for example, failure to disinfect a vessel after an outbreak, HVAC systems that continually recirculate air containing pathogens, or failure to provide masks or other prophylaxis. Finally, COVID-19 outbreaks could indirectly lead to unseaworthy conditions such as low crewing levels. This section considers each of these potential claims in turn.

2.1 Infected crew members

COVID-19 is a highly contagious communicable disease that "most commonly spreads between people who are in close contact with one another."[22] Thus, crewmembers who board a vessel while infected with COVID-19 are likely to spread it to their shipmates. Crewmembers who contract the virus on board could allege that the owner created an unseaworthy condition by allowing infected crew to board the vessel. This type of claim requires that a crewmember, rather than a condition of the vessel or its appurtenances, can be unseaworthy.

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[19] *Id.* at 1354-1355 ("The vessel was unseaworthy because, first, it lacked proper equipment for a person only five feet tall to make up an upper bunk in four to six foot seas, and, second, the vessel lacked adequate manpower…this unseaworthiness was a proximate cause of Johnson's injury.").
[20] Kennedy v. Adamo, No. 1:02CV1776ENV–RML, 2006 WL 3704784 *2 (E.D.N.Y. Sept. 1, 2006).
[21] *Id.*
[22] *Frequently Asked Questions: Coronavirus Spread*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread.

A ship owner's duty to provide a seaworthy vessel extends to employing a competent crew.[23] To be competent, the crew must be "equal in disposition and seamanship to the ordinary men in the calling."[24] Crewmembers may fail this standard due to unusually violent conduct that places the ship or its crew in peril.[25] As one court concluded regarding a crewmember who attacked a shipmate without provocation, "[h]is presence . . . was a peril to the ship. No place on the ship near Whitaker was a safe place for a seaman to work."[26]

In one case—*Peterson v. United States*—a plaintiff argued that infected crewmembers represented a similar risk to their shipmates as violent crewmembers.[27] The court accepted this legal theory but denied the claim on the facts. Specifically, the court noted that the disease required direct contact to spread and "such an incidence of skin disease was not unusual, especially when a ship sails in tropical waters."[28] This holding indicates that the court accepted the legal theory that infected crewmembers could be unseaworthy, but that it may be difficult to show that the infection was unreasonably dangerous—the mere presence of sick individuals on board in this case was insufficient. It is plausible, however, that courts could find vessels unseaworthy in cases involving more dangerous or infectious pathogens or involving, for example, infected crew who refuse to socially distance or wear protective equipment. If so, cases involving COVID-19 could turn on whether the affected crewmember poses an unreasonable risk of infection to the rest of the crew.

2.2 Living and working conditions that cause contagion

Living and working conditions that cause or contribute to injury, including illness, make a vessel unseaworthy.[29] As the court noted in *Selby v. United States*, crewmembers:

> "had a right to expect that the operation of the ship would be so conducted that no reasonable precautions would be omitted to safeguard the health of the human beings in the crew. This would seem to mean that the ship would be maintained in as cleanly and sanitary a condition as was reasonably possible; that obligation might be likened to the duty to provide adequate and nourishing food; safe and dry sleeping quarters; a cleanly mess hall where the members of the crew could partake of their meals in an atmosphere reasonably free from avoidable contamination peculiar to the nature of the ship's business."[30]

As suggested by this passage, unseaworthy conditions may arise from a variety of causes. A variety of cases have focused on conditions of a vessel itself, such as inadequate or inoperative ventilation systems, dampness, inadequate lighting, and uncovered radiators.[31] Others have focused on

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[23] Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 340 (1955) ("We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other."); FORCE & NORRIS, *supra* note 6, § 27:9.
[24] Boudoin, 348 U.S. at 337.
[25] *Id.* at 340.
[26] Clevenger v. Star Fish & Oyster Co., 325 F.2d 397 (5th Cir. 1963).
[27] 224 F.2d 748 (9th Cir. 1955).
[28] Peterson v. U.S., 224 F.2d 748 (9th Cir. 1955).
[29] FORCE & NORRIS, *supra* note 6, § 27:12.
[30] 161 F. Supp. 689, 693 (E.D.N.Y. 1958).
[31] *Id.* (collecting cases).

equipment provided, such as availability of boots and adequacy of provisions.[32] A crewmember infected by COVID-19 could potentially show that living and working conditions were unseaworthy based on either vessel characteristics or its operations.

Cases alleging unseaworthy living and working conditions often turn on whether the plaintiff can allege sufficient facts to show that the conditions are unreasonable. Where there is strong evidence of one or more conditions likely to give rise to injury, injured crewmembers can recover. For example, the court in *Boboricken v. United States* characterized the vessel as "a living hell" in which the claimant "was subjected to soot and fumes and heat and filth, improper food and lack of sleep" for the duration of the voyage.[33] He had no means of ventilation while working in the engine room, nor was he given any protective gear for the duration of a journey that lasted 6 months instead of the planned 6 weeks. Given the severity of the conditions aboard the vessel, the court had "no hesitancy in making a finding for unseaworthiness" or in finding that the conditions caused or contributed to the plaintiff's tuberculosis.[34] Cases involving merely unpleasant facts or a lack of evidence, however, will not result in a determination of unseaworthiness. In *Selby*, the court found the vessel seaworthy despite piles of horse excrement on the main deck and in the holds throughout a 9-month journey and rotting corpses of horses and mules left out in the sun for days on end.[35] In this case, the plaintiff failed to prove that the vessel was not reasonably fit for its intended purpose of carrying livestock.[36] Similarly, in *Rey v. Colonial Navigation Co.*, a fireman failed to prove that the ventilation in his sleeping quarters was insufficient despite evidence that the quarters lacked portholes and had a defective ventilation system.[37] Thus, cases alleging unseaworthy living and working conditions depend on the facts involved and how the conditions relate to the reasonable expectations for the work.

Cases alleging that living and working conditions contribute to the spread of COVID-19 will require sufficient evidence to show those conditions are unreasonable. There are few recent cases considering whether conditions giving rise to illness are unseaworthy, however. As a result, parties cannot rely on precedent to predict whether specific conditions are unreasonable. Instead, cases alleging unseaworthiness due to factors such as missing or inadequate masks or ventilation will be required to develop substantial expert evidence to support their claims.

2.3 Insufficient crew due to widespread contagion aboard ship

While the previous two sections considered potential unseaworthiness claims related to infection of a crewmember with COVID-19. However, disease outbreaks could also lead to injury for other reasons. For example, an outbreak on board could result in a high number of crewmembers becoming incapacitated, which could in turn cause a vessel to be undermanned, resulting in a

[32] *Id.*
[33] Boboricken v. U.S., 76 F. Supp. 70, 72 (W.D. Wash. 1947).
[34] *Id.* at 71.
[35] 161 F. Supp. 689, 690-91 (E.D.N.Y. 1958).
[36] *Id.* at 695.
[37] 116 F.2d 580, 582 (2d Cir. 1941) ("No expert witness was called to testify that this system of ventilation was insufficient… the evidence as to improper ventilation was too slight to be submitted to the jury.").

physical injury to a crewmember. Courts have found inadequate crew to be an unseaworthy condition.[38] For example, a court found an unseaworthy condition where an engineer was not provided help to conduct a two-person job, resulting in a back injury.[39] Similarly, the Supreme Court has held that provision of inadequate or incompetent crew—such as crew lacking ordinary strength—could be unseaworthy.[40] A widespread COVID-19 outbreak could reduce the available crew below the levels needed to safely perform the work of a vessel or weaken those remaining so they are no longer competent. Under such conditions, a jury could plausibly determine that the vessel was unseaworthy when and where additional manpower was required.

3 Causation challenges with unseaworthiness claims based on COVID-19 transmission

Covered workers seeking COVID-19-related damages due to unseaworthiness must prove that the unseaworthy condition proximately caused their infection (or other injury). Proving when and where a worker contracted a virus can be challenging and may limit recovery. COVID-19 symptoms may not present until 2-14 days after exposure to the virus.[41] Accordingly, infected workers who develop symptoms after embarkation may not be able to prove whether they contracted the virus onboard or prior to departure—a particular challenge for covered workers who are not at sea for long periods. Asymptomatic workers who later develop long-term health problems may similarly be unable to prove that they were infected at work. Further, even if a crewmember clearly is infected at sea—for example, developing symptoms substantially after embarkation—if may be difficult to connect that infection with the unseaworthy condition. For example, it may not be possible to prove that an infection resulted from contact with an infected crewmember, transmission of pathogen via the ventilation system, or a lack of masks or other personal protective equipment. However, these challenges do not foreclose claims based on unseaworthiness. Courts will consider the factual evidence presented to determine whether a claimant has adequately proven that the unseaworthy condition caused or substantially contributed to the infection.

Courts have confronted causation challenges in a number of cases of infections with other illnesses, most notably tuberculosis. Several courts faced with claims based on development or aggravation of tuberculosis due to unseaworthy conditions have found in the plaintiff's favor.[42] In *Bobricken*, for example, the court found "without hesitancy" that there was "a sufficient causal connection between the hardships endured by the libelant growing out of the unseaworthiness of the vessel and his tuberculosis."[43] However, some courts deciding similar claims have not awarded damages due in part

[38] FORCE & NORRIS, *supra* note 6, § 27:9.
[39] Am. President Lines, Ltd. V. Welch, 377 F.2d 501 (9th Cir. 1967).
[40] Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 728 (1967).
[41] *Frequently asked questions: symptoms & emergency warning signs,* CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Symptoms-&-Emergency-Warning-Signs.
[42] Boboricken v. U.S., 76 F. Supp. 70, 72 (W.D. Wash. 1947); Evans v. Schneider Trans. Co., 250 F.2d 710 (2d Cir. 1990) (affirming jury verdict based in part on unseaworthiness aggravating tuberculosis); Sooba v. U.S., 1956 A.M.C. 1873 (W.D. Wash. 1956) (awarding damages for tuberculosis contracted as a result of damp, unventilated sleeping quarters).
[43] Boboricken v. U.S., 76 F. Supp. 70, 72 (W.D. Wash. 1947).

to insufficient evidence of causation.[44] These cases make clear, however, that courts may be willing to award damages where sufficient evidence of causation is presented.

4 Conclusion

The COVID-19 pandemic has created new and emerging challenges for the maritime industry, including the possibility of outbreaks among vessel crews and other workers. Such outbreaks may result in liability to vessel owners, including the possibility that infections are the result of unseaworthy conditions. The doctrine of unseaworthiness may apply to COVID-19 outbreaks in several ways. First, an infected crewmember poses a risk of infection to his or her coworkers. Second, the vessel or its gear, such as protective equipment, could be inadequate to prevent infection. Finally, outbreaks could weaken a crew such that a vessel becomes inadequately manned. While claims based on these conditions are possible, they face substantial difficulties. A claimant must show not only that these conditions exist but that they are unreasonable. In addition, claimants must prove that the conditions proximately caused or contributed to their injury. Injured claimants may not be able to satisfy their burden of proof. However, where the facts support a determination that conditions were unseaworthy and caused or contributed to a COVID-19-related injury, maritime law does not appear to preclude successful claims.

Commonsense measures to avoid the development of unseaworthy conditions may reduce the risk of liability due to unseaworthiness as well as other forms of liability, such as negligence and maintenance and cure. Such measures could include requiring crewmembers to test negative prior to embarkation, ensuring adequate supplies of personal protective equipment and mandating their use, using fresh rather than recirculated air in crew quarters, and returning to port when infections are detected on board. Employing such measures may not only align with public health in a time of pandemic, but also avoid costly litigation.

[44] See Rey v. Colonial Nav. Co., 116 F.2d 580, 582 (2d Cir. 1941); Smith v. U.S., 66 F.Supp. 933 (D. Md. 1946); Quintin v. Sprague S.S. Co., 149 F.Supp. 226 (S.D.N.Y. 1957); Selby v. U.S., 161 F.Supp. 689 (E.D.N.Y. 1958);