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Lyle C. Cavin Jr., Esq.

Philip A. Rush

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THE UNSEAWORTHINESS DOCTRINE AND SEAMAN'S ASSAULT: NAVIGATING THE MUDDY WATERS

LYLE C. CAVIN, JR., ESQ.* AND PHILIP A. RUSH**

I. INTRODUCTION

A. THE PURPOSE

This article will propose a set of guideposts or factors for use by the Ninth Circuit in determining a vessel owners liability under the unseaworthiness doctrine for assaults inflicted by one crew member upon another. It will also be suggested that some degree of serious injury must be found before imposing liability under the doctrine. Additionally, the authors recommend what will be termed the "fighting seaman" stereotype be dropped in assessing the assaulting seaman's disposition.

Although primary emphasis is placed on Ninth Circuit decisions, an analysis of other Circuits will be made as a comparison and to provide background for this subject. Additionally, it should be noted that personal injury claims resulting from shipboard assault may generally state three causes of action:[1] 1) un-

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* J.D. Golden Gate University, 1969. Mr. Cavin has been a practicing attorney in San Francisco for the past 18 years, specializing in seamen's personal injury and longshoremen/harbor worker compensation claims.

** Third year student, Golden Gate University School of Law, Class of 1988. Mr. Rush is a graduate of the California Maritime Academy (Class of 1979) and served aboard United States flag vessels as a deck officer for six years.

1. *See* generally 1B S. BELLMAN, A. JENNER, B. CHASE, J. LOO AND H. PRIVAL, BENEDICT ON ADMIRALTY § 4, at 1-22 (1986) [hereinafter BENEDICT ON ADMIRALTY].

seaworthiness;[2] 2) negligence (Jones Act);[3] and 3) maintenance and cure.[4] However, as this article focuses on unseaworthiness, issues arising under the negligence and maintenance and cure claims will only be discussed in broad terms.

B. Overview

The warranty of seaworthiness provides that the shipowner has a non-delegable duty[5] to provide the crew with a vessel and gear in seaworthy condition, such that the vessel and appurtenant equipment are reasonably fit for their intended purpose.[6] The warranty is absolute and completely divorced from concepts of negligence.[7] As applied to crew members the shipowner warrants the seaman to be of equal disposition and seamanship to ordinary men in the calling.[8]

The above rule reflects a strong policy recognizing the inherently hazardous conditions a seaman is continuously subjected to in his work environment.[9] As such, the Court has determined under proper circumstance that the shipowner is better

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2. For a general discussion on the unseaworthiness claim, *see* G. Gilmore and C. Black, The Law of Admiralty § 6-38, at 383 (2d. ed. 1975) [hereinafter Gilmore & Black].

3. 46 U.S.C. § 688 (1982). *See* generally Gilmore & Black, *supra* note 2, § 6-20, at 325. *Also see* Benedict on Admiralty, *supra* note 1, § 2, at 1-7.

4. For a general discussion on maintenance and cure, *see* Gilmore & Black, *supra* note 2, § 6-6, at 281. *See also* Benedict on Admiralty, *supra* note 1, § 42, at 4-5.

5. Mahnich v. Southern S.S. Co., 321 U.S. 96, 102 (1944).

6. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

7. Delivering the opinion for the Court, Justice Rutledge discusses the absolute nature of unseaworthiness:

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

Seas Shipping v. Sieracki, 328 U.S. 85, 94-95 (1946).
See also Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971), where the Court distinguishes between personal acts of instantaneous negligence and negligence in creating an unseaworthy condition.

8. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 337 (1955), *approving* Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (1952).

9. Mahnich v. Southern S.S. Co., 321 U.S. 96, 103-04 (1944). *See also infra* note 30 and accompanying text.

suited to pass the risk of loss to the shipping community (who benefits from the seaman's services), rather than imposing the brunt of loss solely on the injured seaman.[10]

In determining whether the shipowner's warranty of seaworthiness has been breached by the assaulting seaman, the Supreme Court in *Boudoin v. Lykes Bros. S.S. Co.*,[11] stated:

> The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? If it is the former, it is one of the risks of the sea that every crew takes. If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member.[12]

In plying the murky waters of unseaworthiness the following discussion will attempt to assist the Ninth Circuit in distinguishing between liability and non-liability under the doctrine. For this purpose the remainder of the article will be divided into three main topic headings: 1) history and development of the unseaworthiness doctrine; 2) a main discussion of proposals; and 3) a conclusion.

II. HISTORY AND DEVELOPEMENT

A. Evolution of the unseaworthiness doctrine in relation to seaman's personal injury

The modern doctrine of unseaworthiness as applied to seamen's personal injury has evolved over a period of centuries.[13] The exact origins of the doctrine are unclear, although

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10. Seas Shipping v. Sieracki, 328 U.S. 85, 93-94 (1946). *See also infra* notes 31 and 39 with accompanying text.

11. 348 U.S. 336 (1955).

12. *Id.* at 340.

13. For a general discussion on the history of the unseaworthiness doctrine in regard to seamen's personal injury, *see* Mitchell v. Trawler Racer, 326 U.S. 539, 543-550 (1960). *See also generally* Benedict on Admiralty, *supra* note 1, § 23, at 3-16. Additionally, *see* Chamlee, The Absolute Warranty of Seaworthiness: A History and Comparative Study, 24 Mercer L. Rev. 519, 528-29 (1973).

mention of it may be found in the early sea codes of continental Europe.[14] These codes dealt with the seaman's right to maintenance and cure when injured in the service of the vessel.[15]

During the early 19th century, American courts extended the doctrine to encompass the seaman's wage claim for abandonment of an unseaworthy vessel.[16] During the later part of that century the doctrine was further extended to recovery for personal injury.[17] These early cases imposed a negligence "due diligence" standard on the shipowner to provide a seaworthy vessel.[18] Under the negligence standard a seaman could not recover for injuries caused by a hazardous condition of which the vessel's owner or ship's officers were neither actually nor constructively aware.[19]

Courts recognizing the seaman's unique and inherently hazardous work environment began to unravel the negligence strand from the unseaworthiness claim beginning with the famous *Osceola* dicta in 1903.[20] In the subsequent case of *Carlisle Packing Co. v. Sandanger*,[21] the Court suggested that the vessel in question may have been unseaworthy at the time she left the dock without regard to negligence.[22] This was taken by subsequent courts and commentators as imposing an absolute duty on the part of the shipowner detached from any concepts of negligence.[23]

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14. *Michell*, 362 U.S. at 543.
15. *Id.* at 543.
16. *Id.* at 544.
17. *Id.*
18. *Id.*
19. *See* BENEDICT ON ADMIRALTY, *supra* note 1, § 23, at 3-19.
20. Although subject to much debate, considering the historical context of the opinion, Justice Brown, states in dicta:

> Upon full review, however, of English and American authorities upon these questions, we believe the law may be considered as settled upon the following propositions:
>
> . . .
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of ship or a failure to supply and keep in order the proper appliances appurtenant to the ship.[citation omitted].

The Osceola, 189 U.S. 158, 175 (1903).
21. 259 U.S. 255 (1922).
22. *Id.* at 259.
23. *See generally* discussion of unseaworthiness after the Osceola in Mitchell v.

By 1944, the Supreme Court in *Mahnich v. Southern S.S. Co.*,[24] set the course for the modern day doctrine of seaworthiness regarding personal injury recovery, by expressly stating its suggestion in *Carlisle Packing Co.*,[25] that the shipowner has an absolute duty to provide a seaworthy vessel without regard to negligence. From *Mahnich* and subsequent refinements, the modern rule of seaworthiness may be stated as a non-delegable duty[26] by the shipowner to provide the crew with a vessel and gear in a seaworthy condition, such that the vessel is reasonably fit for her intended purpose.[27] This duty is absolute and completely divorced from concepts of negligence.[28]

The strong policy behind the rule recognizes that seamen are generally powerless[29] to protect themselves from the inherent hazards of their living and work environment.[30] Risk of loss

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Trawler Racer, 362 U.S. 539, 545-550 (1960).

24. 321 U.S. 96 (1944).

25. *Id.* at 100-02.

26. *Id.* at 102.

27. *Mitchell*, 362 U.S. at 550.

28. *See infra* note 8.

29. 46 USC § 11501 (1983) provides in relevant parts:

> Penalties for specified offenses.
>
> When a seaman lawfully engaged commits any of the following offenses, the seaman shall be punished as specified:
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> . . .
>
> (4) For willful disobedience to a lawful command at sea, the seaman, at the discretion of the master, may be confined until the disobedience ends, and on arrival in port forfeits from the seaman's wages not more than 4 days pay or, at the discretion of the court, may be imprisoned for not more than one month.
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> (5) For continued willful disobedience to a lawful command or continued willful neglect at sea, the seaman, at the discretion of the master, may be confined, on water and 1,000 calories, with full rations every 5th day, until the disobedience ends, and on arrival in port forfeits, for each 24 hours' continuance of the disobedience or neglect, not more than 12 days' pay or, at the discretion of the court, may be imprisoned for not more than 3 months.
>
> (6) For assaulting a master, mate, pilot, engineer, or staff officer, the seaman shall be imprisoned for not more than 2 years.

30. In discussing the underlying policy of the unseaworthiness doctrine, Justice Stone states:

> We have often had occasion to emphasize the conditions of the seaman's employment (citation omitted), which have been deemed to make him a ward of the admiralty and to place a large responsibility for his safety on the owner. He is subject

for injuries resulting from hazardous conditions will pass to the shipowner who spreads the loss to the shipping industry as a whole, which benefits from the seaman's services under hazardous conditions.[31] It was against this backdrop that the courts began extending the warranty of seaworthiness to include the ship's crew.

B. THE UNSEAWORTHINESS DOCTRINE AND ASSAULT BETWEEN CREW MEMBERS

In *Keen v. Overseas Tankship Corp.*,[32] the plaintiff originally brought suit under an unseaworthiness and negligence claim for injuries resulting from an unprovoked attack with a meat cleaver by a fellow crew member.[33] Judge Learned Hand reversed the district court judgment for defendant and ordered a new trial.[34] Noting the general warranty of seaworthiness extended to both patent and latent defects in the vessel's hull and

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> to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done.

Mahnich v. Southern S.S. Co., 321 U.S. 96, 103-04 (1944).

31. In discussing the shipowner/crew member relationship, Justice Rutledge, delivering the opinion for the Court, stated:

> [The] helplessness of [seamen] to ward off [marine hazards] and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault [footnote]. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-94 (1946).

32. 194 F.2d 515 (2d Cir. 1952).

33. *Id.* at 516.

34. *Id.* at 519.

gear Judge Hand stated:

> [W]e can see no reason for saying that, although the owner is liable if the ship's plates[35] are started without his knowledge, he is not liable if he signs on a homicidal paranoiac, whose appearance does not betray his disposition.[36]

In extending the warranty of seaworthiness to include the vessel's crew, Judge Hand stated that the warranty was "not that the seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to ordinary men in the calling."[37] Thus, if the assaulting seaman's disposition fell below that of the ordinary seaman, his unequal disposition constitutes a "defective" condition for which the shipowner will be held strictly liable.

Consistent with the policy as stated in *Mahnich* and subsequent decisions,[38] the court stressed that the injured seaman should not bear the risk of loss as a result of an inherently dangerous condition (the unequally disposed seaman), even where the owner had used due diligence in selecting a crew.[39] Risk of

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35. A "plate" generally refers to a flat piece of steel used in shipbuilding. Its name will vary depending on use (*e.g.*, "tank top plating", plating used to form the top of a double bottom; or "deck plating", plating used to form the deck). "Plates", as Judge Hand used the term, appears to refer to the hull plating or plating that forms the skin of the ship. *See generally* E. TURPIN AND W. MCEWEN, MERCHANT MARINE OFFICERS' HANDBOOK, at 14-32 (1965), and W. EDDINGTON, GLOSSARY OF SHIPBUILDING AND OUTFITTING TERMS, at 210 (1944).

36. *Id.* at 518.

37. *Id.*

38. *See supra* notes 30 and 31.

39. Judge Learned Hand, speaking to fears that adoption of such a rule would shut down the shipping industry, states:

> As for the fears of the judge [in adopting this rule] in the case at bar which we have just mentioned, we can see no antecedent reason to assume that after the owner has used due care in selecting the crew, they will in many instances turn out not to be up to the ordinary measure of the calling. But suppose there will be many such instances; that is no reason why an individual seaman who has suffered because his fellow is not up to his work, must bear the loss. Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will show in freight rates; and so far as it does, the recovery will be spread among those who use the ships. As we have said, this has been the uniform practice when the injury has arisen from defects

loss is passed to the shipowner and any increase in freight fares, as a result of increased insurance premiums, would be spread among those who use such services.[40]

A qualification to *Keen* appeared the following year in *Jones v. Lykes Bros. S.S. Co.*[41] In *Jones*, the plaintiff seaman brought an unseaworthiness claim for injuries sustained when his roommate beat him, resulting in a broken hip.[42] The beating took place without apparent provocation although the two had argued several hours earlier.[43] The trial court held the roommate was of unequal disposition under the *Keen* standard, thus breaching the shipowner's warranty of seaworthiness.[44]

On appeal Judge Learned Hand reversed.[45] Finding the owner would not be held liable for every "sailors' brawl",[46] the court refined the meaning of the seaman's disposition by stating that:

> [A]ll men are to some degree irascible . . . [but]. . .[s]ailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the "disposition" of "the ordinary men in the calling."[47]

In other words, what may appear to an office worker insufficient provocation for a fist fight, could be sufficient provocation for a seaman. Thus, *Jones* added a new qualification in assessing the assaulting seaman's disposition.

In conclusion, the court found the assailant had not breached the shipowner's warranty of seaworthiness.[48] Addition-

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> in material; and we have yet to learn that hull and gear are less likely to fail under stress than those who handle both.

Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (2d Cir. 1952).

40. *Id.*
41. 204 F.2d 815 (2d Cir. 1953).
42. *Id.* at 817.
43. *Id.* at 816.
44. *Id.*
45. *Id.* at 817.
46. *Id.*
47. *Id.* at 817.
48. *Id.* In reversing Judge Hand states: "Such a set-to seldom results in serious in-

ally, the court noted in other cases of this type, a prior history of violent behavior, use of a weapon, or worse, had been shown before liability was imposed.[49] *Keen* and *Jones* became the foundation cases for the Supreme Court in *Boudoin* two years later.

In *Boudoin*, a heavily intoxicated crew member snuck into the plaintiff's room to steal a bottle of liquor.[50] When the plaintiff awoke the assailant beat him over the head with a bottle causing severe injuries.[51] Shortly after the attack the assailant came back with a knife intending to inflict further injury on the plaintiff.[52] After threatening the mate, the assailant left the vessel without permission to obtain more alcohol.[53] The master eventually placed him in irons and subsequently discharged him from the vessel.[54]

In affirming the trial court's finding of unseaworthiness the Court stated:

> 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 [footnote]. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect.[55]

Attempting to draw a line between breach and non-breach of warranty, the Court distinguished between "an assault within the usual and customary standards of the calling" and one com-

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jury, when only fists are used, and we are to judge Hunter's disposition, not by the fact that the plaintiff broke his hip, but by what would ordinarily follow from what he did." *Id.* at 817.

Curiously, it would appear from the majority of subsequent case law that the facts in *Jones* would result in breach of warranty. *See, e.g., infra*, note 73 and accompanying text.

See also, T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, (1987), §53, at 167, where proximate causation under the unseaworthiness doctrine is viewed in the traditional sense, such that: "(1) the unseaworthiness played a substantial part in bringing about or actually causing the injury and that (2) the injury was either a direct result or a reasonably probable consequence of the unseaworthiness."

49. *Id.*

50. *Boudoin*, 348 U.S. at 337.

51. *Id.*

52. *Id.* at 338.

53. *Id.*

54. *Id.*

55. *Id.* at 339.

mitted by "a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature."[56] If the former, the seaman bore the risk of loss.[57] If the latter, the shipowner bore the risk.[58] The Court additionally adopted the *Jones* qualification in assessing the seaman's disposition such that it must be bore in mind that seamen are more easily provoked than office workers.[59]

The trial court found the assailant of unequal disposition by evidence that he was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults."[60] The Supreme Court affirmed the trial court decision, finding the assailant had crossed the line, and breached the shipowner's warranty of seaworthiness.[61]

III. MAIN DISCUSSION

A. AIDS TO NAVIGATION

1. Analogy to criminal "aggravated assault"

One of the simpler rules of prudent navigation is to know where you are and where you are going. The discussion up to this point has focused on the first part of our prudent navigation rule, where are we?

The Court in *Boudoin*, asks us to distinguish between "an assault within the usual and customary standards of the calling" commonly referred to as the "sailors' brawl",[62] and the case of

56. *Id.* at 340.
57. *Id.*
58. *Id.*
59. *Id.* at 339, citing to *Jones* with approval.
60. Boudoin v. Lykes Bros. S.S. Co., 112 F. Supp. 177 (E.D. La. 1953), *rev'd*, 221 F.2d 618 (5th Cir. 1954), *cert. granted*, 348 U.S. 336 (1955).
61. *Boudoin*, 348 U.S. at 340.
62. *Id.* at 339. It would appear that "sailors' brawl" is a term of art not susceptible to easy definition. In Jones v. Lykes Bros. S.S. Co., 204 F.2d 815, 816 (2d Cir. 1953), the court stated a shipowner would not be liable for "injuries resulting from every sailors' brawl." Interpreting this statement, one might conclude if the shipowner is not liable for injuries resulting from every "sailors' brawl," then there might be some sailors' brawls where he is liable. Whatever Judge Hand meant by "sailors' brawl", some courts have equated it with an "assault within the usual and customary standards of the calling." *See* Stechcon v. United States, 439 F.2d 972, 794 (9th Cir. 1971), where the court states "[t]he record before us conclusively shows that appellant's injuries were not sustained in

an assault where the assailant possesses "a wicked disposition, a propensity to evil conduct, a savage and vicious nature."[63] In breaking this proposition down into components, lets first begin with the term "assault".

Assault is often used as a generic term for the two distinct actions of assault and battery.[64] Assault in terms of a specific tort, is intent to inflict apprehension of a harmful or offensive contact, where battery is the actual physical completion of the assault.[65]

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a 'sailor's brawl'. . . ." *See also* Hildebrand v. S.S. Commander, 247 F. Supp. 625, 627 (E.D. Va. 1965).

63. *Boudoin*, 348 U.S. at 340.

64. *See* W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 46 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]:

> The two terms [of assault and battery] are so closely associated in common usage that they are generally used together, or regarded as more or less synonymous [footnote]. Loosely drawn criminal statutes, which make use of "assault" to include attempted battery, or even battery itself, have assisted in obscuring the distinction.

See also, W. LA FAVE AND A. SCOTT, CRIMINAL LAW, § 7.14(a), at 684 (2d ed. 1986) [hereinafter LA FAVE]:

> (a)Assault and Battery Distinguished.
> Although the word "assault" is sometimes used loosely to include a battery, and the whole expression "assault and battery" to mean battery [footnote], it is more accurate to distinguish between the two separate crimes, assault and battery, on the basis of the existence or non-existence of physical injury or offensive touching. Battery requires such an injury or touching. Assault, on the other hand, needs no such physical contact . . . .

65. *See* RESTATEMENT (SECOND) OF TORTS § 13 (2d ed. 1965):

> Section 13. Battery: Harmful Contact
> An actor is subject to liability to another for battery if
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
> (b) a harmful contact with the person of the other directly or indirectly results.

See also 3 E. DEVITT, C. BLACKMAR AND M. WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 81.01, at 196 (4th ed. 1987) [hereinafter FEDERAL JURY PRACTICE AND INSTRUCTIONS]:

> Intentional Tort - "assault" - "battery" - defined.
> The law protects the physical integrity of every person from all unnecessary and unwarranted violation or interference.
> Any intentional attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and an intentional display of force such as

Assuming the shipboard assault includes both intent to cause offensive touching and actual offensive touching[66] then "an assault within the usual and customary standards of the calling," must in the minimum, be some type of battery.[67] If this first type of assault is a battery, then the second type of assault of which the Court speaks, must also a battery, but with something more. Something more, the Court tells us is "a wicked disposition, a propensity to evil conduct, a savage and vicious nature."[68]

Focusing on the assaulting seaman's disposition the Court appears to be looking for a greater evil intent on the part of the assaulting seaman before finding him "defective" in terms of the warranty of seaworthiness. However, in determining intent we must focus on the circumstances surrounding the assault and the resulting harm.[69]

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would give the victim reason to fear or expect immediate bodily harm, constitutes an "assault." An "assault " may be committed without actually touching, or striking, or doing bodily harm to the person of another.

Any intentional use of force upon the person of another is a "battery." So, the least intentional touching of the person of another, if accompanied by an intentional use or display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes a "battery."

See also, PROSSER AND KEETON ON TORTS, *supra* note 64, at 39.

66. Nearly all cases in this area involve some degree of intentional offensive contact. *See, e.g.*, cases cited *infra* note 73.

67. Intentional offensive touching meeting the requirements of battery as defined *supra* note 65. *See also*, 22 ALR3d 624, 657, where the editors distinguish between the "ordinary assault" and assault by a seaman with a wicked, evil, vicious or savage disposition.

68. *Boudoin*, 348 U.S. at 340.

69. *See* FEDERAL JURY PRACTICE AND INSTRUCTIONS, *supra* note 63, at 197:

Intent - Defined - Proof of

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

See also Golden v. Sommers, 56 F.R.D. 3 (M.D. Pa. 1972) *aff'd*, 481 F.2d 1398 (3d Cir.

Under maritime criminal statutes for assaults, a similar distinction is made between the level of sanction imposed by examining the resulting harm to the victim. The misdemeanor crime or what might be termed "simple assault", includes assault by striking, beating, or wounding.[70] The felony crime or what might be termed "aggravated assault",[71] includes assault resulting in serious bodily injury.[72]

1973)("reckless" under certain circumstance may equal intent, if the evidence supports such a finding).

70. *See* 18 U.S.C. § 113(d)(e) (1982 & Supp. IV 1986) and 18 U.S.C. § 3559(a)(1)(F)-(I) (Supp. IV 1986), which defines 18 U.S.C. § 113(d)(e) as misdemeanors. 18 U.S.C. § 113 states in its relevant parts:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> . . .
>
> (d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.
>
> (e) Simple assault, by fine of not more than $300 or imprisonment for not more than three months, or both.

See also United States v. Guilbert, 692 F.2d 1340 (1982), *cert. denied*, 460 U.S. 1016 (assault by striking, beating or wounding is the equivalent of a simple battery. No particular degree of severity in injury required, nor specific intent as required by the more serious offenses under the section).

71. In discussing aggravated battery *see* LA FAVE AND SCOTT, *supra* note 64, at 684, where the authors state "Although the common law created the twin crimes (misdemeanors) of assault and battery, in modern times legislatures have added the more serious crimes (felonies) of aggravated assault and batteries (eg. assault, battery with intent to kill . . . , assault, battery with a dangerous weapon).

The authors also state "[a]ll jurisdictions have statutes, variously worded, which define aggravated batteries and punish them as felonies [footnote]. Traditionally, the most common statute of this type was one covering "assault [footnote] with intent to murder" (or to kill, or to do great bodily injury, . . . or commit mayhem). *Id.* at 688.

72. 18 U.S.C. § 113(a)-(c)(f) (1982 & Supp. IV 1986) and 18 U.S.C. § 3559(a)(1)(A)-(E) (Supp. IV 1986), which defines crimes under 18 U.S.C. § 113(a)-(c)(f) as felonies. 18 U.S.C. § 113(a)-(c)(f) states in its relevant part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> (a) Assault with intent to commit murder, by imprisonment for not more than twenty years.
>
> (b) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.
>
> (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.
>
> . . .
>
> (f) Assault resulting in serious bodily injury, by fine of not

Although a higher degree of bodily injury is not an expressed requirement of *Boudoin*, there are several inferences that suggest it is. First, as a term of art, Judge Hand's "seamans' brawl" describes the common physical encounters between fighting seamen. In stating the shipowner is not liable for every seamans' brawl, the inference is made that something more serious must result before liability will be imposed.

Second, the Court in *Boudoin* uses the adjectives "wicked, evil, savage and vicious" in describing the disposition of the assaulting seaman. An attack by an individual possessing such a mental state again infers a serious resulting injury. Third, the majority of case law in this area suggests that a higher degree of physical harm must be present before liability will be imposed.[73] In decisions favorable to plaintiff the injuries have generally en-

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more than $10,000 or imprisonment for not more than ten years, or both.

73. *See, e.g.*, the following cases resulting in favorable decisions for plaintiff, where a higher degree of resulting harm is found: Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955)(unprovoked attack with bottle causing serious injury); Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985)(unprovoked stabbing resulting in extended hospitalization); Pashby v. Universal Dredging Corp., 608 F.2d 1312 (9th Cir. 1979)(attack with 18" eyebolt causing injuries to head, leg, and hand); Calcagni v. Hudson Waterways Corp., 630 F.2d 1049 (2d Cir. 1979)(attack with wheel wrench; plaintiff incurred various bruises and lacerations); Smith v. Lauritzen, 356 F.2d 171 (3d Cir. 1966)(attack with cargo hooks causing severe head injuries); Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104 (2d Cir. 1964)(unprovoked attack using broken bottle and teeth; plaintiff hospitalized); Clevenger v. Star Fish & Oyster Co., 325 F.2d 897 (5th Cir. 1963)(attack from behind with spear causing punctured lung and severing two ribs); Kelcy v. Tankers Co., 217 F.2d 543 (2d Cir. 1954)(plaintiff attacked by assailant, causing cut over left eye, bloody nose, cuts around mouth and damaged dentures); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952)(unprovoked attack with meat cleaver causing serious head injuries); Handley v. United States, 157 F. Supp. 616 (S.D.N.Y. 1958)(stab wound to abdomen, plaintiff hospitalized); Bartholomew v. Universe Tankers, 168 F. Supp. 155 (S.D.N.Y. 1957)(unprovoked attack with fists and feet; plaintiff trampled); Thompson v. Coastal Oil Co., 119 F. Supp. 838 (D.N.J. 1954)(plaintiff attacked from behind with meat cleaver; severe injuries to head).

In the following cases, plaintiff failed to establish unseaworthiness under fact patterns where lesser degrees of resulting harm was found: Lambert v. Morania Oil Tanker Corp., 677 F.2d 245 (2d Cir. 1982)(assailant hit plaintiff with fists and foot); Schultz v. Evelyn Jewell, Inc., 476 F.2d 630 (5th Cir. 1973)(assault on shrimp boat; no serious injury reported by the court); Kirsch v. United States, 450 F.2d 326 (9th Cir. 1971)(plaintiff struck twice with fists, was able to work rest of voyage); Boorus v. West Coast Trans-Oceanic, 299 F.2d 893 (9th Cir. 1962)(fist fight between crew members; no injury seen or reported); Stankiewicz v. United Fruit S.S. Corp., 299 F.2d 580 (2d Cir. 1956)(assailant hit plaintiff with jacket zipper); Walters v. Moore-McCormack Lines, Inc., 309 F.2d 191 (2d Cir. 1952)(assailant hit plaintiff with fists; no corroborated evidence of serious injury); Kuhl v. Manhattan Tankers Co., 1972 A.M.C. 236 (E.D. Va. 1972)(plaintiff claims struck in face by chief mate, no medical attention sought).

tailed serious injury, debilitation and or medical attention.[74]

In sum, by drawing an analogy from the criminal code it would appear that case law under the unseaworthiness claim has grafted a type of civil "aggravated battery" into the general maritime law couched in unseaworthiness language. As such, although not directly addressed by the Court in *Boudoin*, a strong inference can be made that similar to criminal aggravated assault a higher degree of resulting harm must be found before the seaman will be found to be unequally disposed.

Caution should be exercised though in keeping the two bodies of general maritime law and criminal code separate and distinct. First, the doctrine of unseaworthiness is not controlled by the criminal statute.[75] Additionally, the underlying principle of criminal law is to protect the public as a whole, where the primary purpose of unseaworthiness is to compensate the individual seaman for injuries incurred.[76] However, given this cautionary note the analogy may still prove useful as a reference point in distinguishing the "sailors' brawl" and assault by the unequally disposed seaman, by focusing on the resulting harm.

2. The fighting seaman stereotype

A second murky area is the *Jones* qualification on seamen's disposition. In *Jones*, the court makes two statements emphasizing the plaintiff's heavy burden in proving that the assault went beyond the "usual and customary standards of the calling."[77] First, the court states that in determining the seaman's disposition it must be bore in mind that they are more easily provoked to fight than ordinary office workers.[78] Later the opinion states "in other decisions of this sort the assault has been either with a weapon, or the assailant has been independently shown to have been exceptionally quarrelsome, or worse."[79]

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74. *See generally, supra* note 73 and accompanying text.

75. On a plain reading, 18 U.S.C. § 113 has no application to the unseaworthiness claim.

76. *See generally*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS §2, at 7 (4th ed. 1971).

77. *Jones*, 204 F.2d at 817.

78. *Id.* at 817.

79. *Id.*

Both statements speak to the plaintiff's heavy burden in proving unequal disposition, but on what foundations are they based? The latter statement cites a string of cases to back up the proposition.[80] The former statement cites no statistical or case authority. One could speculate that the statement may be a product of an antiquated stereotype of seamen as brawlers.

Apparently, the court in *Jones* felt the *Keen* standard drifting away from the pier and decided to tightened up on the shorelines in order to bring the vessel back alongside. Unfortunately, it seems they took in too tight on the head line (with the fighting seaman stereotype), thus leaving the stern out in the stream. Most courts have been able to steer clear of the hazard created by stereotyping, hopefully recognizing its underlying intent by focusing on plaintiff's heavy burden more than the truth of the statement itself.

As the stereotype of the fighting seaman appears based more in fiction than fact, is it useful to retain it? Removal would not appear to conflict with policy considerations in protecting the seaman's risk of loss in an inherently dangerous environment.[81] Additionally, by removing the stereotype, the equal disposition of seamen can be judged in its present day 20th Century context.[82] For these reasons the Ninth Circuit should dismiss Judge Hand's caricature as an unfortunate choice of words; however, his underlying intent of plaintiff's heavy burden in proving unequal disposition should be retained.

B. GUIDEPOSTS

Up to this point we have basically dealt with the *Keen*, *Jones* and *Boudoin* trilogy that leaves us a policy, a rule, and a brief list of factors as guidelines.

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80. *Id.* at 817, *citing* Keen v. Overseas Tankship Co., 194 F.2d 515 (2d Cir. 1952); Kyriakos v. Goulandris, 151 F.2d 132, 135 (2d Cir. 1945); Koehler v. Presque-Isle Transportation Co., 141 F.2d 490 (2d Cir. 1944); The Rolph, 299 F. 52, 55 (9th Cir. 1924).

81. *See supra* notes 30 and 31.

82. For an example of how the stereotype works, *see* Hildebrand v. S.S. Commander, 247 F. Supp 625, 627 (E.D. Va. 1965), where the court states that the assailant acted without "intoxicating beverages so frequently leading to the typical sailors brawl." The publishing headnotes naturally interpreted this as a "drunken sailors brawl."

The policy recognizes inherent hazards in the seaman's unique work environment over which he has little control.[83] The risk of loss will pass to the shipowner for seamen's injuries resulting from hazardous conditions on board the vessel.[84] The shipowner will in turn spread the loss among the shipping industry who benefit from performance of the seaman's services under the hazardous conditions.[85]

The policy is implemented via the shipowner's warranty of seaworthiness. Under the warranty, the shipowner has an absolute duty to provide a seaworthy vessel such that the vessel and appurtenant gear are reasonably fit for their intended purpose.[86] The warranty has been extended to include the vessel's crew members.[87] In the context of seamen, the shipowner warrants him to be of equal disposition to other ordinary seamen of the calling.[88]

In determining whether a seaman possesses an unequal disposition at the time of the assault, thus breaching the shipowner's warranty, we are called on to distinguish between an assault within the "usual and customary standards of the calling" and an assault by a seaman with a wicked and vicious disposition.[89] A useful analogy in distinguishing the two situations may be drawn from the criminal law distinction between "simple assault" and "aggravated assault", where the aggravated assault requires a higher degree of resulting injury.

In *Boudoin* and *Jones* the respective courts developed a short list of relevant factors to aide in determining whether the assaulting seaman possessed an unequal disposition. The Supreme Court in *Boudoin* found factors such as violent character, belligerent disposition, excessive drinking habits, disposed to fighting, and making threats and assaults to be significant in determining disposition.[90] In *Jones*, the court suggested the use of

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83. *See supra* notes 30 and 31 with accompanying text.

84. *See supra* notes 30, 31, and 39 with accompanying text.

85. *Id.*

86. *Mahnich*, 321 U.S. at 102; *Mitchell*, 362 U.S. at 539; *Sieracki*, 328 U.S. at 94-95; *Usner*, 400 U.S. at 500.

87. *See supra* note 8.

88. *Boudoin*, 348 U.S. at 339.

89. *Id.* at 340.

90. *Id.*

a weapon, exceptionally quarrelsome behavior, or worse was needed.[91]

Combining the *Boudoin* and *Jones* factors into excessive intoxication, history of prior assaults or aggressive behavior, use of a weapon, or worse, is useful but lacking as a comprehensive list. Fortunately, subsequent circuit decisions have fleshed out several more factors that add to the laundry list. Pulling together and analyzing all the various cases has lead the authors to propose nine significant factors that should be examined in making a determination of the unseaworthiness claim. The list includes; 1) *provocation*, 2) *injury*, 3) *prior and subsequent acts*, 4) *intoxication*, 5) *use of a weapon*, 6) *physical differences*, 7) *self-defense*, 8) *warning*, and 9) *conduct of superiors*.

If one accepts the arguments and discussion up to this point then the following will probably appear to be nothing more than common sense guidelines. The proposed guideposts are by no means exhaustive, but they do suggest some recurring themes that the Ninth Circuit as well as other circuits have considered important. As it is doubtful that any two assaults will occur in the same manner, different factors may be given more or less weight than suggested here. It is in the end a judgment call, it is hoped the following proposed guidelines may prove helpful in that determination.

1. *Provocation*. If one may infer that a person who attacks without provocation possesses violent tendencies, then provocation may become an important factor in distinguishing between equal and unequal disposition. In *Pashby v. Universal Dredging Corp.*,[92] plaintiff was assaulted in an unprovoked rear attack by a deckhand using an 18" eyebolt.[93] The court reversed summary judgment for defendant finding that the nature of the assault raised material issues to the claim.[94]

A similar result was reached in *Stechcon v. United States*,[95]

91. *Jones*, 204 F.2d at 817.
92. 608 F.2d 1312 (9th Cir. 1979).
93. *Id.* at 1313.
94. *Id.* at 1314.
95. 439 F.2d 792 (9th Cir. 1971).

in an unprovoked attack from rear with fists.[96] Here the court found the assault conclusively not of the "sailor's brawl" type, and reversed summary judgment for defendant.[97] In sum, a lack of provocation would appear to be a strong inference of unequal disposition in the Ninth Circuit.[98]

On the flip side, district court decisions within the Ninth Circuit have found that a provoking seaman should not benefit from his own wrongdoing as evidenced in *Watson v. The Letita Lykes*,[99] and *Palmer v. Apex Marine Corp.*[100] In *Watson*, the overwhelming evidence showed plaintiff provoked the fight and the other seaman only acted in self defense.[101] In *Palmer*, the court dismissed plaintiff's unseaworthiness claim where the evidence showed plaintiff provoked an attack on his watch partner who possessed no apparent propensities toward evil conduct.[102]

Additionally, where there is mutual provocation as in *Boorus v. West Coast Trans-Oceanic S.S. Line*,[103] and *Mon-*

96. *Id.* at 794.

97. *Id.*

98. For similar result in other circuits where little or no provocation was found, see Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985)(unprovoked attack from rear with a knife); Claborn v. Star Fish & Oyster Co., 578 F.2d 983 (5th Cir. 1978)(unprovoked fatal attack from rear with 10" bait knife); Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104, 106 (2d Cir. 1964)(unprovoked attack by assailant with broken glass, a bottle and biting with his teeth); Hildebrand v. S.S. Commander, 247 F. Supp. 625 (E.D. Va. 1965)(unprovoked attack by second mate on third mate after third mate refused to stand second mate's watch); Bartholomew v. Universe Tanker, Inc., 168 F. Supp. 155, 156 (S.D.N.Y. 1957)(unprovoked attack; assailant trampled and beat plaintiff with fists and then attempted to throw him over the side).

99. 135 F. Supp. 933 (S.D. Cal. 1955).

100. 510 F. Supp. 72 (W.D. Wash. 1981).

101. *Watson*, 135 F. Supp. at 934.

102. *Palmer*, 510 F. Supp. at 73. For similar cases where evidence showed plaintiff may have provoked attack, see Harbin v. Interlake S.S. Co., 570 F.2d 99, 104 (6th Cir. 1978)(plaintiff's provocation coupled with the fact that assailant hit him in non-vital areas plus assailant's good record did not support a conclusion of savage disposition); Smith v. American Mail Lines, Ltd., 525 F.2d 1148 (9th Cir. 1975)(court speculates that plaintiff's deceased may have provoked attack); Robinson v. S.S. Atlantic Sterling, 369 F.2d 69, 71 (5th Cir. 1967)(plaintiff captain provoked messman into violent attack with knife); McConville v. Florida Towing Corp., 321 F.2d 162, 164-65 (1st Cir. 1963)(court finds plaintiff's own misconduct and provocation the sole proximate cause of his injuries); Stankiewicz v. United Fruit S.S. Corp., 229 F.2d 580 (2d Cir. 1956)(inference (discussed under negligence claim) that plaintiff had tied assailant's clothes in knots prior to assailant striking plaintiff with his jacket); Kuhl v. Manhattan Tankers Co., 1972 A.M.C. 236, 239-40 (E.D. Va. 1972)(plaintiff bosun habitually drunk and argumentative provoked chief mate into hitting him).

103. 299 F.2d 893 (9th Cir. 1962).

plaisir v. Delta S.S. Lines,[104] the Ninth Circuit has not imposed liability. In *Boorus*, plaintiff bosun filed an unseaworthiness and negligence claim for alleged injuries resulting from a fight with the ship's carpenter.[105] The Ninth Circuit affirmed judgment for the shipowner where circumstance suggested both parties were protagonists in the fight.[106]

In *Monplaisir*, the plaintiff was summoned before a Coast Guard administrative hearing after a knife fight, forcing him to leave the vessel early.[107] Plaintiff brought suit under an unseaworthiness claim for loss of wages and damages alleging that he was wrongfully discharged.[108] The district court noted the Coast Guard ALJ decision that found both parties to the fight willing participants and guilty of misconduct.[109] The district court granted summary judgment to defendant finding that plaintiff's own misconduct was the substantial factor which lead to his discharge, and not the other party's action.[110]

In addition to the general discussion of provocation above, *Jones* and *Boudoin* remind us that in determining disposition, seamen are more easily provoked than office workers.[111] For reasons mentioned earlier the authors feel this caveat should be dismissed. Lack of adequate provocation should be viewed in terms of the disposition of the present day ordinary seaman, without regard to antiquated stereotypes.

2. *Injury*. The seriousness and permanent nature of an injury may be a strong indication of the inflicting party's disposition. Again, drawing an analogy from criminal "aggravated assault" statutes, it appears the circuits are looking for serious

104. 1983 A.M.C. 694 (N.D. Cal. 1983).

105. *Boorus*, 299 F.2d at 893.

106. *Id.* at 894-95.

107. *Monplaisir*, 1983 A.M.C. at 695.

108. *Id.* at 694.

109. *Id.* at 695.

110. *Id.* at 698. *See also* Connolly v. Farrell Lines Inc., 268 F.2d 653 (1st Cir. 1959)(plaintiff accuses assailant of not paying debts in dice game; assailant charges plaintiff; plaintiff later advances on assailant with broken bottle); Gulledge v. United States, 1972 A.M.C. 1187 (E.D. Penn. 1972)(conflicting evidence as to who was the aggressor). *See also* Holmes v. Mississippi Shipping Co., 301 F.2d 474 (5th Cir. 1962), *cert. denied*, 371 U.S. 802 (1962)(self inflicted amputation of right hand due to plaintiff's own mental delusion did not render vessel unseaworthy).

111. *Jones*, 204 F.2d at 817. *Boudoin*, 348 U.S. at 339.

bodily injury in distinguishing between the "sailor's brawl" and the assault committed with a "wicked and savage disposition." However, factors such as provocation and causation may lessen its affect.[112]

In *Smith v. American Mail Line, Ltd.*,[113] plaintiff's deceased was murdered by an unknown assailant who nearly decapitated him with a fire axe.[114] However, because the vessel carried 12 passengers (as to which the shipowner owes no warranty of seaworthiness) each of whom could have been the murderer, breach of warranty was not established.[115] However, the court acknowledged the district court finding that the attacker had a vicious and savage character such that it could render the ship unseaworthy, if the assailant had been a crewmember.[116]

Serious injury was also apparent in *Pashby*, where plaintiff suffered severe injuries to his head, leg, and hand, after an unprovoked assault by a deck hand wielding an 18" eyebolt.[117] The Ninth Circuit reversed defendant's summary judgment.[118]

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112. *See e.g.*, Harbin v. Interlake S.S. Co., 570 F.2d 99, 101-04 (6th Cir. 1978)(plaintiff hit on hip with pipe; evidence of provocation by the plaintiff and the assailant's good record did not support a finding of savage disposition); Smith v. American Mail Line, Ltd., 525 F.2d 1148 (9th Cir. 1975)(fatal injury but plaintiff failed to establish injury inflicted by crewmember); Robinson v. S.S. Atlantic Sterling, 369 F.2d 69, 71 (5th Cir. 1967)(plaintiff stabbed in stomach, but provoked his assailant); McConville v. Florida Towing Corp., 321 F.2d 162, 164 (1st Cir. 1963)(intoxicated plaintiff provoked fight); Connolly v. Farrell Lines, Inc., 268 F.2d 653 (1st Cir. 1959)(plaintiff advanced on assailant with broken bottle); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir. 1954)(broken hip was not the usual result in this type of assault); Monplaisir v. Delta S.S. Lines, 1983 A.M.C. 649 (N.D. Cal. 1983)(both parties willingly entered into knife fight causing suspension of papers); Descendia v. Hudson Waterways Corp., 1975 A.M.C. 1403, 1407 (S.D.N.Y. 1975)(cut to lower lip; plaintiff was aggressor); Gulledge v. United States, 1972 A.M.C. 1187 (E.D. Penn. 1972)(twenty-three stitches required for head cuts; strong inference of plaintiff returning to start second fight).

113. 525 F.2d 1148 (9th Cir. 1975).

114. *Id.* at 1149.

115. *Id.*

116. *Id.*

117. *Pashby*, 608 F.2d at 1313.

118. *Id.* at 1314. For other cases involving serious injury, see Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 337 (1955)(severe head injuries, medical treatment required); Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985)(stab wound in back requiring 12 days hospitalization; recurring pshycological problems); Calcagni v. Hudson Waterways Corp., 630 F.2d 1049, 1051 (2d Cir. 1979)(multiple bruises and lacerations) Stechcon v. United States, 439 F.2d 792, 794 (9th Cir. 1971)(cut to eye requiring stitches); Horton v. Moore-McCormack Lines, 326 F.2d 104, 106 (2d Cir. 1964)(injuries resulting from severe beating required shoreside hospitalization); Clevenger v. Star Fish

However, where the physical injury is non-existent, unreported for a significant period of time, or only requiring slight medical attention, the inference of unequal disposition is less. In *Watson*, x-rays showed injury had occurred prior to the fight in question and the plaintiff's unseaworthiness claim was ultimately dismissed.[119] A similar result was also reached in *Boorus*, where no injury was apparent or reported during the voyage.[120] In *Kirsch v. United States*,[121] plaintiff was hit twice but no serious injury was reported. Plaintiff was able to work the rest of the voyage, and judgment for plaintiff was ultimately reversed.[122]

In sum, it appears the Ninth Circuit is looking for some type of serious injury before considering breach of warranty. Additionally, for reasons stated earlier under "Analogy to criminal aggravated assault", *supra*, the nature of the injury is a critically important factor in the proper analysis of the unseaworthiness claim.

3. *Prior and subsequent acts or conditions.* In proving the unequal disposition of the assailant, prior or subsequent acts of violence, belligerence, or excessive intoxication, may infer unequal disposition at the time of the assault.[123] The weight given

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& Oyster Co., 325 F.2d 397, 398 (5th Cir. 1963)(two ribs severed and punctured lung); Keen v. Overseas Tankship Corp., 194 F.2d 515, 516 (2d Cir. 1952)(serious injury to head); The Rolph, 299 F. 52 (9th Cir. 1924)(injury to eyes and permanent injury); Hildebrand v. S.S. Commander, 247 F. Supp. 625, 626 (E.D. Va. 1965)(front tooth knocked out, requiring shoreside treatment); Handley v. United States, 157 F. Supp. 616, 618 (S.D.N.Y. 1962)(stab wound to abdomen; three weeks hospitalization); Thompson v. Coastal Oil Co., 119 F. Supp. 838, 841 (D.N.J. 1954)(near fatal blow to head; recurring neuropsychiatric problems).

119. *Watson*, 135 F. Supp. at 934.

120. *Boorus*, 299 F.2d at 896.

121. 450 F.2d 326 (9th Cir. 1971).

122. *See also* Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 247 (2d Cir. 1982)(plaintiff kicked in knee during fight); Stankiewicz v. United Fruit S.S. Corp., 229 F.2d 580, 581 (2d Cir. 1956)(plaintiff hit in eye with jacket zipper); Monplaisir v. Delta S.S. Lines, 1983 A.M.C. 649 (N.D. Cal. 1983)(no physical injury pleaded); Palmer v. Apex Marine Corp., 510 F. Supp. 72 (W.D. Wash. 1981)(finger bitten during fight); Kuhl v. Manhattan Tankers Co., 1972 A.M.C. 238, 240 (E.D. Va. 1972)(plaintiff hit once in face with fist; no medical attention sought or given).

123. In BENEDICT ON ADMIRALTY, *supra* note 1, at 3-257, the authors state that "[t]he courts are somewhat reluctant, except in the most extreme cases, to allow the jury to infer from the nature of the assault itself that the assailant had a violent disposition; additional proof of prior acts in support thereof is usually necessary."

In addition to prior acts, subsequent acts have also been examined. *See* Boudoin v.

such evidence has varied within the Ninth Circuit.

In *Boorus*, and *Palmer*, the courts found no evidence of prior quarrelsome behavior by the assailant, ultimately ruling in the shipowner's favor.[124] However, in *Kirsch*, the court found evidence of three prior fist fights and one subsequent to the assault on plaintiff, yet reversed judgment for plaintiff.[125] Then in *Stechcon*, where there was no evidence of quarrelsome history, but the assailant attacked from the rear without provocation requiring stitches to the eye, summary judgment for defendant was reversed.[126]

The varying weight given prior and subsequent acts in the above cases appears to parallel closely the severity of the injury and lack of provocation.[127] A similar trend can be observed in other circuits where evidence of prior and subsequent acts are introduced.[128]

Lykes Bros. S.S. Co., 348 U.S. 336, 338 (1955)(after the assault, assailant left the vessel against orders and was subsequently placed in irons and later discharged); Kirsch v. United States, 405 F.2d 326, 327 (9th Cir. 1971)(assailant had history of three prior fist fights and one subsequent to assault on plaintiff); Hildebrand v. S.S. Commander, 247 F.Supp. 625, 627 (E.D. Va. 1965)(assailant pulled knife on chief mate after assaulting second mate).

For admission of prior and subsequent acts *see generally* 22 C. WRIGHT AND K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE, § 5242, at 487 (1978).

124. *Boorus*, 299 F.2d at 896. *Palmer*, 510 F. Supp. at 73.

125. *Kirsch*, 450 F.2d at 327.

126. *Stechcon*, 439 F.2d at 794.

127. *See, e.g.*, Kirsch v. United States, 450 F.2d 326, 327 (9th Cir. 1971)(plaintiff able to work rest of voyage after apparently unprovoked attack); Stechcon v. United States, 439 F.2d 792 (9th Cir. 1971)(attack unprovoked, stitches to eye required); Boorus v. WestCoast Trans-Oceanic, 299 F.2d 893, 895 (9th Cir. 1962)(both parties protagonists; no injury reported to ship's officers); Palmer v. Apex Marine Corp., 510 F. Supp. 72, 73-74 (W.D. Wash. 1981)(both protagonists; plaintiff suffered injury to finger); Watson v. Letitia Lykes, 135 F. Supp. 933, 934 (S.D. Cal. 1955)(plaintiff the aggressor; nominal injuries).

128. *See, e.g.*, Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 246 (2d Cir. 1982)(assailant had minor criminal record; parties had roomed together for a week with out complaint or incident); Harbin v. Interlake S.S. Co., 570 F.2d 99, 101 (6th Cir. 1978)(assailant was a licenced officer for twenty-six years, never a complaint, never lost his temper, highly regarded by crew, no prior problems with plaintiff); Robinson v. S.S. Atlantic Sterling, 369 F.2d 69, 71 (5th Cir. 1967)(assailant was a quiet, peaceful and efficient man); Gerald v. United States Lines, 368 F.2d 343 (2d Cir. 1966)(no evidence of prior violent conduct by either parties); Horton v. Moore-McCormack Lines Inc., 326 F.2d 104 (2d Cir. 1964)(assailant had previously attacked and bitten another crew member); McConville v. Florida Towing Corp., 321 F.2d 162, 164 (1st Cir. 1963)(plaintiff had struck the assailant nine months before; assailant was not quarrelsome nor prone to fighting; had tried to avoid the fight); Walters v. Moore-McCormack Lines, Inc., 309 F.2d

Additionally, evidence of contrition has appeared in two early Second Circuit cases as a significant mitigating act.[129] Apparently, having offered apologies had some influence in concluding the assailant was of equal disposition.[130] Although lip service has been paid to contrition as a factor in subsequent cases it has not reappeared as a significant factor.[131]

4. *Intoxication.* The assailant's severe drunken state in *Boudoin* was one of several important factors the Court considered in upholding the unseaworthiness claim.[132] The Ninth Circuit has followed *Boudoin* and examined the influence of intoxicants in assault cases.

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191 (2d Cir. 1962)(one prior conviction for assault in last 20 years); Connolly v. Farrell Lines Inc., 268 F.2d 653, 655 (1st Cir. 1959)(evidence of log entry declaring assailant unfit for duty due to intoxication; a knife was also found under his pillow but no other indications of any problems); Stankiewicz v. United Fruit S.S. Corp., 229 F.2d 580, 581 (2d Cir. 1956)(plaintiff testified that assailant was belligerent, loud, argumentative and started fights, including two previous ones); Kelcy v. Tankers Co., 217 F.2d 543, 544 (2d Cir. 1954)(assailant had a prior conviction and had served time for assault with a weapon; assailant chased the plaintiff out of the galley with a knife two days prior; after assault the assailant threatened chief mate with ax); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815, 816 (2d Cir. 1953)(parties on friendly terms four months prior to assault; no evidence of unusual truculence except for the assault); Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (2d Cir. 1952)(plaintiff tried to submit evidence of assailant's quarrelsomeness and prior history at trial; judgment for defendant reversed and new trial ordered); Descendia v. American Export Lines, 1975 A.M.C. 1403, 1404 (S.D.N.Y. 1975)(parties had shared same quarters for three months without incident; plaintiff placed in brig for assault); Gulledge v. United States, 1972 A.M.C. 1187, 1188 (E.D. Pa. 1972)(plaintiff said to be argumentative several hours before attack; testimony that assailant was a quiet, peaceable man, who did not argue or look for trouble); Kuhl v. Manhattan Tankers Co., 1972 A.M.C. 236, 239 (E.D. Va. 1972)(no previous problems with chief mate on prior voyages); Fletcher v. Keystone Tankship Corp., 1970 A.M.C. 1812, 1814 (S.D. Tex. 1970)(plaintiff suffering delusion of alleged homosexual advances); Hildebrand v. S.S. Commander, 247 F. Supp. 625, 626 (E.D. Va. 1965)(assailant had previously made threatening gestures to another seaman; plaintiff had known assailant for years with no differences); Handley v. United States, 157 F. Supp. 616, 617 (S.D.N.Y. 1958)(assailant characterized as bully with pugnacious character, who frequently displayed and threatened to use his knife; assailant had threatened other third mate and challenged him to a fight; master testified that assailant said he would kill plaintiff if he did not leave the vessel); Thompson v. Coastal Oil Co., 119 F. Supp. 838, 841 (D.N.J. 1954)(assailant was later convicted for the assault).

129. Walters v. Moore-McCormack Lines, Inc., 309 F.2d 191, 192 (2d Cir. 1962)(assailant repented; sought to aid plaintiff by wiping his face with a towel); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815, 817 (2d Cir. 1953)(assailant showed contrition after beating plaintiff).

130. *Jones*, 204 F.2d at 817; *Walters*, 309 F.2d at 192-94.

131. *See* Hildebrand v. S.S. Commander, 247 F. Supp. 625, 628 (E.D. Va. 1965), where contrition listed as a factor.

132. *Boudoin*, 348 U.S. at 338.

In *Boorus*, evidence was introduced that the assailant was intoxicated at the time of the assault.[133] However, plaintiff failed to substantially corroborate the evidence and the court ultimately affirmed judgment for defendant.[134] In *Stechcon*, noting among other factors an absence of intoxication, the court reversed summary judgment for defendant.[135] In *Palmer*, the bosun's drunkenness was found not to be the proximate cause of plaintiff's injuries.[136]

However, in the case of heavy or excessive intoxication, *Boudoin* and other circuit decisions have found a strong inference of unequal disposition. The court in *Handley v. United States*,[137] found the assailant had consumed 4 to 6 scotches before stabbing the plaintiff on a dock.[138] In *Claborn v. Star Fish & Oyster Co.*,[139] the assailant had been drinking heavily for several days causing the captain to tie him to the stern shortly before his fatal attack on plaintiff's deceased with a 10" bait knife.[140] The court found the vessel unseaworthy as a matter of law.[141]

Although intoxication has been examined by the Ninth Circuit it has yet to be utilized as a strong indication of unequal disposition. *Boudoin* and some circuit decisions suggest that heavy or excessive intoxication is needed before it becomes a significant factor.[142] Smaller amounts of alcohol consumed prior to an assault appear to carry little weight.[143]

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133. *Boorus*, 299 F.2d at 894.
134. *Id.* at 897.
135. *Stechcon*, 439 F.2d at 794.
136. *Palmer*, 510 F. Supp. at 74.
137. 157 F. Supp. 616 (S.D.N.Y. 1958).
138. *Id.* at 618.
139. 578 F.2d 983 (5th Cir. 1978).
140. *Id.* at 984-85.
141. *Id.* at 987.
142. *Boudoin*, 348 U.S. at 337. *See also* McConville v. Florida Towing Corp., 321 F.2d 162, 164 (1st Cir. 1963)(assailant was heavily intoxicated at time of assault); Keen v. Overseas Tankship Corp., 194 F.2d 515, 516 (2d Cir. 1952)(assailant drunk when assaulted plaintiff with a meat cleaver); Montanez v. Prudential-Grace Lines, Inc., 1972 A.M.C. 1251, 1252 (E.D. Pa. 1972)(assailant visibly intoxicated).
143. For cases dealing with smaller amounts of alcohol see Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 246 (2d Cir. 1982)(assailant had consumed a couple beers ashore prior to assault); Gerald v. United States Lines, 368 F.2d 343, 344 (2d Cir. 1966)(assailant and possibly plaintiff had been drinking beer prior to assault); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815, 816 (2d Cir. 1953)(assailant and plaintiff each had a

5. *Weapons.* The Ninth Circuit as well as the Supreme Court and other circuits have consistently viewed the use of dangerous or deadly weapons as a critical factor in determining unseaworthiness.[144] Plaintiff's deceased in *Smith v. American Mail Line*, was fatally attacked with fire ax, but plaintiff could not establish that a crewmember was the assailant.[145] Judgment for defendant was affirmed.[146] In *Pashby*, the assailant attacked plaintiff from the rear with an 18" eyebolt causing severe injuries.[147] Defendant's summary judgment was reversed.[148] Also, even where an instrument is used in the everyday work place it may be viewed as a weapon depending on the manner of use.[149]

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can of beer earlier in the evening); Gulledge v. United States, 1972 A.M.C. 1187, 1188 (E.D. Pa. 1972)(some evidence of prior intoxication, but several hours before).

144. *See, e.g.,* Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 337 (1955)(assailant attacked plaintiff with a bottle); Deakle v. John E. Graham & Sons, 756 F.2d 821, 824 (11th Cir. 1985)(stabbed in back); Calcagni v. Hudson Waterways Corp., 630 F.2d 1049, 1051 (2d Cir. 1979)(assailant hit plaintiff with wheel wrench); Claborn v. Star Fish & Oyster Co., 578 F.2d 983, 985 (5th Cir. 1978)(fatal stabbing with 10" bait knife); Harbin v. Interlake S.S. Co., 570 F.2d 99, 102 (6th Cir. 1978)(assault with pipe); Robinson v. Atlantic Sterling, 369 F.2d 69, 70 (5th Cir. 1967)(plaintiff stabbed in stomach with knife); Gerald v. United States Lines, 368 F.2d 343, 344 (2d Cir. 1966)(assailant attacked with knife; plaintiff knocked assailant out with a piece of dunnage); Smith v. Lauritzen, 356 F.2d 171, 173 (3d Cir. 1966)(assailant attacks plaintiff with cargo hooks); Horton v. Moore-McCormack Lines, Inc., 326 F.2d 104 (2d Cir. 1964)(assailant attacked plaintiff with a bottle, broken glass and his teeth); Clevenger v. Star Fish & Oyster Co., 325 F.2d 397, 398 (5th Cir. 1963)(attack with a steel bar 4'x 1" with sharp point); McConville v. Florida Towing Corp., 321 F.2d 162, 164 (1st Cir. 1963)(alleged assailant defended himself with an "iron dog"); Connolly v. Farrell Lines, Inc., 268 F.2d 653, 655 (1st Cir. 1959)(assailant hit plaintiff over the head with a plank while plaintiff was advancing on him with a broken bottle); Stankiewicz v. United Fruit S.S. Corp., 229 F.2d 580, 581 (2d Cir. 1956)(assailant hits plaintiff in eye with zipper attached to jacket); Keen v. Overseas Tankship Corp., 194 F.2d 515, 516 (2d Cir. 1952)(assailant assaults plaintiff with meat cleaver); Monplaisir v. Delta S.S. Lines, 1983 A.M.C. 694, 695 (N.D. Cal. 1983)(assault with knife, but plaintiff is proximate cause of his own injury); Descendia v. American Export Lines, 1975 A.M.C. 1403, 1405 (S.D.N.Y. 1975)(plaintiff slashed alleged assailant's hand with scissors); Gulledge v. United States, 1972 A.M.C. 1187, 1190 (E.D. Pa. 1972)(plaintiff claims assailant hit him over the head with a coffee mug); Handley v. United States, 157 F. Supp. 616, 618 (S.D.N.Y. 1958)(assailant stabbed plaintiff with knife); Thompson v. Coastal Oil Co., 119 F. Supp. 838, 841 (D.N.J. 1954)(attack with meat cleaver).

145. *Smith v. American Mail Line*, 525 F.2d at 1149.

146. *Id.* at 1151.

147. *Pashby*, 608 F.2d at 1313.

148. *Id.* at 1314.

149. *See generally* Smith v. Lauritzen, 356 F.2d 171, 177 (3d Cir. 1966)(focus is on the dangerous nature of the instrument (cargo hooks) when used as a weapon); Gulledge v. United States, 1972 A.M.C. 1187 (E.D. Pa. 1972)(plaintiff alleges a coffee mug was used to committ assault causing twenty-three stitches to his head).

The Fifth and Eleventh Circuits have ruled under certain circumstances, an assault with a weapon may render the vessel unseaworthy as a matter of law. In the Fifth Circuit case of *Clevenger v. Star Fish & Oyster Co.*,[150] the mate who was in command of the vessel during unloading operations savagely plunged a 4' x 1" sharpened "devils fork," into the back of deckhand after an exchange of words.[151] The assault punctured a lung and severed two ribs.[152] Reversing the district court ruling for defendant, the court held, as a matter of law, the vessel to be unseaworthy.[153]

Several years later the Fifth Circuit in *Claborn*, again ruled the vessel unseaworthy as a matter of law.[154] In *Claborn*, a delirious deckhand in an extraordinarily savage and unprovoked attack fatally stabbed plaintiff's deceased in the back with a 10" bait knife.[155] The Fifth Circuit reversed a lower court judgment for defendant finding the facts demonstrated the assailant to be unequally disposed, thus breaching the shipowner's warranty of seaworthiness as matter of law.[156]

More recently the Eleventh Circuit in *Deakle v. John E. Graham & Sons*,[157] ruled that the facts established the vessel unseaworthy as a matter of law.[158] In *Deakle*, the assailant deckhand apparently went berserk stabbing the captain in the back in an unprovoked attack.[159] The plaintiff was granted a directed verdict and defendant appealed.[160] The Eleventh Circuit affirmed the lower court ruling finding the vessel unseaworthy as a matter of law.[161]

6. *Physical differences.* A more subtle distinction examined by the Ninth Circuit and other circuits are physical differences

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150. 325 F.2d 397 (5th Cir. 1963).
151. *Id.* at 398.
152. *Id.*
153. *Id.* at 402-03.
154. *Claborn*, 578 F.2d at 987.
155. *Id.* at 985.
156. *Id.* at 987. *See also* Pashby v. Universal Dredging Corp., 608 F.2d 1312, 1314 (9th Cir. 1979), citing to *Claborn*, 578 F.2d. at 987.
157. 756 F.2d 821 (11th Cir. 1985).
158. *Id.* at 826.
159. *Id.* at 824.
160. *Id.*
161. *Id.* at 826.

including age and size, between the assailant and victim. In *Stechcon*, the assailant, who attacked from the rear without warning was 75 lbs. heavier than his victim.[162] Considering the weight disparity along with the unprovoked nature of the attack and injury to the eye, the reviewing court ultimately reversed defendant's summary judgment.[163]

The Second Circuit in *Kelcy v. Tankers Corp.*,[164] found the trial court's ruling on unseaworthiness was justified noting the plaintiff was 56 years old and no match physically against his 25 year old assailant.[165] In *Harbin v. Interlake S.S. Co.*,[166] plaintiff was 47 years old at 6'1", 215 lbs.[167] His alleged assailant, 38 years old, was shorter and lighter.[168] In reversing plaintiff's judgment, the Sixth Circuit in addition to other considerations, appeared to use age and size as offsetting factors.[169]

In sum, when age or size is examined as a significant factor the differences have been substantial.[170] However, it is apparent that some caution should be exercised in the amount of weight given such differences as a smaller, older person may be equally capable of viciously assaulting a fellow crew member.

7. *Self-defense.* Generally, the focus of the affirmative defense of self defense is on the reasonableness of the force used to repel.[171] The Ninth Circuit as well as other circuits have also

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162. *Stechcon*, 439 F.2d at 794. *See also* The Rolph, 229 F. 52 (9th Cir. 1924)(assailant was a large and powerful man).

163. *Id.* at 794.

164. 217 F.2d 543 (2d Cir. 1954).

165. *Id.* at 543 n.4.

166. 570 F.2d 99 (6th Cir. 1978).

167. *Id.* at 101.

168. *Id.*

169. *Id.* at 101-04.

170. For cases in other circuits where size and weight have been considered, see Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 247 (2d Cir. 1982)(plaintiff 6'3", 275 lbs.; assailant 5'8", 145 lbs.); Walters v. Moore-McCormack Lines, Inc., 309 F.2d 191, 192 (2d Cir. 1962)(plaintiff 30 lbs. lighter than assailant); McConville v. Florida Towing Corp., 321 F.2d 162, 164 (1st Cir. 1963)(alleged assailant a much smaller man; court concludes plaintiff was aggressor); Handley v. United States, 157 F. Supp. 616 (S.D.N.Y. 1958)(assailant 6'2", 250 lbs.; plaintiff 5'7", 170 lbs.).

171. *See* FEDERAL JURY PRACTICE AND INSTRUCTIONS, *supra* note 65 at § 81.02, at 197:

> Self-Defense - Burden of Proof on Defendant
>
> In addition to denying that any assault or battery by the defendant proximately caused injury to the plaintiff, the defendant alleges that any act or conduct of the defendant which

focused on the plaintiff's *lack* of self defense as a factor, significantly where the assailant continues his attack.[172]

In *Stechcon*, plaintiff offered no defense to an unprovoked rear attack.[173] Considering all relevant factors the circuit court reversed defendant's summary judgment.[174] However, in *Kirsch*, the circuit court reversed judgment for plaintiff even though he offered no defense to an assault by the third assistant engineer.[175]

> may have caused any injury or damage to the plaintiff, at the time and place alleged, was committed or done following an unprovoked assault by the plaintiff upon the person of the defendant.
>
> A person upon whom an unprovoked assault is being made, or who has reasonable ground for believing, and does believe, that another person is about to inflict bodily injury upon him, need not retreat, but may stand his ground and defend the integrity of his person; and where in such self-defense of his person he injures his assailant, the law holds there is legal justification, provided he used no more or greater force or means than he in fact believed to be reasonably necessary, and would appear to a reasonable person, under like circumstance, to be necessary, in order to prevent bodily injury to himself.
>
> Self-defense is an affirmative defense to the plaintiff's claim, and the burden of proving this defense, by a preponderance of the evidence in the case, is on the defendant.

See also Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 247 (2d Cir. 1982)(plaintiff forces off his aggressor); Robinson v. S.S. Atlantic Sterling, 369 F.2d 69, 70 (5th Cir. 1967)(plaintiff drew pistol and fired on his assailant after stabbing); Smith v. Lauritzen, 356 F.2d 171, 175 (3d Cir. 1966)(assailant claims self defense in attacking plaintiff with cargo hooks after verbal exchange); Gerald v. United States Lines, 368 F.2d 343, 344 (2d Cir. 1966)(plaintiff knocked assailant out with piece of dunnage after being slashed with a knife); Connolly v. Farrell Lines, Inc., 268 F.2d 653, 654 (1st Cir. 1959)(plaintiff armed himself with a broken bottle and advanced on alleged assailant); Gulledge v. United States, 1972 A.M.C. 1187, 1190 (E.D. Pa. 1972)(assailant claimed he hit plaintiff once with coffee mug in self defense); Fletcher v. Keystone Tankship Corp., 1970 A.M.C. 1812, 1813 (S.D. Tex. 1970)(no justification for fatally shooting alleged assailant).

172. *See* Stechcon v. United States, 439 F.2d 792, 794 (9th Cir. 1971)(plaintiff offered no defense to unprovoked attack); Bartholomew v. Universe Tankers, Inc., 168 F. Supp. 155 (S.D.N.Y. 1957)(no defense to beating); Thompson v. Coastal Oil Co., 119 F. Supp. 838 (D. N.J. 1954)(no defense to attack with meat cleaver).

However, in some cases even where there is a lack of self-defense, ultimate judgment in shipowner's favor has been granted. *See* Kirsch v. United States, 450 F.2d 326, 327 (9th Cir. 1971)(plaintiff did not try to strike back after being hit by his assailant); Walters v. Moore-McCormack Lines, 326 F.2d 104 (2d Cir. 1964)(no defense to beating by larger man).

173. *Stechcon*, 439 F.2d at 794.

174. *Id.* at 795.

175. *Kirsch*, 450 F.2d at 327.

The different results in *Stechcon* and *Kirsch* could perhaps again be better explained by the nature of the resulting injury. In *Kirsch*, no apparent medical attention was necessary and he was able to work the rest of the voyage.[176] In *Stechcon*, plaintiff received injury to his eye requiring medical attention and stitches.[177] Therefore, within the Ninth Circuit a lack of self defense may be view as a weightier factor depending on the seriousness of the injury.

8. *Warning.* Closely related to provocation and self-defense, is the issue of lack of warning by the assailant before attack. A lack of warning prior to attack would appear to be a strong inference of a violent nature. In *Stechcon*, the assailant attacked without warning from the rear causing injury to the eye.[178] In *Pashby*, the assailant attacked without warning from the rear with an 18" eyebolt causing severe injury.[179] In both cases defendant's summary judgment was reversed.[180] Other circuits have also used a lack of warning as a factor in determining disposition.[181]

Naturally, expressed warnings are also viewed as significant evidence of disposition as found in *Handley* and *Calcagni v. Hudson Waterways Corp.*[182] In *Handley*, the district court considered evidence that the assailant told the master he would kill plaintiff if the plaintiff did not leave the ship.[183] The assailant subsequently stabbed the plaintiff on the pier.[184] Viewing the to-

176. *Id.* at 327.
177. *Stechcon*, 439 F.2d at 794.
178. *Id.* at 794.
179. *Pashby*, 608 F.2d at 1313.
180. *Stechcon*, 439 F.2d at 795; *Pashby*, 608 F.2d at 1314.
181. *See, e.g.*, Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955)(plaintiff awoke and was attacked with bottle in unprovoked and sudden assault); Deakle v. John E. Graham & Sons, 756 F.2d 821 (11th Cir. 1985)(unprovoked rear attack with knife; no warning); Clevenger v. Star Fish & Oyster Co., 325 F.2d 397 (5th Cir. 1970)(rear attack with "devils fork"; no defense); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir. 1953)(sudden assault; no apparent provocation other than verbal exchange several hours earlier; judgment for plaintiff reversed); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952)(rear attack with meat cleaver; no apparent warning); Hildebrand v. S.S. Commander, 247 F. Supp. 625 (E.D. Va. 1965)(sudden unprovoked attack; no warning); Thompson v. Coastal Oil Co., 119 F. Supp. 838, 841 (D. N.J. 1954)(rear attack with meat cleaver; no warning; no defense).
182. 603 F.2d 1049, 1051 (2d Cir. 1979).
183. *Handley*, 157 F. Supp. at 617-19.
184. *Id.* at 617.

tality of the circumstances, the court concluded that the assailant possessed an unequal disposition.[185]

A similar result is seen in *Calcagni*, where the assailant, the third engineer, threatened to kill plaintiff while chasing him up a ladder and striking him with a wheel wrench.[186] On appeal the Second Circuit found the trial court was not in error for submitting the unseaworthiness claim to the jury.[187]

9. *Conduct of officers.* Case law from other circuits suggest the conduct of superiors should be of a higher caliber than the ordinary crew.[188] This seems a reasonable enough proposition considering the power that superiors possess aboard the vessel.[189]

In the Ninth Circuit, superior/inferior positions have been examined as a factor in the unseaworthiness claim. Affirming judgment for defendant, the court in *Boorus* noted plaintiff bosun had no authority over the carpenter, his alleged assailant.[190] However, analysis utilizing this factor has not been consistent. In *Kirsch*, the third assistant engineer assaulted the chief steward.[191] In reversing plaintiff's judgment, the reviewing court never analyzed the assailant's position as a licensed officer.[192]

Cases from the Fourth and Fifth Circuits suggest that superiors should be held to a higher standard of conduct. In *Clevenger*, emphasis was placed on the commanding position of the assailant at the time of assault in finding the vessel was un-

185. *Id.* at 618.

186. *Calcagni*, 603 F.2d at 1051-52. *See also* Claborn v. Star Fish & Oyster Co., 578 F.2d 983, 984 n.2 (5th Cir. 1978) (assailant stated that plaintiff's decedent was "one of them" as he grabbed for the bait knife, which was taken away).

187. *Id.* at 1051.

188. *See* Claborn v. Star Fish & Oyster Co., 578 F.2d 983, 986 (2d Cir. 1978)(agreeing with the reasoning of *Clevenger* that the command position implies a higher stand of conduct); Clevenger v. Star Fish & Oyster Co., 325 F.2d 397 (5th Cir. 1963)(mate was commanding officer at time of his assault on deck hand); Hildebrand v. S.S. Commander, 247 F. Supp. 625, 628 (E.D. Va. 1965)("we think that other officers and members of a crew of a vessel have the right to expect that the character and behavior of an officer will be somewhat better than that of an ordinary seaman").

189. *See supra* note 30.

190. *Boorus*, 299 F.2d at 894.

191. *Kirsch*, 450 F.2d at 327.

192. *Id.*

seaworthy as a matter of law.[193] Similarly, in *Hildebrand v. S.S. Commander*,[194] where the third mate assaulted the second mate in an unprovoked attack, the district court stated "[i]n short, we think that other officers and members of a crew of a vessel have the right to expect that the character and behavior of an officer will be somewhat better than that of an ordinary seaman."[195]

Although the Ninth Circuit as well as other circuits have shown inconsistencies in the examination of superiors assaulting inferiors, the reasoning of *Clevenger* and *Hildebrand* appear sound and should be applied in a consistent manner within the Ninth Circuit.[196]

IV. CONCLUSION

Although advances in modern ship design have made vessels more comfortable, nothing has changed their character as floating steel islands. By tradition and necessity most seamen are locked into an inherently hazardous environment over which they have little control. The admiralty courts have long recognized these hazardous conditions and have sought to protect the seaman's risk of loss under certain conditions through the doctrine of unseaworthiness. The doctrine will impose strict liability on the shipowner for injuries resulting from defects in the vessel including a defective crew member. In determining if a seaman is defective we must distinguish between the equally and unequally disposed seaman.

In attempting to clarify the issues arising in determination of the unseaworthiness claim for assault, the authors set forth

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193. *Clevenger*, 325 F.2d at 398. *See also supra* note 188 and accompanying text.

194. 247 F. Supp. 625, 628 (E.D. Va. 1965).

195. *Id.* at 628.

196. For fact situations or discussion of officers assaulting fellow crew members in other circuits, see Calcagni v. Hudson Waterways Corp., 630 F.2d 1049, 1051 (2d Cir. 1979)(third assistant assaults crew member with wrench); Claborn v. Star Fish & Oyster Co., 578 F.2d 983, 986 (5th Cir. 1978)(a higher command position will invoke a higher standard of conduct); Clevenger v. Star Fish & Oyster Co., 325 F.2d 397, 398 (5th Cir. 1963)(mate assaults deck hand with "devils fork"); Handley v. United States, 157 F. Supp. 616, 617 (S.D.N.Y. 1958)(assault between licensed officers, judgment for plaintiff affirmed). *But see* Harbin v. Interlake S.S. Co., 570 F.2d 99 (6th Cir. 1978)(second assistant allegedly assaults fireman; court appears to discount their relative positions, focuses on assailant's good record and reputation instead).

two preliminary suggestions. First, an analogy to aggravated assault may be drawn in focusing attention not only on the mental state or disposition of the seaman, but also the nature of the resulting physical injury incurred by the victim. Case law suggests that a strong inference of unseaworthiness may be drawn where serious bodily injury is found.

Second, recognizing that the plaintiff has a heavy burden in establishing that a fellow crewmember is of unequal disposition, Judge Hand's unfortunate caricature of fighting seamen should be discarded in judging the equal disposition of today's seaman. The stereotype of fighting seamen adds nothing objective in attempting to reach a rational determination and only serves to confuse the issues at hand.

From a comprehensive analysis of the relevant case law the authors suggest using the proposed guideposts as a checklist in reviewing individual circumstances of the case. Decisions in this area suggests that serious bodily injury or death, lack of justifiable provocation, and use of a weapon are extremely weighty factors to consider. The authors propose that the Ninth Circuit should adopt the reasoning of the Fifth and Eleventh Circuits in ruling a vessel unseaworthy as a matter of law where the above three factors are found in combination.

In addition to the remaining factors of prior and subsequent acts, intoxication, physical differences, and warning, the Ninth Circuit should focus particular attention on the conduct of licenced officers when assaulting fellow crewmembers. Licensed officers hold a commanding position and nearly absolute authority over unlicensed seamen in the closed ship board environment. Penalties for disobedience can be severe. As such, the Ninth Circuit should consistently hold licensed officers to a higher standard of conduct in determining equal disposition.

In sum, the authors have attempted to chart out a few recognized landmarks or guideposts with suggested aids in navigating the unseaworthiness claim for assaults between crew members. In addition, the prudent navigator should always consider any local conditions or circumstances that might affect his position before setting the course.