Vessel owners and operators should be aware of standards applied by US courts in the context of shipboard accidents. The US Court of Appeals for the Second Circuit has recently addressed the doctrine of res ipsa loquitor, in the context of shipboard accidents caused by a seaman's action, and the interplay with concepts of negligence. In its decision, the Second Circuit held that uncontrollable elements of nature, typically viewed as independent potential causes of accident, instead constitute normal conditions under which a seaman must work, and the existence of such elements does not impact the analysis of negligence. Add Index

HIGH STAKES FOR SEAMEN IN THE SECOND CIRCUIT: THE APPLICATION OF RES IPSA LOQUITOR IN THE CONTEXT OF SEAMENS' PERSONAL INJURY CLAIMS

By Joseph G. Grasso and Laura Ann P. Keller*

Almost every sailor has experienced it — while on the bow on a breezy day, a rogue wave or unforeseen puff causes the sailor to drop a line. After quickly recovering and completing the task at hand, the skipper asks, "What happened?" The sailor inevitably responds by saying something along the lines of, "I don't know – the line slipped." According the U.S. Court of Appeals for the Second Circuit, that is no longer an appropriate response. Not only does a seaman's loss of control of a line constitute negligence, it is enough for the application of the doctrine of *res ipsa loquitor*.

In *Manhattan by Sail, Inc. v. Tagle*, a seaman dropped a halyard on a sightseeing passenger vessel and it swung back and struck a passenger in the head. The Second Circuit held that these facts were sufficient to invoke the doctrine of *res ipsa loquitor*, and that the seaman's actions, even in the absence of *res ipsa loquitor*, amounted to negligence.[1] While the majority of the opinion consists of a discussion of the doctrine of *res ipsa loquitor*, the court stated in a footnote that because it found that the seaman was negligent, the court's entire discussion of the standards for *res ipsa liquitor* constitutes dictum, not a holding of the case.[2] However, the *res ipsa* analysis is likely to be cited in future cases in the Second Circuit and beyond.

In *Tagle*, a passenger boarded a sightseeing vessel, the SHEARWATER, and was directed to sit near the base of the forestaysail mast, a mast that sits between the main mast and the bow. A halyard ran from the base of the forestaysail mast, up the mast, and back down to the forestaysail. The halyard attached to the sail by means of a one-pound stainless steel pelican clip. When the halyard was not attached to the sail, the line, and consequently the stainless steel clip, were free to swing like a pendulum from the base of the forestay (at the bow) to the forestaysail mast. A deckhand aboard the vessel was ordered to raise the forestaysail, and in preparing to do so, lost control of the halyard, allowing it to swing back toward the mast. The stainless steel clip then

[1] 873 F.3d 177, 183,184–85 (2017).

[2] *Id.* at 183 n.2.

struck the passenger in head.[3] The passenger sued the vessel owner and operator, who then filed a petition seeking exoneration from liability under the Limitation of Liability Act.[4]

After a bench trial, the U.S. District Court for the Southern District of New York granted the owner exoneration from liability, holding that the doctrine of *res ipsa loquitor* did not apply because "sailors do, even when exercising ordinary care, sometimes lose control of a line – whether due to wind or an unexpected wave or wake," and this was not "the sort of accident that can occur *only* because of someone's negligence."[5] The Second Circuit rejected this reasoning because "[*r*]*es ipsa loquitor* is not limited to accidents that could occur *only* because of negligence. For *res ipsa loquitor* to apply, a claimant must show that the event is of a type that *ordinarily* does not occur in the absence of negligence."[6] The Second Circuit found that this was one of those events – "A deckhand who *carefully* exercises the *skills* required for the seaman's job will not ordinarily lose hold of an extended weighted halyard."[7]

In reading the Second Circuit's decision, a sailor might ask: What about wind? What about waves? Aren't there elements outside of a seaman's control that could cause such accidents? While the Second Circuit acknowledged the existence of such elements, it held that a seaman must be in control even in the face of those uncontrollable elements: "Waves and wind, and the consequent shifting and rolling of the deck, are the normal conditions of the sea, in which seamen must work protecting the safety of passengers and crew."[8] Accordingly, the Second Circuit found that this case was analogous to *Johnson v. United States*, in which the U.S. Supreme Court held that "a man does not ordinarily drop a block on a man working below him,"[9] and not to *Irwin v. United States*, in which the Second Circuit held that the doctrine of *res ipsa* did not apply because a "freak swell" caused an accident.[10] In reviewing these two decisions, the Second Circuit relied heavily on the fact that the seaman "did not know why he lost control of the halyard."[11] The court stated that this "absence of any evidence of unusual circumstances powerfully supports the proposition that there were none and that [the seaman's] loss of control of the line was due to his negligence and nothing else."[12]

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[3] *Id.* at 179–80.

[4] 46 U.S.C § 30501, *et seq.*

[5] *Manhattan by Sail*, 873 F.3d. at 180 (citing *Matter of Complaint of Manhattan by Sail, Inc.*, 168 F. Supp. 3d 590, 595 n.5 (S.D.N.Y. 2016)).

[6] *Id.* at 180 (emphasis in original).

[7] *Id.* at 181 (emphasis in original).

[8] *Id.*

[9] *Id.* (citing *Johnson v. U.S.*, 333 U.S. 46, 48 (1948).

[10] *Id.* at 182 (citing *Irwin v. U.S.*, 236 F.2d 774 (2d Cir. 1956).

[11] *Id.* at 182–83.

[12] *Id.* at 183.

The Second Circuit also conducted an ordinary negligence analysis, and similarly found that "a reasonably prudent *seaman*" would not lose control of a halyard.[13] In order to find evidence of negligence, the court appeared to conduct the same analysis as it did to apply the doctrine of *res ipsa*, in that "[b]ecause the shipowners had no evidence supporting an inference of any cause other than negligence, no issue of material fact that might contradict or undermine the inference of negligence was presented to the fact-finder."[14] Accordingly, it vacated and remanded the case to the District Court with instructions to enter a finding of negligence as the cause of the passenger's injury.[15]

This decisions likely leaves shipowners and operators asking whether any shipboard accident is now presumed to be a result negligence unless the owner can prove otherwise. Given the Second Circuit's reliance on the lack of *evidence* of external factors (even though such factors may well have existed), shipowners and operators would be encouraged to not only prepare a report that an incident occurred, as the captain did in this case,[16] but log details of external conditions such as the wind speed and wave conditions, and also to press witnesses on the details of what happened immediately before an incident, and *how* the incident occurred. A court may be looking for such details later.

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[13] *Id.* at 183–84.

[14] *Id.* at 184.

[15] *Id.* at 185.

[16] *Id.* at 182–83.