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If the Shoe Fits...

By Marilyn Raia

Most of us have a wide variety of footwear we can choose to wear on the job. Seamen, however, are quite limited in their choices. If a seaman chooses the wrong footwear and is injured as a result, there may be no recovery for the injury. Occasionally, a seaman's failure to wear appropriate footwear is found to be the fault of the seaman's employer which can be held liable for a resulting injury.

Sandals in the Engine Room

The injured seaman in *Taylor v. Bisso Towboat Company, Inc.* 2009 WL 270745 (E.D. La 2009) was the chief engineer aboard the tug **M/V Jane S**. While the tug was tied up at a wharf on the Mississippi River on standby, Taylor went to the engine room to start the engines in preparation for moving the vessel. On his approach to the top landing of an internal flight of stairs leading from the top of the engine room to the bottom, Taylor slipped, fell down the stairs, and hurt himself. At the time of his fall, Taylor was wearing sandals.

Taylor sued his employer, Bisso, contending the tug was unseaworthy due to a substance that had leaked onto the stairway from a nearby washer/dryer. He also contended the presence of the leakage was known or should have been known to Bisso. Bisso denied liability. It alleged the injury was due to Taylor's negligence in failing to follow the company rules which stated in part "[a]t no time when the vessel is operating will thongs, flip-flops, sandals or tennis shoes be worn on deck or in the engine room."

After a court trial, the district judge denied a recovery to Taylor and entered judgment in favor of Bisso. The court recognized the duty of the seaman's employer to provide a reasonably safe place for the seaman to work. However, it noted the duty is not absolute which means the employer is not automatically liable for damages when a seaman is injured on the job. The court also recognized the duty of the seaman to act with ordinary prudence under the circumstances of his employment which circumstances include experience, training, and education.

The district court held the sole cause of Taylor's fall and injuries was Taylor's negligence in wearing sandals in the engine room in violation of Bisso's rules. There was no evidence of a slippery substance on the stairs or adjacent deck other than what Taylor said. Further, Taylor did not tell his fellow crewmembers who came to his aid that he had slipped on a substance on the stairs. Accordingly, the district court concluded Taylor's sandals caused him to trip and fall down the stairs and dismissed the case with prejudice.

Tennis Shoes on Deck

Tennis shoes can be as unsafe as sandals on a ship. *Krall v. United States*, 1990 WL 192504 (E.D. La. 1990) involved an able-bodied seaman, Krall, who was working on the tanker **U.S.N.S. Sealift Indian Ocean** with other crewmembers in a butterworth operation. He chose to wear tennis shoes for the job. He slipped and fell on the first of two steps leading to the midship house, injuring his shoulder and back, and cutting his forearm. After falling, he claimed to have noticed a milky white substance on the deck with the imprint of his tennis shoe in it.

Krall sued the United States and lost. He contended the chief mate had notice of the milky substance on the deck which was expected during butterworth operations, and failed to remove it or warn Krall about it. He also contended the policy against wearing tennis shoes on

deck was neither communicated to him nor enforced.

Three of Krall's fellow crewmembers were near the scene of the incident and testified they did not see a milky substance on the deck with the imprint of a tennis shoe. The district court found Krall was aware of the shipboard policy regarding what footwear was appropriate and willfully failed to comply with it. It also found Krall had proper work shoes in his cabin but chose not to wear them.

The district court held a seaman such as Krall is charged with "the responsibility of using good judgment in the selection and manner in which he undertakes to do a given task" and is required to "exercise ordinary and reasonable care for his own safety." The court attributed sole fault to Krall for his injuries due to his choice of improper footwear, and noted "common sense dictates that the wearing of work shoes on the deck of a tanker is prudent and safer than tennis shoes."

Captain Chooses Wrong Shoes

Certainly the master of a vessel should be able to choose the right kind of shoes to wear while working on a vessel. But that is not always the case. In *Dean v. Sea Supply, Incorporated*, 2019 AMC 1194 (5th Cir. 2019), Capt. Dean slipped and fell while trying to fix the No. 4 engine on the *M/V Jessica Elizabeth*, and injured himself. At the time of the injury he was wearing tennis shoes. The vessel's safety manual provided "safety toed shoes or boots with slip-resistant soles shall be worn at all times while outside the living quarters."

Dean sued his employer and the vessel in rem asserting various legal theories. The district court rejected them all. It held Dean 100 percent at fault for his injuries. It reasoned he failed to wear the proper shoes in violation of the vessel's safety manual and failed to clean his shoes or the walking surface in the engine room both of which he knew were oily. The Fifth Circuit Court of Appeal affirmed.

Dean contended the vessel should be held partly at fault because the No. 4 engine was broken and its failure to work properly rendered the *M/V Jessica Elizabeth* unseaworthy. He argued the vessel was unseaworthy because he had to stand in oil to fix the engine. Those contentions were rejected as irrelevant in light of the finding that Dean was solely responsible for his injuries. The court also rejected Dean's argument that the vessel owner was negligent by not enforcing its footwear policy. In summarizing Dean's fault, the court concluded he 1) ignored the footwear policy; 2) failed to ask for help from a deckhand; and 3) failed to clean the walkway and his shoes knowing they were oily despite the ready availability of absorbent materials.

Employer Fails to Provide Proper Footwear

Under certain circumstances, courts have imposed an obligation on the seaman's employer to provide proper footwear for the seaman to wear. In those cases, they have allowed a seaman to recover for an injury was caused by the lack of proper footwear. *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969) illustrates the point.

White was a seaman employed on a drilling barge. He suffered an accidental injury to his heel which left an abraded spot. The accident was reported to his employer. Less than three weeks later, he was assigned the job of cleaning the drilling mud tank on the barge. The pressure jets used to stir the mud in the tank were not operating properly which contributed to the settling of the mud in the tank. Accordingly, to clean the tank it was necessary to get into the tank and wade in the drilling mud.

White was not advised about the need for safety equipment. Nor was he told whether rubber boots were available to wear while he was cleaning the tank. The drilling mud contained a caustic substance which aggravated his prior heel injury. White sued. He alleged unseaworthiness of the drilling barge and negligence by his employer. After White presented his evidence at trial, the district judge dismissed the case finding he failed to prove unseaworthiness or negligence, and was himself 100 percent at fault in causing his injury.

The Fifth Circuit reversed. It found the vessel unseaworthy based on the lack of rubber boots and other equipment for use by seamen who were ordered to clean the drilling mud tank. Rimrock argued that other drillers in the industry did not provide safety equipment to their employees and therefore its compliance with industry standards meant the barge was seaworthy. The court rejected the argument.

Further, it declined to attribute any fault to the seaman. It reasoned even though White had worked around the tank and had seen it being cleaned, there was no evidence he ever had an open wound in contact with the caustic substance in the drilling mud, or knew the drilling mud was hazardous. Finally, it found White could not have been comparatively at fault because his employer who had ordered him to work inside the tank had not warned him about the caustic substance.

Seamen have a general obligation to choose the right footwear to wear when working on a vessel and to follow company rules regarding what footwear is to be worn. If a seaman makes a wrong choice and/or violates company rules, the seaman may not recover from his employer for an injury caused by the wrong footwear. However, under certain circumstances, the seaman's employer may be held liable for a seaman's injuries resulting from improper footwear if the seaman was not aware of the dangers presented by an assigned task and was not provided with the proper footwear by his employer.