Since neither of these events has occurred, the conclusion is inescapable that the appellant remains a viable municipality with taxing powers.

Since each appellee has different tax liabilities to be reduced to judgment, each case is reversed and remanded for the trial court to enter an appropriate judgment consistent with this Opinion.

The decisions of the trial court are reversed and remanded.

TAKI KOMANTA, Plaintiff-Appellant

v.

GLOBAL ASSOCIATES, INC., Defendant-Appellee

Civil Appeal No. 372

Appellate Division of the High Court

Marshall Islands District

January 19, 1984

Appeal from judgment for defendant in negligence action brought by crewmember of tugboat for injuries occurring while tug was being maneuvered into dock. The Appellate Division of the High Court, Hefner, Associate Justice, held that though the trial court gave an erroneous reason for granting its judgment, since the plaintiff could not prevail in a negligence action, as the cause of action arose in admiralty, and even if construed as a maritime "unseaworthiness" claim, the proper action was against the owner of the ship, as opposed to its operator, therefore the judgment for defendant was affirmed.

1. **Admiralty—Unseaworthiness—Generally**

   The term "unseaworthiness", in the context of suits to recover for personal injuries, is broad enough to include almost all types of operating negligence in the navigation and management of the ship.

2. **Admiralty—Unseaworthiness—Generally**

   An "unseaworthiness" claim must be brought against the owner of a vessel and not the shipowner's agent.

3. **Admiralty—Unseaworthiness—Generally**

   "Unseaworthiness" claim may be brought against charterer and not owner of a vessel, only if the owner had completely and exclusively relinquished possession, command, and navigation to the charterer, and the charterer was in effect a demise or bareboat charterer.

4. **Admiralty—Unseaworthiness—Particular Cases**

Corporation which operated and maintained vessel under ultimate control and command of the U.S. Army was not liable under an "unseaworthiness" claim as a demise or bareboat charterer.

5. **Admiralty—Unseaworthiness—Particular Cases**

In negligence action brought by employee of tugboat against the corporation which operated and maintained the tugboat, for injuries which occurred in harbor while approaching the dock, judgment for defendant was affirmed, even though the trial court gave an erroneous reason for granting the judgment, since the plaintiff could not prevail in a negligence action since the cause of action was in admiralty, and even if construed as a maritime "unseaworthiness" claim, the proper action was against the owner of the ship, as opposed to its operator.

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Counsel for Appellee: WILLIAM J. BLAIR, ESQ., J. BRADLEY KLEMM, ESQ., Suite 1008, Pacific News Bldg., 238 O'Hara Street, Agana, Guam 96910

Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, and HEFNER*, *Associate Justice*

HEFNER, *Associate Justice*

BACKGROUND

The appellant is a citizen of the Marshall Islands and, at the time of his injury, an employee of Global Associates, Inc. (Global).[1] The accident causing plaintiff's injuries occurred in Kwajalein Missile Range harbor on August 6, 1979. On September 3, 1980, the appellant filed this action

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* Chief Judge of the Commonwealth Trial Court, Commonwealth of the Northern Mariana Islands, designated as Temporary Associate Justice by Secretary of Interior.

[1] The other defendant, a Dr. Beck, has been dismissed out of the suit and only Global remains as a defendant.

and on August 31, 1981, he filed an amended complaint.[2] The basis of appellant's claim against Global is:

> On or about August 6, 1979, plaintiff was severely injured in the course of his employment, while serving as a crewmember on a tugboat operated by defendant Global Associates, Inc., in Kwajalein Missile Range harbor. As the tug neared the wharf it was negligently maneuvered in such a way as to cause plaintiff to become pinned between the tug and part of the wharf, resulting in plaintiff's back being crushed and broken in seven places.

The plaintiff also requested a jury trial which was granted by the trial court on September 28, 1981. Shortly thereafter Global filed a motion for summary judgment and to strike the jury trial order.

Global's motion was supported by points and authorities which alerted the appellant to the position of Global which was to the effect that:

1. Plaintiff's cause of action as alleged was based on ordinary negligence;

2. Plaintiff's claim arises out of a maritime tort and is within the jurisdiction of admiralty;

3. Since under general maritime law an injured seaman has no cause of action for ordinary negligence, the plaintiff has alleged no cause of action against Global;

4. That if the court could construe the complaint as alleging unseaworthiness, the plaintiff still had no cause of action against Global;

5. Any unseaworthiness claim must be brought against the shipowner (U.S. Army) and not Global unless the latter assumed the obligation of the shipowner;

6. Since this is an admiralty matter, no jury trial is afforded the plaintiff.

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[2] Appellee protested the filing of the Amended Complaint without a court order after its answer was filed. (See Rules of Civil Procedure 15(a).) Since the only basic change in the Amended Complaint was to eliminate Dr. Beck as a defendant, we find this failure to comply with Rule 15(a) of no great moment. The crucial allegations charging negligence are the same in the complaint and amended complaint.

Global's motion was filed on October 27, 1981, and a hearing was held sometime in November of 1981. At the hearing appellant was given 60 days to file opposing points and authorities. The file reflects that none were filed and on January 25, 1982, the court issued an "Order" denying Global's motion for summary judgment but granting Global's motion to strike the jury demand.

This "Order" raises several questions. Though signed by the trial judge, it bears no filing stamp; it has a long pencil mark across its face as if it were to be cancelled; it is placed in the trial files out of chronological order; from the opening remarks of the court and counsel at the trial, it is apparent the Order was never served on counsel prior to trial (Tr. pp. 1–5); and, of paramount importance, neither the Order nor the trial court's response to counsel for Global at trial gave the reason for its ruling. In this case the failure of the trial court to delineate the court's reasons perplexes this panel. To say that "there were sufficient grounds under [plaintiff's] amended complaint" (Tr. p. 2, lines 20–21) is, in our view, not definitive enough nor did it extend to counsel any meaningful guidelines for the conduct of the trial. More than that, the January 25th Order is patently inconsistent. If plaintiff's action is for ordinary negligence he would be entitled to a jury trial and this was denied him by the Order. If, however, the case sounds in admiralty, then certainly the trial court should have treated, discussed, and determined defendant's motion on a definitive basis and, as will be seen, should have resulted in a different ruling.

Admittedly, the trial court could have found a genuine issue of fact remaining to be determined but this is not even indicated in the court's ruling. Global produced witnesses at the summary judgment motion hearing in addition to an affidavit and the record shows no response by the

appellant.[3] Indeed, the trial court waited for over 60 days for some response. Thus the consternation and surprise of Global's counsel at trial is easy to discern.

But the problems of this case do not end there. The trial proceeded over the objection of Global (Tr. p. 5, lines 12–14) with the plaintiff proceeding to make an opening statement. Immediately, Global objected to a variance in what the plaintiff said he intended to prove and what the allegation of the complaint stated. (Tr. pp. 7–10.) Thereafter, the variance objection was raised periodically. (Tr. p. 14, lines 11–15; p. 19, lines 2–4 and lines 11–13; p. 25, lines 9–14; pp. 116–122.) Global was finally given a continuing objection. (Tr. p. 122, lines 24–25.)

The judgment rendered in this case ruled in favor of the defendant and stated: "The proof provided by plaintiff constitutes a material variance from the pleadings and, therefore, is fatal to any recovery on the part of the plaintiff." Thus the judgment for Global was based on the asserted variance.

DISCUSSION

Initially, we find the matter of variance to be blown out of proportion and erroneously decided by the trial court. The "variance" can be simply stated. In the complaint, the plaintiff alleged the tug he was working on was negligently maneuvered so that the plaintiff was pinned between the tug and the wharf. At trial, it was testified that the tug struck the dock causing a tire to flip up onto the tug and pinning the plaintiff between the tire and a winch on deck. We find this difference of such inconsequential substance

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[3] The Rules of Civil Procedure, Rule 45(e) states in part:

When a motion for summary judgment is made and supported by (testimony or affidavits), an adverse party may not rest upon the mere allegations . . . of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgments, if appropriate, shall be entered against him.

that we do not tarry long on the subject. Indeed, Global concedes as much.

We are left with the definite impression that neither the plaintiff nor the court ever grasped and fully considered the import of Global's position which was initially advanced in its motion for summary judgment.

The conclusion is inescapable that this is an action in admiralty and the High Court obtained its jurisdiction pursuant to 5 TTC § 53. The plaintiff was a seaman aboard a tug performing his duties at the time of the accident. We can find no authority for a cause of action by a seaman for ordinary negligence against the operator of a vessel nor has the plaintiff been able to offer any.[4]

Now that the trial of this matter has taken place the facts of how the accident occurred are apparent. Simply stated, the tug's engine malfunctioned when the master tried to reverse the engine as it approached the dock. As a result the tug hit the dock fairly hard, causing the tire bumper on the dock to flip over onto the tug pinning the appellant against the winch.[5] In short, the tug was unseaworthy and any claim the appellant had must be based on that theory and recovery is against the vessel and her owner. *The Osceola*, 189 U.S. 158, 175 (1903).

[1] As pointed out by Global, the scope of "unseaworthiness" has been broadened radically since *The Osceola* case was decided. The term "unseaworthiness" (at least in the context of suits to recover for personal injuries) is broad enough to include almost all (perhaps all) types of operating negligence in the navigation and management of the

[4] In the United States, a seaman injured in the course of his employment by the negligence of the shipowner, master or fellow crewmembers, is given the right to recover damages for his injuries. (46 USC § 688, generally known as the Jones Act.) The appellant has not argued that this Act applies in the Trust Territory and this court can find no basis to apply it in this case.

[5] This recitation of events is gleaned from the deposition of the master of the tug, Adrian Kamahele (admitted into evidence by stipulation—Tr. pp. 161–162) and the testimony of John Renn, marine department manager of Global.

ship. Gilmore & Black, *The Law of Admiralty*, § 6-5, p. 278 and §§ 6-38 to 44, pp. 383–404.

Even though the appellant has insisted throughout the proceedings in this matter that his claim is for ordinary negligence, it is concluded that the "negligently maneuvered" allegation in appellant's complaint (quoted above) and the facts of the accident as gleaned from the trial testimony bring the appellant within the broad scope of an unseaworthiness claim. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944).

[2] But this gives no solace to the appellant because an unseaworthy claim must be brought against the owner of the vessel and not the shipowner's agent. *Mahnich*, supra; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946).

The record is clear that the U.S. Army was the owner of the vessel on which the appellant was injured.

Though the appellant was alerted in no uncertain terms as to the position of Global, he never has attempted to show the one exception that could still provide him a claim against Global and that is if Global assumed the obligations of the shipowner such as a demise or bareboat charterer. *Law of Admiralty*, supra, § 4-23, p. 242.

[3] To create such a situation, the owner of the vessel must completely and exclusively relinquish possession, command, and navigation to the charterer. *Reed v. S.S. Yaka*, 373 U.S. 410, 83 S. Ct. 1349, reh. den. 375 U.S. 872, 84 S. Ct. 27; *Guzman v. Pichirilo*, 369 U.S. 698. 82 S. Ct. 1095 (1962). See also 14 ALR Fed. at p. 553.

[4] The evidence in this case does not support any finding that Global was a demise or bareboat charterer.[6] The vessel upon which the appellant was injured was not only

[6] Indeed, there is a presumption against a demise or bareboat charter. 14 ALR Fed. at 552.

owned by the United States Army (Tr. p. 139, lines 3–7), but any changes of major components on the vessel had to receive Army approval (Tr. p. 139, lines 17–20; p. 141, lines 11–22). Simply put, Global operated and maintained the vessel under the ultimate control and command of the U.S. Army.

[5] This court comes to the unalterable conclusion that the trial court gave an erroneous reason for granting a judgment to Global but this case is a unique one in that the judgment is affirmed since it is clear to the panel that the appellant could not prevail on his theory of the case or even on an unseaworthiness theory. The panel does not take this approach lightly. However, the appellant was on notice early in this litigation as to appellee's position and failed to meet the challenge. Unfortunately, the trial court also failed to address the issue on appellee's motion for summary judgment. If it had, we are convinced the result would be the same as reached by this panel.

The judgment for the appellee is affirmed.

SANTOS BORJA and PAULINE B. BORJA, Plaintiffs-Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Defendant-Appellee

Civil Appeal No. 374

Appellate Division of the High Court

Palau District

January 19, 1984

Appeal from granting of summary judgment for defendant, on statute of limitations ground, in medical malpractice action. The Appellate Division of the High Court, Hefner, Associate Justice, held that there was no basis for tolling the two-year statute of limitations, where plaintiff had told the physi-