The Stevendore's Duty to Indemnify Shipowners for Injuries to Longshoremen-Employees

Laurence L. Pillsbury

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol15/iss4/7

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
COMMENT

THE STEVEDORE’S DUTY TO INDEMNIFY
SHIPOWNERS FOR INJURIES TO
LONGSHOREMEN-EMPLOYEES

By Laurence L. Pillsbury*

In this sometime weird Ryan-Yaka world, there is only one thing
certain: no stevedore in his right mind wants, or encourages, a suit by
an injured employee against a third party vessel or vessel owner. . . .
For the filing of the third party suit precipitates a three-cornered Kil-
kenny Fair in which all lash out against the other, and in the end it
is so often the case of the injured worker winning, and the impleaded-
stevedore-employer losing as a result of an injury that some thought
was exclusively covered under the Longshoremen’s Act.1

Workmen’s compensation statutes are today the principal instru-
ments for compensating workers for their occupational injuries and
at the same time distributing the cost to the industry.2 When the em-
ployer complies with the statutory requirements, the compensation
statutes ordinarily provide the employee’s exclusive remedy against
his employer.3 Yet in almost all jurisdictions the worker’s rights against
third-parties are preserved.4 In situations where a third-party is solely
at fault, the problems are relatively simple. However, where the third-
party and the employer are concurrently at fault, the compensation
statutes have generated some troublesome problems in the area of
contribution and indemnity. These problems present what a leading
authority has described as “perhaps the most evenly-balanced contro-
versy in all of compensation law.”5

The volume of maritime litigation over this controversy between
third-parties and employers greatly exceeds that of any other juris-
diction. This comment will examine that maritime litigation with par-
ticular emphasis on the rationale underlying the third-party’s indemnity
action. The controversy can best be examined after a survey of the

* Member, Third Year Class.
1 Brown, J., dissenting in Strachan Shipping Co. v. Melvin, 327 F.2d 83, 90 (5th
Cir. 1964).
4 Id. §§ 71-73.
5 Id. § 76.10 at 228.
employee's maritime action against third-parties. Part I of this com-
mment is therefore devoted to a brief survey of the nature and sweep
of that action. Part II is devoted to the indemnity action proper. Part
III is devoted to a rather extraordinary maritime development under
which the employee is allowed to sue his employer directly if his em-
ployer is a shipowner. This anomaly of maritime law appears to have
washed in largely in the wake of the indemnity action.

The usual case develops after a shipboard injury to a longshore-
man. The longshoreman is a harbor worker whose job is to load and
unload ships. Ordinarily he is employed by a stevedoring company,
which is in turn engaged as an independent contractor by the ship-
owner to perform the ship's stevedoring operations. The longshore-
man, unlike the interstate railway worker6 and the full-fledged seaman,7
is covered by a scheme of workmen's compensation—The Longshore-
men's and Harbor Workers' Compensation Act.8 The stevedoring
company (hereafter called the stevedore) is, for purposes of the Act,
the longshoreman's employer. In compensation language, the ship-
owner is a third-party, except in the occasional case where the ship-
owner himself hires the longshoreman.

I. THE LONGSHOREMAN'S ACTION FOR
UNSEAWORTHINESS

The longshoreman's action against the shipowner generally couples
a negligence count with a count alleging that the ship was unseaworthy
under the doctrine of Seas Shipping Co. v. Sieracki.9 The latter, as we
shall see, is essentially a doctrine of liability without fault. The long-
shoreman can bring his action in several forums. He can maintain
the action on the admiralty side of the federal courts either as a libel
in rem against the ship or as a libel in personam against the shipowner.10
If diversity of citizenship requirements are met, he can sue the ship-
owner on the law side of the federal courts11 and obtain a jury trial.12

(1958), gives the interstate railway employee an action against his employer at law
for damages.

(1957).


9 328 U.S. 85 (1946). The longshoreman need not elect between unseaworthiness
Soc. Armadora Del Norte, 320 F.2d 357, 361 (9th Cir.), cert. denied, 350 U.S. 825
(1956).


12 Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 360 (1962); Weyer-
He can also bring the action in the state courts. In any forum substantive maritime law applies. Under that law assumption of risk is not a defense, and contributory negligence operates to mitigate the recovery, but not to bar it.

The longshoreman's unseaworthiness claim ordinarily can be maintained whenever his injury is attributable to ship's equipment or appurtenances which are not reasonably fit for their intended purpose. As a remedy for longshoremen, unseaworthiness had its origin as recently as 1946 in Seas Shipping Co. v. Sieracki. Sieracki, the longshoreman, was injured while loading the ship when a shackle supporting a boom broke due to a latent defect. In the trial court, Sieracki recovered judgments for negligence against Bethlehem Steel Company, the builder of the ship, and against a subcontractor of Bethlehem; but recovery against the shipowner was denied on the ground that the shipowner owed no duty to Sieracki to inspect for latent defects. In the court of appeals, the judgment in favor of the shipowner was reversed. The court did not disagree with the trial court's conclusion that the shipowner was free of negligence, but granted Sieracki judgment on the ground that the ship was unseaworthy. The Supreme Court agreed. Regarding the law settled that a seaman could recover for unseaworthiness without proof of fault, the Court treated the controversy as turning on whether the longshoreman was entitled to the seaman's remedy. The Court concluded that he was.

The decision rested largely on the Court's finding that loading and unloading was historically the work of the ship's crew. In short, the longshoreman was entitled to the seaman's remedy because he was

---

17 See generally Gilmore & Black, Admiralty 315-32 (1957).
18 328 U.S. 85 (1946).
20 149 F.2d 98 (3d Cir. 1945).
21 The shipowner apparently conceded the point. In fact, the proposition that a seaman could recover for unseaworthiness without proof of fault was far from settled. See the historical studies in Mitchell v. Trawler Racer, 362 U.S. 539, 555-70 (1960) (Frankfurter, J., dissenting); Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. Pa. L. Rev. 1137, 1139-47 (1963); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L.Q. 381 (1954).
"doing a seaman's work and incurring a seaman's hazards." The Court also suggested that it was sound social engineering to require the shipowner, who was in a position to distribute the loss in the shipping community, to bear the loss as part of the cost of stevedoring services.

The decision has been more than lightly criticized. Recent scholarship, for example, has convincingly demonstrated that the Court's history was unsound by showing that only on rare occasions did seamen of the past load or unload their ships. Moreover, even if the Court's historical notions are accepted, there remains a vast difference between the longshoreman and the seaman of the modern day. As the dissent pointed out, longshoremen

unlike members of the crew of a vessel . . . do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed; they have the same recourse as land workers to avoid the hazards to which they are exposed. . . .

And for efficient distribution of the risk of loss, the dissent pointed out that Congress had provided the Longshoremen's and Harbor Workers' Compensation Act.

Despite the criticism of Sieracki, the doctrine of strict liability to the longshoreman for unseaworthiness has been carried to all corners of the law of shipboard injuries. All manner of things and conditions in and about the ship have been held to render it unseaworthy.

Cases of defective ship's loading gear, defective ladders, unsecured beams and defective hand tools have been commonplace.

---

22 328 U.S. at 99.
23 Id. at 93-94, 96.
25 Shields & Byrne, supra note 21, at 1139-47; Tetreault, supra note 21, at 413-14.
26 328 U.S. at 105.
27 Id. at 107-08.
Improper loading or unloading of cargo which creates a hazardous condition renders a ship unseaworthy. Defective conditions under foot such as slippery decks can constitute unseaworthiness. In a recent extreme case, a skylarking harbor worker tripped over a random plank of wood on top of a hatch, and, though the harbor worker was deemed fifty per cent negligent, the court held the ship unseaworthy. The trial court found that the unaccounted-for presence of the plank “created a danger not integral to the necessary operations of the ship” and thus the ship was “less than reasonably fit for its intended use.” Even the crew must be “equal in disposition . . . to the ordinary men in the calling.” Thus, victims of shipboard assaults by unduly bellicose crewmen have recovered for unseaworthiness.

Dockside injuries are not beyond the ambit of this so-called “humanitarian policy” if the injury can still be attributed to the ship or its cargo. Thus, in *Strika v. Netherlands Ministry of Traffic,* a longshoreman injured on the dock by defective ship’s loading tackle was allowed recovery. And in the recent case of *Gutierrez v. Waterman S.S. Corp.*, a longshoreman on the dock slipped on some beans which had spilled from defective bags during unloading. The Supreme Court held that the bean bags were unseaworthy and that the Sieracki doctrine applied even though the injury occurred on the dock.

---

36 Id. at 626 (the court of appeals summarizing the trial court’s findings).
41 “A ship that leaks is unseaworthy; so is a cargo container that leaks.” Id. at 213.
It is immaterial that the hazardous conditions are created by non-crew-members, even though they are negligent. Defective cargo containers, for example, have been held to make a ship unseaworthy, though the containers are supplied by the consignor of the cargo. Hazards arising from improper loading or unloading of cargo make the ship unseaworthy, though the conditions are created by negligent fellow servants of the injured longshoreman. Even defective equipment brought aboard temporarily by the stevedore renders the ship unseaworthy.

Moreover, it is now immaterial that the hazardous condition is only transitory. For a time it was thought that transitory conditions, such as temporarily slippery decks, were not within Sieracki's full sweep. The suggestion was that a ship was less than seaworthy if a deck stood greasy for a long period of time, but not if the same amount of grease had been freshly spilled. In cases falling into the transitory class, it was thought that constructive notice to the ship's officers or appropriate members of the crew was a necessary condition of recovery. This limitation on Sieracki, however, was struck down in the recent case of


In Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960), a wrongful death action, a recovery for unseaworthiness was allowed, reduced by 50% for "contributory negligence," though the unseaworthy condition was created and triggered solely by the decedent himself. Similarly, in Donovan v. Esso Shipping Co., 250 F.2d 65 (3d Cir. 1958), cert. denied, 359 U.S. 907 (1959), a ship was held unseaworthy due to conditions created and triggered solely by the plaintiff, but recovery was denied on a theory of 100% "contributory negligence." In Holmes v. Mississippi Shipping Co., 301 F.2d 474 (5th Cir.), petition for cert. dismissed per stipulation, 371 U.S. 802 (1962), a seaman, who cut off his hand with three strokes of a meat cleaver during a schizophrenic fit, sought to recover from the shipowner for unseaworthiness on the theory that the plaintiff-seaman was not equal in disposition to the ordinary man in the calling. The court, conceding that he might recover if a fellow seaman had severed the hand, denied recovery on rather unclear rationale. The same court has held that suicide resulting from insanity is not wilful misconduct so as to fall within the statutory exception to the Longshoremen's and Harbor Workers' Compensation Act. Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929 (5th Cir. 1951), cert. denied, 342 U.S. 932 (1952).


Mitchell v. Trawler Racer. In that case a seaman was injured as he attempted to step over the ship’s rail to the dock. He slipped on slime which had apparently remained from earlier in the day when fish and spawn had been unloaded across the rail. The trial court treated the matter as a case of transitory unseaworthiness and incorporated a concept of constructive notice into its charge to the jury. The Supreme Court held the instruction erroneous.

There is no suggestion in any of the decisions that the duty is less onerous with respect to... an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska S.S. Co. v. Petterson... In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner’s actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.

This brief examination of a few of the innumerable progeny of Sieracki should sufficiently demonstrate that the shipowner’s liability for longshoremen’s injuries is not only sans fault but is extremely broad in sweep. In short, virtually any defect in equipment or any unusual condition, even a stray block of wood or a leaky bean bag, can render a ship unseaworthy. Moreover, as we have seen, it matters not that the condition is only temporary or that it is created by someone other than a member of the ship’s crew.

II. THE SHIPOWNER’S INDEMNITY ACTION

The shipowner’s indemnity action developed somewhat later than the longshoreman’s unseaworthiness claim. Not until the 1956 case of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp. did the shipowner become certain that he was to have some assistance in insuring that injured longshoremen would have an adequate award outside the Compensation Act. In that landmark decision the Supreme Court held that in certain factual situations the shipowner could obtain indemnity from the stevedore on the basis of an implied-in-fact promise to render workmanlike service. That decision will be examined closely after a brief look at the Ryan background. The pre-Ryan decisions in the Supreme Court actually suggested that stevedores as well as longshoremen were to be the darlings of the law of admiralty.

47 Ibid.
1. The Ryan Background

In 1952 the Supreme Court took the case of Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp. A harbor worker who had suffered injuries aboard ship brought the action against the shipowner for negligence and unseaworthiness. The shipowner brought in Haenn, an independent contractor who employed the injured harbor worker, alleging that Haenn's negligence had contributed to the injury and praying that contribution be awarded. By stipulation a judgment was rendered in favor of the harbor worker. In the third-party action the jury returned a special verdict that the shipowner was twenty-five per cent and Haenn seventy-five per cent responsible. The district judge, however, decided there was a general maritime rule requiring that damages be equally divided between the two parties. The court of appeals agreed that contribution should be allowed, but held that it could not exceed Haenn's liability under the Longshoremen's Compensation Act.

The Supreme Court decided the matter in a fashion which the shipowner could hardly have anticipated. After acknowledging the ancient maritime rule of divided damages in mutual-fault collision cases, and that courts exercising maritime jurisdiction traditionally have fashioned rules with greater freedom than common law courts, the Court concluded that "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." The Court expressly declined to decide whether section 5 of the Longshoremen's Act (the employer's exclusive liability provision) barred contribution. Under the Court's disposition, the contribution action was dismissed and the shipowner, who was only twenty-five per cent negligent, was sent home strapped with the stevedore's negligence as well as his own.

52 342 U.S. at 285.
53 The liability of an employer... [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death....
54 The pre-Halcyon cases were sharply divided as to whether § 5 or the general policy of the Act barred contribution, but none had seriously suggested that the common law rule of non-contribution applied in the admiralty. The cases are collected and discussed in Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. Pa. L. Rev. 321, 323-28 (1954).
55 Compare Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963), a case of mutual-fault collision between a private ship and a government dredge. An injured government employee, covered by the Federal Employees' Compensation Act, sued the
The shipowner’s next defeat in the Supreme Court came less than two years later in *Pope & Talbot, Inc. v. Hawn.* Hawn, a carpenter who was temporarily aboard ship to repair grain-loading equipment, was injured due to the unseaworthiness of the ship along with the concurring negligence of both the shipowner and Hawn’s employer (an independent contractor). By the time judgment was entered in Hawn’s favor against the shipowner, he had received about 5,000 dollars in compensation payments from his employer, for loss of wages and medical expenses. Hawn had agreed to reimburse his employer from the recovery. The shipowner, pointing out that the verdict against him included these very items, contended that the judgment should be reduced *pro tanto.* He argued that to allow Hawn to keep that amount would constitute a double recovery, and to allow Hawn’s employer to recoup his payments from the recovery would give an unconscionable reward to an employer whose negligence contributed to the injury. The Supreme Court disposed of the argument in three sentences:

A weakness in this ingenious argument is that section 33 of the [Longshoremen’s] Act has specific provisions to permit an employer to recoup his compensation payment out of any recovery from a third person negligently causing such injuries. Pope & Talbot’s contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot’s liability at the expense of... [the employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case.

This is a rather summary disposition of an important question which might well have been decided the other way. First, the stevedore’s right to reimbursement when the longshoreman prosecutes the action is not provided for in the Longshoremen’s Act. The provisions of the Act cover only the situation where the claim has been assigned

---

private shipowner and recovered $16,000. Under the settled admiralty rule in mutual-fault collision cases each shipowner is entitled to recover from the other one-half his damages. The government objected to the private shipowner’s including the $16,000 in his total damages. The Court held in favor of the shipowner, saying that § 7(b) of the Federal Employees’ Act, which is almost identical to § 5 of the Longshoremen’s Act, did not qualify the ancient admiralty rule of divided damages in mutual-fault collision cases.


57 Section 14(a) of the Longshoremen’s Act requires the employer, unless he controverts his liability, to make payments to the injured employee without a formal award. Acceptance of compensation paid without a formal award does not prejudice the employee’s right of action against the third party, although payments pursuant to a formal award can have that effect. See note 60 infra.

58 The agreement appears to be immaterial. The Etna, 138 F.2d 37 (3d Cir. 1943), held that even in the absence of agreement the employer was entitled to reimbursement on equitable principles. The employer, however, was not negligent in that case.

59 346 U.S. at 412.
to the stevedore by operation of the Act. When the longshoreman himself sues the third-party tortfeasor, reimbursement has been allowed by the courts solely on equitable principles.

Second, conceding arguendo that the result should not depend on who prosecutes the action, there is no indication in the statutory recoupment provisions that they were intended to apply when the stevedore is concurrently negligent with the third party. It is far more likely that Congress contemplated the simple situation where the third party's negligence is the sole cause of the injury. If Congress had contemplated cases of concurrent fault, the monsoons of litigation over contribution and indemnity would have been avoided by specific statutory enactment.

Third, while the stevedore's liability under the Act is absolute, he deserves no judicial sympathy in this situation. The shipowner's liability for unseaworthiness is just as absolute, and the shipowner does not have the benefit of limited damages.

Fourth, allowing the shipowner a pro tanto defense would not be at odds with a rule of non-contribution. On the contrary, the two rules ordinarily complement each other. The obvious and inevitable result of a strict application of the rule of non-contribution is that neither wrongdoer is allowed to shift any part of his loss to the other. And to avoid double recovery, whenever the injured party recovers part of his loss from one wrongdoer, whether by settlement or under a judgment, his recovery against the other is reduced pro tanto. Under the decision in Pope & Talbot, not only was Hawn's recovery not reduced pro tanto, but the negligent employer was allowed to shift his full loss to the shipowner. Pope & Talbot is not a mere affirmation of the non-contribution rule of Halcyon. The net result of this decision is that the

---

60 Section 33(b) of the Act at the time of the Pope & Talbot case provided for immediate and automatic assignment of the employee's cause of action upon acceptance by the employee of compensation under a formal award. 44 Stat. 1440 (1927), as amended, 52 Stat. 1168 (1938). Currently § 33(b) provides for an assignment unless the employee institutes proceedings against a third-party within six months after accepting compensation under a formal award. 44 Stat. 1440 (1927), as amended, 52 Stat. 1168 (1938), as amended, 73 Stat. 391 (1959), 33 U.S.C. § 933 (Supp. III, 1962). However, § 14(a) of the Act provides that "compensation shall be paid . . . without an award, except where liability is controverted by the employer." 44 Stat. 1432 (1927), 33 U.S.C. § 914(a). Section 33(e) provides for reimbursement of the employer in the situation where the claim is prosecuted or compromised by the employer after an assignment. After deduction of the employer's legal expenses, compensation paid, and compensation thereafter payable, four-fifths of the balance is payable to the employee. 44 Stat. 1440 (1927), as amended, 33 U.S.C. § 933(e) (Supp. III, 1962). There is no provision for reimbursement of the employer when the employee prosecutes the claim.

61 The Etna, 138 F.2d 37 (3d Cir. 1943), supra note 58.

62 Under the older rule, settlement or partial satisfaction from one tortfeasor often completely released the others, but there is no authority for allowing a double recovery. See Annots., 50 A.L.R. 1057 (1927); 27 A.L.R. 805 (1923), supplemented by 65 A.L.R. 1087 (1930).
rule of non-contribution applies only against the shipowner and not against the stevedore. While the negligent shipowner is allowed neither contribution nor a pro tanto defense, the negligent stevedore is awarded full indemnity.63

After Halcyon and Pope & Talbot, all the shipowner had left was a right to indemnity in certain factual situations, and even this had not been approved by the Supreme Court. Shortly after Halcyon, it was argued in the lower courts that allowance of indemnity could not be squared with Halcyon's rule of non-contribution, but the lower courts refused to read that case broadly.64 In situations where the shipowner was allowed indemnity prior to Halcyon, the lower courts continued to allow it.65 The supporting rationale was, however, uncertain. When the shipowner and stevedore had a contract with express indemnity provisions squarely covering the injury, there was of course no difficulty. But in the absence of such provisions, the decisions frequently revealed a blending together of distinct principles in one rather bewildering potpourri.

One can extract from these pre-Ryan cases essentially two basic and distinct rationales:66 (1) genuine implied-in-fact contract, and (2) quasi-contract.67 Indemnity on the basis of genuine contract princi-

---

63 Compare Witt v. Jackson, 57 Cal. 2d 57, 17 Cal. Rptr. 369, 360 P.2d 641 (1961) (Traynor, J.). The California Supreme Court, in a similar case under the California Workmen's Compensation Act, allowed the third-party tortfeasor a pro tanto defense on the theory that the negligent employer should not profit from his own wrong.

64 Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953); States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 253 (9th Cir. 1953).

65 E.g., Brown v. American-Hawaiian S.S. Co., 211 F.2d 16 (3d Cir. 1954); Crawford v. Pope & Talbot, Inc., supra note 64; States S.S. Co. v. Rothschild Int'l Stevedoring Co., supra note 64; Read v. United States, 201 F.2d 758 (3d Cir. 1953).

66 An additional theory, common law negligence, appears in a few cases, but has proved to be of little importance. The most notable example is States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 253, 256 (9th Cir. 1953). See also Considine v. Black Diamond S.S. Corp., 163 F. Supp. 107 (D. Mass. 1958).

67 A considerable amount of the confusion that exists in the cases could be avoided if the distinction between the genuine contract and the quasi-contract were carefully observed. One scholar has remarked:

The persistent failure to recognize... [the distinction between contracts proper and quasi contracts (or contracts implied in law)], however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that quasi contracts are in no sense genuine contracts. The contractor's obligation is one that he has voluntarily assumed. He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable.

WOODWARD, Quasi Contracts § 4 at 6 (1913).
inciples came to a head in the *Ryan* decision and can be examined most easily along with that case. The quasi-contractual theory will be examined briefly at this point.

In the absence of the Longshoremen's Compensation Act, there would be little doubt that the quasi-contractual theory would justify indemnity in appropriate cases. For example, when both the shipowner and the stevedore are liable to the longshoreman, the former for unseaworthiness without fault and the latter for negligently creating the unseaworthy condition, and the shipowner suffers and satisfies a judgment, then clearly the two essential requirements for quasi-contractual indemnity are fulfilled. First, the satisfaction of the judgment by the shipowner operates to confer a benefit on the stevedore, who is completely released from his liability to the longshoreman. Second, considering the stevedore's negligence and the shipowner's lack of negligence, it is surely inequitable to allow the stevedore to retain the entire benefit. Under these circumstances the authorities actually indicate that the stevedore would be regarded as unjustly enriched unless he fully indemnified the shipowner.

Several difficulties are presented when the Longshoremen's Compensation Act is superimposed on the situation.

One difficulty is generated by the limited liability features of the Act. When the shipowner suffers and satisfies a judgment in favor of the longshoreman, it no longer can be asserted that he confers a benefit on the stevedore in any amount in excess of the latter's liability for compensation under the Act. With only a limited benefit conferred, one would think it rather clear, on principle, that quasi-contractual indemnity should be limited to that amount. Surprisingly, however, no case has been found which squarely discusses the point, and only one which, somewhat instinctively, reaches that result. The other pre-*Ryan* cases which appear to rest at least partially on a quasi-contractual approach are divided between two extremes. Some allow full indemnity.

---

68 See Keener, *Quasi-Contracts* 408-09 (1893); Woodward, *Quasi Contracts* §§ 258-59 (1913); Restatement, *Restitution* § 95 (1937).

69 "In order to establish the existence of a quasi contractual obligation it must be shown: (1) That the defendant has received a benefit from the plaintiff. (2) That the retention of the benefit by the defendant is inequitable." Woodward, *Quasi Contracts* § 7 at 9 (1913).

70 Authorities cited note 68 *supra*.


72 See Woodward, *Quasi Contracts* § 3 (1913).


or, if the degrees of fault are approximately equal, then—in the pre-
Halcyon cases—ordinary contribution.\textsuperscript{75} The other cases deny both
contribution and indemnity.\textsuperscript{76}

The problem with which the courts have struggled most often is
the effect of the employer's exclusive liability provision in section 5 of
the Act.\textsuperscript{77} Is the shipowner's indemnity action on the quasi-contractual
theory barred on the ground that it is an action "on account of" the
injury of the longshoreman? On the one hand, it is clear that an action
brought on the employee's right is barred, and it is probably fair to
conclude that the Act bars derivative actions, such as for wrongful
death or loss of consortium.\textsuperscript{78} On the other hand, no court has seriously
questioned the shipowner's right to maintain an action on an express
indemnity bond given by the stevedore. On which side should the
quasi-contractual right fall?

Semantically, it would be more accurate to say that the quasi-
contractual action arises "on account of" the unjust enrichment which
may or may not follow the injury, rather than "on account of" the in-
jury itself. However, the answer probably should not rest on technical
or semantic arguments, but on broader considerations of the economic
results which the different constructions would produce. Assuming
for the purpose of illustration that indemnity, if allowed at all, is to
rest on the quasi-contractual theory, then there appear to be three
possibilities.

If section 5 of the Act is construed to allow unlimited indemnity,\textsuperscript{79}
then the net economic result is that the stevedore is protected by the
Act only within narrow limits. He is required to indemnify the ship-
owner in the mutual-fault cases whenever the shipowner is merely
passively at fault. On the other hand, the shipowner is economically
unaffected by the Act; his rights and liabilities, under this view, are
what they would be in the absence of the Act.

If section 5 is construed to completely bar indemnity,\textsuperscript{80} then the

\begin{itemize}
\item \textsuperscript{75} Portel v. United States, 85 F. Supp. 458 (S.D.N.Y. 1949); The S.S. Samovar, 72
F. Supp. 574, 588 (N.D. Cal. 1947); The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942);

\item \textsuperscript{76} Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951); American Mut. Liab. Ins.
Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); Miranda v. City of Galveston, 98 F. Supp.
245 (S.D. Tex. 1951); Johnson v. United States, 79 F. Supp. 448 (D. Ore. 1948); Standard
Wholesale Phosphate & Acid Works, Inc. v. Rukert Term. Corp., 193 Md. 20, 65
A.2d 304 (1949).

\item \textsuperscript{77} Quoted supra note 53.

\item \textsuperscript{78} Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), \textit{cert. denied}, 340 U.S. 852
(1950), squarely held that a spouse's action for loss of consortium was not barred, but
the decision was expressly overruled seven years later in Smither & Co. v. Coles, 242

\item \textsuperscript{79} See cases cited supra note 74.

\item \textsuperscript{80} See cases cited supra note 76.
\end{itemize}
stevedore enjoys a broad scope of protection under the Act. He is not only free of his maritime liabilities in all cases, but, under *Pope & Talbot*, he generally can recoup his compensation payments whenever the injured employee has an action against a third-party. However, the necessary result of this view is that the shipowner's ultimate economic burden is considerably increased by the Act. He shoulders the full liability not only when his negligence contributes to the injury, but, under the *Sieracki* doctrine, whenever an unseaworthy condition on the ship is a contributory cause. This is a rather toxic consequence for an Act generally purporting to modify only legal relations between the longshoreman and his employer.

An intermediate position is reached if section 5 is construed to allow indemnity, but recovery is limited to the stevedore's liability for compensation under the Act. Under this view, the stevedore's liability would never extend beyond the limits set by statute. On the other hand, the shipowner's burden, while greater than in the absence of the Act, would be considerably less than if indemnity were barred altogether.

The preferable view would seem to be to allow indemnity to the extent of the stevedore's liability under the Act. Unlimited indemnity simply cannot be squared with the fundamentals of unjust enrichment. On the other hand, the equivocal language of section 5 cannot justify the increased burden cast on the shipowner when indemnity is completely denied.\(^{81}\)

\(^{81}\) An additional problem that has appeared in a number of the cases is the so-called "common liability requirement." Quasi-contractual contribution and indemnity have been denied in some of the cases on the ground that shipowner and stevedore do not share a common liability *in tort* for the longshoreman's injury. The most notable examples are *Slattery v. Marra Bros.*, 186 F.2d 134 (2d Cir. 1951), and *American Mut. Liab. Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950). While some of the commentary appears to approve, *Weinstock*, supra note 54, at 335; Comment, 37 Tul. L. Rev. 786, 791-92 (1963), the approach seems to overemphasize the procedural sense of "common liability." Even if stevedore and shipowner cannot be joined at law by the longshoreman, surely both are liable for the same injury. The principles of unjust enrichment that apply to common tort liabilities are essentially the same as those applying to common contractual liabilities. *Woodward*, Quasi Contracts § 257 (1913); *Restatement, Restitution*, introductory note to title C of chapter 3 at 385 (1937). There seems to be no legitimate reason for denying contribution or indemnity simply because one party is liable in contract and the other in tort. See Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance, 47 Harv. L. Rev. 976 (1934). Should there be a different result simply because one party's liability "sounds in workmen's compensation," which is probably neither tort nor contract? Actual joinder of indemnitor and indemnitee by the principal obligee is not a prerequisite of indemnity. *Restatement, Restitution* § 86, comment a (1937). Should a procedural barrier which makes joinder impossible make a material difference? *Bacille v. Halcyon Lines*, 187 F.2d 403 (3d Cir. 1951), reversed *sub nom.* *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), disapproved, quite rightly it would seem, the cases denying contribution and indemnity for lack of a "common liability." In short, unjust enrichment may exist quite aside from procedural requirements of joinder.
2. Ryan and the Implied-in-Fact Promise of Workmanlike Service

In 1956, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, the Supreme Court finally came to the shipowner’s rescue. In that case, Palazzolo, a longshoreman unloading cargo aboard ship, was injured due to the defective manner in which the cargo had been stowed in the ship’s prior port of call. Palazzolo sued Pan-Atlantic, the bareboat charterer of the ship, on counts of negligence and unseaworthiness. Pan-Atlantic brought a third-party indemnity action against Ryan, an independent stevedoring contractor who had loaded the ship at its prior port of call. It happened that Ryan was also responsible for unloading the ship, and thus was Palazzolo’s employer. Pan-Atlantic and Ryan had a standing informal letter agreement under which Ryan had agreed to furnish stevedoring services, but there were no express indemnity provisions. In the trial court, Palazzolo recovered judgment against Pan-Atlantic, but Pan-Atlantic’s indemnity action was dismissed. The trial court found that Ryan had negligently stowed the cargo, but that Pan-Atlantic was also negligent in failing to properly supervise the loading and discover the defective stowage. The trial court concluded “that while Pan-Atlantic was guilty of a lesser degree of fault than Ryan, it was, nevertheless a joint tort-feasor, and under such circumstances, a contract of indemnity cannot be implied on the part of Ryan.”

The Second Circuit affirmed Palazzolo’s judgment, but reversed the trial court’s denial of indemnity.

We think the improper stowage the primary and active cause of the accident. . . . [Indemnity over is recoverable where, as here, the employer’s negligence was the “sole” “active” or “primary” cause. . . . Ryan was obligated by implied contract to perform the work in a reasonable safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity.]

The first round in the Supreme Court ended with an equally divided Court and the Second Circuit decision was affirmed per curiam without opinion. On rehearing, the decision was finally affirmed by a Court divided five to four.

The Court’s opinion, by Mr. Justice Burton, has proved durable and is worthy of close attention:

The [Longshoremen’s and Harbor Workers’ Compensation] Act nowhere expressly excludes or limits a shipowner’s right, as a third person, to insure itself against . . . [his liability to longshoremen]
either by a bond of indemnity, or the contractor’s own agreement to save the shipowner harmless. Petitioner’s agreement in the instant case amounts to the latter for, as will be shown, it is a contractual undertaking to stow the cargo “with reasonable safety” and thus to save the shipowner harmless from petitioner’s failure to do so. . . .

The shipowner’s action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor’s breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner. . . .

That agreement necessarily includes petitioner’s obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner’s stevedoring contract. It is petitioner’s warranty of workmanlike service that is comparable to a manufacturer’s warranty of the soundness of its manufactured product. . . .

Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner’s failure to discover and correct the contractor’s own breach of warranty as a defense.88

The sharp dissent by four justices appears to stem largely from a misunderstanding of the Court’s opinion. The dissenters in substance charged the court with allowing indemnity on the basis of an implied-in-fact promise to indemnify, and they argued, quite rightly, that there was not the slightest support in the record that such a promise had been made. The dissenters conceded that if there had been such a promise the shipowner would be entitled to indemnity. In its absence, the dissenters assumed that indemnity could be based only on quasi-contractual principles, and that, they thought, was forbidden by the Longshoremens’s Act.89

88 Id. at 130-35.
89 I agree, of course, that if the employer here had made a contract, oral or written, agreeing to hold this shipowner harmless or to indemnify the shipowner against liability for injuries to the stevedore’s employees caused by the shipowner’s negligence in whole or in part, the contract would have been valid and indemnity could have been obtained. . . . But I think there is not the slightest support in this record for a finding that any such contract was made. . . . I recognize that common-law indemnity may sometimes arise where two people commit a tort or a wrong which hurts the same person. . . . But indemnity so imposed is plainly “on account of” the negligence of the wrongdoer or his employees. The Act expressly forbids such a recovery by “anyone” from a stevedoring company “on account” of an injury to one of its longshoremen. . . .
By assuming that the only alternative to recovery on a quasi-contractual theory was recovery under an implied-in-fact promise to indemnify, the dissenters appear to have overlooked a fundamental point. The damages which the law imposes for breach of an ordinary contract to do work are on occasion the same damages that would be imposed for breach of an express contract to indemnify. As an illustration, suppose A contracted to dismantle, overhaul and reinstall the clapper valves on B's cargo ship. A failed to properly replace the clapper valves in one hold, and as a result C's cargo on B's ship was damaged by seawater entering the hold on the ship's next voyage. C recovered from B for breach of the contract of affreightment. B now recovers judgment from A for breach of the repair contract. Under ordinary principles of damages B is entitled to recover his losses caused by the breach of contract, provided they are not too remote. The payments which B was required to make to C would not be too remote. Note that if A had promised to indemnify B and save him harmless for all damages ensuing from improper work, the recoverable damages would be the same.

The test for limiting damages in the ordinary contract to perform work is probably the underlying source of the confusion. The usual statement is that "damages are recoverable only for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made." This statement unfortunately suggests that the determination of recoverable damages is a matter of determining what the parties intended, "foreseeability" being confused with "intent." This confusion seems to be the source of occasional state-
ments that a party impliedly promises to pay damages for a breach of contract. In truth, however, damages are not based on the intent of the parties; they are imposed by law quite apart from the parties' intent. It is well settled that the defendant need not actually foresee the injury. A fortiori he need not assent to paying for it. All that is required is that one in the defendant's position at the time the contract was made would have had reason to foresee the injury. This hypothetical foreseeability test is merely a working rule that the law has adopted to avoid imposing damages which would serve no socially useful purpose.

Thus, in Ryan, all that Pan-Atlantic needed for its recovery was a contract under which the stevedore expressly promised to do Pan-Atlantic’s stevedoring. From that it can surely be implied, as a matter of fact, that the stevedore undertook to do a workmanlike job, including the observance of the safety precautions customary to the trade. No more than that need have been implied. If that contract is breached, the courts will redress the violation of the shipowner’s right with compensatory damages for all injury that is not too remote. While the Court did not focus on the question of remoteness, it would appear fair to conclude that the stevedore had reason to foresee that, if he breached his contract by unsafely stowing the cargo, the shipowner might well stand liable to third parties for resulting personal injuries. This is the substance of the Court’s decision; it did not rest on a finding of an implied-in-fact promise to indemnify, which the dissenters assumed was the only alternative to a quasi-contractual recovery.

Unfortunately, the dissenters’ interpretation of the Ryan decision is shared by a wide following. Larson, for example, has described the Ryan doctrine as a “sequence of implied agreement superimposed upon implied agreement,” meaning an implied indemnity agreement superimposed on an implied agreement to perform in a workmanlike way.

---

93 E.g., Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F.2d 513 (9th Cir. 1962): “In the case at bar, the district court found . . . that though appellees’ agreements to indemnify the shipowners were not expressed in writing, there was in each contract an implied-in-fact provision that appellees promised to perform their services with care, and, in the event of a breach of that promise, to indemnify the shipowners for any liability imposed upon the shipowner for injury to any longshoreman.”
94 5 CORBIN, CONTRACTS § 1010 (1951).
95 Id. §§ 1009, 1012.
96 Ibid.
97 Id. § 1006.
98 Cases cited supra note 91.
Others have described the Ryan doctrine as a “contractual fiction” or have confused express indemnity provisions with the Ryan doctrine by calling them both “warranties.” More important is the fact that this interpretation has appeared and proved troublesome in the post-Ryan decisions.

The difficulties are most pronounced in cases where an express indemnity provision is coupled with a promise to render services. Suppose, for instance, that the stevedoring contract in Ryan had included an express indemnity provision which did not squarely cover the injury, e.g., “The stevedore shall indemnify and save the shipowner harmless in case of damage to property or injury to persons, including employees of the stevedore, resulting solely from the stevedore’s negligence.” Since Palazzolo’s injury was the result of concurring negligence of Pan-Atlantic and Ryan, rather than the sole negligence of Ryan, there would be considerable difficulty in allowing the shipowner indemnification on the basis of the express indemnity provision. Assuming that indemnity is not allowed under that provision, does the rule of expressio unius est exclusio alterius operate to bar indemnity on the basis on which it was allowed in Ryan? If the Ryan holding rests on an implied-in-fact promise to indemnify, as the dissenters assumed, the answer should be in the affirmative. But if the holding rests on an express promise to render stevedoring services (with an implied-in-fact promise of workmanlike performance), the expressio unius rule should have no application. The promise to indemnify for a particular loss may fairly imply that there is no promise to indemnify for another, but it does not fairly imply that the stevedore is limiting the damages which the law imposes for breach of his chief promise to perform stevedoring services. To do the latter the clause would have to operate as a disclaimer provision, and disclaimer provisions are strictly construed against the party attempting to limit his damages.

The expressio unius rule was applied by the trial court in the recent case of Italia Societa Per Anzioni di Navigazione v. Oregon Stevedoring Co. In that case a shipowner sought indemnity after satisfying a judgment in favor of a longshoreman whose injuries were attributable to defective equipment brought aboard by the stevedore. The contract between the shipowner and stevedore contained an express indemnity provision under which the stevedore agreed to be responsible for

---

101 E.g., id. at 558; Comment, 37 Tul. L. Rev. 786, 790 (1963).
104 310 F.2d 481 (9th Cir. 1962). The unreported trial court decision was summarized by the court of appeals, id. at 482.
injuries caused by his own negligence. The trial court found that the
stevedore had not been negligent in failing to discover the latent defect
in his equipment, and held that the express indemnity provision cover-
ing negligence precluded recovery under the *Ryan* doctrine, in sub-
stance relying on *expressio unius*. The court of appeals, not reaching
the *expressio unius* question, affirmed on the ground that even in the ab-
sence of the express indemnity clause, the *Ryan* doctrine does not cover
non-negligent conduct of the stevedore.\(^1\) The Supreme Court, how-
ever, reversed on this point and remanded for the court of appeals to de-
termine the effect of the express indemnity provision on the obligation
to render workmanlike service.\(^2\) That decision should be forthcoming.

The *Ryan* doctrine has not been confined to the maritime. Several
decisions by the California courts have indicated approval of the doc-
trine. Unfortunately, they appear to have unwittingly adopted the view
that it rests on an implied-in-fact promise to indemnify.

The *Ryan* case was first relied on in *San Francisco Unified School
Dist. v. California Bldg. Maintenance Co.*\(^3\) The school district, after
being held liable to an employee of the maintenance company (an
independent contractor) for failure to furnish a safe place to work,
sought indemnity from the maintenance company. The parties had
a written agreement under which the employer had promised to per-
form maintenance work and to be responsible for damages resulting
from its operations. After a thorough review of the decisions in other
jurisdictions, including *Ryan*, the court granted the school district
indemnity.

The court [in *Ryan*] held that the contract of the stevedoring com-
pany with the shipowner included, by implication, a provision to save
the shipowner harmless from any damages flowing from a breach of
the contract. . . .

The maintenance company [in the instant case] contracted and
agreed to wash the . . . windows from the inside from stepladders.
This contract was breached. Stepladders were not furnished to em-
ployees, nor were they instructed to use them. The contract also pro-
vided that the maintenance company "is held responsible for payment
of any and all damages" resulting from its operations. Even if this
did not amount to an express contract to indemnify the school district
for damages caused to it by a breach of the contract by the mainte-
nance company, such a warranty or agreement to indemnify would
necessarily be implied.\(^4\)

---

\(^1\) 310 F.2d 481 (9th Cir. 1962).
\(^2\) 84 Sup. Ct. 748 (1964).
\(^4\) Id. at 447-49, 338 P.2d at 793-94. See Cal. Labor Code § 3864, enacted one
year later:

If an action as provided in this chapter prosecuted by the employee, the
employer, or both jointly against the third person results in judgment against
While the court construed the *Ryan* decision as the dissenters in *Ryan* did, at least there was no suggestion that *expressio unius* applied.

Three years later, however, the Supreme Court of California applied to similar facts what is in substance the *expressio unius* rule. In *County of Alameda v. Southern Pac. Co.*, a rock and gravel company contracted to maintain a portion of a spur track used by the railroad to service the gravel company. The gravel company agreed to release and indemnify the railroad from liability for damage by fire to property owned by or in the custody of the gravel company, and also to release and indemnify the railroad from liability resulting from the gravel company's operation of its locomotive crane. A motorist lost control of his vehicle and suffered injuries proximately caused by defective maintenance of a crossing on the portion of the spur track which the gravel company had contracted to maintain. The railroad satisfied a judgment in favor of the motorist and sought indemnity from the gravel company. The trial court granted indemnity, not under the express indemnity provisions which clearly did not cover the accident, but for breach of the promise to maintain the crossing. The supreme court stated:

[The cases in California upon which Southern Pacific relies have treated such an action . . . as being upon . . . an implied promise to indemnify . . . and the cases cited and discussed in . . . [San Francisco Unified School Dist. v. California Bldg. Maintenance Co.] indicate that courts generally, where they allow such an action, treat it as one for recovery on an implied promise to indemnify the promisee for damages which the promisee is compelled to pay because of the breach by the promisor of his express promise. . . .

The industrial track agreement contains two express provisions by which Rock [the gravel company] agrees to indemnify Southern Pacific for Southern Pacific's liability for negligence . . . Since the parties industriously expressed these provisions for indemnity, we should be reluctant to engage Rock in another separate and independent obligation of indemnity by implication. The contract itself . . . gave an express remedy to Southern Pacific by providing that if Rock failed in its duty of maintenance, Southern Pacific could itself do the necessary work at Rock's expense . . . It is reasonable to conclude that Southern Pacific, having carefully provided in express terms for indemnity for its own negligence in two particulars, would have likewise made express provision for indemnity against liability based on

such third person or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

Added Cal. Stat. 1959, ch. 955 § 31, p. 2988. Compare Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F.2d 513 (9th Cir. 1962). The court held that the stevedore's liability under the *Ryan* doctrine was a liability "assumed under written contract" within the meaning of an insurance policy.

its negligent failure to maintain the spur track in proper condition if it had intended to bind Rock to such an obligation.\footnote{110}

The promise of the gravel company to maintain the spur track crossing was thus rendered largely illusory. The duty to maintain became merely a duty to pay the cost of maintenance, while the railroad's option to perform became a duty to perform.

Of the courts which have faced the \textit{expressio unius} question, the Second Circuit appears to be the only court which has clearly grasped the real nature of the \textit{Ryan} doctrine. In \textit{Pettus v. Grace Line},\footnote{Id. at 487-88, 11 Cal. Rptr. at 757, 360 P.2d at 333. One factual feature of the case which the court only mentioned was that the county gave the railroad notice in 1951 that the crossing was in need of repair, but the railroad apparently did not advise the gravel company of this fact until 1953. The railroad might well have been precluded from recovering damages which, after notice of breach, it should have avoided. See \textit{CORNUT, CONTRACTS} § 1039 (1951).} a shipowner was held liable to a longshoreman injured when struck by a draft of coffee bags being lowered by shipboard loading gear. The winch had a defective brake, but the stevedore's employees continued to use the equipment, compensating for the malfunction by applying the brake several feet before the normal cut-off point. The jury found the ship "unseaworthy with negligence."\footnote{Id. at 152. (The court noted that the record was unclear whether "negligence" referred to the shipowner or stevedore.)} In the third-party action against the stevedore for indemnity, the jury returned a verdict for the shipowner. One of the stevedore's contentions on appeal was that the trial judge erred in instructing the jury that the stevedore warranted workmanlike performance. The written contract between the parties included a broad indemnity provision under which the stevedore was responsible for damages arising from his negligence\footnote{Id. at 155. \textit{Accord}, \textit{Drago v. A/S Inger}, 305 F.2d 139 (2d Cir. 1962); \textit{Berti v.}} and the stevedore asserted that this negated the usual warranty of workmanlike service. The court disagreed.

The stevedoring companies explicitly promised to provide all labor and supervision necessary "for the proper and efficient conduct of the work" and agreed to provide full stevedoring services for Grace Line's ships. Similar language has been held to constitute a contractual warranty of workmanlike performance. . . . The indemnity clause here defines the scope of liability for the stevedores' negligence and includes a guaranty that the stevedoring companies will carry sufficient insurance to cover losses arising out of the contractor's negligence. It does not explicitly disavow the obligations created by the other provisions. In the absence of an express disclaimer we cannot construe this clause as disavowing the fundamental obligation to provide workmanlike service.\footnote{Id. at 155. (The court noted that the record was unclear whether "negligence" referred to the shipowner or stevedore.)}
As one can see, the distinction between a promise to indemnify and a promise to perform in a workmanlike manner is not an idle one. In the cases where only an ordinary service agreement is involved, the result does not usually depend on how one interprets the Ryan decision. But when the service agreement is coupled with an express indemnity provision which does not squarely cover the accident, the interpretation proves crucial.\textsuperscript{115}

3. Developing the Warranty of Workmanlike Service

While there has been confusion as to whether the stevedore's duty to indemnify rests on an implied-in-fact promise to indemnify or merely to perform in a workmanlike way, the duty was clearly laid down in Ryan as a contractual obligation. It was "of the essence" of the stevedoring contract.\textsuperscript{116} The post-Ryan decisions in the Supreme Court, however, have cast the obligation into the sea of warranty.\textsuperscript{117}

Compagnie De Navigation Cyprien Fabre, 213 F.2d 397, 400-01 (2d Cir. 1954).

In D'Ago\-sta v. Royal Netherlands S.S. Co., 301 F.2d 105 (2d Cir. 1962), where an express indemnity provision squarely covered the injury, a stevedore appealed on the ground that the shipowner did not allege a cause of action on the express indemnity provision and that the provision precluded a recovery on the Ryan doctrine. The court said "We agree with the appellant that an action on an implied warranty cannot be maintained in this case because of the existence of the express indemnity provision." \textit{Id.} at 107 (emphasis added). The court rejected the stevedore's procedural objections and sustained the recovery on the express indemnity clause. It should be emphasized that the indemnity clause covered injuries "in any manner connected with the performance of this contract, whether such injury shall be caused by the negligence of the contractor or the... [steamship company] up to a limit of $100,000 for each person." In \textit{Pettus v. Grace Line}, from all that appears, the jury may have been allowed to base its verdict on the express indemnity provision and the promise to perform in a workmanlike manner without making an alternative decision. Can that be reconciled with the dictum in \textit{D'Ago\-sta}? Compare \textit{Read v. United States}, 201 F.2d 758 (3d Cir. 1953), where the shipowner sought "indemnity by operation of law," and not on the basis of an express indemnity clause or a contract to do work (though both were present), in order to reach the bankrupt stevedore's insurance, which covered only liability imposed on the stevedore "by law." The case appears to hold that the indemnity action can be maintained on three theories at the same time. \textit{Id.} at 763.

\textsuperscript{115} An additional problem is raised when the stevedore attempts to recover from his insurance carrier after indemnifying the shipowner. Many policies exclude "liability assumed under a contract or agreement." \textit{Indemnity Ins. Co. v. California Stevedore & Ballast Co.}, 307 F.2d 513 (9th Cir. 1962), held that a stevedore's liability under the Ryan doctrine was a "liability assumed under a written contract," but under the peculiar policy involved this resulted in a judgment against the insurance company. Compare Lo Bue v. United States, 188 F.2d 800 (2d Cir. 1951), and \textit{Read v. United States}, supra note 114.

\textsuperscript{116} 350 U.S. at 133.

\textsuperscript{117} In describing the development of strict liability in the products liability field, Prosser has remarked:

The adoption of this particular device [warranty] was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of
The first seed was planted in the *Ryan* opinion itself, where a single sentence described the stevedore’s obligation as a “warranty of workmanlike service that is comparable to a manufacturer’s warranty of the soundness of its manufactured product.” However, in view of the numerous other assertions that the right was a contractual right, and the assertion that it did not rest in tort or in quasi-contract, that one sentence concerning warranty without further articulation added little if anything to the Court’s rationale. But, as we shall see, little seeds generate large trees.

In *Crumady v. The Joachim Hendrik Fisser,* a longshoreman recovered a judgment for unseaworthiness in an action in rem against the ship. At the time of the injury the ship apparently was under the operation and control of a bareboat charterer who had contracted for the stevedoring services. However, at the trial, the shipowner, rather than the charterer, appeared as claimant of the ship and sought indemnity from the stevedore. The question was thus raised whether a contractual relationship is essential to support the indemnity action. The entire discussion of the Court on this point follows:

The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedoring company “to faithfully furnish such stevedoring services.”

We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel’s owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, section 133. Moreover, as we said in the *Ryan* case, “competency and safety of stowage are inescapable elements of the service undertaken.” . . . They are part of the stevedore’s “warranty of workmanlike service that is comparable to a manufacturer’s warranty of the soundness of its manufactured product.” . . . See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.121

---

118 350 U.S. at 133.
120 The record in *Crumady* does not disclose the nature of the charter, but in a subsequent case, *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960), which came up through the same circuit, both the court of appeals, *King v. Waterman S.S. Corp.*, 272 F.2d 823, 826 (3d Cir. 1959), and the Supreme Court, 364 U.S. at 424, indicated that the ship in *Crumady* was operated by the charter party. Of the three principal types of charter parties, only the bareboat charterer operates and controls the ship. See *Gilmore & Black, Admiralty* 170-71, 216-17 (1957). The bareboat charterer takes the ship “lock, stock and barrel” and becomes owner *pro hac vice*. *Id.* at 171.
121 358 U.S. at 428-29.
The fairest interpretation of this passage is that the shipowner is entitled to indemnity under the *Ryan* doctrine as a third party beneficiary of the contract between the charterer and the stevedore. There are, however, other alternatives. Perhaps the ship itself, and not the shipowner, is to be regarded literally as a third-party beneficiary. Under sound legal analysis, it is doubtful that a ship qua ship is capable of being, or suing as, a third-party beneficiary of a contract, but under the vague metaphors of the maritime action in rem, anything is conceivable. And the Court did say that the contract was "for the benefit of the vessel."

Another possibility is raised by the last sentence quoting the passage in *Ryan* describing the stevedore's obligation as a warranty. Is the Court suggesting under notions of warranty that the shipowner can have indemnity without even the standing of a third-party beneficiary? The *MacPherson* case, which the Court cited, is a leading authority for eliminating privity requirements in the products liability field, but that action sounded wholly in negligence.

Assuming that the Court allowed the shipowner recovery as a third-party beneficiary, and this seems to be the fairest interpretation, is it justified? This theory is a consensual one—the third party's rights arise because of the intentions of the promisor and promisee. Section 133 of the Restatement of Contracts, which the Court cited, defines three types of third-party beneficiaries: (1) donees, (2) creditors, and (3) incidental beneficiaries. Obviously a gift was not intended, and if the shipowner was an incidental beneficiary, he acquired no rights under the contract. Presumably, the Court thought the shipowner was a beneficiary of the creditor species. Section 133 states "where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a creditor beneficiary if . . . performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary . . . ." In *Crumady*, wherein lay the "actual or supposed" duty owed by the charterer to the shipowner which the parties contemplated that the stevedore would satisfy? Was the charterer under an "actual or supposed" duty to the shipowner to have safe and workmanlike stevedoring services performed? The shipowner being a bareboat lessor, this is extremely doubtful. The shipowner is not interested in the way the charterer manages the ship; he is not concerned with how or whether the ship

---

122 In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960), an in rem action, a change of venue under the forum non conveniens doctrine was sought by the barge owner. The Court was not very sympathetic with the fiction of the suit in rem. It quoted with approval the following language from The City of Norwich, 118 U.S. 468, 503 (1885): "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. . . . In the matter of liability, a man and his property cannot be separated . . . ." 364 U.S. at 24.

123 Restatement, Contracts § 147 (1932).
is loaded and unloaded;\textsuperscript{124} he is not even personally liable for injuries suffered during the demise.\textsuperscript{125}

True, the charterer is ordinarily under an express contract to indemnify and save the shipowner harmless from libels asserted against the ship,\textsuperscript{126} but if this was the charterer's duty which the stevedore agreed to satisfy, then nothing less than an express promise to indemnify, expressly running to the shipowner, would appear sufficient.\textsuperscript{127} There was, however, not the slightest evidence of such a promise even to the charterer, and real promises to indemnify are not easily inferred.\textsuperscript{128} And if one did in fact exist in favor of the charterer, it is doubtful that it could be extended by implication, in any realistic sense, to the shipowner.\textsuperscript{129} In short, it is rather implausible that either the charterer or the stevedore in any way contemplated the shipowner as a beneficiary of their contract. Thus, under close appraisal, it appears that the Court imposed indemnity on the stevedore and fictitiously passed it off as a matter of contract. This is a far cry from \textit{Ryan}. Indemnity was imposed in \textit{Ryan} for breach of a simple contractual agreement to furnish workmanlike stevedoring services. \textit{Crumady}, however, is a case of indemnity imposed solely as a matter of law.

One year later, the same issue was back before the Court, and this time under more favorable circumstances. In \textit{Crumady}, the privity of contract issue was only one of several questions before the Court. However, in \textit{Waterman S.S. Corp. v. Dugan & McNamara, Inc.},\textsuperscript{130} certiorari was granted solely to consider whether a contractual relationship

\textsuperscript{125} Pichirilo v. Guzman, 290 F.2d 812 (1st Cir. 1961), \textit{rev'd on other grounds}, 369 U.S. 698 (1962); Grillea v. United States, 229 F.2d 687 (2d Cir. 1956); Vitozi v. Balboa Shipping Co., 163 F.2d 288 (1st Cir. 1947). It has been held, however, that if the unseaworthiness exists at the time of the demise, the owner is personally liable. Cannella v. Lykes Bros. S.S. Co., 174 F.2d 794 (2d Cir.), \textit{cert. denied}, 338 U.S. 659 (1949).
\textsuperscript{126} An indemnity agreement is apparently a standard clause in a bareboat-charter contract. See Read v. The Yaka, 183 F. Supp. 69, 76 n.7 (E.D. Pa. 1960). Such agreements were also involved in Grillea v. United States, 232 F.2d 919, 924 (2d Cir. 1956), and Leotta v. The S.S. Esparta, 188 F. Supp. 168 (S.D.N.Y. 1960).
\textsuperscript{127} In Ferrigno v. Ocean Transport, Ltd., 309 F.2d 445 (2d Cir. 1962), a longshoreman recovered a judgment from the shipowner for unseaworthiness. The longshoreman was employed by a stevedore who had been engaged, not by the shipowner, but by a charterer which had hired the ship to carry cargo—apparently on a specific voyage. The charterer, in any event, was not operating the ship. The trial court, 201 F. Supp. 173 (S.D.N.Y. 1961), held that the shipowner was a third party beneficiary of the following indemnity provision: "The Stevedoring Company further agrees to indemnify . . . the charterers [and their agents] against any loss sustained as a result of any claim . . . whatever which may be brought by any . . . employee of the Stevedoring Company . . . for . . . personal injury sustained during the progress of the work . . . ." 201 F. Supp. at 180. The Second Circuit reversed on the ground that "there was no showing of any intent" in the contract to indemnify the shipowner. 309 F.2d at 446.
\textsuperscript{128} See generally Annot., 175 A.L.R. 8, 20-38 (1948).
\textsuperscript{129} See note 127 supra.
\textsuperscript{130} 364 U.S. 421 (1960).
was necessary. Moreover, the Third Circuit, concerning itself solely with the one issue, had considered the point no less than three times, first before a division of the court and then twice by rehearing before the court en banc.

The facts in this case varied only slightly from *Crumady*. The original longshoreman's action was in personam against the shipowner, who had control of the ship at the time of the injury. The stevedoring services had been contracted for by the consignee of the cargo, and not by an operator of the ship. In its third-party action against the stevedore, Waterman, the shipowner, neither alleged nor sought to prove a third-party beneficiary contractual relationship. The shipowner, claiming no contractual standing whatsoever, apparently based his case on a theory that indemnity should be allowed simply because the stevedore was primarily responsible for the injury.

The Third Circuit finally affirmed the trial court's denial of indemnity. Appraising *Crumady*, the court said that "the actual holding... seems to be that a contractual undertaking of the stevedore with the operator of the ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship." The court thought that it could not go a step farther and allow indemnity where the stevedore had been engaged by the consignee of the cargo. The court regarded the shipowner and stevedore as contractual strangers, and concluded that a judgment for the shipowner, in the absence of a contractual relationship, would collide with the non-contribution rule of the *Halcyon* case.

A unanimous Supreme Court reversed:

In the *Ryan* and *Weyerhaeuser* cases considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedore. If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that bridge was crossed in the *Crumady* case. There we explicitly held that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper performance of the stevedoring services was unaffected by the fact that the shipowner was not the party who had hired the stevedore. That case was decided upon the factual premise that the stevedore had been engaged not by the shipowner, but by the party operating the ship under a charter. The Court's language was unambiguous:...
This reasoning is applicable here. We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an in rem or an in personam proceeding.\footnote{138}

When a case has been litigated all the way through the Supreme Court entirely on one question, whether a contractual relationship is necessary to sustain the indemnity action, it would seem altogether impertinent thereafter to ask that question seriously. But quae
er is the shipowner's indemnity action here based on his standing as a third party beneficiary of a contract?

The language of the above passage, if one ignores the quote from Crumady, is consistent with the proposition that the shipowner need not qualify as a third party beneficiary. This interpretation is greatly buttressed when one considers the state of the record below: a contractual relationship was neither pleaded, proved, nor stipulated.\footnote{139} On the other hand, the language is also consistent with the proposition that the shipowner qualified as a third party beneficiary. While the Court did clearly say that a direct contractual relationship is not necessary, a third party beneficiary's contractual relationship could be regarded as other than direct. The quote from Crumady, which was examined earlier, buttresses this latter view. Judging from subsequent lower court decisions, one can cite Waterman for either proposition.\footnote{140}

The nature of the stevedore's warranty (and by this time the obligation was seldom called anything else) finally was given a measure of judicial realism by the Second Circuit in DeGioia v. United States Lines.\footnote{141} In that case, a diehard stevedore, who had contracted with a cargo consignee, appealed from an indemnity judgment on essentially the same question that was litigated in Waterman. Judge Clark wrote for the court:

\ldots [The stevedore's] claim rests, however, on a misunderstanding of the nature of the stevedore's obligation to indemnify the shipowner for damages paid by the latter to injured longshoremen. It is misleading to consider this literally only an action ex contractu. The basis of the stevedore's obligation is its implied warranty of workmanlike service. The obligations which arise from warranty are not limited to the confines of an action on the contract; the zone of responsibility may extend beyond those in direct contractual relationship. \ldots This is the meaning, as we see it, of Waterman S.S. Corp v. Dugan & McNamara, Inc. \ldots

\footnote{138} 364 U.S. 421 at 423-24.  
\footnote{139} 272 F.2d at 825.  
\footnote{140} Compare Drago v. A/S Inger, 305 F.2d 139, 142 (2d Cir. 1962), with DeGioia v. United States Lines, 304 F.2d 421, 425, 426 (2d Cir. 1962).  
\footnote{141} 304 F.2d 421 (2d Cir. 1962).
The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved. Thus while the cases speak in the language of contract, it is misleading to cling to the literal implications of that language. Since the shipowner here was held liable for injuries the jury found were the foreseeable result of the stevedores' failure to perform in a workmanlike fashion, it may recover indemnification, whether it was strictly a "third party beneficiary" or not. Waterman S.S. Corp. v. Dugan & McNamara, Inc. . . . 142

Judge Clark frankly acknowledged that the shipowner's action is not necessarily based on contract. At the same time, there was no attempt to justify the action on a quasi-contractual theory. Judge Clark did mention "warranty," but the meaning of that term presumably is to be gathered from the context. The thrust of the passage appears to be that indemnity is imposed by law on the plain theory that the injury was the foreseeable result of the stevedore's failure to perform in a workmanlike manner, and since the stevedore is best able to minimize such injuries, he is liable. This rationale has merit, for only on this basis can the indemnity cases be reconciled. As we have seen, the quasi-contractual theory will justify indemnity only to the extent of the stevedore's compensation liability. And the original Ryan doctrine will justify indemnity only where there is a contractual relationship.

As the doctrine stands today, the shipowner need not concern himself, on the one hand, with concepts of unjust enrichment or active and passive negligence. On the other hand, he need not allege or prove a contract. The doctrine may be called "warranty" but there

---

142 Id. at 425-26.
143 Compare Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (Traynor, J.). The Supreme Court of California weened the consumer's products liability action from the law of warranty as well as the law of sales. Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . , and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. 59 Cal. 2d at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.
144 See text at note 72 supra.
145 In Ryan the Court said the shipowner's action did not rest in quasi-contract or tort. 350 U.S. 124 at 131. This was re-emphasized in Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1957). The Court said that "sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."
has never been any serious consideration of misrepresentation or reliance.146

4. The Stevedore's Breach

The stevedore's obligation to render safe and workmanlike service is quite broad in definition. Its specific features, however, have been filled in rather well by a considerable volume of litigation since the Ryan case. Today one can trace with some assurance the line between performance and breach.

In Ryan itself it was settled that the warranty (as it is now called) is breached when the injury-producing conditions are created by the stevedore's negligence. It is now clear that the warranty may be breached in the absence of negligence. In a recent case, the Supreme Court, reversing the Ninth Circuit, decided that a stevedore who brings aboard defective equipment which renders a ship unseaworthy must indemnify the shipowner, notwithstanding that the stevedore is free of negligence.147

It was also settled in Ryan that a shipowner may recover for the stevedore's breach though the shipowner negligently fails to discover the dangerous condition created by the stevedore.148 It is now apparently settled that the shipowner is entitled to indemnity even when he knows of the hazard.149

When the injury-causing condition is not created by the stevedore, the considerations are somewhat different. The stevedore has no affirmative duty to inspect for danger.150 Yet once he has knowledge, he breaches his warranty if he continues work in the face of the

146 In examining the development of strict liability to the consumer in the products liability field, Prosser has remarked:

Traditionally, warranty requires that the plaintiff shall act in reliance upon some representation or assurance, or some promise or undertaking, given to him by the defendant. This is extraordinarily difficult, and may be quite impossible to make out where, as is frequently the case, the consumer does not know who has made or sold the goods, and does not care. The husband or guest who eats a plate of beans seldom asks the housewife whose product they are, and still less often at what store she bought them.

Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1128 (1960).


150 Orlando v. Prudential S.S. Corp., 313 F.2d 822, 823 (2d Cir. 1963); Cia Maritima Del Nervion v. James J. Flanagan Shipping Corp., 308 F.2d 120, 125 (5th Cir. 1962); Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198, 201 (2d Cir. 1957).
hazard. The stevedore must either remove the danger or actually
discontinue work until the danger is eliminated by the shipowner.
Continuing work after merely notifying the shipowner of the hazard
is not regarded as workmanlike
service, though it may be if the
shipowner affirmatively orders work to continue despite the hazard.
Even if the stevedore does not discover the unseaworthy condition, he
will be liable if his independent negligence can be said to "call the
condition into play." Thus in Crumady v. Joachim Hendrik Fisser,
the ship was unseaworthy, though unknown to the stevedore, in that
an electrical safety device on a winch was set by the ship's crew with
too high a tolerance. A longshoreman was injured when the stevedore's
employees put too great a strain on the winch, causing the boom to
collapse. The shipowner obtained indemnity on the theory that the
stevedore's independent negligence "called into play" the unknown
danger in the loading gear.

As one can see even from this brief survey, the shipowner has had
almost as much success with his indemnity action as the longshoreman
has had with his unseaworthiness claim. Indeed, when the stevedore
created the unseaworthy condition, no case has been found where
the shipowner has been denied indemnity. And although someone
else creates the condition, the shipowner nevertheless is entitled to
indemnity if the stevedore either discovers the condition or negligently
calls it into play.

In DeGioia v. United States Lines, Judge Clark stated that the
function of the Ryan doctrine is to allocate the losses caused by ship-
board injuries to the entrepreneur best able to minimize the particular

---


156 304 F.2d 421 (2d Cir. 1962).
Assuming that to be true, the *Ryan* doctrine has served exceedingly well. Bearing in mind that the stevedore is the expert in matters of loading and unloading and that he is principally in charge of the stevedoring operations, it can be fairly said that in virtually all of the situations where the stevedore is required to indemnify the shipowner, he is in the best position to minimize the risks involved. The situation where the stevedore’s independent negligence calls into play an unknown defect in ship’s equipment raises the closest question. Contribution would probably produce the fairest result, but if one must make an either-or choice, then even here the stevedore probably is best able to minimize the risks.

Although the *Ryan* doctrine appears sound, there may be serious question as to the merits of the *Sieracki* doctrine. It is quite arguable that many of the cases should not be taken from the umbrella of the Compensation Act in the first instance. Indeed, the *Ryan* doctrine appears to be largely the child of the extreme virility enjoyed by the doctrine of unseaworthiness. The *Sieracki* decision itself was perhaps not wrongly decided. At least it can be said that, as between shipowner and stevedore, the shipowner is in a better position to minimize the risks created by basic defects in the ship’s hull and equipment, such as the defective boom shackle which caused Sieracki’s injury. Unfortunately, the doctrine has been extended to extremes. Progressing largely on factual analogies, rather than on step-by-step examination of each case in light of fundamental principles, the decisions have extended the *Sieracki* doctrine until it now embraces a great variety of risks which the stevedore is in far better position than the shipowner to minimize. It became obvious that the shipowner was paying for a large number of the stevedore’s wrongs. In short, *Ryan* was needed to atone for *Sieracki*’s excesses.\(^\text{158}\)

III. THE LONGSHOREMAN’S MARITIME ACTION AGAINST HIS EMPLOYER FOR UNSEAWORTHINESS

If the caption to this section is astonishing, so is the result in the case of *Reed v. The Yaka*.\(^\text{159}\) Longshoreman Reed was injured aboard ship, while engaged in loading operations, when his foot went through a latently defective pallet. Reed filed a libel in rem against the ship to recover for his injuries. The owner of the ship, Waterman Steam-

\(^{157}\) *Id.* at 426.

\(^{158}\) The shipowner was first held liable for defective equipment brought aboard by the stevedore in Alaska *S.S. Co. v. Petterson*, 347 U.S. 396 (1954), *affirming mem.* 205 F.2d 478 (9th Cir. 1953). The case was decided over the vigorous dissent of three Justices in March of 1954. Certiorari was granted in *Ryan* in October of 1954. In April of 1955, the decision of the Second Circuit granting the shipowner indemnity was affirmed without opinion by an equally divided Court. 349 U.S. 901. The landmark opinion in *Ryan* was rendered on rehearing in January of 1956. 450 U.S. 124.

\(^{159}\) 373 U.S. 410 (1963).
ship Corporation, answered the libel and impleaded Pan-Atlantic Steamship Corporation, the bareboat charterer of the ship at the time of the injury.

Reed had good reason not to prosecute a personal action against the shipowner, as a bareboat demise generally is thought to personally immunize the owner from claims for unseaworthiness, at least when the unseaworthy conditions arise after the demise. This was clearly the case in *Yaka*, as the defective pallet was brought aboard by the bareboat charterer.

Reed had even better reason for not bringing a personal action against Pan-Atlantic. A bareboat charterer is regarded as owner pro hac vice and undoubtedly is personally liable for claims of unseaworthiness, but in this case a seemingly unsurmountable difficulty existed, as Pan-Atlantic was Reed's employer. An independent stevedoring contractor had not been engaged. As the law stood, the Longshoremen's Act appeared to be Reed's sole remedy against Pan-Atlantic.

There were two rather outlandish theories on which one might have given Reed an outside chance to succeed with his libel in rem, but the prospects under both must have appeared rather dim. One possibility was that the ship could be held liable, notwithstanding the personal immunity of both the owner and the bareboat charterer. One Second Circuit decision had been so construed. However, two other circuits, including the Third Circuit in which the action was brought, had squarely held that the libel in rem was essentially a procedural device and that there had to be an underlying or lien-creating liability. The other possibility was that the shipowner would be regarded personally liable, despite the bareboat demise, and that this would support the libel in rem. The court of appeals decisions were all at odds with this proposition, but the Supreme Court had recently reserved the question.

---

160 Pichirilo v. Guzman, 290 F.2d 812 (1st Cir. 1961), *rev'd on other grounds*, 369 U.S. 698 (1962); Grillea v. United States, 229 F.2d 687 *rev'd on other grounds on rehearing*, 232 F.2d 919 (2d Cir. 1956); Vitozi v. Balboa Shipping Co., 163 F.2d 286 (1st Cir. 1947).

161 Cannella v. Lykes Bros. S.S. Co., 174 F.2d 794 (2d Cir.), *cert. denied*, 338 U.S. 859 (1949), held that the demisor was liable for unseaworthiness arising prior to the demise.

162 373 U.S. at 411.


165 Smith v. The Marmacdale, 198 F.2d 849 (3d Cir. 1952), *cert. denied*, 345 U.S. 908 (1953); Samuels v. Munson S.S. Line, 63 F.2d 881 (5th Cir. 1933). That the Supreme Court views the libel in rem as little more than a convenient procedural device, see Continental Grain Co. v. Barge FBL-555, 364 U.S. 19 (1960).

166 Cases cited *supra* note 160.

As the case turned out, the Supreme Court expressly declined to reach either theory. Instead, the Court held that Pan-Atlantic, Reed’s employer, could be held personally liable in its capacity as a bareboat charterer, despite the provisions of the Longshoremen’s Act, and that this personal liability would support the libel in rem.

Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner [pro hac vice] acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under Ryan, the burden ultimately falls on the company whose default caused the injury. . . . We cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like Sieracki, Ryan, and others, the holdings of which have been left unchanged by Congress. In particular, we pointed out several times in the Sieracki case, which has been consistently followed since, that a shipowner’s obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts . . . . And Ryan’s holding that a negligent stevedoring company must indemnify a shipowner has in later cases been followed and to some degree extended. In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. . . . We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship’s service.

There is no question about squaring this decision with the Longshoremen’s Act. As the dissent pointed out, it simply cannot be done. In effect, section 5 of the Act, which makes the employer’s liability for compensation “exclusive and in place of all other liability . . . at law or in admiralty on account of such injury,” must be regarded as amended by a proviso: “provided the employer is not an owner or operator of a ship.”

The decision does not rest on an inscrutable mystery of the maritime libel in rem. This is fairly clear from the opinion itself. And in one recent lower court decision, Yaka was construed, quite rightly it would seem, to allow a longshoreman to sue his bareboat-charterer-

---

168 373 U.S. at 411 n.1, 412.
169 Reed had not even argued the point. Id. at 417 (dissenting opinion).
170 Id. at 414-15 (footnotes omitted).
171 Id. at 416.
employer for unseaworthiness in a personal action on the law side of the federal district court.\textsuperscript{173}

Is this not a case of an exception devouring a rule? Twenty years ago (prior to Sieracki), whenever a longshoreman was able to recover a maritime judgment for his injuries, the recovery came largely as a windfall. Today the Court finds it so "harsh and incongruous"\textsuperscript{174} that an injured longshoreman should go without a maritime judgment, that the employment relationship, the backbone of compensation law, falls before Sieracki's sweep.

CONCLUSION

One cannot survey the developments surrounding the longshoreman's shipboard injury without concluding that an extraordinary amount of litigation has been generated over what are essentially ordinary occupational casualties. Surely, the great majority of similar non-maritime casualties are put to rest conclusively under state workmen's compensation statutes. Yet in the maritime, with a compensation statute aimed squarely at the longshoreman's shipboard injuries,\textsuperscript{175} compensation payments, in what must be a large majority of the cases of serious injury, mark only the beginning. Only after two essentially distinct maritime actions does the litigation ordinarily reach its end. And there have been recent attempts, so far unsuccessful, to carry it even further. Stevedores, for example, after indemnifying the shipowner, have attempted to enforce that "hoary" proposition, which is often stated but rarely applied, that a master is entitled to recover from his servant when the negligent act of the servant renders the master liable to third persons.\textsuperscript{176}

\textsuperscript{174} 373 U.S. at 415.
\textsuperscript{175} Section 3 of the Act states that compensation is payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States . . . and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law." 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958). The recent case of Atlantic Stevedoring Co. v. O'Keeffe, 220 F. Supp. 881 (S.D. Ca. 1963), illustrates the Act's limitations. A longshoreman working on a dock was caught up by loose metal banding extending from cargo being hoisted aboard ship by shipboard loading gear. The longshoreman was dropped between the ship and the dock. There was no evidence as to whether he hit the ship or the dock, but he was knocked unconscious and drowned. The court enjoined proceedings under the Longshoreman's Act for lack of jurisdiction.
\textsuperscript{176} See Johnson v. Parfrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962); Cavelleri v. Isthmian Lines, 190 F. Supp. 801 (S.D.N.Y. 1961). See generally, Steffen, The Employer's "Indemnity" Action, 25 U. Cm. L. Rev. 465 (1956). Compare Horton v. Moore-McCormack Lines, 326 F.2d 104 (2d Cir. 1964). A seaman sued the shipowner for unseaworthiness and negligence, alleging that he had been assaulted by a vicious fellow seaman. The evidence showed that the assailant had previously attacked another crew member, that he used a broken glass and a bottle on the plaintiff, and that he bit both of his victims severely. The jury gave the seaman a verdict for $80,000. In
This “three-cornered Kilkenny Fair” is proving rather expensive for the stevedore. Judging roughly from the reported cases, the stevedore ends up paying, via the indemnity action, a substantial majority of the maritime judgments awarded longshoremen. In any event, whenever the indemnity action does succeed, the stevedore pays, in addition to his own legal costs and attorney fees, those of the shipowner which are attributable to the defense in the longshoreman’s action. In one recent decision, the stevedore was required to indemnify the shipowner for costs and attorney fees even though the shipowner’s defense in the longshoreman’s action was successful. And if the longshoreman’s recovery from the shipowner does not substantially exceed the benefits he is entitled to under the Longshoremen’s Act, the stevedore in effect absorbs the costs and fees of the longshoreman as well. With fees for each attorney running perhaps as high as thirty to fifty per cent of the longshoreman’s recovery, a net recovery of 25,000 dollars for the longshoreman may easily cost the stevedore twice that amount.

_a third party action against the assailant, the jury gave the shipowner a verdict for only $4,300. The court of appeals reversed and remanded the third party action, directing the trial court to enter a judgment of $90,000 in favor of the shipowner against the assailant._

Strachan Shipping Co. v. Melvin, 327 F.2d 83, 90 (5th Cir. 1964) (dissenting opinion).

Calderone v. Naviera Vacuba S/A, 328 F.2d 578 (2d Cir. 1964); Paliaga v. Luckenbach S.S. Co., 301 F.2d 403 (2d Cir. 1962).


In Strachan Shipping Co. v. Melvin, 327 F.2d 83 (5th Cir. 1964), Melvin (a longshoreman) received $28,000 from his employer in compensation payments. Thereafter, he sued the shipowner for unseaworthiness and recovered $30,000. In a priority contest between Melvin’s employer and Melvin’s attorney, the court held that the attorney’s 40% contingent fee plus costs (total of $12,500) had first priority. Thus the employer, recouping only $17,500 of this $28,000 in compensation payments, in effect paid $10,500 of the $12,500 total fees and cost for Melvin’s third-party action. The fact that Melvin sued the third-party after $28,000 in compensation payments had been paid is immaterial. Whenever the third-party action recovers less than the value of the compensation payments, the employer must pay the difference between (1) the value of compensation benefits, and (2) the longshoreman’s net recovery (i.e., recovery less costs and attorney fees). See Longshoremen’s Act § 33(f), 44 Stat. 1441 (1927), as amended, 33 U.S.C. § 933(f) (Supp. III, 1962); Voris v. Gulf-Tide Stevedores, Inc., 211 F.2d 549 (5th Cir. 1954).


In Strachan Shipping Co. v. Melvin, discussed _supra_ note 180, the shipowner dismissed the indemnity action against the stevedore on the eve of trial. 327 F.2d at 90 n.14. If that action had succeeded, the stevedore’s expenses would have included: (1)
Moreover, as the law stands, there is considerable room for apparent injustice to longshoremen. The courts appear frequently to assume that a maritime recovery is substantially superior to compensation under the Act.\textsuperscript{183} If this is in fact true, it must strike longshoremen who are unable to bring themselves within Sieracki's embrace as rather arbitrary and unfair.\textsuperscript{184} The Yaka decision did not do much to resolve the disparity if it does in fact exist; it merely moved the line over. Whatever the inefficiencies and injustices of the present machinery, they do not appear to be attributable to the Ryan doctrine. If there is a culprit afloat, it would seem to be the doctrine of unseaworthiness as applied to longshoremen. In what is perhaps the great majority of cases where the stevedore is now required to indemnify the shipowner, the loss should be placed on the stevedore in the first instance, and rationally, under the Longshoreman's Act.

\textsuperscript{183} What else did the Court have in mind in Reed v. The Yaka, 373 U.S. 410, 415 (1963), when it spoke of the "harsh and incongruous results" that would be reached if Reed were not allowed a maritime judgment against his employer? See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 139-40 (1956) (dissenting opinion). The superiority of the maritime judgment has been challenged. Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. of Pa. L. Rev. 1137, 1147-48 (1963).

\textsuperscript{184} Most of these are cases of dockside injuries which could not be attributed to the ship, its equipment or its cargo. However, in McKnight v. N. M. Paterson & Sons, Ltd., 181 F. Supp. 494 (N.D. Ohio 1960), aff'd, 286 F.2d 250 (6th Cir. 1960), cert. denied, 368 U.S. 913 (1961), a longshoreman was actually aboard ship in a hold when he was struck by unloading gear being lowered into the hold by a giant shoreside crane. The shipowner was granted summary judgment on the longshoreman's unseaworthiness claim on the ground that the crane, which was owned by the stevedore, was not physically attached to the ship or "adopted" or "integrated" into the ship's equipment, and thus not within Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), and her progeny.