Hastings Law Journal

Volume 18 | Issue 4 Article 11

1-1967

Shipowner's Indemnity: Non-Contractual Recovery of Maintenance and Cure Expenses from Third Party Tort-Feasor

Michael Cavalier Durney

Based on the expressions in the previously discussed cases, a list of such possibilities might include actions for marine trespass, illegal detention and captures, unlawful deportation, false representations, maintenance and cure, wrongful death under state statutes, and other maritime torts.

In *Vaughan v. Atkinson*[123] the Supreme Court awarded counsel fees for the first time in an action for maintenance and cure. The delinquency of the defendant in that case forced the Supreme Court to rely on the "equitable"[124] powers of admiralty to shape a new remedy and impress upon the defendant the seriousness of his failure to meet his obligation. Other courts in recent cases have expressed the opinion that punitive damages could be allowed to deter a repetition of the defendants behavior.[125] The expressions of support in the cases discussed and the action of the Supreme Court in *Vaughan v. Atkinson* would suggest that while they are not commonly awarded, punitive damages, or a similar form of special remedy, might be useful in admiralty to provide a stronger and more decisive remedy than is provided by the award of compensatory damages alone.

While the cases available indicate that punitive damages could be, and possibly should be, recoverable in admiralty, the fact remains that they are seldom awarded by the admiralty courts. No express of support, however logical and compelling, can establish a legal proposition unless it is accepted by the courts which ultimately must apply it. Punitive damages have not yet achieved that acceptance in our admiralty courts. Yet the possibility of such acceptance can not be dismissed, for the principle has never been rejected and the expressions of support are numerous.

*Byron Boeckman**

[123] 369 U.S. 527, 1962 A.M.C. 1131 (1962).

[124] *Id.* at 530, 1962 A.M.C. at 1133.

[125] United Kingdom Mut. S.S. Assur. Ass'n v. Morewitz, 1953 A.M.C. 2079 (E.D. Va. 1953).

* Member, Second Year Class.

SHIPOWNER'S INDEMNITY: NON-CONTRACTUAL RECOVERY OF MAINTENANCE AND CURE EXPENSES FROM THIRD PARTY TORT-FEASOR

Introduction

Whenever a seaman is disabled, either through illness or injury, he is entitled to be maintained and cured at the expense of the owner of the vessel on which he is signed. This absolute right is subject to only two qualifications: (1) that the disability arose or became apparent while the seaman was in the service of the vessel, and (2) that it was not a product of the seaman's gross and wilful misconduct.[1] Given these two qualifications, the shipowner is strictly liable for main-

[1] Aguilar v. Standard Oil Co., 318 U.S. 724, 1943 A.M.C. 451 (1943); GILMORE & BLACK, ADMIRALTY 254 (1957) [hereinafter cited as GILMORE & BLACK]. See generally 1 NORRIS, SEAMEN §§ 536-608 (2d ed. 1962) [hereinafter cited as NORRIS].

tenance and cure, a liability that is imposed by the general maritime law and which cannot be contracted away [2]

This oldest of remedies[3] afforded a disabled seaman is at present the subject of little controversy except in one particular area: in the *absence of contract* should a shipowner be granted indemnity from a third party for the maintenance and cure of a seaman who has been injured through the negligence of a third party?[4] It is submitted that to do justice between the parties, the shipowner should be allowed to recover over against the third party whose negligence has directly caused the shipowner's loss. Although decisions of the lower federal courts are badly split, the Supreme Court has not yet addressed itself to this question.

The Leading Cases on Shipowner's Indemnity

The roots of the shipowner's indemnity controversy lie in the 1927 decision of the Second Circuit in *The Federal No. 2.*[5] In this case, a seaman employed on a barge was injured when a towing hawser from the barge to the tug swept across the deck of the barge due to the negligence of the tug's crew. The owner of the barge libeled the tug in rem for reimbursement for the expenses of maintaining and curing the injured seaman.[6] The court, applying New York law,[7] saw the problem as arising out of the employer-employee relationship with the employer under a contractual obligation to maintain and care for the employee in the event of injury to him. In the absence of a statutory or contractual right of subrogation, the court reasoned, indemnity could not be granted, since the proximate cause of of the barge-owner's loss was his contract with the seaman, while the negligence of the tug was remote.[8] This denial of recovery by the Second Circuit on the basis of proximate cause became the leading authority against shipowner's indemnity.[9]

In 1946, when the Third Circuit was faced with the indemnity question, it held in *Jones v. Waterman S.S. Corp.*[10] that the shipowner should be allowed to recover over against the negligent third party.[11] In this case, Jones, a seaman in

---

[2] Cortes v. Baltimore Insular Line, 287 U.S. 367, 1933 A.M.C. 9 (1932).

[3] 1 NORRIS § 538.

[4] For purposes of this discussion "indemnity" is defined as "restitution or reimbursement." BLACK, LAW DICTIONARY 910 (4th ed. 1951) citing Travelers Ins. Co. v. Georgia Power Co., 51 Ga. App. 579, 181 S.E. 111 (1935).

[5] 21 F.2d 313, 1927 A.M.C. 1471 (2d Cir. 1927).

[6] *Ibid.*

[7] This was not expressly stated by the court. However, the case has been both cited and criticized on the basis of its application of New York law to the indemnity problem. See Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271, 278, 1962 A.M.C. 1057, 1059 (Tex. Civ. App. 1957); Annot., 70 A.L.R.2d 475, 481 (1960).

[8] 21 F.2d at 314, 1927 A.M.C. at 1473.

[9] GILMORE & BLACK 273. Cases following The Federal No. 2: H-10 Water Taxi Co. v. United States, 252 F Supp. 592, 1966 A.M.C. 2040 (S.D. Cal. 1966); Gomes v. Eastern Gas & Fuel Associates, 127 F Supp. 435, 1955 A.M.C. 97 (D. Mass. 1954); Irwin v. United States, 111 F Supp. 912, 1955 A.M.C. 913 (E.D.N.Y. 1953); Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271, 1962 A.M.C. 1057 (Tex. Civ. App. 1957).

[10] 155 F.2d 992, 1946 A.M.C. 859 (3d Cir. 1946).

[11] *Id.* at 1001, 1946 A.M.C. at 871.

the employ of Waterman, was returning from shore leave at night when the lights on the pier went out. In the darkness Jones fell into an open ditch along a railroad siding owned and operated by the Reading Railroad. Jones first brought a civil suit against Reading for negligence in maintaining an open ditch. Jones settled with Reading for $750.00, executed a general release in its favor, and then brought a civil suit against Waterman for maintenance and cure. After it was established that a shore leave injury was within the scope of maintenance and cure,[12] Waterman sought to implead Reading as a third party defendant. After upholding the impleader,[13] the Third Circuit ruled that Waterman's claim against Reading had no support in maritime law, but was instead supported by the common law of Pennsylvania.[14] The court saw the shipowner-seaman relationship as more closely analogous to that of father and child than to employer and employee,[15] an analysis that ran directly counter to the reasoning in *The Federal No. 2*.[16] Although unable to find any case law directly on the subject,[17] the court held that in view of this higher level of relationship, Waterman could recover the sums it would be compelled to expend for the maintenance and cure of Jones. In support of its holding, the court relied[18] to a considerable degree upon the holding of a federal district court in *United States v. Standard Oil Co.*[19] that the government could recover the expenses it incurred for the medical care of a soldier injured by a third party. As a result, the Third Circuit found for Jones against Waterman and granted a recovery over for Waterman against Reading.[20]

In view of both subsequent and previous cases, the decision of the Second Circuit in *The Federal No. 2* is questionable. It was well established in the New York courts prior to 1927 that in the basic fact situation found in *The Federal No. 2* (an injury by one person to another with resultant liability visited upon a third) an action for indemnity would lie.[21] Subsequent cases applying New York law have

[12] Prior to the decision in the instant case, a question of maintenance and cure as applicable to shore leave injuries was certified to the Supreme Court. In Waterman S.S. Corp. v. Jones and Aguilar v. Standard Oil Co., its companion case, both at 318 U.S. 724, 1943 A.M.C. 451 (1943), the Supreme Court extended the coverage of maintenance and cure to protect the seaman whenever he is "subject to the call of duty as a seaman, and earning wages as such" so as to put injuries sustained on authorized shore leave within the protection of the seaman's right to maintenance and cure. See GILMORE & BLACK 258-61.

[13] 155 F.2d at 997, 1946 A.M.C. at 865.

[14] *Id.* at 997, 1946 A.M.C. at 865.

[15] *Id.* at 1000-01, 1946 A.M.C. at 870-71.

[16] 21 F.2d at 314, 1927 A.M.C. at 1473.

[17] 155 F.2d at 997, 1946 A.M.C. at 865.

[18] *Id.* at 1001, 1946 A.M.C. at 871.

[19] 60 F Supp. 807 (N.D. Cal. 1945).

[20] 155 F.2d at 1001, 1946 A.M.C. at 871. Cases following Jones v. Waterman S.S. Corp.. Myles v. Quinn Menhaden Fisheries, Inc., 302 F.2d 146, 1962 A.M.C. 1626 (5th Cir. 1962); Valentine v. Wiggins, 242 F Supp. 870 (E.D.N.C. 1965); Pure Oil Co. v. Geotechnical Corp., 129 F Supp. 194, 1955 A.M.C. 566 (E.D. La. 1955); Pabellon v. Grace Line, 12 F.R.D. 123 (S.D.N.Y. 1951); Sillanpa v. Cornell Steamboat, 1954 A.M.C. 1189 (N.Y. Sup. Ct. 1954).

[21] Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903); Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892); Annot., 40 L.R.A. (N.S.) 1147 (1912).

reaffirmed this general right of indemnity,[22] with the necessary result that *The Federal No. 2* appears to deviate significantly.

This fact alone, however, would not have rendered the case unpersuasive had the Second Circuit not based its opinion on proximate cause reasoning,[23] i.e., since the shipowner's liability to the seaman arose out of contract, and the injury to the seaman was not an intentional interference with this contract, the contract was the proximate cause of the shipowner's loss and the third party's negligence was remote.[24] In its simplest form, however, proximate cause merely means legally recognized cause.[25] To state that the negligence of the third party was not a legally recognized cause of the shipowner's loss is to completely ignore a basic principle of the right to indemnity·

> It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of another, the former having a right of action against the latter for indemnity [26]

The shipowner was not acting as a volunteer when he undertook to maintain and cure the injured seaman; he was fulfilling a legal obligation that was imposed by the general maritime law.[27] It was not a simple contractual obligation such as to be within the Supreme Court's ruling in *Robins Dry Dock & Repair Co. v. Flint.*[28] The negligence of the tug in *The Federal No. 2* was in fact *directly* responsible for bringing the legal obligation of the shipowner into play. As a result, the proximate cause argument of the Second Circuit was no more than an evasion of the all-important issue of indemnity.

A further weakness of *The Federal No. 2* is that the court, although sitting in admiralty, applied New York law to a maritime problem.[29] Ignoring for the moment whether or not the Second Circuit correctly interpreted New York law, the fact that state law was applied precludes the case from being authoritative as to the status of shipowner's indemnity within the general maritime law.

Of greater significance than these criticisms is the fact that under present maritime law, a shipowner will be granted a right of recovery on the very facts that were before the court in *The Federal No. 2*. The basis for this recovery is

---

[22] See The Jefferson Myers, 45 F.2d 162, 1930 A.M.C. 1911 (2d Cir. 1930); Seely v. City of New York, 24 F.2d 412, 1928 A.M.C. 944 (2d Cir. 1928); Sillanpa v. Cornell Steamboat Co., 1954 A.M.C. 1189 (N.Y. Sup. Ct. 1954); *cf.* Banks v. Central Hudson Gas & Elec. Co., 224 F.2d 631 (2d Cir. 1955), *cert. denied*, 350 U.S. 904 (1955); Bohn v. American Export Lines, 42 F Supp. 228, 1942 A.M.C. 336 (S.D.N.Y. 1941).

[23] The Second Circuit's application of "proximate" cause as a means of denying the shipowner indemnity was sharply attacked by writers who noted the case. See Note, 12 CORNELL L.Q. 235 (1927); Note, 76 U. PA. L. REV. 326 (1928); Note, 37 YALE L.J. 533 (1928).

[24] 21 F.2d at 314, 1927 A.M.C. at 1243.

[25] See PROSSER, TORTS 282 (3d ed. 1964).

[26] 42 C.J.S. *Indemnity* § 21 (1944).

[27] 1 NORRIS § 543.

[28] 275 U.S. 303 (1927). "[A]s a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far." *Id.* at 309.

[29] Note 7 *supra* and accompanying text.

the contract of service which was in force between the shipowner and third party, a factor which played no part in the court's analysis of the indemnity problem in *The Federal No. 2.* Under the ruling of the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*[30] and subsequent cases[31] construing *Ryan*, a shipowner may, on the basis of an "implied warranty of workmanlike service," be indemnified for losses for which a third party who is under a contract of service to the shipowner is responsible. The *Ryan* doctrine is the leading case on the question of indemnity in maritime law[32] and will be examined more closely at a later point in this discussion. Its immediate importance is that it at least impliedly rejected both the reasoning and the holding of the court in *The Federal No. 2.*

When the shipowner's indemnity question arose in the Third Circuit in *Jones v. Waterman S.S. Corp.*, the court, although allowing recovery, did little to settle the question on any concrete basis. The weaknesses of the *Jones* case are basically threefold. First, the lower federal district court holding in *United States v. Standard Oil Co.*,[33] on which the Third Circuit relied rather heavily, was reversed by the Supreme Court,[34] which held that in the absence of statute, the government could not recover hospitalization expenses for a soldier injured by a third party.[35] Although the relevance of the *Standard Oil* case is in dispute, the reversal by the Supreme Court did considerable damage to the conceptual framework of *Jones.*[36] Secondly, the court granted recovery to Waterman on the basis of a contrived tort obligation of Reading, i.e., breach of a duty owed to Waterman not to negligently injure any of the seamen in Waterman's employ.[37] The weakness of this theory is that the jurisdiction of the admiralty court in matters of tort depends upon the location of the tortious activity.[38] Thus, whenever a seaman is injured on land, and sues someone other than his employer for personal injuries as in *Jones*, maritime law is not controlling. As a result there would be no way the shipowner could be universally assured of recovery in shore leave injuries since his right of action would depend upon local law.[39] Lastly, and most importantly, the Third Circuit held that, "Waterman's cause of action does not lie within the purview of the maritime law."[40] This, of course, is true if the shipowner's only enforceable theory of recovery is in tort. But if the shipowner's indemnity can and should be supported by the general maritime law, the technical form of the right of indemnity should not be allowed to restrict recovery to only those cases involving third party injuries to seamen on navigable water. The Third Circuit's

[30] 350 U.S. 124, 1956 A.M.C. 9 (1956).

[31] See, *e.g.*, Ammesmaki v. Interlake S.S. Co., 342 F.2d 627, 1965 A.M.C. 1528 (7th Cir. 1965); United States v. Tug Manzanillo, 310 F.2d 220, 1963 A.M.C. 365 (9th Cir. 1962); Hidick v. Orion Shipping & Trading Co., 157 F Supp. 477, 1958 A.M.C. 1281 (S.D.N.Y. 1957).

[32] 1 EDELMAN, MARITIME INJURY & DEATH 413 (1960).

[33] 60 F Supp. 807 (S.D. Cal. 1945).

[34] United States v. Standard Oil Co., 332 U.S. 301, 1947 A.M.C. 1017 (1947).

[35] *Id.* at 314, 1947 A.M.C. at 1027.

[36] GILMORE & BLACK 275-76.

[37] 155 F.2d at 1000, 1946 A.M.C. at 869.

[38] Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).

[39] See Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271, 1962 A.M.C. 1057 (Tex. Civ. App. 1957).

[40] 155 F.2d at 997 n.3, 1946 A.M.C. at 865 n.3.

grant of recovery by operation of Pennsylvania law is undoubtedly valuable as precedent within the Third Circuit, but beyond that the *Jones* case does little to ensure uniform recovery by the shipowner.[41]

Why Indemnity?

The entire area of shipowner's indemnity is not subject to this marked divergence of judicial authority. It is well settled, for example, that if in a suit by a seaman the shipowner and third party are joined as parties defendant, the shipowner is secondarily liable for those elements of damages covered by maintenance and cure.[42] Similarly, if the seaman has already obtained and satisfactorily executed a judgment against the third party, there is no question that the shipowner can set off in a later action by the seaman amounts of maintenance and cure that have already been compensated for in damages.[43] In view of this, to refuse indemnity when the shipowner seeks to implead the third party or else pursue him in an independent action is at best "unduly technical,"[44] if not wholly inequitable. By granting indemnity, the third party is not being made to pay anything that could not be recovered from him directly in a tort action by the seaman.[45] To deny the shipowner recovery under these circumstances is merely to permit the third party to place the onus of his negligence on the shoulders of an innocent party.

Indemnity Under Present Maritime Law: The Role of the Ryan Case

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.[46] is important to the discussion of shipowner's indemnity in two respects. First, it is a ratification by the Supreme Court of the principles underlying indemnity for losses occasioned by third parties in a maritime situation. Secondly, the case is limited in its scope, and its application must be clearly ascertained.

The *Ryan* doctrine, or the "implied warranty of workmanlike service," was formulated by the Supreme Court in an effort to solve equitably a problem of considerable magnitude. Stevedoring companies were under certain circumstances shifting the burden of their negligence to the shipowners. Under the Longshoremen's and Harbor Workers' Compensation Act, the longshoreman's exclusive remedy against his employer for personal injuries is compensation under this Act.[47] However, the longshoreman could still bring an action against a third party for damages. The shipowner became the object of these suits by longshoremen because of the extension of the seaworthiness doctrine to longshoremen in *Seas Shipping Co. v. Sieracki*.[48] The inequity of the situation was that the unsea-

[41] See Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271, 1962 A.M.C. 1057 (Tex. Civ. App. 1957).

[42] GILMORE & BLACK 272 n.74 and cases cited therein.

[43] Myles v. Quinn Menhaden Fisheries, Inc., 302 F.2d 146, 1062 A.M.C. 1626 (5th Cir. 1962); Gomes v. Eastern Gas & Fuel Associates, 127 F Supp. 435, 1955 A.M.C. 97 (D. Mass. 1954).

[44] GILMORE & BLACK 277.

[45] *Id.* at 276.

[46] 350 U.S. 124, 1956 A.M.C. 9 (1956).

[47] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964). GILMORE & BLACK 251.

[48] 328 U.S. 85, 1946 A.M.C. 698 (1946). See GILMORE & BLACK 358-74. See generally NORRIS, MARITIME PERSONAL INJURIES §§ 140-96 (2d ed. 1966).

worthiness of the vessel for which the longshoreman brought suit had in many cases been the product of the stevedoring company's negligence. By allowing the shipowner to recover from the stevedoring company on the basis of an implied warranty of workmanlike service arising out of the stevedoring contract, the Supreme Court in *Ryan* did no more than to replace the burden of the stevedore's negligence on its own shoulders.

Subsequent cases,[49] the most notable of which is *United States v. Tug Manzanillo*,[50] have made the *Ryan* doctrine applicable to other types of service contracts, and, moreover, have allowed the shipowner to be indemnified for all losses occasioned by the third party. Thus, given a contract of service, a shipowner may on the basis of an implied warranty of workmanlike service recover the expenses of maintaining and curing a seaman injured by the third party.

The Supreme Court in its formulation of the *Ryan* doctrine, however, explicitly limited its indemnity discussion to only those cases involving contracts between the shipowner and the third party. Said the Court: "Because respondent in the instant case relies entirely upon petitioner's contractual obligation, *we do not meet the question of a noncontractual right of indemnity* "[51] Thus when there is no contract of service between the parties, *Ryan* by its language is not controlling.

In view of this, the federal district court in *H-10 Water Taxi Co. v. United States*[52] would seem to be in error in implying that *Ryan* and its progeny preclude indemnity for maintenance and cure expenses where there is no contract between the shipowner and third party. Apparently proceeding upon the premise that indemnity in a non-contract case had to be based on the subrogation of the shipowner to the rights of the injured seaman against the third party, the court relied on the *Ryan* doctrine as interpreted in *United States v. Tug Manzanillo* to hold that there was no room for subrogation in this situation.[53] This is a questionable interpretation of the doctrine, however. *Ryan* does not hold that there can never be any possibility of indemnity by subrogation of the shipowner to the rights of the injured party against third parties, since the longshoreman in *Ryan* had no rights against his employer under the Longshoremen's and Harborworkers' Compensation Act,[54] aside from statutory compensation, to which the shipowner could be subrogated.[55] In permitting recovery by implying a warranty of workmanlike service running from the stevedore to the shipowner, the Supreme Court did not decide the subrogation question and, at most, rejected by implication subrogation as the basis of indemnity where there is a contract between the shipowner and the third party The possibility of a recovery by subrogation against a third party in the absence of such a contract remains open.

---

[49] Cases cited note 31 *supra.*

[50] 310 F.2d 220, 1963 A.M.C. 365 (9th Cir. 1962).

[51] 350 U.S. 124, 133, 1956 A.M.C. 9, 16 (1956). (Emphasis added.)

[52] 252 F Supp. 592, 1966 A.M.C. 2040 (S.D. Cal. 1966).

[53] See *id.* at 592, 1966 A.M.C. at 2041.

[54] 44 Stat. 1424-46 (1927), 33 U.S.C. §§ 901-50 (1964).

[55] GILMORE & BLACK 251.

Non-Contractual Indemnity

Although the right to indemnity normally grows out of a contract of indemnity, this not a prerequisite in certain situations. As was stated by a federal district court in Florida:

> Broadly, the rule is that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not [56]

One application of non-contractual indemnity to a maritime problem can be illustrated by two recent cases which arose in a federal district court in Pennsylvania. These cases involved apportioning maintenance and cure expenses between successive employers of seamen. In both cases, *Gore v. Maritime Overseas Corp.*[57] and *Gooden v. Texaco, Inc.*,[58] the court found that the disabilities of the seamen sued upon were attributable to injuries sustained while in the earlier service of other vessels. Thus although the instant shipowner in each case was held liable for maintenance and cure, the court allowed that shipowner to recover over against the prior shipowner who was in fact responsible for the injury [59] As was stated by the court in the *Gooden* case,

> The fact remains that the sole cause of [the seaman's injury] was the accident aboard the [Texaco vessel] Although we have concluded that it is for the benefit of the seaman to allow him to recover immediately all maintenance from the last vessel on which he served, ultimate responsibility for bearing the financial loss should be carried by the ship on which the accident actually occurred.[60]

There was no contract between the successive shipowners to which the *Ryan* doctrine could be applied. The recovery in these cases was based on equitable principles of non-contractual indemnity arising by force of maritime law.[61]

In 1965, the Ninth Circuit dealt with another type of indemnity problem. In this case, *Simpson Timber Co. v. Parks*,[62] a shipowner sought indemnity from a door manufacturer whose negligent packaging had been responsible for the injury of a longshoreman. The longshoreman had fallen through the top of a crate of hollow doors and recovered from the shipowner for unseaworthiness. There being no contract of service on which the *Ryan* doctrine could operate, the court granted indemnity to the shipowner on the basis of unjust enrichment.[63] Since the shipowner had discharged a liability to the longshoreman that was owed by the door manufacturer, the court held, the manufacturer could not equitably retain the benefit thus conferred.[64]

---

[56] Lowe v. Vessel Madrid, 210 F Supp. 826, 833 (S.D. Fla. 1962).

[57] 256 F Supp. 104 (E.D. Pa. 1966).

[58] 255 F Supp. 343, 1966 A.M.C. 1704 (E.D. Pa. 1966).

[59] 256 F Supp. at 125; 255 F Supp. at 348, 1966 A.M.C. at 1708.

[60] 255 F Supp. at 348, 1966 A.M.C. at 1708.

[61] "[T]his Court, while sitting in admiralty, is very largely a Court of equity attempting to render natural justice between the parties involved." *Ibid.*

[62] 1966 A.M.C. 1081 (9th Cir. 1965), *rev'd on other grounds*, 369 F.2d 324, 1966 A.M.C. 2704 (9th Cir. 1966).

[63] 1966 A.M.C. at 1089-90.

[64] *Ibid.*

The few cases that have recognized a noncontractual right of indemnity in the shipowner-third party maintenance and cure situation take the position that the general maritime law supports this right, notwithstanding reliance in the *Jones* case on Pennsylvania law. However, none of these cases except *Jones* has ever been forced to deal squarely with the problem of shipowner's indemnity, but rather have encountered it obliquely.[65] As a result, they form part of the fabric of the maritime law of non-contractual indemnity, but unfortunately do not offer sufficiently strong precedent on which a shipowner could rely for recovery in future cases.

The Applicability of Railroad Indemnity Cases to Shipowner's Indemnity

Under the Jones Act enacted in 1920, Congress granted to seamen the rights of railway workers in cases of personal injury.[66] In effect, the Federal Employers' Liability Act (FELA)[67] and the cases arising thereunder were incorporated into the general maritime law insofar as they relate to personal injuries to seamen.[68] Congress considered the two types of employment, railroad and maritime, to be sufficiently related to warrant this. The Supreme Court has interpreted this grant to seaman of the rights of railway workers as being merely an enlargement of an existing remedy (maintenance and cure for injuries received by seaman in the course of their employment) "traditionally cognizable in admiralty "[69]

Under the Jones Act, a seaman, or his personal representative in case of death, may avail himself of the rights of a railway worker whenever the seaman "suffer[s] personal injury in the course of his employment "[70] The Supreme Court has construed "in the course of employment" to be the equivalent of "in the service of the ship," the standard used for determining the shipowner's liability for maintenance and cure.[71] Thus, whenever a seaman is disabled in the service of the ship, his situation closely approximates that of an injured railway worker under the FELA.

Indemnity for third party injuries to railway employees has met with con-

---

[65] For example in Myles v. Quinn Menhaden Fisheries, Inc., 302 F.2d 146, 151, 1962 A.M.C. 1626, 1631 (5th Cir. 1962), the court, in denying a seaman's claim for maintenance and cure, stated by way of dictum that had the seaman recovered from the shipowner, the shipowner could have been indemnified by the responsible third party. Similarly in Valentine v. Wiggins, 242 F Supp. 870, 872 (E.D.N.C. 1965), the court, in denying the shipowner's motion to dismiss the plaintiff-seaman's suit for maintenance and cure stated that "it is well settled that the shipowner has a right to indemnity from a third party tort-feasor for 'maintenance and cure' expenses."

[66] Section 33 of the Merchant Marine Act (Jones Act), 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964), reads in part: " in such action [by the seaman against his employer] all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply "

[67] 35 Stat. 65-6 (1908), 45 U.S.C. §§ 51-60 (1964).

[68] See Panama R.R. v. Johnson, 264 U.S. 375, 1924 A.M.C. 551 (1924); Dixon v. Serodino, 331 F.2d 668, 1964 A.M.C. 1983 (6th Cir. 1964).

[69] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 43, 1943 A.M.C. 149, 154 (1942).

[70] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[71] Braen v. Pfeifer Oil Trans. Co., 361 U.S. 129, 1960 A.M.C. 2 (1959).

siderable success. Beginning in 1948, a series of indemnity actions were instituted against the United States by railroad companies. The companies had paid off claims by employees arising under the FELA for injuries which were solely attributable to the negligence of employees of the United States. In one case, a railway employee had been hit by a mailbag thrown by a postal employee.[72] In two others, government workers had placed objects too close to the tracks with the result that railroad employees riding on the side of trains were injured.[73] And in a fourth, railway workers were injured by chlorine gas leaking from gas bombs that had been shipped by the government without warning and in a faulty condition.[74] All of these conditions violated the "safe place to work" provision of the FELA and made the employers liable to the injured employees.[75]

The FELA had no provision allowing either indemnity or rights of subrogation in actions against third party tort-feasors.[76] When the railroads prosecuted these claims against the United States under the Federal Tort Claims Act,[77] however, the courts held that the technical form of these actions was immaterial.[78] On the facts of the cases, the United States had been clearly responsible for the injuries which gave rise to the claims paid by the railroads, and therefore the courts found an implied duty on the part of the United States to reimburse the railroads.

One important aspect of these cases is that the courts were quite amenable to the railroads' claims for indemnity, and they granted recovery on extremely broad grounds. In *St. Louis-San Francisco Ry. v. United States*,[79] the plaintiff-railroad contended that its right to recovery under the Tort Claims Act arose by operation of the provisions of the FELA. The Fifth Circuit held that since the plaintiff's claim could be supported by the law of Mississippi, there was no need to determine whether the plaintiff's contention was correct.[80] In 1948, the Tenth Circuit held that where the accident took place on a federal reservation, the plaintiff's right to indemnity arose by operation of "federal common law."[81] And in 1955, when the railroad indemnity question was before the Seventh Circuit, it merely cited the foregoing cases as authority for allowing recovery.[82] In response to the argument by the United States that the railroad's claim was quasi-contractual and thus not within the ambit of the Tort Claims Act, the court said,

---

[72] Chicago R.I. & Pac. Ry. v. United States, 220 F.2d 939 (7th Cir. 1955).

[73] Terminal R.R. Ass'n v. United States, 182 F.2d 149 (8th Cir. 1950); United States v. Chicago R.I. & Pac. Ry., 171 F.2d 377 (10th Cir. 1948).

[74] St. Louis-San Francisco Ry. v. United States, 187 F.2d 925 (5th Cir. 1951).

[75] See, *e.g.*, Terminal R.R. Ass'n v. United States, 182 F.2d 149, 150 (8th Cir. 1950). The Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U.S.C. § 51, reads in part: "Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury or death resulting by reason of any defect or insufficiency, due to its [the carrier's] negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[76] See 35 Stat. 65-6 (1908), 45 U.S.C. §§ 51-60 (1964).

[77] 28 U.S.C. §§ 1346, 2671-80 (1964).

[78] Chicago R.I. & Pac. Ry. v. United States, 220 F.2d 939, 940-41 (7th Cir. 1955). See Annot., 70 A.L.R.2d 475 (1958).

[79] 187 F.2d 925 (5th Cir. 1951).

[80] *Id.* at 926.

[81] United States v. Chicago R.I. & Pac. Ry., 171 F.2d 377, 379 (10th Cir. 1948).

[82] Chicago R.I. & Pac. Ry. v. United States, 220 F.2d 939, 940-41 (7th Cir. 1955).

> In all these cases it was held or recognized that the plaintiff railroad was entitled to maintain suit against the government to recovery money which it had paid an employee for damages sustained as a result of negligence by the government. These cases also are generally to the effect that it is immaterial how the action be labeled.[83]

In 1960, the Seventh Circuit extended the range of the railroad's right of indemnity so that a private party as well as the federal government could be held liable as a third party tort-feasor. In this case, *Baltimore & O.R.R. v. Commercial Transp. Co.*,[84] a private trucking company had negligently collided with plaintiff's train, injuring some of plaintiff's employees. On the basis of its prior decision in *Chicago, R.I. & Pac. Ry. v. United States*, as well as its predecessors, the court held that the railroad could be reimbursed for its settlement of the FELA claims brought by the injured employees.[85] The main issue, said the court, is

> whether plaintiff, as a matter of law had a right to recover for amounts expended in payment of hospital and medical bills of its injured employees In a similar situation this court rejected the contention that a railroad was a mere volunteer and held it entitled to indemnification for amounts paid for medical services to its employees for injuries caused by the negligent third party.[86]

To illustrate the similarity between the shipowner indemnity problem and the railroad indemnity cases, the fact situations that were before the courts in *H-10 Water Taxi Co. v. United States*[87] and *Chicago R.I. & Pac. Ry. v. United States*[88] may be used. In *Water Taxi*, the libelant-shipowner had been hired by a ship repair company to haul garbage from a naval vessel which was being repaired. A seaman aboard libelant's garbage scow had been injured when the sailors aboard the naval vessel dropped a 50 gallon drum of garbage on him. The seaman received $3000 in maintenance and cure expenses, but the shipowner's claim for indemnity from the United States was denied. In the *Chicago* case, an employee of the railroad had been struck by a mailbag negligently thrown by a government postal employee. The railroad settled its employee's claim for personal injuries under the FELA and then sued the United States for indemnity. The court without hesitation granted recovery to the plaintiff-railroad. In both these cases the injuries to the respective employees were due solely to the negligence of third parties, with the employers bearing the financial burden of this negligence. Yet the shipowner was unable to recoup his loss from the responsible party.

In view of the fact that Congress has extended to seamen the rights of railroad workers in regard to personal injuries in the course of employment, the shipowner indemnity problem, which is an unavoidable consequence of such personal injuries, should logically be solved in the same way as in the railroad cases. No harm would be worked on the rights of the seamen and in a very real sense the seamen would derive a benefit if the shipowner were granted a right of recovery. Under existing case law, the only means by which the shipowner can be assured of a recovery against a third party is if he can force the seaman either

---

[83] *Ibid.*

[84] 273 F.2d 447 (7th Cir. 1960).

[85] *Id.* at 448.

[86] *Ibid.*

[87] 252 F Supp. 592, 1966 A.M.C. 2040 (S.D. Cal. 1966).

[88] 220 F.2d 939 (7th Cir. 1955).

to join the shipowner and third party as parties defendant or to sue the third party first and subsequently the shipowner.[89] In both of these situations, however, the seaman is at a disadvantage in that he is forced to litigate his claim for maintenance and cure which would otherwise be uncontested. If, however, the shipowner had an independent action for indemnity against the third party, there would be little impetus to forestall settlement with the seaman in the hope that he might bring a suit in a manner which would enable the shipowner to recover over against the third party Thus, by adopting the FELA solution to the indemnity problem, the rapid settlement of seamen's claims for maintenance and cure for injuries caused by third parties would be enhanced, a result that would be in keeping with the policy of protecting the seamen as a "ward of the admiralty court."[90]

The Need for a Maritime Right of Indemnity

In order to ensure a uniform rule of shipowner's indemnity, the right of action must be found to arise by operation of maritime law.[91] By so doing, the doctrine of "maritime law supremacy"[92] will prevent a shipowner's action for indemnity from being subject to the vagaries of state law. Briefly stated, this doctrine of maritime law supremacy operates when the maritime law is confronted by contrary state law in non-admiralty courts.[93] Given such a confrontation, maritime law is recognized as prevailing.[94] The Supreme Court in 1953 put it this way:

> While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.[95]

The operation of such a doctrine would have prevented a state court in a case such as *Houston Belt & Terminal Ry. v. Burmester*[96] from denying indemnity on the grounds that Texas law did not support such a right.

In addition to preventing a denial of recovery by force of local law, a maritime right of indemnity is needed to deal with cases that are wholly within the maritime jurisdiction and which require a determination of rights and duties on the basis of applicable maritime law. The *Water Taxi* case has shown that maritime injuries to seamen by third parties who do not stand in a contractual relationship to the shipowner are still a problem to be reckoned with.[97]

By construing shipowner's indemnity as a maritime right, no injustice is being worked against the rights of non-maritime individuals whose rights are generally

---

[89] See GILMORE & BLACK 277.

[90] See Garrett v. Moore-McCormack Co., 317 U.S. 239, 1942 A.M.C. 1645 (1942); Harden v. Gordon, 11 Fed. Cas. 480 (No. 6,047) (C.C. Me. 1823).

[91] GILMORE & BLACK 277.

[92] Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[93] See GILMORE & BLACK 374-75.

[94] See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 1954 A.M.C. 1 (1953); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[95] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10, 1954 A.M.C. 1, 7 (1953).

[96] 309 S.W.2d 271, 1962 A.M.C. 1057 (Tex. Civ. App. 1957).

[97] Note 52 *supra* and accompanying text.

under the aegis of local law. They are not being subjected to double liability,[98] *i.e.*, by both the injured seaman and the indemnity seeking shipowner, nor are they being deprived of any substantive protection of local law. The shipowner's ability to recover over against the third party would be wholly dependent upon the third party's liability to the injured seaman.[99] If a seaman chooses to pursue the third party tort-feasor independently, he can do so only under local law.[100] In the interest of justice, the liability of the third party should be similarly determined by local law. The only part the maritime law would play in a suit by the shipowner is that it would prevent local law from denying the existence of the indemnity action.

Conclusion

The existing split of judicial authority on the question of shipowner's indemnity should be resolved. It is submitted that justice and logic require a resolution in favor of the shipowner. Two of the three writers who have addressed themselves to this problem have agreed on this.[101] The other has merely stated that at present the weight of judicial authority does not allow recovery.[102] Maintenance and cure is for all practical purposes a form of workman's compensation that has sprung from the general maritime law without the aid of statute.[103] Statutory compensation acts have granted the employer a right of subrogation under the circumstances as are present in the shipowner-third party cases.[104] The United States has this right when a seaman employed on a public vessel is injured by a third party.[105] In view of the fact that the general maritime law is predominantly decisional it is extremely doubtful that a shipowner would ever be granted a statutory right of recovery. The burden, therefore, is on the admiralty court.

The maritime case precedent for granting indemnity is admittedly confused. Cases construing the *Ryan* doctrine have at least impliedly reversed the holding of the court in *The Federal No. 2* which has been considered the leading argument against allowing indemnity. *Jones v. Waterman S.S. Corp.* which granted recovery on the basis of state rather than maritime law has been shown to be inadequate in its attempt at resolving the problem. The maintenance and cure apportionment

[98] In an action by a seaman for maintenance and cure, the defendant-shipowner's third party complaint was dismissed as the seaman had obtained full satisfaction of a judgment against the third party. Taylor v. N.Y. Trap Rock Corp., 146 N.Y.S.2d 348 (App. Div. 1955) (per curiam).

[99] GILMORE & BLACK 276.

[100] The seaman has only two maritime remedies, maintenance and cure and unseaworthiness, and these can only be used as a means of recovery against the shipowner. They are legal obligations of the shipowner. 1 NORRIS § 543 (maintenance and cure); 2 NORRIS § 610 (unseaworthiness). As to the Jones Act, the seaman may only avail himself of this federally created remedy in a suit against his employer. 2 NORRIS § 666.

[101] 1 EDELMAN, MARITIME INJURY AND DEATH 58 (1960); GILMORE & BLACK 276.

[102] 1 NORRIS § 567.

[103] See GILMORE & BLACK 253.

[104] *E.g.*, Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1442 (1927), 33 U.S.C. § 933(b) (1964). See 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 74, 74.11 (1961).

[105] Federal Employees' Compensation Act, 39 Stat. 747 (1916), 5 U.S.C. § 776 (1964).