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THE INJURED LONGSHOREMAN VS. THE SHIP-OWNER AFTER 1972: BUSINESS INVITEES, LAND-BASED STANDARDS, AND ASSUMPTION OF RISK

Admiralty practitioners are quite familiar with the series of Supreme Court cases in the 1940's and 1950's which effectively repealed on nonconstitutional grounds a key provision of the Longshoremen's and Harbor Workers' Compensation Act (LHCA).¹

The provision in question made liability under LHCA procedures exclusive for employers of longshoremen (usually called stevedoring companies or stevedores), thus protecting them from civil suits by injured employees.² This exclusive liability provision was given in exchange for guaranteed compensation regardless of whether the stevedore was negligent or had a valid defense.³ Such provisions are, of course, central to any workers' compensation system. But perhaps with an eye on the unsatisfactory schedule of benefits under this act,⁴ the Supreme Court ruled first that injured longshoremen could sue third party vessel owners under a warranty of seaworthiness so broad that it included conditions caused solely by the stevedore's negligence.⁵ It then held that where the unseaworthy condition which caused the injury to the longshoreman arose solely because of the negligence of the stevedore or its employees, the vessel owner who was rendered liable to the injured longshoreman had a right to indemnification from the stevedore.⁶ Through this triangular procedure, the stevedore was in effect subjected to civil suit brought by its injured employees in spite of the clear exclusive liability provision of the LHCA.

Finally, in 1972, Congress undertook to restore the immunity of the stevedore from civil suit.⁷ This was done by altering the contours of the longshoreman's third party action against vessel owners. The

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strict liability remedy of unseaworthiness was abolished, and negligence was made the exclusive remedy in such actions.\(^8\)

The 1972 amendments, however, set no guidelines by which to fashion a standard of care for vessel owners. But the legislative history is full of references to "land-based standards,"\(^9\) and courts have relied on these references to hold that vessel owners owe longshoremen the standard of care owed to business invitees.\(^10\) More specifically, the courts have adopted the Restatement Second of Torts formulation of the business invitee standard.\(^11\)

This note will argue that such a standard is inconsistent with many of the policy statements in the legislative history. Congress retained the third party action as a means of encouraging the vessel to prevent injuries by providing a safe place for longshoremen to work.\(^12\) The business invitee standard, however, defines the vessel's duty in terms of the plaintiff's perception, frequently preventing inquiry into the reasonableness of the vessel's conduct. Thus, the standard not only fails to encourage the vessel to take remedial action, but also contravenes the comparative negligence policy of balancing the relative fault of all the parties involved. Moreover, the business invitee standard incorporates the defense of assumption of risk which the legislative history expressly abolished.\(^14\) The note also argues that the standard is difficult of application and therefore contrary to admiralty traditions of simplicity,\(^15\) and that the standard is a product of the common law classification system which accorded preference to landowners.\(^16\) Since many land-based jurisdictions are beginning to reconsider the classification system, it would be unfortunate at this late date for the admiralty courts to adopt a vestige of that system.

This note proposes an alternative standard of care\(^17\) which would require the vessel to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge. Analysis would focus upon the vessel's action rather than upon the plaintiff's perceptions of the dangerous condition.

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9. H.R. REP. No. 1441, 92d Cong., 2d Sess. 5-7 (1972) [hereinafter cited as COMMITTEE REPORT].
10. See notes 99-106 & accompanying text infra.
11. See notes 107-22 & accompanying text infra.
12. COMMITTEE REPORT, supra note 9, at 6-7.
13. Although the statute is silent on the subject, the legislative history states that Congress intended to preserve the admiralty concept of comparative negligence. COMMITTEE REPORT, supra note 9, at 8.
14. *Id.*
15. See notes 100-22, 150-51 & accompanying text infra.
16. See notes 123-52 & accompanying text infra.
17. See notes 153-64 & accompanying text infra.
The vessel would be deemed to have constructive knowledge of all conditions that could be discovered by a reasonable inspection, except as to conditions arising in the area of stevedoring operations after the stevedore commences work. With respect to such conditions, the vessel would have a duty to take reasonable remedial action when it has actual knowledge of their existence. The latter requirement entails a rejection of the theories of relinquishment of control and "no nondelegable duty."18

It is recognized, however, that one of the fundamental purposes of the 1972 amendments was to remove the flood of longshoremen's litigation clogging the federal courts. It is suggested that longshoremen and stevedores should be held to a relatively strict standard of care. Such an arrangement would make it unprofitable to bring suit in the majority of cases. Thus, the purpose of the amendments would be fulfilled without arbitrarily cutting off the vessel's liability.

The History of Longshoremen's Third Party Actions

Traditionally, the shipowner warranted the seaworthiness of the vessel for the benefit of cargo owners. In the latter part of the 19th century this warranty was expanded, and by the turn of the century the shipowner was "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." The warranty of seaworthiness was extended to seamen because of the special hazards of their work, the rigorous discipline to which they were subjected, and the special protection traditionally accorded to them by admiralty courts. Since longshoremen were not

18. The Supreme Court had referred to the warranty of seaworthiness as a nondelegable duty. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 n.11, 100 (1945); Petterson v. Alaska S.S. Co., 205 F.2d 127 (9th Cir. 1953), aff'd, 347 U.S. 396 (1954). In the Petterson case this language was used to justify inclusion within the warranty of seaworthiness of equipment and conditions introduced solely by the stevedore. As will be seen, Congress was quite adamant that the warranty of seaworthiness and its "nondelegable duty" aspects no longer be the law in third party actions by longshoremen against vessel owners. See notes 165-204 & accompanying text infra.

19. COMMITTEE REPORT, supra note 9, at 5; GILMORE & BLACK, supra note 4, at 280, 411.


21. Id.


thought to be "seamen," they did not have the benefit of the warranty of seaworthiness. However, they could sue the shipowner for negligence, a remedy that was not available to seamen. Longshoremen also could bring negligence actions against their stevedore employers, subject to the fellow servant rule, but, like other industrial workers, they had no remedy for injuries from unavoidable industrial accidents.

States reacted to this situation by enacting workmen's compensation statutes, and in 1917 the Supreme Court held three such statutes constitutional. Later that year, however, the Court held that state compensation did not extend to longshoremen's shipboard injuries because of the constitutional requirement of national uniformity in the maritime law. Within the next seven years Congress twice attempted to extend state compensation benefits to longshoremen without drafting a federal compensation scheme, but the Supreme Court struck down both on the ground of the uniformity requirement.

In the mid-1920's an injured longshoreman faced a rather grim situation. Longshoremen did not have the seaman's remedies of unseaworthiness, maintenance and cure, and the Jones Act. Almost alone among industrial workers, longshoremen were not eligible for workmen's compensation benefits, and Congress appeared resolutely opposed to drafting a compensation statute meeting the constitutional requirement of uniformity. It was in this climate that the Supreme Court decided *International Stevedoring Co. v. Haverty*, which extended the Jones Act remedy to longshoremen by holding that for purposes of the Jones Act, longshoremen were seamen. The Court reached this conclusion by assuming that longshoremen's work was formerly performed by the ship's crew. Within six months Congress re-

25. The Osceola, 189 U.S. 158, 175 (1903). Under *The Osceola*, seamen were not only barred by the fellow servant rule but apparently had no right to sue their employers for negligence at all, unless such negligence could be characterized as unseaworthiness. See *Chelentis v. Luckenbach S.S. Co.*, 243 F. 536 (2d Cir. 1917), aff'd, 247 U.S. 372 (1918).
27. Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917). The Court also held that workmen's compensation benefits were not within the "saving to suitors" clause because such a compensation scheme was a remedy unknown to the common law. *Id.*
28. See Gilmore & Black, supra note 4, at 407-08.
29. 272 U.S. 50 (1926).
30. 48 U.S.C. § 688 (1970). The Jones Act enabled "seamen" to sue their employers for negligence. It abolished the defenses of fellow servant and assumption of risk, and substituted comparative negligence for the harsher common law rule of contributory negligence as a complete defense. The Jones Act standard of negligence is considerably more favorable to the plaintiff than that of the general maritime law.
31. 272 U.S. at 52. In support of this proposition the Court cited *Atlantic Transp. Co. v. Imbrovek*, 234 U.S. 52 (1914). In *Imbrovek*, the Court stated by way
acted to *Haverty* by enacting the LHCA.\(^{32}\)

Like most workmen’s compensation statutes, the LHCA made compensation benefits the employee’s exclusive remedy against the employer.\(^{33}\) Since the Jones Act only applied to suits against employers, longshoremen were effectively deprived of their newly acquired Jones Act remedy. However, the LHCA paralleled the state statutes in preserving the employee’s right to sue third parties (almost always the shipowner) outside the compensation system.\(^{34}\)

Initially, the longshoremen’s third party action was governed by a confusing amalgam of maritime concepts of negligence\(^{35}\) and the land-based concept of the duty owed to a business invitee.\(^{36}\) But in 1946, *Seas Shipping Co. v. Sieracki*\(^{37}\) extended to longshoremen the seaman’s remedy for unseaworthiness. The rationale for the decision was the questionable *Haverty* assumption\(^{38}\) that unloading cargo was “performed until recent times by members of the [ship’s] crew,”\(^{39}\) and that longshoremen were therefore seamen because they were “doing a seaman’s work and incurring a seaman’s hazards.”\(^{40}\)

Subsequent cases greatly expanded the scope of the warranty of seaworthiness. All equipment aboard the ship was warranted as seaworthy, including equipment owned and brought aboard by the stevedore solely for the purposes of unloading cargo.\(^{41}\) The shipowner was liable for unseaworthy conditions arising after the stevedore assumed complete control of the vessel,\(^{42}\) and for “latent” unseaworthiness

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35. See, e.g., *Anderson v. Lorentzen*, 160 F.2d 173 (2d Cir. 1947); *Grillo v. Royal Norwegian Gov’t*, 139 F.2d 237 (2d Cir. 1943).
37. 328 U.S. 85 (1946).
40. *Id.* at 99.
“brought into play” by the stevedore. If unseaworthiness was divorced from concepts of negligence, the shipowner was liable for “transitory” conditions not in existence long enough to give constructive notice of their presence.44

The finishing stroke came with Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp. Ryan held that a stevedore owed to a vessel owner an implied warranty of workmanlike performance. Negligence of the stevedore or its employees which caused the unseaworthiness upon which a longshoreman was injured was held to be a breach of this implied warranty and rendered the stevedore liable to the vessel owner for indemnification of any amounts paid by the vessel owner to the injured longshoreman. This in effect deprived the stevedore of its immunity from civil suit for damages stemming from the personal injuries of its employees. Also, since few injuries were outside the broad scope of the Sieracki doctrine of unseaworthiness, the federal courts became flooded with longshoremen's injury actions.

The 1972 Amendments to the LHCA

The problems engendered by the Sieracki-Ryan doctrine motivated Congress to enact sweeping revisions of the LHCA. The 1972 amendments raised benefits from the grossly inadequate seventy dollars per week maximum to a flexible figure keyed to the “national average weekly wage.” This scheme provides compensation benefits

46. In a later case, the Supreme Court indicated that conduct not amounting to negligence could also constitute a breach of the warranty of workmanlike performance. If the stevedore nonnegligently introduced defective equipment on board the vessel, and if such equipment caused the vessel owner to be liable to an injured longshoreman, the stevedore would be liable to the vessel owner for an indemnity under the Ryan doctrine. Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).
47. If the vessel owner’s negligence contributed to the longshoreman’s injury, there could be no indemnity, since, during the Ryan era, the maritime law did not recognize contribution among joint tortfeasors. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). Recently, however, the Supreme Court has restricted the old anti-contribution rule to LHCA cases. Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974).
48. See text accompanying notes 1-6 supra.
49. See COMMITTEE REPORT, supra note 9, at 5; GILMORE & BLACK, supra note 4, at 280, 411.
usually equal to two-thirds of the average weekly wage of the injured worker. The jurisdictional limits of the LHCA were extended landward to include injuries from maritime employment on an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The amendments retained intact the section making the compensation system the exclusive remedy of the employee against the employer, and also preserved the employee's right to recover against third parties. But a new provision, section 905(b), altered the contours of the third party action.

The first sentence of section 905(b) permits longshoremen and harborworkers to sue the vessel for negligence. The last clause of the sentence not only abolishes the Ryan implied warranty of workmanlike performance, but also provides that an employer cannot be held liable, "directly or indirectly," for its employees' injuries. Contractual clauses purporting to shift this liability to the employer will be null and void. In the second and third sentences, Congress appears to have overruled Reed v. The Yaka, a case which prevented the shipowner from benefiting from the exclusive liability provision of the LHCA by employing the longshoremen directly. The fourth sentence of section 905(b) overrules Sieracki and the last prevents the development of a new strict liability theory by making negligence the exclusive basis for recovery against the shipowner.

52. COMMITTEE REPORT, supra note 9, at 2-3.
54. "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U.S.C. § 905(b) (Supp. V, 1975).
55. "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21) (Supp. V, 1975).
56. "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel." 33 U.S.C. § 905(b) (Supp. V, 1975).
58. See GILMOR & BLACK, supra note 4, at 444-45.
59. "The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." 33 U.S.C. § 905(b) (Supp. V, 1975).
60. "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." Id.
Section 905(b) merely provides the broad outlines of the third party action, and it must be read in conjunction with the legislative history in order to discern the congressional intent as to the applicable standard of care. In discussing the third party action, the committee report seeks a compromise position, rejecting both the shipping industry proposal that the third party action be totally abolished and the longshoremen's proposal that strict liability principles be continued.\(^6^1\) The committee report rejects the *Haverty* assumption that longshoremen encounter seamen's hazards and therefore should have seamen's remedies.\(^6^2\) But it states that social policies such as the protection of workers' health and safety require some type of third party liability,\(^6^3\) and it concludes that fairness to all the parties involved requires that they be placed in the same position as parties to land-based industrial accidents.\(^6^4\) The committee report emphasizes that this position prohibits the application of "any special maritime theory of liability or cause of action."\(^6^5\) The report specifically overrules several unseaworthiness cases, but significantly it states, "[T]his listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence."\(^6^6\) The report comes closest to adopting a specific standard of care with this statement:

> [T]he vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.\(^6^7\)

Almost as an afterthought the report prohibits the common law defenses of assumption of risk and contributory negligence, and adopts the admiralty rule of comparative negligence.\(^6^8\)

The committee report does not seem to require the adoption of a specific standard of care. A fair reading of the report suggests that the repeated references to land-based principles were intended merely to emphasize the congressional intent that no strict liability theory be developed to take the place of unseaworthiness.\(^6^9\) Except in unusual

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61. *Committee Report*, supra note 9, at 4-5.
62. *See id.* at 5-6.
63. *Id.* at 4, 6.
64. *Id.* at 6.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 80.
69. Only one court has adopted this view. In *Giacona v. Capricorn Shipping Co.*, the court said: "The Committee was not so concerned with what maritime negligence standards were at the time they were hammering out the bill as what the standards might become. . . . Congress wanted to eliminate unseaworthiness for longshoremen and
circumstances, strict liability doctrines do not apply in lawsuits involving nonmaritime industrial injuries.\textsuperscript{70} Therefore, placing longshoremen on an equal footing with land-based industrial workers would require that their actions against shipowners be governed by contemporary notions of fault. But this policy of equivalence does not appear to require identical standards. The language of the committee report is broad and general enough to allow courts to make the adjustments necessary to reconcile traditional admiralty policies and the unique circumstances of maritime industries with land-based principles.

The courts, however, have interpreted the committee report as requiring absolute correspondence between the standards governing longshoremen's third party actions and those governing lawsuits by non-maritime industrial workers.

\textbf{Application of the Business Invitee Standard in Postamendment Cases}

Admiralty courts insisting that land-based and shipboard standards of care be identical have turned to the \textit{Restatement Second of Torts} for guidance. Section 343 of the \textit{Restatement} holds a possessor of land liable to business invitees if he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

Subsection (b) above is intended to be read in conjunction with section 343A(1) of the \textit{Restatement}:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

These sections impose a duty of reasonable care on a possessor of land if he has or should have knowledge of the danger. But the duty of care is removed if the land possessor can expect that his invitees will notice the danger.

Thus, under these sections, a vessel owner's duty of care is partly defined by the injured longshoreman's perceptions of the danger.

\textsuperscript{70} See, e.g., \textit{Restatement (Second) of Torts} §§ 409-29 (1965).
Whether such a standard reintroduces into admiralty the defense of assumption of risk in the form of a limitation on the defendant's duty of care is the question next considered.

Assumption of Risk

The committee report makes clear the congressional intent that the admiralty rules favoring comparative negligence and precluding the defense of assumption of risk be preserved under the 1972 amendments. The admiralty has a strong policy favoring these longstanding rules. The rule precluding the defense of assumption of risk originated in 1936 with two Jones Act cases, The Arizona v. Anelich and Beadle v. Spencer. Since the Jones Act incorporated the Federal Employers' Liability Act, these two cases presented the issue of whether the FELA's circumscribed version of assumption of risk was to be imported into maritime law through the Jones Act. The Supreme Court avoided this problem by finding that the defense of assumption of risk had never been available in the maritime law. Two years later the Court confirmed this position in Socony-Vacuum Oil Co. v. Smith, stating that the traditional maritime policy of protecting seamen "will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available." This rule applies not only to the Jones Act, but to all such maritime claims, including longshoremen's actions.

After Socony, the unavailability of assumption of risk encouraged defendants to attempt to disguise assumption of risk as contributory negligence in order to salvage a reduction of damages. Courts adamantly refused to "allow assumption of risk to masquerade as contributory negligence," but this position required drawing a precise boundary between the two defenses. It was obvious that the line had to be

71. COMMITTEE REPORT, supra note 9, at 8.
72. 298 U.S. 110 (1936).
73. 298 U.S. 124 (1936).
77. GILMORE & BLACK, supra note 4, §§ 6-27, at 353-54.
78. Id.
80. Id. at 432.
82. GILMORE & BLACK, supra note 4, §§ 6-27, at 353-54.
drawn at the point at which the plaintiff's decision to proceed in the face of a known risk became unreasonable. In employment situations, admiralty courts have found that in the face of a known risk, the duty to exercise reasonable care for his own safety requires the employee to complain about the danger. If the employee complains of the danger and his superior promises to repair it or orders him to continue working, neither assumption of risk nor contributory negligence may be asserted against the employee. However, a failure to complain, if it is unreasonable, may result in a reduction of damages.

The Restatement Second of Torts' section 343-343A standard of care is fundamentally inconsistent with these admiralty notions of assumption of risk and contributory negligence. It is generally conceded that the land-based concept of assumption of risk as a bar to the plaintiff's recovery is written into the section 343-343A standard. Many courts have held that an instruction on the standard of care owed to business invitees serves the same purpose as an instruction on assumption of risk, and in cases where both are in issue the latter instruction need not be given. Where invitees voluntarily encounter a known dangerous condition, courts have provided different rationales for the denial of recovery. Some courts have stated that the defendant owes no duty, while others have found that the defendant breached his duty but that the plaintiff assumed the risk. It may be argued that under the "no duty" view, the section 343-343A standard is not inconsistent with an abolition of assumption of risk because the denial of liability does not rest on the affirmative defense. According to this view assumption of risk would not have to be pleaded and the jury would

84. Compare Rivera v. Farrell Lines, 474 F.2d 255 (2d Cir. 1973), and Rivera v. Rederi A/B Nordstjerman, 456 F.2d 970 (1st Cir. 1972) (complaint by plaintiff's fellow employee held sufficient), with Mroz v. Dravo Corp., 429 F.2d 1156 (3d Cir. 1970), and DuBose v. Matson Navigation Co., 403 F.2d 875 (9th Cir. 1968); cf. Gilmore & Black, supra note 4, §§ 6-27a, at 357, n.165m.

85. A longshoreman does not assume the risk of obeying the orders of his superior, but "[U]nwarranted obedience to an obviously dangerous order would be negligence which would mitigate damages." Klimaszewski v. Pacific-Atlantic S.S. Co., 246 F.2d 875, 877 (3d Cir. 1957).

86. Id.

87. See Restatement (Second) of Torts § 496C, comment d (1965); Restatement (Second) of Agency § 521, comment a (1957).


89. Restatement (Second) of Torts § 496C, comment d (1965).

90. This view gives the plaintiff the burden of proving either that he didn't appreciate the danger or that he didn't encounter it voluntarily. See Popejoy v. Hannon, 37 Cal. 2d 159, 170, 231 P.2d 484, 491 (1951); Restatement (Second) of Agency § 521, comment d (1957); Restatement (Second) of Torts § 496C, comment d (1965). This not only forces the plaintiff to prove a negative, but also has the effect of forcing plaintiff to rebut a prima facie showing that he assumed the risk, when in fact the defendant has made no showing at all.
not be instructed on it. But this argument exalts form over substance, because “the effect of either ground of decision is the same.”

Like the admiralty courts, land-based courts have had occasion to examine the gray area in which assumption of risk overlaps contributory negligence. The Restatement Second of Torts lists four different species of assumption of risk. The third category includes cases in which a plaintiff proceeds voluntarily and with reasonable care in the face of a known risk; the fourth category includes cases in which a plaintiff proceeds voluntarily but carelessly in the face of a known risk. The Restatement notes that the reasonableness of the plaintiff's conduct is determined by weighing the utility of the conduct against the magnitude of the risk. However, many states have adopted the admiralty rule of comparative negligence while maintaining the defense of assumption of risk. With respect to such jurisdictions, the Restatement suggests that in situations where assumption of risk overlaps contributory negligence, assumption of risk should not be allowed to bar the plaintiff's recovery because it would defeat the policy of "reduc[ing] the damages in the case of all such negligent conduct, whatever the defense may be called." Thus, even if the 1972 amendments to the LHCA had not expressly proscribed the defense of assumption of risk, the 343-343A standard, with its incorporated notions of assumption of risk, would be unacceptable because it is inconsistent with the policy of comparative negligence. Since assumption of risk has been expressly disallowed, this conclusion is even stronger.

The Postamendment Cases

As has been suggested, the application of the Restatement's formulation of the business invitee standard is fraught with theoretical
problems. Nevertheless, the weight of the authority seems to be in favor of its application to longshoremen's third party actions.97

The leading case adopting the section 343-343A standard is *Ramirez v. Toko Kaiun.*98 The plaintiff in *Ramirez* was a longshoreman who was injured while unloading a cargo of pipe. The pipe had been stowed by the "solid block stow" method, meaning that it was not bundled or separated by dunnage. The unloading method required slipping a wire through one end of a stack of pipe, raising that end, and then slipping an unloading harness underneath the center of the bundle. The plaintiff's team complained about the danger of this method and requested "on-the-spot dunnage," but they were told to keep working. The plaintiff's injury occurred when the wire slipped loose and a partially raised bundle of pipe fell on his foot.

Applying the section 343 standard, the first question the court faced was whether the condition of the cargo posed an unreasonable risk of harm to longshoremen attempting to unload it.99 The court found that "solid block stow" was a common method of stowing cargo and that it was commonly unloaded with reasonable safety.100 Since the condition was not unreasonably dangerous the vessel had no duty in the first instance to repair it or warn of its existence, and judgment was entered for the defendant.

*Ramirez* does not deal exclusively with the plaintiff's perceptions. But this analysis is not a result of the court's application of the section 343 standard; rather it resulted from the stage of the section 343 standard that was in issue. If the condition had been unreasonably dangerous, then the court would have applied the next stage of the standard, dealing with the plaintiff's conduct in the face of the danger.101

*Hite v. Maritime Overseas Corp*102 is an early case involving an obvious danger, and the facts of the case more aptly demonstrate the potential injustice in the application of the business invitee standard to longshoremen. In *Hite,* the plaintiff was employed by an independent ship cleaning contractor. While working at the top of a petroleum tank, he brushed against a frayed drop wire hanging nearby. The electric shock knocked him off the scaffold, and he fell thirty feet to the bottom of the tank. The court held that the vessel had no duty to re-

99. Id.; see RESTATEMENT (SECOND) OF TORTS § 343(a) (1965).
100. 385 F. Supp. at 653.
101. See note 103 infra.
pair or warn about the condition because it was open and obvious. Here, the analysis focused upon what the plaintiff could reasonably have been expected to perceive and not upon what the vessel should or should not have done about the condition.

In Fitzgerald v. Compania Naviera La Molinera, the death of plaintiff's decedent resulted from breathing poisonous gases while inspecting a recently fumigated cargo of grain. A temporary bulkhead blocked the ship's ventilation system and caused the gases to linger in the hold. The court granted a summary judgment for the defendant because the plaintiff made no showing that the vessel knew or should have known that the cargo would be fumigated. However, in a dictum application of the section 343 standard, the court stated the defendant's duty in terms of the plaintiff's perceptions; the defendant would have had no duty to warn because "the defect in the ventilation of the hold, the existence of a barrier to the movement of air, was readily visible to anyone entering the hold." 

In both Anuszewski v. Dynamic Marines Corp. and Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, the vessels and the plaintiffs had actual knowledge of the dangerous conditions, but the courts reached different results. In Anuszewski, a loading crane dislodged a hatch cover beam which the stevedore had negligently allowed to remain in place after the hatch cover had been removed. The beam fell into the hold and struck the plaintiff. Safety regulations required such beams to be fastened by pins, but the beams had been left unfastened in a previous port. The plaintiff's crew complained about the condition, but their foreman promised it would be corrected and ordered them to continue working. Applying the accepted standard, the court held that the vessel knew that the condition posed an unreasonable risk of harm, but that its liability was cut off because it could have expected the plaintiffs to protect themselves against it.

103. Id. at 227.
104. The court also said, "There were no facts presented by the plaintiff that would support a jury finding that the officers or crew of the [ship] maintained any degree of control or supervision of the work being performed by the plaintiff during the course of the cleanup operation." Id. at 224. It is difficult to see how the vessel's control could have changed the result. Since the court held that the vessel had no duty because the condition was obvious, the vessel's control or lack of control was irrelevant to the existence of a duty.
106. Fumigation occurred after the stevedore commenced operations, and no crew member remained aboard who might have known of the condition. Id. at 415-16.
107. Id. at 415.
110. 391 F. Supp. at 1145; cf. 39 C.F.R. § 1918.43(e).
111. 391 F. Supp. at 1144.
112. Id. at 1148.
In _Crowshaw_, the dangerous condition was a swinging deck block which was part of the hatch opening mechanism. Some time after the stevedore commenced operations, the block was left in a precarious erect position. The plaintiff brushed against it, and it swung down and crushed his foot. After stating that the vessel could not be liable for dangerous conditions in an area over which the stevedore had exclusive control, the court found that control over the block was shared. The court held that both the stevedore and the vessel negligently failed to discover the condition and warn the longshoremen about it. Although the court did not specifically mention it, this holding requires findings that the condition was unreasonably dangerous and that the vessel should have expected that the plaintiff "[would] not discover or realize the danger, or [would] fail to protect [himself] against it." The Court, however, went on to find that the plaintiff had not exercised reasonable care in inspecting and working around the block, and his recovery was reduced in proportion to his contributory negligence.

In _Frasca v. Prudential-Grace Lines, Inc._, the plaintiff was injured when he slipped off a ladder and fell into the hold. The plaintiff's longshoring crew had returned on the second day of work to find the hold, ladders, and decks covered with a thin film of grease. The source of the grease was never determined. The danger was aggravated by the fact that the edge of the hatch hung over the top rung of the access ladder, requiring the longshoremen to maintain a precarious position while reaching for the first step. A cleaning agent was used on the decks, but it could not be used on the ladder. The plaintiff was injured when he slipped off the first step while descending the ladder late in the day, after much grease had been tracked up and down. Since the condition was both unreasonably dangerous and obvious, the sole issue, under 343A, was whether a reasonable jury could find that the owner should have expected that the stevedore would not correct and the longshoremen would not protect themselves against the known danger or that the owner should have otherwise anticipated the harm despite such knowledge.

113. 398 F. Supp. at 1231.
114. _Id._
115. _See Restatement (Second) of Torts § 343(a) (1965)._ 
116. _Id._ § 343(b). 
117. "[T]he precarious elevation of the block which caused Crowshaw's [sic] injury would have been obvious to the naked eye. Crowshaw's lack of familiarity with the block did not excuse him from a duty of inspection. His failure to make a reasonable inspection and the manner in which he worked near the block constituted contributory negligence." 398 F. Supp. at 1231 (emphasis added).
119. _Id._ at 1101.
The court said that the shipowner would have been liable if the accident had occurred in the morning, because it was foreseeable that the stevedore would not have had time to perform its duty of cleaning up and making the work area safe. However, the court held that the shipowner escaped liability because it could not have foreseen that the stevedore would fail to perform its duty throughout the day, and that if any negligence was the cause of the plaintiff's injury, it was solely that of the stevedoring company and the plaintiff himself.

Although the stevedore was not a party to the action in *Frasca*, its negligence appears to have barred the plaintiff's recovery. Moreover, the court's preoccupation with the nonfeasance of the stevedore distracted its attention from the universally accepted principle that "the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm." The statement that the shipowner would have been liable if the accident had occurred in the morning suggests that it was negligent in some degree. Rather than examining the conduct of third parties in a search for a superseding cause, the court should have measured the relative negligence of the parties to the action.

The Future of 343-343A in Land-Based Jurisdictions

One of the ironies involved in the adoption of land-based standards by admiralty courts is that land-based courts are beginning to criticize the traditional common law rules according the interests of property owners preference over the interests of persons injured on their land. In *Rowland v. Christian*, the California Supreme Court abolished the rigid categories which classified plaintiffs according to their purpose in entering the land. Many other jurisdictions have followed this lead. The courts give three reasons for the change in attitude. First the classification system had evolved into a highly technical state, with fine distinctions and exceptions within exceptions, and the sheer complexity made the system too ponderous to function as an efficient judicial tool. Second, because of the great increase in population,

120. *Id.* at 1101-02.
121. *Id.* at 1102.
122. RESTATEMENT (SECOND) OF TORTS § 452(1) (1965). Although the rule speaks of an actor's "conduct," illustrations five, six, and seven show that it extends to dangerous conditions.
the flow of large numbers of people into urban areas, and the modern practice of living in close proximity, more individuals are exposed to the dangers of any given piece of property. This greater exposure justifies the imposition of a higher standard of care upon property owners. Third, the classification system arose in a feudal society which revered the ownership of property and viewed the landowner as "a sovereign within his own boundaries." Since landowners no longer dominate the social hierarchy, they should be held to the same standard of care as the rest of the population. Courts view it as anomalous that "while negligence has emerged as the main basis of liability for unintended torts, real property law and theory still dominate recovery for injuries occurring on private property." In jurisdictions which have abolished the common law categories, the landowner's duty of reasonable care, formerly owed only to business invitees, has been extended to all persons lawfully on the property.

This criticism has been directed toward the system of pigeonholing and not at the nature and scope of the business invitee duty. However, it may be argued that the business invitee standard of care is tainted by the same infirmities that resulted in the downfall of the classification system. The standard is difficult of application, and its technical niceties often exonerate a landowner even when he has failed to exercise reasonable care. Because landowners traditionally were allowed to act freely within the boundaries of their property, the landowner's duty to entrants was not thought to arise from his maintaining a dangerous condition, but from his superior knowledge of its existence. Thus,entrants were not actually entitled to reasonably safe

126. See, e.g., Wood v. Camp, 284 So. 2d 691, 696 (Fla. 1973) (disapproving the classification system but not rejecting it).


130. See Basso v. Miller, 45 U.S.L.W. 2006 (N.Y. Ct. App. June 17, 1976). There, the New York court abolished the classification system but expressly incorporated one of its elements, the likelihood of the plaintiff's presence on the land, into the new standard of care owed by landowners to all entrants.

131. See notes 97-122 & accompanying text supra.

132. Anuszewski v. Dynamic Mariners Corp., 391 F. Supp. 1143 (D. Md. 1975), is the best example of this point. The court concluded that "[t]he failure of the vessel to lock or fasten the beams constituted negligence on the part of the shipowner. . . . [B]ut negligence on the part of the ship is not actionable negligence . . . ." Id. at 1145. The reason the business invitee standard exonerates negligent defendants is that it incorporates the defense of assumption of risk. See notes 71-96 & accompanying text supra. Moreover, it shifts to the plaintiff the burden of proving that he did not assume the risk. See Restatement (Second) of Agency § 521, comments a, d (1957).

133. See, e.g., Hokanson v. Joplin Rendering Co., 509 S.W.2d 107 (Mo. 1974).
premises, but merely to equal knowledge of the dangers. In our crowded modern society where people live shoulder-to-shoulder, a dangerous condition will inevitably result in a number of injuries, regardless of whether the condition is known or obvious. Courts are finally accepting this fact; language in recent opinions suggests that no longer will a mere warning automatically discharge a landowner's duty. In the future, the burden of remedial action will be weighed against the seriousness and likelihood of injury to determine what protective action will be required of a landowner. Such a balancing process is consistent with the manner in which courts determine the rights and duties of parties to tort actions in which property ownership is not a factor.

The Demise of Control

An analogous development has been taking place with respect to the landowner's responsibilities to the employees of an independent contractor. When an independent contractor is involved inquiry into the landowner's duty usually focuses on the question of control. Traditionally, when a landowner relinquished control of the premises, he had no responsibility for dangerous conditions arising thereafter. When he maintained control of the premises, he had a continuing duty to the employees of the independent contractor, as well as to all other business invitees. The general rule of nonliability after relinquishment of control has been riddled with exceptions. It is generally accepted that the presence of an independent contractor will not shield the land-

134. Id. See also Prosser, supra note 127, at 394.
135. See Wood v. Camp, 284 So. 2d 691, 696 (Fla. 1973).
136. The United States Court of Appeals for the District of Columbia Circuit has suggested that a landowner's duty with respect to a dangerous condition should be determined by the flexible balancing test used in other areas of tort law. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972). "A landowner must act as a reasonable man in maintaining his premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk." Id. at 100.
137. Id.
139. Control over the premises should be distinguished from control over the contractor's conduct and methods of operation. If the landowner maintains control over the contractor's methods, then the contractor is not "independent" and the landowner may be liable on a theory of respondeat superior. See Restatement (Second) of Agency §§ 2, 220 (1957).
140. Prosser, supra note 127, at 386.
141. "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions." Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 503, 277 N.W. 226, 228 (1937). See Restatement (Second) of Torts §§ 409-29 (1965).
owner from liability if he was negligent in selecting or instructing the contractor if the work relates to a special class of persons such as the general public or the employer's tenants or if the work is abnormally or inherently dangerous. These exceptions are milestones in a trend toward disregarding a landowner's relinquishment of control as conclusively establishing his lack of liability. On the frontier of this trend is a movement to impose a duty on the landowner to protect employees of independent contractors against all conditions of which he has actual knowledge. This duty exists even when the dangerous condition arises after the landowner has relinquished control of the premises.

Like the business invitee standard of care, the rule that a landowner has no duty with respect to conditions arising after he has relinquished control of the premises is rooted in real property law. The rule does not focus on the exercise of reasonable care under the circumstances but rather upon possession and control of property. Because the original reasons for their existence have long since disappeared, the concepts have an uncertain future in land-based tort law. In their waning years, they certainly should not be imported into the maritime law. The 905(b) standard should comport with the admiralty's "traditions of simplicity and practicality" and should be "free from inappropriate common-law concepts."

142. Restatement (Second) of Torts § 411 (1965).
143. Id. §§ 410, 413.
144. Id. §§ 415, 417-18, 425.
145. Id. §§ 419-21.
146. Id. §§ 413, 416, 423, 427-27A.
147. In Warren v. Hudson Pulp & Paper Corp., 477 F.2d 229 (2d Cir. 1973), the landowner had a representative on the construction site who had actual knowledge of the danger but exercised no control over the premises or the contractor's methods of operation. The court affirmed a judgment in favor of the contractor's employee against the landowner, stating: "In the presence of a known danger, the fact that the dangerous condition was created or partially caused by an independent contractor will not shield the landowner from legal liability." Id. at 234. According to the Fifth Circuit court of appeals, "Florida follows the rule that where an employer gains knowledge of a dangerous situation created by an independent contractor it may incur liability through its failure to halt the operation or otherwise remove the danger." Emelwon, Inc. v. United States, 391 F.2d 9, 11 (5th Cir. 1968). Sposito v. Zeitz, 23 Wis. 2d 159, 127 N.W.2d 43 (1964), arose under the Wisconsin safe place statute, Wis. Stat. Ann. § 101.11 (1973). The landowner had no control over the construction site, but the court said by way of dicta: "Where such dangers arose, however, out of acts of the contractors or resulted from their failure properly to maintain equipment, we think the owner has not violated the safe place statute until he has had actual or constructive notice of the defect." 23 Wis. 2d at 162, 127 N.W.2d at 45.
148. See cases cited in note 147 supra.
150. Id. at 631.
151. Id. at 630.
ible and adaptable enough to reflect future developments in land-based torts concepts. Anachronisms and rigidity are built into the business invitee standard and the relinquishment of control rule.

A Proposed Standard of Care

Injuries of longshoremen can be divided into three broad categories. The first category includes injuries caused by conditions in existence when the stevedore first boards the ship; the second, injuries from conditions arising after the stevedore commences operations; and the third, injuries caused by the operating negligence of the longshoreman's co-workers. The third category poses no possibility of vessel liability under the 1972 amendments and will not be discussed here.

Conditions within the first category include holes in cargo loaded in a previous port, cargo from a previous port stowed in such a manner that it cannot be unloaded with reasonable safety, temporary defects in the ship's appliances in existence when the stevedore commences operations, and permanent defects in the ship's appliances or design. The first step in analyzing the vessel's duty with respect to such conditions should be to determine whether the vessel had actual knowledge of the condition or would have discovered it through a rea-


153. Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971), distinguishes dangerous conditions and operating negligence. A longshoreman injured by the conduct of his co-workers clearly is barred from suing the stevedore by the exclusive liability provision of the LHCA, 33 U.S.C. § 905(a) (Supp. V, 1975). He cannot recover from the operating negligence of the employees of an independent contractor with respect to the vessel because the operating negligence of the employees of an independent contractor will not be imputed to the employer of the contractor. The vessel is liable for the operating negligence of a crew member under the doctrine of respondeat superior. There are numerous cases involving the stevedore's operating negligence. See, e.g., Slaughter v. S.S. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974); Knox v. United States Lines, 186 F. Supp. 668 (E.D. Pa. 1960).


reasonably diligent investigation. In contrast to the unseaworthiness doctrine, the vessel would not be liable for unknown or undiscoverable conditions.\textsuperscript{158}

The next question is whether the condition involves an unreasonable risk of harm. The policy of encouraging vessels to eliminate dangerous conditions demands that this be the central question in determining whether a vessel owner has breached a duty to the injured longshoreman. The obviousness of a condition should not be a controlling factor in weighing the dangers. This would insert notions of assumption of risk and is better left to comparative negligence analysis.

If a condition is determined to be unreasonably dangerous, then the last question is what remedial action is required to discharge the duty of reasonable care. The answer should be obtained by weighing the burden of remedial action against the likelihood of injury. For example, the likelihood of injury from a hole in the cargo may be relatively slight, but the risk would appear to outweigh the burden of repairing the condition by spreading dunnage over it. On the other hand, there are some conditions which cannot be repaired. In the case of a structural defect in the ship, for example, the shipowner cannot be expected to rebuild the whole ship for the benefit of longshoremen, nor can he be expected to unload the cargo himself. The shipowner depends on the stevedore to unload cargo, and longshoremen are paid for their skill in handling dangerous cargo. Where remedial action is impossible, or the attendant burden outweighs the risk of harm, a warning is all that may reasonably be expected of the vessel. A single verbal warning may be inadequate where the longshoremen are likely to forget about the danger or become preoccupied with their work.\textsuperscript{159} In such cases a written warning should be posted or continual verbal reminders should be given.

Conditions within the second category arise on portions of the ship affected by stevedoring operations after the stevedore commences work. Category two conditions include defective equipment brought aboard by the stevedore,\textsuperscript{160} holes or other conditions that develop in the cargo as it is being loaded,\textsuperscript{161} slippery substances spilled during stevedoring operations,\textsuperscript{162} and appliances of the ship which are normally safe but become dangerous after the stevedore has commenced

\textsuperscript{158} See COMMITTEE REPORT, supra note 9, at 6-7 (example suggesting no liability without actual or constructive notice).

\textsuperscript{159} See RESTATEMENT (SECOND) OF TORTS § 343A (1965).

\textsuperscript{160} See, e.g., Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), aff'd, 347 U.S. 396 (1954).

\textsuperscript{161} See, e.g., Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975).

operations.\textsuperscript{163} It is proposed that the vessel’s liability for category two conditions should be substantially similar to its liability for conditions within category one. The only difference should be that with respect to category two conditions, the vessel should have no duty to inspect and therefore should be liable only where it has actual knowledge of the condition.\textsuperscript{164}

**Relinquishment of Control and Nondelegable Duty**

Two lines of criticism will be directed at this proposal. First, it will be said that the vessel cannot be liable for conditions arising in a part of the ship after control over that area has been relinquished to the stevedore.\textsuperscript{165} Second, it will be said that this imposes a nondelegable duty on the vessel, and that the committee report expressly precludes “nondelegable duty” as a theory of recovery.\textsuperscript{166} This proposal rejects the doctrines of relinquishment of control and delegability of duty because they are confusing and metaphysical, and because they

\textsuperscript{163} See, e.g., Nuzzo v. Rederi, 304 F.2d 506 (2d Cir. 1962); Grays Harbor Stevedore Co. v. Fountain, 5 F.2d 385 (9th Cir. 1925); Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224 (D. Ore. 1975).

\textsuperscript{164} Imposing a duty to conduct reasonable inspections might force the vessel to interfere with stevedoring operations. This proposal allows the vessel to rely upon the stevedore’s expertise until the vessel acquires knowledge of a danger. See Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975).

\textsuperscript{165} One pre-Sieracki case, applying negligence principles, held that a shipowner could not be liable for a dangerous condition arising after control had been relinquished to the stevedore. Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir. 1945). A similar result was reached under the Sieracki doctrine when the Third Circuit held that the duty to provide a seaworthy ship ended when the shipowner relinquished control to the stevedore. Lopez v. American-Hawaiian S.S. Co., 201 F.2d 418, 420 (3d Cir. 1953). The Supreme Court, summarily affirming a Ninth Circuit opinion, in effect overruled both Grasso and Lopez, holding that the shipowner’s control was only relevant to negligence, and since unseaworthiness was a strict liability remedy the shipowner was liable despite relinquishing control. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), aff‘g 205 F.2d 478 (9th Cir. 1953). Because it had been withdrawn from navigation, no warranty of seaworthiness covered the ship in West v. United States, 361 U.S. 118 (1959). The Court held that the shipowner could not be guilty of negligence because he had no control over the ship or the repair operations. Id. at 123. These cases will be asserted to support the argument that the relinquishment of control doctrine applies to 905(b) negligence actions. This argument may be rebutted on the following grounds. First, the 1972 amendments did not reinstate pre-Sieracki maritime negligence law; the committee report expressly disapproved maritime negligence theories. Admittedly, the committee report can be interpreted as referring only to maritime theories favorable to plaintiffs, and because relinquishment of control is a defendant’s doctrine it may not be affected by the reference to maritime theories. But such an interpretation would not require relinquishment of control to be incorporated into the 905(b) standard; it would merely allow courts to adopt the doctrine if they deemed it advisable. For reasons developed in the text, such an adoption would not be advisable. See text accompanying notes 182-85 infra.

\textsuperscript{166} See COMMITTEE REPORT, supra note 9, at 6.
yield results that do not reflect the proportional fault of each of the parties involved.

The doctrines of relinquishment of control and nondelegable duty overlap and interrelate, but for purposes of clarity they will be examined separately. Possession and control of premises, as opposed to actual ownership, is the basis of liability for dangerous conditions thereon. The concept of control also determines whether an agent is a servant or an independent contractor. Thus, an owner or a principal is not liable for dangerous conditions if he has relinquished control of the premises, and he is not liable for the acts of an independent contractor because he has no control over the methods of the independent contractor. If he relinquishes control of property to an independent contractor, ordinarily he is liable for neither the dangerous condition of the property nor the negligent conduct of the contractor.

Much confusion, however, has surrounded the doctrine of control because of the failure to distinguish between conduct and conditions. Where employees of independent contractors have been injured by conditions on the premises, courts have exonerated the owner by reasoning that he had no control over the contractor's methods of operation, even though he never relinquished control over the premises. On the other hand, in cases of injuries caused by the negligent conduct of co-workers, courts have spoken of the owner's liability for dangerous conditions. Because the control doctrine is a relatively simple judicial tool, courts, in order to avoid the task of analyzing fault, have employed it even in situations where the landowner clearly acted with reasonable care. This reliance has given rise to technical distinctions which bear little relation to the question of fault. Further confusion has resulted from a tendency to find control when the injured party is an uninformed invitee, but not when the injured party is familiar with the dangers. Perhaps recognizing the ambiguities and anomalies of

167. See PROSSER, supra note 127, at 471.
169. W. SEAVEY, LAW OF AGENCY § 84, at 142 (1964).
170. This general rule has been riddled with exceptions. See note 141 supra.
171. The distinction is not always easily made. Where conduct creates a dangerous condition, an injury may be said to have been caused by both the conduct and the condition. See, e.g., Popejoy v. Hannon, 37 Cal. 2d 159, 231 P.2d 484 (1951).
the control doctrine, recent cases have found that control was shared,\(^ {177}\)
or have avoided the question of control altogether,\(^ {178}\) determining liability upon the basis of reasonable care. In some cases this more flexible approach has been required by statute.\(^ {179}\)

There can be only two reasons for incorporating the relinquishment of control doctrine into the 905(b) standard. First, it can be argued that the abolition of the unseaworthiness remedy rehabilitates the old pre-\textit{Sieracki} unseaworthiness and maritime negligence cases that applied the relinquishment of control test.\(^ {180}\) But courts have expressly held that maritime cases do not apply and that the 905(b) standard is to be governed by a hypothetical national land-based jurisdiction.\(^ {181}\) This introduces the second argument; the committee report's reference to land-based standards means that land-based notions of relinquishment of control should be incorporated into 905(b) actions. The preferable interpretation of the committee report would be that the reference to land-based standards does not demand the adoption of specific rules,\(^ {182}\) but rather that it requires courts to exercise their discretion in molding a negligence standard that generally conforms to land-based standards and that is free of concepts inappropriate for maritime law. This interpretation is necessary because land-based jurisdictions have conflicting rules,\(^ {183}\) and admiralty courts must exercise their discretion in determining which rules are best applied to 905(b) actions.

It would be unfortunate for the courts, in exercising this discretion, to adopt a doctrine fraught with the confusion that surrounds relinquishment of control, particularly when there are indications that land-based jurisdictions may be abandoning it.\(^ {184}\) The doctrine of control may have some force when applied to an inexperienced landowner ignorant of the techniques and methods of an independent contractor. But the shipowner-stevedore relationship is more similar to the rela-


\(^{177}\) \textit{See}, e.g., Wiseman v. United States, 327 F.2d 701 (3d Cir. 1964).


\(^{180}\) \textit{See} note 165 \textit{supra}.


\(^{182}\) \textit{See} note 69 & accompanying text \textit{supra}.

\(^{183}\) \textit{See} note 176 \textit{supra}.

\(^{184}\) \textit{See} notes 139-52 & accompanying text \textit{supra}. 
tionship of general and subcontractor, in which control is generally not a factor. The vessel's agents usually have extensive knowledge of stevedoring operations; they have operated the ship's equipment, they have watched longshoreman perform, and they have probably even handled cargo on occasion. The shipowner cannot be analogized to the landowner ignorant of and inexperienced in the methods of an independent contractor.

The duty suggested by this note with respect to conditions arising after the stevedore assumes control will undoubtedly be termed a "nondelegable duty" and criticized as contrary to the committee report. But it is difficult to know the exact meaning Congress attributed to "nondelegable duty." The land-based standards to which Congress referred encompass many different kinds of nondelegable duties. In its most limited sense, a nondelegable duty is merely a species of vicarious liability. It imposes liability upon the employer of an independent contractor for the conduct of the contractor for which, but for the duty, the employer would not be liable. This includes situations in which the contractor is actively negligent and situations in which the employer knows or has reason to know that the contractor is engaging in the type of activities for which strict liability will be imposed.

But the term "nondelegable duty" is also used in a broader sense. This broader meaning includes not only those situations in which the employer's liability derives solely from the negligence of the independent contractor, but also those situations in which the employer is personally negligent. In such situations the employer's liability arises from the presence of an unreasonably dangerous condition on his property. Various land-based courts have held that this species of nondelegable duty is owed to the employer's own employees, to employees of inde-

186. See COMMITTEE REPORT, supra note 9, at 6. There is some indication that Congress intended the 905(b) negligence action to be governed by "standard Missouri variety workmen's compensation" law. Hearings on S.231B, S.525, & S.1547 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., 273 (1972) (remarks of Senator Eagleton). Under Missouri law, an owner of premises owes employees of an independent contractor a nondelegable duty to provide a safe place to work. Schneider v. Southwestern Bell Tel. Co., 354 S.W.2d 315, 319 (Mo. App. 1962).
190. Myers v. Little Church by the Side of the Road, 37 Wash. 2d 897, 227 P.2d 165 (1951).
pendent contractors, and to other business invitees. This type of nondelegable duty may arise whether the independent contractor creates the condition or merely fails to repair it or take other precautions. Such a duty may be imposed even when control over the premises is shared or has been relinquished to the contractor. In this sense, "nondelegable duty" seems to mean that the concurrent negligence of an independent contractor will not cut off the employer's liability for his personal negligence. In contrast to the vicarious liability sense, it does not refer to an employer who is free from fault and whose liability derives solely from the negligence of an independent contractor.

Further confusion is engendered by the special implications that surrounded the term "nondelegable duty" during the Sieracki period. Admiralty courts often spoke of the nondelegable duty of providing a seaworthy ship. As unseaworthiness grew into a strict liability remedy, the term "nondelegable duty" became associated with liability without fault. When defense counsel objected that a particular injury could not have been prevented by the exercise of reasonable care on anyone's part, the courts responded that the duty to provide a seaworthy ship was nondelegable.

It certainly cannot be contended that Congress intended to abolish "nondelegable duty" in all its meanings. In its broadest sense "nondelegable duty" is nothing more than a shorthand way of stating the liability of an employer of an independent contractor without analyzing the true ground upon which that liability rests. Since courts have

198. "[The vessel's duty] is a 'nondelegable' duty in the sense that an owner will nevertheless be liable for the negligence of an independent contractor who is hired to repair or remedy the condition. But it is not 'nondelegable' as that term has been traditionally used in admiralty law to describe the absolute duty imposed by the doctrine of seaworthiness . . . ." Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092, 1099 (D. Md. 1975).
held landowners liable on the ground that they owed a nondelegable duty in cases where the landowners were personally negligent, such an interpretation of the committee report's abolition of nondelegable duty would be tantamount to a holding that longshoremen could never recover against the vessel. This would be manifestly contrary to the letter of the statute and the spirit of the compromise that gave rise to it.

An interpretation of impermissible "nondelegable duty" as a species of vicarious liability, however, would appear to be inconsistent with the general congressional references to land-based standards. Such an interpretation would bar recoveries by longshoremen in situations within any of the well established exceptions to the general rule of non-liability of the employer of an independent contractor, situations in which land-based plaintiffs would always recover.

The most desirable interpretation of the committee report would be that "nondelegable duty" was used there only in the special sense that the term acquired during the Sieracki period and that Congress intended to abolish only those no-fault theories which were unique to the maritime law. The context in which the term appears would support this interpretation. This argument is not to be understood as advocating the adoption of land-based notions of nondelegable duty. Nondelegable duty is such an imprecise term that no discussion of the concept in a judicial opinion can help lead to a rational result. Excluding the entire concept from the 905(b) action will prevent courts from disposing of longshoremen's negligence claims merely by concluding that to allow recovery would require imposing a nondelegable duty upon the vessel. It is submitted, however, that requiring the vessel to act with reasonable care, in light of its actual knowledge, to repair conditions arising after the stevedore has commenced operations would not conflict with the abolition of "nondelegable duty" in the limited sense in which Congress appears to have used that term.

200. See notes 190-96 & accompanying text supra.
201. In the tripartite compromise that gave rise to the amendments, longshoremen sacrificed their unseaworthiness remedy in return for higher compensation benefits and an assurance that some form of third party action would survive.
203. See note 198 supra.
204. "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'nondelegable' duty, or the like." COMMITTEE REPORT, supra note 9, at 5.
Summary

This proposal imposes a relatively high standard of care upon vessels, and an accurate reflection of the factors contributing to longshoremen’s injuries requires that a high standard of care be imposed on the longshoremen to protect themselves. Their trade is a risky one, and they are paid for their skill at working in dangerous surroundings. They expect that after a long ocean voyage the ship will harbor a number of dangerous conditions. Consequently, in caring for their own safety, they should be required to act with the expertise, skills, and knowledge possessed by a reasonable man in their particular trade. The mere fact, however, that a dangerous condition is known, open, or obvious should not in itself preclude a recovery. In encountering a known danger, the longshoreman’s duty to exercise care for his own safety should be discharged by a complaint to the foreman, a demand that the condition be repaired, or a request for special equipment. If the longshoreman encounters a known danger without exercising reasonable care for his own safety, his recovery should be reduced to the extent that his negligence contributed to his injury. For example, if a longshoreman chose to work around a cargo hole without demanding dunnage, and if he became preoccupied with his tasks, forgot about the hole, and stepped into it, then both his failure to complain and his preoccupation would be deviations from his duty of care which contributed to his injury. However, the mere fact that he chose to work around the hole without complaining would not bar his recovery. Of course, the proportion of relative fault is always a question for the finder of fact, and the exact ratio should depend on the facts of each case.

Conclusion

In the years after Sieracki, longshoremen stood an extremely high chance of recovering a verdict with every complaint filed in court. In effect, the Supreme Court developed a common law workmen’s compensation system which the lower courts reluctantly administered. Now caution. Their concern is for the distinct possibility, given the history of federal court rulings on the subject, that, the courts will construe the nondelegable admiralty negligence as a cause of action amounting to unseaworthiness, a no-fault liability.” Id. at 1193. Accord, Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092, 1099 n.2 (D. Md. 1975); 1 A. BENEDICT ON ADMIRALTY § 114, at 6-13 to -15 (7th ed. 1973).

206. COMMITTEE REPORT, supra note 9, at 4705.


208. See notes 84-86 & accompanying text supra.

209. Id.


211. See notes 84-86 & accompanying text supra.
the pendulum has swung in the other direction. With longshoremen finally receiving an adequate level of compensation benefits, courts evidently feel that the third party action should be successful only in extraordinary cases. Consequently, the courts have applied a number of devices that cut off the vessel’s liability without relation to the percentage fault of the parties. These devices include a standard of care which incorporates assumption of risk and contributory negligence as a complete bar, relinquishment of control, the no nondelegable duty concept, and the notion that the safety of longshoremen is the primary responsibility of the stevedore.

This note accepts the notion that longshoremen should not recover as easily as they have in the past. They surrendered the Sieracki remedy in return for higher benefits, and for the courts to give it back to them would contravene the legislative compromise embodied in the 1972 amendments.

However, the legal devices that the courts have used to restrict the 905(b) action are unacceptable. Their only validity arises from general references in the congressional committee report to land-based standards, strict liability theories, and nondelegable duties. These devices are inconsistent with other specific references in the committee report as well as with general traditions of the maritime law. The proposed alternative standard of care is merely a sketch and does not purport to be complete. But it is submitted that the proposed standard is more in harmony with maritime traditions than the developing business invitee standard of care.

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