FORTY YEARS IN THE WILDERNESS: MARITIME PERSONAL INJURY ACTIONS SINCE THE LONGSHOREMEN'S ACT

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The official theory [for the development of law] is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them forgotten, the result of following them must often be failure and confusion from the merely logical point of view.

Holmes, Oliver Wendell,
The Common Law, p. 35,
(1881)

As one studies the law, a common phenomenon seems to consistently reoccur: The legal (or social) reason which gave rise to a particular legal decision has been forgotten or, more appropriately, ignored, and courts continue to shape a patchwork of decisions upon a form of yesterday's vintage. When reviewing the prickly pear of multi-party suits involving the injured longshoreman, it cannot escape observation that the establishment of this judicial Donneybrook Fair[1] never should have been, and, therefore, should be congressionally eliminated.[2] The purpose of this article is to review the expansion of litigation concerning maritime personal injuries indemnity actions and the resulting round-robin of crossclaims and counterclaims which illustrates an urgent need for congressional attention.

I. The Longshoreman Goes to Sea

In order to properly understand the course courts have taken on their advance of "dots and dashes"[3] in this area, a review of the legal background and development is important.

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1. As stated Judge Brown in one of these cases:

> This is another of the growing number of multiparty Donneybrook Fairs in which like kilkenny cats, . . . , all lash out against each other in the hope that someway from someone, somehow all or part of the *Sieracki-Ryan-Yaka-Italia* fallout can be visited on another. D/S Ove Skou v. Herbert, 365 F.2d 341, 344 (5th Cir. 1966).

2. Although in 1204 King John of England believed the establishment of the Donneybrook Fair outside of Dublin, Ireland was based on the best of politics, it took six hundred and fifty years before error was admitted and the Fair abolished.

3. "Our course of advance, therefore, is neither a straight line nor a curve. It is a series of dots and dashes." Cardozo, Benjamin N., *The Paradoxes of Legal Science*, P.6 (1928).

In looking to the needs of employees engaged in commerce, Congress in 1908 enacted the Federal Employers' Liability Act enlarging tort liability of railroad companies[4] and in 1920 enacted the Jones Act[5] which extended the benefit of the FELA to seamen. Neither of these Acts purported to deal with longshoremen; and it was accepted that a longshoreman had the same common-law right of action against his employer as did any shoreside employee. Because of the nature of his work, it was determined that a longshoreman might, at his election, bring an action either at common law or in the admiralty court.[6] In the admiralty court, the longshoreman had the benefit of the rule that contributory negligence would not bar recovery as it would at common law.[7] The reason for affording longshoremen the benefits of the admiralty court was "justified" by Justice Hughes in 1914 in the case of *Atlantic Transport Company v. Imbrovek*.[8]

> The libelant was injured on a ship, lying in navigable waters, and while he was engaged in performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo of this character, upon its proper performance, depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly, the work was done by the ship's crew; but, owing to the exigencies of increasing commerce, and the demand for rapidity and special skill, it has become a specialized service develving upon a class 'as clearly identified with maritime affairs as are the mariners'.[9] [Emphasis added]

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4. 35 Stat. 65 (1908); 45 U.S.C., Sections 51-60.

5. 41 Stat. 1007 (1920); 46 U.S.C., Sec. 688.

6. *See, e.g.*, Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); The Protos, 48 Fed. 919 (E.D. Pa. 1891); Post v. The Guillermo, 26 Fed. 921 (S.D.N.Y. 1886); Gerrity v. The Kate Cann, 2 Fed. 241 (E.D.N.Y. 1880), *aff'd*, 8 Fed. 719 (Cir. Ct. E.D.N.Y. 1881).

7. The Max Morris, 137 U.S. 1 (1890).

8. 234 U.S. 52 (1914).

9. *Id.* at 61-62. *Cf.*, Campbell v. Hackfield, 125 Fed. 696 (9th Cir. 1903) where it was held that such a case was not a maritime tort; the Supreme Court specifically refused to follow this reasoning. Remedies for visitors or repairmen or other shoreside individuals were classed with longshoremen. *See e.g.*, Leather v. Blessing, 105 U.S. 626 (1881); Pacific American Fisheries v. Hoff, 291 Fed. 306 (9th Cir. 1923), *cert. den.*, 263 U.S. 712 (1924). The Anaces, 93 Fed. 240 (4th Cir. 1899). *See*, The Osceola, 189 U.S. 158 (1903) where the rights of seamen were reviewed. An injured seaman could recover certain benefits in case of injury, such as maintenance and cure, but could only collect indemnity for an injury when it was the result of the *unseaworthiness* of the vessel; no recovery could be had when injury was caused through the negligence of a fellow crew member.

This identification would, unfortunately, prove to be irrevocable as it related to further consideration of the status of longshoremen.

In 1929, six years after the Jones Act was enacted, the Supreme Court held in *International Stevedoring Company v. Haverty*[10] that the statute applied to an action brought in a state court against a stevedore by his longshoreman-employee for personal injuries suffered while unloading a ship. The basis of the decision was that since seamen and longshoremen were similarly engaged in activities in the same industry, Congress undoubtedly intended to include longshoremen under the benefits of the statute. As will be seen, however, this "intention" seemed to be overlooked by all concerned.

During this first twenty-five years of this century, protracted efforts were underway to legislate benefits that would favor the employee regarding responsibility of employers for the personal injuries of their employees. Nearly all states enacted a form of workmen's compensation statutes which generally provided for a fund to protect every employee and his dependents from destitution when the employee suffered personal injury in the course of the employer's business regardless of who or what caused the injury.[11] It was assumed that such statutes would cover all *land based* employees and that the particular locale of the injury was immaterial. Consequently, at that time longshoremen were considered to be within the jurisdiction of the state workmen's compensation acts.[12] This assumption was unfortunately to be shortlived.

In a 5-4 decision in 1917 in *Southern Pacific Company v. Jensen*,[13] the Supreme Court held that a widow of a longshoreman who was killed while unloading a ship in New York Harbor could not recover under the New York Workmen's Compensation Law.[14] The Court reasoned that since the Constitution of the United States granted federal judicial power over "all cases of admiralty and maritime jurisdiction",[15] such state legislation "works material prejudice to the characteristic features of the general

10. 272 U.S. 50 (1926).

11. *See generally*, Larson, *Workmen's Compensation* (1964). The constitutionality of these statutes was upheld as early as 1917: New York Central R.R. Co. v. White, 243 U.S. 188 (1917) [New York]; Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917) [Washington].

12. *E.g.*, Federal: Riegel v. Higgens, 241 Fed. 718 (N.D. Cal. 1917); Barton v. Tiejen & Lang Dry Dock Co., 219 Fed. 763 (D.N.J. 1915); State: Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915); Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916).

13. 244 U.S. 205 (1917).

14. N.Y. Sess. Laws, ch. 316 (1914).

15. U.S. Const., art. III.

maritime law or interferes with the proper harmony of that law in its interstate relations".[16]

It is important to note that the court relied heavily upon the definition of the longshoreman as articulated in the *Imbrovek* case previously discussed.[17] The result of *Jensen* was to leave longshoremen injured upon navigable waters without workmen's compensation of any sort. Within a year after *Jensen*, Congress enacted legislation to authorize the application of state compensation for employment injuries occurring with admiralty jurisdiction by amending the savings clause to give "claimants the rights and remedies under the workmen's compensation law of any state. . . ."[18] The Supreme Court found the legislation unconstitutional by reaffirming the *Jensen* rationale that such was an unconstitutional delegation to the states of congressional power to regulate maritime affairs.[19] Congress tried again in 1922 to sanction state compensation coverage for longshoremen by passing legislation that eliminated coverage for "the master or members of the crew of a vessel."[20] The Supreme Court again struck down the legislation holding that, although it excluded seamen, it still extended coverage to longshoremen unloading vessels upon navigable waters, thus raising the same constitutional objections as stated in *Jensen* on the *Imbrovek* reasoning.[21]

The Court, however, extended a helping hand and spelled out for Congress the manner in which to accomplish their objective:

> Without a doubt, Congress has the power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employer's liability law or general provision for compensating injured employees; . . . .[22]

With this guiding light, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927.[23] Although the Act solved some immediate problems, its passage and subsequent decisions regarding it created a multitude of difficulties. The maze of factual patterns demanded a wary traveler between the *Jensen* rationale and the coverage afforded by state compensation. The task was to provide compensation to

16. *Supra*, note 13 at 216.
17. *Supra*, note 9.
18. 40 Stat. 395 (1917).
19. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
20. 42 Stat. 634 (1922).
21. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).
22. *Id.* at 227.
23. 44 Stat. 1424 (1927), 33 U.S.C., Sec. 901, *et seq.*

those employees who were precluded from state coverage while providing as much as constitutionally possible to state compensation. Although the scope of this article is not to review in depth the state versus the federal workmen's compensation problems under this Act, it will suffice to say that *Jensen* and the resulting legislative and judicial counters have plagued the courts[24] and writers[25] ever since—and will undoubtedly continue to do so unless some coherent conclusion can be established. The confusion wrought by the *Imbrovek-Jensen-Haverty* cases in identifying longshoremen so closely with maritime law established judicial refinements that only continued to confuse rather than clarify.[26] The

24. *E.g.*, Caldarola v. Eckert, 332 U.S. 155 (1947) [longshoreman right to bring an action against general agent of United States for maritime tort depended in a state court upon local law]; Davis v. Department, 317 U.S. 249 (1942) [workman drowned while working from a barge on abandoned drawbridge can collect state compensation]; Employer's Liability Co. v. Cook, 281 U.S. 233 (1930); [non-stevedoring employee temporarily so engaged may not recover state compensation]; Smith v. Taylor, 276 U.S. 179 (1928) [longshoreman drowned by blow of ship's sling knocking him off dock into water received impact on land and, therefore, can recover compensation from state]; Grant Smith Co. v. Rohde, 257 U.S. 469 (1922) [state act may be applied to injury on vessel under construction in navigable waters]; Marine Stevedoring Corp. v. Oosting, 398 F.2d 900 (4th Cir. 1968) [jurisdiction of Longshoremen's Act depends on function or status rather than situs of injury]; Noah v. Liberty Mutual Ins. Co., 267 F.2d 218 (5th Cir. 1959) [injury on land but knocked into water where Longshoremen's Act applied].

25. Allen, *The "Twilight Zone" Between the Jurisdictions of State and Federal Compensation Act*, 16 Ins. Counsel J. 202 (1949); Ambler, *Seamen are "Wards of Admiralty" but Longshoremen Are Now More Privileged*, 29 Wash. L.R. 243 (1954); Bozanich, *The Ambiguous Employee: The Relationship Between the Longshoremen's Act and State Compensation Legislation*, 18 Hast. L.R. 891 (1967); Dickinson & Andrews, *A Decade of Admiralty in the Supreme Court*, 36 Cal. L.R. 169 (1948); Hendricks, *Jurisdiction in Longshormen's Injuries*, 16 Clev. Mar. L.R. 124 (1967); Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 Harvard L.R. 637 (1955); Comment, *"Upon Navigable Waters" Requirement For Jurisdiction Under The Longshoremen's and Harbor Workers Act of 1927*, 4 Wash. Univ. Q. 615 (1968); Comment, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale L.J. 243 (1947); *see also*, Larson, *Workmen's Compensation*, Secs. 89-00, 89-60 (1968).

26. It is interesting to note that in 1924 the constitionality of the Jones Act was upheld in Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) which was the same year that the Court struck down the last congressional attempt to bring the longshoremen under state compensation acts in Washington v. Dawson, 264 U.S. 219 (1924). In the *Dawson* case, as mentioned, the Court suggested the basis for the Longshoremen's and Harbors Workers Compensation Act but apparently no thought was given to applying the Jones Act to longshoremen. Also, the Jones Act application did not seem to occur to witnesses testifying for the passage of the Longshoremen's and Harbor Worker's Compensation Act. *See* Hearings, House Committee on Judiciary, 69th Cong., 1st Sess. 40 (Apr. 8, 15, 22, 1926); Sen. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). The *Haverty* case holding that the Jones Act applied to longshoremen was decided in October, 1926 while the Longshoremen's Act was adopted in March, 1926, *supra*, note 10.

longshoreman had gone to sea with seamen, and his rights and remedies, unfortunately, would sink or float based on maritime considerations.

II. An Age of Judicial Legislation

Under basic tort concepts, a longshoreman employed by a stevedoring business injured through the negligence of a third person can bring an action for damages against the third party regardless of the Longshoremen's Act regarding the relationship between the longshoremen-employee and his stevedoring-employer.[27] For almost twenty years after the passage of the Longshoremen's Act, however, there were relatively few cases brought against third parties. The basis of the few claims made was that the vessel owner, its agents or employees were negligent in some duty owed the longshoreman.[28]

Then in 1946, the Supreme Court took another pull on the oar and sent the longshoreman further out to sea, and the shipowner and stevedore companies to the courthouse. In *Seas Shipping Company v. Sieracki*,[29] a majority of the court held that a vessel on which a longshoreman was working *owed an absolute duty of seaworthiness* to the longshoreman as it did to a seaman. No authority could be cited for the decision, and Justice Stone correctly stated in his dissent that:

> [t]he Court has thus created a new right in maritime workers, not members of the crew of the vessel, which has not hitherto been recognized by maritime law or by any statute. For this I can find no warrant in history or precedent, nor any support in policy *or in practical needs*.[30] [Emphasis added]

The latter phrase is essentially the basis of the controversy still continuing today. The doctrine of unseaworthiness traditionally afforded seamen[31] and now extended to longshoremen, was obviously a species of strict liability.[32] It is also important to note that recovery for such

27. 44 Stat. 1440 (1927), 33 U.S.C., Sec. 933(a).

28. *See e.g.*, United States Fidelity v. United States, 152 F.2d 46 (2nd Cir. 1945); Johnson v. American Hawaiian Steamship Co., 98 F.2d 847 (9th Cir. 1938); Weldon v. United States, 9 F. Supp. 347 (D. Mass. 1934).

29. 328 U.S. 85 (1946).

30. *Id.* at 103.

31. *See* The Osceola, 189 U.S. 158 (1903); The City of Alexandria, 17 Fed. 390 (S.D.N.Y. 1883).

32. As stated in Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-550 (1960):

> [T]he decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care . . . .
>
> The duty is absolute, but it is a duty to furnish a vessell and appurtenances

unseaworthy conditions would not restrict itself to the vessel's equipment, but would include circumstances where a longshoreman was injured by defective equipment brought aboard the vessel by the longshoremen's stevedoring employer[33] and circumstances where injury was caused or contributed to by the negligence of the stevedore or its employees.[34]

As mentioned above, even prior to *Sieracki* the shipowner party was occasionally sued by the longshoreman as a third party. In such cases, the shipowner sometimes sought indemnity from the longshoremen's stevedore-employer on the ground (1) that it was entitled to full indemnity because its liability was solely passive in nature and was caused by the active negligence of the stevedore or its employees[35] or (2) that the shipowner was entitled to contribution from the stevedore since the stevedore's negligence contributed to the condition.[36] Obviously, one logical extension of *Sieracki* was to point the way for automatic institutions of indemnity actions by shipowners against the stevedore-employer. Under the *Sieracki* reasoning, the shipowner could be held for unseaworthiness (in addition to negligence) even when the stevedoring-employer's negligence caused or contributed to the injury by creating an unseaworthy condition. The flood gates of protracted litigation had thus been partially opened.

Courts had differed, however, on whether there could, in fact, be any right over by the shipowner against the stevedore-employer. Section 5 of the Longshoremen's Act specifically stated: "The liability of the employer . . . shall be exclusive *and in place of all other liability* of such employer to the employee. . . ."[37] [Emphasis added]

The legislative history contemplated that the stevedore-employer's liability for injury or death of an employee would be entirely limited to the provisions of the Act calling for compensation payments.[38] It had been

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reasonably fit for their intended use. The standard is not perfection, but reasonable fitness . . . .

See also, Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L.Q. 381 (1954); Comment, *Admiralty's Stepchild: Strict Tort Liability*, 5 Williamette L.J. 481 (1969).

33. *See, e.g.*, Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964); *see* note 65 *infra;* Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), note 23 George Washington L.R. 603 (1955).

34. *See, e.g.*, Crumady v. The Joachin Hendrik Fisser, 358 U.S. 423 (1959); *see* note 56 *infra.*

35. *See, e.g.*, Seaboard Stevedoring Corp. v. Sagadahoc S.S. Co., 32 F.2d 886 (9th Cir. 1929).

36. *See, e.g.*, The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942).

37. 44 Stat. 1426 (1927), 33 U.S.C., Sec. 905.

38. Sen. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926).

specifically held in *American Mutual Liability Company v. Matthews*[39] that the language of the Act would clearly preclude contribution. The Court reasoned that since contribution among tortfeasors required *common liability* to the injured party (i.e., jointly or severally liable), and that the Longshoremen's Act limits the stevedore-employer's liability to compensation payments, there obviously can be no common liability between the shipowner and the stevedore.[40]

The differing philosophical ramifications of this issue was thoroughly explored in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation*[40] which began its two year journey through the courts about the same time the *Matthews* case was decided. The District Court had apportioned damages between the shipowner and the stevedore on a contribution theory.[42] The Court of Appeals of the third circuit rejected this conclusion and alternatively held that the Longshoremen's Act limited the stevedore's liability only to the amount that the stevedore-employer would be obligated to pay compensation under the Act.[43] The Supreme Court rejected *both* rationales of the lower courts, and in this writer's judgment reached a proper result—*but for the wrong reasons*. The Court stated that just where the economical loss should fall between the shipowner and the stevedore-employer (when both supposedly had common liability) belonged to Congress and not the Courts.

> In absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution between joint tort feasors. . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted injuries. . . . Many groups of persons with varying interest are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. . . .[44]

This reasoning was extremely unfortunate for a variety of reasons. First, and most importantly, the Court completely ignored and avoided

39. 182 F.2d 322 (2d Cir. 1950).

40. See discussion in Bacile v. Halcyon Lines, 187 F.2d 403 (3rd Cir. 1951), *rev'd.*, 342 U.S. 282 (1952); United States v. Rothchild International Stevedoring Co., 183 F.2d 181 (9th Cir. 1950).

41. 342 U.S. 282 (1952); see note 21, Geo. Wash. L.R. 241 (1952).

42. 89 F. Supp. 765 (E.D. Pa. 1950).

43. 187 F.2d 403 (3rd Cir. 1951).

44. *Supra*, note 41 at 285-286.

Section 5 of the Longshoremen's Act which would have barred any liability by the stevedore beyond compensation payments as in *Matthews*, or at least limited payments as the *Halcyon* decision by the Court of Appeals. Such a result would have put to rest the Alice-in-Wonderland world that had been created by *Sieracki*. Secondly, the question of *indemnity* as against *contribution* was quickly placed in limbo.[45] Courts faced with the problem that contribution was not permitted blithely called "contribution" indemnity and proceeded forward;[46] indemnity was still recognized as untouched by *Halcyon*.[47]

The *Sieracki* rule was further extended by the Supreme Court in the case of *Pope & Talbot v. Hawn*[48] without the need to consider the *Halcyon* problems. The *Haverty* case was exhumed for reference to the "historic doctrine of unseaworthiness" to hold that a longshoreman had the right to seek workmen's compensation *or* sue the vessel as a third party for a breach of seaworthiness, *and* to sue the vessel as a third party for negligence. Justice Jackson's dissent underscored the situation that was clearly being created. He stated, in part, that

> . . . Congress knew and respected the difference between the seaman to whom it preserved admiralty remedies plus the remedies of the Jones Act, and harbor workers, such as claimant, who are given the remedies of the Compensation Act, like most other shoreworkers.
>
> I cannot bring myself to believe that it is either the Congressional will or the tradition of maritime law or common sense to mingle the two wholly separate types of labor in their remedies as is being done in this case.[49]

Thus, over all obstacles, the longshoremen had the best of both worlds—land and sea. Although confusion reigned, it was clear that the remaining battles were to be fought between the stevedore-employer and the shipowner on indemnity and contribution questions blurred in species of contract and tort. As will be seen, the varied approaches to spread fault (and, therefore, payment) would be confined only by the imagination of

45. It is curious that with all the judicial efforts to attach longshoremen to the sea and maritime tort law, the *Halcyon* decision rejected the doctrine of contribution among joint tort feasors when maritime law fully recognizes the doctrine of comparative negligence and consequently recognizes that fault may be shared.

46. *See e.g.*, States S.S. Co. v. Rothchild International Stevedoring, 205 F.2d 253 (9th Cir. 1953).

47. Crawford v. Pope & Talbot, 206 F.2d 784 (3rd Cir. 1953).

48. 346 U.S. 406 (1953).

49. *Id.* at 426.

the lawyer in building bridges to exoneration from the untidy residue of Supreme Court decisions on the subject.

Three years after *Halcyon*, the Court again was faced with a factual pattern where a shipowner sought indemnification against the stevedore when the stevedore's negligence was a contributing factor to the injury. In the landmark case of *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*,[50] the Court once again had the opportunity to consider the exclusive provision of Section 5 of the Longshoremen's Act which the *Halcyon* decision had sidestepped. The reasoning in *Matthews* was urged but the Court held that the shipowner had a cause of action for breach of an implied warranty in the stevedoring contract that was an independent one, and not "on account of" the longshoremen's injury. Of course, it was obvious that the measure of damages and the "breach" was clearly *dependent* upon the injury. The Court specifically reserved, however, the issue of the exclusionary effect of Section 5 upon a shipowner's right of action *not* based upon contractual obligations.[51] On the implied contract theory, the Court reasoned that the stevedore had a duty to prevent the shipowner from incurring liability due to the conduct of the stevedore. It was pointed out that this duty was independent of the duty owned by the stevedore to its employee as provided by the Longshoremen's Act. *Halcyon* was distinguished on the ground that since the instant claim was not for contribution "considerations which led to the decision in *Halcyon* . . . are not applicable."[52]

There was a material question unanswered as to whether *Ryan* intended to eliminate the concept of contribution among joint tort feasors because the right to indemnity rests on the contractual relationship rather than a tort theory, or, simply, that the duties owed by the stevedore to its employees and to the shipowner are independent. The flood gates were, however, opened wider and the cases continued to flow due to the variety of unanswered questions in *Ryan*. The most unfortunate result, of course, was that the Court failed to adopt the reasoning that the shipowner's cause of action against the stevedore was one "on account of such injury or death", and consequently barred because of the exclusivity provision of Section 5 of the Longshoremen's Act. This was the theory adopted by the four dissenters written by Justice Black.[53]

50. 350 U.S. 124 (1956). See note 25 Geo. Wash. L.R. 100 (1956).

51. *Id.* at 132, note 6. See discussion in Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., 394 U.S. 404 (1969).

52. *Id.* at 133.

53. *Id.* at 135-147. See Fager, *Should The Compensation Lien Take Precedence Over the Attorney's Lien in a Ryan Recovery, The Case for the Employer*, IV Forum 217 (1969).

Two years later the Court again faced the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company*.[54] The injury to the longshoreman was caused by the falling of a temporary shelter built by the stevedore-employer that should have been torn down by the shipowner prior to going to sea. The Supreme Court held that *Ryan* should not be limited to circumstances involving a *stevedore's negligent handling of cargo* but that the duty of workmanlike performance *includes* the use of equipment incidental to any cargo operations. Obviously this was not a question of seaworthiness and the jury had specifically found that the condition did not render the vessel unseaworthy. In short, then, if the stevedore performed *any* work which led to foreseeable liability of the shipowner, he would be "entitled to indemnity absent conduct on its part sufficient to preclude recovery."[55] The significance here, of course, is the fact that after *Ryan* and before *Weyerhaeuser*, it could have been argued that indemnity would not be applicable where the stevedoring-employer's negligence *did not* create or contribute to an *unseaworthy condition*—especially, on contract principles. By *Weyerhaeuser*, however, the Court permitted the indemnity doctrine to be extended to situations where the longshoreman's injury was not the result of an *unseaworthy condition*, but simply the result concurrent negligence of the stevedore and the shipowner.

Ryan had implied that indemnity was dependent upon a contractual relationship between the shipowner and the stevedore. This "requirement" was all but removed in *Crumady v. The Joachim Hendrik Fisser*.[56] Here the action was brought *in rem* against the vessel rather than *in personam* against the vessel owner. At the time of the injury, the vessel owner had it chartered, and the charterer engaged the stevedore. The contention that *Ryan* demanded a contractual relationship was avoided by the Court by regarding the vessel owner as a third-party beneficiary to the contract since the stevedoring contract would indicate that the *vessel* itself was the intended beneficiary of the stevedore-employer's warranty of workmanship.[57] This reasoning brought back the ghosts of the *Imbrovek* and *Sieracki* cases as to the seaworthiness issue of the vessel.

The Court also suggested that the stevedore-employer could be liable

54. 355 U.S. 563 (1958).

55. *Id.* at 567. The quoted phrase of "conduct on its part sufficient to preclude recovery" has never been defined by the Supreme Court—nor could it in view of its later cases.

56. 358 U.S. 423 (1959); see note 34, N.D. Lawyer 576 (1960).

57. The third-party beneficiary doctrine was not new to Maritime law. *See, e.g.*, Hagen v. Scottish Ins. Co., 186 U.S. 423 (1903); The John Russel, 68 F.2d 901 (2d Cir. 1934); O'Rourke v. Peck, 29 Fed. 223 (S.D.N.Y. 1886). *See also*, Corbin, *Contracts*, Sec. 776.

for indemnity without privity between the stevedore and shipowner on the basis that the stevedore's warranty of workmanlike performance was similar to a manufacturer's warranty on its products under *MacPherson v. Buick Motors Company*.[58]

Clearly, the contractual considerations discussed in *Ryan* had all but disappeared, and in 1960 the Court seemed to indicate that of the two theories with respect to privity suggested in *Crumady*, the warranty theory was preferrable. In *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*,[59] an action *in personam* was brought against the shipowner. The contract of the stevedore-employer, however, was between the consignee of the cargo and the stevedore. Although the Court relied on the *Crumady* discussion relating to both third-party beneficiary and warranty theories to dismiss the difference in an *in rem* or an *in personam* action, the *Waterman* case can be rationalized on warranty theory much easier than on a third-party beneficiary theory. The stevedore's "warranty of workmanlike service" can presumably be held to run to those within the scope of performance which would obviously include the shipowner. On the other hand, it is far more difficult to apply a third-party beneficiary theory to the relationship between a consignee of the cargo, the vessel and the vessel owner enforceable against the stevedore. At least in *Crumady*, the charterer had certain duties arising from the contract between it and the shipowner where the third-party beneficiary theory could be applied against the stevedore when the action was *in rem*.

The Court's continued effort to judicially legislate was carried to a new high in *Reed v. The S.S. Yaka*[60]—even to a point beyond the theories presented by counsel! In short, the Court held that the exclusiveness of Section 5 of the Longshoremen's Act[61] was subordinated to the warranty of seaworthiness and that a longshoreman-employee could sue his stevedore-employer when the shipowner, albeit *pro hoc vice*, was the stevedore's employer. Incredibly enough, this issue was not even presented to the Court.[62] The majority of Court conceded that the result was inconsistent with Section 5 of the Longshoremen's Act, but the Court

58. 217 N.Y. 382, 111 N.E. 1050 (1916). Such strict liability has been delightfully characterized as "a freak hybrid born of illicit intercourse of tort and contract." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1126 (1960).

59. 364 U.S. 421 (1960).

60. 373 U.S. 410 (1963). See excellent discussion in Bue, In the Wake of Reed v. The S.S. Yaka, 18 Hast. L.J. 795 (1967).

61. 44 Stat. 1426 (1927); 33 U.S.C., Sec. 905.

62. 373 U.S. at 411, Note 1; Proudfoot, *"The Tar Baby": Maritime Personal-Injury Indemnity Actions*, 20 Stan. L.R. 423, 431 note 35 (1968).

reasoned that since the *Sieracki* rationale held that the Act was not a bar to recovery on unseaworthiness grounds, and, that since the *Ryan* rationale held that the Act was not a bar to recovery over by the shipowner from the stevedore, it was inconsistent to deny the same rights simply because the employer was also the shipowner. By this boot strap theory, the Court continued to perpetuate the initial fallacious reasoning on the excuse that Congress must act to show the Court the error of its ways.

> [W]e cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki, Ryan*, and others, the holdings of *which have been left unchanged by Congress*.[63] [Emphasis added]

As indicated in the dissent, and it is clear from the Court's opinion, the contract theory of *Ryan* was now myth.

> [W]e pointed out several times in the *Sieracki*, case which has been consistently followed since, that a shipowner's obligation of seaworthiness *cannot be shifted about, limited, or escaped by contracts or by the absence of contracts* and the shipowner's obligation is rated, *not in contracts*, but in the hazards *of the work*.[64] [Emphasis added]

One year later the Court finally stated what it had been avoiding in its previous decision by dealing with various themes of contract and tort. In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*,[65] the Court judiciously stated that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce likelihood of injury."[66] In this case the injury was caused when a latently defective rope broke which had been supplied by the stevedore-employer. A provision in the contract between the stevedore and the shipowner provided that each would be responsible for personal injury or death resulting from its employees' negligence. Such a provision would seem to have amounted to an express disclaimer of the implied warranty of workmanlike service. The Court, however, made short shift of this argument:

> We think that the stevedore's implied warranty of workmanlike

63. 373 U.S. at 414-415.
64. Ibid.
65. 376 U.S. 315 (1964); note 78 Harvard L.R. 190 (1964); note 62 Mich. L.R. 1446 (1964).
66. 376 U.S. at 324.

> performance applied in these cases is sufficiently broad to include the respondent's [stevedore] failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct.[67]

At least in *Ryan*, the stevedore had been negligent, but in *Italia*, the *Ryan* doctrine was clearly extended to one of liability without fault[68] which *Sieracki* had prophesied.

In the wake of these decisions, it is not surprising to find cases where the *stevedore-employer* has brought in the *longshoreman-employee* seeking indemnification of the amount the stevedore was required to pay the shipowner. The full circle of such an action seems absurd in the face of the Longshoremen's Act, but the rationale has been provided by the "logical" extensions of the *Sieracki-Ryan-Yaka-Italia* syndrome. Usually, such an action would be of little practical value. However, following the Court's reasoning to conclusion, when the longshoreman is the original plaintiff whose negligence was the sole cause of the stevedore's liability for indemnity, he would have a fund to pay a judgment resulting from the initial action against the shipowner. It would appear that courts would be justified in allowing such a claim based on the reasoning in *Italia*: "Liability should fall upon the party best situated to adopt preventive measures and thereby to reduce likelihood of injury."[70] Courts have not been so inclined, however, for several reasons.

It will be recalled that in *Ryan* the Court pointed out that the duty (i.e., warranty) running between the shipowner and the stevedore was not the same as running between the stevedore-employer and the longshoreman-employee. Consequently, such indemnification principles supposedly would not apply. Subsequent decisions following Ryan, however, clearly indicate that the Court really is talking about warranty of workmanship-*period*.[71]

Obviously, the most compelling reason to deny such an action is that of policy. To permit recovery by the stevedore-employer against the

67. *Id.* at 320.

68. *Cf.*, Booth S.S. Co. v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958); Gilchrist v. Mitsui Sempaku K.K., 266 F. Supp. (E.D. Pa. 1967); *See also*, Cunningham, Warranties Go to Sea, 15 Syracuse L.R. 19 (1963); White, *A New Look at the Shipowner's Right-over for Shipboard Injuries*, 12 Stan. L.R. 717 (1960).

69. *See, e.g.*, Nicroli v. Den Norske Afrika-OG Australieline Wilhelmsens Dampskibs-Aktieselskab, 332 F.2d 651 (2d Cir. 1964); Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962); Malfitana v. King Line, Ltd., 198 F. Supp. 399 (S.D.N.Y. 1961).

70. *Supra*, note 66.

71. *See* discussion in Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962).

longshoreman-employee would do violence to the policy of distributing losses in maritime personal injury. It seems clear to this writer, however, that such a result underscores the problem the Supreme Court has created. It is not a question of considering the consensual contract theory versus a warranty of workmanship theory, but a question of a clear understanding of the unneeded extensions of *Sieracki* and *Ryan*, and subsequent cases in the face of the Longshoremen's Act.

In *Federal Marine Terminals, Inc. v. Burnsside Shipping Company, Ltd.*,[73] the Supreme Court once again had an opportunity to review its past course when considering whether a stevedore may sue the shipowner directly for compensation payments paid to its longshoreman-employee. The Court quickly found that the appropriate provision of the Longshoremen's Act[74] did not bar a direct action, and secondly, that under federal maritime law the shipowner owed the stevedoring contractor a duty whose breach would give rise to a direct action for damages. The Court pointed out that this duty was not the same to the stevedore-employer as it is to the longshoreman-employee citing the *Weyerhaeuser*[75] case. The Court also quickly pointed out that such a direct action would be for indemnity, not contribution, thus reaffirming the *Halcyon* case. The most interesting consideration by the Court, however, was its treatment of the question of whether the stevedoring contractor has a direct action against the shipowner on some *other* theory rather than tort. For example, just as there is supposedly an implied warranty running from the stevedore to the shipowner, there should be reciprocal contractual warranties running from the shipowner to the stevedore. In this case, it was argued that such reciprocal warranties were recognized in *Ryan* by the Court's statement that "the stevedoring contractor . . . has received a contractual *quid pro quo* from the shipowner for assuming

72. *See, e.g.*, Cusumano v. Wilhelmsen, 267 F. Supp. 164 (S.D.N.Y. 1967) [attempt of stevedore to recoup from longshoremen]; Chevis v. Luckenbach Overseas Corp., 228 F. Supp. 642 (E.D. Tex. 1964) [division of award between shipowner and stevedore on contribution theory]. The District of Columbia has a particular problem based on the *Ryan* theory alone as it relates to the holding section 5 of the Longshoremen's Act does not bar an action by the third party against the employer since the Longshoremen's and Harbor Workers Act is the workmen's compensation act applicable in the District of Columbia, D.C. Code, Sec. 36-501 (1967). See Moses-Ecco Co., Inc. v. Roscoe-Ajax Corp., 115 U.S. App. D.C. 366, 320 F.2d 685 (1963); Liberty Mutual Ins. Co. v. Goode Const. Co., 97 F. Supp. 316 (D.D.C. 1951). Consequently, the Supreme Court's holdings have had a material influence on multi-party litigation in the District of Columbia.

73. 394 U.S. 404 (1969).

74. 73 Stat. 391 (1959), 33 U.S.C., Sec. 933.

75. 394 U.S. at 416 citing 355 U.S. 563, 568 (1958).

responsibility for the proper performance of all of the latter's stevedoring requirements."[76] [Emphasis in original]

Prior consideration of this issue by courts has been limited to consideration of the shipowner's duties only in the context of a stevedore's defense to a shipowner's claim for breach warranties as discussed in *Ryan*.[77] It was also argued that in addition to an express or implied contractual right, the stevedore has right of indemnity conferred by law in order to place the liability where it belongs under the *Italia* theory.[78] Since all the facts were not before the Court, it did not decide this issue but specifically permitted the issue to be raised in the District Court. Further, the Court pointed out that *Ryan* did not meet the question of a non-contractual right of indemnity and that *Ryan* recognized the "difference between" the non-contractual right of indemnity and the claim for contribution from a joint tort feasor.[79] Again, the unanswered questions were abundant.

III. Conclusion

It has been said that "experience is the name everyone gives to their mistakes".[80] It seems clear that the mistakes of the ill-advised decisions of *Sieracki, Halcyon*, and *Ryan, et al* will continue to be perpetuated by the Supreme Court in the name of judicial experience. Although the gradual development of the illogical result can be found as far back as the *Jensen* case attaching maritime law to longshoremen, the turning point would be the enactment of the Longshoremen's and Harbor Workers Compensation Act and the unfortunate rulings thereunder—especially *Sieracki*. The shadow of uncertainty cast by these decisions can only be removed by a light of Congressional action.

It is submitted that attempting to urge tort analysis over contract considerations as to indemnity questions only amplifies the main problems. The implications made in the *Yaka* case that cases "like *Sieracki, Ryan*, and others . . ." have been unchanged by Congress and, therefore, imply Congressional approval clearly puts the issue in perspective. The Supreme Court within its own framework could, of course, provide some consistency on the indemnity questions by

76. 394 U.S. at 419, note 19 citing 350 U.S. at 129, note 3.

77. *See, e.g.*, D/S Ove Skou v. Herbert, 365 F.2d 341 (1966); Pettus v. Grace Line, Inc. 305 F.2d 151 (2d Cir. 1962). *See generally*, Proudfoot, *"The Tar Baby": Maritime Personal-Injury Indemnity Actions*, 20 Stan. L.R. 423, 442-445 (1968).

78. *Supra*, note 66.

79. 394 U.S. at 421, note 25 citing 350 U.S. at 132, note 6.

80. Wilde, Oscar, *Lady Windermere's Fan*, Act III.

eliminating certain fictitious distinctions on the contractual warranty and tort concepts. Although such a course would be preferable over existing rulings, it avoids the core of the difficulty.

Even prior to *Sieracki*, under general tort principles a longshoreman-employee injured through the negligence of a third party was permitted to recover damages from the third party regardless of the existence of a workmen's compensation act. As we have seen, *Sieracki* extended the traditional seaman's protection of the doctrine of unseaworthiness to longshoremen. It is submitted that this concept should be eliminated. Prior to this decision, of course, indemnity actions by a shipowner held liable to a longshoreman on negligence principles were undertaken against the stevedore-employer. These actions were either based upon the situation where the shipowner's liability was solely a question of passive failure to prevent a dangerous condition from occuring through the negligence of the employees of the stevedore[82] or based upon mutual fault concepts involving contribution.[83] With the *Sieracki* unseaworthiness extension, the shipowner could be held liable to the longshoreman not only for negligence but also for unseaworthiness under facts when the stevedore-employer's negligence also contributed to the accident or where the stevedore-employer's negligence created the unseaworthiness.

It appears that Congress has two alternatives to correct the present situation. The first, and most obvious, would be to limit the stevedore-employer's liability to that of compensation payments thus leaving the shipowner without any remedy for indemnification. As was seen in the *Burnside* case, the stevedore-employer who pays compensation to the representative of a deceased employee not only has a subrogation remedy to recover the payments under the Longshoremen's Act[84] but can bring a direct action in tort against the shipowner for compensation payments and did "not preclude the possibility of a direct action under some other theory"[85] which, of course, raises the blurred concepts of the non-contractual right of indemnity. It would appear, therefore, that to limit the employer's liability to the Act, thus barring an indemnity action by the shipowner but allowing the stevedore-employer its subrogation under the Act *and* a direct action against the shipowner would only cause further

81. *Supra*, note 63.

82. *See, e.g.*, Seaboard Stevedoring Corp. v. Sagadahoc S.S. Co., 32 F.2d 886 (9th Cir. 1929).

83. *See, e.g.*, The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942).

84. *Supra*, note 74.

85. 394 U.S. at 419.

difficulty in seeking to place the ultimate liability "on the company whose default caused the injury."[86]

The most practical approach would be to remove the doctrine of unseaworthiness from the land based longshoreman-employee. This doctrine espoused by the *Imbrovek-Jensen-Haverty* case culminating in *Sieracki* is clearly unwarranted. By removing this extension, all the remedies would be available to provide a procedural course of action permitting recovery and the burden of payment to be placed upon the entity responsible. Thus, when a longshoreman-employee elects to sue the third-party shipowner in negligence, the shipowner can bring an action against the stevedore-employer for indemnity *and* contribution. When the facts so warranted the stevedore-employer could either take advantage of its subrogation right under the Act or bring a direct action against the shipowner to recoup the compensation payments made to the longshoreman-employee. Such an alternative would reverse the Alice-in-Wonderland world created by the Supreme Court.

86. Italia Societa per Azioni di Navigatione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964).