Shipowner's Duties and Apportionment of Liability Under the Longshoremen's and Harbor Workers' Compensation Act

Anne Hintermeister
INTRODUCTION

In 1972, Congress undertook a major revision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).1 The LHWCA provides longshoremen and other harbor workers2 with no-fault benefits for job-related injuries and insulates compensation-paying employers from any other liability based on those injuries.3 The 1972 amendments were enacted to eliminate the "circular liability suit," a mechanism developed in a series of Supreme Court decisions4 that enabled injured waterfront workers to obtain full damages from their employers who were supposedly immune from suit under the LHWCA.5

The circular liability suit was made possible by the unique organization of the longshoring industry. Typically, harbor workers are hired by independent contractors, known as stevedores, who in turn contract with shipowners to provide longshoring services.6 The stevedore is the employer under the

---


2. The LHWCA applies not only to longshoremen but also to any person engaged in maritime employment including shipyardmen, shipbuilders, and shipbreakers, 33 U.S.C. § 902(3) (1976), who is injured in navigable waters or adjoining areas. Id. § 903(a). The statute expressly excludes masters and crew members. Id. The LHWCA includes owners, charterers, agents, masters, officers, and crew members in the definition of "vessel." Id. § 902(21). The term "longshoreman" as used in this Comment will include any harbor worker covered by the LHWCA unless otherwise indicated. The term "stevedore" will be used to refer to independent contractors who employ harbor workers. The term "shipowner" will include officers and crew members employed by the shipowner.

3. 33 U.S.C. §§ 904, 905(a) (1976). The exclusive liability section, unchanged by the 1972 amendments, provides: "The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." Id. § 905(a). Insurance carriers share the employer's immunity from suit under the LHWCA. Johnson v. American Mut. Liability Ins. Co., 559 F.2d 382, 388-90 (5th Cir. 1977).

4. See notes 10-11 infra and accompanying text.

5. See notes 10-12 infra and accompanying text.

LHWCA, liable to the longshoreman for compensation benefits and receiving immunity from law suits.\(^7\) Shipowners receive no such protection and the statute specifically authorizes longshoremen to sue them as third parties.\(^8\) There is a great potential for such suits because the work location belongs to the shipowner. In addition, shipowners own most of the equipment used by the longshoremen.\(^9\) As a result of this unusual employment situation, injuries to workers covered by the LHWCA almost always involve three parties: the injured longshoreman, the stevedore-employer, and the third party shipowner.

The circular liability suit actually consisted of two separate actions. First, shipowners were held liable to longshoremen for most shipboard injuries based upon a warranty of seaworthiness, a form of strict liability.\(^10\) Second,

\(^7\) Id.
\(^8\) 33 U.S.C. §§ 905(b), 933(a) (1976).
\(^9\) G. Gilmore & C. Black, \textit{supra} note 6, §§ 6-4, -46, at 278, 410; Theis, \textit{supra} note 1, at 773. For this reason industry representatives urged Congress to enact a bill making shipowners and stevedores joint employers of longshoremen and therefore immune from suit. \textit{Hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 15023, Before the Subcomm. on Labor of the Comm. On Education and Labor, 92d Cong., 2d Sess. 91-94 (1972) [hereinafter cited as \textit{Hearings}]. The proposal, however, was rejected.

The potential for third-party suits is further increased by the fact that longshoring is one of the most dangerous occupations in the United States. At the time of the amendments, the injury frequency rate was four times that of manufacturing. S. Rep. No. 1125, 92d Cong., 2d Sess. 2 (1972) [hereinafter cited as Senate Report]. The House and Senate reports are substantially the same. \textit{See H.R. Rep. No. 1141, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. Code Cong. & Ad News 4698. Amendment of the LHWCA appears to have had little effect on reducing injuries in the longshoring and shipbuilding industries. Total workdays lost as a result of occupational injuries for longshoremen and other harbor workers have increased from 396.3 per 100 workers in 1973 to 520.8 in 1975. Among shipbuilding and shiprepair employees, lost workdays have increased from 152.6 to 215.6. In contrast, the rates for total private sector employees were only 53.3 in 1973 and 56.1 in 1975. U.S. Bureau of Labor Statistics, Dept of Labor, Bull. No. 1966, \textit{Handbook of Labor Statistics}, Table 147, at 319-25 (1977). In 1974, longshoring ranked first and shipbuilding and shiprepairing ranked tenth among all occupational classifications in number of lost work days. U.S. Bureau of Labor Statistics, Dept of Labor, Bull. No. 1932, \textit{Occupational Injuries and Illnesses in the United States by Industry, 1974}, at 18 (1976). Statistics compiled by the National Safety Council reflect similar rates. Figures for 1973 through 1975 indicate that the injury frequency rate for stevedoring was more than double that for all industries combined. Also, the injury severity rate was over four times as high. National Safety Council, \textit{Accident Facts} 36-37 (1976).

\(^10\) Early cases involving maritime personal injuries were dominated by the Supreme Court's desire to compensate workers for almost every work-related injury and to extend the liberal remedies available to seamen to other harbor workers. \textit{See G. Gilmore & C. Black, \textit{supra} note 6, § 6-46, at 411. Recovery for personal injuries caused by the unseaworthiness of a vessel became available to seamen in 1903. The Osceola, 189 U.S. 158. 175 (1903) (dictum). The warranty of seaworthiness encompassed defects in the structure or equipment of the ship that rendered it "inadequate for the purpose for which it was ordinarily used." Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944). Liability for defects was imposed without regard to negligence, and the shipowner's duty could not be discharged by the exercise of due care. \textit{Id.} at 105; Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259 (1922). The duty to provide a seaworthy ship and equipment was absolute and nondelegable. Mahnich v. Southern S.S. Co., 321 U.S. at 102.

In 1946, the Supreme Court extended the seamen's action for unseaworthiness to longshoremen, \textit{Seas Shipping Co. v. Sieracki}, 328 U.S. 85 (1946), and the remedy was later extended to
stevedores were required to indemnify shipowners for damages recovered by longshoremen under a warranty of workmanlike performance, a doctrine that held stevedores responsible for almost every unseaworthy condition that could be connected to them or to their employees. Through this process, workers were able to circumvent the LHWCA and indirectly obtain full damages from the stevedore for most shipboard injuries despite his immunity from suit.

other harbor workers exposed to dangers caused by unseaworthy conditions. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412-13 (1953). The scope of the warranty was continually expanded until 1972. E.g., Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963) (defective cargo containers, dangerous conditions on the pier); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) (temporary or transitory conditions); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959) (defect-free equipment which was improperly adjusted); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (defective stowage of cargo); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) (unfit crew members); Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), aff'd per curiam, 347 U.S. 396 (1954) (defective equipment brought on board by the stevedore). The Court rejected defenses raised by shipowners that they had neither actual nor constructive knowledge of the defect, e.g., Mitchell v. Trawler Racer, Inc., 362 U.S. at 549, or that they had relinquished control of the vessel in a seaworthy condition. E.g., Petterson v. Alaska S.S. Co., 205 F.2d at 480. Although the Supreme Court stated that shipowners were not required to provide an accident-free ship, Mitchell v. Trawler Racer, Inc., 362 U.S. at 550, in reality shipowners had become insurers of the safety of workers aboard their vessels.

Until 1956, shipowners were required to bear the entire burden of longshoremen's recoveries based upon unseaworthiness. The Supreme Court had rejected any form of contribution in third-party suits, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285-87 (1952), and refused to allow an offset or credit to shipowners equal to the amount of compensation benefits paid by a negligent stevedore. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 411-12 (1953), discussed at notes 230-32 infra and accompanying text. In 1956, however, the Court held that stevedores could be required to indemnify shipowners based upon an implied “warranty of workmanlike service,” an independent duty owed to shipowners arising out of the agreement to provide longshoring services. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The stevedore's warranty was distinguished from tort concepts of apportionment, which were prohibited by the exclusive liability provision of the LHWCA. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. at 128-32. The exercise of due care did not satisfy the warranty, Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 320-22, 324 (1965), and with respect to equipment he supplied, the stevedore was held to a standard approaching strict liability—the equipment must be safe and fit for intended use. Id. at 322. In addition, negligence of the shipowner in causing the injury did not preclude a successful indemnity action, e.g., Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. at 567, and liability was imposed even when the shipowner created the unseaworthy condition and it was merely aggravated by the stevedore's conduct. E.g., Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

Prior to 1972, the stevedore's warranty was extended to the fitness of the longshoremen he provided. Contributory negligence on the part of a longshoreman was held to be a breach of the warranty rendering the stevedore liable to the shipowner for the damages recovered by the longshoreman. E.g., McLaughlin v. Trelleborgs Angfrtygs A/B, 408 F.2d 1334 (2d Cir.), cert. denied, 395 U.S. 946 (1969). Not only were stevedores indirectly liable for damages paid by the shipowner, but liability for unseaworthiness also was imposed on shipowners who hired longshoremen directly. In this situation, the shipowner was required to make no-fault compensation benefits as an employer, but was denied the protection of the statute's exclusive liability provision. Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967); Reed v. The Yaka, 373 U.S. 410 (1963).
The circular liability suit frustrated Congress' intention in creating a workmen's compensation statute for harbor workers.\textsuperscript{12} It also encouraged unnecessary litigation which resulted in burdensome and unpredictable insurance costs for stevedores.\textsuperscript{13} Congress attempted to resolve these problems by amending the LHWCA in 1972. Under the amendments, the statutory compensation benefits available to injured longshoremen were substantially increased.\textsuperscript{14} In addition, Congress added section 905(b) which limited the shipowner's liability for work-related injuries by replacing the longshoremen's strict liability action for unseaworthiness with one based upon negligence and relieved stevedores of the burden of having to indemnify shipowners for damages recovered by longshoremen in third-party suits.\textsuperscript{15}

Although it is clear that section 905(b) has effectively dismantled the

\textsuperscript{12} Workmen's compensation statutes are often viewed as a compromise between employers and employees. Workers give up their rights to sue in return for guaranteed benefits. Employers agree to provide such benefits in return for immunity from suit. See Galimi v. Jetco, Inc., \textit{514 F.2d 949, 952 (2d Cir. 1975)}; 1 A. Larson, \textit{The Law of Workmen's Compensation \S 1.10 (1978)}; W. Prosser, \textit{Handbook of the Law of Torts \S 80, at 531-32 (4th ed. 1971)}. Although the LHWCA granted such immunity to compensation-paying employers, \textit{33 U.S.C. \S 905(a) (1976)}, it effectively had been repealed by the shipowner's right to indemnity. \textit{See note 11 supra} and accompanying text.

\textsuperscript{13} Senate Report, \textit{supra} note 9, at 4, 9. According to testimony at the House hearings on the 1972 amendments, although benefits payable under the LHWCA had remained constant and the number of injuries had actually decreased, the cost of workmen's compensation insurance increased substantially, reflecting the large recoveries and legal costs resulting from the increased number of third-party suits. \textit{Hearings, supra} note 9, at 85; \textit{see Senate Report, supra} note 9, at 9.

A witness from the insurance industry estimated that one out of every three dollars paid was attributable to third-party suits. \textit{Hearings, supra} note 9, at 242. Other testimony indicated that legal fees accounted for approximately 50\% of the expenditures connected with third-party suits, \textit{id.} at 106, and that employer's insurance costs had tripled between 1961 and 1972. \textit{Id.} at 86.

\textsuperscript{14} \textit{Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, \S 5(b), 86 Stat. 1252 (amending 33 U.S.C. \S 906(b) (1976)). The maximum weekly benefit available under the LHWCA was increased from \$70 to 200\% of the national weekly wage to be reetermined annually by the Secretary of Labor. \textit{Id.} \S 906(b)(1)(D).}

\textsuperscript{15} The section provides that: "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. 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. 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. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." \textit{33 U.S.C. \S 905(b) (1976)}.

circular liability suit, the section does not explain the duty\textsuperscript{16} owed by shipowners to longshoremen, and does not address the question of whether the stevedore's fault should in any way short of indemnity or contribution affect the shipowner's liability to the longshoreman. As a result, circuit courts confronted with these questions have reached conflicting results. With respect to the shipowner's duty, the Second and Fifth Circuits have applied by analogy the rules defining a landowner's duty to business invitees,\textsuperscript{17} while the Third and Ninth Circuits have applied the rules relating to employers of independent contractors.\textsuperscript{18} The Fourth Circuit has employed both approaches,\textsuperscript{19} and there is considerable conflict within several of the other circuits.\textsuperscript{20} With respect to the apportionment of damages question, the Fourth Circuit has held that the shipowner is entitled to an offset or credit representing the portion of the damages attributable to a stevedore's negligence.\textsuperscript{21} The Fifth and Ninth Circuits, however, have held that, under the 1972 amendments, shipowners must pay the full amount of the longshoremen's damages;\textsuperscript{22} it appears that the Second Circuit will follow suit.\textsuperscript{23}

This Comment will analyze these problems and attempt to suggest solutions that are consistent with congressional intent. Part I will examine the case law defining the shipowner's duty created by the 1972 amendments. Part II will criticize and attempt to reconcile some of the conflicting cases and propose a uniform definition of duty. Finally, Part III will discuss the propriety of apportioning damages when an injury is caused by the concurrent negligence of the stevedore and the shipowner.

\textsuperscript{16} It is important to note the distinction between the concepts of duty and standard of care. Duty generally refers to a legal obligation to conform to a particular standard of care arising out of the relationship between the parties. See Restatement (Second) of Torts § 4 (1965); W. Prosser, \textit{supra} note 12, §§ 42, 52, at 244-45, 324-27. The applicable standard of care defines the conduct required of one under a duty, \textit{id.} § 52 at 324, which, under § 905(b), is to exercise reasonable care. Both the existence of a duty and a failure to conform to the required standard of care are necessary elements of a tort cause of action. W. Prosser, \textit{supra} note 12, § 30, at 143. That § 905(b) does not define the duty owed by shipowners but only the standard of care, and that courts sometimes use the terms interchangeably, has led to some confusion in cases when liability is sought to be imposed for a negligent failure to act. See Shepler v. Weyerhauser Co., 279 Or. 477, 490-91, 569 P.2d 1040, 1047-48 (1977), \textit{cert. denied}, 434 U.S. 1051 (1978).

\textsuperscript{17} E.g., Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976).

\textsuperscript{18} E.g., Wescott v. Impresas Armadoras, S.A., Pan., 564 F.2d 875 (9th Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), \textit{cert. denied}, 434 U.S. 861 (1977).


\textsuperscript{20} See notes 87, 97 \textit{infra} and accompanying text.


\textsuperscript{22} E.g., Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978); Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975), \textit{cert. denied}, 425 U.S. 936 (1976).

I. THE SHIPOWNER'S DUTY

A. The Theory of Negligence Applied by the Courts

As a result of Congress' failure to explain the shipowner's duty in the legislative history, courts have had to look for guidance to existing areas of law. Although one treatise has advocated application of the body of law developed under the Jones Act, courts have unanimously rejected this proposal as inconsistent with congressional intent. Two other possibilities are the definition of duty developed in negligence actions brought by longshoremen prior to 1972, and the formulation of duty developed in cases dealing with landowners.

Maritime negligence law is generally viewed as placing a somewhat higher duty on shipowners than that traditionally imposed upon landowners under state law. The common law distinctions based upon the plaintiff's relationship to the shipowner (invitee/licensee) have been abolished and, in addi-

24. See note 16 supra and accompanying text.
27. See, e.g., Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 40 n.12, 45 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976); Fitzgerald v. Compania Naviera La Mollinera, 394 F. Supp. 413, 415 (E.D. La. 1974); 1A E. Jhirad, Benedict on Admiralty § 112, at 6-10 (7th ed. 1977) [hereinafter cited as Benedict]. Congress did not refer to the Jones Act in the legislative history and expressly rejected the rationale of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), that longshoremen should be entitled to the same remedies as seamen. Senate Report, supra note 9, at 8-10.
28. Maritime negligence law received little attention from the courts after the decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). As the warranty of seaworthiness came to encompass negligent acts aboard ship in addition to defects in structure and equipment, the two theories overlapped and recoveries were generally based upon unseaworthiness. See G. Gilmore & C. Black, supra note 6, § 6-37, at 379. A negligence action, however, was the only remedy available when the harbor worker was not performing traditional seamen's work, e.g., United N.Y. & N.J. Sandy Hook Pilot's Ass'n v. Halecki, 358 U.S. 613, 617-18 (1959), when the vessel was not in navigation at the time of the injury, e.g., West v. United States, 361 U.S. 118 (1959), and in death cases before the decision in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (allowing a wrongful death action based upon unseaworthiness under maritime law), e.g., Tungus v. Skovgaard, 358 U.S. 588 (1959) (state wrongful death statutes applied). One commentator has advocated application of the maritime theory of negligence developed in these cases to suits under § 905(b). See Comment, Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints, 21 VIII. L. Rev. 244, 267-70 (1976) [hereinafter cited as Viewpoints]. See also 1A Benedict, supra note 27, § 112, at 6-9 to -10.
tion, the shipowner's obligation to provide a safe place to work has been held to be a nondelegable duty. In recent years, however, the landowner's obligation has undergone like changes. As a result, modern theories of premises liability are quite similar to maritime negligence law. The real issue, therefore, is not whether the section 905(b) duty should be based upon landowner or maritime theories but how progressive the duty should be.

The legislative history of section 905(b) does not give a clear indication of which definition of duty was intended by Congress. On the one hand, the Senate report expressly states that the more progressive admiralty rules prohibiting the defenses of assumption of risk and contributory negligence are to be retained and that the rule of comparative negligence is to be applied. Statements in the report suggest a relatively high standard of care in providing longshoremen with a safe place to work and in taking corrective action when the shipowner knows or should know about a dangerous condition.

On the other hand, the report states that a longshoreman's recovery may not be based upon a nondelegable duty owed by the shipowner and that shipowners are not to be charged with the negligent acts of stevedores or their employees, both of which imply that the more traditional aspects of land-based law were considered relevant by Congress.

32. See, e.g., Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964); Anderson v. Lorentzen, 160 F.2d 173 (2d Cir. 1947); Vanderlinden v. Lorentzen, 139 F.2d 995 (2d Cir. 1944); 1A Benedict, supra note 27, §§ 112, 114, at 6-4 to -9, -12. See also Bole ski v. American Export Lines, Inc., 385 F.2d 69, 74-75 (4th Cir. 1967); Price v. SS Yaracuy, 378 F.2d 156, 161-62 (5th Cir. 1967); Ferrante v. Swedish Am. Lines, 331 F.2d 571, 575 (3d Cir.) (holding the shipowner liable when he knows or should know of dangerous conditions arising during the work), cert. denied, 379 U.S. 801 (1964). Shipowners, however, are often relieved of this duty once possession and control of the workplace are relinquished and the danger is created by the work of independent contractors. E.g., West v. United States, 361 U.S. 118 (1959); Moye v. Sioux City & New Orleans Barge Lines, Inc., 402 F.2d 238 (5th Cir. 1968), cert. denied, 395 U.S. 913 (1969).

33. See notes 90, 117 infra and accompanying text.


35. Senate Report, supra note 9, at 12.

36. Id. at 10-11. A factor suggesting that Congress did not intend strict adherence to land-based law is the preservation of the right of a longshoreman hired directly by the shipowner to sue his employer for negligence. See note 48 infra. Lawsuits against compensation-paying employers generally are not permitted in land-based law. See 2A Larson, supra note 12, § 66.10, at 12-20 to -21.

37. Senate Report, supra note 9, at 10-11. The committee report states at numerous points that shipowners are to be in the same position as third parties in nonmaritime employment situations and that maritime workers are to have the same rights as their land-based counterparts have against third parties. Id. at 9, 10-11. Congress' use of the term land-based standards, however, is not very helpful because there is no uniform common law rule of landowner's liability and often no rules exist for the type of dangers encountered by longshoremen. See, e.g., Espinoza v. United States Lines, Inc., 444 F. Supp. 405, 412-13 (S.D.N.Y. 1978); Robertson II, supra note 1, at 466; Viewpoints, supra note 28, at 266-67. The legislative history does not refer to the law of any particular jurisdiction, to any Restatement provisions, or to any recognized common law doctrines such as the "open and obvious" rule or the rules relating to work done by independent contractors. See, e.g., Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 454 (W.D. Wash. 1977); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 492-93 (N.D. Cal. 1977);
Despite the apparent conflict in the legislative history, courts overwhelmingly have chosen to impose upon shipowners the more traditional duty owed by landowners to persons injured on their property. Based upon segments of the legislative history, courts have determined that these land-based standards are consistent with congressional intent, whereas the maritime standard incorporates theories of vicarious liability and nondelegable duties which were expressly rejected by Congress.

B. Application of Land-Based Standards

1. Landowner's Duties to Invitees—Sections 343 and 343A of the Restatement

a. Dangers Known to Both the Shipowner and the Longshoremen

Initially, district courts applying land-based standards generally classified longshoremen as business invitees and imposed upon shipowners the traditional landowner's duty, requiring them to inspect the ship for dangerous conditions and to warn the longshoremen of any latent defects. These courts

Shepler v. Weyerhaeuser Co., 279 Or. 477, 494-97, 569 P.2d 1040, 1049-51 (1977), cert. denied, 434 U.S. 1051 (1978). Some courts have suggested that the numerous references to land-based law were made merely to emphasize departure from the warranty of seaworthiness and that maritime negligence principles may be appropriate in cases under § 905(b). See Davis v. Inca Compania Naviera S.A., 440 F. Supp. at 454-456; Gallardo v. Westfal-Larson & Co. A/S, 435 F. Supp. at 492; Giacona v. Capricorn Shipping Co., 394 F. Supp. 1189, 1192-93 (S. D. Tex. 1975); Note, The Injured Longshoreman vs. the Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk, 28 Hastings L. J. 771 (1977) [hereinafter cited as The Injured Longshoreman]; Viewpoints, supra note 28, at 263-64. Although it appears that nondelegable duties recognized in land-based law would be contrary to congressional intent, see Senate Report, supra note 9, at 10-11, they are neither prohibited by the terms of the statute nor totally precluded by the language of the committee report. See Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. at 492; Shepler v. Weyerhaeuser Co., 279 Or. at 499 n.22, 569 P.2d at 1052 n.22. In rejecting a nondelegable duty as a basis for recovery under § 905(b), the report explains that longshoremen are not "endow[ed] . . . with any special maritime theory of liability or cause of action." Senate Report, supra note 9, at 10 (emphasis added). See generally Those, supra note 1, at 777-90.


also applied the common law "open and obvious" doctrine, barring recovery for injuries caused by conditions that were either known to the longshoreman or that he could have reasonably been expected to discover.\textsuperscript{41} A number of circuit courts, however, held that the open and obvious doctrine improperly incorporated into section 905(b) an assumption of the risk defense and was not consistent with modern theories of landowner's liability. These courts chose to adopt the formulation of the duty owed to invitees contained in sections 343 and 343A of the Restatement (Second) of Torts.\textsuperscript{42}

Section 343 of the Restatement, as applied to shipowners, imposes liability for physical harm to longshoremen caused by conditions on the ship if: (1) the shipowner knows of or would by the exercise of reasonable care discover the condition; (2) he should realize that it involves an unreasonable risk of harm; (3) he should expect either that the longshoremen will not discover or realize the danger or that they will fail to protect themselves against it; and (4) he fails to exercise reasonable care to protect them against it.\textsuperscript{43} Section 343A modifies the common law open and obvious doctrine by imposing liability on the shipowner if he should anticipate the harm to the longshoreman notwithstanding that it is open and obvious.\textsuperscript{44} Under section 343A, if the shipowner should expect that the invitees will nonetheless proceed to encounter the danger, either because they are distracted or because a reasonable person in their position would determine that the advantages outweigh the risks, he will be under a duty to protect them.\textsuperscript{45}


\textsuperscript{43} Restatement (Second) of Torts § 343 (1965); \textit{see} W. Prosser, supra note 12, \S 61, at 392-93. Shipowners are of course liable for failure to carry on their own activities aboard the ship with reasonable care. E.g., \textit{In re} Allied Towing Corp., 416 F. Supp. 1207 (E.D. Va. 1976) (explosion caused by loading improper grade of fuel oil); \textit{see} Restatement (Second) of Torts § 341A (1965).

\textsuperscript{44} Restatement (Second) of Torts § 343A (1965). The section is to be read in conjunction with § 343. \textit{Id.} § 343, Comment a.

\textsuperscript{45} \textit{Id.} § 343A, Comment f; W. Prosser, supra note 12, \S 61, at 394. \textit{See generally} Annot. 35 A.L.R.3d 230 (1971). This rule is also applied in situations in which the invitee would not anticipate encountering such a dangerous condition, or for some reason would forget about its existence. W. Prosser, supra note 12, \S 61, at 394.
The Second Circuit's opinion in *Napoli v. Hellenic Lines, Ltd.* illustrates the application of section 343A. In *Napoli*, a longshoreman had fallen from some unsecured boards resting on drums stacked on the deck. The court, discussing the shipowner's duty regarding an open and obvious danger, stated that if the longshoreman were required to stand on top of the drums to carry out his duties, the shipowner might have anticipated that he would do so, and would have a duty to protect him. Longshoremen also have prevailed under section 343A when an openly dangerous condition existed on decks or passageways which they had to cross in order to reach their work area and

46. 536 F.2d 505 (2d Cir. 1976).
47. Id. at 506.
48. Id. at 509. The court did not require that the longshoreman have no other alternative but "to leave his job or face trouble for delaying the work." *Id.; accord*, Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 452-53 (W.D. Wash. 1977). Under the modified open and obvious rule, the plaintiff generally is not required to forgo employment in order to avoid an obvious risk. Restatement (Second) of Torts § 343A, Comment f, Illustration 5; *see* Foster v. A.P. Jacobs & Assoc., 85 Cal. App. 2d 746, 193 P.2d 971 (1948); Seelbach, Inc. v. Mellman, 293 Ky. 790, 170 S.W.2d 18 (1943).

It should be noted that in *Napoli*, the shipowner had hired the longshoremen directly rather than contracting with a stevedoring company, 536 F.2d at 506, and thus was an employer for purposes of the LHWCA. Although several courts have declined to follow *Napoli* for this reason, *see* Chavis v. Finlines Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978); Brown v. Ivarans Rederi A/S, 545 F.2d 854, 866-64 n.10 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), such a distinction is inappropriate. In amending the LHWCA, Congress chose to retain the pre-1972 right of a longshoreman to sue the shipowner for damages in this situation, and provided that the shipowner's liability is to be determined by the same principles as in third-party suits. *See*Senate Report, *supra* note 9, at 11. The second sentence of § 905(b) provides that there is no action for damages if the injury was caused by the negligence of persons performing longshoring services. The third sentence provides a similar exception in suits by shipbuilders or repairmen. *Id.* at 11-12. This exception, described as a fellow servant defense, is necessary in a direct employment situation because the longshoremen are employees and the shipowner would otherwise be vicariously liable for their negligence. *See* 1A Benedict, *supra* note 26, § 115, at 6-16; Gorman, *supra* note 1, at 16; note 8 *supra*. In direct suits, courts make a distinction between the conduct of the defendant in his role as a shipowner and as an employer, holding him liable for "owner occasioned negligence" and excluding damages arising from the employer-employee relationship. Smith v. M/V Captain Fred, 546 F.2d 119, 123 (5th Cir. 1977); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 40-44 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Duncan v. Dravo Corp., 426 F. Supp. 1048, 1051 (W.D. Pa. 1977); *In re Allied Towing Corp.*, 416 F. Supp. 1207, 1209 (E.D. Va. 1976). *Contra*, Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84 (N.D. Cal. 1978) (refusing to allow direct suit); Buna v. Pacific Far East Line, Inc., 441 F. Supp. 1360, 1366-67 (N.D. Cal. 1977) (same). Some courts, however, have read the language of the second and third sentences of § 905(b) as providing a defense in ordinary third-party suits, *see*Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233, 1240 (5th Cir. 1977); Bovia v. S/S Agia Erini, 433 F. Supp. 1020, 1021 (E.D. La. 1977), and others have read it as exempting shipowners from liability for the portion of the longshoreman's damages caused by the negligence of the stevedore. Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153, 1155 (4th Cir.) (en banc), *cert. granted*, 99 S. Ct. 348 (1978) (No. 78-479); Shellman v. United States Lines Operators, Inc., 1975 A.M.C. 362, 370 (C.D. Cal. 1974), rev'd, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *see* notes 184-89 *infra* and accompanying text.

when crew members instructed the longshoremen to continue working despite a known unsafe condition.\(^{50}\)

Other courts applying section 343A, however, have taken a more restrictive view in defining the point at which a shipowner should realize that a longshoreman cannot protect himself from an obvious danger. In *Gay v. Ocean Transport & Trading, Ltd.*,\(^ {51}\) the Fifth Circuit held that a shipowner was not liable when a boom, operated by longshoremen, knocked a pallet stacked nearby into the hold injuring the plaintiff.\(^ {52}\) Although crew members knew of the presence of the pallet and had informed the stevedore that it could not be placed on the dock, the court stated that they had no duty to take protective measures under the circumstances because “[i]t was not the type of danger that must be faced notwithstanding knowledge.”\(^ {53}\) A similar result has been reached in situations involving unsecured hatch covers,\(^ {54}\) improper equipment,\(^ {55}\) and grease on ladders and decks in the work area.\(^ {56}\)

Many courts interpreting section 343A in cases in which the dangerous condition was known to both the shipowner and the longshoreman have held for the shipowner on the grounds that a reasonable shipowner would not anticipate the harm resulting from such dangers because he would reasonably expect the stevedore either to remedy the condition or to warn his employees.\(^ {57}\) This reasoning often prevents recovery because foremen or other

---


51. 546 F.2d 1233 (5th Cir. 1977).

52. Id. at 1240.

53. Id. at 1242.


In this connection, courts have rejected arguments that violations of the OSHA regulations governing harbor employment, 29 C.F.R. §§ 1915-1918 (1977), are evidence of negligence on the part of the shipowner, e.g., Chavis v. Finnlines Ltd., O/Y, 576 F.2d at 1082; Gay v. Ocean
employees of the stevedore generally supervise the work and longshoremen direct their complaints about working conditions to them before going to the shipowner.\textsuperscript{58}

b. Dangers Unknown to the Shipowner—The Duty To Inspect

Section 343 imposes upon shipowners a duty to take protective measures not only as to dangers within their actual knowledge but also as to those which they could have been reasonably expected to discover. In other words, shipowners must make a reasonable inspection of their vessels.\textsuperscript{59} The section, however, does not define the scope or duration of the duty to inspect and makes no distinction between dangerous conditions existing before the invitees enter and those which arise thereafter and are caused by the invitees themselves.\textsuperscript{60}


\textsuperscript{59} Restatement (Second) of Torts § 343, Comments b, d (1965); W. Prosser, supra note 12, § 61, at 393. A shipowner may also incur liability for injuries caused by defects in any tools or equipment he supplies. Restatement (Second) of Torts §§ 388-393 (1965). Under § 392, one who supplies a chattel to be used for his business purposes is subject to liability for harm to the user if he fails to exercise reasonable care in making it safe or discovering its dangerous condition and warning the user. The supplier is liable even though the danger is discoverable by an inspection which the injured party or another is under a duty to make. Id. § 393. These sections have not received much attention in LHWCA cases. In Castel v. Moller, A.P., 441 F. Supp. 851 (N.D. Cal. 1977), a longshoreman standing on a portable ladder belonging to the shipowner was injured when the ladder moved, in part because the rubber feet on the bottom of the ladder were missing. The court, considering the lesser duty imposed by § 388, stated that the employer was under a duty to provide a safe ladder to his employee, and that to shift liability because the plaintiff used one belonging to the ship would be an unacceptable result. In addition, the court stated that there must be proof that the ladder was defective at the time it was supplied. Id. at 853-54.


\textsuperscript{60} See Espinoza v. United States Lines, Inc., 444 F. Supp. 405, 410 (S.D.N.Y. 1978). The comments to § 343 suggest such a distinction, stating that the landowner's and thus the shipowner's liability arises out of an implied representation to the invitees that the premises have been made safe for their reception and that they need not be on the alert to discover defects. Restatement (Second) of Torts § 343, Comments b, d (1965); see W. Prosser, supra note 12, § 61, at 388-89. The scope of the duty to inspect is limited to the "area of invitation" or parts of the premises that are held open to the invitees. Restatement (Second) of Torts § 332, Comment 1 (1965); W. Prosser, supra note 12, § 61, at 391-92.
Several courts have interpreted sections 343 and 343A as requiring shipowners to provide longshoremen with a safe place to work initially but have refused to impose any continuing duty to inspect the work of the stevedore.61 These courts believe that Congress intended that shipowners be permitted to delegate their duty to provide a safe place to work to the stevedore and that he is to have the primary responsibility to provide safe working conditions for the longshoremen.62 Based upon this interpretation, a shipowner was exonerated from liability to a longshoreman who suffered from carbon monoxide poisoning when the stevedore ordered him to work in an unventilated compartment and provided a defective blower.63 Another court held for the shipowner when a longshoreman was injured during the course of the work as a result of the stevedore's failure to provide adequate dunnage.64

The Second Circuit applied a similar interpretation in *Munoz v. Flota Mercante Grancolombiana S.A.*65 There, the plaintiff was injured when he fell from a makeshift pathway in the hold which had been constructed with boxes of cargo by other longshoremen during the unloading.66 Although the shipowner was unaware of the dangerous condition, the plaintiff argued that reasonable care required an inspection of the ship and correction of any hazards.67 The court held that recovery under the circumstances would be contrary to congressional intent and set forth the following rule: "[A] shipowner cannot be liable in damages when he relinquishes control of the hold, then in a reasonably safe condition, . . . and the stevedore's negligence creates a latent, dangerous condition, unknown to the owner . . . ."68

Rather than merely holding that the shipowner has no duty to inspect the progress of the longshoring operations, the *Munoz* court chose to distinguish its earlier decision in *Napoli v. Hellenic Lines, Ltd.*69 However, instead of distinguishing it as a case in which the dangerous condition existed before the work began,70 the *Munoz* court stated that *Napoli* was not controlling because there the danger was open and obvious while in *Munoz* it was caused by a latent condition.71 The court failed to note that the open and obvious rule focuses upon the longshoreman's perception of the danger, and that its distinction was directed at the shipowner's awareness. This distinction led to

---


65. 553 F.2d 837 (2d Cir. 1977).

66. Id. at 838-39.

67. Id. at 841.

68. Id.

69. 536 F.2d 505 (2d Cir. 1976), discussed at notes 46-48 supra and accompanying text.

70. Although the *Napoli* opinion is unclear on this point, there was some evidence that the plywood boards from which the plaintiff fell had been placed on top of the drums by the ship's crew and thus constituted a preexisting hazard. Id. at 506; see Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1079 (4th Cir. 1978).

71. 553 F.2d at 840-41.
confusion in later cases regarding the shipowner's duty to inspect the vessel before and after the longshoremen begin work.\textsuperscript{72}

Relying on \textit{Munoz} and purporting to apply section 343, several courts have abrogated the duty to inspect for preexisting dangers in the cargo itself or for defects in the method of stowage.\textsuperscript{73} These dangers are often created by longshoremen in previous ports. In \textit{Ruffino v. Scindia Steam Navigation Co.},\textsuperscript{74} a longshoreman fell and was injured when he stepped into a hole between two pallets of cargo which was covered by a rug. The stevedore who had previously loaded the cargo had created the dangerous condition by failing to cover the pallets with dunnage.\textsuperscript{75} Although the danger was clearly preexisting as to the plaintiff, the court held for the shipowner on the grounds that no liability could be imposed for a failure to inspect or supervise and that “[b]efore liability can attach for such independently created danger, the owner must have knowledge of its existence and an opportunity to alleviate it.”\textsuperscript{76}

c. Dangers Arising After Work Has Begun and Within the Actual Knowledge of the Shipowner

The cases under sections 343 and 343A, though holding that a shipowner is under no duty to inspect the ship during longshoring operations, suggest that he may be liable if he has actual knowledge of a dangerous condition, irrespective of when it arises, and fails to take corrective action. Several circuit courts, without explicitly distinguishing between known and unknown


\textsuperscript{73} See Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977) (plaintiff fell into space between pallets of cargo which was not covered with dunnage); Valle v. Jugoslavenska Linejska Plodiba, 434 F. Supp. 608 (S.D.N.Y. 1977) (plaintiff struck by a piece of dunnage because of tilting of pallets during the voyage). See also Briley v. Charente S.S. Co., 572 F.2d 498 (5th Cir. 1978) (plaintiff's foot caught in separation netting covering carelessly loaded cargo); Lemon v. Bank Lines, Ltd., 449 F. Supp. 1016 (S.D. Ga. 1978) (unsteady tier of cargo fell on plaintiff); Espinoza v. United States Lines, Inc., 444 F. Supp. 405 (S.D.N.Y. 1978) (plaintiff lost his footing on a dented cargo container). Courts applying independent contractor rules also have held that there is no duty with respect to some preexisting dangers. See Wescott v. Impresas Armadoras, S.A. Pan., 564 F.2d 875 (9th Cir. 1977) (hold lacked proper fixtures for attaching taglines); Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186 (4th Cir. 1977) (plaintiff injured because of a failure to apply brakes to rolling cargo containers when loaded), \textit{aff'd on rehearing en banc}, 577 F.2d 1153 (4th Cir.), \textit{cert. granted}, 99 S. Ct. 348 (1978) (No. 78-479); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) (plaintiff injured by collapsing cargo which had been improperly stowed).

\textsuperscript{74} 559 F.2d 861 (2d Cir. 1977).

\textsuperscript{75} \textit{Id.} at 862.

\textsuperscript{76} \textit{Id.; cf.} Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186, 190 (4th Cir. 1977) (holding improper a jury instruction that a shipowner has a duty to see that cargo is properly stowed), \textit{aff'd on rehearing en banc}, 577 F.2d 1153 (4th Cir.), \textit{cert. granted}, 99 S. Ct. 348 (1978) (No. 78-479); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) (stevedore has primary duty for safe conditions in the hold); Valle v. Jugoslavenska Linejska Plodiba, 434 F. Supp. 608 (S.D.N.Y. 1977).
conditions, have applied section 343A to conditions arising in the course of the work that were known to the shipowner, suggesting that shipowners have a duty under those circumstances. Others have suggested that the shipowner's awareness of the condition is relevant to the question of liability. In addition, several district courts have made an explicit distinction, stating that after control of the ship is turned over to the stevedore, the shipowner remains liable for a failure to warn or take corrective action with respect to dangerous conditions he observes.

Dicta in a recent Second Circuit case also supports this approach. In *Lopez v. A/S DIS Svendborg*, the court held that the fact that the risk of harm is not recognized until unloading is in progress is no basis for failure to take precautionary measures once the shipowner learns of the danger. The absence of a duty to inspect or supervise the work, according to the *Lopez* court, is relevant only to the notice to the shipowner. The *Lopez* opinion, however, is in direct opposition to the earlier Second Circuit case of *Cox v. Flota Mercante Grancolombiana, S.A.* in *Cox*, although the shipowner was not only aware of the dangerous condition but had actually agreed to correct it, the court held that he had no duty to do so and thus could not be held liable for the resulting harm.


80. 581 F.2d 319 (2d Cir. 1978).

81. Id. at 324.

82. Id. at 329 n.11. The statement in Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977), that the shipowner must have an opportunity to alleviate the danger before he can be held liable was explained as "merely a timeliness gloss" on the requirement of notice: the shipowner must know of the danger in sufficient time to correct it. *Lopez v. A/S DIS Svendborg*, 581 F.2d at 323; see Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 685 (2d Cir. 1978) (liability imposed when crew members had an opportunity to observe the unsafe condition after work had begun and took no action), cert. denied, 47 U.S.L.W. 3301 (U.S. Ct. 31, 1978) (No. 78-358).


84. 577 F.2d at 800, 804. There is now a split among panels within the Second Circuit with the decisions in *Lopez* and Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir. 1978), cert. denied, 47 U.S.L.W. 3301 (U.S. Ct. 31, 1978) (No. 78-358), representing the liberal view and the opinions in *Cox* and Hickman v. Jugoslavska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978) (per curiam), representing the conservative view. The *Canizzo* court declined to follow *Cox*, suggesting that the *Cox* decision had done "what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness." 579 F.2d at 686 n.3.
2. Duty Owed by Employers of Independent Contractors—Sections 409-429 of the Restatement

Perhaps in response to the difficulties encountered in attempting to adapt sections 343 and 343A to LHWCA cases, the Third Circuit has explicitly rejected the landowner-invitee analogy and instead has chosen to rely upon the Restatement provisions dealing with the duty owed by an employer of an independent contractor. In addition, independent contractor rules have been applied in several decisions from circuits which had previously applied invitee rules in LHWCA cases. These courts have confronted the same problems in defining the extent of the shipowner’s duty of inspection and in determining whether actual knowledge on the part of the shipowner should give rise to a duty to take protective measures. Thus, the body of case law that has developed under the independent contractor rules is quite similar to, and as confusing as, that developed by courts applying the invitee sections.

The basic rule under the independent contractor approach is found in section 409 of the Restatement. Subject to numerous exceptions, “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” The exceptions fall into two broad categories. The first category is situations in which the employer is liable for his own personal negligence in connection with the work entrusted to the contractor. The second category is situations in which the employer is vicariously liable for the negligence of the contractor, irrespective of whether he himself is at fault, based upon a policy determination that the employer should not be permitted to shift responsibility for the conduct and quality of the work. The exceptions in this category have been dismissed as contrary to congressional intent in enacting section 905(b).

86. See Davison v. Pacific Inland Navigation Co., 569 F.2d 507, 513-14 (9th Cir. 1978); Wescott v. Impresas Armadoras, S.A., Pan., 564 F.2d 875, 883 (9th Cir. 1977).
88. Restatement (Second) of Torts § 409 (1965). The independent contractor rule is an exception to the principle that employers are subject to liability for the acts or omissions of persons they employ. If there is an agency relationship and control over the details of the work, the contractor will be considered a servant and the rule of vicarious liability will be applied. Restatement (Second) of Agency §§ 219-220 (1958). The trend, however, is toward imposition of vicarious liability even for the acts of independent contractors. The exceptions to the rule are so numerous that it is only “applied where no good reason is found for departing from it.” Restatement (Second) of Torts § 409, Comment b (1965).
89. See Restatement (Second) of Torts §§ 410-415 & Introductory Note, Topic 1 (1965); W. Prosser, supra note 12, § 71, at 469-70; notes 137-43 infra and accompanying text.
90. See Restatement (Second) of Torts §§ 416-429 & Introductory Note, Topic 2 (1965); W. Prosser, supra note 12, § 71, at 470-71. These exceptions are classified as nondelegable duties, rendering the employer liable for the contractor’s failure to discharge his duty of due care.
91. Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1081 (4th Cir. 1978); Hurst v. Triad
In *Hurst v. Triad Shipping Co.*, the Third Circuit chose to adopt the independent contractor approach rather than the invitee sections for several reasons. The *Hurst* court reasoned that the cases interpreting sections 343 and 343A had placed a duty upon shipowners to oversee longshoring operations to protect longshoremen from dangers arising during their work and that, to that extent, imposed an impermissible nondelegable duty upon shipowners. The court also noted that application of the invitee rules caused confusion because other courts avoided imposition of a nondelegable duty by evasive readings of the sections and by classifying the danger in question as open and obvious. Moreover, the Third Circuit stated that exclusive reference to the invitee rules was inappropriate in third-party suits because correct application of land-based standards required that the independent contractor rules also be taken into consideration. Finally, although section 343A is not as restrictive as the common law open and obvious rule, the *Hurst* court criticized that doctrine as incorporating the assumption of risk defense into section 905(b).

The inquiry under section 409, in contrast to sections 343 and 343A, is not into the perceptions of either the shipowner or the longshoreman or the reasonableness of their conduct in light of it. Instead, courts applying section 409 are concerned with whether control of the ship and the manner of the work was relinquished to the stevedore prior to the time the dangerous condition arose and whether the condition was created by the shipowner or the stevedore. In *Hurst*, the plaintiff was injured when metal legs sus-

---


95. *Id.* at 1249-50 n.35.


97. *See* notes 85-87 *supra* and accompanying text. The independent contractor rules have been adopted in cases involving shipyard injuries even by courts which have applied the invitee rules to dangerous conditions encountered by longshoremen in loading or unloading. *See* Riddle v. Exxon Transp. Corp., 563 F.2d 1103 (4th Cir. 1977); Bossard v. Corp., 559 F.2d 1040 (5th Cir. 1977), cert. denied, 435 U.S. 934 (1978); Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), cert. denied, 435 U.S. 924 (1978); Harrelson v. United States, 420 F. Supp. 788 (S.D. Ga. 1976), *aff’d*, 548 F.2d 353 (5th Cir. 1977). When a ship has been turned over to a shipyard for repairs or maintenance there is even less control exercised by the shipowner over the manner of the work and no opportunity to observe or discover defects. Even when crew members are present in the shipyard, they generally have less expertise in recognizing dangerous conditions. Under these circumstances, it would be unfair to charge the shipowner with any continuing responsibility for safe working conditions. Even with respect to dangers existing when the vessel is turned over to the shipyard, the courts have applied the common law rule that there can be no
pended from a crane fell into the hold where he was working because there was no safety catch attaching them to the crane.\textsuperscript{98} The court determined that the stevedore was negligent in failing to secure the metal legs with a safety catch and that section 409 insulated the shipowner from liability for the stevedore's negligence unless one of the exceptions to the rule applied.\textsuperscript{99} The only exception the \textit{Hurst} court found relevant was section 414.\textsuperscript{100} Section 414 imposes liability on the employer when he retains the right to control any aspect of the work and is negligent in exercising that right.\textsuperscript{101} Under this section, however, the shipowner may avoid liability to the longshoreman and still retain "a general right to order the work stopped or resumed, to inspect its progress or to receive reports."\textsuperscript{102} Although the \textit{Hurst} court held for the shipowner, presumably he would have been liable if he had retained sufficient control over the manner in which the stevedore used the crane.

In addition to section 414, several other Restatement sections would not impose nondelegable or no-fault liability on the shipowner, and, therefore, could be applied in LHWCA cases.\textsuperscript{103} Treatment of these sections has been disappointing. Several courts have avoided their application by holding that they are intended only to benefit third parties, not the contractor's employees.\textsuperscript{104} Other courts have held that they are premised on the availability of indemnification, and, therefore, inappropriate in LHWCA cases.\textsuperscript{105}

Thus, under the prevailing independent contractor analysis, the shipowner may delegate his duty to provide a safe place to work and owes no further duties to the longshoremen.\textsuperscript{106} The courts refuse to impose liability on the shipowner for failing to warn the plaintiff or correct the condition because to

\textsuperscript{98} 554 F.2d at 1240-41.
\textsuperscript{99} \textit{Id.} at 1251-53.
\textsuperscript{100} \textit{Id.} at 1251.
\textsuperscript{101} Restatement (Second) of Torts § 414 (1965).
\textsuperscript{103} Restatement (Second) of Torts §§ 410 (negligently given orders), 411 (negligent employment of an incompetent contractor), 413 (negligence in failing to provide for special precautions when the work should be recognized as dangerous in their absence) (1965).
\textsuperscript{106} \textit{See}, e.g., Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1078 (4th Cir. 1978); Cox v.
do so would amount to charging the shipowner with the stevedore's negligence. In short, the courts refuse to accept any theory of concurrent duty or responsibility apart from section 414. Thus, the shipowner is often insulated from liability if the stevedore is at fault in causing the injury. Dicta in several circuit court decisions indicates that the same result is obtained if the shipowner is aware of a dangerous condition arising after control has been relinquished.

II. RECENT TRENDS AND RECOMMENDATIONS

The confusing and contradictory case law under section 905(b) in many instances exempts shipowners from liability for their own negligence. This state of affairs is contrary to Congress' intention that the federal courts develop a uniform duty which will encourage safe working conditions. Several recent district court opinions applying the recommendations of commentators have recognized that shipowners should owe a higher duty regarding conditions existing before the longshoremen come on board and conditions that are unrelated to their work and that a more limited duty should exist with respect to conditions arising out of the longshoring operations. In addition, these courts have criticized application of the more restrictive common law rules relating to open and obvious dangers and classifications of entrants as neither mandated by the language of the legislative history nor in keeping with congressional intent.
A. A Uniform Rule of Reasonableness

Sections 343 and 343A should be abandoned to the extent that they define the shipowner's duty in terms of the common law classifications based upon the status of the plaintiff or in terms of the plaintiff's perceptions of the dangerous condition. Although it is clear that longshoremen are invitees under traditional land-based law, there is no justification for importing the common law classifications into LHWCA cases. They were rejected twenty years ago by the Supreme Court as foreign to the "traditions of simplicity and practicality" of admiralty law, and many state courts have abandoned the classifications, recognizing that the common law landowner's duties are inflexible and inconsistent with modern theories of tort law.

These state courts require a landowner to "act as a reasonable man in maintaining his property 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." They have also stressed the role of the jury in evaluating the reasonableness of the defendant's conduct. This approach is similar to an example given in the legislative history involving an injury caused by an oil spill on the deck. The committee report states that an injured longshoreman could recover if the oil "should have been

115. See note 114 supra and accompanying text.


discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.\textsuperscript{120}

This example not only suggests a duty of reasonable care in LHWCA cases but also demonstrates that the obviousness of the danger should not be relevant to the shipowner's duty to take precautionary measures. The open and obvious rule of section 343A is confusing and difficult to apply. It often acts as a bar to recovery since many courts hold that a shipowner will generally not anticipate the harm caused by an open and obvious condition because he would reasonably expect it to be corrected by the stevedore.\textsuperscript{121}

More importantly, even as modified in section 343A, the open and obvious rule incorporates into section 905(b) the assumption of risk doctrine which was expressly prohibited as a defense in the legislative history.\textsuperscript{122} A more equitable and efficient way to deal with open and obvious dangers, and one more in keeping with congressional intention, is to focus on the reasonableness of the plaintiff's conduct instead of limiting the shipowner's duty. If the plaintiff acted without due care for his own safety from an objective point of view, his recovery should be reduced to the extent that his conduct caused the injury.\textsuperscript{123} The committee report specifically provides that the concept of comparative rather than contributory negligence is to be applied under section 905(b).\textsuperscript{124}

B. Shipowner's Responsibility for Conditions Existing Before the Stevedore Comes on Board

The shipowner's initial duty to longshoremen should be to exercise reasonable care in providing them with a safe place to work.\textsuperscript{125} This duty of

\begin{enumerate}
\item[120.] Senate Report, supra note 9, at 10-11.
\item[121.] \textit{See} Espinoza v. United States Lines, Inc., 444 F. Supp. 405, 410 (S.D.N.Y. 1978); note 57 supra and accompanying text.
\item[122.] \textit{See} Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 453-54 (W.D. Wash. 1977); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 494 (N.D. Cal. 1977); Senate Report, supra note 9, at 12; Restatement (Second) of Torts § 343A, Comment e (1965); id. § 496C, Comment d; note 114 supra and accompanying text. Section 343A uses the concept as a limitation on the duty owed by an occupier rather than as a defense. This distinction, however, does not justify application of the section. \textit{See} The Injured Longshoreman, supra note 37, at 781-82. \textit{But see} Invitee Standard, supra note 29, at 671-76.
\item[123.] \textit{See} Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 454 (W.D. Wash. 1977); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 494 (N.D. Cal. 1977). Whether the longshoreman was aware or should have been aware of the danger may be relevant in determining if he acted with due care for his own safety in proceeding to encounter it. His recovery, however, should not be reduced if he complains about a dangerous condition and is told that it will be corrected or that he should keep working. \textit{The Injured Longshoreman, supra note 37, at 781; see note 50 supra.}
\item[124.] Senate Report, supra note 9, at 12. Section 343A has also been criticized in that by defining the shipowner's duty in terms of the plaintiff's perceptions of the danger, it prevents inquiry into the reasonableness of the shipowner's conduct and thus contravenes the policy of comparative negligence which is aimed at balancing the relative fault of the parties. \textit{See} Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 454 (W.D. Wash. 1977); \textit{The Injured Longshoreman, supra note 37, at 782.}
\item[125.] \textit{E.g.}, Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 507 (2d Cir. 1976); \textit{see} Lopez v. A/S D/S Svendborg, 581 F.2d 319, 323 (2d Cir. 1978); Migut v. Hyman-Michaels Co., 571 F.2d 352,
reasonable care should be distinguished from any absolute duty or strict liability theory. Congress has made it clear that the shipowner is no longer an insurer of the safe condition of the vessel, and, accordingly, he should not be liable for harm resulting from dangerous conditions which are unknown to him and which he reasonably could not be expected to discover. The shipowner, however, should be under a duty to inspect the vessel before the longshoremen come on board, and either take corrective action or warn the longshoremen of dangers that he discovers. In addition, he should be liable whenever a longshoreman is injured by a condition which would have been discovered by a reasonable inspection.

The shipowner should not be able to avoid liability to the longshoremen merely because he did not create the condition. Several courts have refused to hold the shipowner responsible for dangerous conditions resulting from the negligence of stevedores in earlier ports on the theory that to do so would be a form of vicarious liability and contrary to congressional intent. It is submitted, however, that imposing liability upon the shipowner under those circumstances can be justified as a breach of the duty to exercise reasonable care in providing a safe place to work, and, therefore, is not in conflict with congressional intent.

Congress contemplated a duty to provide a safe place to work in order to encourage safe working conditions. Although shipowners are to be liable only for their own negligence, the committee report explains that “nothing in this bill is intended to derogate from the [shipowner’s] responsibility to take


128. See note 73 supra and accompanying text.

129. See Lopez v. A/S D/S Svendborg, 581 F.2d 319 (2d Cir. 1978); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978). Such liability is recognized in the Restatement (Second) of Torts §§ 412 (1965) which provides: “One who is under a duty to exercise reasonable care to maintain land or chattels in such a condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in reasonably safe condition after the contractor’s work is completed.”

130. See Senate Report, supra note 9, at 2. The stevedore has an incentive to promote safe working conditions because the premium he must pay his compensation carrier will reflect the accident rate among his employees. See Report of the National Commission on State Workmen’s Compensation Laws 93-98 (1972). See also Senate Report, supra note 9, at 2. Congress believed that shipowners should have a similar incentive. A proposal to eliminate the third party-suit altogether by making shipowners secondarily liable for compensation benefits was rejected on the ground that it would lead to unsafe working conditions. Id. at 10; see note 8 supra.
appropriate corrective action where it knows or should have known about a dangerous condition.\(^{131}\) This suggests that Congress intended that the shipowner's duties include an inspection of the ship and that liability under section 905(b) is not restricted to conditions created by the shipowner.

C. Shipowner's Responsibility for Conditions Arising Out of and In the Course of the Longshoreman's Work

A more limited duty should be imposed upon the shipowner for conditions which arise out of and in the course of the work.\(^{132}\) The rationale for this rule is that because the stevedore has control over the work, it is regarded as his enterprise, and, therefore, he is the proper party to prevent, bear, and distribute the risks involved.\(^{133}\) Relieving the shipowner of vicarious liability for the negligent acts of the stevedore would conform with congressional intent in that it appears that under the 1972 amendments a shipowner may delegate his responsibility to provide a safe place to work.\(^{134}\)

Application of the rule, however, should be restricted to that part of the work and those areas of the ship over which the stevedore has exclusive control.\(^{135}\) The shipowner should remain under a continuing duty to discover and take corrective action for conditions which arise while the longshoremen are on board but which are unrelated to their work.\(^{136}\) In addition, the

---

131. Senate Report, supra note 9, at 10.

132. See note 113 supra and accompanying text See also Restatement (Second) of Torts §§ 409-429 (1965); W. Prosser, supra note 12, § 71, at 468-69. In West v. United States, 361 U.S. 118 (1959), a shiprepair case, the Supreme Court stated that, although shipowners have a duty to provide a reasonably safe place to work, "[i]t appears manifestly unfair to apply the requirement . . . to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe." Id. at 123; accord, Baum v. United States, 427 F.2d 215 (5th Cir.), cert. denied, 400 U.S. 916 (1970); Patterson v. Humble Oil & Refining Co., 423 F.2d 883 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971); Vessella v. United States, 405 F.2d 599 (4th Cir. 1969); McDonald v. United States, 321 F.2d 437 (3d Cir. 1963), cert. denied, 375 U.S. 969 (1964). The Second Circuit has recently suggested that to exonerate a shipowner after he relinquishes control of the ship to the stevedore is contrary to § 905(b) on the theory that relinquishment of control comes about pursuant to an agreement between the parties and that § 905(b) prohibits agreements to shift liability. Lopez v. A/S D/S Svendborg, 581 F.2d 319, 327 (2d Cir. 1978). It should be noted, however, that the dangerous condition at issue in Lopez existed before the longshoremen began working, although it was not discovered until the work was in progress. Id. at 321.

133. See Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), cert. denied, 435 U.S. 924 (1978); Restatement (Second) of Torts § 409, Comment b (1965).


shipowner should not be insulated from liability because a preexisting dangerous condition was not discovered until work began.\textsuperscript{137} Although control has been relinquished to the stevedore and the shipowner is no longer under a duty to provide a reasonably safe place to work, he should not be relieved of all liability for injuries to longshoremen.

The shipowner also should remain liable for his personal negligence in connection with the contracted work.\textsuperscript{138} The various duties that are placed upon employers of independent contractors under land-based principles are outlined in sections 410 to 415 of the Restatement. Under these sections, liability is not based upon the contractor's negligence, and, therefore, they are appropriate in LHWCA cases even when the stevedore is also at fault.\textsuperscript{139} If the shipowner's negligence has contributed to the injury, negligence on the part of the stevedore should not shield him from liability. Post-1972 cases have recognized that there may be concurrent responsibility for shipboard injuries\textsuperscript{140} and have unanimously rejected the argument that the shipowner is liable under section 905(b) only when his negligence is the sole cause of the injury.\textsuperscript{141} Therefore, the courts should focus upon the conduct of the shipowner and not solely upon the conduct of the stevedore.\textsuperscript{142}

Section 414 of the Restatement, which has been applied in LHWCA cases, imposes liability on a shipowner who negligently exercises a right to control the work.\textsuperscript{143} Although it is clear that under section 414 a shipowner may inspect the progress of the work without incurring liability, if he requests or disapproves of a specific method of stowage or in any way interferes with the details of the loading or unloading, he should be liable to the extent that his conduct creates an unreasonable risk of harm.\textsuperscript{144} The cases decided under

\begin{itemize}
  \item \textsuperscript{138} E.g., Lubrano v. Royal Netherlands S.S. Co., 572 F.2d 364 (2d Cir. 1978) (ship's officer told longshoreman to continue working without dunnage); Butler v. O/Y Finnlines, Ltd., 537 F.2d 1205 (4th Cir.) (crewman told longshoreman to stow counterweight in a dangerous position), cert. denied, 429 U.S. 897 (1976); Shepler v. Weyerhaeuser Co., 279 Or. 477, 569 P.2d 1040 (1977) (shipowner disapproved safer method of stowage), cert. denied, 434 U.S. 1051 (1978); see Lopez v. A/S D/S Svendborg, 581 F.2d 319, 323 (2d Cir. 1978).
  \item \textsuperscript{139} See Restatement (Second) of Torts §§ 409-415, Introductory Note, Topic 1 (1965). The legislative history excludes only liability for negligence of the stevedore or his employees. Senate Report, supra note 9, at 11.
  \item \textsuperscript{142} See, e.g., Espinoza v. United States Lines, Inc., 444 F. Supp. 405, 412 (S.D.N.Y. 1978); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 488 n.8 (N.D. Cal. 1977). This is the general rule in nonmaritime third-party suits as well. The employer's concurrent negligence is not a defense. See 2A Larson, supra note 12, § 75.22.
  \item \textsuperscript{143} See notes 101-102 supra and accompanying text.
  \item \textsuperscript{144} Id. Under land-based law, in addition to inspecting the work, landowners may have a
section 343A, holding shipowners liable when they order longshoremen to continue working in the face of a dangerous condition, could also be explained by reference to this section.

The remaining Restatement duties should also be applied to shipowners. Under section 410 of the Restatement the shipowner would be liable for injuries resulting from conduct by the stevedore pursuant to the shipowner's directions that the shipowner should know will create an unreasonable risk of harm. In addition, the shipowner would be liable under section 411 for harm resulting from the negligent employment of an incompetent stevedore. Section 413 imposes an additional duty upon land-based parties who employ an independent contractor to do work which should be recognized as likely to create a peculiar risk of harm in the absence of special precautions. The employer is liable for any harm caused by his failure to provide for the special precautions by contract or otherwise. The issue in LHWCA cases is whether longshoring can be considered peculiarly dangerous in the absence of special precautions. Although it is among the most dangerous occupations, courts thus far have refused to hold that longshoring involves any peculiar risk. One may argue, however, that although some of the

safety inspector and a coordinator present, e.g., Wolfe v. Bethlehem Steel Corp., 460 F.2d 675 (7th Cir. 1972), may make suggestions to the independent contractor, e.g., Foster v. National Starch & Chem. Co., 500 F.2d 81 (7th Cir. 1974), and may order compliance with a term of the contract as long as the method is not specified. E.g., DeVille v. Shell Oil Co., 366 F.2d 123 (9th Cir. 1966); see Restatement (Second) of Torts § 414, Comment c (1965). But if there is a retention of a right of supervision such "that the contractor is not entirely free to do the work in his own way"—for example, the right to direct the order in which the work is to be done or prohibit dangerous methods—negligent exercise of the power may give rise to liability. Id. § 414, Comments a, c; see, e.g., Summers v. Crown Constr. Co. 453 F.2d 998, 1000 (4th Cir. 1972). Interference or negligent instructions gave rise to liability in pre-1972 maritime cases as well. See, e.g., United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613, 619 (1959) (shipowner directed use of carbon tetrachloride to clean generators); Croy v. Matson Navigation Co., 439 F.2d 788 (5th Cir. 1971) (shipowner directed use of an explosive preservative). See note 50 infra and accompanying text.

145. See note 50 supra and accompanying text.

146. Restatement (Second) of Torts § 410 (1965). The rationale for § 410 is that the employer is liable for harm caused by an act or omission which he directs as though the act or omission were his own. Id. § 410, Comment a. Further, if the employer retains the power to alter his directions, he may be liable for permitting the work to continue under this section. Id. § 410, Comment g.

147. Id. § 411. Under this section, a shipowner would be guilty of negligent selection of a stevedore if he knows or should know that a particular stevedore lacks knowledge, skill, experience, or proper equipment such that his employment will create an unreasonable risk of harm to longshoremen. See id. § 411, Comment a. Some states have extended the rule to situations in which the employer negligently fails to engage a solvent or adequately insured contractor. E.g., Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir. 1977) (applying New Jersey law), cert. denied, 436 U.S. 906 (1978).

148. Restatement (Second) of Torts § 413 (1965). Section 413 is not directed at situations involving risks which are normal, routine, or customary, but rather "to a special, recognizable danger arising out of the work itself." Id. § 413, Comment b. Examples given in the comments include excavations and demolition of buildings. Id. § 413, Comment c.

149. See note 8 supra.

more routine tasks performed by longshoremen do not merit special precautions, workers who handle cargo which is either inherently dangerous or difficult to load and unload safely because of its size or weight should be entitled to the protection of this section. In addition, section 413 should be applied when the design of the ship or the lack of proper equipment on board makes the work particularly hazardous.

A final area of disagreement in LHWCA cases is the shipowner's obligation to warn of dangerous conditions within his actual knowledge during longshoring operations. Although the shipowner should have no duty to inspect and should not be held liable for conditions unknown to him once the work has begun, he should not be permitted to remain silent when he observes a dangerous condition. The shipowner often has actual knowledge of conditions that arise during longshoring operations even though control of the work may rest on the stevedore; a crew member is generally present to prevent pilferage and to see that the cargo and ship are not damaged. Several recent district court decisions have recognized that shipowners should at least have a duty to warn the longshoreman when they observe a condition and know or should know that it poses an unreasonable risk of harm. There is some authority under land-based law for such a duty, and it is implicit in several cases that

aff'd per curiam, 540 F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); Robertson II, supra note 1, at 466-67. But see Lopez v. A/S D/S Svedborg, 581 F.2d 319, 324 (2d Cir. 1978); Johnson v. Canadian Transp. Co., 54 Cal. App. 3d 3d 327, 338, 127 Cal. Rptr. 72, 79 (1976). Section 413 has also been rejected on the ground that it is premised on the general availability of indemnity from the contractor under land-based law which is not available under § 905(b). See Kelleher v. Empresa Hondurena de Vapores, S.A., 57 Cal. App. 3d 52, 62, 129 Cal. Rptr. 32, 38 (1976); Restatement (Second) of Torts § 413, Comment e (1965); id. § 416, Comment c. See also Teofilovich v. d'Amico Mediterranean/Pacific Line, 415 F. Supp. 732, 736 (C.D. Cal. 1976). A third objection is based on the Tenth Circuit's view that § 413 is not available to land-based employees of the contractor. See Parsons v. Amerada Hess Corp., 422 F.2d 610, 614 (10th Cir. 1970); Eutsler v. United States, 57 Cal. App. 3d 52, 62, 129 Cal. Rptr. 32, 38 (1976); Restatement (Second) of Torts § 413, Comment e (1965); id. § 416, Comment c. See also Lindler v. District of Columbia, 502 F.2d 495, 499-500 (D.C. Cir. 1974) (§ 413 applicable to employees of independent contractors covered by the LHWCA).

151. See notes 77-84, 109 supra and accompanying text.


153. Id. at 413; Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 455-57 (W.D. Wash. 1977); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 496-97 (N.D. Cal. 1977); The Injured Longshoreman, supra note 37, at 788-90. See also Robertson II, supra note 1, at 471-73. These courts and commentators propose that shipowners be under a duty to provide a safe place to work or a duty to exercise reasonable care at all times, but that liability for dangers arising after longshoring operations have begun can be imposed only when the shipowner has actual knowledge of the condition. They have rejected an analysis based upon retention or relinquishment of control as inconsistent with a duty of reasonable care under the circumstances and have pointed out that some courts have abused the doctrine. See Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 495-96 (N.D. Cal. 1977); The Injured Longshoreman, supra note 37, at 792-95. It is unclear how a more limited duty after the work has begun is significantly different from one commencing with relinquishment of control. It is submitted, however, that a distinction based upon relinquishment of control is preferable. If the shipowner retains control of the vessel and the work, he should not be absolved of the duty to provide a safe place to work, notwithstanding the fact that work has begun.

154. See, e.g., Warren v. Hudson Pulp & Paper Corp., 477 F.2d 229, 234 (2d Cir. 1973); Emelwon, Inc., v. United States, 391 F.2d 9, 12 (5th Cir.), cert. denied, 393 U.S. 841 (1968);
have applied section 343A without regard to when the danger arose.\textsuperscript{155} In addition, the burden on shipowners would be minimal when compared with the risk of harm to the longshoremen. More importantly, such a duty would further the congressional goal of promoting safe working conditions.

D. Conclusion

At the present time the outcome of longshore cases even within individual circuits is unpredictable. More importantly, the results reached are often unfair to both longshoremen and shipowners. It is submitted that the aforementioned recommendations are consistent with congressional intent and will provide a flexible, equitable method by which to judge the conduct of shipowners.

Congress has eliminated the unseaworthiness remedy but has specifically provided for liability when the shipowner's negligence is responsible for the injury.\textsuperscript{156} Although the legislative history states that longshoremen are to be in no better position than land-based workers, neither are they to be in a worse position. Regardless of their own views on the propriety of third-party suits,\textsuperscript{157} courts should formulate a duty in keeping not only with generally "accepted principles of tort law"\textsuperscript{158} but also with the congressional goals of safety and uniformity.

It should be remembered that regardless of how the courts interpret the duty under section 905(b), a shipowner is liable only when a hazard poses an unreasonable risk of harm and then only if a reasonable shipowner would

\textsuperscript{155} Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967, 968 (Fla. 1977). \textit{See also} Sposito v. Zeitz, 23 Wis. 2d 159, 163, 127 N.W.2d 43, 46 (1964).

\textsuperscript{156} \textit{See} note 77 \textit{supra} and accompanying text.

\textsuperscript{157} In this connection, the Second Circuit has noted that statutory benefits do not fully compensate injured workers and that "while Congress was willing to shift the burden of injury without fault to an improved compensation system ... it was not willing ... to shift the burden of injury through the fault of the ship." Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 686-87 n.3 (2d Cir. 1978), \textit{cert. denied}, 47 U.S.L.W. 3301 (U.S. Oct. 31, 1978) (No. 78-358).

\textsuperscript{158} It is unclear why courts interpreting § 905(b) place such a limited duty on shipowners, especially when decisions in land-based cases are doing away with many of the common law rules that formerly prevented recovery. One factor may be the unavailability of contribution or indemnity from a stevedore who is also at fault in causing the injury. Courts are reluctant to recognize divided responsibility for the injury when it appears that responsibility for payment of the judgment will not be divided. \textit{See} Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 687-88 (2d Cir. 1978) (Friendly, J., dissenting), \textit{cert. denied}, 47 U.S.L.W. 3301 (U.S. Oct. 31, 1978) (No. 78-358); Hess v. Upper Miss. Towing Corp., 559 F.2d 1030, 1034 (5th Cir. 1977), \textit{cert. denied}, 435 U.S. 924 (1978); Castel v. Moller, A.P. 441 F. Supp. 851, 853 n.2 (N.D. Cal. 1977); Teoflovi\v{c} v. d'Amico Mediterranean/Pacific Line, 415 F. Supp. 732, 736 (C.D. Cal. 1976); Kelleher v. Empresa Hondurena de Vapores, S.A., 57 Cal. App. 3d 52, 62, 129 Cal. Rptr. 32, 38 (1976). Another possible explanation for the restrictive reading of § 905(b) is that longshoremen are victims of a "judicial backlash." For years lower courts, inundated with a flood of longshore injury cases, resisted application of the Supreme Court's liberal remedies. \textit{See} D/S Ove Skou v. Herbert, 365 F.2d 341, 344 (5th Cir. 1960), \textit{cert. denied}, 400 U.S. 902 (1970); G. Gilmore & C. Black, \textit{supra} note 6, § 6-1(a), at 274. \textit{See also} H. Friendly, \textit{Federal Jurisdiction: A General View} 131-32 (1973). Now, perhaps, they are overreacting with a flood of pro-shipowner decisions, replacing the excesses of the circular liability suit with an equally unfair interpretation of the LHWCA. \textit{See The Injured Longshoreman, supra note 37, at 799. \textit{See generally} Viewpoints, \textit{supra} note 28, at 251-52.

\textsuperscript{158} Senate Report, \textit{supra} note 9, at 11.
appreciate the risk involved. Moreover, the shipowner is required to use only reasonable care in discharging his duties and the plaintiff must prove that any negligence by the shipowner was the proximate cause of his injuries. It is submitted that courts should look to these limitations on liability rather than restricting liability by narrowing the shipowner's duty.

III. APPORTIONMENT OF LIABILITY

A. The Nature of the Controversy

By replacing the longshoreman's unseaworthiness action against the shipowner with one based on negligence, Congress eliminated only one half of the circular liability suit. The second step was to eliminate the warranty of workmanlike performance which had required stevedores to indemnify shipowners for amounts recovered by longshoremen in unseaworthiness actions. Thus, section 905(b) provides that stevedores are not liable "directly or indirectly" for damages recovered by longshoremen and in addition prohibits any agreements or warranties to the contrary. Congress reasoned that because the shipowner's liability is now based upon his own negligence and not on any fault of the stevedore, it is no longer necessary to permit shipowners to recover from the stevedore damages paid to the longshoremen. Elimination of absolute liability, however, has not resolved the problem of apportionment of liability between shipowners and stevedores but has merely limited it to cases in which the shipowner's negligence contributed to the injury.

It seems clear from the language of section 905(b) and from the legislative history that Congress intended to prohibit not only indemnity actions, but also any contribution from the stevedore, whether measured by the stevedore's fault in causing the injury or by the amount of compensation benefits he has paid. This, however, leaves shipowners in a rather unfortunate position

159. See W. Prosser, supra note 12, § 31, at 145-49.
160. Id.; see note 120 supra and accompanying text.
162. See note 11 supra and accompanying text.
164. Senate Report, supra note 9, at 11. Insulation of the stevedore from liability to the shipowner was also tied to the increase in compensation benefits. The Senate Report states that stevedores were willing to pay higher benefits only if they were protected from any other liability. Id. at 5.
165. See, e.g., Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 888 (5th Cir. 1978); Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669, 671 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976). The Senate Report states: "It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort." Senate Report, supra note 9, at 11.

It is uncertain whether third parties other than shipowners can assert claims for contribution or indemnification against a negligent stevedore. Several courts have held that § 905(b) is directed only at the shipowner-stevedore relationship and that the LHWCA's exclusive liability provision, 33 U.S.C. § 905(a) (1976), does not prohibit recovery in other situations. E.g., Gould v. General Mills, Inc., 411 F. Supp. 1181 (W.D.N.Y. 1976) (allowed indemnity action); Brkaric v. Star Iron & Steel Co., 409 F. Supp. 516 (E.D.N.Y. 1976) (allowed claims for contribution);
when injuries are caused by concurrent fault. Without some mechanism to shift part of the loss, the negligent shipowner is liable to the injured longshoreman for the full amount of his damages regardless of the extent to which the stevedore contributed to the injury.\footnote{166} In addition, the stevedore is not only free from responsibility to pay any part of the damages but he, or his compensation benefits and his damages were $10,000, the shipowner would be liable to the longshoreman's suit against the shipowner is successful.\footnote{168} Because section 905(b) prohibits any shifting of liability for the damages to the stevedore by indemnity or contribution, shipowners are claiming entitlement to a credit or offset—reduction of the longshoreman's recovery by imputing the stevedore's negligence to him combined with either reduction or elimination of the stevedore's lien.\footnote{169}

Shipowners have proposed several types of credits including a pro tanto credit, a pro rata credit, and an equitable credit. A pro tanto credit reduces the longshoreman's recovery against the shipowner by the amount of compensation benefits paid by the negligent stevedore and denies the stevedore any right of reimbursement.\footnote{170} Thus, the plaintiff is made whole, the stevedore's

---

\footnote{166} See, e.g., Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975) (shipowner was 30% negligent, stevedore was 70% negligent, damages were $15,485), cert. denied, 425 U.S. 936 (1976); 57 Or. L. Rev. 487, 488-89 (1978) (citing Brief for Appellant at A-6 to -7, Shepler v. Weyerhaeuser Co., 279 Or. 477, 569 P.2d 1040 (1977), cert. denied, 434 U.S. 1051 (1978) (shipowner was 28% negligent, stevedore was 72% negligent, damages were $500,000)).

\footnote{167} When a stevedore's insurance company has assumed payment of compensation, it is subrogated to all the rights of the stevedore. 33 U.S.C. § 933(h) (1976).

\footnote{168} See notes 224-232 infra and accompanying text.


\footnote{170} See, e.g., Shorter, supra note 169, at 678. For example, if the plaintiff received $4,000 in compensation benefits and his damages were $10,000, the shipowner would be liable to the plaintiff for only $6,000 and the plaintiff would be entitled to retain the $4,000 in benefits.
liability does not exceed the benefits provided in the statute, and the shipowner is given some relief from the burden of paying full damages. The pro tanto credit, however, has been criticized as arbitrary because it fails to take into account the relative fault of the stevedore and the shipowner,\(^\text{171}\) and has uniformly been rejected in LHWCA cases.\(^\text{172}\)

A second possibility for apportionment of damages is the pro rata credit. In Murray v. United States,\(^\text{173}\) the District of Columbia Circuit held that under the Federal Employees Compensation Act,\(^\text{174}\) a third party sued by a government employee is entitled to a fifty percent reduction in the damages award if the government is at fault in causing the injury.\(^\text{175}\) The Murray rule

The pro tanto credit has some support under state law. E.g., Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953); Poindexter v. Johnson Motor Lines, Inc., 235 N.C. 286, 69 S.E.2d 495 (1952). Other states permit pro tanto contribution. The third party tortfeasor is obliged to pay the judgment in full and the employer retains his lien on the recovery but the third party may obtain contribution from a negligent employer up to the amount of the compensation benefits paid.

See, e.g., Lamberton v. Cincinnati Corp., ——— Minn. ———, 257 N.W.2d 679 (1977); John W. Brown, Jr. Equip. Rental Corp. v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959); Maio v. Fahn, 339 Pa. 180, 14 A.2d 105 (1940); see Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 726 n.8 (2d Cir. 1978) (expressing approval of pro tanto contribution but holding that it is prohibited under the LHWCA).

171. See Cohen & Dougherty, supra note 169, at 605. Under any given set of facts, whether a party is 10% or 90% negligent, its liability remains the same because the amount of workmen's compensation benefits is determined by the nature and severity of the injury without regard to fault. From case to case, the relative liability of the parties would depend on the differential between statutory benefits and common law damages for the injury in question. One court has noted that the Supreme Court's decision in United States v. Reliable Transfer Co., 421 U.S. 397 (1975), requiring apportionment of damages based upon comparative fault in collision cases, would require that the same principle be applied in personal injury cases. See Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 44 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976). Thus, any credit not based upon comparative fault is of questionable validity.


173. 405 F.2d 1361 (D.C. Cir. 1968).

174. 5 U.S.C. §§ 8101-8151 (1976). The Federal Employee's Compensation Act (FECA) is the workmen's compensation statute for federal civilian employees and has an exclusive liability provision, id. § 8116(c), similar to § 905(a) of the LHWCA.

175. 405 F.2d at 1365-66. If two third parties were sued, each presumably would be entitled to a one third credit. See Cohen & Dougherty, supra note 169, at 603. The Murray court found support for a credit by comparing third-party suits to situations where one of two joint tortfeasors settles a claim with the victim. 405 F.2d at 1365. Under the District of Columbia rule, the nonsettling tortfeasor is entitled to have a judgment against him reduced by one half on the theory that the victim has sold half the claim. Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962). The Murray court made an analogy between settlement of a claim and the compromise inherent in workmen's compensation statutes. In return for no-fault benefits, the worker has in effect "sold" his claim against the third party who would have been entitled to contribution but for the employer's immunity from any other liability to the employee. 405 F.2d at 1365-66.

The Murray rationale has been criticized because, in cases of settlement, the plaintiff has voluntarily reduced his judgment against the remaining tortfeasor and there is no question of a right to reimbursement. See Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co.,
has been extended to LHWCA cases involving nonmaritime employees in the District of Columbia.\footnote{176} This extension, however, has not been tested under the 1972 amendments and its precedential value for application of a credit to longshore cases is doubtful.\footnote{177}

Litigation under the 1972 amendments has centered primarily on the equitable credit, first proposed in a 1974 law review article.\footnote{178} Under the equitable credit, the shipowner's liability is restricted to the percentage of the damages caused by his proportionate fault.\footnote{179} The stevedore's lien, rather than being automatically eliminated, is reduced to the extent that his negligence reduced the recovery of the longshoreman from the shipowner.\footnote{180} For example, assume that a longshoreman suffers $10,000 in damages resulting from a shipboard injury and his LHWCA benefits amount to $4,000. In addition, assume that the shipowner is twenty percent negligent in causing the injury and the stevedore is eighty percent at fault. If an equitable credit were applied, the plaintiff would receive $2,000 from the shipowner instead of $10,000, because the shipowner was only twenty percent negligent, and also would be entitled to keep the $4,000 in compensation benefits. The stevedore, whose negligence reduced the plaintiff's recovery by $8,000, would recover no part of his lien, but would not be liable to the plaintiff for any additional


The question of the employer's right to reimbursement under a pro rata credit was not addressed in Murray and remains undecided. Commentators have differing views on what the court intended. See 2A A. Larson, supra note 12, § 76.22, at 14-318 (employer would still be permitted to enforce a lien on the recovery); Cohen & Dougherty, supra note 169, at 597 (negligent employer forfeits his lien); Steinberg, supra note 169, at 783 n.97 (employer's lien would be reduced in relation to its fault); Vickery, supra note 1, at 67 n.20 (lien would be reduced by 50%). Although the logic of the Murray credit requires that the lien be reduced in some way, see Turner v. Excavation Constr., Inc., 324 F. Supp. 704, 705 (D.D.C. 1971), reduction would be contrary to the FECA provision providing for reimbursement, 5 U.S.C. § 8132 (1976), which exists despite negligence on the part of the government. Randall v. United States, 282 F.2d 287 (D.C. Cir. 1960), cert. denied, 365 U.S. 813 (1961).


\footnote{179} Cohen & Dougherty, supra note 169, at 606; Coleman & Daly, supra note 169, at 357-58.

\footnote{180} Cohen & Dougherty, supra note 169, at 606; Coleman & Daly, supra note 169, at 358-59.
Thus, the equitable credit not only apportions liability between the stevedore and the shipowner, but also affects the plaintiff's recovery. Whenever the portion of the damages attributable to the stevedore's negligence exceeds the amount of compensation he has paid, the equitable credit reduces the amount the plaintiff normally would receive from the shipowner.

### B. Reduction of the Longshoreman's Recovery from the Shipowner

#### 1. Statutory Language

The Fourth Circuit is the only court which has held that section 905(b) actually provides for reduction of the longshoreman's recovery. In *Edmonds v. Compagnie Generale Transatlantique*, the court construed the language of the section as restricting the shipowner's liability to its proportionate share of the damages. The court based its interpretation of section 905(b) upon a conflict it perceived between the first sentence, providing for a negligence action, and the second sentence, stating that if the plaintiff is employed by the shipowner he may not recover when his injury is caused by persons providing stevedoring services. The court stated that "[t]he sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it." The only method of harmonizing section 905(b), according to the *Edmonds* court, was to read it as insulating the shipowner from damages caused by the stevedore's negligence. The court reasoned that it was "hardly rational" to suppose that Congress intended shipowners to be required to pay the full amount of the damages when they are only slightly at fault.

---

181. Cohen & Dougherty, *supra* note 169, at 606-07; Coleman & Daly, *supra* note 169, at 358-62. If instead, the shipowner had been 80% negligent and the stevedore 20% negligent, the stevedore would be entitled to $2,000 from the recovery—$4,000 (the total amount of the lien) less $2,000 (the amount by which the stevedore caused the plaintiff's recovery to be reduced). The stevedore, therefore, is entitled to partial reimbursement whenever his proportionate fault in causing the injury is such that it reduces the recovery against the shipowner by less than he was obliged to pay in compensation benefits.

A variation of the equitable credit has been proposed whereby the stevedore's right of reimbursement is never totally eliminated but rather is reduced in proportion to his fault in causing the injury. Under the above facts, the lien of the negligent stevedore would be reduced by $3,200 (80% of $4,000). See Santino v. Liberian Distance Transps., Inc., 405 F. Supp. 34 (W.D. Wash. 1975) (outlining this variation of the equitable credit); Coleman & Daly, *supra* note 169, at 360 n.33.


184. Id.

185. Id. at 1155.


187. 577 F.2d at 1155. See also Coleman, *supra* note 169, at 684; Coleman & Daly, *supra* note 169, at 369.

188. 577 F.2d at 1155. The Fourth Circuit did not expressly decide the question of the
A careful reading of the legislative history, however, undermines the rationale of *Edmonds*. Although the section itself is ambiguous, it is clear from the committee report that the second and third sentences are directed at situations in which harbor workers are hired directly by the shipowner and there is considerable authority interpreting the statute in this manner. The statute itself, therefore, does not address the question of the longshoreman's right to a full damage recovery from the shipowner.

2. Legislative Intent

Supporters of the credit have argued that the legislative history supports a limitation on the shipowner's liability for damages. They have interpreted passages in the legislative history stating that under the 1972 amendments shipowners "will not be chargeable with the negligence of the stevedore" as evidencing congressional intention to restrict recoveries against shipowners to their proportionate share of the damages incurred by longshoremen. In this connection, proponents of a credit have argued that reduction of the shipowner's liability was an ingredient in the compromise arrived at in enacting the 1972 amendments. They contend that limiting shipowner's liability was a quid pro quo for eliminating the shipowner's right to indemnification from the stevedore.

Courts favoring a credit have also relied upon the ambiguities in section 905(b) and the legislative history as a justification for supplementing the LHWCA with a credit doctrine. One court viewed the 1972 amendments as containing a "catch-22" in that neither shipowners nor stevedores were to be liable for the stevedore's negligence but injured longshoremen were entitled to damages for it. The court, however, observed that Congress provided for comparative negligence, leaving "the mechanics of its application to the courts."
In addition, pro-credit courts, based upon equitable considerations, have determined that shipowners must be given some relief from the burden of paying damages attributable to the stevedore's fault even if it results in reduced recoveries for longshoremen.\(^{196}\) They have attempted to justify reduction of the recovery on the theory that longshoremen should not be entitled to receive damages for the portion of their injuries attributable to the stevedore's negligence because, having accepted no-fault compensation benefits, they have waived any tort claim based on their employer's negligence.\(^{197}\)

Finally, courts favoring application of a credit have relied heavily upon the Supreme Court's 1975 decision in *United States v. Reliable Transfer Co.*,\(^{198}\) which replaced the admiralty rule of divided damages in collision cases with one based upon comparative negligence, and on its 1974 decision in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*,\(^{199}\) which allowed contribution in personal injury cases. One district court compared the inequities under the 1972 amendments to the "arbitrary and inequitable damage rules" done away with by *Reliable*.\(^{200}\) The Third Circuit, although not expressly deciding the availability of a credit, noted the Supreme Court's "activist attitude in maritime matters" as one factor persuading it that a credit was a possible solution to cases involving concurrent negligence.\(^{201}\) Although *Cooper* and *Reliable* cannot be considered direct authority for application of a credit, advocates of a credit have reasoned that because the Supreme Court saw fit to employ the concept of comparative fault in apportioning damages, this method of fixing liability should be adapted to cases under the LHWCA as well.\(^{202}\)

---


198. 421 U.S. 397 (1975). Before 1975, damages were divided equally in collision cases in which both parties were at fault without regard to their relative degree of fault. The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 169, 177 (1854).


3. Analysis

Application of a credit in section 905(b) suits is not supported by the legislative history and would be contrary to congressional intent. Statements in the legislative history that shipowners are not to be charged with the negligence of the stevedore arguably lend support to restriction of the shipowner's liability when considered apart from the rest of the report. A careful reading of the entire report, however, makes it clear that Congress was relieving shipowners of vicarious liability which had formerly been imposed under the warranty of unseaworthiness. These statements appear as part of a discussion comparing the shipowner's liability for unseaworthiness to that under the new cause of action for negligence and are not made in connection with apportionment of liability.\textsuperscript{203} Cases defining the extent of the shipowner's duty under the amendments have interpreted these statements in this manner, refusing to hold shipowners liable unless they are at fault.\textsuperscript{204} In rejecting a credit based on this argument, the Ninth Circuit concluded that "it is clear that the Act's intent is to absolve the shipowner from liability for negligence on the part of the stevedore. But it is equally clear that the injured plaintiff is entitled to recover the full amount of his damages."\textsuperscript{205} As to the compromise reached in amending the LHWCA, the legislative history suggests that a reduction of the plaintiff's recovery was not contemplated. Rather, in return for the stevedore's complete insulation from liability, shipowners were relieved of their duty to provide a seaworthy ship and were to be held liable under a negligence standard.\textsuperscript{206}

In addition, there is no indication that Congress intended to abrogate the common law rule that either of two concurrently negligent parties can be compelled to pay the total of the plaintiff's damages.\textsuperscript{207} Contribution and


203. See Senate Report, supra note 9, at 10-11; Steinberg, supra note 169, at 794.


206. See Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 721 (2d Cir. 1978); Landon v. Lief Hoegh & Co., 521 F.2d 756, 762 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976). The Landon court pointed out that the Supreme Court had justified the pre-1972 indemnity action on the grounds that the LHWCA gave no quid pro quo to a shipowner liable for the full amount of the longshoreman's damages, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 129 (1956), but that under the 1972 amendments shipowners received a quid pro quo in the abolition of the warranty of seaworthiness. 521 F.2d at 762.

207. E.g., Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 889 (5th Cir.)
indemnification address only the adjustment of rights as between wrongdoers. The plaintiff is not obliged to suffer a reduction in his damages because one of the parties at fault is unavailable for contribution or to achieve equity between wrongdoers.\(^{208}\) Moreover, longshoremen do not waive any rights they may have against the shipowner by accepting statutory benefits from the stevedore. Longshoremen receive no-fault benefits in return for giving up their right to sue the stevedore.\(^{209}\) Shipowners are strangers to the compensation system and have given nothing which would justify reduction of their liability at the longshoremen’s expense.\(^{210}\)

Although the present situation is inequitable to shipowners who would be entitled to relief but for the stevedore’s immunity from suit under the LHWCA,\(^{211}\) some courts are opposed to application of a credit because it would “impose unjustified burdens upon the injured longshoreman.”\(^{212}\) One judge has pointed out that a judicial credit doctrine would vary from district to district and would “simply shift the inequity from the shipowner to injured longshoreman.”\(^{213}\) Shipowners are in a better position to distribute the costs of injuries caused in part by their negligence and liability for full damages may encourage them to take more safety precautions.

Finally, the credit proposals may also be contrary to the Supreme Court’s decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*\(^{214}\) In *Halcyon*, the Court refused to require contribution from a stevedore covered by the LHWCA on the grounds that only Congress could accommodate the diverse interests involved in the apportionment question and choose the

---


209. See *note 12 supra* and accompanying text.


proper rule.°\textsuperscript{215} Courts refusing to apply a credit reason that *Halcyon* requires that they refrain from making any adjustment in the LHWCA and await congressional action.°\textsuperscript{216} Moreover, the Supreme Court has indicated its continuing approval of the *Halcyon* holding in two later cases, using it as authority to dismiss a claim for contribution against an employer covered by the LHWCA°\textsuperscript{217} and carefully distinguishing it in *Cooper*.°\textsuperscript{218} Although *Cooper* and *Reliable* express the Supreme Court's approval of apportionment of liability based upon comparative fault, apportionment is available only when "no countervailing considerations detract" from its application.°\textsuperscript{219}

It is unlikely that Congress intended a credit in view of its goal of eliminating circular liability in suits under the LHWCA. Apportionment of liability would require that stevedores be impleaded and their proportionate fault determined by the trier of fact,°\textsuperscript{220} which would again lead to a type of circular liability suit, resulting in delays and impeding settlements.°\textsuperscript{221} Several credit proposals were before Congress during the hearings on the amendments.°\textsuperscript{222} Had Congress chosen to implement one of these plans, language to that effect certainly would have been included in the statute and outlined in the legislative history.°\textsuperscript{223}

C. Reduction or Elimination of the Stevedore's Right to Reimbursement

1. The Nature of the Stevedore's Lien

Courts confronted with the question of a credit also must determine whether the stevedore's negligence should either reduce or eliminate his lien

\begin{itemize}
  \item \textsuperscript{215} *Id.* at 286-87.
  \item \textsuperscript{217} *Atlantic Coast Line R.R. v. Erie Lackawanna R.R.*, 406 U.S. 340 (1972) (per curiam).
  \item \textsuperscript{218} *Id.* at 111-13.
  \item \textsuperscript{219} *Id.* at 113.

1. The Nature of the Stevedore's Lien

Courts confronted with the question of a credit also must determine whether the stevedore's negligence should either reduce or eliminate his lien

\begin{itemize}
  \item \textsuperscript{222} *See* *Hearings, supra* note 9, at 136, 154 (proration of damages according to degree of fault and pro tanto contribution).
  \item \textsuperscript{223} *See* *Steinberg, supra* note 169, at 786-87.
upon the longshoreman's recovery. The stevedore's right to reimbursement
was not an issue in third-party suits until 1938. The LHWCA as originally
enacted provided that acceptance of compensation benefits by an injured
longshoreman resulted in the automatic assignment of his claim against
the third party to his employer. In 1938, section 933(b) was amended to
provide for such an assignment only when the compensation was paid under a
formal award. The LHWCA, however, continued to direct that benefits be
paid voluntarily and that formal awards be made only when the
stevedore contested his liability for compensation benefits. Thus,
longshoremen were receiving both statutory benefits and the proceeds from
third-party suits against shipowners, except in the few cases in which benefits
were paid under a formal award.

In 1943, this double recovery was eliminated. In The Etna, the Third
Circuit, relying on the doctrine of equitable subrogation, held that the
LHWCA did not entitle longshoremen to both compensation and damages for
the same injury. Accordingly, the court ruled that the stevedore must be
reimbursed out of any third-party recovery regardless of whether compensa-

224. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(b), 44 Stat. 1440
(1927) (current version at 33 U.S.C. § 933(b) (1976)). In addition, § 933 provided that in a suit
brought by an employer after an assignment, the employee should be given any amount
remaining after the employer had been reimbursed for expenses in bringing the suit and benefits
paid. Id. § 33(e) (current version at 33 U.S.C. § 933(e) (1976)). The employer has always had the
option of settling an assignment Id. § 33(d) (codified at 33 U.S.C. § 933(d)
(1976)).

225. Longshoremen's and Harbor Workers' Act, ch. 685, § 12(b), 52 Stat. 1168 (1938) (current
version at 33 U.S.C. § 933(b) (1976)). The section was amended to give longshoremen an
opportunity to sue the shipowner because employers pursued the longshoremen's claims only to
the extent necessary to recover the compensation benefits they had paid. See Louviere v. Shell
Oil Co., 509 F.2d 278, 284 (5th Cir. 1975). See also American Stevedores, Inc. v. Porello, 330
U.S. 446, 456 (1947).

Section 933 was amended again in 1959. In a further attempt to encourage stevedores to
prosecute adequately the assigned cause of action, Congress revised subsection (e) to permit the
employer, as an assignee of the longshoreman's claim, to retain one-fifth of the amount
recovered beyond expenses and benefits paid. Longshoremen's and Harbor Workers' Compensa-
Congress also amended subsection (b) to provide that acceptance of compensation under an
award would result in an assignment only if the longshoreman failed to bring an action within six
months. Id. § 33(e) (current version at 33 U.S.C. § 933(b) (1976)); see S. Rep. No. 428, 86th
provisions were virtually unchanged by the 1972 amendments.

226. 33 U.S.C. § 914(a) (1976). This section, unchanged by the amendments, provides that
"(c)ompensation . . . shall be paid periodically, promptly, and directly to the person entitled
thereto, without an award, except where liability to pay compensation is controverted by the
employer." Id.

227. 138 F.2d 37 (3d Cir. 1943).

228. Id. at 40; accord, Fontana v. Pennsylvania R.R., 106 F. Supp. 461 (S.D.N.Y. 1952),
(1953). The Senate Report accompanying the 1959 amendments to § 933 suggests that Congress
recognized and approved the use of judicially created liens. The Report states that "[a]lthough an
employee could receive compensation under the act and for the same injury recover damages in a
statute, by permitting the stevedore reimbursement only when he paid benefits under a formal award, encouraged him to controvert his liability for the benefits.\textsuperscript{229} Therefore, after \textit{The Etna} the stevedore was assured of reimbursement: if he paid the benefits voluntarily he was given a lien on the recovery; if he paid the benefits under a formal award he was given an assignment.

In 1953, the Supreme Court held that even when the stevedore's negligence contributed to the injury, he may still enforce a lien on the recovery. In \textit{Pope \& Talbot, Inc. v. Hawn},\textsuperscript{230} a shipowner argued that repayment of benefits would constitute an unconscionable reward if the stevedore were also negligent. Instead, he proposed that the lien be denied and the recovery against the shipowner be reduced by an equal amount.\textsuperscript{231} The Court rejected this proposal, reasoning that the LHWCA expressly provided for reimbursement, that it would frustrate the LHWCA's purpose of protecting stevedores who are subject to absolute liability for statutory benefits, and that it would be "the substantial equivalent of contribution."\textsuperscript{232}


Much of the litigation concerning the stevedore's lien occurs in disputes between the stevedore and the plaintiff's attorney concerning who has priority over the proceeds of the third-party recovery. Pre-1972 cases generally held that the stevedore's lien had full priority over the attorney's when the recovery was insufficient to satisfy both. \textit{See}, \textit{e.g.}, Davis \textit{v. United States Lines Co.}, 253 F.2d 262, 265 (3d Cir. 1958); Fontana \textit{v. Pennsylvania R.R.}, 106 F. Supp. 461, 464 (S.D.N.Y. 1952), \textit{aff'd sub nom}. Fontana \textit{v. Grace Line, Inc.}, 205 F.2d 151 (2d Cir.), \textit{cert. denied}, 346 U.S. 886 (1953). Under the 1972 amendments, the majority rule appears to require the stevedore to share in the cost of the attorney by receiving less than full reimbursement because the stevedore has received a benefit and his interests are now allied with those of the longshoreman, \textit{see}, \textit{e.g.}, Swift \textit{v. Bolten}, 517 F.2d 368 (4th Cir. 1975); Chouest \textit{v. A \& P Boat Rentals, Inc.}, 472 F.2d 1026 (5th Cir.), \textit{cert. denied}, 412 U.S. 949 (1973), or to permit the attorney's fee to be recovered first. \textit{See} Valentino \textit{v. Rickners Rhederei G.M.B.H.}, S.S. Etha, 552 F.2d 466 (2d Cir. 1977); Bloomer \textit{v. Tung}, 448 F. Supp. 652, 656 (S.D.N.Y. 1978). \textit{But see} Cella \textit{v. Parthenreederei Ms Ravenna}, 529 F.2d 15, 20 (1st Cir. 1975) (stevedore's lien has full priority because the primary goal of the 1972 amendments is to protect his resources for payment of increased benefits), \textit{cert. denied}, 425 U.S. 975 (1976). \textit{See generally}, Gorman, \textit{supra} note 1, at 24-26.

\textsuperscript{229} 138 F.2d at 40.
\textsuperscript{230} 346 U.S. 406 (1953).
\textsuperscript{231} \textit{Id.} at 411-12.
\textsuperscript{232} \textit{Id.} at 412. Although the Court based its refusal to reduce the stevedore's lien upon § 933, under the facts of the case compensation had been paid without an award and thus it did not come within the section. \textit{See} Hugev \textit{v. Dampskisaktieselskabet Int'l}, 170 F. Supp. 601, 606 (S.D.
2. Freedom of the Courts To Diminish the Stevedore's Lien

There is little evidence of legislative intent with respect to the stevedore's right of reimbursement under the 1972 amendments. It is not mentioned in the committee report and section 933 was left virtually unchanged. Supporters of the credit have argued that section 905(b) is not a bar to reduction of the lien because it refers to legal rather than equitable rights, and was intended to eliminate only indemnity actions.233 They contend that since the lien is equitable in origin and nature, it should be subject to equitable regulation by the courts.234 The argument advanced in favor of reduction of the lien is that the stevedore should not profit from his negligent conduct. Proponents of a credit point out that if the stevedore is allowed to enforce his lien on the recovery, he is in a better position when there is concurrent fault than he would be if no one were negligent since, in the latter situation, he would have no right of reimbursement.235 Reduction of the lien has also been defended on the theory that despite the lack of legislative guidance on this issue, it would be contrary to congressional intent "to protect the stevedore's equitable lien from his own negligent conduct."236 Finally, supporters of the credit point out that reduction or elimination of the lien is not inequitable because, under any of the credit proposals, the stevedore's liability does not exceed what it would have been had no third party been involved or had the plaintiff failed to recover.237

Under the better view, courts refusing to apply a credit have recognized that any proposal which requires reduction of the stevedore's lien would amount to a form of indirect liability which is prohibited by section 905(b).238 If the stevedore has an unconditional right to reimbursement, diminishing it in connection with a reduction of the shipowner's damages achieves the same result as contribution. The stevedore, because of his negligence, is deprived of funds to which he would otherwise be entitled and the shipowner's liability is

235. See Coleman & Daly, supra note 169, at 410; Shorter, supra note 169, at 679. An unconditional right to reimbursement has also been criticized as encouraging unsafe working conditions. See Coleman & Daly, supra note 169, at 408 n.274, 409; Shorter, supra note 169, at 681.
SHIPOWNER'S DUTIES

Under section 905(b), a shipowner and a stevedore would be barred from making an express agreement providing that in the event of an injury to a longshoreman the stevedore would partially reimburse the shipowner for any judgment against him.240 A court would be unjustified in imposing such a result by different means.

In addition, reduction of the lien will discourage stevedores from paying compensation benefits voluntarily, a result totally inconsistent with the purposes of the LHWCA. Section 933(b) specifically provides for an assignment when compensation has been paid under a formal award. Unless this section is either amended or eliminated, a credit doctrine could be applied only in cases where no formal award was made. Stevedores would then controvert their liability for benefits in order to bring any subsequent suit within section 933(b) and thereby assure themselves of reimbursement.241

A second argument in support of eliminating the stevedore's lien is that the lien has been replaced by a direct action against the shipowner in which the stevedore's negligence can be asserted as a defense. This theory is based upon the Supreme Court's 1969 decision in Federal Marine Terminals, Inc. v. Burnside Shipping Co.242 In Burnside, the Court allowed a suit against a shipowner in a case in which the benefits payable under the LHWCA, and thus the stevedore's lien, exceeded the potential third-party recovery.243 Supporters of a credit argue that Burnside has overruled Pope & Talbot in that a suit against the shipowner is now the only means available to the stevedore to recoup the compensation benefits he has paid.244

Burnside, however, did not eliminate the stevedore's lien, but merely held that the lien was not the stevedore's sole remedy.245 Courts overwhelmingly have held that Pope & Talbot is controlling in cases under the 1972 amendments, precluding a defense of negligence to the stevedore's right of reimbursement.246 Nothing in the amendments or the legislative history under-

239. See Steinberg, supra note 169, at 792-93.
243. In Burnside, the potential liability of the stevedore for compensation payments to a longshoreman's widow was $70,000, but the maximum recovery under the applicable wrongful death statute was $30,000. Id. at 410. The Supreme Court held that the employer's rights are not limited to the assignment provided for in § 933(b) of the LHWCA. Id. at 412-14. In addition, the stevedore was permitted to sue the shipowner for negligence rendering the stevedore liable for compensation payments. Id. at 414-17. This direct action against the shipowner was distinguished from contribution because it was not based upon any theory of joint responsibility for the longshoreman's injury but upon a breach of an independent duty of reasonable care owed to the stevedore. Id. at 417-18.
245. 394 U.S. at 412.
mines its continuing validity. In addition, the *Burnside* action has been limited to situations in which the longshoreman's recovery would be insufficient to reimburse the stevedore. 247

D. A Call for Judicial Restraint

Read broadly, the Supreme Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.* 248 prohibits not only contribution, but also any judicial interference in a statutory scheme set up by Congress. 249 The Third Circuit has pointed out "that the apportionment question is fraught with difficulty, that it involves largely intractable conflicting interests, and that it implicates in contradictory ways three ordinarily separate fields of law, to-wit, the common law of torts, statutory workmen's compensation law, and the law maritime." 250 Any judicial solution to the problems raised by the third-party suit ultimately involves a determination of which party can best bear the burden and which body of law should prevail. 251

Giving rights to one party necessarily takes rights away from another. The injured employee argues that he has a right to full common law damages from a negligent third party who is a stranger to the compensation system. The stevedore asserts that he should be immune from suits stemming from his obligation to make no-fault compensation payments and a right to reimbursement when the negligence of a third party renders him liable for those payments. And the shipowner contends that he should be liable only to the extent of his own fault in causing the injury as he would be for the fact that the concurrently negligent party is the plaintiff's employer. 252

Resolution of this dilemma should be left to Congress. 253 Congress has

---


248. 342 U.S. 282 (1952), discussed at notes 214-19 supra and accompanying text.

249. In distinguishing *Halcyon*, the Supreme Court in *Cooper Stevedoring Co. v. Fritz Kopke*, Inc., 417 U.S. 106 (1974) stated that contribution was prohibited in *Halcyon* because it would have been “inconsistent with the balance struck by Congress in the [LHWCA] between the interests of carriers, employers, employees, and their respective insurers.” *Id.* at 112. The Court added that the considerations relied on by the *Halcyon* court “still have much force. Indeed, the 1972 amendments to the [LHWCA] reemphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy.” *Id.* at 112-13.


251. See *Steinberg*, supra note 169, at 797.

252. See *Lamberton v. Cincinnati Corp.*, — Min. —, 257 N.W.2d 679, 685 (1977) (considering the question of apportionment under Minnesota law); 2A A. Larson, supra note 12, § 761 at 14-287, 14-406.

253. See *Steinberg*, supra note 169, at 799-80. See also 2A A. Larson, supra note 12, § 76.53, at 14-407.
considered the rights of all three parties in studying the state of affairs that existed before the 1972 amendments. Its decision to restrict the shipowner's obligation to pay damages to cases in which he is negligent, but then to impose full liability, should not be disturbed.

Anne Hintermeister