St. John's Law Review

Volume 50
Number 2 *Volume 50, Winter 1975, Number 2*

Article 5

August 2012

Stevedore Remedies Under the Longshoremen's and Harbor Workers' Compensation Act (Landon v. Lief Hoegh & Co.)

John M. Toriello

ADMIRALTY LAW

STEVEDORE REMEDIES UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Landon v. Lief Hoegh & Co.

Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act,[1] a stevedoring contractor (stevedore) who had paid compensation to an injured longshoreman could recoup its compensation payments from a culpable shipowner in one of three ways.[2] Under section 33 of the Act, if the longshoremen did not bring suit against the shipowner within 6 months after an award had been granted, the stevedore[3] was subrogated to the longshoreman's cause of action.[4] If the longshoreman brought suit against the shipowner, a stevedore which had voluntarily paid compensation could impress an equitable lien on the longshoreman's recovery to the extent of the compensation benefits.[5] Finally, the Supreme Court, in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*,[6] held that the stevedore could recoup

---

[1] 33 U.S.C. §§ 901 *et seq.* (1970), *as amended*, (Supp. IV, 1974).

[2] The remedies of the stevedore, when combined with those of the longshoreman and shipowner, created a pattern of circular litigation. The longshoreman, in addition to receiving compensation from the stevedore, could sue the third-party shipowner. 33 U.S.C. § 933(a) (1970). The Supreme Court had recognized two bases for this longshoreman-shipowner action. The longshoreman could sue on the ground of negligence, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 413-14 (1953), and on the ground of breach of the warranty of seaworthiness, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The shipowner could then seek indemnity from the stevedore based on breach of the stevedore's warranty of workmanlike performance. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). Finally, the stevedore could pursue an independent action in negligence against the shipowner, impress an equitable lien on any longshoreman recovery, or, in certain circumstances, be subrogated to the longshoreman's cause of action against the shipowner. *See* notes 4-7 and accompanying text *infra*.

[3] All further references to the stevedore employer also include the stevedore's compensation carrier who becomes subrogated to the rights of the stevedore upon payment of the compensation liability. *See* 33 U.S.C. § 933(h) (1970).

[4] Acceptance of such compensation under an award in a compensation order . . . shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Id. § 933(b), *as amended*, (Supp. IV, 1974).

[5] A number of courts have found the stevedore's right to recoup its compensation payments out of the longshoreman's recovery implicit in its subrogation rights under § 33 of the Act, *id.* § 933. *See* The Etna, 138 F.2d 37 (3d Cir. 1943); Fontana v. Pennsylvania R.R., 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd per curiam sub nom.* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953); *cf.* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412 (1953); International Terminal Operating Co. v. Waterman S.S. Co., 272 F.2d 15 (2d Cir. 1959). For a general discussion of the equitable lien theory, see 1 M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 100, at 181-83 (3d ed. 1975).

[6] 394 U.S. 404 (1969).

its compensation liability in an independent negligence action against the shipowner for breach of the shipowner's duty of due care.[7]

In the 1972 amendments, Congress preserved the stevedore's subrogation right,[8] but did not address itself to the availability of the remaining stevedore remedies.[9] Dealing with a case of first impression, in *Landon v. Lief Hoegh & Co.*,[10] the Second Circuit, on the assumption that the independent negligence action is still viable,[11] held that under the amended Act the stevedore retains the

---

[7] Although it did not expressly rule on the issue, a unanimous Court suggested that the employer might also be able to sue the shipowner in warranty based on contract or quasi-contract obligations. *Id.* at 418-21.

[8] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 15(f), 86 Stat. 1262, *amending* 33 U.S.C. § 933(b) (1970) (codified at 33 U.S.C. § 933(b) (Supp. IV, 1974)).

[9] In the 1972 amendments, Congress substantially revised the remedies available to the longshoreman and shipowner. Previously, the Supreme Court had extended the shipowner's liability to seamen for breach of the warranty of seaworthiness to include longshoremen. This extension made the shipowner absolutely liable to longshoremen for injuries they incurred while working aboard the ship. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (5-3 decision). In the ensuing years, the shipowner attempted to shift at least some of this burden by seeking contribution from the stevedore in cases of concurrent negligence. Rejecting such an approach, the Supreme Court established a broad "no contribution" rule. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) (7-2 decision); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 411-12 (1953) (6-3 decision); *see* note 34 *infra*. Nonetheless, the shipowner was finally allowed to shift its entire liability to the stevedore through a contractual indemnity action based on breach of a warranty of workmanlike performance. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (5-4 decision). The *Halcyon* no contribution rule was avoided because the shipowner's indemnity action was based on a duty running directly from the stevedore to the shipowner and not a duty running from the stevedore to the longshoreman. *See* Proudfoot, "The Tar Baby": Maritime Personal-Injury Indemnity Actions, 20 STAN. L. REV. 423, 427-28 (1968).

Through the addition of § 5(b) to the Act, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263, *amending* 33 U.S.C. § 905 (1970) (codified at 33 U.S.C. § 905(b) (Supp. IV, 1974)), Congress abolished the longshoreman's seaworthiness action and the shipowner's contractual indemnity action. Presently, the shipowner can only be sued in negligence and the stevedore appears to be insulated from liability for any judgment recovered against the shipowner. *See* H.R. REP. No. 1441, 92d Cong., 2d Sess. 4-8 (1972). Section 5(b) of the Act provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such a 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. . . . The liability of the vessel . . . shall not be based upon the warranty of seaworthiness . . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b) (Supp. IV, 1974).

[10] 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (U.S. Jan. 31, 1976), *aff'g* 386 F. Supp. 1081 (E.D.N.Y. 1974).

[11] 521 F.2d at 761. Although the Second Circuit found it unnecessary to decide the question, the court suggested that the *Burnside* action might not exist as a result of the 1972 amendments. *Id.* & n.6. *But cf.* 1A E. BENEDICT, ADMIRALTY § 28, at 2-27 to -28, § 119, at 6-32 (7th rev. ed. E. Jhirad 1973); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MARITIME L. & COM. 1, 27 (1974).

right to an equitable lien on the longshoreman's recovery.[12] The court further held, however, that the independent *Burnside* action, presuming it still exists, would be available only when the stevedore's equitable lien is an insufficient remedy, *i.e.* when the longshoreman's recovery in an action against the shipowner is less than the compensation liability of the stevedore.[13]

Landon involved a longshoreman's negligence action arising out of injuries allegedly suffered on board the defendant's ship. The defendant shipowner sought to join Gulf Insurance Company, the stevedore's compensation carrier, which had paid benefits to the plaintiff as prescribed by the Act,[14] as a necessary party pursuant to rule 19(a) of the Federal Rules of Civil Procedure.[15] The shipowner recognized that the Supreme Court, in *Pope & Talbot, Inc. v. Hawn,*[16] held that section 33 of the Act permits the stevedore to recoup his compensation payments out of the longshoreman's recovery.[17] The shipowner argued, however, that this remedy was rendered obsolete when the Supreme Court, in *Burnside,* held that the stevedore may recover its compensation liability in an independent negligence action against the shipowner.[18] Since, according to the defendant, the stevedore would have a claim against the shipowner, as opposed to a lien on the longshoreman's recovery, the

---

[12] 521 F.2d at 760.

[13] *Id.* at 761.

[14] Gulf paid $736 for temporary total disability, *see* 33 U.S.C. § 908(b) (Supp. IV, 1974), and $377 for medical attention given the plaintiff, *see id.* § 907. 521 F.2d at 758.

[15] FED. R. CIV. P. 19(a) provides in pertinent part:

> A person . . . shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

The shipowner also sought to implead the stevedore as a third-party defendant pursuant to *id.* 14, but the stevedore was never served with process. 521 F.2d at 758.

[16] 346 U.S. 406 (1953) (6-3 decision).

[17] 521 F.2d at 759. The *Pope & Talbot* Court also held that comparative negligence is the standard to be applied in a longshoreman's third-party suit under the Act, 346 U.S. at 408-11, and that the longshoreman, in addition to his seaworthiness action, could bring a suit in negligence against the shipowner. *Id.* at 413-14.

[18] The shipowner explained that the equitable lien theory originated in the notion that the stevedore's only cause of action to recover the compensation payments was its right of subrogation under § 33(b). Since the stevedore would not have a right of subrogation under this provision if the longshoreman brought suit, the courts invoked the equitable lien to prevent an innocent stevedore from being remediless and the longshoreman from receiving a double recovery. *See, e.g.,* Fontana v. Pennsylvania R.R., 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd per curiam sub nom.* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953). The shipowner in *Landon* argued therefore that when the Supreme Court, in *Burnside,* recognized the stevedore's independent, direct action against the shipowner, the basis of the lien theory had been removed and the lien, as a stevedore remedy, must collapse. Brief for Appellant at 9-15.

stevedore's absence from the instant litigation would subject the shipowner to a substantial risk of multiple or inconsistent obligations.[19] It was argued, therefore, that joinder was necessary.

Affirming the district court's decision[20] to grant Gulf's motion to dismiss the rule 19(a) complaint, Judge Gurfein, who wrote for a unanimous court,[21] held that the stevedore's equitable lien is a viable remedy encompassed within the stevedore's right of subrogation under section 33 of the Act.[22] The Second Circuit ruled that since the equitable lien[23] will generally be sufficient to reimburse the stevedore for its compensation liability,[24] an independent action will only be available when, as in *Burnside,* the stevedore's compensation payments exceed the longshoreman's recovery.[25] Judge Gurfein noted that this independent action, as a practical

[19] 521 F.2d at 760.

[20] 386 F. Supp. at 1084.

[21] Judges Mulligan and Timbers joined in Judge Gurfein's opinion.

[22] 521 F.2d at 760. Judge Gurfein's conclusion that the equitable lien has retained its viability finds support in Dodge v. Mitsui Shintaki Ginko K.K. Tokyo, 1975 A.M.C. 1505 (D. Ore. 1974), wherein the court, in dealing with the 1972 amendments, recognized the stevedore's right to such a remedy.

[23] For the sake of clarity, the term "equitable lien" will be used throughout this discussion. Actually, the *Landon* court referred to the stevedore's equitable lien as his § 33(b) right of subrogation. 521 F.2d at 760. Despite the original difference between the subrogation provision of § 33 of the Act and the extrastatutory equitable lien, *see* notes 4-5 and accompanying text & note 18 *supra,* judicial application of these two remedies has blurred the distinction between them. In fact, the Supreme Court itself has stated that "§ 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of *any* recovery from a third person negligently causing such injuries." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412 (1953) (emphasis added). *Accord,* Joyner v. F & B Enterprises, Inc., 448 F.2d 1185, 1187 (D.C. Cir. 1971). Although the courts have not precisely identified from what provision of § 33 support for the lien theory may be derived, subsection (f) appears operative. This subsection provides that if the longshoreman accepts compensation *under an award* and commences an action against a third party within 6 months of the *award,* the stevedore will be required to pay as compensation only that amount by which the award exceeds the recovery from the third party. Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 407 n.2 (1969). The equitable lien, then, ensures the same result in those cases where there is no award because the stevedore and longshoreman voluntarily agree on compensation.

[24] 521 F.2d at 760.

[25] *Id.* at 761. Although the *Landon* court clearly established that the availability of the *Burnside* action is limited, its opinion leaves uncertain the extent of that limitation. More specifically, it is unclear whether the action is available once it has simply been determined that the longshoreman's potential recovery will be less than the compensation liability or whether relief may be pursued only after the longshoreman has actually recovered an insufficient judgment. For example, the court stated that a stevedore's "*Burnside* claim for relief would only become a practical remedy . . . after it is determined that the compensation payments exceed the plaintiff's recovery." *Id.* n.5. The court added, however, that "[t]he employer . . . has no claim until the plaintiff has recovered against the ship . . . ." *Id.* at 761. It is doubtful that the latter limitation was intended by the Supreme Court, since the stevedore's counterclaim in *Burnside* was brought before the longshoreman had recovered against the shipowner. *See* 394 U.S. at 408-09. At the very least, then, the Second Circuit has ruled that *Burnside* is unavailable so long as a real possibility exists that the longshoreman will recover from the shipowner an amount equal to the compensation payments he received from the stevedore.

matter, would be utilized infrequently and only in rare factual settings.[26] In view of the primacy of the equitable lien, the court concluded that the stevedore's interest is in the plaintiff's recovery, not in the litigation between the longshoreman and the shipowner.[27] Finally, the panel concluded that in the stevedore's absence, the shipowner would not be subject to a substantial risk of multiple or inconsistent obligations.[28] Accordingly, it ruled that the stevedore was not a necessary party under rule 19(a).[29]

The court realized, and the defendant acknowledged, that the shipowner's ultimate objective was to apportion the liability for the longshoreman's injury between itself and a negligent stevedore, whose exposure would be limited to the amount of its compensation payments.[30] It was also conceded that the Supreme Court, in

---

[26] 521 F.2d at 761.

[27] *Id. See also* Moore v. Hechinger, 127 F.2d 746 (D.C. Cir. 1942). It may be argued, however, that even when the stevedore's remedy is restricted to an equitable lien, it still has an interest in the litigation between the longshoreman and the shipowner. Essentially, the stevedore desires to recoup the compensation benefits paid to the longshoreman. The recoupment, however, depends on the amount of the longshoreman's recovery, if any, in the longshoreman-shipowner litigation. Thus, the better view appears to be that the stevedore's and longshoreman's interests in a third-party action are identical up to the amount of the compensation payments. *See* Blacks v. Mosley Mach. Co., 57 F.R.D. 503 (E.D. Pa. 1972).

[28] 521 F.2d at 761. The reasoning underlying the court's conclusion that the absence of a stevedore would not subject the shipowner to the risks necessary to invoke rule 19(a) joinder is unclear. The question that faced the court was whether the *shipowner* would be subject to a substantial risk of multiple or inconsistent obligations. Nonetheless, in discussing the shipowner's risk of multiple obligations in the event the longshoreman's recovery was less than the stevedore's compensation liability, the court spoke of the possibility of a *stevedore's* risk of multiple obligations: "At worst the *employer* might be liable . . . for an excess above the compensation lien which, by hypothesis, it had not been required to pay to the plaintiff in the original action." *Id.* (emphasis added).

By implying that an insufficient recovery by the longshoreman is a prerequisite to the stevedore's independent suit, *id.* at 761; *see* note 25 *supra*, the Second Circuit further implies that the *Burnside* action, if pursued, is to be brought after the longshoreman's action. This approach, however, invites multiple litigation with the attendant possibility of multiple or inconsistent obligations. The court appears to dismiss this eventuality with the statement that "relatively few cases are likely to go to verdict where the recovery will be less than the lien." *Id.* at 761.

[29] *Id.* To buttress its conclusion, the *Landon* court termed the employee "a statutory trustee of an express trust for the benefit of the employer," *id.*, thereby invoking the classical definition of the relevant interests in the employee's third-party action. This theory was particularly useful since it enabled the employee to sue as a real party in interest without joining the employer. *See* Pyle v. Kansas Gas & Elec. Co., 23 F.R.D. 148 (D. Kan. 1959); FED. R. CIV. P. 17(a). *But see* Koepp v. Northwest Freight Lines, 10 F.R.D. 524 (D. Minn. 1950). Presently, however, the appropriateness of this view is uncertain. *See* United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949) (partial insurer subrogee real party in interest and necessary party); 3A J. MOORE, FEDERAL PRACTICE ¶ 17.09[2.-3], at 359-60 (2d ed. 1974). Even if the "trustee" definition is correct, "Rule 17(a) [real party in interest] is not to be read as prohibiting the joinder of persons who are beneficially interested in the subject matter of the action but are not statutory real parties in interest." 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1550, at 682 (1972).

[30] 521 F.2d at 759-60, 762-63; Brief For Appellant at 23.

Pope & Talbot, had rejected a similar attempt by a shipowner and had termed the reduction of the longshoreman's recovery against the shipowner the substantial equivalent of contribution.[31] The shipowner attempted to avoid the application of the *Pope & Talbot* holding by characterizing the compensation payments, not as the damages recoverable under the Act by the longshoreman from the shipowner, but as the damages of the stevedore collectible only in a separate cause of action.[32] In addition, the shipowner contended that *Pope & Talbot* had been impliedly overruled by both the subsequent amendments to the Act and the *Burnside* decision.[33] The *Landon* court disagreed and found the ultimate objective of the shipowner incompatible with the still viable "no contribution" rule of *Pope & Talbot.*[34] Furthermore, Judge Gurfein reviewed the

---

[31] 521 F.2d at 760.

[32] Brief for Appellant at 24.

[33] 521 F.2d at 760; Brief for Appellant at 25-34.

[34] 521 F.2d at 760. The court cited Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), and Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). In *Halcyon,* the defendant shipowner sought to join the employer as a third-party defendant and apportion liability according to fault. The Court refused to extend the admiralty comparative negligence doctrine to concurrent tortfeasors in noncollision cases, stating that this was more appropriately a legislative function. 342 U.S. at 285-87. In *Pope & Talbot,* the shipowner did not seek to join the employer as a third-party defendant, but argued that it would be unconscionable to allow a contributorily negligent employer to recoup its compensation payments. The Court rejected this argument and expanded the *Halcyon* no contribution rule by stating that the "reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." 346 U.S. at 412, *discussed in* note 9 *supra.*

There are three basic theories which enable the courts to shift liability for an injury. Contribution is a distribution of the loss among joint tortfeasors. The person from whom contribution is sought must be a tortfeasor and also liable to the injured plaintiff. W. PROSSER, LAW OF TORTS § 50, at 307-09 (4th ed. 1971) [hereinafter cited as PROSSER]. If contribution is unavailable, the courts might turn to indemnity. This theory involves a complete shifting of the liability from one tortfeasor to another. The obligation arises either through contract or by operation of law and is usually based on an active-passive negligence distinction. *Id.* § 51, at 310-12. Finally, the court may invoke a comparative negligence standard when the plaintiff and defendant are both at fault. *Id.* § 67, at 434.

Admiralty has followed a rule of comparative negligence between the plaintiff and defendant. *See, e.g.,* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953); The Max Morris, 137 U.S. 1, 15 (1890). And in collision cases, contribution has been awarded among all the parties to the litigation. Villareal, Halcyon *to* Ryan *to* Weyerhauser *to* Cooper — *Where Do We Go from Here?,* 6 J. MARITIME L. & COM. 593 (1975). For a delightful narrative culminating in the application of the maritime divided damages rule, see The Niobe, 31 F. 164 (S.D. Ga. 1887). Thus, the no contribution rule of *Halcyon* is a departure from the general maritime law, but is easily justified if restricted to cases arising under the Act. Section 5(a) of the Act, 33 U.S.C. § 905(a) (Supp. IV, 1974), provides that the employer's only liability to the employee is for compensation payments. Therefore, the employer is not liable to the employee in an employee's third-party action, and the theory of contribution cannot be invoked against him. *See* PROSSER, *supra,* § 50, at 309. Indeed, the Supreme Court has recently extended the admiralty rule of contribution and distinguished *Halcyon* in a noncollision case in which neither of the joint tortfeasors was insulated from liability to the plaintiff. Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111-13 (1974).

events leading up to the 1972 congressional action and concluded that the Legislature had intended to insulate the stevedore from liability arising out of the longshoreman's third-party action.[35] By viewing the stevedore's remedies as a sequential scheme pursuant to which the *Burnside* action would only be available once it is determined that the recovery in a third-party action is less than the compensation liability, the Second Circuit was able to deny joinder and preclude the shipowner from seeking contribution from the stevedore in the longshoreman's third-party suit.[36]

The *Landon* court was faced with a difficult task in having to determine the proper interplay between the *Burnside* action and the other remedies available to the longshoreman, shipowner, and stevedore. This question has never been fully answered by the Supreme Court,[37] nor was the question addressed by Congress in

---

[35] 521 F.2d at 762-63. Judge Gurfein stated his conslusion as follows:

> "Under the proposed amendments the vessel may not by contractual agreement *or otherwise* require the employer to indemnify it, in whole or *in part*, for such damages." . . . We read the emphasis "in whole or in part" to mean to exclude liability by the employer to any extent including the amount of the compensation payments.

Id. at 763, *quoting* H.R. REP. No. 1441, 92d Cong., 2d Sess. 7 (1972) (emphasis added by court).

In Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1974) (three-judge court), the court, discussing the legislative intent underlying the 1972 amendments, similarly concluded that "Congress sought to eliminate all actions against the stevedore [employer] whether for indemnity or contribution, whether based on tort or on contract . . . ." *Id.* at 769. So too, in Hubbard v. Great Pac. Shipping Co., 1975 A.M.C. 1518 (D. Ore. June 16, 1975), the district court held that the Legislature intended the 1972 amendments to prohibit reduction of the shipowner's liability to the longshoreman by the percentage of the stevedore's concurrent negligence. In contrast, Frasca v. Prudential Grace Lines, Inc., 1975 A.M.C. 1143 (D. Md. 1975), apportioned liability between the stevedore and shipowner according to fault and concluded that the stevedore was not entitled to impress an equitable lien on the plaintiff's recovery. This decision was rendered moot, however, by the later entry of judgment notwithstanding the verdict in which the court concluded that the shipowner was not liable because no duty to the longshoreman had been breached. Frasca v. Prudential Grace Lines, Inc. 1975 A.M.C. 1130 (D. Md. 1975).

[36] The court also rejected the contention that the shipowner cannot be held liable unless it is proven that its negligence was the *sole* cause of the longshoreman's injury. 521 F.2d at 763. The Second Circuit did not, however, proceed to outline the appropriate standard of care which a shipowner must observe under the 1972 amendments. *Id.* In Ramirez v. Toko Kaiunn, K.K., 385 F. Supp. 645 (N.D. Cal. 1974), the court described the shipowner's standard of care as follows:

> Shipowner must (1) exercise ordinary care to place the ship . . . in such condition that an experienced stevedore will be able, when exercising ordinary care, to discharge the cargo . . . with reasonable safety . . . and (2) give the stevedore warning of any concealed or latent defects that are known by the shipowner.

Id. at 646. For other courts which have discussed this issue, see Frasca v. Prudential Grace Lines, Inc., 1975 A.M.C. 1130 (D. Md. 1975) (substantial intervening stevedore negligence absolves shipowner), and Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Ore. 1974) (uniform national, as opposed to state, standard of care must be applied). *See also* Grasso v. Lorentzen, 149 F.2d 127 (2d Cir. 1945), decided before the imposition of strict liability on the shipowner, *see* note 9 *supra*, wherein the court held that a shipowner's duty of care is limited to the furnishing of equipment which is in safe condition at the time of delivery.

[37] *See* text accompanying notes 43-50 *infra*.

1972.[38] Although at first glance the court's limitation of *Burnside* appears to be without support, a closer examination of the entire complex of rights and obligations leads to the conclusion that the Second Circuit reached the best possible decision.

In *Burnside,* decided prior to the 1972 amendments' abolition of a shipowner's indemnity action,[39] the plaintiff shipowner, sued by the estate of a deceased longshoreman, sought indemnification from the defendant stevedore for any judgment entered against it. The estate's recovery in its third-party action against the shipowner was limited by the Illinois wrongful death statute to an amount substantially less than the stevedore's compensation liability.[40] Since the stevedore's equitable lien on that recovery would therefore be insufficient to allow total recoupment of its compensation payments, the stevedore counterclaimed in the shipowner's indemnity action for the full amount of its liability under the Act. The Supreme Court held that the subrogation rights under section 33 are not exclusive and that federal maritime law recognizes a stevedore's direct negligence action against the shipowner for the recovery of compensation payments.[41] Furthermore, the Court, although care-

---

[38] The Second Circuit noted that Congress, through the addition of § 5(b), may have eliminated the *Burnside* action, but found it unnecessary to decide this question. 521 F.2d at 760. Section 5(b) makes the exclusive remedy of a person "otherwise entitled" to recover damages, by reason of the shipowner's negligence, actions brought "in accordance with the provisions of [§ 33]." For the text of § 5(b) see note 9 *supra.* As the *Landon* court noted, the argument might be made that the stevedore is a person "otherwise entitled" and that the *Burnside* action cannot be brought in accordance with § 33 of the Act since it is not provided for in that section. 521 F.2d at 760 n.6. A preferable interpretation of the statute, it is suggested, would view the "in accordance" provision as ensuring harmony within the Act. That is, any action allowed by § 5(b) which is also referred to in § 33 would have to be brought *in accordance* with the latter section. However, if an action, like the stevedore's direct claim, is not within the ambit of § 33, it cannot contradict that section and is therefore not barred by it. It should also be noted that Congress, in contrast to its treatment of other Supreme Court decisions which it meant to overrule, did not discuss *Burnside. See* H.R. REP. No. 1441, 92d Cong., 2d Sess. 4-8 (1972); authorities cited note 11 *supra.*

[39] *See* note 9 *supra.*

[40] Whereas the maximum recovery available to the estate of the longshoreman in its action against the shipowner was limited by the Illinois wrongful death statute to $30,000, the stevedore's potential liability under the Act for compensation benefits was $70,000. 394 U.S. at 410.

[41] The issue presented was whether the stevedore had a cause of action, separate from its subrogation right under § 33 of the Act, against the shipowner for compensation paid or to be paid to longshoremen or their representatives. *Id.* at 411-12. In answering the above question in the affirmative, Justice Stewart, writing for a unanimous court, stressed that the Act does not make the stevedore's right to subrogation its exclusive remedy. He stated that in the absence of clear language to the contrary, "the legislative grant of a new right does not ordinarily cut off . . . other nonstatutory rights." *Id.* at 412. Accordingly, the Court found that

> federal maritime law does impose on the shipowner a duty to the stevedoring contractor of due care . . . and does recognize a direct action in tort against the shipowner to recover . . . compensation payments occasioned by the latter's negligence.

fully avoiding a definitive holding, proceeded to suggest the availability of other stevedore remedies in contract and quasi-contract.[42] In short, not only did the *Burnside* Court proclaim the existence of a direct action in tort and imply the availability of other bases for direct actions against a shipowner, it did not even intimate that its holding was limited to the facts of the case or that the actions were restricted in any manner.[43]

Despite the apparent breadth of the *Burnside* decision, its qualification by the Second Circuit was unavoidable. To give full effect to the *Burnside* action, the *Landon* court would have been forced to overturn many of the well-established doctrines governing third-party litigation under the Act. Introduction of an unlimited *Burnside* remedy into the existing litigation scheme would have resulted in double recovery by the stevedore and the imposition of multiple liability on the shipowner[44] unless the compensation pay-

---

Id. at 416-17. The conclusion that the shipowner owes a duty to the stevedore was based upon language in an earlier case where it had been held that the shipowner owes a duty of reasonable care to all persons "on board for purposes not inimical to his legitimate interests . . . ." Kermerac v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959).

If the *Landon* court's interpretation of the stevedore's equitable lien as a remedy no different from the subrogation right of § 33 is accepted as true, its ruling that the *Burnside* remedy is contingent upon the lien contradicts a broad reading of the *Burnside* decision as holding that the stevedore's action against the shipowner is independent of its rights under § 33. This contradiction can be resolved in either of two ways. Either the equitable lien must be separated from § 33 and its viability reassessed in light of *Burnside* and the 1972 amendments, as the shipowner argued in *Landon, see* note 18 and accompanying text & note 23 *supra*, or, as the Second Circuit held, *Burnside* must be narrowly read to apply only where the equitable lien is an insufficient remedy. Nonetheless, it must be noted that the Supreme Court was not specifically presented with the interrelationship of these remedies; it only had to address the broad question of whether a stevedore had a direct action against a shipowner.

[42] 394 U.S. at 418-21.

[43] Commentators have generally agreed that *Burnside* recognized a direct action by the stevedore against the shipowner for breach of an independent duty and that this direct action is separate from the stevedore's statutory rights. *See, e.g.*, 1A E. BENEDICT, ADMIRALTY § 119, at 6-30 (7th rev. ed. E. Jhirad 1973); 2 A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 77.00-.20 (1975); Comment, *An Expansion of the Stevedoring Contractor's Remedies Against a Shipowner in Admiralty*, 65 NW. U.L. REV. 506, 515 (1970); Note, *Maritime Personal Injury: The Ramifications of* Burnside, 11 WM. & MARY L. REV. 723, 736 (1970). Professor Larson identifies nine possible situations in which the statutory remedy would be inadequate and the *Burnside* remedy necessary for the protection of the employer. LARSON, *supra*, § 77.10, at 14-422 to -429. One writer adverts to two possible interpretations of *Burnside*: (1) that the decision is limited to its facts; or (2) that it recognized an independent stevedore remedy which is available whenever the shipowner breaches the duty of due care and causes damages. In view of the expansive language in the opinion, he concludes that the second approach is the correct one. 7 HOUSTON L. REV. 137, 141-42 (1969).

[44] A longshoreman injured due to the concurrent or sole negligence of a shipowner could both collect his compensation payments from the stevedore and recover *full* damages from a shipowner. The stevedore, in turn, could impress an equitable lien to the extent of the compensation payments on the longshoreman's recovery. Consequently, introduction of a direct stevedore action into this litigation scheme would allow the stevedore, through the equitable lien and the direct action, to recoup compensation payments twice and force the shipowner, in the stevedore's action and again in the longshoreman's action, to bear the burden of double liability.

ments were deemed the damages of the stevedore and no longer recoverable in the longshoreman's third-party litigation.[45] But, such an approach is contrary to the established practice of allowing the longshoreman to pursue his claim for full damages.[46] Furthermore, this reduction of the shipowner's liability to the longshoreman would negate the no contribution rule established by the Supreme Court and adhered to for over 20 years.[47] In addition, the stevedore's lien on the proceeds of the longshoreman's suit would have to be eliminated.[48] Yet this lien has been recognized as implicit in section 33 of the Act and has been approved by the Supreme Court.[49] In view of the fact that the Supreme Court did not even allude to these substantial changes in the Act's pattern of third-party litigation, it is unlikely that its *Burnside* decision was intended to be of such great impact. Consequently, the holding of the case should be limited, if not strictly to its facts, to similar

---

[45] If the compensation payments were regarded exclusively as the damages of the stevedore, the longshoreman could not recover these payments as damages in his third-party action. Consequently, the shipowner would be responsible for compensation payments only to the stevedore, and the possibility of multiple liability would be removed. However, separation of damages is not the total solution. If the stevedore, after the longshoreman's damages have been so reduced, retains its right to an equitable lien, it will still obtain a double recovery, *see* note 44 *supra*, and deprive the longshoreman of his rightful damages. As a result, abolition of the equitable lien and separation of damages must occur simultaneously. For a discussion of problems inherent in the abolition of the equitable lien, see note 49 and accompanying text *infra*.

[46] *See, e.g.*, The Etna, 138 F.2d 37 (3d Cir. 1943); Clark v. Hutchison, 161 F. Supp. 35 (D.C.Z. 1957); Cupo v. Isthmian S.S. Co., 56 F. Supp. 45 (S.D.N.Y. 1941).

[47] *See* note 34 *supra*. Technically, denying the longshoreman recovery of the compensation liability in his third-party action against the shipowner would not amount to contribution from the stevedore, but recognition of the fact that this amount was not properly a part of the longshoremen's original cause of action. The problem with this approach is that not only have the compensation payments traditionally been recognized as part of the longshoreman's damages, *see* note 46 and accompanying text *supra*, but a decrease of those damages by the amount of the compensation payments has been held to be the equivalent of contribution. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408 (1953).

[48] *See* note 45 *supra*.

[49] *See* notes 5 & 23 *supra*. A further problem with eliminating the equitable lien is that such elimination will virtually end, contrary to legislative directive, voluntary payment of compensation. Presently, section 33(f) of the Act provides that the stevedore's compensation payments will be reduced by the amount of a longshoreman's recovery in an action brought by him within 6 months of an award. 33 U.S.C. § 933(f) (1970); Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 407 n.2. (1969). The statute also directs, however, that compensation be paid promptly, without an award, unless the stevedore contests its liability. 33 U.S.C. § 914(a) (1970). Clearly, if the equitable lien is abolished, although the stevedore's compensation liability under an award will be reduced by what is recovered in a longshoreman's third-party action, its compensation liability in the optimal situation where there is no award will not be so reduced. Consequently, stevedores will force an award, in contravention of § 14(a), in order to take advantage of § 33(f). *See* The Etna, 138 F.2d 37, 41 (3d Cir. 1943). Furthermore, if the longshoreman's damages in the third-party action are limited to those in excess of the compensation payments, the reduction of the compensation award, mandated by § 33(f), will deprive the longshoreman of what he rightfully deserves, thereby disregarding the Act's paramount concern, *viz*, protecting the longshoreman, *see* Reed v. The Yaka, 373 U.S. 410, 415 (1963).

situations where it is clear that the longshoreman's recovery will not satisfy the stevedore's lien.[50]

Undoubtedly, the 1972 amendments comprised an important factor underlying the Second Circuit's decision to limit *Burnside* and preserve the no contribution rule. In an attempt to achieve more equitable results, Congress redistributed the liability for longshoreman injuries in situations involving third parties.[51] Previously, the shipowner had been saddled with absolute liability for longshoreman injuries suffered on board[52] or alongside the vessel.[53] This burden, however, could be shifted to the stevedore through an action for complete indemnity based on breach of an implied warranty of workmanlike performance.[54] The net effect of these actions was that "despite the provision in the Act which limits the employer's liability to the compensation and medical benefits . . . , a stevedore-employer [was] indirectly liable for damages to an injured longshoreman . . . ."[55] Congress endeavored to resolve this problem by completely insulating the stevedore from liability for damages recovered by an injured longshoreman from a negligent shipowner.[56] This complete ban on stevedore contribution was predicated on a concomitant restriction of the shipowner's liability to those injuries caused by its negligence.[57] Such congressional action clearly represents an attempt to accommodate the competing interests in this litigation triangle. Significantly, the plan worked out by Congress was designed in the context of the particular pattern of remedies then available. If the judiciary were to radically change these remedies, the delicate balance struck by Congress would be threatened. The Second Circuit, in limiting *Burnside*, adopted what appears to be the dominant statutory theme of insulating the stevedore, thereby further ensuring the continued success of Congress' design.[58]

---

[50] In Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3416 (U.S. Jan. 20, 1976), the Fifth Circuit held that an employer who has paid compensation may pursue his *Burnside* action without waiting for the longshoreman to sue. This case involved the validity of an employer's suit filed 1 day before the expiration of the statute of limitations on the employee's suit. Obviously, the *Louviere* court was presented with a situation where it was clear that the employee's recovery would not satisfy the employer's lien. Notably, the Second Circuit, in Liberty Mut. Ins. Co. v. United States, 290 F.2d 257 (2d Cir. 1961), was faced with a similar situation, but arrived at a contrary result. In light of *Burnside* and *Landon*, the precedential value of this decision is doubtful.

[51] *See* note 9 *supra*.

[52] Seas Shipping Co. v. Sieracki, 328 U.S. 80 (1946); *see* note 9 *supra*.

[53] Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

[54] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); *see* note 2 *supra*.

[55] H.R. REP. No. 1441, 92d Cong., 2d Sess. 5 (1972).

[56] *See* note 35 *supra*.

[57] *See* note 9 *supra*.

[58] If *Burnside* were not limited, the Second Circuit would have condoned the circuitous

Despite the justifiable result reached in *Landon,* continuation of the no contribution rule perpetuates a great injustice. Congress apparently realized that if the shipowner were to be held liable for injuries caused by stevedore negligence, the shipowner must be afforded a right of action against the stevedore.[59] Nonetheless, the solution adopted in 1972 is insufficient in that it does not equitably distribute the burden where the negligence of the shipowner is concurrent with that of the stevedore. Under the amended Act, if the injury is due solely to the negligence of the stevedore, the shipowner will not be held responsible and the longshoreman will only collect his compensation payments.[60] Similarly, if the injury is entirely the fault of the shipowner, it must pay damages to the longshoreman, and the stevedore will, through the equitable lien, recoup its compensation expense. If both the stevedore and the shipowner are negligent, however, the shipowner will be saddled with the entire burden and the stevedore will escape all liability.[61] Certainly, this patent inequity[62] is inconsistent with the oft-repeated objective that the burden should be placed on the party "whose default caused the injury . . . ."[63]

---

litigation Congress sought to eliminate in 1972, *see* Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759, 769 (E.D. Pa. 1974) (three-judge court).

[59] The following was offered as the rationale underlying elimination of the shipowner's indemnity action:

> Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable . . . for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore . . . .

H.R. REP. No. 1441, 92d Cong., 2d Sess. 7 (1972).

[60] *Id.*

[61] That the stevedore will escape all liability where negligence is concurrent follows from application of the doctrine of several liability among joint tortfeasors. According to that doctrine, the shipowner will be liable for damages he has caused without regard to the concurrent negligence of the stevedore. The mere fact that the shipowner's negligence is slight as compared to the stevedore's will not extinguish the shipowner's liability to the longshoreman. Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759, 769 (E.D. Pa. 1974) (three-judge court); PROSSER, *supra* note 34, § 47, at 296-97. Furthermore, through the use of the equitable lien or § 33(f), *see* note 49 *supra*, the stevedore will recoup or reduce its compensation liability to the extent of the longshoreman's recovery.

[62] The inequity of a no contribution rule has been repeatedly demonstrated. *See, e.g.,* Newport Air Park, Inc. v. United States, 293 F. Supp. 809, 815 (D.R.I. 1968), *rev'd,* 419 F.2d 342 (1st Cir. 1969), *discussed in* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer,* 65 NW. U.L. REV. 351, 360-67 (1970); Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587 (1974). Dean Prosser has written:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone . . . .

PROSSER, *supra* note 34, § 50, at 307.

[63] Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964). As additional justification for the recognition or extension of the remedies available in the longshoreman-shipowner-stevedore triangle, the Court has repeatedly intoned the

Clearly, the truly just solution would entail abrogation of the no contribution rule and adoption of a comparative negligence standard with the stevedore's liability limited by its compensation obligation. Due to longstanding judicial precedents and Congress' apparent prohibition of contribution, however, it is submitted that such a change is beyond the proper scope of judicial authority and within the responsibility of the Legislature. Surely, comprehensive congressional review and redefinition of all the rights and obligations within this triangular litigation pattern would serve to clarify the tangled interests of the parties and allow deliberate and more equitable readjustment of their conflicting rights.

John M. Toriello

---

objective of placing the burden on the party "whose default caused the injury . . . ." *Id.* The extension of the shipowner's absolute liability under the doctrine of seaworthiness was thought, in part, to further this objective. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 103 (1946). In allowing the shipowner indemnity action against the stevedore, however, the Court expressly refused to use that objective as a basis for its decision. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132-33 (1956). Nonetheless, 8 years later, the Court adopted the objective to support a broad interpretation of *Ryan.* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., *supra* at 324. Finally, in *Burnside,* the Court quoted *Italia* and expressly stated that the objective of placing the burden on the party at fault has been recognized. 394 U.S. at 420 n.22.