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## LONGSHOREMEN'S PERSONAL INJURY ACTIONS UNDER THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

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*Much like ancient mariners who puzzled over the Greek god Triton and the mermaids, modern judges and legislators often have been vexed in their attempt to ascertain a proper legal classification for the longshoreman. Bound at once to the seafaring trade and mainland commerce, the harbor worker frequently found himself in the anomalous position of being land-based but regarded, nevertheless, as a seaman in the eyes of the law. One of the most confusing instances of this phenomenon was the litigation spawned by work-related personal injuries.*

*In an effort to bring order out of chaos, Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) in 1972 to clarify and limit the circumstances under which the employee of a stevedore could recover damages from a shipowner for on-the-job accidents.<sup>1</sup>*

### INTRODUCTION

The United States federal courts have developed a substantial and, for the most part, unanimous jurisprudence concerning longshoremen's<sup>2</sup> personal injury cases under the 1972 amendments to

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<sup>1</sup> *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 838 (2d Cir. 1977).

<sup>2</sup> As used in this Article, the term "longshoreman" refers to a "person engaged in maritime employment, including any . . . person engaged in longshoring operations, and any

the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).<sup>3</sup> As with all attempts to formulate and apply general principles to specific facts, however, there have been some decisions which either overlook important policy considerations or unnecessarily complicate the process which determines the existence or nonexistence of liability. This Article will examine the decisions of the various federal courts of appeals, with an eye toward the considerations which led to the 1972 amendments in an effort to identify a standard for determining liability which comports with Congress' intent in enacting the amendments.

### PRE-AMENDMENT LAW

Following the enactment of the LHWCA in 1927,<sup>4</sup> the stevedore's<sup>5</sup> liability for an employee's work-related injuries was limited to the compensation provided for by the Act.<sup>6</sup> The longshoreman's remedies against third parties responsible for his injury, however, were preserved.<sup>7</sup> Thus, a longshoreman could receive compensation

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harborworker, including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. § 902(3) (1976).

<sup>3</sup> Pub. L. No. 92-576, §§ 2-22, 86 Stat. 1251 (codified at 33 U.S.C. §§ 901-950 (1976)).

<sup>4</sup> Pub. L. No. 803, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901-950 (1976)).

<sup>5</sup> As used in this Article, the term "stevedore" refers to the independent contractor which is responsible for the work performed by the longshoreman.

<sup>6</sup> 33 U.S.C. § 905 (1970) (amended 1972) provided in part: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . ." See, e.g., *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 47 (5th Cir. 1960); *Doll v. Scott Paper Co.*, 91 F.2d 860, 862 (3d Cir. 1937); *Samuels v. Munson S.S. Line, Inc.*, 63 F.2d 861, 862 (5th Cir. 1933); *Moore v. Christensen S.S. Co.*, 53 F.2d 299, 299 (5th Cir. 1931); 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 63 (3d ed. 1975). The Longshoremen's and Harbor Workers' Compensation Act (LHWCA) followed two unsuccessful attempts by Congress to apply state workmen's compensation laws to longshoremen. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). For an account of the historical development of the LHWCA, see 1 M. NORRIS, *supra*, §§ 56-57.

<sup>7</sup> 33 U.S.C. § 933 (1970) (amended 1972). The original act provided for an automatic assignment of the longshoreman's cause of action against a third party whenever compensation was accepted by the longshoreman. Pub. L. No. 803, § 18, 44 Stat. 1429 (1927). This assignment was modified in 1938 by making it contingent upon the acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner. Despite the explicit statutory language, the courts effectively nullified this assignment by finding a "conflict of interests" exception. See, e.g., *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 531 (1956); *Johnson v. Sword Line*, 257 F.2d 541 (3d Cir. 1958).

Finally in 1959, without any reference to the "conflict of interests" decisions, the Congress amended the Act to permit the simultaneous acceptance of compensation under an award and the prosecution of a lawsuit so long as the lawsuit was commenced within six months of the award. Following the abolition of the *Ryan* indemnity action by the 1972 amendments, this assignment provision has been given real meaning by the courts and the conflict of interests exception has once again been relegated to the status of "exception"

from his employer and recover damages if successful in an action against the shipowner. In order to prevent a double recovery in such a situation, the courts imposed a lien in favor of the stevedore on the longshoreman's tort recovery up to the amount of the compensation payments.<sup>8</sup>

Few problems in this scheme of compensation were encountered until 1946, when, in *Seas Shipping Co. v. Sieracki*,<sup>9</sup> the Su-

rather than "rule". *Rodriguez v. Compass Shipping Co.*, 456 F. Supp. 1014, 1021 & n.7 (S.D.N.Y. 1978); see *Bandy v. Bank Line Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977). See also *Liberty Mut. Ins. Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977).

The shipowner's liability "for injuries received by seamen in consequence of the unseaworthiness of the ship," *The Osceola*, 189 U.S. 158, 175 (1903), is an extension of the warranty which originally inured only to the benefit of cargo owners. This warranty of seaworthiness was extended to seamen due to the special hazards of their work on seagoing voyages and the draconian discipline imposed upon them. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, 150-55, 452 (2d ed. 1975); see *Manich v. Southern S.S. Co.*, 321 U.S. 96, 103-04 (1944). Longshoremen were not considered within this protected category, however, since they did not do the work of seamen. G. GILMORE & C. BLACK, *supra*, at 438-40. As a result, they were limited to an action in negligence against the shipowner. *The Osceola*, 189 U.S. 158, 175 (1903).

In 1926, the Supreme Court brought longshoremen within the protection of the Jones Act, 46 U.S.C. § 688 (1976), by holding that land-based harbor workers were seamen. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). The *Haverty* Court based its decision upon a fiction propounded in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914), where the Court noted that "[f]ormerly [loading and unloading cargo] was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'" *Id.* at 62. Land-based harbor workers, however, plied their trade for centuries before the *Haverty* Court accorded them seaman's status. See *Treault, Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954). Congress shortly overruled *Haverty* by enacting the LHWCA in 1927, Pub. L. No. 803, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901-950 (1976)), thereby providing workmen's compensation to the longshoremen and eliminating their fictional Jones Act status. Under § 933 of the Act, however, the injured longshoreman retained the right to bring a negligence action against the shipowner, predicated upon a duty to use reasonable care in providing a safe place to work. *Lopez v. American-Hawaiian S.S. Co.*, 201 F.2d 418, 418-20 (3d Cir.), *cert. denied*, 345 U.S. 976 (1953); *Anderson v. Lorentzen*, 160 F.2d 173, 173-75 (2d Cir. 1947); *Grillo v. Royal Norwegian Gov't*, 139 F.2d 237, 238 (2d Cir. 1943).

<sup>8</sup> There is no express grant of a lien in the LHWCA. In *The Etna*, 138 F.2d 37 (3d Cir. 1943), a stevedore-employer was allowed to recoup the compensation payments made to the longshoreman following the latter's successful third-party suit. That the LHWCA did not provide the longshoreman with a right to compensation from both employer and shipowner was "an implicit recognition that the employer has a right to reimbursement for his outlay under the Compensation Act out of his employee's adequate recovery from a third person." *Id.* at 40; see *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); 1 M. NORRIS, *supra* note 6, § 100, at 181-83; Noe, *Stevedore Remedies Under the Longshoremen's and Harbor Workers' Compensation Act*, 50 ST. JOHN'S L. REV. 280, 280 n.5 (1975).

<sup>9</sup> 328 U.S. 85 (1946).

preme Court held that a longshoreman is engaged in traditional seaman's work and is therefore entitled to the benefit of the shipowner's warranty of seaworthiness.<sup>10</sup> Because of the absolute nature of this newly imposed liability for longshoremen's injuries, shipowners attempted to shift at least some of the burden by seeking contribution from the stevedore in cases of concurrent negligence.<sup>11</sup> The Supreme Court thwarted this attempt, however, by establishing a broad no-contribution rule.<sup>12</sup> Notwithstanding this setback, shipowners continued their attempts to shift the burden of liability by seeking complete indemnity from the stevedore whenever the employee's injuries were caused by a breach of the stevedore's warranty of workmanlike performance. Reasoning that

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<sup>10</sup> *Id.* at 95. Sieracki, an employee of an independent stevedoring firm under contract to load the plaintiff's ship, was injured by defective equipment being used on board. *Id.* at 87. The Court reasoned that "liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent." *Id.* at 97. While working on board the ship, the longshoreman was considered to be "a seaman . . . doing a seaman's work and incurring a seaman's hazards." *Id.* at 99. Accordingly, the *Sieracki* Court recognized that liability for a longshoreman's injuries caused by the unseaworthiness of a ship is essentially "a species of liability without fault," the imposition of which in this case was based, at least in part, on the stevedore's supposed inability to discover and remove perilous conditions aboard the ship. *Id.* at 94-95.

Generally stated, the shipowner's warranty of seaworthiness "contemplates that a ship's hull, gear, appliances, ways, appurtenances and manning will be reasonably fit for its intended purpose." 2 M. NORRIS, *supra* note 6, § 298; G. GILMORE & C. BLACK, *supra* note 7, at 150-55. Seaworthiness is an absolute and non-delegable duty of the shipowner; originally contractual in nature, it arises out of the relationship between shipowner and crew. 2 M. NORRIS, *supra* note 6, §§ 299, 303. *See generally id.* §§ 298-323.

<sup>11</sup> *See, e.g., American Mut. Liab. Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), wherein a longshoreman was injured by a defective guy rope, negligently supplied by the shipowner and used by the stevedore. *Id.* at 323. Refusing to allow the shipowner any right of contribution against the stevedore, the second circuit ruled that the stevedore was under no duty to discover the defects, since the LHWCA created absolute stevedore-longshoreman liability. *Id.* at 325; *see Slattery v. Marra Bros.*, 186 F.2d 134, 138-39 (2d Cir. 1951).

In *United States v. Rothschild Int'l Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950), a longshoreman was injured by a defective winch which was negligently supplied by the shipowner. *Id.* at 182. The court found that the stevedore's negligence in using the winch after notice that it might be defective entitled the shipowner to full indemnity. *Id.* at 183.

<sup>12</sup> *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). In *Halcyon*, an employee of Haenn was injured while working aboard a moored ship owned by Halcyon. *Id.* at 283. The employee sued Halcyon on theories of negligence and unseaworthiness, and Halcyon impleaded Haenn as a third-party defendant, alleging that Haenn was negligent. Although a jury found Halcyon 25% negligent and Haenn 75% negligent, the district court ruled that Haenn was liable in contribution for 50% of the damages. *Id.* at 283. This ruling apparently was based on the admiralty doctrine used in collision cases, whereby joint wrongdoers share the burden of damages equally. *Id.* at 284. Reversing the lower court's determination, the Supreme Court refused to extend the doctrine of loss-sharing to non-collision cases, concluding that such a solution should await congressional action. *Id.* at 285. Furthermore, it expressed doubt as to whether any such rule should be based on equal division of damages or relative degrees of fault and whether the LHWCA should limit the operation of a contribution rule. *Id.* at 286-87.

this warranty is the "essence" of the stevedoring contract, the Court upheld this approach in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*<sup>13</sup> The *Ryan* Court observed that unlike a shipowner's claim for contribution, the indemnity action was not barred by the exclusive liability section of the LHWCA, since such an action was predicated solely upon a duty running directly from the stevedore to the shipowner.<sup>14</sup>

Thus, while the burden of liability ultimately was borne by the party whose default caused the injury, a pattern of circular litigation was established as the norm in longshoremen's personal injury actions. An injured longshoreman could receive compensation from his employer and sue the shipowner for negligence and breach of the warranty of seaworthiness.<sup>15</sup> The shipowner, in turn, could obtain indemnity from the longshoreman's employer based on a breach of the warranty of workmanlike performance whenever the stevedore failed to provide reasonably safe equipment or conduct the stevedoring operations in a reasonably safe manner.<sup>16</sup> Thus, the courts were besieged with longshoremen's personal injury suits and the steve-

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<sup>13</sup> 350 U.S. 124 (1956).

<sup>14</sup> *Id.* at 131-32. The stevedore's agreement to provide stevedoring services was construed to be a "contractual undertaking to stow the cargo 'with reasonable safety' and thus to save the shipowner harmless from [the stevedore's] failure to do so." *Id.* at 130. Since the plaintiff's action was not based upon a joint tortfeasor theory, the *Halcyon* bar to contribution was inapplicable. *Id.* at 133.

Although the *Ryan* indemnity action was challenged as arising only from the employee's injury and, as such, in "hopeless contradiction" with *Halcyon*, see G. GILMORE & C. BLACK, *supra* note 7, at 443; Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity For Equitable Uniformity in Tripartite Industrial Accident Litigation*, N.Y.L.F. 587, 592 (1974), the permissibility of that theory of shipowner recovery remained law until the enactment of the 1972 amendments. See, e.g., *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Rich v. United States*, 177 F.2d 688 (2d Cir. 1949).

<sup>15</sup> 33 U.S.C. § 933(a)(1976); see *Reed v. Steamship Yaka*, 373 U.S. 410 (1963); *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206 (1963); *Morales v. City of Galveston*, 370 U.S. 165 (1962); *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954), *aff'g per curiam Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). See generally George, *Ship's Liability to Longshoremen Based on Unseaworthiness—Sieracki Through Usner*, 3 J. MAR. L. & COM. 45 (1970); Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137 (1963).

<sup>16</sup> *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The stevedore could successfully defend against a shipowner's indemnity suit only where it was able to demonstrate that the shipowner's conduct prevented or seriously handicapped the stevedore in the performance of its service. See *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); *Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974). See generally Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 MICH. L. REV. 539 (1963).

dore often would be held liable for the total amount of damages. In short, the LHWCA was a failure as a workmen's compensation statute.<sup>17</sup>

Various reasons have been offered for the peculiar and at times tortured development of the law regarding longshoremen's personal injury suits.<sup>18</sup> It appears clear, however, that once the Supreme Court adopted the position that no-fault liability for injuries to longshoremen should rest with the shipowner under the warranty of seaworthiness rather than the stevedore-employer under the LHWCA,<sup>19</sup> a further adjustment was necessary because such judicially imposed no-fault liability did not offer the compensating factors which a legislatively established workmen's compensation sys-

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<sup>17</sup> The predominant criticism of such circuitous litigation centered upon the nullifying effect it had on the LHWCA. In enacting the LHWCA, Congress attempted to place the burden of compensation on the stevedore in all cases and the risk of injury on the shipowner only when the shipowner's negligence caused the injury. The Court's decisions shifted the risk in virtually all cases to the stevedore by means of the implied warranty of workmanlike performance. See Stover, *supra* note 16, at 563; Note, *The Injured Longshoreman vs. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk*, 28 HASTINGS L.J. 771, 776 (1977) [hereinafter cited as *The Longshoreman After 1972*]. Other critics of the Ryan-Sieracki line of cases have said that in addition to nullifying the Act, the result was inefficient, unfair, confusing, and caused needless litigation. See Strachan Shipping Co. v. Melvin, 327 F.2d 83, 90 (5th Cir. 1964) (Brown, J., dissenting); Proudfoot, "The Tar Baby": *Maritime Personal Injury Indemnity Actions*, 20 STAN. L. REV. 423, 445 (1968); Shields & Byrne, *supra* note 15, at 1151-52; Comment, *The Stevedore's Duty to Indemnify Shipowners for Injuries to Longshoremen-Employers*, 15 HASTINGS L.J. 530, 530, 565-66 (1964); Comment, *The Longshoremen's and Harbor Workers' Compensation Act of 1972: Half-Way Protection for the Stevedore and the Longshoreman*, 64 MICH. L. REV. 1553, 1569 (1966) [hereinafter cited as *Half-Way Protection*].

<sup>18</sup> Some commentators have attributed the problems to fundamental deficiencies in the LHWCA which have been distorted by judicial interpretation. Proudfoot, *supra* note 17, at 445. Others have cited Congress' inaction, see, e.g., Comment, *Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244, 252 (1975-1976), while one commentator has argued that the problems arose due to the improvident use of contract theory in dealing with what is essentially a tort problem. Proudfoot, *supra* note 17, at 445. Other explanations have ranged from the longshoreman's incentive to sue because of high damage awards, *Half-Way Protection*, *supra* note 17, at 1571, to the use of the indemnity theory to alleviate the financial stress of the shipping industry, *id.*, and the desire to fasten tort liability on third parties connected with a work accident, Theis, *Amended Section Five of the Longshoremen's and Harbor Workers' Compensation Act*, 41 TENN. L. REV. 773, 773 (1974).

<sup>19</sup> The correlation of the stevedore's warranty of workmanlike performance and the shipowner's warranty of seaworthiness is useful in reciting the historical development of third-party liability under the LHWCA. The authors do not intend to suggest, however, that the existence of the warranty of workmanlike performance is necessarily dependent upon the finding of an absolute nondelegable duty on the shipowner or other general contractor. See 2A LARSON, WORKMEN'S COMPENSATION LAW, § 76.43(a), at 14-357 (1972).

tem offered. Although the costs ultimately borne by the stevedore far exceeded what Congress envisioned when the LHWCA was originally enacted, the placement of the burden on the defaulting party gave stevedores and shipowners alike an incentive to adopt procedures which would increase safety within the industry.

#### THE 1972 AMENDMENTS AND THEIR LEGISLATIVE HISTORY

Congress specifically repudiated the application of a no-fault standard of recovery against any party except the stevedore-employer when it enacted the 1972 amendments to the LHWCA.<sup>20</sup> Accordingly, a shipowner is no longer strictly liable to longshoremen for injuries caused by a breach of the non-delegable duties to provide a seaworthy ship or a safe place to work, since such duties have been abolished.<sup>21</sup>

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<sup>20</sup> Section 905(b), as amended in 1972, provides in part:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . 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. . . . 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.

33 U.S.C. § 905(b) (1976).

<sup>21</sup> As amended, § 905(b) expressly provides that a third-party action against the vessel may not be predicated on a breach of the warranty of seaworthiness. 33 U.S.C. § 905(b) (1976). Thus, if the longshoreman now wishes to sue the vessel, he must base the suit on negligence.

The *Ryan* indemnity action also has been explicitly eliminated by the provision that "the employer shall not be liable to the vessel for such damages directly or indirectly." *Id.* The longshoreman's absolute right to compensation from the stevedore-employer remains intact. 33 U.S.C. § 904 (1976). As stated in the House committee report:

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act.



Both the Senate and House committee reports demonstrate that the overriding concern in enacting the 1972 amendments was the fashioning of an effective workmen's compensation scheme which would not only provide injured workers with adequate compensation, but would also give employers a strengthened incentive to provide the fullest measure of on-the-job safety.<sup>22</sup> Additionally, the legislation was intended to diminish substantially the number of third-party actions and thereby provide resources to help finance the generous compensation benefits under the LHWCA.<sup>23</sup> Partly because of these increased compensation benefits, both committees concluded that the imposition of liability without fault on third-party vessels was unnecessary.<sup>24</sup> In addition, the *Sieracki* view that longshoremen are engaged in seamen's work and subject to seamen's risks was emphatically rejected.<sup>25</sup> Similarly, the rationale underlying the *Ryan* indemnity action was found to be inapposite since

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H.R. REP. NO. 1441, 92D CONG., 2D SESS. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4703.

<sup>22</sup> See S. REP. NO. 1125, 92D CONG., 2D SESS. 2 (1972); H.R. REP. NO. 1441, 92D CONG., 2D SESS. 1, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4699. The House committee recognized that longshoring was "one of the most hazardous types of occupations," H.R. REP. NO. 1441, 92D CONG., 2D SESS. 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4705, and expressed concern for the improvement of safety conditions:

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

*Id.* at 4699. The Senate Report reaffirms this intent by emphasizing: "It is the Committee's view that every appropriate means be applied toward . . . a workmen's compensation system which maximizes industry's motivation to bring about such an improvement." S. REP. NO. 1125, 92D CONG., 2D SESS. 2 (1972).

<sup>23</sup> The Senate committee report states:

The committee heard testimony that the number of third party actions brought under the *Sieracki* and *Ryan* line of decisions had increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.

S. REP. NO. 1125, 92D CONG., 2D SESS. 9 (1972). The amendments to the LHWCA also provided for an increase in the maximum weekly compensation of longshoremen from a fixed dollar amount to a percentage of the "national average weekly wage" for the injured worker's occupation. 33 U.S.C. § 906(b) (1976). Thus, benefits rose from \$70 per week to 2/3 of the claimant's average weekly wage, up to \$350.

<sup>24</sup> See S. REP. NO. 1125, 92D CONG., 2D SESS. 9 (1972); H.R. REP. NO. 1441, 92D CONG., 2D SESS. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4703-04.

<sup>25</sup> H.R. REP. NO. 1441, 92D CONG., 2D SESS. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4703-04. The House Committee realized that the rationale for applying the seaworthiness doctrine to seamen did not justify its application to longshoremen. Non-seamen working on a vessel in port are not subject to "the extreme hazards incident to" the employment of seamen, "which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers." *Id.*

“the vessel [would] no longer be liable under the seaworthiness doctrine for injuries which [were] really the fault of the stevedore.”<sup>26</sup>

The committees emphasized, however, that an action could still be maintained against the vessel, although the predicate for such an action could not be the stevedore's or any other party's negligence.<sup>27</sup> Express language in the statute and the legislative history establish that the stevedore would bear the major responsibility for the proper and safe conduct of cargo operations, and its negligence would not provide a basis for shipowner liability.<sup>28</sup> In those cases where neither party was at fault, the stevedore alone

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<sup>26</sup> H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4704. Since the injured longshoreman can only recover from the vessel if the shipowner is negligent, there would be no need to permit the vessel to seek indemnification from the stevedore. The amendment not only prohibited the “implied” indemnity agreement, but also any express agreement since it recognized that shipowners could, by their superior economic strength, require express indemnification provisions. Such a result would be in contravention of the amendment and against public policy. *Id.*

<sup>27</sup> *Id.* In explaining the 1972 Amendments to his colleagues on the House floor, Representative Eckhardt concluded:

Now, if this bill is passed, you wipe out these decisions of a quarter of a century.

You wipe out the non-delegable duty of the ship to protect the worker, and you permit the ship to simply leave the entire job to the stevedoring company . . . .  
118 CONG. REC. 3683 (1972).

The House committee commented on the express language of 905(b) that “no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.” 33 U.S.C. § 905(b) (1976). Congress iterated its intention that the shipowner not be held liable “for the manner or method in which stevedores or employees of stevedores . . . perform their work . . . ; for gear or equipment of stevedores or employees of stevedore . . . whether used aboard ship, or shore . . . or for other categories of unseaworthiness which have been judicially established.” H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4703-04. Furthermore, the House committee report emphasized that the vessel would be held to a standard of care equivalent to land-based standards, rather than a maritime standard of care based on the absolute duty of seaworthiness. *Id.*; see note 21 and accompanying text *supra*.

<sup>28</sup> 33 U.S.C. § 905(b) (1976); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6-7, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4703-04. The LHWCA of 1927 was amended in 1958 “to authorize the establishment of an effective safety program.” H.R. REP. NO. 2287, 85th Cong., 2d Sess., reprinted in [1958] U.S. CODE CONG. & AD. NEWS 3843. As amended, 33 U.S.C. § 941(a) (1976) provides in part:

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injuries to his employees.

would bear the burden of liability by providing compensation benefits and medical care.

With respect to the negligence remedy preserved for longshoremen, the reports and the statute state that this remedy should be governed by land-based theories of liability.<sup>29</sup> Thus, while a longshoreman would enjoy the same rights against third parties as a non-maritime worker, the shipowner would enjoy the same protections as its land-based counterpart.<sup>30</sup> Nonetheless, the committees also specified that this negligence remedy would be a matter of federal law and should therefore be nationally uniform.<sup>31</sup>

Out of this legislative history five principles evolve. First, the most important consideration is the improvement of safety conditions in the longshoring industry. Second, this compensation scheme can, if properly applied, serve as an effective means to fulfill the congressional goal of increased safety. Third, the only party subject to liability regardless of fault is the stevedore-employer. Fourth, the primary responsibility for providing safe working conditions rests with the stevedore-employer. Fifth, the vessel or other third party must exercise reasonable care, just as a land-based person must in providing a safe place to work.<sup>32</sup>

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<sup>29</sup> 33 U.S.C. § 905(b) (1976) provides that "[t]he liability of the vessel . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." Additionally, the House report states that it was Congress' intent "not to endow [the longshoreman] with any special maritime theory of liability . . . such as 'unseaworthiness.'" H.R. REP. No. 1441, 92d Cong., 2d Sess. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4703.

<sup>30</sup> H.R. REP. No. 1441, 92d Cong. 2d Sess. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4703.

<sup>31</sup> The Senate committee report states:

[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

S. REP. No. 1125, 92d Cong., 2d Sess. 12 (1972).

<sup>32</sup> The Occupational Safety and Health Administration (OSHA), the governmental agency charged with enforcing the Safety and Health Regulations for Longshoring promulgated under 33 U.S.C. § 941(a), recently commissioned a study of the causes of accidents arising out of stevedoring operations. See COOPER & CO., *A CAUSAL STUDY OF ACCIDENTS IN THE LONGSHORING INDUSTRY AND OSHA'S EFFECTIVENESS* (1975). The study made the following findings:

The industry itself has a number of unique and special problems which virtually make OSHA's tasks almost insurmountable. The industry's difficulties and special characteristics are not often quoted: 'special material handling gear, casual labor and highly hazardous and changing workplace.' The special problem in this industry are its well documented inordinantly poor industrial relations complicating effective supervision of work, a long inbred tradition of doing things unsafely

## JUDICIAL INTERPRETATION OF THE AMENDMENTS

In accordance with the clear congressional intent to eliminate longshoreman's actions based on unseaworthiness, each court of appeals which has confronted the issue has clearly stated that third-party actions brought by persons covered under the LHWCA can no longer be predicated on any species of the non-delegable duty to provide a safe place to work.<sup>33</sup> The more difficult task devolving upon the courts since 1972, however, has involved determination of the respective duties of the shipowner and the stevedore. Clearly, where a duty is improperly ascribed to the shipowner, not only is liability unfairly imposed but, more importantly, the compensation scheme no longer serves to prod the employer to adopt and enforce precautions which would avoid future accidents of a similar type.<sup>34</sup> Accordingly, this delineation must be accomplished with proper regard for the congressional finding that the primary responsibility for providing a safe place to work is on the stevedore-employer and the congressional desire to utilize the compensation scheme as an effective incentive to improve the safety conditions in the longshoring industry.<sup>35</sup>

In view of the congressional direction to develop a law of negligence which is at once land-based and nationally uniform, the courts have looked to the *Restatement (Second) of Torts (Second Restatement)* for guidelines and principles.<sup>36</sup> Indeed, several courts

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and accepting it, a serious problem of alcoholism and a number of economic incentive factors which mitigate against improvement and safety.

.....  
Ultimately the longshoring industry's problems will only be solved when the industry, its unions and even OSHA stop projecting the blame for safety problems on the other parties and begin to seriously cooperate in hazard reduction.

The most likely area for such increased cooperation is in improving the quality of attitudes and skills of first line supervisors as a means of reducing the proliferation of unsafe procedures contributing to accidents.

*Id.* at 1-3. Supported by extensive research, these conclusions dramatically demonstrate the wisdom of the express provision in the statute that the longshoreman cannot recover against the shipowner for injuries caused by the stevedore's negligence.

<sup>33</sup> See, e.g., *Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir*, 570 F.2d 449 (2d Cir. 1978) (per curiam); *Wescott v. Impresas Armadoras, S.A., Panama*, 564 F.2d 875 (9th Cir. 1977); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Bess v. Agromar Line*, 518 F.2d 738, 742 (4th Cir. 1975).

<sup>34</sup> A stevedore has no incentive to remedy a defect or improve safety conditions unless it either profits directly or is saved the expense of paying damages in the event of injury. See, e.g., *The Longshoreman After 1972*, supra note 17.

<sup>35</sup> See note 28 supra.

<sup>36</sup> The most frequently cited sections of the *Second Restatement* are 343 and 343A.

Section 343 states that a possessor of land is liable for injuries incurred by his invitees due to a condition on his land if he:

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

RESTATEMENT (SECOND) OF TORTS § 343 (1965). Section 343A states:

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

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

RESTATEMENT (SECOND) OF TORTS § 343A (1965).

As one commentator has noted: "These sections impose a duty of reasonable care on a possessor of land if he has or should have knowledge of the danger. But the duty of care is removed if the land possessor can expect that his invitees will notice the danger." *The Longshoreman After 1972*, *supra* note 17, at 779; *see, e.g., Wiles v. Delta S.S. Lines, Inc.*, 574 F.2d 1338 (5th Cir. 1978) (*per curiam*); *Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1489 (1978); *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, Panama 540 F.2d 757 (4th Cir. 1976) (*per curiam*), *cert. denied*, 429 U.S. 1098 (1977).

In addition to §§ 343 and 343A, various courts have relied upon those provisions of the Second Restatement which concern liability for the acts of independent contractors. Sections 409 to 414 of the *Second Restatement* provide:

§ 409. Except as stated in §§ 410-429 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.

§ 410. The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

§ 411. An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

§ 412. One who is under a duty to exercise reasonable care to maintain land or chattels in such 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.

§ 413. One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

have adopted the *Second Restatement* as the appropriate standard by which to judge the shipowner's liability.<sup>37</sup> It should be emphasized, however, that the congressional reference to land-based law was intended primarily to prevent the expansion of the vessel's liability to an extent which might approximate the no-fault standards of the seaworthiness warranty.<sup>38</sup> Accordingly, land-based principles, as evidenced by the *Second Restatement*, should only be adopted when they comport with the congressional finding that the primary duty for providing a safe place to work rests with the stevedore-employer.<sup>39</sup> The ensuing examination of the various federal courts of appeals' decisions reveals that, with some notable exceptions, the general approach has been to analyze the propriety of liability in each case with primary emphasis on this congressional intent.

In *Bess v. Agromar Line*,<sup>40</sup> the plaintiff was injured aboard the defendant's vessel while participating in the loading operation conducted by his employer.<sup>41</sup> Noting the express abolition of the unseaworthiness remedy in the 1972 amendments to the LHWCA, the *Bess* court concluded that the amendments "preclude an action based upon the non-delegable duty to provide a safe place to work or a breach thereof."<sup>42</sup> The lower court's dismissal of the case was affirmed, because the unsafe condition which caused the injury was "the result of the loading process which was under the sole control

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(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

§ 414. One who entrusts work to an independent contractor but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

RESTATEMENT (SECOND) OF TORTS §§ 409-414 (1965); see, e.g., *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977); *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103 (4th Cir. 1977).

<sup>37</sup> See, e.g., *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F.2d 757, 759 (4th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1098 (1977); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092, 1097-98 (D. Md. 1975); *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 646 (N.D. Cal. 1974). See generally *The Longshoreman After 1972*, supra note 17.

<sup>38</sup> *Lucas v. "Brinknes" Schiffarhts Ges.*, 379 F. Supp. 759, 767-68 (E.D. Pa. 1974) (3-judge court); see note 27 supra.

<sup>39</sup> See *id.*

<sup>40</sup> 518 F.2d 738 (4th Cir. 1975).

<sup>41</sup> *Id.* at 739. The plaintiff in *Bess* was injured when he stepped into a space between bales which had been previously stowed by his longshore gang. *Id.* at 740. The plaintiff had allegedly requested dunnage from his supervisor so that the tiers of cargo could cover over a flat work surface provided. *Id.* at 739.

<sup>42</sup> *Id.* at 741-42.

of the independent stevedoring contractor."<sup>43</sup>

While the fourth circuit in *Bess* refused to rest liability on the doctrine of seaworthiness, language in the court's opinion did suggest that, had the defendant-shipowner known of the unsafe condition, a different determination might have resulted.<sup>44</sup> Later deci-

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<sup>43</sup> *Id.* at 742. The fourth circuit has dealt with the issue of the shipowner's liability in several cases decided subsequent to *Bess*. In *Butler v. O/Y Finnlines Ltd.*, 537 F.2d 1205 (4th Cir.), *cert. denied*, 429 U.S. 897 (1976), the court recognized that when the vessel's personnel interfered with the cargo operations and asserted direct control over the method utilized by the stevedore, the shipowner was under a duty to avoid acting in a negligent manner. In *Edmonds v. Compagnie Generale Transatlantique*, 558 F.2d 186 (4th Cir. 1977), *modified on other grounds on rehearing en banc*, 577 F.2d 1153, *cert. granted*, 47 U.S.L.W. 3310 (Nov. 7, 1978), the court, *inter alia*, affirmed the district court's grant of a new trial based on a charge which could have been construed as imposing a non-delegable duty on the shipowner to ensure that cargo was loaded properly by an outport stevedore. 558 F.2d at 190. In *Edmonds*, the plaintiff was injured in the course of discharging operations when he stepped behind a container which then rolled backwards. The plaintiff alleged that his injury was caused by the loading stevedore's failure to set the container's air brakes. *Id.* at 189-90. The court reasoned:

The stowage of the cargo at Rotterdam was under the exclusive control of the Dutch stevedore. There was no evidence of knowledge on the part of the defendant of any dangerous condition, nor that, in the exercise of ordinary care, such knowledge should have been acquired.

*Id.* at 190. Since the instruction that the shipowner had a duty to see "that the cargo is properly stowed," *id.* n.4, could have been construed as imposing a non-delegable duty to provide a safe place to work, the court found that the district judge had not abused his discretion in setting aside the first verdict for the plaintiff. *Id.* at 190.

In *Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978), the fourth circuit affirmed a jury verdict for the defendant shipowner. On appeal, the plaintiff claimed that the jury charge was erroneous because the trial judge failed to instruct that the shipowner had a duty to provide a reasonably safe place to work or that the jury should evaluate the conduct of the shipowner in light of the Safety and Health Regulations for Longshoring. In addition, the plaintiff claimed that the trial judge should have, but did not, apply the standards enunciated in §§ 343A, 413 and 416 of the *Restatement (Second) of Torts*, at 1076-79.

As to the first objection, the fourth circuit found that the jury was properly instructed that the shipowner had a duty to exercise ordinary care to provide persons working aboard with a reasonably safe place to work. The court specifically found that the charge espoused by the plaintiff would contravene the congressional intent underlying the 1972 amendments. *Id.* at 1077. So too, the plaintiff's contention regarding § 343A of the *Second Restatement* was disposed with because such a charge would conflict with the congressional intent underlying the amendments when the condition was created by the longshoring operation which was under the control of the stevedore. Repeating the *Riddle* court's analysis of § 343A, the court in *Chavis* found that this *Restatement* section is inapposite to any case under the LHWCA whenever the "stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard worker." *Id.* at 1080 (quoting *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1107 (4th Cir. 1977)). Sections 413 and 416 of the *Second Restatement* were also found inapplicable under the LHWCA because they represent a standard of vicarious liability which is not available to the employee of the independent contractor. 576 F.2d at 1081.

<sup>44</sup> 518 F.2d at 742 & n.9.

sions by the fourth circuit served to buttress this inference,<sup>45</sup> but it was not until the court's decision in *Anuszewski v. Dynamic Mariners Corp., Panama*,<sup>46</sup> that the question was squarely presented. In *Anuszewski*, two longshoremen were injured when a hatch cover support beam fell into the hold in which they were working.<sup>47</sup> Knowledge of this condition was presumed on the part of the shipowner because a crew member was present during the stevedoring operations to prevent pilferage.<sup>48</sup> Nonetheless, the fourth circuit affirmed the district court's use and interpretation of section 343 of the *Restatement (Second) of Torts* in holding that it was reasonable for the shipowner to have expected that the longshoremen would discover the unsafe condition and protect themselves by correcting it. Observing that the condition was open and obvious and not one which the longshoremen "invitees" were required to face despite knowledge, the court found that these longshoremen had been injured by the negligence of the stevedore who had control of the premises and not by any actionable negligence on the part of the shipowner.<sup>49</sup>

Thereafter, in *Riddle v. Exxon Transportation Co.*,<sup>50</sup> the court analyzed the shipowner's liability in light of section 409 of the *Second Restatement*, which absolves employers from liability for acts or omissions of independent contractors.<sup>51</sup> Although the *Second*

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<sup>45</sup> See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 558 F.2d 186, 189 (4th Cir. 1977), modified on other grounds on rehearing en banc, 577 F.2d 1153 (4th Cir.), cert. granted, 47 U.S.L.W. 3310 (Nov. 7, 1978).

<sup>46</sup> 540 F.2d 757 (4th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1098 (1977).

<sup>47</sup> 540 F.2d at 758. Although the presence of the beam was an unsafe condition which previously had been complained of to the stevedoring foreman, the situation had not been remedied by the day of the accident. *Id.*

<sup>48</sup> 391 F. Supp. 1143, 1145 (D. Md. 1975), *aff'd*, 540 F.2d 759 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977).

<sup>49</sup> 391 F. Supp. at 1148.

<sup>50</sup> 563 F.2d 1103 (4th Cir. 1977).

<sup>51</sup> *Id.* at 1113. Section 409 of the *Second Restatement* provides that "[e]xcept as stated in §§ 410-429, 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." *RESTATEMENT (SECOND) OF TORTS* § 409 (1965). Plaintiff Riddle was injured in an explosion aboard the defendant's vessel, which was being repaired by the plaintiff's employer. 563 F.2d at 1106-07. Discussing the *First Restatement*, the court found that under the traditional rule a shipowner did not owe a duty to warn the employees of independent contractors of dangerous conditions which are open and obvious. *Id.* at 1110-11. In light of sections 343 and 343A of the *Second Restatement*, however, the court noted that there has been some movement away from the traditional rule and observed that there was authority for the proposition that a shipowner might be liable for injuries resulting from open and obvious dangers when he should have realized that the plaintiff would not be protected despite his knowledge or the obviousness of the condition. 563 F.2d at 1111. The court concluded, however, that the



*Restatement* provides twenty exceptions to this rule,<sup>52</sup> the court summarily found that the great bulk of these exceptions were inapplicable to third-party actions under the LHWCA since they are based on a theory approximating non-delegable duty. The court also rejected the contention that the retention of a right to inspect the stevedore's work would be sufficient to impose a duty upon the shipowner to closely supervise the stevedore's work and ensure the safety of the longshoremen.<sup>53</sup> Accordingly, the court concluded that "where the dangerous condition resulting in injuries to a longshoreman or ship repair worker was due to the negligence of the stevedore or shipyard, without the knowledge or participation of the shipowner, the latter [is] not liable."<sup>54</sup>

The *Riddle* court relied heavily on an earlier decision by the third circuit in *Hurst v. Triad Shipping Co.*<sup>55</sup> In a comprehensive discussion, the *Hurst* court reviewed the applicability of sections 343-343A of the *Restatement (Second) of Torts* in the context of the longshoreman's negligence remedy against the shipowner. The court held that sections 343 and 343A could not be relied on since their application would "create a duty in the shipowner to apprise himself of, to warn the longshoremen of and to protect them from dangerous features of the independent contractor's—*i.e.* the stevedore's—activity."<sup>56</sup> Such a duty would render nugatory "the *Restatement* sections dealing with employer control over the activity of independent contractors, §§ 409-29."<sup>57</sup> As a result, the *Hurst* court held that the shipowner was not required to supervise the stevedore and detect the dangerous condition of a cargo hook used to discharge the vessel. Characterized as a variation on the theme of non-delegable duties, this duty was found to have been abolished

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modern rule still would not impose liability upon a vessel for open and obvious dangerous conditions,

[w]hether existing at [the] time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard worker.

*Id.* at 1112.

<sup>52</sup> 563 F.2d at 1113; see note 36 *supra*.

<sup>53</sup> 563 F.2d at 1113. The plaintiff contended that RESTATEMENT (SECOND) OF TORTS § 414 (1965) required the imposition of a duty to supervise when the shipowner retained the right to stop and inspect the work. See note 36 *supra*.

<sup>54</sup> 563 F.2d at 1115.

<sup>55</sup> 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977).

<sup>56</sup> 554 F.2d at 1249-50 & n.35.

<sup>57</sup> *Id.* at 1250 n.35.

by section 905(b).<sup>58</sup> Instead, the third circuit chose to apply section 409 of the *Second Restatement*, and observed:

[T]his general rule well expresses the Congressional concern for the practical operation of the Longshoremen's Act: shipowners shall not be liable in damages for acts or omissions of stevedores or employees of stevedores. . . . Therefore, unless one of the recognized exceptions, §§ 410-29 to the general rule that the employer of the contractor has no duty applies, our application of § 409 means that [the defendant] cannot be held liable for the stevedore's unsafe method of operation in this case.<sup>59</sup>

The court also rejected the applicability of sections 416 through 429, since these exceptions to the general rule of nonliability for independent contractor's acts are not predicated upon the negligence of the employer, but rather are rules of vicarious liability imposing non-delegable duties.<sup>60</sup> Finally, the court concluded that the shipowner's retention of the right to stop and inspect the work is not sufficient to charge the vessel with liability for the stevedore's improper and unsafe methods of operation.

In contrast to the third and fourth circuits, the fifth circuit has had little difficulty in construing sections 343 and 343A in favor of shipowner nonliability. In *Gay v. Ocean Transport & Trading Ltd.*,<sup>61</sup> the court refused to hold the shipowner liable in two separate suits concerning injuries sustained by longshoremen as a direct result of their employers' negligence in failing to properly ventilate the hold and failing to adequately secure pallets on the ship's deck. In the former case, the court held that the 1972 amendments required dismissal, since the plaintiff's claim was based upon the theory that the vessel had a duty to provide a safe place to work, a concept

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1250. The first circuit in *Anderson v. Iceland Steamship Co.*, 525 F.2d 1142 (1st Cir. 1978), adopted a position closely analogous to that of the third circuit in *Hirsch*. In *Anderson*, the court reversed the denial of a directed verdict and dismissed the complaint on appeal of a longshoreman/checker who claimed to have slipped on fish gurry on the pier in the vicinity of the vessel during discharge operations. The first circuit expressly reserved decision on whether §§ 343, 343A of the *Second Restatement* are applicable to longshoremen's personal injury cases under the 1972 Amendments. The court did find, however, that §§ 409-415, of the *Second Restatement* dealing with the liability of an employer of an independent contractor were relevant to the longshoreman/shipowner/stevedore situation. The court held that § 414A, which was the most favorable section to the plaintiff's cause, did not permit a finding of liability since "there was no showing of any duty on the vessel to be aware of and correct dangerous conditions existing for approximately two days on the dock."

<sup>60</sup> 554 F.2d at 1250-51.

<sup>61</sup> 546 F.2d 1233 (5th Cir. 1977).

specifically negated by the amendments.<sup>62</sup> In the latter situation, dismissal was ordered notwithstanding a crewmember's knowledge of the unsafe condition, since the stevedore had both created the condition and failed to remedy it. Although the court's decision in *Gay* was premised upon the fact that the plaintiff was not required to face the danger despite knowledge,<sup>63</sup> a different result did not obtain in a later decision by the same court where the hazard was unavoidable. In *Hess v. Upper Mississippi Towing Corp.*,<sup>64</sup> a barge which the plaintiff's employer had contracted to free of gas exploded while he was working on board. The court found that the dangerous gas condition was known to all parties, but that "the plaintiff . . . was 'the person best able to appreciate the potential consequences of the danger.'"<sup>65</sup>

Unlike the other courts of appeals which have been discussed, the ninth circuit has not seen fit to apply or even refer to the standards set out in the *Second Restatement*. Rather, that court has emphasized the degree of knowledge and control of the shipowner,

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<sup>62</sup> *Id.* at 1239.

<sup>63</sup> *Id.* at 1242.

<sup>64</sup> 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 489 (1978).

<sup>65</sup> 559 F.2d at 1034 (quoting *Brown v. Mitsubishi, Shintaku Ginko*, 550 F.2d 331, 334 (5th Cir. 1977)). It should be noted that the fifth circuit has continued to utilize § 343A, with results which are in accord with *Anuszewski* and *Hurst*. See, e.g., *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977), wherein the court held that the safety and health regulations applicable to stevedoring operations, 29 C.F.R. § 1918.2 (1977), placed the responsibility for compliance on the stevedore-employer, and that a breach of those regulations could not be used as a predicate for the imposition of liability on a shipowner-defendant. 550 F.2d at 333. Moreover, the court held that there was no duty owed by the ship to the plaintiff even assuming that the dangerous condition which caused the injury was known to the shipowner. *Id.* at 333-34. Relying heavily on *Gay*, the court stressed that the dangerous condition was created by the stevedore's employees and it was therefore these employees who were in the best position to abate the danger. *Id.* at 334. Applying §§ 343 and 343A, the court concluded that when these two factors were considered along with the plaintiff's own awareness of the hazard and his personal control over it, this was not the type of danger which must be faced despite knowledge. 550 F.2d at 334-35.

In *Briley v. Charente S.S. Co.*, 572 F.2d 498 (5th Cir. 1978), the court, following *Gay* and *Brown*, found that the injury was caused solely by the stevedore's negligence because the condition was known to the plaintiff, and, regardless of knowledge by ship's personnel, the stevedore's employees were in the best position to correct the danger but refused to do so. *Id.* at 499-500. In *Wiles v. Delta S.S. Lines, Inc.*, 574 F.2d 1338 (5th Cir. 1978), the court reversed and remanded a case in which judgment had been entered for the shipowner after a non-jury trial because the trial court had not considered § 343A of the *Second Restatement*. *Id.* at 1339. Finally, in *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), a case involving a latent defect known to the ship's personnel and some of the longshoremen, but not the plaintiff, the court affirmed a jury verdict for the plaintiff. The court found that there was ample evidence to support the jury's conclusion that the shipowner knew of the dangerous condition, failed to either warn or alleviate it and should have realized that the longshoreman would not discover or realize the danger. *Id.* at 886.

stevedore and longshoreman. While the ninth circuit has not chosen to rely on the *Second Restatement*, its decisions have been consistent with those of the other circuits. In *Wescott v. Impresas Armadoras S.A. Panama*,<sup>66</sup> for example, the court followed the fifth, fourth and third circuits in proclaiming that "the vessel owner owes no duty to protect or to warn the stevedoring company or its employees against dangerous conditions in their equipment arising in the course [of] performing their contractual duties on board the ship."<sup>67</sup> Similarly, in *Davison v. Pacific Inland Navigation Co.*,<sup>68</sup> the court reversed a denial of a directed verdict for the shipowner because there was ample evidence of negligence on the part of the stevedore and no evidence that the injury was "attributable to any act or omission of" the shipowner.<sup>69</sup> In *Davison*, the plaintiff longshoreman was injured while he was engaged in discharging a cargo of urea. The stevedore-employer was shown to have had firsthand knowledge of the dangers incident to the discharge of this type of cargo and control over the method of discharge utilized, while the shipowner had no knowledge of the possible safety hazards.<sup>70</sup> As a result, the court concluded:

For this court to uphold plaintiff's verdict and ignore the fact that [the stevedore] had control of the unloading process, had knowledge of the nature and attendant dangers of the cargo, and by proper unloading techniques [the stevedore] could have prevented the injury to Davison is to ignore the proximate cause of this accident.<sup>71</sup>

It is apparent that the consistent philosophy and uniformity of result in the decisions of the various courts of appeals have been reached via divergent routes. The fifth and fourth circuits have approved the use of section 343 of the *Second Restatement*. Section 343A has been adopted by the fifth circuit, discussed and questioned by the fourth circuit and rejected by the third circuit. So too, section 409 has been recognized by the third circuit as the generally applicable standard in longshoreman's personal injury suits; a conclusion concurred in by the fourth circuit but apparently not by the fifth circuit. The ninth circuit has expressly reserved decision on the

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<sup>66</sup> 564 F.2d 875 (9th Cir. 1977).

<sup>67</sup> *Id.* at 883 (quoting *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1251-52 (3d Cir. 1977)).

<sup>68</sup> 569 F.2d 507 (9th Cir. 1978).

<sup>69</sup> *Id.* at 509 n.1.

<sup>70</sup> *Id.* at 513.

<sup>71</sup> *Id.* at 514.

applicability of these sections, focusing instead on the knowledge and control of the stevedore.

Thus, the *Second Restatement* provisions, originally invoked to foster uniformity of decision, have led to at least a technical division of the circuits. These provisions have been read and applied in light of the legislative history, however, to the effect that the shipowner may reasonably rely on the stevedore to remedy and warn against dangers within its knowledge and control. Moreover, the courts have recognized the intent of Congress to place the duty of care on the party best able to prevent the accident. Consequently, there should be no recovery against a vessel when the longshoreman's injuries are caused by the stevedore's negligence in the conduct of its operation or in failing to alleviate dangerous conditions which are or should be known by the stevedore and are within its control.

More than a mere technical inconsistency, however, obtains within the second circuit. Initially, in *Napoli v. Hellenic Lines, Ltd.*,<sup>72</sup> the court held that a longshoreman, who was required by his job to work on snow-covered plywood, apparently placed on deck by the ship's crew, could pursue an action for negligence against his employer who was both the shipowner and stevedore. The *Napoli* court reversed a verdict for the defendant on the ground that the trial court had erroneously charged the jury that if it found the condition was known to the plaintiff it should return a verdict in favor of the defendant. The court relied on section 343A of the *Second Restatement* in reaching this conclusion, stating that "a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore."<sup>73</sup> The *Napoli* court added in dicta, however, that "[u]nder

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<sup>72</sup> 536 F.2d 505 (2d Cir. 1976).

<sup>73</sup> *Id.* at 508. Since the shipowner was acting as its own stevedore, the court did not consider principles of law regarding independent contractors. For this reason, several later decisions limited *Napoli* to its special facts. See, e.g., *Cox v. Flota Merchante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 841 (2d Cir. 1977). The House Report, H.R. REP. 1441, 92d Cong., 2d Sess. 1, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, seems to indicate that it was the intent of Congress that a longshoreman employed directly by the ship not be prevented from bringing suit against his employer. His rights "should not depend on whether he was employed directly by the vessel or by an independent contractor." *Id.* at 7,4705; see Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447, 477-78 (1976), wherein the author states that the language of the House committee report, together with that of § 905(b), clearly indicates Congress' intent that "the longshoreman employee of a stevedore/shipowner have a tort action provided the negligence that hurt him was of non-longshoring personnel." *Accord*, *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir.

this rule, a vessel is liable to longshoremen only for injuries resulting from obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid.”<sup>74</sup>

In contrast, in *Munoz v. Flota Merchante Grancolumbiana, S.A.*,<sup>75</sup> the same court recognized that a shipowner may reasonably rely on the stevedore to take adequate precautions to prevent the creation of latent dangers during loading and unloading and to rectify those that do exist. Reading sections 343 and 343A of the *Second Restatement* in light of the express intent of Congress that the shipowner not be held responsible for the negligence of the independent stevedore,<sup>76</sup> the court stated:

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1977). *But see* *Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030, 1034 (5th Cir. 1977), wherein the court appears to interpret § 905(b) as barring the longshoreman employed directly by the vessel from bringing a negligence action against the shipowner.

<sup>74</sup> 536 F.2d at 509. The court stated further that use of this standard would not constitute a departure from the direction of Congress that principles of negligence rather than strict liability should apply. *Id. But see* *Cox v. Flota Merchante Grancolumbiana, S.A.*, 577 F.2d 798 (2d Cir. 1978). The court also required that the plaintiff offer evidence sufficient to show that his “attention [would] be distracted” or his duties as an employee require[d] his unavoidable exposure to [the condition].” 536 F.2d at 508. As support for this approach, the court cited § 343A of the *Restatement (Second) Torts*, see note 36 *supra*, which would relieve the possessor of land from liability for obvious dangers, unless he “should anticipate the harm despite such knowledge or obviousness.” When read together with comment (f) of this section, however, the strict application of this formula to shipowner/longshoreman actions does not appear to be warranted. The several examples given by the commentator to illustrate application of this principle concern such persons as store customers who could conceivably be distracted by displays designed specifically for that purpose, and customers who leave supermarkets carrying large packages which may block their view of potential hazards. None of the examples given pertains to an invitee in a position analogous to that of the longshoreman—someone whose chosen occupation often demands his presence in dangerous situations, and whose work requires a particular expertise. It does not seem logical that the shipowner, who has contracted with the stevedore to have expert work performed on his ship, can reasonably anticipate that the latter’s employee will “forget [the dangers] he has discovered.” *RESTATEMENT (SECOND) OF TORTS* § 343A, Comment f (1965). The commentator also suggests that the possessor of land may be liable if he believes that the invitee will encounter the danger because he reasonably believes the advantages of doing so appear to outweigh the apparent risk. *Id.* It is submitted that it is unrealistic to expect the shipowner to assume that the independent contractor would order his men to continue working under conditions that constitute violations of the OSHA Safety and Health Regulations for Longshoring. *See* *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Gay v. Ocean Transp. & Trading Corp.*, 546 F.2d 1233 (5th Cir. 1977); note 124 *infra*.

<sup>75</sup> 553 F.2d 837 (2d Cir. 1977).

<sup>76</sup> *Id.* at 841. The court was of the opinion that charging the shipowner with the negligence of the stevedore would destroy the stevedore’s incentive “to monitor unsafe procedures,” *id.*, since under the LHWCA the stevedore is now immune from indemnity suits brought against him by the shipowner. *Id.*

This view is supported by further comments on the standard of care made by Chief Judge Kaufman:

Shipping companies engage stevedores to load and unload goods from their ships

It would, in our view, contravene the clear congressional intent and scheme to approve recovery against Grancolumbiana in this case. The shipowner had no duty to supervise the minute details of work totally entrusted to the competence of the stevedore. Indeed, commercial reality and applicable union regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship.<sup>77</sup>

That the principles of *Munoz* were not limited to cases of latent defects was demonstrated by the court in *Hickman v. Jugoslavenska Linijska Plovidba Rijeka "Zvir"*.<sup>78</sup> The *Hickman* court held that actual notice of an allegedly dangerous condition was insufficient to impose any duty upon the shipowner.<sup>79</sup> The court further stated:

The dichotomy of latent and obvious defects referred to in the cases is not always controlling or pertinent in determining the liability of the shipowner.

. . . .  
 . . . Since the loading operation was not under the control of the shipowner, the mate had no right to interfere with the loading.  
 . . . He had a right to rely upon the expertise of the steve-

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because the work requires unusual expertise. In addition, the regulations of the International Longshoremen's Association prohibit crew members of foreign flag ships . . . from performing this type of labor.

*Id.* at 838. In *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977), the second circuit extended the *Munoz* rule to cover a condition created by an outport stevedore, holding that the shipowner could not be liable on a theory of constructive notice of a space in the stow placed there by an independent contractor. *Id.* at 862-63.

<sup>77</sup> 553 F.2d at 840-41. The stevedore, Universal Maritime Services (UMS), had contracted with the defendant-shipowner to load and unload goods, a task which requires "unusual expertise." *Id.* at 838. *Munoz*, employed by UMS, was ordered to work in the hold. He attempted to reach the hold via hatch no. 3, but could not because the forward escape hatch was blocked by cargo. He took an alternate route which required him to use a pathway from which he fell. *Id.* Since the stowing of the cargo in the lower hold was the duty of UMS and the pathway had been built in order to facilitate the longshoremen's work, the court stated that it "would be remiss in [its] duty . . . if [it] required the owner to pay for the stevedore's negligence." *Id.* at 841. It would appear that the crowded condition created by the work crew constituted a violation of the OSHA Safety and Health Regulations for Longshoring, in particular, 29 C.F.R. § 1918.21(i) (1977). That section provides in pertinent part that "the means of access shall be so located that drafts of cargo do not pass over it. In any event loads shall not be passed over the means of access while employees are on it." It should be noted further that the regulations specifically provide that "[t]he responsibility for compliance with the requirements of this part is placed upon 'employers.'" *Id.* § 1918.2(a).

<sup>78</sup> 570 F.2d 449 (2d Cir. 1978) (per curiam).

<sup>79</sup> *Id.* at 451. The *Hickman* court held that, inasmuch as the shipowner had not contracted to supply dunnage, "it was the stevedore who was responsible for the safety of the longshoremen and it was his duty to supply [the] dunnage." *Id.* at 452; see *Bess v. Agromar Line*, 518 F.2d 738 (4th Cir. 1975); *Citizen v. M/V Triton*, 384 F. Supp. 198 (E.D. Tex. 1974); *Fedison v. Vessel Wislica*, 382 F. Supp. 4 (E.D. La. 1974).

dore. . . . The longshoremen were acutely aware of the condition and the stevedore, their employer, was in the best position to remedy the same.<sup>80</sup>

After *Hickman*, the law in the second circuit seemed to be developing in a manner consistent with the other circuits. Longshoreman injuries caused by improper stevedore activities were not the responsibility of the shipowner. *Munoz*, in its citation of decisions from other circuits, seemed to recognize that this principle applied even when the shipowner knew of the dangerous condition, since it is the stevedore which bears the primary responsibility for conducting safe operations and is in the best position to rectify dangerous conditions within the longshoremen's work area. *Napoli* seemingly was limited by *Munoz* and *Hickman* to dangerous conditions which were not only open and obvious, but also within the shipowner's control, and not of the stevedore's making. Finally, while the second circuit initially placed great reliance on the *Restatement (Second) of Torts*,<sup>81</sup> the court thereafter demonstrated little concern for adherence to its principles. Rather, the *Munoz*, *Ruffino* and *Hickman* panels analyzed the relationship of the stevedore and shipowner, concluding in each instance that the shipowner was not at fault because the stevedore's expertise and control justified the vessel's reliance and precluded the vessel's interference.

Two weeks after the decision in *Hickman*, however, the second circuit handed down the first in a series of controversial and contradictory opinions. In *Lubrano v. Royal Netherlands S.S. Co.*,<sup>82</sup> the court, over a vigorous dissent by Judge Moore, reversed and remanded a directed verdict for the shipowner, finding that the evidence presented could support the conclusion that a ship's officer, after notification of a dangerous condition, directed the longshoremen to work or affirmatively joined in the stevedore's direction that the work should continue.<sup>83</sup> Such action by the officer would, ac-

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<sup>80</sup> 570 F.2d at 451-52 (citation omitted). The court explicitly stated that the dangerous condition had been created by the negligence of the stevedore in improperly loading the ship and, despite its knowledge of the condition, failed to remedy it. *Id.* at 452.

<sup>81</sup> See *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976).

<sup>82</sup> 572 F.2d 364 (2d Cir. 1978).

<sup>83</sup> *Id.* at 367. Lubrano claimed that his injury was caused by the absence of dunnage. *Id.* at 369. On the day of his accident, Lubrano was assisting in the stowage of "greasy drums of tallow in the hold of defendant's vessel." During the course of this loading, it became apparent that there was insufficient dunnage to cover the greasy cargo. *Id.* The members of the gang allegedly complained to the hatch boss and stevedore foreman. These men then informed the ship's officer because the ship had contractually agreed to supply dunnage to the stevedore. *Id.* The officer attempted to procure additional dunnage but before it was available



ording to the majority, present a jury question of shipowner liability under section 343A of the *Second Restatement*.<sup>84</sup>

In his dissent, Judge Moore found that the majority's interpretation was factually unsound and legally unacceptable. Citing as a "factual error" the majority's assumption that the shipowner retained power to direct the stevedore's employees, Judge Moore concluded that the majority's result was contrary to post-amendment law.<sup>85</sup> It was this "contrary-to-fact assumption," he reasoned, which resulted in the majority's "holding that a shipowner, having . . . relinquished the control to the independent contractor, must stand by to countermand the stevedore's directions lest it be charged with joining in."<sup>86</sup> The dissent also criticized the majority's use of section 343A, noting that this section must be read in light of the congressional intent underlying the 1972 Amendments.<sup>87</sup>

Following *Lubrano*, the second circuit once again, in a unanimous opinion written by Judge Moore, attempted to free itself of the restraints necessarily imposed by sections 343 and 343A of the

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plaintiff slipped and fell while working on top of the first tier of drums. *Id.* at 365. The critical factual dispute concerned the reaction of the ship's officer to the news that the longshoremen needed additional dunnage. The hatch boss had testified, somewhat inconsistently, that the officer had told them to "wait" and that the stevedore and ship owner had told him "to do the best we can until we get something that we could work with," a phrase the *Lubrano* majority interpreted as indicating that the officer had directed the men to work or had affirmatively joined in the stevedore's decision. *Id.* at 367.

<sup>84</sup> *Id.* The question to be presented to the jury was whether the vessel, through its officer, had ordered the work to proceed notwithstanding the knowledge of the dangerous condition. If the jury answered in the affirmative, the vessel would be liable for its negligent failure to prevent the injury which it should have anticipated. *Id.*

<sup>85</sup> *Id.* at 369 (Moore, J., dissenting). Judge Moore criticized the majority for its implied determination that the shipowner, if in fact an officer had ordered the work to continue, had any authority to so direct the longshoremen. *Id.* (Moore, J., dissenting). He was of the opinion that such a finding would require that a shipowner oversee the operations and exercise control of the work or be charged with responsibility for the stevedore's improper directions. *Id.* (Moore, J., dissenting); see *Cox v. Flota Merchante Grancolombiana, S.A.*, 577 F.2d 798, 804 (2d Cir. 1978), wherein the court stated that the conclusion derived from the "overwhelming decisional authority," is that the "shipowner had no duty to supervise the operation entrusted to the stevedore." *Id.* at 804. But see *Slaughter v. S.S. Ronde*, 390 F. Supp. 637 (S.D. Ga. 1974), *aff'd per curiam*, 509 F.2d 793 (5th Cir. 1975). For a critical treatment of *Slaughter*, see Comment, *Business Invitee Doctrine Used to Define Vessel's Standard of Care Under Section 905(b) of the 1972 Amendments*, 7 RUT.-CAM. L. REV. 147, 153-54 (1975) [hereinafter referred to as *Vessel's Standard of Care*].

<sup>86</sup> 572 F.2d at 369 (Moore, J., dissenting).

<sup>87</sup> *Id.* at 372 (Moore, J., dissenting). Judge Moore believed that the proper interpretation would therefore be that "no liability will arise for obvious defects." *Id.* (Moore, J., dissenting). In addition, he noted that "the special characteristics of the [Act] preclude unthinking adherence to § 343A alone or to a literal reading thereof." 572 F.2d at 372 (Moore, J., dissenting).

*Second Restatement* and reiterated the *Hickman* panel's observation that the labels "latent" and "open and obvious" do not represent the beginning and end of all analysis of the proper standard of care to be imposed on shipowners under the LHWCA.<sup>88</sup> More important, according to the court in *Cox v. Flota Merchante Grancolumbiana*,<sup>89</sup> is the knowledge of the stevedore, the relationship of the accident to the stevedoring operations and the control exercised by the stevedore and the shipowner.<sup>90</sup> Accordingly, the *Cox* court limited *Napoli* to its special facts and distinguished *Lubrano* based on the absence, in *Cox*, of evidence indicating that the shipowner had instructed the longshoremen to continue working or affirmatively joined in the stevedore's decision to do so.<sup>91</sup> Rather, the court concluded that it was the stevedore's decision alone to continue working despite a dangerous situation, since "[it] was the stevedore which had exclusive control of the gangs and how, when and where they worked."<sup>92</sup> Since the responsibility for the safety of the longshoremen rested with the stevedore and since the shipowner was not charged with a duty to supervise the stevedore's operation, the court reversed the judgment for the plaintiff and dismissed the complaint.<sup>93</sup>

Although the panel in *Cox* distinguished *Lubrano*, the validity of that distinction was questioned 3 weeks after the *Cox* decision was announced, when another second circuit panel, with Judge

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<sup>88</sup> *Cox v. Flota Merchante Grancolumbiana, S.A.*, 577 F.2d 798, 802 n.4 (2d Cir. 1978).

<sup>89</sup> 577 F.2d 798 (2d Cir. 1978).

<sup>90</sup> *Id.* at 802-04.

<sup>91</sup> *Id.* at 802. In *Cox*, evidence was presented that the plaintiff was injured when a hatch beam which had not been secured was dislodged in the course of cargo operations and fell to the lower hold striking the plaintiff. *Id.* at 799. Two supervisory employees of the stevedore testified that, before the accident occurred, they had been aware of the unsecured nature of the beams and had informed a mate who purportedly assured them that the crew would put pins in the beam locks. *Id.* at 800. It would appear that the stevedore, by virtue of continuing the unloading despite his awareness of the possible injury, violated the OSHA Safety and Health Regulations for Longshoring. Section 1918.43 (3)(e) provides in pertinent part that "any beam . . . shall be . . . secured so that it cannot be displaced by accident." 29 C.F.R. § 1918.43(3)(e) (1977). Compliance with this regulation is the stevedore's responsibility. *Id.* § 1918.2(a); see *Anuszewski v. Dynamic Mariners Corp., Panama*, 391 F. Supp. 1143, 1145 (D. Md. 1975), *aff'd per curiam*, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), *discussed in notes 46-49 and accompanying text supra*.

<sup>92</sup> 577 F.2d at 802.

<sup>93</sup> *Id.* at 804. After reviewing the decisions of the second and other circuits, *id.* at 801-04, the *Cox* court held that it was the expert stevedore's sole responsibility as an independent contractor to remedy the condition as the Safety and Health Regulations required. *Id.* at 804. It further held that since the operation was not under the control of the shipowner, it was not liable for the stevedore's negligence in failing to take adequate precautions. *Id.*

Friendly dissenting, decided *Canizzo v. Farrell Lines, Inc.*<sup>94</sup> There, the majority, in a footnote which has been characterized as "most unusual,"<sup>95</sup> stated that it viewed *Cox* as in conflict with *Lubrano* and acknowledged that "the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations. . . ." <sup>96</sup> In *Canizzo*, the court affirmed a non-jury determination that the shipowner was liable for injuries sustained by the plaintiff, on the grounds that the shipowner should have been or was aware of grease and wires allegedly encumbering the main deck of the vessel and did not remedy the condition.<sup>97</sup>

<sup>94</sup> 579 F.2d 682 (2d Cir.), cert. denied, 47 U.S.L.W. 3297 (Oct. 31, 1978).

<sup>95</sup> Bongiovanni v. N.V. Stoomvaart-Maats "Dostzee," No. 77-1316, slip op. at 7 (S.D.N.Y. Sept. 15, 1978).

<sup>96</sup> 579 F.2d at 686 n.3. In his dissent, Judge Friendly noted that the district judges could "scarcely be expected to function" now that the *Canizzo* majority failed to adhere to the decision in *Cox*. See also Feinberg, *Judicial Administration: Stepchild of the Law*, 52 ST. JOHN'S L. REV. 187, 190 (1978). Such practical considerations underlie the doctrines of stare decisis. See Gurfein, *Appellate Advocacy, Modern Style*, 4 J. ABA Section of Litigation 9 (1978). As Judge Cardozo observed some 50 years ago:

The situation would . . . be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before . . . . I think that a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice . . . there should be less hesitation in frank avowal and full abandonment.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149-50 (1921). Judge Cardozo's observations attain even greater cogency when they are applied to situations like *Cox* and *Canizzo*, where the second ruling represents a divergence from the decision of sister circuits.

In *Talliercio v. A/S D/S Svendborg*, 451 F. Supp. 949 (S.D.N.Y. 1978), district court Judge Bonsal attempted to reconcile *Cox* and *Canizzo* on the ground that the hazard in *Canizzo* was not "so connected with the stevedore's expertise that 'the shipowner [should] defer to the competence of the stevedore.'" *Id.* at 951-52. In *Cox*, however, securing hatch beams was peculiarly within the province of the stevedore's expertise to which the shipowner could reasonably defer. *Id.* The court additionally pointed out that the injury in *Canizzo* resulted from the "affirmative act" of the ship's crew in placing wires on top of the greasy deck while, in *Talliercio*, the court concluded, there was no affirmative act. *Id.* at 951. The court also reviewed the facts in *Lubrano*, stating that if it were determined that the ship's officer had directed or joined in the stevedore's direction to the longshoremen to continue working, this would have constituted an "affirmative act" on the part of the ship. *Id.* at 951 n.1.

<sup>97</sup> 579 F.2d at 684. The lower court found that the shipowner's negligence was the proximate cause of the accident. The ship's crew had placed cluster light wires on top of a patch of grease, thereby exacerbating the dangerous condition. When placing the wires on the deck, the crew noticed or should have noticed the existence of a greasy surface. *Id.*

It should be noted that the House committee report, H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6-7, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4704, in illustrating the application of the principles to be followed in accordance with § 905(b) as amended, refers to facts which a longshoreman must prove in order to hold a shipowner liable for negligence when the longshoreman slips and is injured on an oily deck. The report provides that in such a situation, the longshoreman must prove that the vessel either created or should have known of the dangerous condition, and willfully or negligently failed to remove it. *Id.* It is further

The majority, without discussing the substantial case law of the other circuits, relied solely on section 343A and held that if the shipowner had actual or constructive knowledge of a dangerous condition, it had a duty to remedy it or warn of it, without regard for the shipowner's reasonable reliance on the independent expert stevedore.<sup>98</sup> The only exception to this rule allowed by the court was for injuries caused by a condition actually created by the stevedore.<sup>99</sup>

In his dissent, Judge Friendly warned of the dangers of the overbroad theories of liability propounded by the majority:

Unless the courts keep the longshoremen's negligence action against the ship within proper bounds, the ship's situation will be worse in some respects than before since it will be deprived of its former third party action against the longshoremen's employer. Moreover, the increased compensation payments, which Congress conceived as the usual source of making the longshoremen whole, will absorb a still larger share of his recovery against the ship with the consequent attenuation of any benefit to the injured worker. And all this despite the fact that the employer is generally in a far better position than the ship to prevent accidents to its employees.<sup>100</sup>

Criticizing the majority's use of sections 343 and 343A of the *Second Restatement*, Judge Friendly suggested the use of a simpler statement of the shipowner's responsibilities based on his interpre-

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stated that the shipowner "will not be chargeable with the negligence of the stevedore." *Id.* 29 C.F.R. § 1918.38 (1977) provides that "[i]f decks are wet with . . . oil, the employer shall not permit employees to engage in longshoring operations until necessary walking and working areas have been made safe by the use of suitable non-skid materials." Further, *id.* § 1918.91(c) provides that "[s]lippery conditions shall be eliminated as they occur." The responsibility for compliance with these regulations rests with the stevedore. *Id.* § 1918.2(a). In light of the foregoing, it is difficult to understand how the defendant in *Canizzo* could reasonably be held liable for its failure to anticipate that the stevedore would act in violation of the applicable OSHA Safety and Health Regulations for Longshoring.

<sup>98</sup> 579 F.2d at 685.

<sup>99</sup> *Id.* The court left open the question of the shipowner's liability when it has knowledge of a dangerous condition created by the negligence of the stevedore. *Id.*

<sup>100</sup> *Id.* at 687-88. (Friendly, J., dissenting). Judge Friendly pointed out that even if the ship's personnel were aware of the patches of grease, their knowledge could be imputed to the vessel only if they had a duty, by reason of the existence of an agency relationship, to inform the shipowner. *Id.* at 690 (Friendly, J., dissenting). This duty might arise if the employees of the vessel who "should have" been aware were ship's officers, but there was no proof that such was the case. *Id.* (Friendly, J., dissenting). Judge Friendly also pointed out that it was reasonable for the shipowner to rely on the stevedore's acting in compliance with the OSHA Regulations. See note 77 *supra*.

tation of the legislative intent underlying the 1972 amendments to the LHWCA.<sup>101</sup>

Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires. The typical cases where the ship was to be liable under § 905(b) would be for conditions of which it was or should have been aware but of which the employer was not and could not reasonably be expected to be and for affirmative acts of negligence for which the employer bore no responsibility. . . .<sup>102</sup>

In the latest decision in the series, *Lopez v. A/S D/S Svendborg*,<sup>103</sup> a panel consisting of a single circuit judge and two district court judges paid lip service to Judge Friendly's warning and reversed a directed verdict for the shipowner where shifted cargo with spilled contents was discovered by the stevedore and was brought to the attention of a ship's officer.<sup>104</sup>

Rejecting the *Munoz* interpretation that Congress through the 1972 amendments sought "encouragement of safety within the industry by placing the duty of care on the party best able to prevent accidents,"<sup>105</sup> the *Lopez* court chose as its polestar the concept that

<sup>101</sup> 579 F.2d at 688 (Friendly, J., dissenting).

<sup>102</sup> *Id.* (Friendly, J., dissenting).

<sup>103</sup> 581 F.2d 319 (2d Cir. 1978).

<sup>104</sup> *Id.* at 330. The foreman told the stevedore hatch boss to "[k]eep working, . . . [but] tell your men to be careful." *Id.* at 321. The ship's officer was present when this instruction was given, but did not utter a word. *Id.* The only apparent cause of the shifting was heavy seas, which may have been encountered during the ocean voyage to the United States. *Id.*

<sup>105</sup> *Id.* at 327. The court stated that since the stevedore "shared in the decision to continue working" it might be held liable for its own negligence. *Id.* at 324. At most this statement indicates that the stevedore's and shipowner's concurrent negligence contributed to the plaintiff's injuries. Such a scenario has, in some cases, resulted in a reduction of the third party's liability to one-half of the judgment, based on an analogy to settlements between a plaintiff and one of two tortfeasors, see *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727 (D.C. Cir. 1972); *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968); Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Worker's Compensation Act*, 41 INS. COUNCIL J. 63, 66-67 (1974).

In the context of the 1972 amendments, the ninth circuit and the fifth circuit have rejected the argument that a longshoreman's recovery should be reduced when the stevedore was concurrently negligent. *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978); *Dodge v. Mitsui Shintaku Ginko K.K. Toyko*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). The second circuit applied this principle in affirming the denial of a shipowner's motion to join the stevedore-employer as a necessary party under FED. R. Civ. P. 19(a). *Landon v. Lief Hoegh & Co.*, 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). The third circuit has discussed but not decided the issue. *Marant v. Farrel Lines, Inc.*, 550 F.2d 142 (3d Cir. 1977).

it is the shipowner who is "in a better position to distribute the loss."<sup>106</sup> The panel held, in express conflict with *Munoz* and its progeny, that the shipowner has a non-delegable duty to provide the longshoreman with a safe place to work.<sup>107</sup> Rejecting the *Cox* holding that the shipowner "cannot be held liable for negligence toward plaintiff because it was entitled to rely on the [stevedore] . . . to alleviate any condition dangerous to its employees,"<sup>108</sup> the court found irrelevant "the independent contractor's control over the work and the place where the work is done."<sup>109</sup> It further found that since the 1972 amendments eliminated indemnity, "to enable a shipowner to escape liability by entering an agreement with the stevedore would contravene Congress' intention."<sup>110</sup> Finally, the court concluded that section 413 of the *Second Restatement*

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In the leading decision limiting a longshoreman's recovery, *Edmonds v. Compagnie Generale Transatlantique*, 558 F.2d 186 (4th Cir. 1977), modified on rehearing en banc, 577 F.2d 1153 (4th Cir.), cert. granted, 47 U.S.L.W. 3310 (Nov. 7, 1978), the original panel held that the shipowner would only be responsible for that portion of the judgment which equalled the shipowner's percentage of fault plus the amount of the stevedore's lien. The panel found four principles which were applicable to the decision of the case. First, the Congress, in 1972, sought to eliminate the type of circuitous litigation which prevailed prior to the enactment of the 1972 amendments. Second, the stevedore has a lien, equitable or statutory, on any recovery by one of its employees against a third party. Third, the longshoreman is entitled to bring an action against a shipowner based on the negligence of the shipowner. Fourth, the shipowner is responsible for its own, not the stevedore's negligence. In cases of concurrent negligence of shipowner and stevedore, the third and fourth principles are harmonized by allowing suit but limiting recovery to the percentage of fault attributable to the shipowner. The second principle was protected by the continuation of the stevedore's lien regardless of its fault. Finally, the court found that the "simple reduction of the vessel's liability" will not result in the circuitous litigation sought to be abolished by the 1972 Amendments.

On rehearing en banc, this decision was modified by restricting the shipowner's liability to the percentage of damages which equalled its percentage of fault, and reserving decision on the extent and viability of the stevedore's lien because the stevedore was not a party to the action.

<sup>106</sup> *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 327 (2d Cir. 1978).

<sup>107</sup> *Id.* at 323-25.

<sup>108</sup> *Id.* at 327-28.

<sup>109</sup> *Id.* at 328. It would appear that the court did not consider the obligations of the stevedore to keep working areas "reasonably clear" of "loose tripping or stumbling hazards." 29 C.F.R. § 1918.91(a) (1977); see *Vessel's Standard of Care*, supra note 85, at 156, wherein the author criticizes adherence to a theory that would permit a finding of negligence on the part of a shipowner, when the stevedore was fully cognizant of the dangerous condition. The author would, in addition, impose upon the longshoremen the responsibility of insisting "that work methods are tailored to meet these developing dangers," since they are "normally the first to observe new or existing dangers." *Id.*

<sup>110</sup> 581 F.2d at 328. Any agreement which by its nature would purport to hold the shipowner harmless is "prohibited as a matter of public policy," since "vessels by their superior economic strength could circumvent and nullify the provision . . . by requiring indemnification from a covered employer for employee injuries." H.R. REP. NO. 1441, 92d Cong., 2d Sess. 7, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4704.

contains the appropriate standard by which to measure shipowner liability.<sup>111</sup>

Thus, the judges of the second circuit are on an admitted and obvious collision course on the standard of care issue. While it remains to be seen whether this conflict within the second circuit will be resolved by that court sitting *en banc* or by the Supreme Court,<sup>112</sup> the eventual resolution of this conflict seems inevitable.

### THE ALTERNATIVE STANDARDS OF CARE

There emerge from the cases two alternative standards of care under the 1972 amendments:

(1) That the shipowner has a duty to remedy or warn of conditions of which it has or should have knowledge and of which the stevedore is not and could not reasonably be expected to be aware,

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<sup>111</sup> 581 F.2d at 324. Section 413 of the *Second Restatement* provides:

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

- (a) fails to provide in the contract that the contractor shall take precautions, or
- (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

RESTATEMENT (SECOND) OF TORTS § 413 (1965). The *Lopez* holding is also in conflict with the decision of the court in *Lipka v. United States*, 369 F.2d 288 (2d Cir. 1966), *cert. denied*, 387 U.S. 935 (1967). The *Lipka* court, when faced with an issue similar to that in *Lopez*, refused to hold that the employee of a negligent independent contractor comes within the protective provisions of the *Second Restatement* which would permit an injured party to sue the contractor's employer notwithstanding the "inherent dangers" involved in the work. *Id.* at 292-93; see *Galbraith v. United States*, 296 F.2d 631, 634 (2d Cir. 1961); *Wallach v. United States*, 291 F.2d 69, 72 (2d Cir.), *cert. denied*, 368 U.S. 935 (1961). *Lipka* was later followed in *Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (Mar. 21, 1978), where the court held that §§ 410 to 415 of the *Second Restatement* only apply to third parties, not to "an employee of [an] independent contracto[r]." 559 F.2d at 1033. The *Hess* court reviewed the language used in RESTATEMENT (SECOND) OF TORTS § 411 (1965), which refers to the liability of the independent contractor's employer to "third persons," as distinguished from §§ 413, 416 and 427, which concern his liability "to others." 559 F.2d at 1033. The court noted that while the use of the word "others" may mean that the employee of an independent contractor should be considered to be within the protection of the latter sections, the majority of courts have held otherwise. *Id.* at 1033-35. The courts which would allow such an action, e.g., *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974), were classified by the *Hess* court as representing "a minority view of land-based law which has been undermined by the 1972 Amendments to the Longshoremen's Act." 559 F.2d at 1034; accord, *Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978).

<sup>112</sup> Petitions for a writ of certiorari have been denied in *Cox*, \_\_\_ U.S.L.W. \_\_\_ ( ), and *Canizzo*, 47 U.S.L.W. 3297 (Oct. 31, 1978). A request for a rehearing *en banc* in *Lopez* has also been denied.

and to refrain from affirmative acts of negligence not the responsibility of the stevedore;<sup>113</sup> or

(2) The *Lopez* position that the shipowner is responsible to remedy or warn of any condition known to it, without regard to the shipowner's reliance on the expert stevedore. Beyond warning, the non-expert shipowner must remedy any condition known to it which it should reasonably anticipate the longshoremen employees of the master stevedore would be unable to avoid despite their control of, familiarity with, and ability to reduce or remove the risk of injury.<sup>114</sup>

In examining these competing standards of care, it is important to consider the policies which prompted Congress to adopt the 1972 amendments.<sup>115</sup> The policy argument providing the underpinnings for the standard of care proffered by the *Lopez* court was the belief that the shipowner is in a better position to distribute the loss.<sup>116</sup> This position, however, has been recognized since the decision of the Supreme Court in *Sieracki* as the basic foundation of a theory of

<sup>113</sup> *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 688 (2d Cir.) (Friendly, J., dissenting), cert. denied, 47 U.S.L.W. 3297 (Oct. 31, 1978); see *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1110-12 (4th Cir. 1977); *Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 144 (3d Cir. 1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233, 1238 (5th Cir. 1977); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976).

<sup>114</sup> *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 323-24 (2d Cir. 1978).

<sup>115</sup> *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 688 (2d Cir. 1978) (Friendly, J., dissenting), cert. denied, 47 U.S.L.W. 3297 (Oct. 31, 1978). The goals sought to be achieved by Congress were concisely listed by the court in *Munoz v. Flota Merchante Grancolombiana S.A.*, 553 F.2d 837 (2d Cir. 1977). Among them are "adequate, increased and sure compensation for injured longshoremen, elimination of the rubric of liability without fault for shipowners, and encouragement of safety within the industry by placing the duty of care on the party best able to prevent accidents." *Id.* at 839.

<sup>116</sup> *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 327 n.8 (2d Cir. 1978). This conclusion is not supported by the authority cited by the court, Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. CHI. L. REV. 661 (1973), which concludes that neither employers as a class nor independent contractors as a class are always better able to distribute the cost of the risk. *Id.* at 672. The author contends that "courts cannot easily identify a single party who is better able to accomplish [the] objectives [of] prevention, distribution and compensation." *Id.* at 669. Assuming *arguendo* that a court "might theoretically be able to identify the proper party on whom to impose liability, the task imposes great difficulties in practice and creates an overly complex and unpredictable body of law." *Id.* The commentator further states:

All traditional approaches to vicarious liability . . . are grounded in generalizations about parties to the employment agreement. They assume that one class of defendants has deeper pockets, more control, or greater ability to distribute risk than some other class. Insofar as contractors and employers are concerned, these generalizations are of questionable validity.

*Id.* at 674. Although a case-by-case inquiry to determine the party best able to "distribute and prevent risk" might be more equitable than a categorical rule, such a standard "may not be within the competence of any court to make and, in any event, [would involve] high administrative costs." *Id.* at 674-75.



strict liability without fault.<sup>117</sup> As Chief Justice Stone stated: "The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them."<sup>118</sup> Justice Stone's remarks are peculiarly appropriate to the 1972 amendments, since the House committee noted that "assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."<sup>119</sup> As recognized by Chief Judge Kaufman in *Munoz*,<sup>120</sup> placing liability on the party best able to prevent the harm is the foundation for liability predicated upon fault. Thus, even assuming that the shipowner is in the best position to bear the loss, to cause that loss to fall on the shipowner would thwart the fundamental purpose of the 1972 amendments.<sup>121</sup>

As stated by Judge Moore in his dissent in *Lubrano*:

The stevedore is in the best position to avoid the cost and causes of accidents, and on its shoulders rests the primary responsibility for the safety of [the] longshoreman. Such responsibility is consistent with the promotion of safe working conditions and economic efficiency.<sup>122</sup>

Robertson has written that placing the responsibility on the stevedore seems consonant with industry practice, since the shipowner typically has little control over the details of the loading and

<sup>117</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 108 (1946) (Stone, C.J., dissenting).

<sup>118</sup> *Id.* (Stone, C.J., dissenting). Mr. Justice Stone disagreed with the majority in *Sieracki* on the ground that he believed that "Congress had made a determination that the employer is best able to bear the loss." *Id.* (Stone, C.J., dissenting).

<sup>119</sup> H.R. REP. No. 1441, 92d Cong., 2d Sess. 1, reprinted in [1972] U.S. CODE & CONG. AD. NEWS 4698, 4699.

<sup>120</sup> 553 F.2d 837, 839 (2d Cir. 1977).

<sup>121</sup> Further support for this position is found in the OSHA report, see note 32 *supra*, which found that special problems in the longshoring industry are not the "hazardous and changing work places" but the "inordinately poor industrial relations, ineffective supervision and a long inbred tradition of doing things unsafely" on the part of stevedoring companies and their employees.

<sup>122</sup> 572 F.2d at 371 (Moore, J., dissenting). It is the stevedore's ability to absorb the cost of the loss through insurance that prompted several courts to hold that the longshoreman may not recover from the shipowner for injuries sustained as a result of the stevedore's negligence. See, e.g., *Lipka v. United States*, 369 F.2d 288, 293 (2d Cir. 1966), cert. denied, 387 U.S. 935 (1967), wherein the court states that "[t]he principal justification for denying recovery to employees of an independent contractor . . . is that they are covered by workmen's compensation, and that 'it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS §§ 17-18 (tent. Draft No. 7 1962)); accord, *Hess v. Upper Miss. Towing Co.*, 559 F.2d 1030, 1034 (5th Cir. 1977); *Eutslar Corp. v. United States*, 376 F.2d 634, 636 (10th Cir. 1967).

unloading operation.<sup>123</sup> In addition, he concedes that tradition as well as the Safety and Health Regulations for Longshoring put the responsibility for these operations on the stevedore.<sup>124</sup> However, Robertson argues if shipowners learn that they have duties to take remedial action for conditions created by or within the control of the stevedore, "the power or authority to take corrective action will develop."<sup>125</sup> To impose such a duty on shipowners, however, would create chaos in the maritime industry since, as the courts have long recognized, stevedore companies are expert in loading and discharging vessels, but shipowners are not.<sup>126</sup>

In addition, reliance on sections 343 and 343A of the *Restatement (Second) of Torts* is misplaced. As Judge Friendly has pointed out:

In retrospect it seems to have been a mistake for courts to give such talismanic significance to §§ 343 and 343A of the Restatement of Torts 2d as has sometimes been done. These sections are awkwardly drafted; the framers had no notion that they would be applied to the tangled situations of shiploading or unloading; and they must be read together with Chapter 15, 'Liability of an Employer of an Independent Contractor.'

In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 Amendments.<sup>127</sup>

<sup>123</sup> Robertson, *supra* note 73, at 471, 475; *accord*, *Munoz v. Flota Merchante Grancolombiana S.A.*, 553 F.2d 837, 840-41 (2d Cir. 1977).

<sup>124</sup> Robertson, *supra* note 73, at 471; *see* *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 333 (5th Cir. 1977); *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233, 1239 n.9 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 391 F. Supp. 1143, 1145 (D. Md. 1975), *aff'd per curiam*, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). *But see* Comment, *Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244, 269-70 (1975).

<sup>125</sup> Robertson, *supra* note 73, at 471. This position is discussed in *Vessel's Standard of Care*, *supra* note 85. There the author reaches a contrary conclusion, stating that it is unreasonable to place a "duty of care on the vessel which would require its officers to observe the stevedore's operations closely and inform its supervisors and longshoremen employees of any dangerous conditions they might create." *Id.* at 153; *see* *Munoz v. Flota Merchante Grancolombiana S.A.*, 553 F.2d 837 (2d Cir. 1977), wherein the court states that "commercial reality and applicable union regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship." *Id.* at 840-41; *accord*, *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1251-52 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977).

<sup>126</sup> *See* *Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir*, 570 F.2d 449, 452 (2d Cir. 1978) (*per curiam*); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 841 (2d Cir. 1977).

<sup>127</sup> *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 688 (2d Cir.) (footnote omitted) (Friendly, J., dissenting), *cert. denied*, 47 U.S.L.W. 3297 (Oct. 31, 1978); *see* note 36 *supra*. In *Hurst v.*

Moreover, the Reporter of the *Second Restatement* has stated that these sections are based on the notion that "the obligation as to the condition of the premises is of such importance that it can not be delegated. . . ." <sup>128</sup> Both committees in Congress expressly stated that they intended "not to endow [the employee] with any special maritime theory of liability under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duty,' or the like." <sup>129</sup>

Just as sections 343 and 343A of the *Restatement (Second) of Torts* were not envisioned by the drafters to apply to the "tangled situations of ship loading and unloading," the exceptions to section 409 of the *Second Restatement* dealing with independent contractors were not intended to apply to situations where suit is brought by an employee of the independent contractor. <sup>130</sup> The express reference in chapter 15 of the *Restatement (Second) of Torts* to the landowner's liability to "others" was not meant to bring such persons within the exceptions, since they are covered by workmen's compensation. <sup>131</sup> Additionally, section 413, which requires special precautions to be taken or contracted for when there is a peculiarly unreasonable risk of harm, <sup>132</sup> is not applicable to loading and unloading conditions since the stevedore is in the best position to recognize and remedy dangerous conditions. "Where working conditions create obvious risks of injuries which might be lessened by a more careful method of [stevedoring], the stevedore is required to do whatever it reasonably can to minimize the danger, whether by

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Triad Shipping Co., 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977), the court, deeming the *Second Restatement* section applying to licensees as inapposite to the longshoreman/shipowner situation, stated that "[s]tevedores and their employees cannot be regarded as licensees." 554 F.2d at 1249. That court would apply the sections dealing with independent contractors because stevedores, "with respect to the work they perform for shipowners . . . [are] independent contractors," and hence, a longshoreman would be classified by the *Hurst* court as merely an employee of the independent contractor. *Id.*

<sup>128</sup> W. PROSSER, *THE LAW OF TORTS* § 61, at 395 (4th ed. 1971).

<sup>129</sup> H.R. REP. NO. 1441, 92d Cong., 2d Sess. 6, reprinted in [1972] U.S. CODE & CONG. AD. NEWS 4698, 4703; S. REP. NO. 1125, 92d Cong., 2d Sess. 9 (1972).

<sup>130</sup> See note 111 *supra*.

<sup>131</sup> See *id.*

<sup>132</sup> RESTATEMENT (SECOND) OF TORTS §§ 413(a), 413(b) (1965); see note 36 *supra*. Comment a to § 413 provides that "[t]his Section states the rule as to the liability of the employer who fails to provide in the contract, or in some other manner, that the contractor shall take the required precautions." It is submitted that since the contractor (stevedore) is already bound to take the "required precautions" outlined in the OSHA Safety and Health Regulations for Longshoring, § 413 is inapplicable to the longshoreman/stevedore/shipowner situation. See *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1113 (4th Cir. 1977); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976). See also *Chavis v. Finnlincs Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978).

rearranging cargo or having supervisory personnel on hand to assess safety and oversee discharge."<sup>133</sup> Similarly, section 414, which provides for liability of the employer of an independent contractor who retains control over the work and fails to exercise that control with reasonable care, is inapplicable to the shipowner/stevedore situation.<sup>134</sup> The retention by a shipowner of the right to inspect the work of the stevedore or stop work if it is not being performed in accordance with the contract is not the pervasive control to which section 414 was intended to apply.<sup>135</sup> Finally, the exceptions contained in sections 416 to 429 have been recognized to be inapplicable to cases under the 1972 amendments since they are based on vicarious liability.<sup>136</sup>

It is submitted that sections 343 to 343A and 410 to 429 of the *Second Restatement* were never intended to apply to the shipowner/stevedore situations and should be disregarded by the courts in determining the proper standard of care. It would indeed be ironic if Congress, after instructing the courts to look to land-based law to avoid imposition of non-delegable duties on the shipowner, had to act to overrule the court's misinterpretation of its intent. It would be equally ironic if analysis of the *Second Restatement* provisions, informed by the intent of Congress, left us with only the fundamental rule of non-liability stated in section 409. Neither result was intended by Congress. Congress intended that the federal courts look to the substantial body of land-based law with regard to independent contractors and extract therefrom a federal common law as to the shipowner's duty of care to a longshoreman. It was a mistake of the courts to grasp immediately *Restatement* provisions as a substitute for examination of the decisional basis of land-based law. Based on his extensive research into the decisions of state and federal courts applying land-based law, Vickery has extracted the following standard of care:

- The [vessel] owner . . . has a duty either
- A. To use reasonable care to make the premises reasonably safe for the use of the independent contractor, or
  - B. To give the independent contractor adequate and timely

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<sup>133</sup> *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 148 (2d Cir. 1976).

<sup>134</sup> *See Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1251 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); note 36 *supra*.

<sup>135</sup> 554 F.2d at 1251.

<sup>136</sup> *See Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030, 1033 (5th Cir. 1977); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1251 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); note 36 *supra*.

warning of dangers known to him but unknown to the independent contractor.<sup>137</sup>

In addition, various corollaries of this standard of care were gleaned from the cases. For example, there is no duty with regard to conditions known or knowable to the independent contractor,<sup>138</sup> and warning to the independent contractor for any dangerous conditions on the vessel is sufficient because the stevedore, not the shipowner, has a duty to warn its own employees.<sup>139</sup> The shipowner owes no duty to warn the stevedore or its employees of dangerous conditions created by the stevedore or its employees,<sup>140</sup> and the former is not liable to a longshoreman if the injuries were caused by a condition the stevedore was hired to correct.<sup>141</sup> Moreover, the shipowner who retains no more right of control than is necessary to secure satisfactory completion of the work owes no duty to protect the stevedore's employees from dangerous conditions arising during the performance of the work.<sup>142</sup>

It is readily apparent that Vickery's extraction of the common-law principles leads to the same standard of care as Judge Friendly's analysis based on effectuating Congress' objectives. Application of this standard of care also rationalizes the results of the decisions in the third, fourth, fifth and ninth circuits, as well as those decisions within the second circuit that agree with the other circuit courts of appeals. Adoption of this standard of care, however, would require

<sup>137</sup> Vickery, *supra* note 105, at 64 (in part citing *Poston v. United States*, 396 F.2d 103 (9th Cir.), *cert. denied*, 392 U.S. 946 (1968); *Wurz v. Abe Pollin, Inc.*, 384 F.2d 549 (4th Cir. 1967); *Salim v. United States*, 382 F.2d 240 (5th Cir. 1967); *Honea v. West Va. Pulp & Paper Co.*, 380 F.2d 704 (4th Cir. 1967); *Tyler v. Peel Corp.*, 371 F.2d 788, 790 (5th Cir. 1967); *Barrett v. Foster Grant Co.*, 350 F.2d 1146 (1st Cir. 1966); *Csizmadia v. P. Ballantine & Sons*, 287 F.2d 423 (2d Cir. 1961); *Sullivan v. Shell Oil Co.*, 234 F.2d 733 (9th Cir.), *cert. denied*, 352 U.S. 925 (1956)).

<sup>138</sup> Vickery, *supra* note 105, at 64 (in part citing *Stanley v. United States*, 476 F.2d 606 (1st Cir. 1973); *Honea v. West Va. Pulp & Paper Co.*, 380 F.2d 704 (4th Cir. 1967); *Hodge v. United States*, 310 F. Supp. 1090 (M.D. Ga. 1969), *aff'd*, 424 F.2d 545 (5th Cir. 1970)).

<sup>139</sup> Vickery, *supra* note 105, at 65 (in part citing *Kull v. Mid-America Pipeline Co.*, 476 F.2d 271 (5th Cir. 1973); *Parsons v. Blount Bros.*, 281 F.2d 414 (6th Cir. 1960); *Whitlow v. Seaboard Air Line R.R.*, 222 F.2d 57 (4th Cir. 1955); *Whirlpool Corp. v. Morse*, 222 F. Supp. 645 (D. Minn. 1963)).

<sup>140</sup> Vickery, *supra* note 105, at 65 (in part citing *Fisher v. United States*, 441 F.2d 1288 (3d Cir. 1971); *Olson v. Kilstofte & Vosejпка, Inc.*, 327 F. Supp. 583 (D. Minn. 1971); *Bidetto v. New York City Hous. Auth.*, 25 N.Y.2d 848, 250 N.E.2d 735, 303 N.Y.S.2d 695 (1969)).

<sup>141</sup> Vickery, *supra* note 105, at 65 (in part citing *Whitlow v. Seaboard Air Line R.R.*, 222 F.2d 57 (4th Cir. 1955); *Gasper v. Ford Motor Co.*, 13 N.Y.2d 104, 192 N.E.2d 163, 242 N.Y.S.2d 205 (1963); *Briere v. Lathrop Co.*, 258 N.E.2d 597 (Ohio 1970)).

<sup>142</sup> Vickery, *supra* note 105, at 65-66 (in part citing *Kull v. Mid-America Pipeline Co.*, 476 F.2d 271 (5th Cir. 1973); *Lipka v. United States*, 369 F.2d 288 (2d Cir.), *cert. denied*, 387 U.S. 935 (1966); *Deville v. Shell Oil Corp.*, 366 F.2d 123 (9th Cir. 1966)).

results different than those reached in *Lopez* and perhaps also in *Cannizzo*.

### CONCLUSION

In post-*Sieracki* days, longshoremen and other workers enjoyed a virtual guarantee of recovery with every lawsuit commenced. Indeed, the Supreme Court, in effect, superimposed a second compensation act in which district and appellate courts reluctantly acquiesced. Since the 1972 amendments, the overwhelming authority supports a standard of care which gives effect to the express congressional intent that the safety of loading and unloading operations rests upon the stevedore. This line of cases holds that the shipowner cannot be held liable on any theory of non-delegable duty. In addition, this body of authority rules that the shipowner may not be exposed to liability for stevedore negligence, and that the shipowner is not responsible for a condition within the knowledge and control of the stevedore. These decisions point to, and are compatible with, the standard of care enunciated by Judge Friendly in his *Canizzo* dissent, and settled principles of land-based law.

A few decisions, however, apparently seek to reverse what Congress had done and thwart its intent by imposing a sweeping potential liability on the shipowner based on knowledge of any dangerous condition not actually created by the stevedore, without regard to the shipowner's reasonable reliance on the independent contractor.<sup>143</sup> This small minority of decisions represents a refusal to accept the legislative compromise in which longshoremen and their unions voluntarily surrendered their favored status before the courts in exchange for unprecedented compensation benefits. In exchange for financing these most generous benefits, the stevedore was relieved

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<sup>143</sup> Mr. Daniels, a member of the House Committee in charge of the bill on the floor, stated in the House debate that "[t]he strongest opposition to this bill comes from a certain group of lawyers who specialize in third party actions." 118 CONG. REC. 36,387 (1972). This was the one interest group given short shrift by the Congress in the legislative compromise. As the late Congressman Steiger stated:

Quite frankly, Mr. Speaker, the opposition to this bill from a small group of attorneys is disturbing. There are some who apparently are more interested in clogging port city courts than in effectively updating the inadequate benefits now available.

118 CONG. REC. 36,385 (1972).

Indeed, the longshoremen's union rejected the opposition of the plaintiff's bar to the abolition of unseaworthiness and informed the House Committee that they opposed the bill if the abolition of unseaworthiness were stricken therefrom. *Id.* It is submitted that decisions such as *Lopez* grant the only vanquished interest group in this legislative compromise ultimate hegemony.

of the burden of indemnity. Decisions such as *Lopez* would have the shipowner relegated to a poor third in the *quid pro quo*, losing almost certain indemnity but still facing ultimate liability for conditions within the knowledge and control of the stevedore and from which, by force of the same statute, the stevedore is required to protect its employees.

To the extent that Congress has not preempted policy determinations by the courts in this area, the same considerations, *viz.*, commercial reality, safety and fairness, which underly the 1972 congressional action ought to be utilized by the courts in interpreting the legislative compromise. These considerations amply demonstrate the soundness of the line of cases in the third, fourth, fifth and ninth circuits and the decisions of the second circuit in *Hickman* and *Cox*.