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RYAN INDEMNITY IN MARITIME PROPERTY DAMAGE CASES: WHAT OF PROPORTIONTE FAULT?

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In 1956 the Supreme Court in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp. *implied a warranty of workmanlike performance in stevedoring contracts. The stevedore's breach of this warranty entitled the shipowner to full indemnity for damages paid by the shipowner to injured longshoremen. This Article discusses the origin and development of the* Ryan *warranty and* Ryan *indemnity, focusing on post-*Ryan *statutory and decisional developments. The author advocates the application of principles of comparative negligence in maritime property damage cases.*

I. INTRODUCTION

The Supreme Court's 1956 decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[1] altered the respective liabilities of shipowners and stevedores arising out of accidents causing injury or death of longshore employees of the stevedore occurring while performing work aboard the shipowner's vessel. Since 1946, shipowners had been held strictly liable for longshoremen's injuries caused by a breach of the shipowner's warranty to maintain the vessel in seaworthy condition. The stevedore employer, on the other hand, was liable to its employees only to the extent provided by the Longshoremen's and Harbor Workers Compensation Act.[2] *Ryan* effected no change in the statutory obligation of stevedores to compensate their employees for job-related injuries. The decision did, however, afford the shipowner a right to full indemnity from the stevedore predicated upon the stevedore's breach of a warranty of workmanlike performance implied in its contract with the shipowner.

Such a breach entitled a shipowner to full indemnity for any judgment or reasonable settlement amount paid to a third party, including reimbursement of fees and expenses incurred in defending the third party's claim. Like the common law doctrine of contribu-

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1. 350 U.S. 124, 1956 A.M.C. 9 (1956).
2. 33 U.S.C. §§ 901-950 (1970 & Supp. 1975) [hereinafter cited as Longshoremen's Act].

tory negligence, a breach of the warranty had all-or-nothing consequences; the degree of fault of the parties was disregarded.

Ryan indemnity caught on quickly as part of the law of maritime contracts, and during the 1960's it developed into a very potent doctrine.[3] The lower courts applied it to contexts outside that in which it had arisen.[4] The doctrine grew steadily until the 1970's when a number of developments in the maritime law, both statutory and decisional, cut back on its application and eroded its rationale. In 1972 Congress amended the Longshoremen's Act, overruling *Ryan* insofar as it applied to the tri-party personal injury litigation among longshoremen, shipowners, and stevedores. In addition, Supreme Court decisions in 1974 and 1975 re-established the right to contribution among joint tortfeasors in non-collision cases and adopted a rule allocating damages in collision cases based on proportionate fault.[5]

This article discusses the *Ryan* warranty and the *Ryan* indemnity action in light of these developments. Particular attention is given to the questionable justification for imposing the "all-or-nothing" consequences of *Ryan* indemnity under an implied warranty in view of the ability of courts to proportion damages based on fault. The emphasis of the article is on the applicability of *Ryan* indemnity to cases other than those dealing with personal injury and death, although it is impossible to divorce a discussion of *Ryan* and its progeny from personal injury and death cases, where the doctrine originated.

II. ORIGIN OF THE *RYAN* DOCTRINE

The implied warranty of workmanlike performance was created in the context of longshoremen's personal injury litigation. In *Ryan,* a longshoreman was injured on a ship while unloading cargo. He

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3. *See generally* Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability,* 61 MICH. L. REV. 539 (1963).
4. "[F]rom little acorns big oaks may grow." Delta Engineering Corp. v. Scott, 322 F.2d 11, 18 (5th Cir. 1963), *cert. denied,* 377 U.S. 905 (1964). See notes 24-36 and accompanying text *infra.*
5. See notes 85-95 and accompanying text *infra.* The allocation of damages based on proportional fault must be distinguished from the principle of joint and several liability. The Supreme Court has consistently applied the principle of joint and several liability in maritime property damage cases. The adoption of proportionate fault does not relieve a joint tortfeasor of responsibility to pay full damages in situations where the other tortfeasor is insolvent, has absconded, is immune or excused from liability, or has limited liability. Thus, an innocent vessel (damaged in a mutual fault collision between two other vessels) can recover full damages from one of the vessels where the other vessel is unable to pay one-half of the damages. The Alabama & The Gamecock, 92 U.S. 695 (1875). As another example, innocent cargo (damaged in a mutual fault collision) can recover full damages from the non-carrying vessel where the carrying vessel is excused from liability to cargo under the Harter Act. The Chattahoochee, 173 U.S. 540 (1899). *See generally* Owen, *The Origins and Development of Marine Collision Law,* 51 TULANE L. REV. 759, 804-06 (1977).

sued the shipowner alleging negligence in the stowage of the cargo and a breach of the shipowner's duty to provide a seaworthy ship.[6] The shipowner filed a third-party complaint against the longshoreman's stevedore employer. The district court found both the shipowner and the stevedore negligent, but denied the shipowner's third-party claim for contribution and indemnity.[7] The Second Circuit, reversing on the issue of third-party liability, held that despite the absence of an express agreement of indemnity, the stevedore was liable to the shipowner for damages caused by the breach of its contract to stow the cargo properly and safely.[8] On appeal, the Supreme Court affirmed the judgment of the Second Circuit.[9]

Promulgation of the *Ryan* doctrine was to a large measure prompted by an earlier Supreme Court decision. In 1946 in *Seas Shipping Company v. Sieracki*[10] the Court extended the warranty of seaworthiness (a form of liability without fault) to include workers performing traditional seamen's work aboard a vessel. The result was to increase greatly the number of claims brought against shipowners by employees covered by the Longshoremen's Act, such as shipyard workers and longshoremen, to whom the shipowner had previously owed no duty of seaworthiness. As a no-fault claim, unseaworthiness imposed a heavy burden of defense on the shipowner. Often, the unseaworthy condition had been created, or brought into play, by the stevedore's or shipyard's control of the performance of work aboard the ship. Through its decision in *Ryan* the Court sought to ease the burden placed upon shipowners as a result of their being held strictly liable for damages caused by the unseaworthiness of the vessel.

To achieve this end, the Court in *Ryan* found contracts between shipowners and stevedores to contain an implied warranty that the latter would discharge its duties in a workmanlike manner. Where breach of this implied warranty led to the vessel's becoming unseaworthy and damages resulted, the shipowner, held strictly liable, could claim indemnity from the stevedore in a third-party action. Such an action was based upon the following reasoning. A contract warranty is an assurance that a fact exists at the time the contract begins and that it will continue to exist during the term of the contract.[11] Under common law, a breach of a contract warranty

6. Longshoremen were held to possess this right in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 1946 A.M.C. 698 (1946), but the right was statutorily eliminated by the 1972 Amendments to the Longshoremen's Act, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (codified in 33 U.S.C. § 905(b) (Supp. 1975)).
7. Palazzolo v. Pan-Atlantic S.S. Corp., 111 F. Supp. 505, 1953 A.M.C. 755 (E.D.N.Y. 1953).
8. Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277, 1954 A.M.C. 766 (2d Cir. 1954).
9. 350 U.S. 124, 1956 A.M.C. 9 (1956).
10. 328 U.S. 85, 1946 A.M.C. 698 (1946).
11. A "warranty" is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve

generally gives rise to a right of indemnity.[12] Indemnity is an obligation of one party (the indemnitor) to pay any losses or damages incurred by the other party (the indemnitee) including those resulting from claims by a third person against the indemnitee. An obligation to indemnify can arise out of either a tort or a contract relationship, and it can be express or implied.[13] Unlike contribution, indemnity shifts the entire burden to the indemnitor.[14]

The application of tort theories to shift liability to stevedores had been effectively foreclosed in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[15] The Supreme Court denied a shipowner's claim for contribution from a stevedore-employer found seventy-five percent at fault for the longshoreman's injuries. Misreading the role of contribution in American maritime law,[16] the Court chose not to adopt a rule of contribution among joint tortfeasors in non-collision cases.[17] This holding reinforced the statutory exclusivity of a stevedore-employer's tort liability under the Longshoremen's Act.[18]

The *Ryan* decision avoided the *Halcyon* rationale and the exclusive liability provision of the Longshoremen's Act by basing the shipowner's recovery on contract indemnity rather than on contribution among joint tortfeasors. Mr. Justice Burton noted the contractual relationship between the parties and stated:

> Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.[19]

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the promisee of any duty to ascertain the fact for himself, and amounts to a *promise to indemnify* the promisee for any loss if the fact warranted proves untrue.

17A C.J.S. *Contracts* § 341 at 325 (1963) (emphasis added) (footnotes omitted); see 8. S. WILLISTON, CONTRACTS § 970 (3d ed. 1964). *See also* 11 WILLISTON, *supra*, §§ 1392-1393A (1968); 5 A. CORBIN, CONTRACTS § 1037 at 228-34 (1964).

12. See authorities cited in note 11 *supra*.
13. See 42 C.J.S. *Indemnity* (1944) and cases cited.
14. See Digges, *Product Liability in Maryland Revisited*, 7 U. BALT. L. REV. 1, 26-40 (1977); W. PROSSER, LAW OF TORTS § 51 (4th ed. 1971).
15. 342 U.S. 282, 1952 A.M.C. 1 (1952).
16. *See* Staring, *Contribution And Division of Damages in Admiralty and Maritime Cases*, 45 CAL. L. REV. 304, 329 (1957).
17. 342 U.S. at 285-87, 1952 A.M.C. at 3-5.
18. The Court declined to intrude where Congress had been so active. 342 U.S. at 287, 1952 A.M.C. at 5; *see* 33 U.S.C. § 933(i) (1970).
19. 350 U.S. at 133-34, 1956 A.M.C. at 16-17 (footnotes omitted).

Stevedores were not eager for their employees to bring actions against shipowners, as the shipowner would recoup its losses by seeking *Ryan* indemnity from the stevedore for breach of the stevedore's implied contractual warranty of workmanlike performance.

Negligence of the shipowner did not bar the shipowner's right to *Ryan* indemnity; and, on the other hand, freedom from negligence did not insulate the stevedore-employer from liability to the shipowner. In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*,[20] the absence of negligence on the part of the stevedore did not affect the shipowner's claim for *Ryan* indemnity. The Court referred to the juxtaposition of the *Ryan* warranty to the shipowner's duty to provide a seaworthy ship:

> Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations.[21]

This development of the warranty was to some extent a departure from common law concepts of restitution and agency. A principal's right to recover from an agent who causes the principal to be liable to a third person was supported by general rules of restitution and agency, but only *if the principal was without fault.*[22]

The creation of implied contractual indemnity also brought new interest in common law "tort indemnity" based on determinations of active and passive negligence.[23] In maritime property damage cases, indemnity-minded attorneys invoked the right to indemnity based upon tort concepts. However, apportioning damages based upon the comparative fault of the parties received little attention.

III. JUDICIAL DEVELOPMENT OF THE *RYAN* WARRANTY SINCE 1956

After seven years of development of *Ryan* indemnity, a student commentator observed that "[a]s a legal theory in the abstract, the

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20. 376 U.S. 315, 1964 A.M.C. 1075 (1964).
21. *Id.* at 324, 1964 A.M.C. at 1083.
22. RESTATEMENT OF RESTITUTION § 96 (1937); RESTATEMENT (SECOND) OF AGENCY § 401, at Comment d (1958).
23. *See* Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178, 1969 A.M.C. 767 (5th Cir. 1969) (Bargeowner — Service Contractor); Simpson Timber Co. v. Parks, 390 F.2d 353, 1968 A.M.C. 566 (9th Cir. 1968) (Shipowner — Manufacturer), *cert. denied,* 393 U.S. 858 (1968); Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599, 1960 A.M.C. 716 (2d Cir. 1960) (Shipowner Shipyard), *cert.* denied, 363 U.S. 844 (1960); 41 AM. JUR. 2d *Indemnity* §§ 19-27 (1968).

Ryan doctrine could apparently enjoy unlimited expansion."[24] It was true enough. The Supreme Court and the lower federal courts developed the *Ryan* doctrine in a line of decisions generally favorable to the shipowner-indemnitee. The warranty ran to the ship, as well as to shipowners.[25] Fees and expenses were included in the indemnity. The shipowner was entitled to indemnity under the *Ryan* warranty even though the shipowner was not the party who had hired the stevedore.[26] Shipowners asked the courts to recognize an implied warranty in nearly all their contractual relationships. The warranty was extended to provide indemnity actions in a variety of admiralty cases: cargo damage,[27] towing contracts,[28] ship repairs,[29] ship painting,[30] ship cleaning,[31] a wharfinger's obligation to a ship,[32] pilotage,[33] launch service,[34] and a drill barge owner's contract with an independent drill pipe contractor.[35] The *Ryan* warranty was extended to non-maritime situations as well.[36]

The Supreme Court did not delineate the circumstances necessary for the application of *Ryan* indemnity. In his dissent in *Ryan,* Justice Black noted that the "precise scope of the indemnity which the Court finds the stevedore intended to assume is left in doubt."[37] The expansion of the unseaworthiness concept in favor of

24. Comment, *The Ryan Doctrine: Present Status and Future Development,* 37 TUL. L. REV. 786, 808 (1963).
25. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 1959 A.M.C. 580 (1959).
26. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 1960 A.M.C. 2260 (1960).
27. Interstate Steel Corp. v. S.S. "Crystal Gem," 317 F. Supp. 112, 1970 A.M.C. 617 (S.D.N.Y. 1970); St. Paul Fire & Marine Ins. Co. v. Vessel TRINITY, 1967 A.M.C. 1768 (C.D. Cal. 1967); The shipper or consignee's rights against the carrier, however, were not affected by *Ryan* indemnity. These rights and the carrier's liability are governed by the statutory scheme in The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300–1315 (1970), and The Harter Act, 46 U.S.C. §§ 190–196 (1970). Schnell v. The Vallescura, 293 U.S. 296, 1934 A.M.C. 1573 (1934).
28. Tebbs v. Baker Whiteley Towing Co., 407 F.2d 1055, 1969 A.M.C. 275 (4th Cir. 1969); Dunbar v. Henry DuBois' Sons Co., 275 F.2d 304, 1960 A.M.C. 1393 (2d Cir.), *cert. denied,* 364 U.S. 815 (1960).
29. American Export Lines v. Norfolk Shipbuilding & Drydock Corp., 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964); Booth S.S. Co. v. Meier & Oelhaf Co., 262 F.2d 310, 1959 A.M.C. 1974 (2d Cir. 1958).
30. Mortensen v. A/S Glittre, 348 F.2d 383, 1965 A.M.C. 2016 (2d Cir. 1965).
31. H & H Ship Service Co. v. Weyerhaeuser Line, 382 F.2d 711, 1967 A.M.C. 2483 (9th Cir. 1967).
32. Dow Chemical Co. v. Barge UM-23B, 424 F.2d 307, 1970 A.M.C. 1622 (5th Cir. 1970).
33. Tampa Ship Repair & Dry Dock Co. v. A.P. St. Philip, Inc., 440 F.2d 1193, 1971 A.M.C. 1547 (5th Cir. 1971); Barbey Packing Corp. v. The S.S. Stavros, 169 F. Supp. 897, 1959 A.M.C. 1542 (D. Ore. 1959). *But see* United States v. Joyce, 511 F.2d 1127, 1975 A.M.C. 1498 (9th Cir. 1975) (indemnity based upon negligence).
34. United States v. Tug Manzanillo, 310 F.2d 220, 1963 A.M.C. 365 (9th Cir. 1962); Moore-McCormack Lines, Inc. v. Boston Line and Serv. Co., 286 F. Supp. 399, 1968 A.M.C. 520 (D. Mass. 1968).
35. Whisenant v. Brewster Bartle Offshore Co., 446 F.2d 394, 1971 A.M.C. 1783 (5th Cir. 1971).
36. *See, e.g.,* General Electric Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), *rehearing denied per curiam,* 272 F.2d 624 (4th Cir. 1959), *cert. denied,* 361 U.S. 964 (1960).
37. 350 U.S. at 143, 1956 A.M.C. at 24.

longshoremen occasioned by *Sieracki* provided ample nourishment for development of *Ryan* indemnity.[38] The Fifth Circuit alone resisted the expansion of *Ryan* indemnity beyond the facts of *Ryan*.[39] As the lower federal courts extended the application of *Ryan* indemnity after 1956, the reasons for the expansion were often not well stated or analyzed.

The development and expansion occurred in the five areas indicated below.

A. *Invocation By A Shipowner Not Exposed To A Third-Party's Claim Based On Liability Without Fault*

Despite general recognition that the implied *Ryan* warranty was dependent upon the existence of a shipowner's absolute duty of seaworthiness,[40] *Ryan* indemnity was questionably extended to include situations in which shipowners were not exposed to a claim based on no-fault liability.

For example, in 1957, a time charterer was permitted to invoke the *Ryan* warranty where it had been subjected to vicarious liability to a shipowner for negligence by a third person to whom the vessel had been entrusted.[41] In cargo cases shipowners were able to obtain *Ryan* indemnity against stevedores even though a shipowner's duty to a shipper with respect to the seaworthiness of the vessel is not absolute, and only extends to the exercise of *due diligence* to make the vessel seaworthy.[42] In *Tebbs v. Baker Whiteley Towing Co.*,[43] a

38. The Fifth Circuit noted in Lusich v. Bloomfield S.S. Co., 355 F.2d 770, 1966 A.M.C. 191 (5th Cir. 1966), that the development was favorable to the shipowners.

39. [T]he *Ryan* doctrine is closely tied to a vessel and this obligation which the shipowner owes to those employed on the vessel. We are accordingly extremely hesistant to extend the burdensome *Ryan* doctrine to situations not substantially similar to those which gave birth to the doctrine. The obligations which the owner of an offshore drilling platform owes to those employed on it are not sufficiently similar to those owed by a shipowner to a seaman to permit the extension of the doctrine.

Loffland Bros. Co. v. Roberts, 386 F.2d 540, 549, 1968 A.M.C. 1463, 1473 (5th Cir. 1967), *cert. denied,* 389 U.S. 1040 (1968).

The Fifth Circuit adopted this position after the *Ryan* decision in 1956 and has maintained it to the present time. *In Re* Dearborn Marine Service, Inc., 499 F.2d 263, 287 (5th Cir. 1974) (citing cases), *cert. dismissed,* 423 U.S. 886 (1975).

40. *See, e.g.,* Davis v. Chas. Kurz & Co., 483 F.2d 184, 187, 1974 A.M.C. 1862, 1865 (9th Cir. 1973); Liberty Mut. Ins. Co. v. Fruehauf Corp., 472 F.2d 69, 70 (6th Cir. 1972); Barr v. Brezina Constr. Co., 464 F.2d 1141, 1145 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); Hobart v. Sohio Petroleum Co., 445 F.2d 435, 438, 1971 A.M.C. 2633, 2637 (5th Cir. 1971), *cert. denied,* 404 U.S. 942 (1971); Schwartz v. Compagnie Generale Transatlantique, 405 F.2d 270, 276, 1969 A.M.C. 311, 318 (2d Cir. 1968); DeGioia v. United States Lines Co., 304 F.2d 421, 425, 1962 A.M.C. 1747, 1752–53 (2d Cir. 1962).

41. James McWilliams Blue Line, Inc. v. Esso Standard Oil Co., 245 F.2d 84, 1957 A.M.C. 1213 (2d Cir. 1957).

42. 46 U.S.C. §§ 190–196 (1970) (Harter Act); 46 U.S.C. §§ 1300–1315 (1970) (Carriage of Goods by Sea Act).

43. 407 F.2d 1055, 1969 A.M.C. 275 (4th Cir. 1969).

negligent bailee of a tow was permitted to invoke the *Ryan* warranty against the tug even though the bailee had no exposure to absolute liability.

B. Application Despite Express Disclaimers

The Supreme Court made clear that an express oral or written agreement was not a prerequisite for *Ryan* indemnity. Justice Black dissented and chastized the majority for implying an obligation to indemnify without "a shred of evidence" that the stevedore had so agreed.[44] Subsequent lower court decisions recognized, as a general proposition, that a clear and express disclaimer would prevent *Ryan* indemnity. But few contracts were found sufficiently clear and express, and written provisions limiting a stevedore's liability were seldom successful.

In *Pettus v. Grace Line, Inc.*,[45] an express contractual provision setting out the stevedore's liability for negligence did not avoid the *Ryan* warranty. In *David Crystal, Inc. v. Cunard Steam-ship Co.*,[46] an express disclaimer of liability for "losses resulting from possible theft or error in delivery" did not prevent the imposition of *Ryan* indemnity against a stevedore for misdelivery of cargo against a forged delivery order. The court said that "such disclaimers are not favored and must be strictly construed."[47] Even the following disclaimer was not enough:

> This contract constitutes the full agreement between the parties hereto, and no warranty of any nature is to be implied from any of the wording of this agreement.[48]

The Second Circuit implied a *Ryan* warranty in favor of a shipowner even though the stevedoring contract with the consignee contained an express warranty running only to the consignee.[49] The Ninth Circuit held that an express assumption of liability for negligence in a stevedoring contract did not negate the implied *Ryan* warranty of workmanlike performance.[50] And, as a final example, a clause placing responsibility on the shipowner and charterer for damages as a result of the vessel's failure to comply with the Safety

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44. 350 U.S. at 141-44, 1956, A.M.C. at 22-25.
45. 305 F.2d 151, 1962 A.M.C. 2329 (2d Cir. 1962). *See also* McCross v. Ratnaker Shipping Co., 265 F. Supp. 827, 1967 A.M.C. 291 (D. Md. 1967).
46. 339 F.2d 295, 1965 A.M.C. 39 (2d Cir. 1964), *cert. denied,* 380 U.S. 976 (1965).
47. *Id.* at 300, 1965 A.M.C. at 46.
48. Brattoli v. Kheel, 302 F. Supp. 745, 752, 1969 A.M.C. 427, 437 (E.D.N.Y. 1969). *See also* Caputo v. Kheel, 291 F. Supp. 804, 1969 A.M.C. 439 (S.D.N.Y. 1968).
49. Drago v. A/S Inger, 305 F.2d 139, 1963 A.M.C. 98 (2d Cir.), *cert. denied,* 371 U.S. 925 (1962).
50. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 336 F.2d 124, 1964 A.M.C. 1927 (9th Cir. 1964), *cert. denied,* 379 U.S. 973 (1965).

and Health Regulations for Longshoring was not "clear and explicit" contract language precluding *Ryan* indemnity.[51]

After the *Italia* decision,[52] a student author wondered how a stevedore might avoid *Ryan* indemnity:

> *Italia* prompts inquiry as to how stevedoring companies may escape this form of liability. Since federal maritime law governs the interpretation of the implied warranties, stevedores may not expect relief from state legislatures. However, federal law does not prohibit express disclaimers of strict liability and courts are bound to respect an express contractual disclaimer of any duty to indemnify in the absence of negligence. No public policy, such as the unequal bargaining power of the contracting parties, militates against such an arrangement between stevedore and shipowner. Such a disclaimer must be clear, however, for the Court's decision calls into question holdings that the recitation of a limited express warranty precludes the finding of an implied warranty. The decision suggests as well that the stipulation in the *Italia* contract imposing liability upon the shipowner for injuries caused "by reason of the failure of the ship's gear and/or equipment" might not be sufficient to bar indemnification.[53]

All that could be said with certainty was that an explicit disclaimer in a written stevedoring contract *might* negate the implied *Ryan* warranty.

C. *Counsel Fees and Expenses*

Recovery of counsel fees and expenses was a feature of the *Ryan* doctrine attractive to a prospective indemnitee. The Supreme Court has not held that a shipowner's litigation expenses are recoverable under the *Ryan* indemnity, but the Court in *Ryan* did cite Section 334 of the *Restatement of Contracts,* which states that reasonable litigation expenses are recoverable damages caused by a breach of contract.[54] The lower federal courts arrived at a consensus that the foreseeable damages recoverable for a breach of the *Ryan* warranty

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51. Sanchez v. Lubeck Linie, AG, 318 F. Supp. 821, 1971 A.M.C. 687 (S.D.N.Y. 1970).
52. 376 U.S. 315, 1964 A.M.C. 1075 (1964).
53. 78 HARV. L. REV. 143, 191 (1964) (footnotes omitted).
54. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 129 n.3 (1956). The cited RESTATEMENT section reads as follows:

> EXPENSE OF LITIGATION CAUSED BY BREACH OF CONTRACT.
> If a breach of contract is the cause of litigation between the plaintiff and third parties that the defendant had reason to foresee when the contract was made, the plaintiff's reasonable expenditures in such litigation are included in estimating his damages.

RESTATEMENT OF CONTRACTS § 334 (1932).

included reasonable attorney's fees and expenses incurred in defending the injured party's action for damages.[55]

The shipowner was entitled to recover its fees and expenses regardless of whether the shipowner's defense was successful.[56] If the rule were otherwise, the courts reasoned, then there would be "a premium on losing law suits."[57] The shipowner could also be awarded pre-judgment interest on its fees and expenses.[58] The shipowner, however, was not entitled to recover fees and expenses incurred in prosecuting the indemnity action against the stevedore.[59]

There were some early and isolated denials of fees and expenses,[60] but only one exception developed. The Third Circuit in *Gilchrist v. Mitsui Sempaku K.K.*,[61] held that a shipowner should not be awarded fees and expenses unless the stevedore's breach was the "sole responsible cause" of the damage.

D. Contributory Negligence Of The Indemnitor's Employee Established An Automatic Breach Of The Warranty

The Second, Fourth, and Ninth Circuits held that an employee's contributory negligence was directly imputed to his employer and

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55. The most extensive early analysis of the right of a shipowner to recover fees and expenses is contained in two near-companion cases decided in Virginia. In General Electric Co. v. Mason & Dixon Lines, Inc., 186 F. Supp. 761 (W.D. Va. 1960), the judge discussed the right of an indemnitee in a non-maritime case to receive counsel fees and expenses as part of his indemnification. The court in that case reviewed the existing case law and text authorities on the subject and concluded that:

> (1) Basically, the indemnitee does have the right to recover attorneys' fees in an indemnity case.
>
> (2) The right of recovery is not dependent upon a written or express contract of indemnity but also is applicable to an implied contract of indemnity.

186 F. Supp. at 766. Ten months after the *General Electric* decision, another federal judge in Virginia cited this case and some others for the proposition that it was "fairly well settled" that an indemnitee could get attorneys' fees from the indemnitor under an express or implied contract of indemnity. Holley v. The Manfred Stansfield, 186 F. Supp. 805, 811, 1960 A.M.C. 2307, 2316 (E.D. Va. 1960). The rationale was that full indemnification should include reasonable counsel fees and expenses incurred in defending the third party's claim since the shipowner would not have been put to such expense had it not been for the indemnitor's breach of the warranty.

56. Arista Cia. DeVapores S.A. v. Howard Terminal, 372 F.2d 152, 1967 A.M.C. 312 (9th Cir. 1967).

57. Massa v. C.A. Venezuelan Navigacion, 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964).

58. Jones Stevedoring Co. v. Nippo Kisen Co., 419 F.2d 143, 1969 A.M.C. 2465 (9th Cir. 1969).

59. Calderone v. Naviera Vacuba S/A, 328 F.2d 578, 1964 A.M.C. 600 (2d Cir. 1964); Paliaga v. Luckenbach S.S. Co., 301 F.2d 403, 409 n.1, 1962 A.M.C. 1632, 1639 n.1 (2d Cir. 1962); Holley v. The Manfred Stansfield, 186 F. Supp. 805, 1960 A.M.C. 2307 (E.D. Va. 1960).

60. *See, e.g.*, Deans v. Kihlstrom, 197 F. Supp. 339, 1961 A.M.C. 2273 (E.D. Va. 1961) (case settled); Cimino v. United States, 1960 A.M.C. 2120 (S.D.N.Y. 1960) (no indemnification if shipowner successfully defends).

61. 405 F.2d 763 (3d Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

constituted a breach of the warranty.[62] The Fifth Circuit did not go so far. It held that the contributory negligence of the employee was only a factor to be taken into consideration in determining whether there had been a breach.[63]

E. Defenses And Counterattacks

The Supreme Court did establish a defense to *Ryan* indemnity in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*[64] The stevedore/indemnitor could defeat the shipowner's *Ryan* indemnity claim by showing conduct by the shipowner sufficient to preclude indemnity.[65] Generally, shipowner conduct that amounted to a material breach of the contract precluded indemnity. More specifically, the shipowner was not entitled to *Ryan* indemnity when its conduct prevented, actively hindered, or seriously handicapped the stevedore's performance.[66]

Shipowners occasionally pressed their indemnity claims before a determination of liability on the main claim. The stevedore's defense of unripeness was not always successful. In *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*,[67] the court held that a shipowner's *Ryan* indemnity action was ripe simply because suit papers had been filed against the shipowner and the shipowner had incurred some expenses. There was little direct authority in most circuits as to when a claim for *Ryan* indemnification was premature. In practice, however, shipowners and stevedores usually postponed resolution of the indemnity issue until the time of the trial of the claim against the shipowner.

The stevedore/indemnitor could also base a defense on causation. Although the breach was divorced from principles of negligence, a causal connection had to be established between the claimed breach and the harm suffered by the shipowner.[68]

62. United States Lines, Inc. v. Jarka Corp., 444 F.2d 26, 1971 A.M.C. 1351 (4th Cir. 1971); McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334, 1969 A.M.C. 1387 (2d Cir. 1969), *cert. denied,* 395 U.S. 946 (1969); Arista Cia. DeVapores S.A. v. Howard Terminal, 372 F.2d 152, 1967 A.M.C. 312 (9th Cir. 1967). *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-55, at 446 (2d ed. 1975).
63. LeBlanc v. Two-R Drilling Co., 527 F.2d 1316, 1976 A.M.C. 303 (5th Cir. 1976); D/S Ove Skou v. Herbert, 365 F.2d 341, 1966 A.M.C. 2223 (5th Cir. 1966), *cert. denied,* 400 U.S. 902 (1970).
64. 355 U.S. 563, 1958 A.M.C. 501 (1958).
65. *Id.* at 567-68, 1958 A.M.C. at 505.
66. See Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727, 1971 A.M.C. 1356 (3d Cir. 1971); United States Lines, Inc. v. Jarka Corp., 444 F.2d 26, 1971 A.M.C. 1351 (4th Cir. 1971); H & H Ship Serv. Co. v. Weyerhaeuser Line, 382 F.2d 711, 1967 A.M.C. 2483 (9th Cir. 1967); D/S Ove Skou v. Herbert, 365 F.2d 341, 1966 A.M.C. 2223 (5th Cir. 1966), *cert. denied,* 400 U.S. 902 (1970); Mortensen v. A/S Glittre, 348 F.2d 383, 1965 A.M.C. 2016 (2d Cir. 1965). *See also* Villareal, *Fourteen Years With Conduct Sufficient To Preclude Indemnity,* 4 J. MAR. L. & COM. 309 (1973).
67. 339 F.2d 673, 1965 A.M.C. 283 (3d Cir. 1964), *cert. denied,* 328 U.S. 812 (1965).
68. Garner v. Cities Service Tankers Corp., 456 F.2d 476, 1972 A.M.C. 1980 (5th Cir. 1972).

The Supreme Court also established a limited counter-action in favor of stevedores. In *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*,[69] the Court held that a shipowner owes a duty of due care to a stevedore, and when this duty is breached the stevedore has a cause of action in tort to recover the amount of employee compensation payments caused by the shipowner's negligence.[70] The Court left open whether the stevedore could recover under two other theories: (1) an implied contractual warranty in favor of the stevedore, and (2) a quasi-contractual right to indemnity based on active/passive negligence concepts. The Court remanded for consideration of these theories,[71] but there was no subsequent reported decision in the case.

IV. LEGISLATIVE AND DECISIONAL DEVELOPMENTS — 1970-1975

Events in the 1970's have cast doubt on the justification for *Ryan* indemnity. In personal injury and death suits by employees covered under the Longshoremen's Act, the 1972 Amendments[72] and their legislative history establish that a shipowner may no longer implead the employer for indemnity. The statutory scheme under the Longshoremen's Act is paramount and is not to be altered by judicial gloss. Section 905(b) of the Longshoremen's Act now states that any agreement or warranty imposing liability on the employer for damages recovered against a shipowner is declared void:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.*[73]

The original reason for *Ryan* indemnity is gone because the 1972 Amendments preclude shipowner's liability to injured longshoremen based upon unseaworthiness.[74]

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69. 394 U.S. 404, 1969 A.M.C. 745 (1969).
70. *Id.* at 417, 1969 A.M.C. at 754-55.
71. *Id.* at 418-22, 1969 A.M.C. at 755-58.
72. Pub. L. No. 92-576, 86 Stat. 1263 (amending 33 U.S.C. §§ 901-950 (1970)).
73. 33 U.S.C. § 905(b) (Supp. 1975) (emphasis added).
74. Section 905(b) provides in pertinent part as follows:
    > 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.

    Legislative history reveals the following reasoning for the amendment:
    > The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an

The Supreme Court first commented on the effects of the 1972 Amendments in a footnote in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*:[75]

> The intent and effect of this amendment were to overrule this Court's decisions in *Seas Shipping Co. v. Sieracki,* and *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer.[76]

The 1972 Amendments brought on a rash of lower court farewells to the *Ryan* warranty. Some courts stated flatly that the *Ryan* warranty had been abolished.[77] These comments, however, did not address the expansion of *Ryan* indemnity beyond personal injury and death cases. Few maritime attorneys believed that the enactment of the 1972 Amendments alone would eliminate the general application of *Ryan* indemnity to maritime contracts.

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injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

H. R. REP. No. 92-1441, 92d Cong. 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4704.

75. 417 U.S. 106, 1974 A.M.C. 537 (1974).
76. *Id.* at 113 n.6, 1974 A.M.C. at 542 n.6 (citations omitted).
77. *See, e.g.,* Valentino v. Rickners Rhederei, G.M.B.H., 552 F.2d 466, 470, 1977 A.M.C. 618, 624 (2d Cir. 1977) ("the abolition of the 'warranty of workmanlike performance' and its accompanying right to indemnity"); Hudson Waterways Corp. v. Coastal Marine Serv., Inc., 436 F. Supp. 597, 600 n.2, 1978 A.M.C. 341, 343 n.2 (E.D. Tex. 1977) ("The *Ryan* Doctrine in its original form, has been abolished"). Judge Wisdom of the Fifth Circuit commented in Brock v. Coral Drilling, Inc., that the 1972 Amendments eliminate the implied warranty:

> The effect of the Amendments is to eliminate the *Ryan* doctrine, under which the shipowner could recover against the stevedore for breach of its warranty of workmanlike service. Since the shipowner cannot be sued by a *Sieracki* seaman on the strict liability theory of unseaworthiness, *Ryan* indemnity from the stevedore is unnecessary. Furthermore, the Amendments state that contractual agreements requiring the stevedore to indemnify the shipowner for such damages are void as against public policy.

477 F.2d 211, 213 n.1, 1973 A.M.C. 1117, 1118 n.1 (5th Cir. 1973).

Considering the 1972 Amendments and several Supreme Court decisions of broader application, however, the future of *Ryan* indemnity is uncertain. Proportional damages based on degrees of fault is now the general rule for damages in maritime property damage cases. The move toward proportional fault began in 1970. In *United States v. Seckinger,*[78] a contract claim based on negligence, the Supreme Court showed a preference for allocation of damages rather than full liability or indemnity being imposed on one party. A United States Government contractor agreed that it "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence." The United States had paid damages to an injured employee of the contractor, and the Fifth Circuit ruled that the contract clause did not permit the Government to recover from the contractor any of the damages paid to the employee. The Supreme Court preferred a comparative negligence interpretation of the clause:

> A synthesis of all of the foregoing considerations leads to the conclusion that the most reasonable construction of the clause is the alternative suggestion of the Government, that is, that liability be premised on the basis of comparative negligence. In the first place, this interpretation is consistent with the plain language of the clause, for Seckinger will be required to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee.
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> Secondly, the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocally indicated as the intention of the parties is preserved intact. In no event will Seckinger be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, Seckinger will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent.[79]

Two years after the enactment of the 1972 Amendments, the Supreme Court revived the contribution remedy thought to have been foreclosed by *Halcyon.* In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,*[80] the Court redefined and limited the rule against contribution in maritime cases. The Court followed the interpretation of several appellate courts that the rule against contribution in non-collision maritime cases was inapplicable where the joint tortfeasor was not statutorily immune from tort liability.[81]

78. 397 U.S. 203 (1970).
79. *Id.* at 215-16 (footnotes omitted).
80. 417 U.S. 106, 1974 A.M.C. 537 (1974).
81. *See In re* Seaboard Shipping Corp., 449 F.2d 132 (2d Cir. 1971), *cert. denied,* 406 U.S. 949 (1972); Watz v. Zapata Off-Shore Co., 431 F.2d 100, 1970 A.M.C. 2307

The most significant decision affecting the future of *Ryan* indemnity in property damage cases is *United States v. Reliable Transfer Co.*[82] Prior to 1975, damages in maritime collision cases where both parties were at fault were divided equally or were placed completely on one party in some cases under the "major/minor" fault rule.[83] *Reliable Transfer* established that damages in a collision case are to be allocated in proportion to the comparative degree of the fault of the parties. The lower federal courts are viewing *Reliable Transfer* as the latest development in the evolution of admiralty law towards comparative fault and proportionate recovery and have applied the rule of comparative fault to various property damage claims based on negligence.[84]

An exception remains, however, in cargo damage cases. The determination of rights between shipper and carrier is established by the Harter Act[85] and the Carriage of Goods by Sea Act.[86] The allocation of damages in such cases is controlled by *Schnell v. The Vallescura.*[87] There the Court recognized a rule which determined the damages for which each party is liable, and later decisions implemented burdens of proof which allowed carriers to avoid that portion of the damage proved to have been caused by one of the statutory exceptions provided in the above mentioned acts, such as perils of the sea.[88] The Second Circuit, for example, declined to apply *Reliable Transfer* and disturb this statutory and decisional scheme in cargo damage suits:

> This admiralty cargo suit involves the damage and loss to a shipment of yams. It also represents an invitation to apply to cargo suits the doctrine of proportionate fault recently made applicable to collision and stranding cases by *United States v. Reliable Transfer Co.*, an invitation which we decline.
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> . . . Indeed, this area of maritime law has been governed for some forty years by a rule which does allow for apportionment according to relative degree of fault, although an occasional harsh result may arise, as when the

(5th Cir. 1970); Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F.2d 1131, 1971 A.M.C. 995 (5th Cir. 1970), *cert. denied,* 400 U.S. 993 (1971).

82. 421 U.S. 397, 1975 A.M.C. 541 (1975). For a discussion of the place of *Reliable Transfer* in the historical development of American collision law, *see* Owen, *The Origins and Development of Marine Collision Law,* 51 TUL. L. REV. 759 (1977).
83. *See* City of New York, 147 U.S. 72, 85 (1893).
84. *See, e.g.,* Hanover Insurance Co. v. Puerto Rico Lighterage Co., 553 F.2d 728, 1977 A.M.C. 850 (1st Cir. 1977).
85. 46 U.S.C. §§ 190–196 (1970).
86. 46 U.S.C. §§ 1300–1315 (1970).
87. 293 U.S. 296, 1934 A.M.C. 1573 (1934).
88. J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F.2d 580, 1971 A.M.C. 539 (2d Cir. 1971); Pioneer Import Corp. v. The Lafcomo, 138 F.2d 907 (2d Cir. 1943), *cert. denied,* 321 U.S. 766 (1944).

> carrier is unable to sustain its final burden of providing the relative degree of fault. In such a case the carrier must bear all the damages even though it has been established that those damages were in part caused by occurrences for which it is excepted from liability. Nevertheless, the rule of *Schnell v. The Vallescura,* clearly stated and frequently applied, must govern in this case.[89]

Similarly, in mutual fault collision cases involving cargo damage, cargo interests are entitled to recover full damages from the non-carrying ship.[90]

As previously mentioned, damages are not apportioned in personal injury and death claims of maritime employees covered by the Longshoremen's Act. The 1972 Amendments and the *Kopke* decision give preeminence to the statutory immunity of maritime employers under the compensation scheme of the Longshoremen's Act. Although the 1972 Amendments did not alter the joint and several liability of third parties suable for negligence under sections 905(b) and 933, shipowners are seeking the application of comparative negligence principles to establish an "equitable credit" reducing their liability in personal injury and death cases.[91]

The current trend towards allocation of damages based on degrees of fault can be traced to some early criticisms of the *Halcyon* and *Ryan* decisions. In a very thorough and scholarly article on damages in admiralty and maritime cases written in 1957, Graydon Staring demonstrated that the dictum in *Halcyon* limiting the application of contribution to collision cases was incorrect.[92] The article also pointed out that contribution had been applied in admiralty to contract claims based upon negligence:

> Despite the inclination of courts to discuss contribution as though it were only a tort matter, it may be more desirable to say that it arises from a breach of duty. The somewhat artificial dichotomy which exists in the common law between torts and contracts has not traditionally been observed in admiralty. The admiralty courts are civil law courts and the civil law in general has never experienced the agonies of the common law writ system and has never observed a sharp distinction between contractual and delictual rights. Accordingly, in numerous instances already cited, contribution or division has been allowed in cases of

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89. Vana Trading Co. v. S.S. "Mette Skou," 556 F.2d 100, 106, 1977 A.M.C. 702, 709–10 (2d Cir.) (citation omitted), *cert. denied,* 434 U.S. 892 (1977).
90. The Chattahoochee, 173 U.S. 540 (1899).
91. Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153, ___ A.M.C. ___ (4th Cir. 1978). *See also* Coleman and Daly, *Equitable Credit: Apportionment of Damages,* 35 MD. L. REV. 351 (1976).
92. Staring, *supra* note 16, at 345. Staring's article was cited four times in the *Reliable Transfer* decision.

> breach of contract. While contribution for breach of contract raises certain problems, the flexibility of admiralty on this point, as on others where it contrasts with common law rigidity, should be recognized and perpetuated as a means of doing substantial justice.[93]

Professors Gilmore and Black, completing the first edition of their text in the Spring of 1956, also pointed out that full indemnity under the *Ryan* doctrine was no improvement over the denial of contribution among joint tortfeasors in non-collision cases decreed by *Halcyon*.[94] Subsequently, Congress enacted the 1972 Amendments and chose to insulate maritime employees from contribution and indemnity in personal injury and death cases. These changes were effected, however, more out of concern for burgeoning federal court caseloads, than as an attempt to improve admiralty jurisprudence. But in property damage cases the "wholehog" results of *Ryan* indemnity continue to be unjustified.

V. SURVEY OF RECENT *RYAN* INDEMNITY CASES

A. Non-Personal Injury And Non-Death Cases

1. The Continued Existence And Application Of The Warranty

The effects of these legislative and decisional developments are slowly materializing, but shipowners have continued to receive the benefits of *Ryan* indemnity in several recent cargo damage cases despite the qualified nature of their duty to shippers.[95] These

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93. *Id.* at 334 (footnotes omitted).

94. In this situation Halcyon suggested that the whole loss would fall on the shipowner, the employer paying nothing (no contribution among tortfeasors). The obvious unjustness of the rule no doubt stimulated the lower courts in their invention of ways to evade it. Under Ryan, on the other hand, at least in the absence of a contrary agreement in the contract between employer and shipowner, the whole loss falls on the employer, the negligent shipowner paying nothing. This result seems quite as contrary to natural justice as that dictated by Halcyon.

    . . . .

    . . . Despite Halcyon the admiralty tradition of a comparative negligence rule, with division of damages, is impressively deep-rooted. If the Court would overrule Halcyon in its conceptual aspects (as it has by Ryan overruled it in practical effect) and adopt, or for that matter 'fashion', a comparative negligence rule, the way would be open to protect the interests of the employee without coming to the unhappy wholehog results of either Halcyon or Ryan.

    G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY, at 374 (1st ed. 1957) (footnote omitted). For a recent commentary and analysis of the law of damages in admiralty, see Allbritton, *Division of Damages in Admiralty*, 2 J. MAR. L. & COM. 323 (1971).

95. SS Amazonia v. New Jersey Export Marine Carpenters, Inc., 564 F.2d 5, 1977 A.M.C. 1885 (2d Cir. 1977); F. J. Walker, Ltd. v. Motor Vessel "Lemoncore," 561 F.2d 1138, 1978 A.M.C. 300 (5th Cir. 1977); Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1974 A.M.C. 2568 (2d Cir. 1974); Stein Hall & Co. v. S.S. Concordia Viking, 494 F.2d 287, 1974 A.M.C. 275 (2d Cir. 1974); Master Shipping Agency,

decisions do not indicate that any consideration was given to the lack of shipowner exposure to the seaworthiness duty or to the availability of contribution and proportionate fault.

Shipowner liabilities stemming from breach of the warranty of seaworthiness was discussed by the Second Circuit in *Fairmont Ship Corp. v. Chevron International Oil Co.*,[96] a case involving tug assistance provided as part of a bunkering contract. The shipowner sued Chevron to recover damages to its vessel when she fetched up against a dike due to negligence of the tugs furnished by the oil company. The court distinguished the determination of whether the *Ryan* warranty could appropriately be implied in a contract from a determination of whether full *Ryan* indemnity is owing should the *Ryan* warranty, once it is held to exist, be breached. The court observed that:

> [T]he primary issue in *Ryan* was the indemnity problem, and the Court used the warranty of workmanlike performance as a vehicle on which to base the stevedore's liability to indemnify the shipowner. *Ryan's* recognition of the existence of a warranty of workmanlike performance in a maritime service contract was merely incidental to its particularized holding that the shipowner in the circumstances there presented was entitled to indemnity. Thus, the factors to be considered in determining whether a contract includes a warranty of workmanlike performance are entirely separate from the factors that go into the determination of whether that warranty encompasses an obligation to indemnity.[97]

The court concluded that the *Ryan* warranty still had validity, but offered the new rationale that "*Ryan*, by necessary implication, confirmed the applicability to maritime service contracts of the hornbook rule of contract law that one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner."[98] In considering whether a warranty should encompass an obligation to indemnify, the court recited the elements of *Ryan* indemnity in a way that would restrict further expansion:

> [A] shipowner, relying on the expertise of another party (the contractor), enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner; the improper, unsafe or incompetent execu-

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Inc. v. M.S. Farida, 1976 A.M.C. 91 (S.D.N.Y. 1975) (shipowner bound to prove the exercise of due diligence and at the same time entitled to the warranty of workmanlike performance from the stevedore company).

96. 511 F.2d 1252, 1975 A.M.C. 261 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975).
97. *Id.* at 1259, 1975 A.M.C. at 270.
98. *Id.*, 1975 A.M.C. at 271.

> tion of such services would foreseeably render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the shipowner would thereby be exposed to liability regardless of fault.[99]

The court noted that in *Fairmont,* it was not really dealing with an indemnity case. However, having found that Chevron impliedly warranted to perform in a workmanlike manner, and that it had breached this *Ryan* warranty, the court held the oil company liable for all the damages (making the result for practical purposes the same as if the parties had stood in the relationship of indemnitor to indemnitee). Thus, while the court conceptually distinguished the *Ryan* warranty from the *Ryan* indemnity, likening the former to "a hornbook rule of contract law," and employing, *inter alia,* the concept of liability based on unseaworthiness to delimit the scope of the application of the latter, there was no discussion of apportionment of damages, whether awarded in an indemnity situation or otherwise. Later that year, however, the Supreme Court in *Reliable Transfer* addressed the issue of apportionment of property damage awards in a way that may presage the death knell of "all or nothing" awards for breach of the *Ryan* warranty.

In *Flunker v. United States,*[100] the Ninth Circuit avoided an endorsement of the *Ryan* doctrine in situations where the shipowner was not faced with no-fault liability:

> The appropriate course is to require that, in the absence of express contract, a covenant of workmanlike performance will not be implied in favor of a shipowner unless there is a relationship between the tortfeasor and the shipowner in the context of shipping that makes the implication reasonable.[101]

In a footnote, the court observed that "[m]ost cases to date have implied such a warranty only when the shipowner owes a non-fault duty to the plaintiff. [Citing *Fairmont*]. We do not need to decide whether the warranty of workmanlike service extends beyond non-fault situations."[102]

Another recent decision introduced negligence considerations to the application of *Ryan* indemnity in situations where the shipowner is not exposed to liability on some no-fault basis. This is plainly contrary to the principles of *Ryan* indemnity developed in the *Italia* case.[103] In *Navieros Oceanikos, S.A. v. S.T. Mobil Trader,*[104] a

99. *Id.* at 1258, 1975 A.M.C. at 269 (footnotes omitted).
100. 528 F.2d 239 (9th Cir. 1975).
101. *Id.* at 243.
102. *Id.* at n.3.
103. Italia Societa per Azoni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964). See text accompanying notes 20-23 *supra.*
104. 554 F.2d 43, 1977 A.M.C. 739 (2d Cir. 1977), *noted in* 9 J. MAR. L. & COM. 273 (1978).

shipowner sued a barge owner for damage caused by a fire that broke out during bunkering operations. The district court had found the barge twenty-five percent at fault and the shipowner seventy-five percent at fault and refused to place full responsibility on the bargeowner under *Ryan* indemnity. The Second Circuit affirmed. The existence of an implied warranty of workmanlike performance in the bunkering contract was recognized. In the absence of exposure to liability without fault, however, the court stated that there would be no reason to indemnify a shipowner who was contributorily negligent.[105]

Other court decisions, however, have rejected any limitation on *Ryan* indemnity based on the nature of the shipowner's liability to a third person. In *Henry v. A/S Ocean,*[106] the court said that "[T]he stevedore's liability for breach of warranty does not rest upon the nature of the shipowner's liability (i.e., whether it is based upon unseaworthiness rather than upon negligence) but upon the stevedore's own contractual obligation to the shipowner."[107]

The federal appellate decisions since 1972 do indicate that the expansion of *Ryan* indemnity is over. The Fifth Circuit cases cautioning against expansion of *Ryan* indemnity are now joined by decisions from the Second and Ninth Circuits which pull back from *Ryan* indemnity. The Fifth Circuit reiterated its position in 1975:

> The dying gasp at a WWLP [warranty of workmanlike performance] under *Ryan* meets with a similar lack of success since we have repeatedly resisted all efforts to project this implied indemnity concept outside the special

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105. *Id.* at 46-47, 1977 A.M.C. at 742-44. *See also* Fitzgerald v. Compania Naviera La Molinera, 394 F. Supp. 402 (E.D. La. 1974), in which the court held that an indispensable predicate for applying *Ryan* indemnity was the shipowner's non-delegable duty of seaworthiness. In S.S. Seatrain Louisiana v. California Stevedore and Ballast Co., 424 F. Supp. 180, 1977 A.M.C. 1427 (N.D. Cal. 1976), Judge Orrick examined the background of the *Ryan* indemnity. He called the shipowner's liability under the unseaworthiness doctrine the underlying rationale for the implied right of indemnity. Observing that "the *Ryan* indemnity route was justifiably foreclosed since the underlying rationale for it, the mitigation of the harsh no-fault doctrine of a warranty of seaworthiness, had been removed." 424 F. Supp. at 183, 1977 A.M.C. at 1430.

> The relationship was highlighted by one district court as follows:
> The implied agreement to indemnify a party held liable for unseaworthiness arose in maritime contracts where the indemnitor was to provide a service for the vessel owner. [Citing *Ryan.*] One overriding principle may be distilled from the cases discussing this implied [clause] in maritime contracts: where some act of the indemnitor performed within the sphere of the contractual relationship subjects the indemnitee to liability without fault, indemnity is due.

Hamilton v. Canal Barge Co., 395 F. Supp. 978, 989, 1977 A.M.C. 2274, 2286 (E.D. La. 1975).

106. 512 F.2d 401, 1975 A.M.C. 162 (2d Cir. 1975).

107. *Id.* at 406, 1975 A.M.C. at 167. *See also* D'Esposito v. Lipsett Steel Products, 1976 A.M.C. 818 (N.Y. Sup. Ct. 1976) (vessel's liability to marine surveyor for negligence subjected a stevedore to indemnity based upon an implied warranty).

> circumstances of the shipowner relationships that evoked the doctrine in the first place absent any contractual provisions in the underlying contracts.[108]

And again in 1977:

> We "have held that the Ryan [WWLP] doctrine is . . . closely tied to a vessel and this obligation which the shipowner owes to those employed on the vessel. * * * We are accordingly extremely hesitant to extend the burdensome *Ryan* doctrine to situations not substantially similar to those which gave birth to the doctrine. The obligations which the owner of an offshore drilling platform owes to those employed on it are not sufficiently similar to those owed by a shipowner to a seaman to permit the extension of the doctrine."[109]

In *Sims v. Chesapeake & Ohio Railway,*[110] an implied warranty of a wharfinger to a shipowner was limited to the conditions of the berth, the removal or notice of dangerous obstructions at the berth, and provision of a safe means of access to a berthed ship. The court held that this did not amount to a warranty of "the safe condition of all property which it may own in the dock area."[111] A number of other court decisions also show a trend against further expansion of *Ryan* indemnity.[112]

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108. Law v. Sea Drilling Corp., 510 F.2d 242, 252, 1977 A.M.C. 2379 (5th Cir. 1975) (footnote omitted).
109. Nutt v. Loomis Hydraulic Testing Co., 552 F.2d 1126, 1131 n.17, 1977 A.M.C. 2340, 2347 n.17 (5th Cir. 1977) (citation omitted).
110. 520 F.2d 556 (6th Cir. 1975).
111. *Id.* at 561.
112. In Pastore v. Taiyo Gyogyo K.K., 1977 A.M.C. 926 (E.D. Pa. 1977), the court stated that there was no reason to extend *Ryan* indemnity to a shipowner's claim for indemnity against the City of Philadelphia. The shipowner had been sued by a firefighter for personal injury. The court dismissed any arguments for indemnity from the City on the basis that "no special legal relationship between the employer and the shipowner [existed] which would support such a claim." 1977 A.M.C. 940 n.9. In First Mississippi Corp. v. Fielder Towing Co., 430 F. Supp. 39 (N.D. Miss. 1976), the court refused on the facts to imply the *Ryan* warranty into a written contract between a ship broker and a shipowner. In Manhattan Oil Transp. Co. v. M/V Salvadore, 1976 A.M.C. 134 (S.D.N.Y. 1975) an on-board inspector was held not to make or give a warranty of workmanlike performance to a shipowner. In Burgess v. M/V Tamano, 373 F. Supp. 839, 1974 A.M.C. 2069 (S.D. Me. 1974), *aff'd,* 559 F.2d 1200 (1st Cir. 1977), the court held that the Coast Guard did not owe an implied warranty of workmanlike performance to a shipowner in connection with the Coast Guard's performance of its containment and clean-up activities after an oil spill. *See also* Orient Overseas Line v. Globemaster Baltimore, Inc., 33 Md. App. 372, 365 A.2d 325, 1976 A.M.C. 2365 (1976), where a state appellate court was presented the issue of whether a terminal operator owed the *Ryan* warranty to the carrier. The court avoided the issue by holding the shipowner's conduct sufficient to preclude indemnity. *But see* Hermann C. Stark, Inc. v. Finn Lines, ___ F.2d ___, 1978 A.M.C. 1330 (S.D.N.Y. 1978) (terminal operator owes duty to shipowner).

2. Disclaimer

There are only a few recent cases involving express disclaimers which attempt to negate *Ryan* indemnity, but the issue is receiving more attention. That the courts are discussing this point at all should give some comfort to maritime contractors who still hope that an express disclaimer will be recognized by the courts as negating or limiting *Ryan* indemnity.

In *Elgie & Co. v. S.S. S.A. Nederburg,*[113] the contract between the stevedore and the shipowner limited the stevedore's liability to loss caused by fraud or negligence. An integration clause stated that "no warranty of any nature shall be implied from any of the wording of this agreement."[114] The shipowner contended that the *Ryan* warranty could not be eliminated through such an express disclaimer. The court held that a warranty of workmanlike performance was implied in maritime service contracts but did not decide the effect of the disclaimer. On the other hand, the *Ryan* warranty was not implied in a stevedoring contract between the Military Sea Transportation Service[115] and a stevedore, which contained a provision that specifically disclaimed indemnity if:

> . . . the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.[116]

3. Counsel Fees And Expenses

Whether a new approach to *Ryan* indemnity will affect the award of counsel fees and expenses is unknown at this time. In 1974, the Third Circuit kept alive its *Gilchrist*[117] exception denying fees and expenses where the stevedore's breach was not the sole cause of the injury. A concurring opinion questioned the validity of the *Gilchrist* decision, but nevertheless recognized that "there may be unusual circumstances which would justify the denial of attorney's fees and expenses despite the right to recover indemnity proper."[118]

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113. 1976 A.M.C. 2446 (S.D.N.Y. 1976).
114. *Id.* at 2459.
115. Now the Military Sealift Command.
116. United States v. Northern Metal Co., 379 F. Supp. 1131, 1137 (E.D. Pa. 1974).
117. Gilchrist v. Mitsui Sempaku K.K., 405 F.2d 763 (3d Cir. 1968), *cert. denied,* 394 U.S. 920 (1969). See text accompanying note 61 *supra.*
118. Burris v. Global Bulk Carriers, Inc., 505 F.2d 1173, 1179, 1975 A.M.C. 226, 235 (3d Cir. 1974) (Hunter, J. concurring).

The Fourth Circuit has developed an "equitable modification" of the normal indemnification rule and denied an award of fees and expenses even though the shipowner was awarded indemnity on a settlement amount paid to a longshoreman.[119]

Where one party has breached a contract promise, the measure of damages is the consequences "reasonably foreseeable at the time when [the contract] was entered into as probable if the contract were broken."[120] This measure of damages would not normally include counsel fees and expenses of a direct action against the party who breached the contract. The American rule is generally against awarding fees to a winning party in litigation except where permitted by statute.[121] Furthermore, in most maritime cases the indemnitee's defense costs are covered by insurance under a standard P & I (protection and indemnity) policy, a collision liability clause in a Hull policy, or by a separate F D & D (freight, demurrage and defense).

4. Defenses

Continued recognition of *Ryan* indemnity has carried with it the continued availability of the "conduct sufficient to preclude indemnity" defense under *Weyerhaeuser*.[122] In *Compagnie Generale Transatlantique v. United States*,[123] a shipowner sued the United States (as owner of a Navy ship) for damages. The United States sought indemnity against a towing company. After recognizing the existence of the *Ryan* warranty in towing contracts, the court held that the United States would not be entitled to indemnity because it actively hindered the indemnitor's performance. In *Breton Island Co. v. Kennedy Marine Engine Co.*,[124] an owner of a fishing vessel sued an engine repairer under an implied warranty of workmanlike performance. The engine repairer invoked the *Weyerhaeuser* defense and was successful in defeating the indemnity claim. One wonders what the results could be in such cases if the courts allocated damages based on comparative fault.

The ripeness of a *Ryan* indemnity action may be challenged. A Fourth Circuit decision held that indemnity was not ripe merely because suit had been filed against the shipowner.[125] The court reasoned that the absence of a trial determining liability and the

119. Farrell Lines, Inc. v. Carolina Shipping Co., 1974 A.M.C. 1178 (4th Cir. 1974), *reh. denied per curiam*, 509 F.2d 53, 1975 A.M.C. 978 (4th Cir. 1975).
120. 11 S. WILLISTON, CONTRACTS § 1344 (3d ed. 1968).
121. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240 (1975). *See* Hermann C. Stark v. Finn Lines, ___ F.2d ___, 1978 A.M.C. 1330 (S.D.N.Y. 1978) (fees awarded).
122. 355 U.S. 563, 1958 A.M.C. 501 (1958). See text accompanying notes 64-66 *supra*.
123. 522 F.2d 148, 1975 A.M.C. 1104 (2d Cir. 1975) (per curiam).
124. 406 F. Supp. 820, 1977 A.M.C. 1800 (S.D. Miss. 1976).
125. A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp., 559 F.2d 928, 1977 A.M.C. 1505 (4th Cir. 1977).

absence of a settlement made the indemnity action not ripe because of the possibility of incongruous results.

A defense to *Ryan* indemnity based on a state contract statute of limitations was successful in *Hartford Fire Insurance Co. v. Callanan Marine Corp.*[126] In that case, a shipper sued a barge owner for cargo loss, and the barge owner impleaded the towing company. The court, applying laches, held that the running of the three-year state statute of limitations shifted to plaintiff a burden of showing why the action should be allowed. On the other hand, in *Federal Commerce and Navigation Co. v. Calumet Harbor Terminals, Inc.*,[127] a one-year suit limitations clause in a terminal tariff did not bar an indemnity claim in the absence of actual notice of the tariff provision.

B. Personal Injury And Death Cases

While one of the main purposes of the 1972 Amendments was to eliminate *Ryan* indemnity in personal injury and death cases, there may still be some life to *Ryan* indemnity even in these situations. Section 905(b) of the Longshoremen's Act declares "void" any warranties or agreements between a "vessel" and a covered employer,[128] but *Ryan* indemnity had expanded to a point where parties other than "vessels" were asserting *Ryan* indemnity actions. The issue has arisen in several cases.

Two good examples are *Brkaric v. Star Iron & Steel Co.*[129] and *Zapico v. Bucyrus-Erie Co.*[130] *Brkaric* involved a suit brought by a longshoreman against a manufacturer of a crane, who filed a third-party claim for indemnity and contribution against the stevedore-employer. The indemnity claim was allowed on the basis that employers covered under the Longshoremen's Act may still be liable

126. 389 F. Supp. 436 (S.D.N.Y. 1973).
127. 542 F.2d 437, 1976 A.M.C. 2568 (7th Cir. 1976).
128. 33 U.S.C. § 905(b) (Supp. 1975).
129. 409 F. Supp. 516, 1976 A.M.C. 1572 (E.D.N.Y. 1976).
130. 434 F. Supp. 567, 1977 A.M.C. 2068 (S.D.N.Y. 1977), *rev'd*, ___ F.2d ___, 1978 A.M.C. ___ (2d Cir. 1978). *See also* White v. Texas Eastern Transmission Corp., 512 F.2d 486, 1976 A.M.C. 1153 (5th Cir. 1975) (manufacturer of component's part sued employer covered under the Longshoremen's Act for breach of the implied warranty; indemnification rejected), *cert. denied*, 423 U.S. 1049 (1976); Spadola v. Viking Yacht Co., 441 F. Supp. 798, 1978 A.M.C. 253 (S.D.N.Y. 1977) (personal injury suit by a longshoreman against shipper/yacht owner who filed third-party complaint against stevedore/employer for contribution and indemnity; the claim for contribution was rejected under *Halcyon*, the claim for indemnity was rejected under Section 905(b) which prohibits such agreements and Section 905(a) which makes the stevedore's liability exclusive); Meyers v. J.A. McCarthy, Inc., 428 F. Supp. 656 (E.D. Pa. 1977) (indemnification suit by stevedore against employer who loaded trucks aboard the ship; the stevedore was different from the company that loaded the trucks; indemnification against the employer rejected); Standard Fruit & S.S. Co. v. Metropolitan Stevedoring Co., 52 Cal. App. 3d 305, 125 Cal. Rptr. 111, 1976 A.M.C. 196 (1975) (in order to effect the Congressional intent of the 1972 Amendments, the terms "vessel" and "charterer" should be given the broadest possible interpretation in connection with eliminating indemnity suits against statutorily immune employers).

to a non-vessel for contribution or indemnity. In *Zapico,* a longshoreman was injured as a result of negligent manufacture of a truck crane being shipped to Europe. He sued the manufacturer-shipper who in turn sought indemnity against the stevedore-employer alleging (1) it was a third-party beneficiary to the stevedore's *Ryan* warranty and (2) the breach of an independent duty owed to it by the stevedore. The district court held that a stevedore-employer was not statutorily immune from a manufacturer's claim for contribution or indemnity. The Second Circuit reversed. Judge Friendly, writing for the court, was somewhat reluctant in denying the indemnity claim, but did so because there was not enough evidence to imply an agreement to indemnify:

> Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that sec. 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees. . . .
>
> . . . .
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> However, even if so much should be accepted, Bucyrus still has the heavy burden of finding an implied agreement by the stevedore to indemnify it.
>
> . . . .
>
> On these facts, therefore, we find that there is simply not enough of a nexus to imply an agreement by ACL [the stevedore] to indemnify Bucyrus based on the independent contract between ship and stevedore.[131]

VI. CONCLUSION

There will be a re-examination of the rationale of *Ryan* indemnity resulting in different and more limited applications. The objective should be to avoid the all-or-nothing consequences of *Ryan* indemnity in property damage cases in favor of a proportionate allocation of damages, unless the contracting parties have expressly provided for indemnity or designated the party who is responsible for loss or damage.[132]

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131. Zapico v. Bucyrus-Erie Co., ___ F.2d ___, 1978 A.M.C. ___ (2d Cir. 1978).

132. By the terms of many time and voyage charters, shipowners often have a right to indemnity against the charterer by virtue of the terms of the charter. Usually, the shipowner has a right of indemnification against the charterer for all damages to the cargo which do not arise out of the unseaworthiness of the vessel. This is an example of how the written terms of a contract between commercial entities dealing in maritime affairs should govern the existence of warranties. *See* Nichimen Co. v. M.V. Farland, 462 F.2d 319, 1972 A.M.C. 1573 (2d Cir. 1972); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 1971 A.M.C. 2383 (2d Cir. 1971).

The second edition of *The Law of Admiralty*,[133] published in 1975, notes the passing of *Ryan* indemnity in personal injury and death actions, but presumes that it will continue in other types of losses:

> The Ryan warranty of workmanlike performance (WOW) is, clearly enough, dead with respect to the shifting of liability from shipowner (or 'vessel') to employer for damages recoverable in the § 905(b) negligence action. Presumably the stevedore, shipbuilder or ship repairer remains liable under normal principles of contract law for other losses caused by his default or breach.[134]

Yet today, one must question whether any purpose is served by *Ryan* indemnity based on an implied warranty. The all-or-nothing aspect of *Ryan* indemnity is off the course charted by recent Supreme Court admiralty decisions and is unnecessary when courts are able to assess fault and divide damages. The *Kopke* decision allows contribution among joint tortfeasors who are not statutorily immune from tort liability. *Reliable Transfer's* allocation of damages based on comparative fault has been extended beyond collision cases to other kinds of property damage cases. *Seckinger* favors a comparative negligence interpretation of contractual provisions relating to responsibility for loss or damage.

Understandably, the lower federal courts may be hesitant to reject previously accepted claims for *Ryan* indemnity on the basis of these developments:

> It may be, as the stevedore argues most persuasively in its petition for rehearing, that the general thrust of *Kopke* is in the direction of a sort of tort indemnity in cases of this type, where contribution among the joint tort-feasors would be the rule[,] but the fact remains that *Kopke* did not purport to overrule *Ryan* and *Weyerhaeuser* wherein the principle of indemnity on which the shipowner's action was predicated was developed. Those cases are plain to the point that, unless the ship's fault is sufficient to preclude indemnity, the ship is entitled to indemnity from the stevedore under circumstances such as those here. While we recognize the equitable appeal of the claim of apportionment raised by the stevedore, we do not feel it appropriate for us to do what the Supreme Court in *Kopke* chose not to do; any reversal or change in the scope of *Ryan* and *Weyerhaeuser* should come from the Supreme Court and not from an intermediate court.[135]

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133. G. Gilmore and C. Black, The Law of Admiralty (2d ed. 1975).
134. *Id.*, § 6-57 at 451.
135. Farrell Lines, Inc. v. Carolina Shipping Co., 509 F.2d 53, 54-55, 1975 A.M.C. at 978, 979-80 (4th Cir. 1975).

Nevertheless, the rules of contribution and apportionment of damages can now be given general application in maritime property damage cases. The federal courts can apply these rules to most property damage cases without risking the upset of established statutory liability schemes which exist in maritime personal injury and death cases. An example is *Navieros Oceanikos, S.A. v. S.T. Mobile Trader,*[136] discussed previously in the article. There is little doubt that property damage claims based on tort will be subject to proportionate fault.[137] The difficulty, largely conceptual, lies with contractual property damage claims that are in reality based on negligence.

The Second Circuit's decision in *Fairmont* demonstrates the conceptual difficulties courts have when dealing with contractual claims based on negligence. The court supported the *Ryan* warranty on that principle of basic contract law that implies in every contract for work or services a duty to perform diligently and in a workmanlike manner.[138] Many states with maritime interests recognize such an implied warranty in contracts for work or services,[139] and Williston specifically refers to such a warranty.[140]

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136. 554 F.2d 43, 1977 A.M.C. 739 (2d Cir. 1977).

137. In Master Shipping Agency, Inc. v. M.S. Farida, 571 F.2d 131, 1978 A.M.C. 1267 (2d Cir. 1978), a stevedore and marine lasher were held "jointly and severally" liable to a shipowner for cargo damage and ship damage caused by inadequate stowage and lashing of heavy tractors. Although the court applied *Ryan* indemnity as between the shipowner and the stevedore and lasher, the liabilities of the latter parties *inter se* were governed by *Kopke* and *Reliable Transfer.* Whether the shipowner was negligent was not discussed; the court noted only that the shipowner did not prevent or handicap the stevedore or lasher in the performance of their duties.

138. 511 F.2d at 1259, 1975 A.M.C. at 264. *See* 17 AM. JUR. 2d *Contracts* § 371 at 814 (1964). *See also* 9 S. WILLISTON, CONTRACTS § 1012C at 38-39 (3d ed. 1967); 17A C.J.S. *Contracts* § 329 at 292-93 (1963); Annot. 25 A.L.R.2d 1085 (1952).

139. Sherrill v. Alabama Appliance Co., 240 Ala. 46, 197 So. 1 (1940) (reasonable skill and diligence required in service contract); C.P. Robbins & Assoc. v. Stevens, 53 Ala. App. 432, 301 So.2d 196 (1974) (construction contract contains implied duty to perform with ordinary skill and workmanship); Kuitems v. Covell, 104 Cal. App. 2d 482, 231 P.2d 552 (1951) (implied duty to perform roof installation with care, skill, expedience and faithfulness); Jose-Balz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931) ("It is an implied part of every builders [*sic.*] contract that he will use reasonable skill in his work"); Hebert v. Pierrotti, 205 So. 2d 888 (La. Ct. of App. 1968) (contract to move house implied duty to perform in a "skillful, careful, diligent, and good workmanlike manner"); Gosselin v. Better Homes, Inc., 256 A.2d 629 (Me. 1969) (in construction contract, law implies duty to perform in a "reasonably skillful and workmanlike manner"); Johnson v. Metcalfe, 209 Md. 537, 121 A.2d 825 (1956) (duty to perform electrical installations with "skill and care" implied); George v. Goldman, 333 Mass. 496, 131 N.E.2d 772 (1956) (party contracting to build house agrees "by implication to do a workmanlike job"); Nash v. Sears, Roebuck & Co., 383 Mich. 136, 174 N.W.2d 818 (1970) ("Every contract of employment includes an obligation, whether express or implied, to perform in a diligent and reasonably skillful workmanlike manner."); Mayer Ice Mach. & Eng'r. Co. v. Van Voorhis, 88 N.J.L. 7, 95 A. 735 (1915) (implied in contract is agreement that "work shall be done in a proper and workmanlike manner"); Duenewald Printing Corp. v. G. P. Putnam's Sons, 276 App. Div. 26, 92 N.Y.S.2d 553 (1949) (professionals bound to exercise

The warranty in the bunkering contract implied by the *Fairmont* court was used to place the full loss on the oil company providing the tugs. There were indications that the court might have considered the shipowner negligent,[141] but the court believed that negligence was not significant in considering whether there should be full recovery under the *Ryan* warranty. The "active hindrance" standard of *Weyerhaeuser* was applied, and the shipowner recovered on the warranty because his conduct was no "hindrance" to the tug's performance.

The particular merits or problems in the *Fairmont* decision, or any other recent decision, are not the subject of this article. The point is that *Fairmont,* and other property damage cases predicated on breach of an implied contractual warranty, could have been decided on a more forthright basis using comparative negligence concepts. If the shipowner in *Fairmont* was free of fault, then the full damages should have fallen on the oil company. On the other hand, if the shipowner's negligence to some extent contributed to the damages (albeit it did not hinder the tugs), then damages could have been fairly allocated based on the comparative degrees of fault.

American admiralty law in the past five years has taken great steps toward comparative negligence and harmony with the law of most other major maritime nations. It remains to be seen how much of an obstacle lies in the vestiges of the *Ryan* implied warranty.

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reasonable skill), *rev'd on other grounds,* 301 N.Y. 569, 93 N.E.2d 452 (1950); Gore v. Sindelar, 74 N.E.2d 414 (Ohio Ct. App. 1947) (absent contrary provision, warranty of workmanlike performance implied); Tharpe v. G. E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970) (construction contract impliedly includes obligation to perform in workmanlike manner); Garlitz v. Carrasco, 339 S.W.2d 92 (Tex. Ct. App. 1960) (personal service contract contains implied covenant for performance in "good and workmanlike manner"); Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950) (implied duty in construction contract to perform in "reasonably good and workmanlike manner"); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958) (implied warranty of workmanlike performance required house to be fit for human habitation).

140. 9 S. WILLISTON, CONTRACTS § 1012C at 39 (3d ed. 1967). If there be support at common law for implying warranties of workmanlike performance, then there is also support at common law for permitting express disclaimers to negate or limit the applicability of such a warranty. The Uniform Commercial Code provisions governing contracts of sale do permit the negation and limitation of certain implied warranties. U.C.C. § 2-316. Where two commercial parties negotiate at arm's length and decide to include a written disclaimer of any implied warranties, courts should honor the stated intention. Where written contracts exist between commercial entities such as shipowners and stevedores and other maritime contractors, the court should be reluctant to imply warranty into such written contracts.

141. 511 F.2d at 1260, 1975 A.M.C. at 273.

> Chevron presses on us one final argument: It claims that the Western Eagle's own conduct in putting herself in a position of danger under conditions of adverse visibility, wind and current should bar Fairmont from recovery. Again, if this were a negligence case, we might have more difficulty. But negligence alone will not bar a plaintiff from recovering for breach of warranty of workmanlike performance.

Id.