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NOTES

ADMIRALTY — RIGHT OF SHIPOWNER TO INDEMNITY FROM INDEPENDENT CONTRACTOR — LIABILITY WITHOUT FAULT¹

While working aboard plaintiff's vessel, an employee of defendant stevedoring contractor sustained injuries when a latently defective tent rope supplied by defendant snapped. The employee recovered against plaintiff in a state court on grounds that the defective rope rendered the vessel unseaworthy. Plaintiff brought this action for indemnity in federal district court contending that by providing a defective rope defendant breached its implied warranty of workmanlike service. Defendant maintained that its implied warranty imposed liability only for negligence. The district court disallowed the claim on grounds that defendant's negligence had not been proved.² The Court of Appeals, Ninth Circuit, affirmed.³ With three Justices dissenting, the Supreme Court reversed. *Held*, absence of negligence on the part of the contractor in supplying defective equipment is not fatal to the shipowner's claim of indemnity on the implied warranty of workmanlike service; the supplied equipment must in fact be safe and fit for its intended use. *Italia Societa per Azioni di Navigazioni v. Oregon Stevedoring Co.*, 84 Sup. Ct. 748 (1964).

Although the right of seamen to recover for injuries caused by a vessel's unseaworthiness was recognized as early as 1903,⁴ it was not clear until the mid-1940's that the doctrine included

1. Writings on the remedies of longshoremen and of other employees of contractors working temporarily aboard ship against the shipowner, and the right of the shipowner as heretofore developed to recover over against the contractor, are legion. *E.g.*, Koliou & Cecil, *Indemnity Suits by Vessel Owner Against Stevedoring Contractor: A Search for the Limits of the Ryan Doctrine*, 27 *INS. COUNSEL J.* 282 (1960); White, *A New Look at the Shipowner's Right-Over for Shipboard Injuries*, 12 *STANFORD L. REV.* 717 (1960); Comment, 6 *N.Y.L.F.* 168 (1960); Comment, 67 *YALE L.J.* 1205 (1958); Notes, 32 *FORDHAM L. REV.* 353 (1963), 10 *W. RES. L. REV.* 609 (1959).

2. The basis of the district court's opinion, however, was that the clause in the stevedoring contract which expressly provided that the contractor would be liable for damages resulting from its negligence served as a disclaimer of liability for damages resulting from the failure to exercise greater care.

3. 310 F.2d 481 (9th Cir. 1962). Its affirmation of the judgment below, however, was not on the basis of a disclaimer of warranty, but solely on the grounds that defendant's warranty was not breached in the absence of negligence.

4. *The Osceola*, 189 U.S. 158 (1903).

liability without fault.⁵ Moreover, until passage of the Jones Act⁶ in 1920, the principle that seamen were not allowed to recover for the negligence of the master or other members of the crew precluded recovery in most cases predicated on negligence.⁷ Consequently, since the advantages of seeking recognition as "seamen" were limited, longshoremen and other dockside workers sought protection under the newly emerging state workmen's compensation schemes. In 1917, however, the Supreme Court in *Southern Pacific Co. v. Jensen*⁸ held that state compensation statutes could not be applied to injuries incurred on navigable waters; it reasoned that the constitutional grant of admiralty jurisdiction dictated a nationally uniform system of maritime law. Shortly thereafter, seamen received an effective remedy for negligently inflicted injuries with the passage of the Jones Act.⁹ Six years later longshoremen were accorded the same remedy by the Supreme Court's holding in *International Stevedoring Co. v. Haverty*¹⁰ that longshoremen fell within the act's definition of seamen. Apparently prompted by a desire to limit liability imposed by this decision and by unsuccessful attempts to overrule *Jensen*,¹¹ Congress in the next year enacted a distinct federal system of compensation for waterfront employees — the Longshoremen's and Harbor Workers' Compensation Act.¹² Patterned after the New York compensation statute,¹³ the act imposed liability without fault on the employer,¹⁴ but mitigated this disadvantage to him by setting out a limited

5. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). See *Dixon v. United States*, 219 F.2d 10, 14 (2d Cir. 1955); GILMORE & BLACK, ADMIRALTY 315-24 (1957); Note, 21 LA. L. REV. 496, 498-502 (1961). For recent developments see *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), noted in 21 LA. L. REV. 496 (1960); Comment, 21 LA. L. REV. 755 (1961).

6. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

7. See *Dixon v. United States*, 219 F.2d 10, 13-14 (2d Cir. 1955) and cases cited therein; GILMORE & BLACK, ADMIRALTY 279 (1957).

8. 244 U.S. 205 (1917).

9. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958). See generally GILMORE & BLACK, ADMIRALTY 279-315 (1957).

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

11. In the first attempt, Congress amended the "saving to suitors" clause of §§ 24 and 256 of the Judicial Code of 1911 to provide that the United States district courts would have exclusive jurisdiction in maritime cases, saving ". . . to claimants their rights and remedies under the workmen's compensation law of any state." 40 Stat. 395 (1917). These amendments were declared unconstitutional in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), as an invalid attempt to delegate federal legislative power to the states. A similar attempt, 42 Stat. 634 (1922), was also declared unconstitutional on the same grounds. *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924).

12. 44 Stat. 1424-46 (1927), 33 U.S.C. §§ 901-950 (1958). See GILMORE & BLACK, ADMIRALTY 251 (1957); Comment, 6 N.Y.L.F. 168, 172 (1960).

13. 2 LARSON, WORKMEN'S COMPENSATION § 89.10 (1952).

schedule of recovery¹⁵ and by the provision that, as between employer and employee, the remedy under the act was exclusive.¹⁶ The employee, however, was free to pursue any right he may have against a third person.¹⁷ The classification of longshoremen as seamen in *Haverty* made this latter right particularly important; together they set the stage for *Seas Shipping Co. v. Sieracki*.¹⁸ Decided some twenty years later, when the obligation of seaworthiness imposed liability upon the shipowner despite his lack of fault,¹⁹ *Sieracki* held that longshoremen injured aboard ship had the benefits not only of the federal compensation statute but also, as against third persons,²⁰ of the now liberal doctrine of unseaworthiness.²¹

The ability of dockside workers to recover against shipowners for unseaworthiness was further expanded by the holdings that they were within the aegis of the doctrine even though the unseaworthy condition was in the equipment brought aboard by the stevedoring company²² or caused by its negligence.²³ Moreover, in *Reed v. The Yaka*²⁴ the Supreme Court recently held that recovery could be had against the vessel for unseaworthiness even though the plaintiff was employed by the bareboat charterer, who was ultimately liable;²⁵ the court concluded

14. 44 Stat. 1426, § 4 (1927), 33 U.S.C. § 904 (1958).

15. 44 Stat. 1426-29 (1927), 33 U.S.C. §§ 904-909 (1958).

16. 44 Stat. 1426, § 5 (1927), 33 U.S.C. § 905 (1958).

17. 44 Stat. 1440 (1927), 33 U.S.C. § 933 (1958).

18. 328 U.S. 85 (1946).

19. See text accompanying note 5 *supra*.

20. Since the federal compensation act provides an exclusive remedy as between employer and employee, the employee no longer can proceed against his employer under the provisions of the Jones Act as in the *Haverty* case. See GILMORE & BLACK, ADMIRALTY 282-83 (1957).

21. The rights of non-crew workmen other than longshoremen to recover for unseaworthiness has not yet been fully determined. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), a carpenter who was repairing grain loading equipment was held to be within the doctrine. However, in *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959), noted in 5 N.Y.L.F. 432 (1959), 37 N.C.L. Rev. 479 (1959), 13 U. MIAMI L. REV. 465 (1959), 10 W. RES. L. REV. 609 (1959), an employee of an electrical subcontractor was not so considered; the grounds were that the particular work undertaken by him was not of a type traditionally done by the ship's crew. See, generally, Annot., 3 L.Ed. 2d 1764 (1959).

22. *E.g.*, *Reed v. The Yaka*, 373 U.S. 410 (1963); *Rogers v. United States Lines*, 347 U.S. 984 (1954) (*per curiam*); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1953) (*per curiam*). See, generally, Annot., 77 A.L.R.2d 829 (1961).

23. See, *e.g.*, *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956).

24. 373 U.S. 410 (1963), noted in 32 FORDHAM L. REV. 353 (1963).

25. Here, there was an indemnity clause in the bareboat charter agreement providing for the charterer to hold the owner harmless against any liens and claims that might arise out of the vessel's operation. 373 U.S. at 411; 183 F. Supp. 69, 70. It seems that the liability would be the same even in the absence of such a provision. See GILMORE & BLACK, ADMIRALTY 494-95, 509 (1957).

that application of the exclusive remedy of the Longshoremen's and Harbor Workers' Act would be "out of keeping with the dominant intent of Congress to help longshoremen."²⁶

Since contribution for maritime torts was limited to collision cases, prior to 1956 it seemed that a shipowner who paid the cost of injuries sustained by a worker as a result of an unseaworthy condition created by his employer's company had no recourse against the employer.²⁷ In *Ryan v. Pan-Atlantic S.S. Corp.*,²⁸ however, the Supreme Court held that a shipowner could seek full indemnity from a stevedoring contractor on the theory that the contractor owes an implied contractual warranty of "workmanlike service";²⁹ this theory thus avoided the tort rule of no contribution. Subsequent cases established that the warranty extends not only to the actual service of moving and stowing the cargo, but also to the use and maintenance of the stevedoring equipment.³⁰ Furthermore, the contractor's obligation is not affected by the fact that a contributing cause of the injury is an unseaworthy condition not occasioned by the contractor³¹ or even by the fact that the shipowner was negligent.³² Moreover,

26. 373 U.S. 410, 415 (1963). The court's reasoning strongly indicates that the result would be the same even if the owner, instead of the charterer, were the longshoreman's employer.

27. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

28. 350 U.S. 124 (1956).

29. *Id.* at 133.

30. *Crumady v. The Joachim Hendrick Fisser*, 358 U.S. 423 (1959); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

31. See *Waterman S.S. Co. v. Dugan & McNamara*, 364 U.S. 421 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

32. *Crumady v. The Joachim Hendrik Fisser*, 364 U.S. 421 (1960); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Calmar S.S. Corp. v. Nacirema Operating Co.*, 266 F.2d 79 (4th Cir. 1959). The Supreme Court in *Weyerhaeuser S.S. Co.* indicated, however, that certain conduct on the part of the shipowner would preclude indemnification: "If . . . [the contractor] rendered a substandard performance which led to foreseeable liability of the petitioner (the vessel), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added.) 355 U.S. at 567. While subsequent Supreme Court decisions appear to make no reference to the possibility that certain conduct by the shipowner may preclude indemnity, some lower court decisions appear to have recognized this concept. *E.g.*, *Williams v. Pennsylvania R.R.*, 313 F.2d 203, 213 (2d Cir. 1963); *De Geois v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962); *McNamara v. Weichsel Dampschiffahrts AG Kiel, Germany*, 293 F.2d 900, 903 (2d Cir. 1961). While no cases were found where indemnity was actually refused on these grounds, in *Hugev v. Dampckisakliesskabet International*, 170 F. Supp. 601, 610-11 (S.D. Cal. 1959), the court enunciated by way of dictum several duties of the shipowner which, if violated, would release the contractor. Apparently, these statements met with the approval of the court of appeals. 274 F.2d 875 (9th Cir. 1960) (*per curiam*), *cert. denied*, 363 U.S. 803 (1960).

The Second Circuit suggested that although fault on the part of the shipowner may not prevent his right to indemnification, there might be some possi-

stevedoring contracts are held to be for the benefit of the vessel and consequently the shipowner may seek indemnification even though the contract was actually entered into by another party,³³ e.g., a charterer or cargo consignee.

Since in all the Supreme Court cases allowing indemnification after *Ryan* the contractor had been found negligent, the court had not had occasion to determine whether the "warranty of workmanlike service" extended beyond negligence liability. While it is true that in *Ryan* it was stated that the standard was comparable to a manufacturer's warranty³⁴ and that one Second Circuit case held the standard to be one of strict liability,³⁵ there seems to have been much doubt whether a shipboard contractor's warranty included more than reasonable care. Indeed, there is much language in *Ryan* indicating the standard to be reasonable care,³⁶ and similar language appears in subsequent Supreme Court cases.³⁷ Furthermore, the Second Circuit opinion appears to have been the only affirmative holding of strict liability;³⁸ there is much language in lower federal court opinions indicating that indemnification should be allowed only when the contractor has been negligent.³⁹

bility that it could justify a partial judgment for the stevedoring company back over against the shipowner. *Williams v. Pennsylvania R.R.*, *supra*; *Pettus v. Grace Line, Inc.*, 305 F.2d 151, 154 (2d Cir. 1956).

33. *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Williams v. Pennsylvania R.R.*, 313 F.2d 203 (2d Cir. 1962); *Drago v. A/S Inger*, 305 F.2d 139 (2d Cir. 1962).

34. 350 U.S. at 133-34.

35. Both *S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958). A contractor's mechanic was injured as the result of the breaking of a steel strap which was being used in removing a cylinder from an engine aboard the steamship company's vessel.

36. E.g., "contractual undertaking to stow the cargo 'with reasonable safety,'" 350 U.S. at 130; "action to recover . . . a sum measured by foreseeable damages," *ibid.*; "contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner," *id.* at 131-32; stow the cargo "in a reasonably safe manner," *id.* at 134. (Emphasis added.)

37. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), the court approving the district court's charge to the jury which used negligence as the standard; *Waterman Co. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960), "warranty to perform the contract with reasonable safety," *id.* at 423; "the warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness," *ibid.*; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), "obligation to perform its duties with reasonable safety," *id.* at 567, "if in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner," *ibid.* (Emphasis added.)

38. Although no other such cases were found by the writer, *DeVan v. Pennsylvania R.R.*, 167 F. Supp. 336 (E.D. Pa. 1958), apparently in effect held the contractor to strict liability. However, the issue was not squarely faced.

39. E.g., see *Cia Maritima Del Nervion v. James J. Flanagan Shipping Corp., Stevedore Division*, 308 F.2d 120, 123-24 (5th Cir. 1962); *Calderola v. Cunard*

In the instant case the Court rejected the contractor's contention that the right of indemnification in *Ryan* was based on a warranty theory solely to circumvent the decisions denying contribution in non-collision cases⁴⁰ and therefore was not intended to describe the standard of care.⁴¹ Seizing upon the statements in *Ryan* that the contractor's warranty was like that of a manufacturer⁴² and that the shipowner's action is not changed "from one for a breach of contract to one in tort simply because recovery may turn upon the standard of the performance of the petitioner's stevedoring services,"⁴³ the court maintained that *Ryan* did indeed establish a different standard from that of tort. The court buttressed its decision with the statement that in *Reed v. The Yaka*⁴⁴ it had been assumed without deciding that the shipowner could recover over against the contractor even though the defect was latent and the contractor was without fault.⁴⁵ These legal arguments were supplemented with the policy consideration that, since the contractor was in a better position to take preventive steps to eliminate the possibility of injury,⁴⁶ it was appropriate for the ultimate cost to be on him.⁴⁷

The court's argument that in *Yaka* it had been assumed that the standard was one of strict liability seems tenuous. In *Yaka* the shipowner was seeking recovery from his *bareboat charterer* for the amount paid in the in rem action brought against the vessel by the injured longshoreman. Although the charterer had undertaken to do his own stevedoring, this fact should be of no significance because the suit was based on the express *charter* provision that the charterer was liable to the owner for any liens that its use may have caused to be placed on the vessel;⁴⁸ and

S.S. Co., 279 F.2d 475, 478 (2d Cir. 1960); *Parentan v. Iino Kauin Kabushiki Kaisya*, 251 F.2d 928, 930 (2d Cir. 1958), *cert. denied*, *International Terminal Operating Co. v. Kauin Kaisha, Ltd.*, 356 U.S. 939 (1958); *Ignatyuk v. Tramp Chartering Corp.*, 250 F.2d 198, 201 (2d Cir. 1957); *Parker v. United States*, 223 F. Supp. 647, 650 (D. Ore. 1963); *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206, 211 (D. Md. 1962); *De Palma v. South African Marine Corp.*, 206 F. Supp. 274, 275-76 (S.D.N.Y. 1962).

40. See text accompanying notes 27-29 *supra*.

41. 84 Sup. Ct. at 752.

42. *Id.* at 751.

43. *Id.* at 751. See text accompanying note 49 *infra*.

44. 373 U.S. 410 (1963).

45. 84 Sup. Ct. at 751.

46. "[T]he stevedore company which brings its gear on board knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations." *Id.* at 753.

47. *Id.* at 753-54.

48. See note 25 *supra*.

therefore recovery was not sought on the basis of a stevedoring contract. Similarly, reliance on the language in *Ryan* relating to the suit not being changed from contract to tort because of the particular standard involved seems difficult to justify. Indeed, it appears that this language was intended to mean that even though the standard imposed by the contractor's implied warranty *might be the same as that of tort*, it is of a contractual nature and therefore is not subject to the rule preventing contribution in non-collision tort cases.⁴⁹ However, while it cannot be said that *Ryan* unequivocally established a warranty of strict liability, the comparison of the warranty to that of a manufacturer lends support for the position of the court in the instant case.

The court analogized the contractor's warranty to the shipowner's duty of seaworthiness. Thus the contractor is not the insurer of his activities; his duty is to furnish equipment or perform services which are *reasonably suited for the intended purpose*.⁵⁰ It is submitted that the decision in the instant case is proper: it is too late to protest the *Sieracki* rule that dockside workers may look, not only to the employer for recovery under the federal compensation statute, but also to the liberal maritime doctrine of unseaworthiness.⁵¹ Like the cost of compensation under the federal act, the expense of the maritime remedy should be passed to the one best situated to take the proper preventive steps to reduce the occurrence of injury — thus, the contractor, not the shipowner, should ultimately be responsible.⁵² However, this basic consideration should preclude application of the strict liability interpretation of the warranty of workmanlike service when the injury-causing defect is in equipment supplied by the shipowner and operated with care and diligence by the contractor. Otherwise, the contractor would be held for

49. See notes 27-29 *supra* and accompanying text.

50. 84 Sup. Ct. at 752-53.

51. See text accompanying notes 12-20 *supra*.

52. See note 46 *supra*. However, it would seem that the instant case does not undercut the possibility of the contractor limiting his liability by express contractual provisions. For an indication that the contractor may do so, see *De Gioia v. United States Lines*, 304 F.2d 421, 426 (2d Cir. 1962); *Hugev v. Dampekisakliesselskabet International*, 170 F. Supp. 601, 607 (S.D. Cal. 1959), *affirmed per curiam*, 274 F.2d 875 (9th Cir. 1960), *cert. denied*, 363 U.S. 803 (1960). It is submitted, however, that the recorded cases give the impression that the shipowners have the greater bargaining power and thus the great bulk of the contracts containing express warranties are stipulated in favor of the shipowner instead of the contractor.

events beyond its control while the shipowner — the only party who has the means to prevent the accident — would go free.⁵³

Wendell G. Lindsay, Jr.

CIVIL LAW PROPERTY — PARTITION OF LAND SUBJECT
TO A USUFRUCT

Plaintiff filed suit for partition by licitation¹ of property owned as follows: an undivided half interest was held in perfect ownership by all eleven living heirs; one co-heir (a defendant) had the usufruct of the other undivided interest while his eleven co-heirs (including plaintiff) held the naked ownership thereof in indivision.² Thus all the parties to the suit owned an undivided interest in imperfect and perfect ownership. Dismissal of plaintiff's suit was affirmed on appeal. *Held*, partition by licitation of all interest cannot be forced by a proprietor who holds shares of undivided perfect and naked ownership, if the property, or an undivided portion thereof, is burdened with a valid usufruct. *Fricke v. Stafford*, 159 So. 2d 52 (La. App. 1st Cir. 1963).

The Civil Code provides that anyone may demand partition of a thing held in common.³ Determination of what constitutes

53. For the proposition that the shipowner has no right to indemnity in such cases, see *Hudson S.S. Co. v. Ayala Colon*, 314 F.2d 44 (1st Cir. 1963) (*per curiam*); *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206 (D. Md. 1962).

1. All references in this Note to partition mean partition by licitation. The property in this suit, 225 acres of land, is not susceptible to the preferable partition in kind which is governed by different rules. See *Kaffie v. Wilson*, 130 La. 350, 57 So. 1001 (1912).

2. The father, who died first, left a life usufruct to his youngest daughter, subject only to his surviving spouse's legal usufruct, and the naked ownership of his undivided interest in the community to the remaining children. When the mother died, she left her undivided one-half ownership to all the children. The property was held in indivision, though each heir had been sent into possession. The court held that an attack on the usufruct on the grounds that it impinged upon the legitime had prescribed. *Fricke v. Stafford*, 159 So. 2d 52 (La. App. 1st Cir. 1963).

3. LA. CIVIL CODE art. 1289 (1870): "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

Id. art. 1308: "The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common. (As amended by Acts 1871, No. 87.)"

For the nearly identical article which is the basis of French doctrine and cases on the subject, see FRENCH CIVIL CODE art. 815(1).