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The Longshoremen's and Harbor Workers' Compensation Act and the Invitee Standard: Maritime Law Gone Aground?

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COMMENTS

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND THE INVITEE STANDARD: MARITIME LAW GONE AGROUND?

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[1] to provide a compensation system for longshoremen injured in the course of their employment.[2] In the years following its enactment, problems arose which induced Congress, in 1972, to amend the LHWCA.[3]

The original LHWCA limited injured longshoremen to compensation benefits as the sole remedy against their employers, typically stevedore companies which contract to load or unload vessels.[4] The injured workers were permitted, however, to maintain third-party suits against the vessel.[5] A series of early court decisions circumvented the exclusive benefits provision by establishing causes of action which permitted longshoremen to recover damages indirectly from their stevedore employers.[6] The severe economic impact of this circumven-

1. The original act was the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901–950 (Supp. V 1975)).

2. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6–4 (2d ed. 1975).

3. Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 92–576, 86 Stat. 1263 (1972) (amending 33 U.S.C. §§ 901–950 (1970)).

4. 33 U.S.C. § 905 (Supp. V 1975). A stevedore company is an independent contractor which hires harbor workers to fulfill contracts to load or unload vessels. Throughout this note, the term "stevedore" will be used to refer to the stevedore company, as distinct from that company's employees. The term "longshoremen" will be used to refer to the employees of the stevedore, and the owner or owners of a ship will be referred to by the term "vessel."

5. The exclusivity and election provisions of the original LHWCA, left intact by the 1972 amendments, were promulgated in § 5 of the LHWCA. *Id.*

6. In Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), the Supreme Court extended the vessels' warranty of seaworthiness, a non-delegable duty of absolute liability, to cover longshoremen. This extension meant that a vessel was liable to any longshoremen injured on the job without regard to the vessel's negligence. As a result, the vessel was liable to injured longshoremen even when the injury was the result of the stevedore's negligence.

The vessel's duty to maintain a safe working place was absolute, even though it had completely relinquished control of the work areas. Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd*, 347 U.S. 396 (1954). This placed an undue burden on the vessel which the Court sought to alleviate in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). In *Ryan*, the Court determined that when a longshoreman is injured as a result of the stevedore's negligence, the vessel, which would be liable under the seaworthiness doctrine, can claim indemnity from the stevedore as having breached an implied warranty of workmanlike performance. The causes of action established by *Sieracki* and *Ryan* allow the longshoreman to sue the stevedore indirectly by

tion on the stevedores and the maritime industry generally was one problem which the 1972 amendments were designed to correct.[7]

Another problem with which Congress was particularly concerned was the extremely poor safety record of the longshoring industry.[8] Longshoring had one of the worst accident rates of any of the nation's industries.[9] The 1972 amendments were viewed by Congress as a means of redistributing the liability for longshoring accidents so as to promote safety in the industry.[10]

Among the many new provisions of the 1972 amendments designed

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bringing a third-party action against the vessel, which could in turn sue the stevedore for indemnification. This circumvented the LHWCA which provided that the longshoreman's only remedy against the stevedore should be the benefits provided. *See* Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 98 S. Ct. 188 (1977), for a particularly well-presented review of the circumvention problem. The motive behind the development of circumvention appears to have been a reaction to the concededly inadequate benefits of the LHWCA. G. GILMORE & C. BLACK, *supra* note 2, at § 6-56; *see* 118 CONG. REC. 36381 (1972) (remarks of Rep. Daniels); *id.* at 36387 (remarks of Rep. Hicks). However, circumvention may also have been the result of a continued desire of the courts to maintain an independent specialized field of admiralty law.

7. Hurst v. Triad Shipping Co., 554 F.2d 1237, 1243-44 (3d Cir.), *cert. denied*, 98 S. Ct. 188 (1977). The large number of sizable third-party suits brought under the unseaworthiness doctrine resulted in a heavy economic burden on the maritime industry, which has been cited as a cause of that industry's decline in this country. *See Longshoremen's and Harbor Workers' Amendments: Hearings on S. 2485 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st & 2d Sess. 123-26 (1968) (statement of Francis A. Scanlan). In addition, circumvention disrupted the balance of liabilities established by the LHWCA so that stevedores were faced with a double liability: payments of workmen's compensation benefits as well as possible indemnification to shipowners for damages awarded in third-party actions. One result of this double liability was extremely high insurance rates for stevedores. *See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, & S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 258-63, 288 (1972) (statement of Francis A. Scanlan). Furthermore, the great increase in third-party suits placed a severe burden on the court dockets of federal district courts. *Id.* at 283-87. *See* H.R. REP. No. 1441, 92d Cong., 2d Sess. 4-5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4702-03 [hereinafter cited as HOUSE REPORT] (the committee noted its concern with insurance rates and court backlog).

8. *See* HOUSE REPORT, *supra* note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705.

9. Brown v. Ivarans Rederi A/S, 545 F.2d 854, 861 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) (" 'Longshoring . . . has an injury frequency rate which is well over four times the average for manufacturing operations.' ") (quoting S. REP. No. 1125, 92d Cong., 2nd Sess. 2 (1975)); 118 CONG. REC. 36387 (1972) (remarks of Rep. Hicks) ("Longshoring ranks second only to coal mining as the most hazardous occupation in our Nation . . . .").

10. *See* notes 33 & 34 and accompanying text *infra*.

to solve these problems, one of the most controversial[11] was the limitation of the vessel's standard of care to negligence.[12] Because the statute provides no explication of the negligence standard, there have been conflicting formulations of what the precise standard of care should be.[13] It is the purpose of this note to examine the inconsistent standards adopted by the courts and to suggest one which most closely reflects congressional rationales for reducing the liability of the vessel to the harm resulting from its negligence.[14]

In addition to delineating the problems of circumvention and safety, the legislative history of the 1972 amendments[15] manifests the intent of Congress to adopt a uniform standard of care throughout the nation,[16] to apply comparative negligence,[17] and to bar the defense of assumption of risk.[18] The House Report strongly emphasizes the congressional intent to place vessels and longshoremen in the same position they would occupy if engaged in non-maritime activities on

11. 118 CONG. REC. 36382–88 (1972) (during floor debate the primary issue of concern was the reduction of a vessel's standard of care); *see* HOUSE REPORT, *supra* note 7, at 4, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4701–02 ("One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations.").

12. 33. U.S.C. § 905(b) (Supp. V 1975). This section provides in pertinent part as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

13. *See* notes 26, 27, & 37 and accompanying text *infra*.

14. The standard of care prior to the 1972 amendments was the absolute liability imposed under the warranty of seaworthiness. *See* note 6 *supra*. Changing the standard to negligence results in liability in a smaller number of cases, so that the change can be accurately described as a reduction in liability.

15. The basic source document is the House Report. *See* note 7 *supra*. The Senate Report, S. REP. No. 1125, 92d Cong., 2d Sess. (1972), is nearly identical to the House Report and so future reference will be made to the House Report only. The congressional debate relating to the 1972 amendments is located at 118 CONG. REC. 36376–89 (1972).

16. HOUSE REPORT, *supra* note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705.

17. *Id.*

18. *Id.*

shore.[19] It is clear from the House Report that existing standards applicable to land-based parties should be applied, and that no special maritime standard of care should be devised.[20] While courts must agree that congressional intent should be effectuated,[21] they differ in determining which specific standard of care best accomplishes this end.[22]

I. THE INVITEE STANDARD

Some courts, noting the intent of Congress to place the parties in the same position as similarly situated land-based parties, and to establish a uniform standard, have looked to the *Restatement (Second) of Torts* as the national expression of land-based tort principles.[23] A

19. In the House Report, there are four references to placing the vessel and the longshoreman in a position equivalent to that of land-based third parties engaged in nonmaritime activities. HOUSE REPORT, *supra* note 7, at 6-7, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4703-04. The most definitive statement declares,

> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

Id. at 7, [1972] U.S. CODE CONG. & AD. NEWS at 4704.

20. The House Report states,

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

Id. at 6, [1972] U.S. CODE CONG. & AD. NEWS at 4703 (emphasis added).

21. Obviously, if Congress finds that the primary purposes of its legislation are being frustrated by judicial interpretations, it may pass further amendments. Also, because Congress has the constitutional power to establish admiralty and maritime law, Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934), its determinations of the substantive law in this field ought to be given special weight by the courts.

22. *See, e.g.*, Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 98 S. Ct. 188 (1977); Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. [Transpacific Carriers, *etc.*] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976); Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484 (N.D. Cal. 1977); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975).

23. *See, e.g.*, Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 98 S. Ct. 188 (1977); Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. [Transpacific Carriers, *etc.*] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976).

careful analysis of the *Restatement* provisions indicates that the invitee standard should be adopted as the proper rule under the 1972 amendments. The parties involved in a third-party action under the LHWCA can be characterized as an employer (vessel), independent contractor (stevedore), and an independent contractor's employees (longshoremen).[24] To place the parties in the land-based relationship which Congress intended, the rules applicable to the employer of an independent contractor should be examined to ascertain the duty[25] normally owed by an employer to an independent contractor's employees.[26] Such an examination reveals that an employer would be liable to an independent contractor's employees only to the extent that

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The use of *Restatement (Second) of Torts* principles rather than the tort law of the jurisdiction in which the trial court is sitting is the best means of insuring a nationally uniform standard as intended by Congress. *See* HOUSE REPORT, *supra* note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705.

24. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 407–429 (1965).

25. It is important to distinguish the question of what duty is owed from the questions of when that duty is breached and when that breach is a proximate cause of the injury. Some recent decisions, such as Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977), have confused these basic distinctions and unnecessarily rejected or criticized the invitee standard.

In Cox v. Flota Merchante Grancolumbiana, S.A., No. 77–7338 (2d Cir. May 10, 1978), the court reversed a verdict based upon an instruction derived from the invitee standard. The court declared that the openness or obviousness of the condition should not affect the vessel's liability. The court noted that the stevedore had complete control over the unloading operation and that union regulations forbade crew members from assuming any role in the enterprise. These facts, however, should not have meant that the shipowners did not have a duty defined by the invitee standard, nor should they have resulted in a finding that the duty was not breached; they demonstrate only that had the shipowner taken reasonable steps to correct the condition, those steps would have been contractually limited to informing the stevedore, which already knew of the condition. Consequently, had the court correctly analyzed the situation as a breach of the invitee standard, it would have found no liability on the part of the vessel because the breach was not a proximate cause of the accident.

The court, failing to recognize this distinction, rejected instructions based upon the invitee standard as creating a "non-delegable duty." The invitee standard, however, does not create a non-delegable duty. The vessel is only liable when it knows or should have known of a danger which it fails to alleviate. This sort of duty was clearly countenanced by the House Report, which expressed the congressional desire to abrogate only special maritime duties that are absolute or non-delegable, such as the warranty of seaworthiness. *See* HOUSE REPORT, *supra* note 7, at 6–7, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4704.

26. This approach was taken by the court in Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 98 S. Ct. 188 (1977). The court adopted the applicable sections of the RESTATEMENT (SECOND) OF TORTS §§ 409–429 (1965) (Chapter 15: Liability of an Employer of an Independent Contractor). Section 409 sets forth the general rule: "Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Because the *Restatement* points out that the rules in §§ 416–429, are rules of vicarious liability which impose non-delegable duties on the employer, RESTATEMENT (SECOND) OF TORTS, Introductory Note, Topic 2, at 394–95 (1965), the court applied only the rules stated in §§ 409–415. 554 F.2d at 1249–51.

it breached the duty it owed to its business invitees.[27] Consequently, the invitee standard is the appropriate rule for third-party actions under the LHWCA.[28]

Under the invitee standard, a landowner is liable if she knows or should know of a risk created by a condition on the land which she should expect will not be discerned or protected against by the invitee, and fails to use reasonable care to protect him. Even if the danger is known or obvious to the invitee, the landowner's duty will not be lessened if the landowner should anticipate harm to the invitee despite such knowledge or obviousness.[29] If applied in a comparative negli-

27. In Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 1489 (1978), the court noted that under the independent contractor provisions of the *Restatement,* the employer of an independent contractor owes no duty to the independent contractor's employees. *Id.* at 1033. The court cited Eutsler v. United States, 376 F.2d 634 (10th Cir. 1967), *cited with approval in* 559 F.2d at 1034-35, which adopted the majority rule that workers cannot hold the employer of their independent contractor employer on a third-party basis. This rule, developed in a nonmaritime situation, is part of the land-based law which the courts should apply to LHWCA actions following the 1972 amendments.

The reason for the *Restatement* rule is found in a Special Note to Chapter 15, which states,

> The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for their safety. The one exception which developed was that the servants of the contractor doing work upon the defendant's land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See § 343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor's servants. One reason why such responsibility has not developed has been that the workman's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workman's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

RESTATEMENT (SECOND) OF TORTS, Special Note, Chapter 15, at 17-18 (Tent. Draft No. 7, 1962).

This note, as pointed out in *Eutsler,* was never incorporated into the final *Restatement* draft, but has been cited with approval as persuasive authority in cases adopting the majority rule. 376 F.2d at 636.

28. The following cases applied the invitee standard in some form: Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., Panama, 540 F.2d 757 (4th Cir. 1976), *cert. denied,* 97 S. Ct. 1116 (1977); Napoli v. [Transpacific Carriers, *etc.*] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976); Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224 (D. Ore. 1975); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975).

29. The *Restatement* provides,

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

gence framework with the defense of assumption of risk unavailable, the invitee standard would meet the guidelines indicated in the legislative history of the 1972 amendments.[30]

In addition, utilization of this standard would further the congressional desire to solve the safety problem in the longshoring industry.[31] Congress considered the imposition of a negligence standard derived from land-based tort law to be consistent with the objective of improving safety.[32] With the 1972 amendments, Congress intended to

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(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1965). The section should be read together with § 343A. *Id.*, Comment a. Section 343A provides in pertinent part, "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* § 343A. The statement of the invitee standard in §§ 343-343A is the more widely accepted rule for land-based liability. *See, e.g.*, Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. [Transpacific Carriers, *etc.*] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976); *cf.* Wescott v. Impresas Armadoras, S.A. Panama, 564 F.2d 875 (9th Cir. 1977) (analysis similar to §§ 343-343A is applied).

The facts in one early case adopting the invitee standard well illustrate the desirability of adopting § 343A as well as the older standard of § 343. In Anuszewski v. Dynamic Mariners Corp., Panama, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977), the longshoremen noticed and reported to their supervisors an unsecured cargo hatch. Nothing was done and the men continued to work. A cargo boom dislodged the hatch, which fell into the hold and injured the plaintiff. The trial court rendered judgment for the defendants under the invitee standard, holding that the condition was known and obvious and that the vessel was therefore not liable. In this situation, however, it is clear that the vessel did not maintain safe working conditions through the use of reasonable care, and that the workers, by complaining to their supervisors, did all that they should reasonably be expected to do. It is in this sort of case that the additional requirement of § 343A is needed to reach a just result. It was reasonably forseeable to the vessel that longshoremen, confronted with the option of walking off the job or continuing to work under the risk, might continue to work.

30. *See* notes 16-20 and accompanying text *supra*.

31. *See* text accompanying notes 8-10 *supra*. The other major concern of Congress, the circumvention problem, was partially solved by § 5 of the 1972 amendments. 33 U.S.C. § 905b (Supp. V 1975). That section provides that third-party suits can only be based on negligence, not unseaworthiness, and prohibits indemnification actions by the vessel against the stevedore. It thereby effectively blocks this particular means of judicially circumventing the LHWCA. *See* note 6 *supra*.

32. The House Report describes the negligence standard as "fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels." HOUSE REPORT, *supra* note 7, at 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4703. The Committee also stated that "[p]ermitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work." *Id.* at 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4704.

place the primary responsibility for safety on the stevedore.[33] This localization of responsibility is consistent with the general federal policy toward occupational safety and health.[34] Some courts, properly viewing increased liability on the vessel as contrary to the policy of centralized responsibility, have refused to extend the vessel's duty of care beyond that recognized by the invitee standard.[35] The invitee standard, therefore, may be viewed as implementing congressional intent with respect to the LHWCA and, more importantly, as part of a broader federal safety policy.

II. THE INVITEE STANDARD EXAMINED

The invitee standard has not met with universal approval. A number of courts have considered it inconsistent with congressional intent to promote safety and to prohibit the use of the defense of assumption of risk.

33. *See* 118 CONG. REC. 36388 (1972) (remarks of Rep. Mink). In Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977), the court said that "[t]his was an important aspect of the legislative plan, intended to focus responsibility for longshoremen's safety on those best able to improve it, the stevedores." *Id.* at 144. Similarly, in Munoz v. Flota Merchante Grancolumbiana, S.A., 553 F.2d 837 (2d Cir. 1977) (reversing a judgment for the longshoreman), the court concluded that Congress intended to encourage "safety within the industry by placing the duty of care on the party best able to prevent accidents." *Id.* at 839.

In the House Report, however, the committee carefully indicated that reduction of the standard of care was not intended to reduce the safety responsibilities of the vessel under the Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). *See* HOUSE REPORT *supra* note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705. This caveat is of limited importance because the OSHA standards as promulgated are applicable only to the stevedore and not the vessel. *See, e.g.*, Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 498-500 (N.D. Cal. 1977); *accord*, Brown v. Mitsubishi Shintako Ginko, 550 F.2d 331 (5th Cir. 1977).

34. Since the enactment of OSHA, federal policy has been to place responsibility for safety on one party. Generally, this party is the employer of the workers whose health and safety is to be protected. An employer has the general duty under OSHA to provide employment and a place of work free from conditions dangerous to the employees. The employer also has a specific duty to comply with promulgated standards. Although OSHA also places a duty on the employee to comply with safety and health rules and regulations applicable to her conduct, no penalties are exacted for failure to comply. It is expressly left to the employer to insure compliance by the employee. *See* J. GRIMALDI & R. SIMONDS, SAFETY MANAGEMENT, 313-14 (3d ed. 1975). The regulations promulgated for longshoring, which place the responsibility for safety on the stevedore, are consistent with this policy. The invitee standard, by placing all parties involved in a longshoring operation in the same relationship as similarly situated land-based parties, effectuates the congressional intent to apply general federal safety policy to the longshoring industry.

35. *See* Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977).

A. Safety

In *Gallardo v. Westfal-Larsen & Co. A/S*,[36] the invitee rule was rejected in favor of a specialized maritime negligence standard.[37] The court mistakenly concluded that by incorporating the plaintiff's perceptions into the standard of care required of the defendant, the invitee standard would frustrate the congressional intent to compare the negligence of both parties, which would in turn result in reduced incentives for safe behavior.[38] Consequently, the court promulgated a stricter standard of care,[39] increasing the vessel's liability[40] and de-

36. 435 F. Supp. 484 (N.D. Cal. 1977).

37. The court announced the following standard:

> Before the commencement of stevedoring operations, the owner of a vessel in navigable waters has a duty to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge. After the commencement of stevedoring operations, the owner of a vessel in navigable waters has a duty to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual knowledge.

435 F. Supp. at 490. This standard differs from the invitee standard in two ways. First, it does not expressly provide that the forseeability of the plaintiff's actions should be considered in determining whether the defendant used reasonable care. Second, it extends the vessel's duty to dangers other than those caused by conditions on board the ship, so that the vessel could be held liable for injuries caused by the negligent conduct of the stevedore. In Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 457 (W.D. Wash. 1977), the court cited the *Gallardo* standard with approval, although it was not specifically adopted.

38. The court noted the congressional intent that third-party suits be decided under the doctrine of comparative negligence. *Id.* at 492. It erroneously believed that under the invitee standard there would be instances in which the defendant vessel, even though negligent, would escape liability because of the plaintiff's unreasonable behavior. It is true that under the invitee standard the vessel's duty of care is defined in part by its reasonable expectations as to how the plaintiff will act when confronted with a certain condition. This element of the definition, however, is no more than a recognition of the fact that reasonable care is not defined in a vacuum; whether or not one's actions are reasonable depends in part upon how one expects others to act. The modernized invitee standard of the *Restatement (Second) of Torts* § 343A, *quoted at* note 29 *supra*, increases the vessel's burden to require not only anticipation of reasonable behavior by the plaintiff, but also anticipation of foreseeable risk-taking behavior. A special maritime standard which would deny the vessel the right to act in a manner which anticipates reasonable action by the plaintiff means that the vessel would have to act so as to anticipate unreasonable conduct—a burden higher than that imposed upon similarly situated land-based parties, and not intended by Congress. *See* note 19 and accompanying text *supra*. Contrary to the conclusion of the court in *Gallardo*, the vessel's negligent action will never be a "shield" to liability under the invitee standard, because the invitee standard *defines* what constitutes reasonable behavior. *See* notes 47–49 *infra*.

39. The court justified the utilization of a specialized standard, despite the specific intent of Congress that no such standard be adopted, by balancing this intent against others (safety, prohibition of assumption of risk, etc.) indicated in the legislative history. 435 F. Supp. at 496–97.

40. *See* note 37 *supra*. Application of the special standard would clearly produce more instances of vessel liability than would application of the invitee standard.

creasing the longshoremen's responsibility for their own safety.[41] This shift in the standard of care is contrary to the express intent of Congress,[42] and would not provide any incentives for safe behavior, as indicated by the beliefs of authorities in the field of safety behavior[43] and historical experience under the old LHWCA.[44] Moreover, to the extent that this question is one of policy, it is probably best left to the legislative process. Congress has already suggested that the primary responsibility to maintain safety should be placed on the stevedore, and that the burden placed on the vessel should be that of a land-based party in similar circumstances. Independent determinations of safety policy by the judiciary could eventually lead to the sort of judi-

41. Under the special standard proposed in *Gallardo,* the reasonableness of the plaintiff's behavior would no longer be taken into account in determining the duty of the vessel. 435 F. Supp. at 496. Thus, longshoremen would be relieved of a certain degree of economic responsibility for their own safety, because the vessel's liability would encompass both their reasonable and unreasonable behavior.

42. As discussed earlier, Congress intended to (1) place the parties under LHWCA third-party suits in the same position as similarly situated land-based parties, (2) make the stevedore primarily responsible for safety, and (3) incorporate national safety policy into standards for the longshoring industry. All of these purposes would be frustrated by adopting the specialized standard.

The courts adopting a specialized standard have placed great weight on the failure of Congress to specifically provide that the invitee standard should be adopted. 435 F. Supp. at 492. It does not follow, however, that this failure indicates any intent to reject the invitee standard. It is much more likely that Congress wanted the courts to adopt the land-based standard, but did not want to lock third-party actions into a specific standard which could become obsolete as land-based law developed.

43. There has been very little experimental work done which empirically isolates the actual causative factors involved in industrial safety. Fitch, Hermann, & Hopkins, *Safe and Unsafe Behavior and its Modification,* 18 J. OCCUPATIONAL MED. 618, 618 (1976). At least one study, however, has suggested that relieving workers of economic responsibility for their own safety may increase accident rates. Chelius, *The Control of Industrial Accidents: Economic Theory and Empirical Evidence,* 38 LAW & CONTEMP. PROB. 700, 710–14 (1974). *See generally* Margolis & Kroes, *Introduction,* in THE HUMAN SIDE OF ACCIDENT PREVENTION 3, 3–6 (B. Margolis & W. Kroes eds. 1975); Tuttle, Dachler, & Schneider, *Organizational Psychology,* in THE HUMAN SIDE OF ACCIDENT PREVENTION, *supra* at 7, 16–23. There is apparently no suggestion among safety authorities that relieving workers of the economic responsibility for their own safety would improve safety records. Consequently, it would seem best to respect the judgment of Congress that the most efficacious way to improve the safety record of longshoring is to place the parties in the same relationship as similarly situated land-based parties engaged in non-maritime activities.

44. The assumption made by courts adopting the specialized standard of care is that placing a stricter standard of care on the vessel will result in a reduced accident rate. Although intuitively appealing, history supports the opinions of safety authorities that imposing a strict standard of care on the vessel may not result in improved accident rates. Since the decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), vessels had been under a non-delegable, strict liability duty to maintain safe working conditions, yet the occupational accident rate in the longshoring industry was one of the worst in the nation. *See* note 9 *supra.*

cial circumvention of the LHWCA which led to the 1972 amendments.[45]

B. The Defense of Assumption of Risk

The invitee standard has also been criticized on the ground that the standard is inconsistent with congressional intent to apply the admiralty rule barring the defense of assumption of risk in LHWCA cases.[46] The view that the invitee standard incorporates the assumption of risk defense is based upon a doctrinal confusion which has long plagued the judiciary; it cannot withstand close scrutiny.[47] The two doctrines often confused by the courts are the *defense* of assumption of risk and the "primary assumption of risk" doctrine.[48] Congress intended to eliminate only the former.

The *defense* of assumption of risk applies when the defendant, although in breach of a duty of care owed to the plaintiff, escapes liabil-

45. As discussed earlier, Congress has been developing a uniform safety policy. *See* note 34 *supra*. The intent of Congress was to use the 1972 amendments to place the longshoring industry in the same safety policy framework as other industries. If the safety policy applicable to longshoring is altered by judicial decisions, the intent of Congress to develop one uniform national safety program will be frustrated and the safety function of the 1972 amendments will be circumvented.

46. Brown v. Ivarans Rederi A/S, 545 F.2d 854, 861, 863 n.10 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 1652 (1977); Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448, 453 (W.D. Wash. 1977); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 494 (N.D. Cal. 1977); *See* HOUSE REPORT, *supra* note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705.

47. Courts have misapplied the invitee rule to release a vessel from liability for negligent action in instances where a longshoreman became aware of a risk. *E.g.*, Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975). In *Frasca*, the plaintiff was injured when he fell from a grease-covered ladder. The court stated that if the injury had occurred early in the day the vessel would have been liable under the invitee standard, but because the injury occurred later in the day, after a number of uses by the longshoreman, the danger became known and the vessel was released from liability. *Id.* at 1101–02. Correctly applied, the invitee standard would establish whether there was an initial duty on the part of the vessel to use reasonable care. In *Frasca*, by the court's own admission, there clearly was an initial duty. It was the court's misuse of the "known or obvious" provisions of the invitee standard which led it to release the vessel from its initial duty. This is the same as adopting the assumption of risk rule.

A proper application of the "known and obvious" provision would allow a court to determine if there were any dangers so obvious, or known in fact, that the vessel could reasonably anticipate longshoremen to take self-protective action upon entering the premises. When a longshoreman discovers a latent danger which the vessel had an initial duty to correct, the invitee standard plays no role in determining whether the plaintiff assumed the risk. In such circumstances, the rules specifically governing assumption of risk would normally be determinative; however, in the case of third-party suits under the LHWCA, Congress has expressed its intent that assumption of risk not apply.

48. Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68–69 (1943) (Frankfurter, J., concurring). The two doctrines are distinguished in V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1, at 158 (1974).

ity because the plaintiff became aware of the danger and assumed the risk of injury.[49] This defense applies without regard to the reasonableness of the defendant's own conduct; thus, a vessel could fail to use reasonable care to prevent an extremely dangerous and unreasonable risk, and nevertheless escape liability for the plaintiff's consequent injury because the plaintiff assumed the risk of injury. Congress, aware that injuries are frequently caused by conditions which arise before longshoring operations commence,[50] wanted to avoid insulating the vessel from liability for its own negligent acts and therefore expressed its intent to proscribe the defense of assumption of risk.[51]

This defense, however, must be distinguished from the doctrine of "primary assumption of risk," for it is this doctrine, and not the defense of assumption of risk, that is inherently incorporated in the invitee standard.[52] "Primary assumption of risk" means that in determining the reasonableness of the defendant's actions, one element to be considered is the reasonably foreseeable actions of others. The doc-

49. In his concurring opinion, in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68-89 (1943), Justice Frankfurter said,

> [I]n the setting of one set of circumstances, "assumption of risk" has been used as a shorthand way of saying that although an employer may have violated the duty of care which he owed his employee, he could nevertheless escape liability for damages resulting from his negligence if the employee, by accepting or continuing in the employment with "notice" of such negligence, "assumed the risk." In such situations "assumptions of risk" is a defense which enables a negligent employer to defeat recovery against him.

318 U.S. at 68-69. *See also* V. SCHWARTZ, *supra* note 48, § 9.1.

50. *See, e.g.*, Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1510 (1978) (petroleum fumes asphyxiated worker); Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1489 (1978) (petroleum fumes exploded); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977) (gap between cargo and ship skin hidden); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) (cocoa bean cargo incorrectly stowed); Anuszewski v. Dynamic Mariners Corp., Panama, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977) (unsecured hatch support beam); Davis v. Inca Compania Naviera S.A., 440 F. Supp. 448 (W.D. Wash. 1977) (sloping ship deck which employee had to traverse to reach his work station covered with wheat chaff); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975) (hatch access ladder covered with grease).

51. HOUSE REPORT, supra note 7, at 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 4705.

52. The *Restatement (Second) of Torts* indicates that the invitee rule is used to determine the duty of a landowner to his invitees, and that the defense of assumption of risk is a separate doctrine discussed in §§ 496A-496G. RESTATEMENT (SECOND) OF TORTS § 343A, Comment d (1965). In Comment d to § 496C, it is noted that although the distinction between assumption of risk and initial duty may be of limited importance since the result under either doctrine is often the same, the distinction may be important where statutes have abrogated the defense of assumption of risk. In Comment e, it is further noted that the boundaries of the defendant's duty to act do not always coincide with those of the plaintiff's assumption of risk. *Id.* § 496, Comments d-e.

trine, therefore, is one part of the analysis which leads to a determination of whether the defendant had a duty toward the plaintiff in the first instance and, if so, what that duty was.[53] If the doctrine were eliminated from a consideration of the defendant's conduct, then to escape liability, a defendant would have to act so as to anticipate both reasonable and negligent conduct.[54] Congress did not intend such a standard;[55] statutory abolition of the defense of assumption of risk should not result in the rejection of the "primary assumption of risk" doctrine in determining the defendant's duty.[56] Therefore, this argument is not a sound basis upon which to reject the invitee standard.

III. CONCLUSION

Congress, desiring that the courts establish a standard of care equivalent to that of similarly situated land-based parties, drafted a

53. *See* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68–73 (1943) (Frankfurter, J., concurring); V. SCHWARTZ, *supra* note 48, § 9.1.

54. Assessing the vessel's conduct in a vacuum, with no consideration given to the reasonably foreseeable actions of longshoremen, would establish a standard of care equal to strict liability. The vessel would have to act so as to anticipate and prevent harm to a longshoreman no matter how unreasonable their conduct.

The facts of two cases illustrate and distinguish the two doctrines. In Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975), a workman was injured when he fell from a grease-coated hatch access ladder. The danger was not initially known or obvious, so under the "primary assumption of risk" doctrine, the vessel breached a duty of reasonable care owed to the longshoreman. The longshoreman had discovered the defect yet continued to use the ladder. This should have no impact on the vessel's liability under "primary assumption of risk." The *defense* of assumption of risk, however, would operate to prevent the injured longshoreman's recovery. In order to avoid such results, Congress sought to eliminate this defense.

This situation should be compared with that presented in Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 1510 (1978), in which the ship was full of dangerous residual petroleum fumes. The longshoremen were employed to clean out these fumes and were fully aware of the danger. Under the "primary assumption of risk" analysis, the vessel had no duty in the first instance since the danger was known. The longshoremen, once on the job, were responsible for their own negligent actions (as long as they were aware of the risk or it was obvious) and the vessel was not required to anticipate any dangerous conduct. The same result would be reached by applying the defense of assumption of risk analysis. The longshoremen were aware of the dangers of the petroleum fumes, and by agreeing to accept the job assumed the risk of injury.

55. *See* notes 24–28 and accompanying text *supra.*

56. In Tiller v. Atlantic Coast Lines R.R., 318 U.S. 54 (1943), the Supreme Court considered the abolition of the defense of assumption of risk in the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (Supp. V 1975). In his concurring opinion, Justice Frankfurter pointed out that abolishing the defense of assumption of risk should in no way affect the question of when a defendant has used reasonable care. 318 U.S. at 72. It must first be determined whether the defendant breached any duty owed the plaintiff. If not, there is no liability. If so, that duty may not be relieved by the plaintiff's assumption of risk.

general statute which was accompanied by an abundance of legislative history indicative of congressional intent. This legislation, the 1972 amendments to the LHWCA, permits the courts to determine at any time what the appropriate land-based standard may be and to apply it to third-party LHWCA suits. As land-based law develops, the LHWCA standard should stay in step.

At present, the standard which best effectuates congressional intent is the invitee standard. If it is adopted uniformly for use in third-party cases arising under the LHWCA, the issues to be considered will be as follows:

(1) Did the vessel know, or by the exercise of reasonable care should it have known, of a dangerous condition on board?
(2) Was the danger of such a nature that the vessel could have reasonably expected the plaintiff to have anticipated the harm and acted to protect himself from the danger?

If, upon examination of the relevant facts, the answers to these questions demonstrate that the vessel should have anticipated that harm might occur from a condition on board, the vessel should be held to a duty of reasonable care to protect the plaintiff from harm. If such a duty is found to exist in the first instance, it should not be discharged by a later assumption of risk by the plaintiff.

Construing the legislative history of the 1972 amendments to ignore the directive that no special maritime standard be applied could result in a circumvention of congressional purposes analogous to that which led to the 1972 amendments. The invitee standard should therefore be adopted and applied to all third-party actions arising under the 1972 amendments.

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