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COMMENTS

The Longshoremen's and Harbor Workers' Compensation Act of 1927: Half-Way Protection for the Stevedore and the Longshoreman

The longshoreman is unique among industrial employees in several ways. First, his occupation involves innumerable crossings over the ill-defined line which separates land from navigable waters. Second, in the course of his employment he is likely to spend a great amount of time on premises (a vessel) maintained by a party (a shipowner) who is not his employer. Moreover, a longshoreman must often use equipment supplied by the shipowner. Partially because of these singular aspects of his employment, an injured longshoreman has a vast and potentially confusing array of remedies. Depending largely upon his location at the time of injury, he may have a right to recover by way of one or more of the following: an action under state workmen's compensation legislation against his employer (herein called a stevedore), a proceeding against the stevedore under a federal compensation act, and a damage action against the shipowner for both unseaworthiness and negligence.¹ The chart on the next page sets forth in an oversimplified fashion the principal remedies available to employees injured on or near navigable waters.

The law relating to longshoremen's remedies abounds with surprising anomalies, hyper-technical distinctions, and bits and pieces of judicial legislation. This situation stems largely from deficiencies in the Longshoremen's and Harbor Workers' Compensation Act of 1927,² an inherently inadequate statute greatly distorted by recent judicial interpretation. This Comment undertakes an examination of the act's most salient shortcomings with a view to suggesting possible guidelines for what is believed to be necessary corrective legislation.³

1. See generally Gainsburgh & Fallon, *Calbeck v. Travelers Insurance Co.: The Twilight's Last Gleaming?*, 37 TUL. L. REV. 79 (1962); McKinstry, *The Yaka Decision—Judicial Repeal of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act*, 31 INS. COUNSEL J. 90 (1964); Pillsbury, *Stevedore's Duty To Indemnify Shipowners for Injuries to Longshoremen-Employees*, 15 HASTINGS L.J. 530 (1964); Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137 (1963); Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 MICH. L. REV. 539 (1963); Till & Bluestein, *Amphibious Problems in State Workmen's Compensation Claims*, 32 INS. COUNSEL J. 472 (1965); Weinstock, *The Employer's Duty To Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PA. L. REV. 321 (1954); 37 TUL. L. REV. 786 (1963); 36 *id.* 134 (1961).

2. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1964). Although "harbor worker" is not defined in the act, the act's jurisdictional requirement indicates that Congress meant the legislation to cover only those harbor workers who, like longshoremen, work very near the water.

3. An initial and sometimes difficult distinction must be made between a long-

Source of Relief	Persons Covered	Nature of Liability	Recovery	Jurisdiction
Merchant Marine Act of 1920 ⁴ (Jones Act)	Seamen	Negligence*	Damages	Land and navigable waters
Longshoremen's and Harbor Workers' Compensation Act of 1927 ⁵	Longshoremen; harbor workers	Absolute**	Compensation scale	Navigable waters only
Seaworthiness warranty ⁶	Seamen; longshoremen	Absolute***	Damages	Land and navigable waters
State compensation acts ⁷	Harbor workers; longshoremen	Absolute	Compensation scale	Land only
Negligence law (business invitee) ⁸	Harbor workers; longshoremen; passengers	Negligence	Damages	Land and navigable waters

* The fellow-servant and assumption-of-risk defenses are eliminated; comparative negligence replaces contributory negligence.

** The employee is precluded if his injury resulted solely from his intoxication.

*** Contributory negligence will reduce a recovery.

shoreman or harbor worker and a seaman. This distinction is crucial because § 3(a)(1) of the Longshoremen's Act excludes injuries suffered by "a master or member of a crew of any vessel" from the scope of the act. Moreover, the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. 688 (1958), popularly called the Jones Act, granting *seamen* an FELA-type damage remedy against their employers, is unavailable to longshoremen because § 5 of the Longshoremen's Act makes compensation under the Longshoremen's Act a longshoreman's exclusive remedy against his employer. See text accompanying notes 56-58 *infra*. Thus, the Jones Act and the Longshoremen's Act are mutually exclusive. See *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952). The fact that a person has accepted benefits under the Longshoremen's Act does not necessarily preclude his bringing a later suit under the Jones Act if the former award is offset against any subsequent recovery. See *Lawrence v. Norfolk Dredging Co.*, 194 F. Supp. 484 (E.D. Va. 1961), *aff'd*, 319 F.2d 805 (4th Cir.), *cert. denied*, 375 U.S. 952 (1963); *GILMORE & BLACK, ADMIRALTY* 355 (1957). The distinction seems to hinge on whether a particular employee has a fairly permanent connection with the vessel and is on board "primarily to aid in navigation." If so, he is a seaman. See *Texas Co. v. Savore*, 240 F.2d 674 (5th Cir.), *cert. denied*, 355 U.S. 846 (1957); *cf. Davis v. Department of Labor & Indus.*, 317 U.S. 249, 253 (1942).

4. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964). This act made the damage remedy provided by the Federal Employer's Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1964), applicable to seamen. Regarding the relevance of the Jones Act to longshoremen's relief, see note 3 *supra*.

5. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1964).

6. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), which first extended the benefits of the seaworthiness warranty to longshoremen. See generally text accompanying notes 59-70 *infra*.

7. See generally 36 TUL. L. REV. 134 (1961).

8. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Lahde v. Soc. Armadora Del Norte*, 220 F.2d 357 (9th Cir.), *cert. denied*, 350 U.S. 825 (1955). The availability of this remedy is largely an academic question, for the unseaworthiness doctrine, under which recovery may be obtained without proof of negligence, will be available

I. THE NAVIGABLE WATERS REQUIREMENT: AN INADEQUACY FROM ITS INCEPTION

The Longshoremen's Act was adopted in response to a series of Supreme Court decisions which made it clear that state compensation acts could not constitutionally afford relief to harbor workers injured on navigable waters.⁹ The admiralty law had to remain uniform; maritime injuries could not receive varying treatment under different local laws.¹⁰ A void, intolerable in that era of workmen's compensation ascendancy,¹¹ resulted; the inapplicability of state legislation meant that injured longshoremen were covered by no compensation statute. Congress quickly responded to the Court's prompting by adopting the Longshoremen's Act.¹² However, the legislative history of the provision clearly indicates that, despite urgings for a more extensive law, the act was intended to do no more than to fill the vacuum. Wherever possible, state compensation legislation was to be applied.¹³ Therefore, a longshoreman was not covered by the new statute in a comprehensive, functional manner based upon his occupational status.¹⁴ Instead, section 3(a) provides him relief only if his "disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."¹⁵

In performing his duties of loading and unloading, a longshoreman constantly crosses between land and vessels or barges anchored upon navigable waters.¹⁶ Therefore, section 3(a) has inevitably gen-

in most instances in which a plaintiff could rely upon a common-law negligence theory. See GILMORE & BLACK, *op. cit. supra* note 3, at 364.

9. *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

10. See cases cited note 9 *supra*.

11. See 1 LARSON, *WORKMEN'S COMPENSATION LAW* § 5.30 (1965 ed.).

12. See generally *Washington v. W. A. Dawson & Co.*, 264 U.S. 219, 227-28 (1924).

13. See *Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 643-44 (2d Cir. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965). Prior to the passage of the Longshoremen's Act, the Supreme Court had declared unconstitutional two congressional attempts to apply state compensation acts to longshoremen. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (declaring unconstitutional 40 Stat. 395 (1917) as an invalid attempt to delegate federal power to the states); *Washington v. W. C. Dawson & Co.*, *supra* note 12 (declaring 42 Stat. 634 (1922) invalid on similar grounds). See generally GILMORE & BLACK, *op. cit. supra* note 3, at 333-40.

14. See *Johnson v. Traynor*, *supra* note 13, at 188-90; Clark, *The Longshoreman and Accident Compensation*, 22 MONTHLY LABOR REV. 753, 756 (1926).

15. Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. § 903(a) (1964).

16. "Any rule that we [adopt in applying § 3(a)] . . . is necessarily arbitrary from the longshoreman's point of view because the boundary line between land and sea is crossed by a great deal of traffic and many injuries occur near the line." *Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 647 (2d Cir. 1965) (Hays, J., dissenting).

erated much litigation, and the illogical and impractical jurisdictional requirement which it established has given birth to a host of strained distinctions.¹⁷ For example, a longshoreman injured at any point on a gangplank is injured on navigable waters and is thus within the scope of the act, because a gangplank is considered an extension of a vessel.¹⁸ On the other hand, a harbor worker injured while standing on a pier is not within the protection of the act, because, although the injury might have occurred at a point over navigable waters, the entire pier is considered to be an extension of the land.¹⁹ Most difficult to resolve, however, are the jurisdictional questions arising in those cases where a longshoreman standing on land or an extension thereof either falls or is pushed into navigable waters and there sustains injury or drowns. Here resort is had to less manageable admiralty principles.

A. *The Locality Test*

Historically, the existence of an admiralty court's jurisdiction over suits arising from tortious conduct has been determined by the "locality test." In the landmark case of *The Plymouth*,²⁰ the United States Supreme Court declared that in order for a tort to be considered "maritime," "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters . . ."²¹ In thus establishing the locality test, the Court actually appears to have set forth two standards and seems to have ruled that an admiralty court can take jurisdiction of a tort action if either is satisfied. Moreover, the second guideline (substance and consummation) is certainly less precise than the first, and has been applied less strictly. For example, where one is pushed

17. See *Johnson v. Traynor*, 243 F. Supp. 184, 189 n.4 (1965), where the court offered "as an illustration of the complexities and sometimes the absurdities of jurisdiction problems the case of the fat longshoreman who, in falling, hit both the wharf [calling into effect local law] and the ship [calling into play the Longshoremen's Act] . . ."

18. See *The Admiral Peoples*, 295 U.S. 649 (1935); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

19. *Swanson v. Marra Bros.*, 328 U.S. 1 (1946); *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Hastings v. Mann*, 340 F.2d 910, 911-12 (4th Cir. 1965).

Section 3 expressly states that injuries occurring on dry docks are within the purview of the act. The term "dry dock" has been held to include marine railroads, with the result that a worker killed in an explosion on a barge drawn four hundred feet from the water's edge was held to be covered by the Longshoremen's Act in *Avondale Marine Ways, Inc. v. Henderson*, 201 F.2d 437 (5th Cir.), *aff'd per curiam*, 346 U.S. 366 (1953). The *Avondale* rule was significantly expanded in *Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962), *reversing Harrison Bros. Dry Dock & Repair Yard, Inc. v. Donovan*, 194 F. Supp. 303 (S.D. Ala. 1961).

20. 70 U.S. (3 Wall.) 20 (1865).

21. *Id.* at 35. (Emphasis added.)

from a boat to a wharf and thereby injured, the standard that both the wrong and the injury must have occurred on navigable waters would not be met, and admiralty jurisdiction would be lacking.²² However, the vagueness of the second test would enable a court to hold that the receipt of the blow aboard the vessel was the "substance and consummation" of the wrong and the injury necessary to render the tort "maritime," despite the fact that the victim's descent ended when he struck an extension of land. Of course, this reasoning would preclude the exercise of admiralty jurisdiction where a plaintiff was knocked from a wharf into navigable waters.²³

Where due to an unknown cause a person falls from a vessel onto a wharf, or from a wharf into navigable waters, it can be extremely difficult to determine where the "substance and consummation" of the wrong and injury lies. In the wharf-to-water situation, it is certainly arguable that at least "the substance and consummation of the occurrence which gave rise to the cause of action" took place entirely in the water, for it cannot be shown that any blow or injury was sustained on the wharf.²⁴ Nevertheless, something caused the unfortunate victim to fall; therefore, it can just as easily be contended that only the consummation of the occurrence actually happened upon navigable waters, in which case admiralty jurisdiction would be lacking. In deciding whether admiralty jurisdiction is present in a particular case, a court can reach either an affirmative or a negative result by emphasizing the events which transpired on one side or the other of the line separating land from water.

Since the Longshoremen's Act was designed to provide relief only in those cases in which state compensation legislation could not constitutionally be applied because the events from which a claim arose were within the exclusive cognizance of admiralty, it is not surprising that the locality test, originally formulated to determine the presence of admiralty jurisdiction over tort claims, was quickly adopted as an aid in deciding whether the navigable-waters

22. See *The Admiral Peoples*, 295 U.S. 649 (1935); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *Caldaro v. Baltimore & Ohio R.R.*, 166 F. Supp. 833 (E.D.N.Y. 1956). *But cf.* *The Stabro*, 98 Fed. 998 (2d Cir. 1900) (court refused to read the *Plymouth* test literally and declared irrelevant the place of consummation); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943) ("[The] admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service [performed by the victim] and its relationship to the operation of the vessel plying in navigable waters."); *Castillo v. Argonaut Trading Agency, Inc.*, 156 F. Supp. 398 (S.D.N.Y. 1957). Compare *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 49 (5th Cir. 1960), where it was suggested that the locality test "may well involve many variables and it may be that the ultimate decision can scarcely be made on such an easy mechanical, i.e., physical, basis [e.g., point at which the substance and consummation of an injury occurred]."

23. See *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *Wiper v. Great Lakes Eng'r Works*, 340 F.2d 727 (6th Cir. 1965).

24. *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 49 (5th Cir. 1960).

jurisdictional requirement of the act had been satisfied.²⁵ Thus, where a plaintiff had been knocked from a dock into the water, a strict interpretation of the locality test would deny him relief under the act because the wrong (or its equivalent in the context of workmen's compensation legislation) and the injury had not both occurred on navigable waters.²⁶ The "substance and consummation" version of the locality test engenders the same difficulties when applied in connection with a claim brought under the act as it did in the context of a suit arising from an "amphibious tort."²⁷ However, recent decisions have rendered questionable the viability of either form of the locality test in litigation under the Longshoremen's Act.²⁸

B. *The Line Moves Shoreward*

In *Interlake Steamship Co. v. Nielsen*,²⁹ a shipkeeper who had driven his car off a dock and into Lake Erie in the course of inspecting a moored vessel was deemed to have been covered by the Longshoremen's Act. Since there was a complete lack of evidence showing what had caused the car to leave the pier, the court might have spoken in terms of "substance and consummation" and reached its result by reference to the locality test.³⁰ Nevertheless, it chose to reject entirely the locality test precedents and to rely exclusively upon the fact that no evidence had been offered showing that any injury had been sustained until decedent's car had struck the frozen, but otherwise navigable, waters of the lake. It sought to justify its approach by referring to the "impact of the Admiralty Extension Act"³¹ and to recent Supreme Court dicta in *Calbeck v. Travelers Ins. Co.*³² that "Congress intended the [Longshoreman's] compensation act to have a coverage co-extensive with the limits of its authority . . ."³³

The Admiralty Extension Act, adopted in 1948, did alter the historical locality test somewhat by extending admiralty jurisdiction to cover "all cases of damage or injury . . . caused by a vessel on

25. See *Caldaro v. Baltimore & Ohio R.R.*, 166 F. Supp. 833 (E.D.N.Y. 1956).

26. *But cf.* *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78, 81 (E.D. Va. 1965), where it was suggested that if there had been no impact upon a person falling from land into water until he had hit the water, the Longshoremen's Act would apply.

27. See *Smith & Son v. Taylor*, 276 U.S. 179 (1928); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5th Cir. 1960).

28. *Interlake Steamship Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964); *Gulf Oil Corp. v. O'Keeffe*, 242 F. Supp. 881 (E.D.S.C. 1965); *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965).

29. 338 F.2d 879 (6th Cir. 1964).

30. See text accompanying note 24 *supra*.

31. 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

32. 370 U.S. 114 (1962).

33. *Id.* at 130. Actually, the Court in *Calbeck* was quoting from *De Bardleben Coal Corp. v. Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944).

navigable water, notwithstanding that such damage or injury be done or consummated on land."³⁴ However, the validity of the *Nielsen* court's placing even indirect reliance upon this legislation is dubious, for the Extension Act is, by its language, applicable only in cases in which a vessel has caused damage on land, and in *Nielsen* no vessel had caused any damage. Nevertheless, it has been argued, although unsuccessfully, that by altering the locality test to bring some shoreside injuries within the scope of admiralty jurisdiction, the Extension Act has similarly expanded the coverage of the Longshoremen's Act to include injuries occurring entirely on land.³⁵ This possibility was exhaustively explored in the recent case of *Johnson v. Traynor*.³⁶ The express language of the Extension Act, the legislative history of both statutes, and administrative interpretations convinced the court that the Longshoremen's Act did not cover a person who had sustained an injury on a wharf. Indeed, the court felt that any other holding would have been the product of "the grossest type of judicial legislation."³⁷

The *Nielsen* court's reliance on *Calbeck* was equally misplaced, because in that case the Supreme Court was concerned only with the question whether injuries occurring on navigable waters should nevertheless be compensable under state law because the activity from which the harm arose was of purely "local concern."³⁸ Indeed,

34. Admiralty Extension Act, 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

35. See, e.g., *Gladden v. Stockard S.S. Co.*, 184 F.2d 510 (3d Cir. 1950); *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 640 (2d Cir. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965).

36. 243 F. Supp. 184 (D. Md. 1965).

37. *Id.* at 192. "It can hardly be said that the Extension in Admiralty Act was also intended to amend the federal compensation act to include injuries occurring on land as well as 'upon the navigable waters.'" *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279, 284 (E.D. Va. 1958), *aff'd*, 266 F.2d 82, 84 (4th Cir. 1959).

The *Nielsen* court might have buttressed its position by citing § 20(a) of the Longshoremen's Act, which establishes a presumption that, in the absence of substantial evidence to the contrary, a claim comes within the act. This argument was used in a case involving somewhat similar facts in *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78, 79 (E.D. Va. 1965). *But see* *Atlantic Stevedoring Co. v. O'Keefe*, 220 F. Supp. 881 (S.D. Ga. 1963), where it was suggested that a distinction could be made between presumption of coverage and presumption that the jurisdictional requirement of the act had been met. "Jurisdiction must be first established, and when once shown, then and only then, does the coverage presumption become effective." *Id.* at 885.

38. See *Michigan Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 647 n.1 (2d Cir. 1965); *Johnson v. Traynor*, 243 F. Supp. 184, 195 (D. Md. 1965). More specifically, the court in *Calbeck* was dealing with the troublesome jurisdictional concept embodied in the "twilight zone" doctrine. This principle, first enunciated in *Davis v. Department of Labor*, 317 U.S. 249 (1942), was intended to counter the injustices resulting from the application of the "local concern" doctrine. Briefly, the latter theory allowed state compensation acts to be applied in cases involving injuries sustained on navigable waters if the injured party's work was purely of "local concern." Usually situations where an employee who normally engaged in non-maritime activity was injured when he temporarily ventured onto navigable waters were deemed to be objects of local concern. See, e.g., *Carlin Constr. Co. v. Heaney*, 299 U.S. 41 (1936); *Sultan Ry. &*

the Court implicitly accepted the validity of applying the locality test in the initial determination whether an employee is covered by the Longshoremen's Act.³⁹

C. *The Impact of Nielsen*

Two district court cases illustrate *Nielsen's* impact on the vitality of the locality test. In 1963, before *Nielsen*, the Longshoremen's Act was held inapplicable where a longshoreman had been accidentally lifted from a dock by a dock-based winch and dropped into

Timber Co. v. Department of Labor, 277 U.S. 135 (1928); New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332 (2d Cir. 1937). The local concern doctrine was developed prior to the enactment of the Longshoremen's Act (see Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922)), in an attempt partially to fill the void left by Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), which had held that state compensation acts could not constitutionally cover injuries on navigable waters. Although the Longshoremen's Act eliminated the void entirely, the local concern doctrine nevertheless continued to be applied, ironically as a *defense* to Longshoremen's Act claims. See Gainsburgh & Fallon, *supra* note 1, at 82-83. The continued viability of the doctrine was justified on the basis of the somewhat nebulous language in § 3 of the Longshoremen's Act, which states that compensation is payable under the act only if it may not "validly be provided by State law." Moreover, because the area of "local concern" was never clearly defined, the dangers were great that an employee, by choosing the wrong forum, would incur unnecessary expense and possibly cause the statute of limitations on a claim under state law to expire.

To mitigate these risks, the Court in *Davis* held that where the local nature of the employment was uncertain, the injured employee could proceed under state legislation or the federal act and an award under either would be sustained on appeal. This "twilight zone" rested upon two presumptions. First, where compensation has been awarded under the federal act, 28 U.S.C. § 920 (1964) is applicable; that section creates a presumption in favor of determinations by a federal agency. Second, where there have been no federal findings, but an award under a state act has been made, a presumption of the constitutionality of state action is applicable. Moreover, receipt of benefits under a state act does not prevent an award of compensation under the federal act (see *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409 (9th Cir. 1952); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F.2d 968 (4th Cir. 1951)), although sums received under state law are credited against the federal award. See *Holland v. Harrison Bros. Dry Dock & Ship Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962). The Longshoremen's Act statute of limitations, § 13(a), is tolled while payments are being made under a state act. See *Great Lakes Dredge & Dry Dock v. Brown*, 147 F.2d 265 (N.D. Ill. 1930).

Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), has apparently substantially altered the twilight zone doctrine by virtually eliminating the local concern theory. A thorough review of legislative history convinced the Supreme Court that "Congress intended the [federal] compensation act to have a coverage co-extensive with the limits of its authority and that [§ 3] . . . was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers . . ." *Id.* at 130. Thus, a welder working on a partially constructed barge floating on navigable waters was within the federal act regardless of local concern. *Calbeck* is deemed by some commentators to have eliminated the twilight zone. See, e.g., Gainsburgh & Fallon, *supra* note 1; 50 CALIF. L. REV. 342 (1962). However, Till & Bluestein, *supra* note 1, have suggested otherwise, citing *Holland v. Harrison Bros. Dry Dock & Repair Co.*, 306 F.2d 369 (5th Cir. 1962), and *Matherene v. Superior Oil Co.*, 207 F. Supp. 591 (E.D. La. 1962).

39. See, e.g., *Calbeck v. Travelers Ins. Co.*, *supra* note 38, at 115-17, 119, 124-27.

the water between the ship and the pier.⁴⁰ Citing decisions which had turned upon the application of the "substance and consummation" version of the locality test, the court held that the injury from which the dispute had arisen had not been sustained on navigable waters and that the act was therefore irrelevant.⁴¹ In 1965, in *Gulf Oil Corp. v. O'Keeffe*,⁴² however, the act was held to have covered a deceased engineer who had last been seen "making an effort to get off the barge on to the dock [when] immediately thereafter a splash was heard."⁴³ Completely ignoring the locality test, the court held, on the authority of *Nielsen*, that recovery under the Longshoremen's Act was proper regardless of whether the deceased had fallen from the dock or from the barge.⁴⁴

In contrast to the modification of the principles for applying the federal compensation act's jurisdictional requisites, recent cases have continued to rely upon the locality test in admiralty tort cases brought by or on behalf of persons who fall off docks into navigable waters.⁴⁵ Indeed, the very court which decided *Nielsen* recently limited the applicability of its holding in that case to Longshoremen's Act jurisdictional controversies and applied the locality test in *Wiper v. Great Lakes Engineering Works*,⁴⁶ where a claim was premised upon an admiralty tort theory. An inebriated ship's engineer had gone ashore at night to procure some equipment. His body was recovered three days later from the slip at which his vessel had been tied up; the cause of his death was found to have been asphyxia by drowning. After losing a Jones Act suit against his employer (the shipowner),⁴⁷ decedent's widow sued the dock owner for having negligently failed to provide a safe mooring area. The trial court granted summary judgment for the defendant on the basis of Michigan common law. On appeal, plaintiff argued that maritime law, rather than state law, was applicable. Since the dock, which for the purpose of testing the complaint on a motion to dismiss was presumed to have been the cause of decedent's fall, was an extension of land, the court held, on the basis of the locality test, that maritime

40. *Atlantic Stevedoring v. O'Keeffe*, 220 F. Supp. 881 (S.D. Ga. 1963).

41. The court relied upon *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935), and *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928). See text accompanying note 23 *supra*.

42. *Gulf Oil Corp. v. O'Keeffe*, 242 F. Supp. 881 (E.D.S.C. 1965).

43. *Id.* at 882.

44. Compare *Boston Metals Co. v. O'Hearne*, 329 F.2d 504 (4th Cir.), *cert. denied*, 379 U.S. 824 (1964). The court in *O'Keeffe* probably could have reached the same result had it applied the locality test. See text accompanying note 24 *supra*.

45. See, e.g., *Hastings v. Mann*, 340 F.2d 910 (4th Cir.), *cert. denied*, 380 U.S. 963 (1965); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731 (2d Cir. 1965).

46. 340 F.2d 727 (6th Cir. 1965).

47. The Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. § 688 (1964), popularly called the Jones Act, grants to seamen an FELA damage remedy against their employers. See generally note 3 *supra*.

law was inapplicable. The court reasoned that "the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages."⁴⁸ It should be noted that while plaintiff's case here rested on the assumption that a defect in a dock had caused deceased's fall into the water, in *Nielsen* there was no evidence to indicate what had caused the victim to drive off the dock. Although the cases are thus distinguishable, the *Nielsen* court made no attempt to limit the effect of its holding to situations where no evidence of cause is presented, but implied that all injuries sustained by harbor workers and consummated on navigable waters are compensable under the Longshoremen's Act regardless of their cause.⁴⁹ Despite its language in *Nielsen*, the court really did not feel that the Extension Act eliminated the locality test.

D. Problems and Policy

Even when the locality test was uniformly applied by the federal courts in harbor worker injury cases, there could be difficulties in determining whether relief was available under the Longshoremen's Act or under state compensation legislation.⁵⁰ Now, when seemingly different standards are applied—the "consummation of the wrong and the injury" test and Nielsen's "consummation or 'situs' of the injury alone" formula—an attempt to predict the results of this determination in some cases must challenge the most experienced maritime lawyer.⁵¹ Moreover, a bad guess on the attorney's part can deprive an injured harbor worker of any remedy, for, although the statute of limitations applicable to suits under the Longshoremen's Act is tolled while a harbor worker vainly pursues a state compensation remedy, the relevant limitation period on claims under state compensation acts may continue to run while he seeks redress under federal law.⁵² Thus, where the jurisdictional facts which

48. *Wiper v. Great Lakes Eng'r Works*, 340 F.2d 727, 730 (6th Cir. 1965).

49. Since the Admiralty Extension Act had been specifically designed to affect admiralty tort jurisdiction, the result in *Wiper* suggests that, despite its language in *Nielsen*, the Sixth Circuit did not actually feel that the Extension Act eliminated the locality test.

50. See, e.g., *The Admiral Peoples*, 295 U.S. 649 (1935); *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5th Cir. 1960); *Independence Indem. Co. v. Mansfield*, 2 S.W.2d 547 (Tex. Civ. App. 1928); *St. John v. Thomson*, 108 Vt. 66, 182 Atl. 196 (1936).

51. Compare *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965), with *Hastings v. Mann*, 340 F.2d 910 (4th Cir.), cert. denied, 380 U.S. 963 (1965).

52. See *Great Lakes Dredge & Dock Co. v. Brown*, 47 F.2d 265 (N.D. Ill. 1930), discussing the federal act. The status of state law is demonstrated by *Nielsen* itself, where the Ohio workmen's compensation statute of limitations had run before the plaintiff was certain that she had a federal remedy. Brief for Respondent, p. 6 (petition for certiorari), *Interlake Steamship Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964).

must be proved to obtain relief under federal law are uncertain, it would be unwise for an injured harbor worker to seek the Longshoremen's Act remedy first, although the amount of recovery allowed by state compensation legislation is usually substantially less than that provided by the federal statute.⁵³ If Longshoremen's Act protection were found to be lacking, the untolled statute of limitations on the claim arising under the relevant state legislation might have run in the meantime, and the injured employee would find himself without any compensation remedy.⁵⁴

Two possible explanations can be offered for the current judicial trend extending Longshoremen's Act coverage landward. First, the courts may have simply recognized that a navigable-waters jurisdictional requirement in a workmen's compensation law ostensibly designed to afford relief to employees whose duties require them to divide their time between activities on land and on water is both illogical and impractical. Once the Longshoremen's Act has been invoked and compensation awarded, the hyper-technical distinctions which must be drawn in order to apply the locality test should not call for a reversal. Second, and probably more important, the courts are doubtless aware that Longshoremen's Act compensation awards can be more generous than the recoveries available under state legislation for comparable injuries. Where picayune fact distinctions can determine whether the same injury is worth fifty-four dollars per month throughout the entire period of disability or only thirty dollars monthly for a maximum of three hundred weeks,⁵⁵ the temptation to give a plaintiff the benefit of the more generous federal scale should not be underestimated.

While the motivation underlying these recent decisions may be admirable, the results leave much to be desired. *Nielsen's* new, imperfectly established jurisdictional test, which at most only gives an injured longshoreman the protection of the federal act if he was fortunate enough to sustain at least part of his injury on navigable waters, is no more logical than its predecessor; the longshoreman

53. See generally U.S. Chamber of Commerce Analysis of Workmen's Compensation Laws (Jan. 1962); *id.* (Supp. Jan. 1963); 30 N.A.C.C.A.L.J. 200, 205 (1964); 36 TUL. L. REV. 134, 137 (1961). Under certain circumstances an injured longshoreman may nevertheless desire to proceed under a state law, as, for example, where procedural rules may preclude recovery under the federal act (see *Bryce v. Todd Shipyard*, 17 App. Div. 2d 666, 229 N.Y.S.2d 993 (1962)), or where the relevant state act may be more liberal in defining "total disability." See 36 TUL. L. REV. 134, 137 n.16 (1961).

54. The prudent claimant may be able to protect himself against the running of the state statute of limitations by incurring the expense of double filing, for some state compensation acts contain statutes of limitations which are tolled when a claim is filed. See, e.g., ORE. REV. STAT. § 656.274 (1964). However, other state acts require the filing *and* prosecution of a claim within the limitation period. See, e.g., LA. REV. STAT. § 23:1209 (1964); 50 CALIF. L. REV. 342, 344 n.15, 346 n.38 (1962).

55. Compare LA. REV. STAT. § 23:1231 (1964) with 70 Stat. 655 (1956), 33 U.S.C. §§ 908-09 (1964). See generally 36 TUL. L. REV. 134, 137 (1961).

is still covered—at least potentially—by two disparate compensation laws. It seems that the zone of superficial distinctions and difficult fact determinations has merely been carried a few steps shoreward.

II. AN INADEQUACY ARISING FROM JUDICIAL LEGISLATION: THE DEMISE OF SECTION 5

Section 5 of the Longshoremen's Act provides:

The liability of an employer . . . [for compensation ascertained by reference to a standard schedule] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages . . . on account of such injury or death⁵⁶

This provision, typical for a compensation act, imposes upon an employer limited and determinate liability in exchange for his bearing liability for an employee's injury regardless of whether the harm can be attributed to the employer's fault.⁵⁷ However, recent decisions call into serious question the continued efficacy of this apparently unequivocal provision; the longshoreman can now often recover, either directly or indirectly, damages unlimited in amount from his stevedore-employer.⁵⁸ Since the stevedore normally does not own the ship with which the victim was connected at the time of injury, a two-step procedure must generally be employed in order to circumvent section 5.

A. *The First Step: Recovery Against the Shipowner—The Seaworthiness Doctrine*

The Longshoremen's Act, in conformity with other workmen's compensation legislation, preserves the injured employee's ordinary rights against any party responsible for the harm other than his immediate employer.⁵⁹ Since most injuries to longshoremen occur

56. 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964).

57. See Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 MICH. L. REV. 539, 542 (1963). It is suggested in McKinstry, *The Yaka Decision—Judicial Repeal of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act*, 31 INS. COUNSEL J. 90 (1964), that the Supreme Court in *Crowell v. Benson*, 285 U.S. 22, 37 (1932), characterized the exclusive liability provision of § 5 as fundamental to the constitutionality of the act. This seems to be a somewhat strained interpretation of the case, however, for it appears that the Court actually said only that the navigable-waters requirement and the existence of a master-servant relationship between an injured employee and an employer-defendant were essential to the constitutional application of the act. See *Crowell v. Benson*, *supra*, at 37-38.

58. See, e.g., *Reed v. The Yaka*, 373 U.S. 410 (1963); *DeGioia v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962).

59. 73 Stat. 391 (1959), 33 U.S.C. § 933 (1964). See generally Pillsbury, *Stevedore's Duty To Indemnify Shipowners for Injuries to Longshoremen-Employees*, 15 HASTINGS L.J. 530 (1964). Once an injured longshoreman accepts compensation under a compen-

around vessels during the course of loading or unloading, damage suits against shipowners are common.⁶⁰ In such actions, a longshoreman has recourse to a potent remedy once reserved for seamen alone: the seaworthiness doctrine imposing liability without fault.⁶¹ When a shipowner warrants by implication that his vessel is seaworthy, he is bound to provide a ship free of structural defects as well as defective machinery, equipment, and tackle.⁶² A shipowner can also be liable on an unseaworthiness theory for injuries attributable to an unfit crew,⁶³ the improper stowage of cargo,⁶⁴ and even defective equipment supplied by a stevedore but used in conjunction with the ship.⁶⁵ Furthermore, under maritime law, assumption of risk is not a defense to unseaworthiness liability, and contributory negligence does not preclude relief but merely mitigates the amount of recovery on a comparative-fault basis.⁶⁶

While the seaworthiness doctrine originally gave rise to a cause of action only for injuries caused by defects directly connected with the ship or its appurtenances, the warranty has ventured landward via recent judicial decisions in a manner markedly similar to that

sation order, § 33(b) provides for the automatic assignment of all his rights against third parties to his employer unless the injured employee commences an action against the third party within six months of the award. See *McClendon v. Charente S.S. Co.*, 227 F. Supp. 256 (S.D. Tex. 1964). *But cf.* *Leonard v. Liberty Mut. Ins. Co.*, 267 F.2d 421 (3d Cir. 1959).

60. See, e.g., *Mortensen v. Glittre*, 348 F.2d 383 (2d Cir. 1965); *Albanese v. N.V. Nederl. Amerik. Stoomv. Maats.*, 346 F.2d 481 (2d Cir. 1965); *Misurella v. Isthmian Lines, Inc.*, 328 F.2d 40 (2d Cir. 1964).

61. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *Sieracki* is the landmark case which first extended seaworthiness warranty liability for longshoremen's shipboard injuries. The *Sieracki* holding, originally construed narrowly to apply only to longshoremen (*Guerrini v. United States*, 167 F.2d 352 (2d Cir.), *cert. denied*, 335 U.S. 843 (1948)), was extended to encompass all harbor workers in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). The injured longshoreman, as a business invitee, may also have a negligence cause of action against the shipowner. *Ibid.*

The Court in *Sieracki* justified its extension of seaworthiness protection to longshoremen on the ground that, historically, a vessel was unloaded by members of the crew. "[The longshoreman is], in short, a seaman because he is doing a seaman's work . . ." *Seas Shipping Co. v. Sieracki*, *supra*, at 99. The historical accuracy of the Court's premise has been convincingly challenged in *Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1139-47 (1963).

62. See *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213 (1963); *Mesle v. Kea S.S. Corp.*, 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959); *Di Salvo v. Cunard S.S. Co.*, 171 F. Supp. 813 (S.D.N.Y. 1959); *Bishop v. Alaska S.S. Co.*, 404 P.2d 990 (Wash. 1965). See generally *Stover*, *supra* note 57; 36 *TUL. L. REV.* 329 (1962).

63. See *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952).

64. See *Morales v. City of Galveston*, 370 U.S. 165 (1962).

65. *Rogers v. United States Lines*, 347 U.S. 984 (1954); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954).

66. See *Kermarec v. Compagnie Generale*, 358 U.S. 625, 629 (1959) (contributory negligence); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408 (1953) (contributory negligence); *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431-32 (1939) (assumption of risk); *The Arizona v. Anelick*, 298 U.S. 110 (1936) (assumption of risk).

of the remedy provided by the Longshoremen's Act.⁶⁷ For example, recovery has been allowed when a longshoreman slipped upon sand which had seeped from bags as they were being removed from a truck after they had been unloaded from a vessel.⁶⁸ Similarly, a longshoreman injured by a defective land-based hopper which was not attached to a vessel in any manner recovered damages in an unseaworthiness action.⁶⁹ In each case, recovery was rationalized on the ground that since the plaintiff had been engaged in an unloading process which was one continuous operation, he had been in the ship's service although he had been standing on land. The eventual limits of this new expansion are far from settled or even foreseeable.⁷⁰ It is perhaps ironic, however, that this traditional maritime remedy has ventured much farther inland than has relief afforded by the federal compensation act, which was specifically intended to protect the longshoreman but which even under the liberal *Nielsen* view can be the basis for recovery only if his injury has its "situs" on the water.

B. *The Second Step: Shipowner's Recovery From the Stevedore-Employer—The Indemnity Doctrine*

Where a shipowner has been rendered liable for damages due to an unseaworthy condition wholly or partially brought about by a stevedore, it is understandable that he would look to that stevedore for redress. In 1952, the Supreme Court rejected a shipowner's argument that he had a right to contribution against the stevedore based on the mutual-fault rule regularly applied in ship collision cases, by which contributory negligence is not a defense but damages are apportioned according to the fault attributable to each vessel's owner.⁷¹ The Court felt that expanding the application of this principle beyond the collision context would amount to judicial legislation; thus, the normal tort rule disallowing contribution among joint tortfeasors prevailed.⁷²

67. Compare *The Osceola*, 189 U.S. 158 (1903), with *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), and *Hagens v. Ellerman & Buchnall S.S. Co.*, 196 F. Supp. 593 (E.D. Pa. 1961). In *Gutierrez*, where the Supreme Court first extended the seaworthiness remedy dockside, a longshoreman had slipped on beans spilled from defective bags. In the Court's view, the application of the Admiralty Extension Act, 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964) (see generally text accompanying note 34 *supra*) was not limited to cases where damage on land was caused by the vessel or by a particular part of it, but also extended to instances where a shipowner had committed a tort before the ship had been completely unloaded, if the impact of the misconduct was felt ashore at a time and place not too remote from the wrongful act.

68. *Hagens v. Ellerman & Buchnall S.S. Co.*, *supra* note 67.

69. *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965).

70. Compare *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (2d Cir. 1963), with *Huff v. Matson Nav. Co.*, 338 F.2d 205 (9th Cir. 1964).

71. See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

72. The court expressly refused to consider the effect of § 5 on the rights of the shipowner against the stevedore. *Id.* at 286 n.12.

Nevertheless, in 1956 the Supreme Court accomplished even more than it had refused to undertake four years earlier.⁷³ In the landmark case of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,⁷⁴ the Court affirmed a decision of the Court of Appeals for the Second Circuit that indemnity over in the full amount of any verdict obtained against him may be had by a shipowner from an employer-stevedore whose negligence was the "sole," "active," or "primary" cause of a longshoreman's injury. However, the Court's affirmation was not based upon any concept of primary responsibility.⁷⁵ Although there is some dispute among the commentators regarding the precise rationale behind the ruling, at least it is clear that section 5 was circumvented by basing the shipowner's recovery on an implied contract between himself and the stevedore; therefore, the shipowner's right to indemnity did not arise "on account of" the injury to the employee, as this phrase is used in section 5.⁷⁶ While the exact nature of this implied contract is uncertain, it has been suggested that in contracting with a shipowner a stevedore automatically warrants that he will perform his services in a workmanlike manner and that from this implicit obligation springs a further implied agreement by which the stevedore is said to have promised to indemnify the shipowner for damages resulting from unworkmanlike conduct.⁷⁷

The far-reaching effect of *Ryan* can be illustrated by a recent case in which an independent contractor's employee, a "harbor worker" within the meaning of the act, slipped on an oil slick while painting insignia on the funnel of a vessel.⁷⁸ The painter, alleging unseaworthiness, sued the shipowner, who thereupon impleaded the employer-contractor, claiming a right of indemnification if the employee should recover in the principal action. The jury found that the presence of the oil slick had rendered the ship unseaworthy, but

73. See generally McKinstry, *supra* note 57.

74. 350 U.S. 124 (1956), *affirming* Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277 (2d Cir. 1954).

75. Indeed, the Supreme Court has since expressly indicated that the terms "active" and "passive" negligence have no role in indemnity cases. See *Weyerhaeuser S.S. Co. v. Nacirema Operations Co.*, 355 U.S. 563 (1958).

76. See generally 2 LARSON, WORKMEN'S COMPENSATION LAW § 76.10, at 229 (Supp. 1965); Pillsbury, *supra* note 59, at 547-48; Stover, *supra* note 57, at 550; 38 TUL. L. REV. 202, 203-04 (1964); 37 *id.* 786, 790 (1963).

77. See Pillsbury, *supra* note 59, at 544-49. Much of the confusion may stem from the dissent in *Ryan*, which discussed the majority holding in terms of a contract implied in fact to indemnify a shipowner for injuries to a stevedore's employees caused by the shipowner's negligence, rather than in terms of an implied contract by which a stevedore agrees to indemnify the shipowner for losses sustained because the stevedore's service was not performed in a workmanlike manner. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 141-44 (1956) (Black, J., dissenting). The dissent indicated that this implied contract gave rise to liability "on account of" the longshoreman's injury and was clearly violative of § 5.

78. *Mortensen v. Glittre*, 348 F.2d 383 (2d Cir. 1965).

because the employee had been guilty of contributory negligence in failing to wipe up the oil after he had discovered it, the jury reduced by one third the amount to which it felt the victim would otherwise have been entitled. The trial court then directed a verdict in favor of the shipowner and against the contractor for the full amount of the jury award, on the ground that the employee's contributory negligence, *imputed to his employer*, established as a matter of law the shipowner's right to full indemnity.

In view of the recent trend toward extending shoreward the protection of the seaworthiness remedy, few would argue that section 5 of the Longshoremen's Act continues to offer great solace to the stevedore. A high proportion of the injuries occurring during loading or unloading operations are probably attributable in some way both to an unseaworthy vessel, appurtenance, or crew and also to some unworkmanlike conduct on the part of the stevedore or his employee. In this regard it must be remembered that a shipowner can be held for breaching his seaworthiness warranty if the stevedore supplies defective equipment.⁷⁹ Under these circumstances a shipowner's recovery of indemnity over, even when he and the stevedore are mutually at fault, is bound to be a frequent occurrence.⁸⁰

C. *A Shortcut*

In the comparatively rare instance where a longshoreman's employer is also the owner of the vessel with which the longshoreman was associated at the time of injury, the logical extension of the *Ryan* rationale would indicate that the longshoreman must be satisfied with his compensation remedy. Since the stevedore and the shipowner are the same, section 5 certainly cannot be circumvented on the basis of an implied consensual agreement between the owner and stevedore. However, in *Reed v. The Yaka*⁸¹ the Supreme Court concluded that "only blind adherence to the superficial meaning of a statute"⁸² could deprive such an employee of an opportunity to try for more than the Longshoremen's Act has to offer. In *Reed*, a longshoreman who had been injured when his foot went through a

79. The extent of the seaworthiness doctrine can hardly be overestimated. For example, the shipowner's warranty clearly extends to equipment owned and supplied by a stevedore. See *Rogers v. United States Lines*, 347 U.S. 984 (1954); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954). "The only case which is today clearly outside the scope of the unseaworthiness doctrine is the almost theoretical construct of an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy." GILMORE & BLACK, *ADMIRALTY* 320 (1957).

80. See *Pillsbury*, *supra* note 59, at 559-61; *Stover*, *supra* note 57, at 562. The shipowner may also recover from the stevedore the costs of defending against the unseaworthiness claim. See *Di Vittorio v. Skiles A/S Siljestad*, 244 F. Supp. 48 (S.D.N.Y. 1965).

81. 373 U.S. 410 (1963).

82. *Id.* at 414-15.

latently defective pallet on board a ship libelled the vessel, and its owner impleaded the longshoreman's employer, who happened also to be the bareboat charterer of the craft at the time of the injury. A bareboat charterer is regarded the owner for purposes of warranting the seaworthiness of a vessel and, thus, is personally liable in place of the actual owner on unseaworthiness claims.⁸³ Therefore, section 5 would seem unequivocally to have prevented the victim from bringing an unseaworthiness action. Nevertheless, the Court noted the cases allowing a longshoreman to recover on such a theory where the stevedore was not directly responsible for a ship's seaworthiness, and declared that to deprive the longshoreman of his seaworthiness remedy in this case "would produce a harsh and incongruous result."⁸⁴ Thus, despite the highly pertinent and seemingly unqualifiedly prohibitive language of section 5, coupled with the impossibility of basing the result on an implied contract concept as had been done in *Ryan*, the Court allowed the libellant to bring a damage action directly against his employer in lieu of pursuing his compensation remedy. *Reed* is thus an excellent example of the conscious judicial legislation which has made the Longshoremen's Act unworkable.

III. CONCLUSION

The Longshoremen's Act was designed to provide the injured harbor worker with a swift, certain and inexpensive remedy.⁸⁵ In light of the recent cases discussed above, it is clear that these goals have not been achieved. The act's illogical and impractical jurisdictional basis has resulted in extensive litigation and confusion, which show no signs of diminishing. With its promise of more generous damage awards, the seaworthiness approach, which, taken together with a losing shipowner's inevitable search for indemnity, normally results in the additional expense associated with impleader or a second lawsuit, has supplanted to a significant degree the relatively simple and inexpensive administrative compensation proceedings. Inevitably, where extensive litigation is required, larger attorneys' fees reduce the value of the injured longshoreman's recovery; the prospect of larger damage awards can therefore be more illusory than real.⁸⁶

83. See *Cannella v. Lykes Bros. S.S. Co.*, 174 F.2d 794 (2d Cir.), *cert. denied*, 338 U.S. 859 (1949); *Vitozi v. Balboa Shipping Co.*, 163 F.2d 286 (1st Cir. 1947); *cf. Loe v. Goldstein*, 101 F.2d 967 (9th Cir. 1939).

84. *Reed v. The Yaka*, 373 U.S. 410, 415 (1963). The Court paid particular attention to *Ryan* and *Sieracki*.

85. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932); *Stover*, *supra* note 57, at 542.

86. In *Shields & Byrne*, *supra* note 61, at 1150, it is asserted that approximately 40% of the total estimated cost to the maritime industry of the extension of the seaworthiness doctrine is attributable to lawyers' fees. Compare *Conard*, *Workmen's*

Even while the proposed legislation which became the Longshoreman's Act was under consideration in Congress, legal scholars, labor union representatives, and the Department of Labor urged that the compensation scheme cover longshoremen and harbor workers regardless of where they were injured, as long as the harm that they suffered arose in the course of their employment.⁸⁷ Although there may have been doubts in 1927 that Congress could enact such comprehensive legislation, it is clear that if these suggestions were heeded today, the commerce clause would supply the constitutional authority for the enactment of a statute based upon them.⁸⁸ Coherence and ease of administration would further be served if the act covered only those engaged in typical longshoreman occupations in which they were consistently required to work near the water's edge. The present act covers to an uncertain degree the occasional visitor to navigable waters, such as an electronic-equipment repairman.⁸⁹ There is no compelling reason to place this kind of employee, who is invariably within the ambit of state workmen's compensation legislation, under the Longshoremen's Act simply because he is temporarily working on a moored vessel, for it is now clear that state compensation laws may constitutionally cover him even when he is injured on navigable waters.⁹⁰

Compensation: Is It More Efficient Than Employer's Liability?, 38 A.B.A.J. 1011 (1952), where it is tentatively suggested that the damage remedy provided by the Federal Employer's Liability Act is more efficient than workmen's compensation relief in terms of cost per dollar of benefit conferred.

In Shields & Byrne, *supra* note 61, at 1147-48, it is noted that in one case, Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960), the longshoreman's widow's net recovery on an unseaworthiness theory, after a 50% reduction in her award to accommodate lawyers' fees, was \$1,597.45 out of a gross cost to the employer, largely attributable to defending in the indemnity action, of \$24,293.71. It is estimated that under the Longshoremen's Act she would have received \$23,790.65. Since 73 Stat. 391 (1959), 33 U.S.C. § 933(f) (1964), provides that where recovery against the third party is less than the compensation recovery would have been, compensation will be awarded to make up the difference, the widow did not suffer, but the total expenditure required on the part of the employer was \$46,486.91.

87. See Johnson v. Traynor, 243 F. Supp. 184 (D. Md. 1965); Clark, *The Longshoreman and Accident Compensation*, 22 MONTHLY LABOR REV. 753, 766 (1926).

88. See Atlantic Stevedoring Co. v. O'Keeffe, 220 F. Supp. 881, 883 (S.D. Ga. 1963), and authorities cited in note 87 *supra*.

89. Compare Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), with Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948), and Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (5th Cir. 1962). See discussion of local concern and twilight zone doctrines in note 38 *supra*.

90. See, e.g., Carlin Constr. Co. v. Heaney, 299 U.S. 41 (1936); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); New Amsterdam Cas. Co. v. McManigal, 87 F.2d 332 (2d Cir. 1937). These cases utilized the local concern doctrine, discussed in note 38 *supra*, to allow state compensation acts to apply constitutionally to some injuries on navigable waters. Uncertainties generated by the local concern principle resulted in the formulation of the twilight zone doctrine, which in effect allowed either the federal or state compensation acts to apply to local concern cases. See generally note 38 *supra*. It is arguable that Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), has eliminated both the twilight zone and the local concern doctrines, not on constitutional grounds, however, but rather because the Court felt that Congress intended the

Because policy factors are both numerous and complex, a perfect solution to the seaworthiness-indemnity approach, which virtually destroys the significance of section 5, is not readily apparent. Although the judicial repeal of section 5 seems difficult to justify, and the most apparent solution to the current problem would be to force the shipowner to bear the full loss occasioned by a breach of his seaworthiness warranty, the resulting burden on the shipowner may be intolerable if the longshoreman, lured by potentially high damage awards, persistently pursues his seaworthiness remedy rather than his compensation remedy. Indeed, before the Court in *Ryan* allowed indemnity over, stevedores customarily made voluntary compensation payments to injured employees despite the absence of a formal award under the act, in order to tide the longshoreman over while, with the stevedore's blessing, he pursued his seaworthiness remedy against the shipowner. Since these payments were made informally, there was no statutory assignment of the longshoreman's potential cause of action against the shipowner to the stevedore, who would have made a less appealing plaintiff.⁹¹ Thus the possibility was increased that the shipowner would ultimately bear the burden of injuries to longshoremen. The longshoreman has nothing to lose by pursuing his remedy against the shipowner, because if his recovery is less than his compensation remedy would have been, compensation will be awarded to make up the difference.⁹² Because of these

Longshoremen's Act to cover *all* injuries on navigable waters. It has been suggested that strict reliance on this "water's edge" rule will "provide a simple practical means for determining whether an injured man's remedy in compensation shall be under state or under federal law." Gainsburgh & Fallon, *Calbeck v. Travelers Insurance Co.: The Twilight's Last Gleaming?*, 37 *TUL. L. REV.* 79, 87-88 (1962).

While the simplicity and practicality of applying the navigable-waters jurisdictional requirement is questionable, a valid warning is implicit in the judicial history of which *Calbeck* is a part: care must be taken not to incorporate all of the "local concern" difficulties into any new longshoremen's legislation. Employment which is essentially similar to that of the longshoreman or harbor worker should be carefully defined. Part of the prior confusion which arose in applying the local concern doctrine stemmed from the fact that the principle represented a judicial exception to the normal coverage of the Longshoremen's Act, and was employed on a case-by-case basis, with the result that the exact extent of the doctrine was never clearly discernible.

Collaterally, it should be noted that some have suggested that Congress could now constitutionally place all maritime workers under the state compensation acts, because all states have compensation acts that are essentially similar, so the uniformity of the general maritime law would not be affected if state law were applied. See Allen, *That "Twilight Zone" Between the Jurisdictions of State and Federal Compensation Acts*, 16 *INS. COUNSEL J.* 202, 207 (1949); Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in The Twilight Zone*, 68 *HARV. L. REV.* 637, 656 (1955).

91. GILMORE & BLACK, *ADMIRALTY* 370-71 (1957). This practice of making informal awards will probably be eliminated by a recent amendment to § 33, 73 Stat. 391 (1959), 33 U.S.C. § 933(b) (1964), which makes acceptance of compensation from an employer an assignment only if the longshoreman fails to commence an action against the shipowner within six months.

92. See 73 Stat. 391 (1959), 33 U.S.C. § 933(f) (1964).

factors, the courts probably employed the indemnity-over theory to aid in alleviating the developing financial distress of the American shipping industry.⁹³ Moreover, the American shipowner is less able than the stevedore to pass on the cost of longshoreman injuries to the consumer because he must compete with foreign carriers, while the stevedore unloading only in American ports has no foreign competition.

Of course, an effort to exclude the longshoreman from the scope of protection of the seaworthiness warranty with its attendant liability without fault would reduce the shipowners' burden and make indemnity unnecessary. Some commentators have questioned the propriety of extending the seaworthiness warranty to longshoremen in the first place.⁹⁴ However, it must be remembered that the longshoreman performs much of his work in the "plant" of one who is not his employer. Thus he must labor in surroundings which are inevitably unfamiliar and sometimes hazardous. The spectre of unseaworthiness liability undoubtedly provides an incentive for the shipowner to keep his vessel in good order.

Ideally, where a shipowner and a stevedore have both been responsible for a longshoreman's injury, each should share the burden according to the extent to which he was at fault. However, under current law, the stevedore in most cases ultimately bears the entire loss.⁹⁵ At least two methods for distributing the cost of compensating longshoremen for their injuries may be posited. The first possible solution is to allow indemnity only to the extent of the stevedore's compensation liability.⁹⁶ Under this doctrine, the stevedore would receive the full benefit of the determinate-liability concept embodied in section 5, while the shipowner would be relieved of the burden of paying the total amount awarded to a longshoreman in an unseaworthiness action. On the other hand, perhaps it would be more desirable to grant the longshoreman a damage remedy similar to that found in the Jones Act and the FELA,⁹⁷ where the fellow-servant and assumption-of-risk defenses are eliminated and where comparative negligence replaces contributory negligence,⁹⁸ but against both stevedore and shipowner with the burden also distributed between them on a comparative-fault basis.⁹⁹ Of course, under

93. See Shields & Byrne, *supra* note 61, at 1148-51; Stover, *supra* note 57, at 568.

94. See Pillsbury, *supra* note 59, at 564; Shields & Byrne, *supra* note 61, at 1151.

95. See, e.g., Weyerhaeuser S.S. Co. v. Nacirema Operation Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); cf. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, *rehearing denied*, 369 U.S. 882 (1962).

96. See generally Pillsbury, *supra* note 59, at 542.

97. See note 47 *supra*.

98. See generally 2 LARSON, WORKMEN'S COMPENSATION LAW §§ 91.00-77 (1961).

99. See Flowers v. Travelers Ins. Co., 258 F.2d 220, 225 (5th Cir. 1958). See generally Conard, *supra* note 86, where it is suggested that the F.E.L.A. is more efficient than workmen's compensation in terms of cost per dollar of benefit rendered.

the latter alternative all other remedies against the stevedore and shipowner, including the seaworthiness warranty, would have to be eliminated. This procedure would theoretically have the advantage of distributing the burden more precisely according to every party's (plaintiff's as well as defendant's) respective fault. The former alternative, while distributing the burden less precisely, would give the seaman assurance of compensation for injuries with the possibility of seeking additional damages for unseaworthiness.

The role of weighing these policy factors and selecting among these and other alternatives properly belongs to Congress.¹⁰⁰ The recent judicial decisions discussed above, perhaps attempting to compensate for congressional inaction, have reached results both inefficient and impractical.

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100. After refusing to allow recovery over by a shipowner against a harbor worker's employer on a contribution theory, Mr. Justice Black, speaking for the Court, declared: "Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these acts [the Longshoremen's Act; Jones Act; Public Vessels Act, etc.] as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. The record before us is silent as to the wishes of employers, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1951).