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I. INTRODUCTION

IT is universally recognized that in the past two decades the United States Supreme Court has substantially revised the law under which seamen, longshoremen and harbor workers (or their survivors) may recover damages for personal injury and death. One of the more recent and most authoritative texts in the field of admiralty and maritime law devotes an entire chapter, 147 pages in length, to the subject of the rights of seamen and maritime workers (or their survivors) of recovery for injury and death.[1] The introduction to that chapter likens the Court's rewriting of the law in this field to a volcano and states that as long as it "continues in eruption, no charts can be guaranteed reliable" as to its future course. It must be conceded that one of the more recent, major and most astounding eruptions is that pertaining to the rights of longshoremen to recover damages for personal injuries sustained in the course of their employment aboard vessels. Since World War II the spotlight of judicial decision and review in maritime cases has been focused upon this one narrow field until it has become one of the most litigious in this country. It is the purpose of this article to review the background and history of events within that field, set forth clearly and concisely the status of the law and note some changes which may be forthcoming.

At the outset it would probably be helpful to define some of the terms that will be used in the course of this article. The term "seamen" will be used in the broad sense of those who qualify in case of injury for maintenance and cure, that is, for receipt of a daily living allowance and medical expenses from the ship or her owner until a maximum cure has been effected.[2] Generally the three basic requirements for one to qualify as a seaman in order to be entitled to maintenance and cure in case of injury are that the vessel be in navigation, that the person have some permanent connection with the vessel, and that the person be employed

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1 GILMORE & BLACK, THE LAW OF ADMIRALTY ch. VI, at 248-394 (1957).

2 Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938).

aboard the vessel primarily to aid in navigation.[3] These requirements are very liberally construed. The "shipowner" is the person, group of persons, firm or corporate entity in whom is vested the title to the ship.[4] The terms "longshoremen" and "stevedore" will be used in the generic sense. The "longshoremen" are the laborers who do the actual physical work. The "stevedore" is the contractor or boss who employs longshoremen.[5]

II. SEAMEN'S REMEDY FOR UNSEAWORTHINESS

It has been firmly established for many years that it is the duty of the shipowner to furnish seamen with a "seaworthy" ship. In 1789 the United States District Court for the District of Pennsylvania, in a rather obscure decision, held that a seaman had the right to leave his ship without any penalty, such as forfeiture of wages or prosecution for desertion, if the shipowner failed to provide him with a seaworthy vessel.[6] In 1903 in *The Osceola*,[7] long considered to be one of the landmark cases in the admiralty and maritime law field, the Supreme Court, speaking through Mr. Justice Brown, summed up existing case law and stated the proposition that "the vessel and her owner are, both by English and American Law, liable to an indemnity for injuries received by seamen in the consequence of the unseaworthiness of the ship, or a failure to supply and keep in order appliances appurtenant to the ship."[8] As is apparent from the extended discussion in that decision, the unseaworthiness remedy was a departure from most of the various continental codes which limited an injured seaman's recovery in any case to maintenance and cure, perhaps following the lead of the English Merchants' Shipping Act of 1876 which permitted that type of recovery. The injured seaman, like any other injured person, was barred from recovery at common law for injuries caused by the negligence of a fellow servant. That this was equally true under the maritime law had been assumed by the courts, because of the absence of authority otherwise,[9] and

3 Senko v. La Cross Dredging Corp., 352 U.S. 370 (1957); Norton v. Warner Co., 321 U.S. 565 (1944); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Nelson v. Greene Line Steamers, Inc., 255 F.2d 31 (6th Cir. 1958); A. L. Mechling Barge Line v. Bassett, 119 F.2d 995 (7th Cir. 1941); Hawn v. American S.S. Co., 107 F.2d 999 (2d Cir. 1939).

4 DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 724 (2d ed. 1948).

5 See *id.* at 472.

6 Dixon v. The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

7 189 U.S. 158 (1903).

8 *Id.* at 175.

9 The City of Alexandria, 17 Fed. 390 (S.D.N.Y. 1883).

was finalized as another of the propositions in Mr. Justice Brown's opinion. The development of the unseaworthiness remedy was referred to by Mr. Justice Brown as a "wholesome doctrine." This was probably because it gave seamen, who had been traditionally protected by the courts and frequently referred to as "wards of the admiralty," a remedy for injuries other than the relatively meager recovery of maintenance and cure. Also, this case was decided early in the period which finally produced legislative abrogation of the fellow servant rule—as to railway employees in 1908 with the adoption of the Federal Railway Employees Liability Act,[10] as to seamen in 1920 with the adoption of the Jones Act,[11] and as to many other workers with the adoption of state workmen's compensation acts.

III. LONGSHOREMEN AND HARBOR WORKERS COMPENSATION ACT

After 1903, and for the next forty-three years, the shipowner's warranty of seaworthiness was limited to seamen. Because it was not thought to be applicable to longshoremen and because the common-law fellow servant doctrine made recovery of damages by longshoremen from their stevedore-employers quite difficult (most longshoremen's injuries being caused in whole or in part by the negligence of co-workers), longshoremen were in most instances without an effective remedy to recover much of anything for injuries received in the course of their employment. In 1917, shortly after upholding the constitutionality of state workmen's compensation acts in general,[12] the United States Supreme Court held the New York act to be unconstitutional as to a longshoreman because he was injured aboard a vessel on navigable waters while performing maritime work under a maritime contract and so came within the admiralty jurisdiction.[13] The Court held that application of the state compensation act would be inimical to national uniformity in the maritime law, that the power to modify maritime law rested in Congress, that only common-law remedies, and not statutory compensation provisions, were covered by the "saving to suitors" clause of the Judiciary Act of 1789, and that a state compensation remedy was inconsistent with the congressional intent to encourage investment in shipping evidenced by

10 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).
11 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).
12 New York Cent. R.R. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).
13 Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

the limitation of liability acts of 1851. Later that same year Congress amended the "saving to suitors" clause to include the rights and remedies of claimants under state workmen's compensation laws. In 1920 that amendment was held to be unconstitutional as an invalid delegation of federal power to the states.[14] Four years later a second similar statutory amendment was also held to be unconstitutional.[15] Because of the failure of effective legislative action, late in 1926 the Supreme Court held that longshoremen were "seamen" under the provisions of the Jones Act, giving them an effective remedy for negligence against their stevedore-employers.[16] Six months later Congress adopted the Longshoremen and Harbor Workers Compensation Act[17] as an exclusive remedy for longshoremen against their stevedore-employers, nullifying the decision bringing longshoremen under the Jones Act. The constitutionality of the Longshoremen and Harbor Workers Compensation Act was upheld by the Supreme Court in 1932.[18] The purpose in adopting that statute was undoubtedly the same as that for the adoption of most workmen's compensation acts—to provide employees with a remedy which is both expeditious and independent of proof of fault and to assure employers of a liability which is limited and determinate.[19]

The Longshoremen and Harbor Workers Compensation Act provides for compensation payments for disability or death resulting from injuries arising out of and in the course of employment,[20] provided that the death or disability results from an injury occurring on the navigable waters of the United States, including any dry dock, and that recovery may not validly be provided by state law.[21] A person injured while working on an uncompleted vessel, then launched and afloat in navigable waters, but still under construction, is covered by the act, and acceptance of compensation payments in such a case under a state compensation act does not constitute an election of the remedy under state law so as to preclude recovery under the federal act, the payments under the state act being credited to those due under the federal provi-

14 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
15 Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).
16 International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).
17 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958).
18 Crowell v. Benson, 285 U.S. 22 (1932).
19 Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 159 (1932).
20 64 Stat. 1271 (1950), 33 U.S.C. § 902(2) (1958).
21 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958).

sions.[22] Absolute liability of the employer irrespective of fault is provided for,[23] and recovery schedules for various degrees of disability[24] and for death[25] prescribe amounts of awards based upon the worker's wage rate.[26] Compensation is not payable under the act to the master or members of the crew of any vessel, to any persons engaged by the master to load or unload or repair any vessel under eighteen tons net, to an officer or employee of the United States Government or any agency thereof or any state or foreign government or any political subdivision thereof, or to any person injured or killed solely by reason of his intoxication or his willful intent to injure or kill himself or another.[27] As to the last restriction, there is a presumption against the presence of intoxication or willful intent to injure or kill in the absence of convincing evidence to the contrary,[28] and horseplay has been held not to bar recovery under the act.[29] Although the injured worker's remedy under the act is exclusive as against his stevedore-employer, the employer who has not complied with the act's requirements for securing payments may be subjected to an action for damages, either at law or in admiralty, and in such action the defenses of fellow servant, contributory negligence and assumption of risk are abolished.[30] Penalties are also established for failure on the part of both employer[31] and employees,[32] as well as shipowners,[33] to comply with provisions of the act.

IV. UNSEAWORTHINESS REMEDY EXTENDED TO LONGSHOREMEN

For a period of nineteen years following the passage of the Longshoremen and Harbor Workers Compensation Act, the courts were content for longshoremen to live exclusively within its terms in the case of injuries received or death incurred aboard a ship. Then in 1946 the Supreme Court for the first time held

22 Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).
23 44 Stat. 1426 (1927), 33 U.S.C. § 904 (1958).
24 44 Stat. 1427 (1927), 33 U.S.C. § 908 (1958).
25 44 Stat. 1429 (1927), 33 U.S.C. § 909 (1958).
26 44 Stat. 1431 (1927), 33 U.S.C. § 910 (1958).
27 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958).
28 44 Stat. 1436 (1927), 33 U.S.C. § 920 (1958).
29 General Acc. Fire & Life Assur. Corp. v. Crowell, 76 F.2d 341 (5th Cir. 1935).
30 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).
31 44 Stat. 1442 (1927), 33 U.S.C. § 938 (1958) (for failure to secure payments).
32 44 Stat. 1439 (1927), 33 U.S.C. § 931 (1958) (for misrepresentations for purpose of obtaining benefits under the act).
33 44 Stat. 1442 (1927), 33 U.S.C. § 937 (1958) (for failure to demand certificate of compliance from stevedore).

that a longshoreman could bring suit against a shipowner, whether or not the shipowner was negligent, for damages incurred by reason of the unseaworthiness of the vessel aboard which he was injured, in addition to receiving compensation from his stevedore-employer under the Longshoremen and Harbor Workers Compensation Act.[34] The shipowner's warranty of seaworthiness was extended to longshoremen working aboard the vessel on the basis that, since they were then doing work which was traditionally done by seamen, they should receive the same benefits as did seamen. As could be expected, that decision proved to be the gateway to a new field of litigation in the maritime law. In 1953 the doctrine was extended to other types of harbor workers, such as the carpenter-employee of a repairman.[35] At the same time the Supreme Court also recognized that longshoremen and harbor workers have the right of business invitees aboard a ship to recover damages for operating negligence, in addition to their newly-found right of recovery for injuries resulting from the unseaworthiness of the ship.[36] Thus the longshoreman was placed on a par with the seaman, having a right to recover damages from the shipowner for negligence, similar to that which the seaman enjoyed under the Jones Act, as well as the seaman's ancient maritime remedy to recovery damages for the unseaworthiness of the vessel. In addition the longshoreman also retained an absolute right to compensation from his stevedore-employer under the Longshoremen and Harbor Workers Compensation Act. Though there was originally a hint otherwise, it is now apparently clear that the seaworthiness warranty does not extend to the longshoreman's stevedore-employer.[37]

V. DEFINITION AND SCOPE OF UNSEAWORTHINESS

The seaman's right to a seaworthy vessel having been accorded to longshoremen, an examination of the meaning of the term "unseaworthiness" seems necessary. Over the years this concept has become almost all-inclusive. It has come to mean much more

34 Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

35 Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). It has been held that the seaworthiness warranty does not extend to a longshoreman working on the dock at a job not traditionally done by seamen. Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

36 Pope & Talbot, Inc. v. Hawn, *supra* note 35, at 413, 415.

37 Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960).

than simply a ship's being holed so as to cause her to sink, and includes within its scope structural defects and defective machinery, appliances, furnishings, tackle and equipment. Unseaworthiness claims have been said to fall into two categories: one, where the shipowner, having knowledge, actual or constructive, that certain activity will occur, has the absolute duty of furnishing equipment and a place aboard ship for its use so that the activity can be conducted and accomplished in reasonable safety; the other, where the equipment actually supplied for doing the work proves incapable of performing its function in the manner for which it was designed.[38] It is now firmly established that a vessel's unseaworthiness may arise from any number of individual circumstances, including among others: defective gear, appurtenances in disrepair, unfit crew, improper manner of loading cargo and improper stowage of cargo.[39] It must be made quite clear, however, that mere negligent use of seaworthy equipment does not, in and of itself, make a vessel unseaworthy.[40] Control of the work area is irrelevant to liability for unseaworthiness.[41] A ship is unseaworthy even if the defective equipment is brought aboard the ship by a stevedore for its own use,[42] but there is growing authority that such may not be the case where the defective equipment is that of the stevedore and does not become an "integral part of the ship."[43] Whether or not equipment is so defective as to render a ship unseaworthy is a question of fact for the jury.[44] Interpretation of the term has sometimes been carried to extreme lengths, and such is no more apparent than in a recent decision of the Supreme Court where it was held to be a jury question whether a wrench, concerning which there was testimony from which it might be inferred that there was play in its jaw so as to permit it to slip on a nut, was such a defective appliance as to

38 Mesle v. Kea S.S. Corp., 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959). An excellent and exhaustive discussion of the term "unseaworthiness" is also presented by Judge Herlands in Di Salvo v. Cunard S.S. Co., 171 F. Supp. 813 (S.D.N.Y. 1959).

39 Morales v. City of Galveston, 370 U.S. 165 (1962).

40 Arena v. Luckenbach S.S. Co., 279 F.2d 186 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960); Seitz v. M.V. Captantonis, 203 F. Supp. 723 (D. Ore. 1962).

41 Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).

42 *Ibid.* Rogers v. United States Lines, 347 U.S. 984 (1954); Considine v. Black Diamond S.S. Co., 163 F. Supp. 107 (D. Mass. 1958).

43 Sherbin v. Embiricos, 200 F. Supp. 874 (E.D. La. 1962); McKnight v. N. M. Paterson & Sons, Ltd., 181 F. Supp. 434 (N.D. Ohio), *aff'd*, 286 F.2d 250 (6th Cir. 1960).

44 Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960); Knox v. United States Lines Co., 294 F.2d 354 (3d Cir. 1961).

render a ship unseaworthy.[45] A ship is not regarded as unseaworthy because of a latent defect in its cargo,[46] but the desirability of this attitude is surely to be questioned in the future.

A shipowner's duty to provide a seaworthy vessel is absolute, continuing and non-delegable, and the shipowner is not absolved from this obligation by the exercise of due diligence.[47] Notice to the master or shipowner and actual or constructive knowledge of the unseaworthy condition are no longer necessary, so that liability attaches for transitory or temporary unseaworthiness, involving situations such as water, soap, food, oil, grease, slime, etc., on the deck, as well as for a permanent condition.[48] It has been authoritatively stated that the shipowner's duty is not to provide an "accident-free ship," but is a duty "only to furnish a vessel and appurtenances *reasonably* fit for their intended use";[49] that "the standard is not perfection, but *reasonable* fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but of a vessel *reasonably* suitable for her intended service."[50] The meaning of this phraseology, ostensibly introducing some concept of reasonableness into the shipowner's *absolute* duty to provide a seaworthy vessel, will undoubtedly be the subject of much litigation for many years.

The shipowner's warranty of seaworthiness does not attach to a "dead ship" not in navigation, such as a grain storage vessel.[51] In the case of a bareboat or demise charter, the charterer or demisee stands in the place of the shipowner, and the shipowner is not liable for unseaworthiness of the vessel caused by the

45 Michalic v. Cleveland Tankers, Inc., *supra* note 44.

46 Bell v. Nihonkai Kisen, K.K., 204 F. Supp. 230 (D. Ore. 1962).

47 Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

48 Mitchell v. Trawler Racer, Inc., *supra* note 47.

49 Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955). (Emphasis added.)

50 Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). (Emphasis added.) This case involved an injury to a crew member aboard a fishing vessel who slipped, fell and was injured when, in accordance with recognized custom, he stepped onto the ship's rail in order to reach a ladder attached to the pier to go ashore. The rail had become slippery from spawn and slime which had accumulated there during the unloading of the vessel's catch of fish and fish spawn. The jury had found against the injured seaman on the question of unseaworthiness, but the district judge had instructed the jury that constructive notice was necessary in order to support liability for unseaworthiness. The Supreme Court held such to be unnecessary, and reversed and remanded for a new trial on the issue of unseaworthiness. In doing so, the Court acknowledged the absoluteness of the shipowner's duty to provide a seaworthy vessel, but also made the somewhat ambiguous and contrary statement quoted above.

51 Roper v. United States, 368 U.S. 20 (1961).

charterer or demisee.[52] A split of authority exists as to whether the vessel herself is liable therefor and can be made a party to an action along with the charterer or demisee.[53]

Negligent use of an otherwise seaworthy appliance, which is thereby made "unseaworthy" at the very moment of injury, raises no unseaworthiness question, and the shipowner is not liable therefor.[54] Though this is a relatively simple proposition, its interpretation is most difficult and can best be explained by illustration. In one case a situation was considered in which a loading board tipped and spilled rolls of paper into the hold of a vessel, injuring a longshoreman. Fellow longshoremen had loaded the board improperly. The court held that a stevedore's negligent use of proper equipment for bringing freight aboard did not make the vessel unseaworthy. It was specifically stated that the court did "not believe that unseaworthiness is to be equated with mere negligent conduct."[55] Another situation involved a longshoreman who was injured when a winch, operated by a fellow longshoreman who failed to insert a locking pin, fell out of gear and became free-wheeling, causing a hatch section which had been raised to drop and strike him on the foot. In that instance the court held that the longshoreman's injury was incurred through the negligent *use* of a seaworthy appliance at the very moment of injury, so that the vessel, upon the termination of the negligence, was in fact seaworthy, and the injured longshoreman had no right of recovery against the shipowner.[56] Recent decisions have wrestled with this theory in the light of the pronouncement of the Supreme Court upholding the attachment of liability in cases of transitory or temporary unseaworthiness, whether or not there was actual or constructive notice of the unseaworthy condition. In appropriate instances the courts have absolved the shipowner of the charge of unseaworthiness, affirming a jury verdict or decision of the trial

52 Reed v. S.S. Yaka, 302 F.2d 255 (3d Cir. 1962); Grillea v. United States, 232 F.2d 919 (2d Cir. 1956).

53 *Accord*, Grillea v. United States, *supra* note 52. *Contra*, Reed v. S.S. Yaka, *supra* note 52; Pichirilo v. Guzman, 290 F.2d 812 (1st Cir. 1961), *rev'd*, 369 U.S. 698 (1962), on the ground that the charter was not a demise.

54 This was established by Judge Learned Hand in Grillea v. United States, 232 F.2d 919 (2d Cir. 1956), but its validity seemed somewhat questionable for awhile because of Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), which did away with the defense of transitory unseaworthiness.

55 Arena v. Luckenbach S.S. Co., 279 F.2d 186 (1st Cir.), *cert. denied*, 364 U.S. 895 (1960).

56 Billeci v. United States, 298 F.2d 703 (9th Cir. 1960). See also Sullivan v. United States, 198 F. Supp. 624 (S.D.N.Y. 1961).

court holding the ship to have been seaworthy and the accident to have resulted directly and solely from the negligence of the stevedore through the actions of fellow longshoremen.[57]

VI. INDEMNIFICATION OF SHIPOWNER BY STEVEDORE

A. *History*

For a time following the initial decision which extended the shipowner's warranty of seaworthiness to longshoremen, it became apparent that the longshoreman who received an injury in the course of his employment aboard a ship on navigable waters was in an enviable position, if an injured man can be so regarded. Without the burden of any proof of negligence, he could recover compensation under the Longshoremen and Harbor Workers Compensation Act from his stevedore-employer. At the same time he was entitled to recover damages for either negligence or unseaworthiness from the shipowner and, in the light of the broad judicial interpretation of the meaning of the term "unseaworthiness," the injured longshoreman's recovery of damages in addition to compensation was virtually assured. On the other hand, the shipowner's position was quite unenviable. His was an almost intolerable burden, and this became no more apparent than in 1952 in a case in which a jury had found a shipowner to be twenty-five percent responsible and a stevedore-employer to be seventy-five percent responsible for a longshoreman's injuries, and the Supreme Court denied the shipowner indemnification from the stevedore because of the ancient prohibition against contribution between joint tortfeasors, stating that any change in the common-law rule was a matter of legislative concern.[58] Two years later the Supreme Court reaffirmed that decision.[59] In effect this meant that an injured longshoreman or harbor worker could recover damages from a shipowner for unseaworthiness, and the shipowner

57 Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962); Nuzzo v. Rederi A/S Wallenco, 304 F.2d 506 (2d Cir. 1962); Neal v. Lykes Bros. S.S. Co., 306 F.2d 313 (5th Cir. 1962); Rawson v. Calmar S.S. Corp., 304 F.2d 202 (9th Cir. 1962); Pinto v. States Marine Corp., 296 F.2d 1 (2d Cir. 1961); Knox v. United States Lines Co., 201 F. Supp. 131 (E.D. Pa. 1962).

58 Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). The district court had ignored the jury verdict and entered judgment to the effect that each joint tortfeasor was to pay one-half of the damages. The court of appeals had then upheld the shipowner's right of contribution from the stevedore-employer, but stated that it could not exceed that which the injured longshoreman might have recovered from his employer directly under the Longshoremen and Harbor Workers Compensation Act.

59 Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

had no right to indemnification from the stevedore-employer of the injured man, even though the unseaworthiness resulting in the recovery was caused solely by the negligence of the stevedore-employer. The ultimate burden then rested with the shipowner, even when not in fact negligent or responsible in any respect, or when less responsible than the stevedore, probably on the basis that the shipowner could more practicably absorb such a prospective financial burden than could the stevedore who was already subject to an absolute statutory liability under the Longshoremen and Harbor Workers Compensation Act (and therefore should be entitled to limit the amount of his liability). This result obviously worked an injustice upon shipowners, and lower courts immediately set about by-passing the ancient common-law rule against contribution between joint tortfeasors which the Supreme Court had so vigorously applied to maritime torts.[60]

B. *Stevedore's Warranty of Workmanlike Service*

1. *Generally*

The final breakthrough came in 1956 when the Supreme Court considered "two questions as to the liability of a stevedoring contractor to reimburse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard": first, whether the shipowner was precluded from asserting such liability by the terms of the Longshoremen and Harbor Workers Compensation Act and, second, whether such liability existed in the absence of an express indemnification agreement between the stevedore-employer and the shipowner.[61] The first question was answered in the negative, and the second in the affirmative. The Supreme Court stated that a stevedoring contract contains an implied "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product," and held that a stevedore-contractor has the implied contractual obligation to the shipowner to perform the stevedoring operation in a proper, competent and workmanlike manner with reasonable safety and to discharge foreseeable damages resulting to the shipowner from the stevedore's improper perform-

60 See Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277 (2d Cir. 1954); Brown v. American-Hawaiian S.S. Co., 211 F.2d 16 (3d Cir. 1954); Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953).

61 Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

ance. With this contractual fiction, the Court succeeded in getting around the ever-present bar of the rule against contribution between joint tortfeasors and thus effectively shifted the burden from the innocent shipowner to the negligent stevedore-employer whose liability had supposedly been limited by virtue of the Longshoremen and Harbor Workers Compensation Act.

2. *Scope*

The initial decision of the Supreme Court specifically referred to the proper and safe stowage of cargo.[62] Since then the stevedore's warranty of workmanlike service has been expanded and extended almost without limit. It has been held that the stevedore also warrants to the shipowner that the longshoremen furnished for the job are "reasonably fit to perform their functions."[63] The stevedore's duty to the shipowner is contractual and may be based upon principles other than the shipowner's failure to perform the nondelegable duty to a longshoreman to provide him with a seaworthy vessel.[64] The stevedore's contractual obligation to perform in a competent and workmanlike manner relates not only to the handling and stowage of cargo, but also to the use of equipment incidental thereto.[65] Theories of "active" or "passive" and "primary" or "secondary" negligence do not apply to the field of contractual indemnity, and the shipowner-indemnitee may recover, although negligent in some respects, provided the shipowner is free from "conduct sufficient to preclude recovery."[66] Where negligence of the stevedore, through its employees, causes unseaworthiness of the vessel and results in injury to one of its longshoremen-employees, such also amounts to a breach of the contractual warranty of workmanlike service, and the shipowner is entitled to indemnification from the stevedore.[67] It is not necessary that there be a direct

62 *Ibid.*

63 Trenkle v. Compagnie Générale Transatlantique, 179 F. Supp. 795 (S.D. Cal. 1960).

64 Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958). However, in DeGioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962), the Second Circuit stated that a stevedore's obligation to indemnify the shipowner in longshoremen's personal injury actions is not literally an action *ex contractu*, and that "the primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship . . . ." *Id.* at 425.

65 Weyerhaeuser S.S. Co. v. Nacirema Operating Co., *supra* note 64.

66 *Ibid.*

67 Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959). This case involved a longshoreman who was injured aboard a vessel when a topping lift broke due to abnormal strains placed on the ship's gear and a winch circuit breaker improperly set at six tons, when the winch could safely lift only three tons. Both the placement of the abnormal strains and the improper setting of the winch circuit breaker were

contractual relationship between the shipowner and the stevedore for the application of the warranty of workmanlike service, and it applies even though the stevedoring contract has been entered into with the stevedore by the ship's charterer[68] or even by the cargo's consignee.[69] In effect, if the stevedoring contract is entered into by someone other than the shipowner, the shipowner is considered a third-party beneficiary thereof.

3. *Necessity for Causal Connection*

It is noteworthy, however, that if the stevedore did not create the unseaworthy condition which causes the injury to the longshoreman, had nothing to do with bringing it into play, and had no notice of it, there is authority that the stevedore should not be liable for indemnification to the shipowner. In one case, where a longshoreman was injured when he slipped on a greasy rung of a ladder descending from the deckhouse roof, the longshoreman recovered from the shipowner because of the transitory unseaworthiness of the vessel; but the shipowner was denied indemnification from the stevedore on the grounds that the stevedore had no notice of the greasy condition and no proof was introduced at the trial connecting the placing of the grease to the negligence of the stevedore's employees.[70] In another case a longshoreman was injured when some hatch boards piled on loose dunnage slipped out from under him. The vessel was held to be unseaworthy and her owner negligent, because the dunnage and hatch boards were piled in an unsafe, insecure and haphazard manner; but indemnification of the shipowner by the longshoreman's stevedore-employer was denied, even though the stevedore had knowledge of the condition, because the stevedore had not created the unseaworthy condition and it was present in an area over which the stevedore did not exercise exclusive control.[71] In effect, what has been held in these

made by longshoremen-employees of the stevedore. The district court entered judgment against the shipowner with indemnity over against the stevedore. This judgment was reversed by the court of appeals on the ground that the circuit breaker was not unseaworthy and that the sole cause of the injury was the negligence of the stevedore. The Supreme Court reversed the appellate court's decision and reinstated the judgment of the district court.

68 *Ibid.*

69 Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960). See also Cooper v. D/S A/S Progress, 188 F. Supp. 578 (E.D. Pa. 1960), where an intermediate time charter intervening between charterer and stevedore was held not to affect the stevedore's contractual obligation to unload in a safe and workmanlike manner.

70 Calderola v. Cunard S.S. Co., 279 F.2d 475 (2d Cir. 1960). See also Massaro v. United States Lines Co., 1962 Am. Mar. Cas. 2168 (3d Cir. 1962).

71 Marshall v. S.S. Lake Atlin, 1960 Am. Mar. Cas. 2024 (D. Ore. 1960). See also

cases is that, even though the stevedore's breach of its warranty of workmanlike service is contractual in nature, there must be some causal connection between it and the accident resulting in the longshoreman's injuries. There is authority, however, indicating that the stevedore should suspend operations on its own initiative to avoid injury or damages upon realizing that it would be unsafe to proceed.[72] If the shipowner settles the longshoreman's claim for damages due to unseaworthiness independently and then seeks indemnity from the stevedore-employer for breach of the warranty of workmanlike service, there is authority indicating that the shipowner need not establish actual liability to the longshoreman but only potential liability and the making of a reasonable settlement.[73] However, such an approach has been subjected to criticism.[74]

C. *Acts of Shipowner Which Do Not Preclude Indemnification*

Barring the situation which clearly involves the negligent use of otherwise seaworthy equipment by employees of the stevedore, in almost every situation involving a longshoreman who is seeking to recover damages from a shipowner for injuries received because of the shipowner's negligence or the unseaworthiness of his vessel and a shipowner who is in turn seeking indemnification from the stevedore-employer of the injured longshoreman, the primary question becomes that of what acts on the part of the shipowner-indemnitee will preclude recovery from the stevedore-indemnitor. Of course, this presupposes some breach on the part of the stevedore-employer of its warranty of workmanlike service.

As a general rule, negligent acts on the part of the shipowner-indemnitee, usually through the instrumentality of the ship's crew, have been held not to preclude recovery from the stevedore-

Trenkle v. Compagnie Générale Transatlantique, 179 F. Supp. 795 (S.D. Cal. 1960), holding that there must be some act or omission on the part of the stevedore. To the same effect, but by very brief reference, is Mesle v. Kea S.S. Co., 260 F.2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959).

72 United States v. Arrow Stevedoring Co., 175 F.2d 329 (9th Cir.), *cert. denied*, 338 U.S. 904 (1949); Cassone v. Venezuelan Line, 1962 Am. Mar. Cas. 1347 (S.D.N.Y. 1962); Nordeutsher Lloyd, Brennan v. Brady-Hamilton Stevedore Co., 195 F. Supp. 680 (D. Ore. 1961); Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960).

73 Rederi A/B Dalen v. Maher, 303 F.2d 565 (4th Cir. 1962); California Stevedore & Ballast Co. v. Pan-Atlantic S.S. Corp., 291 F.2d 252 (9th Cir. 1961); Caswell v. K.N.S.M., N.V., 205 F. Supp. 295 (S.D. Tex. 1962).

74 American Export Lines, Inc. v. Atlantic & Gulf Stevedores, Inc., 205 F. Supp. 316 (E.D. Va. 1962).

indemnitor. Failure to inspect, and to discover and correct a stevedore's breach of warranty of workmanlike service is not a bar to recovery from the stevedore by the shipowner. Thus failure to inspect, discover and correct improper stowage of cargo aboard the vessel,[75] and failure to discover and correct the improper use of equipment incidental to the handling and stowage of cargo have been held not to be conduct sufficient to preclude the shipowner's right to recover over against the stevedore.[76] A shipowner's supplying of defective equipment to a stevedore is generally held not to be such an act as to preclude indemnification. The supplying of a defective winch or a winch with a defective component part has been held not to preclude indemnification.[77] A shipowner's maintaining inadequate lighting in a hold[78] or providing unsafe lighting, as in the case of an unseized light,[79] do not bar recovery. Defective topping lift gear,[80] an unbolted ladder,[81] use of slippery dunnage as flooring[82] and unsecured hatch boards,[83] though provided by the shipowner, are not such as to prevent indemnification. Oil on the deck of a ship from a leaking winch box, though held to have made the vessel unseaworthy, was not such as to preclude recovery over by the shipowner from the stevedore-employer of a longshoreman who slipped and fell on the oily slick.[84] Improper securing of a ship for loading or unloading by the ship's crew has been held not to preclude indemnification.[85] A shipowner's providing a litter-strewn area in which longshoremen are to work does not bar indemnification, the duty being upon the stevedore to clear the work area before commencing to load or discharge cargo.[86]

75 Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

76 Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958).

77 Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959); American Export Lines, Inc. v. Revel, 266 F.2d 82 (4th Cir. 1959); Drago v. A/S Inger, 194 F. Supp. 398 (E.D.N.Y. 1961).

78 Schiavone Terminal, Inc. v. Bozzo, 289 F.2d 735 (1st Cir. 1961).

79 Calmar S.S. Corp. v. Nacirema Operating Co., 266 F.2d 79 (4th Cir. 1959).

80 Cook v. The M/V Wasaborg, 189 F. Supp. 464 (D. Ore. 1960); Weigel v. The M/V Belgrano, 188 F. Supp. 605 (D. Ore. 1960), *rev'd on other grounds*, 299 F.2d 897, *aff'd on rehearing*, 302 F.2d 730 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

81 Smith v. Jugoslavenska, 278 F.2d 176 (4th Cir. 1960).

82 Wyborski v. Bristol City Line of S. Ss., Ltd., 191 F. Supp. 884 (D. Md. 1961).

83 Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal.), *aff'd*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960).

84 Drago v. A/S Inger, 194 F. Supp. 438 (E.D.N.Y. 1961); Santomarco v. United States, 1959 Am. Mar. Cas. 1808 (E.D.N.Y. 1959), *aff'd*, 277 F.2d 255 (2d Cir.), *cert. denied*, 364 U.S. 823 (1960).

85 Lamazza v. United States, 190 F. Supp. 692 (S.D.N.Y. 1960).

86 DeGioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962).

One of the most publicized and closely followed cases in this particular phase of maritime law development resulted in the recent decision of the Supreme Court in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*[87] Leighton Beard was a longshoreman employed by Atlantic and Gulf Stevedores, Inc. at Philadelphia, Pennsylvania. Atlantic performed stevedoring services for the owners of the steamship "City of Calcutta," which consisted of discharging bales of burlap from the steamer. Beard was one of the longshoremen engaged in helping to discharge the cargo. The bales had been loaded in India, were banded with one-inch bands which were part of the cargo, and were stowed in tiers. They were discharged from the vessel by use of the bale-hook method. By this method a winch was used with a ring to which six equal-length ropes were attached with a hook on the end of each rope. Two hooks were used on each bale so that three bales were raised with each lifting operation. Longshoremen in the hold of the vessel, including Beard, would attach the hooks to the bales, signal the winch operator to pull the bales from their stow to a position under the open hatch, and then the bales would be raised vertically, swung out from the ship and lowered to the dock. During the unloading operation, two bands on one of the bales parted, and the bale fell, injuring Beard. Atlantic had no part in the loading or stowage of this particular cargo aboard the ship.

Beard brought a civil action, founded upon diversity of citizenship, against the shipowner, alleging unseaworthiness and negligence. The shipowner joined the stevedore-employer as a third-party defendant, alleging negligence in discharging the cargo and in using a dangerous and improper method to do so, and seeking indemnification in the event that the shipowner was held liable to Beard. The case was tried to a jury which found, upon special interrogatories, that both the unseaworthiness of the vessel and the negligence of the shipowner were substantial factors in causing Beard's injuries and that there was no failure of contractual obligation on the part of the stevedore. The district court entered judgment in favor of Beard against the shipowner and in favor of the stevedore on the shipowner's indemnification claim. The Court of Appeals for the Third Circuit held that, since the warranty of workmanlike service extends to the handling of cargo as well as to the use of equipment incidental to cargo handling, the steve-

87 369 U.S. 355, *rehearing denied*, 369 U.S. 882 (1962).

dore was liable, as a matter of law, to the shipowner.[88] The court stated that if it was negligent on the shipowner's part to permit Beard to work in an unsafe place, it was equally negligent for the stevedore to handle the cargo which it charged created an unsafe place to work. Deeming that it was unnecessary "to consider the issue of unseaworthiness," the court of appeals affirmed the judgment in favor of Beard against the shipowner on the issue of negligence, but reversed the judgment in favor of the stevedore, thereby permitting indemnification.

The Supreme Court reversed the decision of the Third Circuit as between the shipowner and the stevedore, and ruled against indemnification. However, careful examination of both the decision of the Supreme Court and the Third Circuit's decision reveals that the Supreme Court did not hold that knowledge of and failure to warn the stevedore in regard to improper stowage or an improper unloading method will preclude the shipowner's right of indemnification. Instead, the Court neatly sidestepped that basic and practical question, as to which the stevedoring industry was earnestly seeking an authoritative decision, and decided the case on a different ground. Essentially, the Court held that since the seventh amendment to the Constitution of the United States provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," the requirements of the seventh amendment were applicable to the case at bar, even though a stevedoring contract is a maritime contract. The applicability of the seventh amendment was predicated upon the fact that the case involved a suit in personam at law with the right of trial by jury. The Court held that, although the jury could have found the shipowner negligent for one or both of the reasons that the use of the bale-hook method in the discharge of the bales was negligent and that the injured longshoreman was not afforded a safe place to work, it could also have found the shipowner liable on a third ground, that the steel bands around the bale were defective, "a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so." The Court then went on the say that if such was the jury's view of the facts, then the stevedore would not be liable under any warranty of workmanlike service; that where there is a view of the facts

88 Beard v. Ellerman Lines, Ltd., 289 F.2d 201 (3d Cir. 1961).

of the case which makes the jury's special verdict legally consistent, it must be resolved in that manner; and that, therefore, the jury's answers to the special interrogatories should be permitted to stand and were not properly the subject of re-examination and reversal by the court of appeals.

Two lessons are to be learned from the *Atlantic & Gulf Stevedores* case. First, negligence in the form of knowledge of the shipowner and failure by it to warn the stevedore in regard to improper stowage of cargo or improper unloading methods being used by the stevedore will not preclude the shipowner's right of indemnification from the stevedore. The reversal by the Supreme Court was not on this ground, and there was authority prior to the Third Circuit's decision supporting that proposition.[89] Second, interrogatories for the special verdict of a jury in regard to the indemnification issue must be artfully worded so as to result in clear revelation of the exact basis of the jury's decision, either in favor of or against indemnification.

D. *Acts of Shipowners Which Do Preclude Indemnification*

1. *Failure of Shipowner To Correct or Warn of Known Latent Defect*

Thus far, the only activity of the shipowner-indemnitee which has been authoritatively held to preclude recovery from the stevedore-indemnitor has been the failure of the shipowner to correct or warn the stevedore of a latent, or hidden, dangerous defect or condition known to the shipowner.[90] In a situation where a longshoreman fell from atop crates on board a lighter to a pier below when one of the crate boards broke, it was held that the injury was not caused by any improper stowage, but was caused by the defective board, and that "the latent defect in the board on top of the crate was an intervening cause which broke any causal chain that might otherwise have existed," and so precluded in-

89 W. J. Jones & Sons, Inc. v. Calmar S.S. Corp., 284 F.2d 499 (9th Cir. 1960), *affirming* 163 F. Supp. 463 (D. Ore. 1959); Curtis v. A. Garcia y Cia, 272 F.2d 235 (3d Cir. 1959). See also Nordeutscher Lloyd, Brennan v. Brady-Hamilton Stevedore Co., 195 F. Supp. 680 (D. Ore. 1961); Fisher v. United States Lines Co., 198 F. Supp. 815 (E.D. Pa. 1961).

90 Although such was not actually involved, the Supreme Court made specific reference to situations involving known latent defects in Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958). In Nuzzo v. Rederi A/S Wallenco, 304 F.2d 506 (2d Cir. 1962), the Second Circuit, in a two-to-one decision, reversed the trial court specifically on the ground that the condition for which the ship had been found unseaworthy was a patent condition and not a latent defect or contrary to the usual and customary standards.

demnification.[91] Likewise, it has been held that the implied warranty of workmanlike service of the stevedore does not place upon him the duty to discover defects in apparatus furnished by the vessel not obvious upon a cursory inspection, such as a rotten rope[92] or a defective rung in a Jacob's ladder.[93] As indicated previously, this rationale has not as yet been judicially extended to include a latent defect in the ship's cargo.[94]

2. *Breach of Express Warranty by Shipowner*

One of the most interesting and more recent decisions in this entire field is *Hugev v. Dampskisaktieselskabet International.*[95] That case involved a situation in which a queen beam belonging in the number one main deck hatch of the motorship "Castleville" was misplaced under the hatch boards of the forward section of number one 'tweendeck hatch, so that the 'tweendeck hatch boards wobbled, seesawed and were generally insecure. A longshoreman fell through the hatch into the hold when walking on the insecure hatch boards. Although the shipowner was held liable for damages to the injured longshoreman since the vessel was deemed unseaworthy because of the misplaced queen beam and unsecured hatch boards, it was also held entitled to indemnification from the stevedore-employer since the stevedore was found to have breached its contractual obligation to perform in a workmanlike manner with reasonable safety by permitting its men to work on the known dangerous hatch boards. The decision was affirmed by the court of appeals.[96] Though the case was actually not decided on this point, the district court in its opinion seemed to indicate that breach by the shipowner of a written warranty in a stevedoring contract might relieve the stevedore of its implied obligation to indemnify the vessel for breach of its warranty of workmanlike service, if the stevedore was unaware of the breach of warranty on the part of the shipowner. But the court went on to state that if the stevedore knew of the breach and nonetheless willingly proceeded with the work despite the known dangerous

91 Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir. 1958). To the same effect in a similar situation, see Pena v. A/S Dovrefjell, 176 F. Supp. 677 (S.D.N.Y. 1959).

92 Ignatyuk v. Tramp Chartering Co., 250 F.2d 198 (2d Cir. 1957).

93 Sciarrillo v. S.S. Fred Christiansen, 206 F. Supp. 182 (S.D.N.Y. 1962).

94 See note 46 *supra.*

95 170 F. Supp. 601 (S.D. Cal. 1959).

96 Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir. 1960).

condition, such would be a waiver by the stevedore of the shipowner's breach of warranty.[97] On appeal the Ninth Circuit specifically indicated that it need not consider the question of waiver, but did state that the evidence fully supported the findings of waiver, if it were necessary. In a subsequent case, another district court in the same circuit so interpreted the reasoning of the trial court in the first case, but based its holding on a different ground and specifically stated that it made no decision as to whether a breach of written warranty by the shipowner would relieve the stevedore.[98] In an even later decision in another circuit it was held that a written indemnification provision, whereby the stevedore agreed to indemnify the shipowner, meant that when both the shipowner and stevedore were negligent, the stevedore was to indemnify the shipowner.[99] From the opposite point of view, then, it should follow that if there is a written indemnification provision whereby the shipowner agrees to indemnify the stevedore and both are negligent, the shipowner should idemnify the stevedore. This has not as yet been decided, but there is some authority indicating that a stevedore may limit its liability for indemnification by express stipulation.[100]

E. *Law Applicable to Indemnification*

An express indemnity clause in a contract between a stevedore and a shipowner is governed by federal law,[101] and recovery under implied warranties is precluded where express contractual warranties cover the field.[102] However, as a practical matter, where there are express contractual warranties present, there is no need to employ the fiction of an implied warranty. Because the Supreme Court has apparently assumed the federal character of the law to be applied to maritime service contracts in its leading decisions,

97 Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601, 611 (S.D. Cal. 1959).

98 Cook v. M/V Wasaborg, 189 F. Supp. 464 (D. Ore. 1960).

99 See note 85 *supra*.

100 In DeGioia v. United States Lines, 304 F.2d 421 (2d Cir. 1962), the court made this bald statement, but the citation given as the basis therefor was D'Agosta v. Royal Netherlands S.S. Co., 301 F.2d 105 (2d Cir. 1962), which held that recovery under an implied warranty is precluded where an express warranty covers the situation.

It is now clear, however, that a shipowner's material breach of a written stevedoring contract will bar the shipowner's right to indemnification from the stevedore under an express indemnification provision in the contract. Pettus v. Grace Line, Inc., 305 F.2d 151 (2d Cir. 1962).

101 A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir. 1958).

102 D'Agosta v. Royal Netherlands S.S. Co., 301 F.2d 105 (2d Cir. 1960).

it has been held that the federal maritime law also governs in situations involving an implied warranty of workmanlike service by the stevedore to the shipowner.[103] Even in a state court the federal substantive law is applicable, but it has been held that, subject to the court's discretion, the state procedural law will be applied unless it so influences the parties' substantive rights as to require the adoption of the federal practice as well as substantive law.[104] In Pennsylvania this resulted in application of the substantive maritime law as to the rights of the injured longshoreman and the shipowner, but prevented impleader of the stevedore because of a state court principle against determination of a contractual right to indemnification in an action for damages for personal injury.[105] This line of reasoning was subsequently rejected and impleader was permitted by one of the federal courts in that same jurisdiction.[106] Federal maritime law also prohibits an action in admiralty against a shipowner by the wife of an injured or deceased longshoreman for loss of consortium.[107]

F. *Recovery of Attorney Fees and Litigation Expenses*

The great weight of authority provides that the shipowner-indemnitee may recover attorney fees and expenses of litigation from the stevedore-indemnitor under either an express or an implied indemnity relationship.[108] One case held this to be limited to provisions of express indemnification or to the situation in

103 Royal Netherlands S.S. Co. v. Strachan Shipping Co., 301 F.2d 741 (5th Cir. 1962); Booth S.S. Co. v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958).

104 Lloyd v. Victory Carriers, Inc., 402 Pa. 484, 167 A.2d 689 (1960).

105 *Ibid.*

106 Scioli v. Dammers & Van Der Heide's Shipping & Trading Co., 28 F.R.D. 396 (E.D. Pa. 1961). *Contra,* West Afr. Nav., Ltd. v. Nacirema Operating Co., 191 F. Supp. 131 (E.D. Pa. 1961), decided three months earlier. In Cooper v. D/S A/S Progress, 188 F. Supp. 588 (E.D. Pa. 1960), it was held that Federal Rules of Civil Procedure 14 and 42(a) clearly permit trial together of the principal action and the third party action for indemnification.

107 Igneri v. Cie. de Transports Océaniques, 207 F. Supp. 236 (E.D.N.Y. 1962); Pruitt v. M.S. Rigoletto, 1962 Am. Mar. Cas. 1997 (E.D. Mich. 1962).

108 Rederi A/B Dalen v. Maher, 303 F.2d 565 (4th Cir. 1962); DeGioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962); A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir. 1958); Shannon v. United States, 235 F.2d 457 (2d Cir. 1956); Holley v. Steamship Manfred Stansfield, 186 F. Supp. 805 (E.D. Va. 1960). The latter decision contains an excellent and extensively annotated discussion on the subject of recovery of costs and attorney fees in cases of indemnification for breach of warranty. See also Caswell v. K.N.S.M., N.V., 205 F. Supp. 295 (S.D. Tex. 1962); Serrano v. Fletes Maritimos S.A., 1962 Am. Mar. Cas. 1183 (D.P.R. 1962); Milea v. International Terminal Operating Co., 1962 Am. Mar. Cas. 674 (S.D.N.Y. 1961); Drago v. A/S Inger, 194 F. Supp. 438 (E.D.N.Y. 1961); Cooper v. D/S A/S Progress, 188 F. Supp. 588 (E.D. Pa. 1960).

which the stevedore, after notice, failed to take the necessary steps to avoid the injury.[109] The court specifically held against recovery of attorney fees by the shipowner from the stevedore where neither the shipowner nor the stevedore was liable because of a failure of proof, though it was stated that recovery of fees in such a case might be permissible if there was an express agreement to that effect. Another decision refused such recovery to a shipowner where there was a settlement between the injured longshoreman and his stevedore-employer, and there was no showing of an express agreement by the stevedore to pay the shipowner's costs and attorney fees nor a willingness on the part of the shipowner to turn over the defense of the case to the stevedore.[110] The Second Circuit very recently considered a situation wherein the stevedore-employer settled with the injured longshoreman during the pendency of the trial, and allowed the shipowner-indemnitee to recover its litigation expenses from the stevedore-indemnitor, even though the shipowner's pleading sought indemnity for sums that might be "adjudged" against it, specifically making its ruling applicable to either an express or an implied indemnification provision.[111] In order to follow the safest course and protect its interest in regard to recovery of attorney fees and litigation expenses, it would probably be advisable in indemnification cases for the shipowner to tender defense to the stevedore and, whenever possible, to implead the stevedore in the longshoreman's case against the shipowner. The failure to bring in the stevedore when service could have been made upon it has been held in one case to preclude subsequent action by the shipowner against the stevedore-employer for indemnification.[112]

G. *Indemnification of Stevedore by Longshoreman Prohibited*

In actions involving these matters, some authority holds that the stevedore-employer cannot counterclaim or file a cross-complaint or cross-libel against the longshoreman-employee,[113] though

109 Cimino v. United States, 1960 Am. Mar. Cas. 2120 (S.D.N.Y. 1960). See also DeGioia v. United States Lines Co., *supra* note 108; Hill v. American President Lines, 194 F. Supp. 885 (E.D. Va. 1961).

110 Deans v. Kihlstrom, 197 F. Supp. 339 (E.D. Va. 1961).

111 Paliaga v. Luckenbach S.S. Co., 301 F.2d 403 (2d Cir. 1962).

112 See note 74 *supra*.

113 Cavelleri v. Isthmian Lines, 190 F. Supp. 801 (S.D.N.Y. 1961). See also Cook v. The M/S Wasaborg, 189 F. Supp. 464 (D. Ore. 1960). The *Cavelleri* case was certified for appeal but the Second Circuit refused to entertain the appeal. In Malfitano v. King Line, Ltd., 198 F. Supp. 399 (S.D.N.Y. 1961), Judge Moore declined to agree with the decision of Judge Kaufman in *Cavelleri*. Since then Judge Feinberg has distin-

this question has yet to be considered by the Supreme Court. The obvious reason for this rule is that, if such were permitted, there would then be established a never-ending circle of liability seemingly incapable of final resolution. It must be noted, however, that contributory negligence on the part of the injured longshoreman will reduce his recovery and, consequently, the amount of the indemnification from the stevedore to the shipowner, on a comparative negligence basis, in accordance with the percentage or degree of his fault.[114]

VII. SUMMARY

Under the present state of the law in this field, which by the very nature of its past could be the subject of substantial change in the future, it is clear that an injured longshoreman, whose injuries are caused either directly or indirectly by the unseaworthiness of the vessel aboard which he is working at the time of his injury, has a right to recover damages from the shipowner, reduced in proportion to his own contributory negligence, if any. The shipowner in turn may obtain complete indemnification from the longshoreman's stevedore-employer, including even costs of trial and actual attorney fees, if the unseaworthiness of the vessel was caused either in whole or in part or was brought into play by the stevedore's breach of its warranty to perform its service in a competent and workmanlike manner. In effect such a breach would be brought about by the negligence of the stevedore-employer through its employees. Thus far, the only act on the part of a shipowner which has been held to preclude such indemnification from the stevedore-employer of the injured longshoreman is failure on the part of the shipowner to correct or warn the stevedore of a latent, or hidden, dangerous defect or condition in the vessel or its appliances known to the shipowner. However, even in such an instance it is probable that if the latent, dangerous defect or condition becomes known to the stevedore and the stevedore nevertheless proceeds with its loading or unloading of the vessel, this would be held to be a waiver of the shipowner's failure to correct or warn, and, in the case of a subsequent injury to a

guished the two and followed *Cavelleri* in Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962).

114 Massaro v. United States Lines Co., 1962 Am. Mar. Cas. 2168 (3d Cir. 1962); Drago v. Inger, 194 F. Supp. 438 (E.D.N.Y. 1961); Santomarco v. United States, 1959 Am. Mar. Cas. 1808 (E.D.N.Y. 1959), *aff'd*, 277 F.2d 255 (2d Cir.), *cert. denied*, 364 U.S. 823 (1960).

longshoreman-employee of the stevedore, the shipowner would not be precluded from obtaining complete indemnification from the stevedore-employer. There is a hint of authority for the proposition that breach of an express warranty in the stevedoring contract by the shipowner will preclude indemnification from the stevedore-employer in case of injury to a longshoreman caused thereby. This question has been decided only as to an express indemnification provision. Again, it is probable that the stevedore's proceeding in the face of a known breach of express warranty by the shipowner would be held to be a waiver by the stevedore of the shipowner's breach.

VIII. COMMENT

The brief but fluid history of recovery of damages for injuries received by longshoremen in the course of their employment aboard vessels on navigable waters has virtually completed its circle. At first the injured longshoreman sought recovery of damages from his stevedore-employer. Because of the fact that most longshoremen's injuries were caused by the negligent acts of their co-workers and therefore were subject to the common-law fellow servant doctrine, thought to be applicable to the maritime law, which prohibited recovery in such cases, the injured longshoreman's remedy against his stevedore-employer proved ineffective. Following the trend of the states in adopting compensation acts, the longshoreman was given a supposedly exclusive and absolute remedy—though limited in amount of recovery—against his stevedore-employer under the Longshoremen and Harbor Workers Compensation Act. For a time it was thought that this statutory remedy precluded any other recovery by the injured longshoreman. Then he was permitted by the courts to recover damages from the shipowner for injuries received by reason of the shipowner's negligence or the unseaworthiness of the vessel aboard which he was injured. A remedy on behalf of an injured worker against a third party is provided for in virtually all compensation acts and is specifically incorporated into the Longshoremen and Harbor Workers Compensation Act. However, because of the absolute and almost all-inclusive character of the unseaworthiness doctrine, the shipowner was virtually placed in an insurer's position as to longshoremen. When this proved to be harsh and unjust, the shipowner was permitted to recover over against the longshoreman's negligent stevedore-employer for breach of either an

implied or an express warranty of workmanlike service. Though the underlying theory was somewhat fictitious, the necessity for allowing indemnification was occasioned by the existence of the ancient common-law rule against contribution between joint tortfeasors. The only thing left to complete the circle of liability would be to grant the stevedore-employer a right of indemnification against the injured longshoreman. Of course, such is not the law and is really unnecessary, because the injured longshoreman's recovery can be reduced in the first instance in accordance with the degree of his contributory negligence, if any is present.

Although the route was circuitous, the result was reached. The stevedore now ultimately bears the risk in case of injury to his longshoreman-employee unless the injury is caused solely by the shipowner's negligence or an unseaworthy condition of the vessel to which the stevedore cannot be connected in any way. Certainly, both the Longshoremen and Harbor Workers Compensation Act itself and the reasons behind it have been nullified to a great extent. While the injured longshoreman still has the benefit of the rapid and assured recovery of statutorily-afforded compensation during disability, his stevedore-employer no longer has a limitation on his liability to offset its absolute character under the act. The basis for the act has been undermined to such an extent that its necessity and effectiveness are now questionable. This is the only major area within the compensation insurance field where such a result has occurred, although minor inroads appear to have been made in some jurisdictions even as to workmen's compensation.[115] Careful scrutiny reveals that there are two basic reasons for this unique development: first, the absolute quality of the shipowner's warranty of seaworthiness which was extended to longshoremen, thereby placing the shipowner in the position of an insurer, contrary to the best interests of the shipping industry in this country, which is already in the throes of economic and operational difficulties and is unable to assume additional financial burdens; and second, the venerable common-law rule against contribution between joint tortfeasors. Many states have done away with the latter by statute, and in the admiralty and maritime law field the judicially-devised rule of divided damages has been applicable to collision cases for many

115 See Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954); Annot., 43 A.L.R.2d 865 (1954), and cases cited therein. See also Bowman v. Atlanta Baggage & Cab Co., 173 F. Supp. 282 (N.D. Fla. 1959).

years. The presence and applicability of both the unseaworthiness and joint tortfeasor doctrines has resulted in injustice to first the shipowner and then the stevedore by virtue of the placement of full liability on the one or the other, regardless of their respective degrees of fault. Since the substantive maritime law is composed largely of federal legislative enactments and judicial pronouncements made over the years by the federal courts, it is to be expected that in the not too distant future liability may well be reapportioned between the injured longshoreman, the shipowner and the stevedore on some sort of a comparative responsibility basis, either by federal legislation or by further judicial interpretation of the applicable substantive law.[116]

116 The initial trend is seemingly to avoid application of the warranty of workmanlike service in difficult cases by holding that whatever caused the injury to the longshoreman did not cause the vessel to be unseaworthy. The effect of this is to free the innocent shipowner and limit the injured longshoreman's recovery and the stevedore-employer's liability to that prescribed by the Longshoremen and Harbor Workers Compensation Act. Such was the result in all of the cases cited in note 57 *supra*. While this would appear to set the law back sixteen or more years, the result in particular cases is probably the least unsatisfactory. The ultimate solution will still probably be realistic apportionment between the three principals involved.