

WORKMEN'S COMPENSATION EMPLOYER'S INDEPENDENT ACTION AGAINST THIRD PARTY

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Ordinarily the liability of an employer to pay workmen's compensation for the occupational injury or death of his employee is exclusive. But, beginning about fifteen years ago, a flood of cases began to appear in which this exclusiveness was indirectly broken down. It came about in this way: an employee injured by the combined fault of his employer and a third party, having recovered workmen's compensation from his employer, sued the third party, as the employee has a right to do under most statutes; the third party, having paid this judgment, then brought an action over against the employer for reimbursement. The exclusiveness bar was penetrated by the third party's alleging that his claim against the employer was not "on account of the injury"—which is the typical language of an exclusiveness clause—but was "on account of" the breach of an independent duty owed by the employer to the third party under a contract.

This line of cases actually originated with a 1938 New York decision, *Westchester Lighting Co. v. Westchester County Small Estates Corp.*¹ But since 1955, the doctrine has been associated with and strongly influenced by the United States Supreme Court decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*² The *Ryan* case held that when a stevedoring company contracted to perform stevedoring operations for a shipowner, this implied an obligation in fact to perform the service in a workmanlike way, and a further obligation to indemnify the shipowner for damages sustained by the shipowner as a result of the nonperformance of this duty of workmanlike performance.

The familiar *Ryan* triangular pattern then began to appear in dozens of stevedoring cases. The injured longshoreman would recover full damages from the shipowner under the near-absolute duty of the shipowner for liability caused by the unseaworthiness of the ship.³ With equal regularity, the shipowner would bring his action over

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¹278 N.Y. 175, 15 N.E.2d 567 (1938). Crane, C. J., dissented.

²350 U.S. 124 (1956).

³The injured longshoreman had been held entitled to assert this liability in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

against the stevedoring company. The trend for a long while was monotonously onesided: the stevedoring company's liability became relentlessly broader, and his attempts to pass the liability to someone else, such as to the very employee whose negligence caused his own injury,⁴ were consistently frustrated.⁵

But in the summer of 1969, there was a break in this story, in the form of a United States Supreme Court decision—the *Burnside* case⁶—suggesting that “two can play at that game” of independent duty. The Court held that when a workmen's compensation third-party statute has provided a statutory method whereby the employer or insurer may be reimbursed for compensation expenditures caused by the third party's negligence, the statutory method is not necessarily exclusive, and the employer may therefore bring a separate action against a third party claiming damages to the amount of compensation paid as the result of the third party's breach of an independent duty to the employer.

In the great majority of cases, there is no occasion for the employer who has paid workmen's compensation to search beyond his rights as statutory subrogee under the act for a remedy against a third-party tortfeasor. Typically, the damages recovered from the third party in an action by the injured employee or by the subrogated employer are more than adequate to cover reimbursement of the employer for his compensation outlay.

In some special circumstances, however, this is not true. The amounts recoverable on the employee's cause of action may be less than the compensation payable, or may even be zero. The question then arises: may the employer assert an independent cause of action against the third party, grounded on breach of a separate duty running from the third party to the employer, to recover the cost of compensation which the employer has been forced to pay because of this breach?

The *Burnside* case answered this question in the affirmative, and promises to become the *Ryan* of this more limited but equally provocative field of law. The peculiar circumstance inspiring the separate suit in this instance was the then-applicable arbitrary limit of \$30,000

⁴See, e.g., *Cusumano v. Wilhelmsen*, 267 F. Supp. 164 (S.D.N.Y. 1967).

⁵For a detailed analysis of the *Ryan* line of cases see 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 76.43(a)-76.53 (1970).

⁶*Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, (1969), *rev'g* *Burnside Shipping Co. v. Federal Marine Terminals, Inc.*, 392 F.2d 918 (7th Cir. 1968), *which had aff'd* 284 F. Supp. 740 (N.D. Ill. 1967).

on wrongful death recoveries under Illinois law,⁷ while the potential compensation liability was \$70,000.

The case began as a classical *Ryan* triangle. The employee longshoreman was killed by a fall into a hatch that had been left unguarded. His widow, having been awarded compensation, brought a wrongful-death action against the shipowner. The shipowner, Burnside, brought a separate action in the same federal court seeking indemnification from the stevedoring company, Marine Terminals, on the ground of breach of warranty of workmanlike performance under the *Ryan* formula. At this point, the familiar scenario took a new turning. The stevedore, hitherto cast in the role of "fall guy" in the drama, suddenly went on the offensive and struck back with a counterclaim for "all sums which have been paid or will be paid" as compensation benefits. The principal ground was that Burnside, as owner and operator of the vessel, owed to the stevedoring contractor "the duty of providing and maintaining a safe place to work so that injury to the employees . . . would be avoided." The facts alleged as showing a breach of this duty included failure to guard or cover the deep tank opening, to clear the passageways, to provide adequate lighting, and to provide a safety railing. The federal district court dismissed this counterclaim, and the seventh circuit affirmed. The ground relied on by the district court was that that employer's rights against third parties provided by the Longshoremen's Act were exclusive. The circuit court added to this a second possible ground when it appeared to assume that there would be no remedy against the third party in any case.

There are thus two issues. The first is whether, assuming the employer would have a cause of action against the third party in the absence of the Longshoremen's Act, that cause of action is destroyed by having had put in its place the exclusive third-party procedure of the compensation system. The second is whether, in this particular situation, the shipowner owes any duty to the stevedoring company whose breach would support a direct and independent action.

The Supreme Court disposed of the exclusiveness issue with refreshing forthrightness. It began by saying that the court of appeals had been "clearly mistaken" in asserting that the statutory remedy was exclusive. The prime ground was that, when a new right is granted by statute, it does not ordinarily cut off existing rights in the absence of clear language to that effect. The statutory language assigning the

⁷The limitation was removed in 1967, but prospectively only, leaving the limitation still applicable to the death here involved. ILL. REV. STAT., ch. 70, § 2 (1967).

employee's cause of action to the employer contains no words of limitation. When Congress wanted to make a right exclusive, it knew how to do so, as shown by the fact that it expressly made compensation benefits the employee's exclusive right against the employer. The legislative history displayed nothing supporting the view that existing rights of action of an employer against a third party were intended to be abolished. On the contrary, the act concerned itself only with rights between the employer and employee, and when it made the employee's compensation remedy exclusive, this was a *quid pro quo* for the employer's shouldering of absolute liability. The third party is not involved in any such *quid pro quo*, and there is, therefore, no reason why he should derive a new immunity from the act.

As to pre-existing authority, the Court said:

Neither this Court nor, before this case, any other court has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers, and we decline to so hold today.⁸

So far as the Supreme Court's own jurisprudence is concerned, the statement is correct. But as to "any other court," it is not correct, even if the Court intended to confine its assertion to cases arising under the Longshoremen's Act—which its language does not indicate. Indeed, it is a curious feature of this litigation that it was conducted at every stage on the theory that the question presented was completely novel. Each opinion—district court, circuit court, and Supreme Court—reiterates that the employer "concedes it is presenting a novel theory."⁹ Actually, it is not all that novel, and the opinions would have been enriched if they had taken more account of the substantial number of both state and federal decisions that had already struggled with this problem.

The Court was quite right in setting to one side cases that did no more than hold that, as to the statutory cause of action against the third party, when it is assigned it remains essentially the employee's cause of action,¹⁰ and that the employer's rights are derived from those of the employee.¹¹ These holdings only tell us what the nature and consequences of the statutory assignment are, once it goes into

⁸394 U.S. at 413-14.

⁹392 F.2d at 919.

¹⁰E.g., *California Cas. Indem. Exch. v. United States*, 74 F. Supp. 401 (S.D. Cal. 1947).

¹¹*Doleman v. Levine*, 295 U.S. 221 (1935).

operation; they tell us nothing about whether a separate cause of action not derived from the employee or from the act may exist.

But there have indeed been cases holding, under comparable statutes, that the employer's statutory third-party rights are exclusive. The first such case was *United States Casualty Co. v. Hercules Powder Co.*,¹² decided by the Supreme Court of New Jersey. A mining company relied on an independent duty owed it by a supplier of fuses, which proved to be defective in breach of the implied warranty of fitness of the Sale of Goods Act, and which by causing a premature explosion injured the mining company's employees. Compensation of \$7,411 was paid the employees, who also sued the fuse supplier in tort, this action being still pending. The New Jersey Act subrogates the employer's insurance carrier to the employee's tort action only if the employee fails to bring it within a specified time.¹³ The carrier here, however, brought an independent action based on the breach of warranty, and claimed as damages the \$7,411 paid on behalf of the employer. The principal reason for the dismissal of this action was that the existence of a statutory mechanism covering the subject of how the employer and carrier are reimbursed by negligent third parties implies that this remedy against the third party is exclusive. The court adds the argument that allowance of the action would result in double liability, which could not be presumed to be the legislative intent.

This holding was approved and adopted ten years later in a Florida case, *United States Casualty Co. v. F. A. Johnson, Inc.*¹⁴ The employer had leased a crane, together with an operator, from the defendant. The crane collapsed and fatally injured an employee of the employer. The employer received an equitable distribution of the judgment when the employee's widow sued the crane owner-defendant in tort. The employer in this suit sought damages, limited to the compensation paid, from the crane owner, for breach of warranty. It was held that the statutory remedies were the exclusive method whereby the insurer or employer might be reimbursed for compensation expenditures.

The following year, the exclusiveness issue was in effect presented to the second circuit in a case arising under the Longshoremen's Act.¹⁵ The employer's carrier here had found himself in the trap created by the provision in that Act assigning the third-party action to the em-

¹²4 N.J. 157, 72 A.2d 190 (1950).

¹³N.J. REV. STAT., § 34:15-40(f) (1937).

¹⁴117 So. 2d 438 (Fla. Dist. Ct. App. 1960).

¹⁵*Liberty Mut. Ins. Co. v. United States*, 290 F.2d 257 (2d Cir. 1961).

ployer six months after acceptance of compensation by the employee. In this instance, by the time the six months had elapsed, the two-year statute of limitations would also have elapsed. The carrier therefore brought suit eleven days before the two-year period expired, but less than four months after the employee's acceptance of compensation. The majority held that the suit would not lie. Chief Judge Lumbard dissented, however, on the ground that the employer had an inherent right of subrogation apart from the statute. He said:

The statutory assignment of rights prescribed by 33 U.S.C.A. § 933 (b) [is] in aid of the employer and not a limitation upon his right to subrogation. The Etna, 3 Cir., 1943, 138 F. 2d 37, 40. The holding of The Etna—that a right of subrogation exists in favor of the employer who has made compensation payments although he cannot qualify for the assignment of rights granted by the 33 U.S.C.A. § 933 (b)—was adopted by this circuit in its summary affirmance at 2 Cir., 1953, 205 F. 2d 151 of *Fontana v. Pennsylvania R.R.*, D.C.S.D.N.Y. 1952, 106 F. Supp. 461; see *International Terminal Operating Co. v. Waterman S.S. Co.*, 2 Cir. 1959, 272 F. 2d 15, certiorari denied 1960, 362 U.S. 919, 80 S. Ct. 671, 4 L. Ed. 2d 739.¹⁶

Note that the statement with which this passage begins is almost identical to that of the Supreme Court in *Burnside*: the statutory right adds to and does not detract from or limit the employer's pre-existing subrogation rights.

Wisconsin has also held its statutory third-party procedure exclusive under a statute which, although somewhat different from the usual assignment or subrogation statute, would probably if anything be weaker in requiring a finding of exclusiveness. In *Murray v. Dewar*,¹⁷ the employee had been instantly killed in a collision, and his widow, who was riding with him, had died after twenty minutes. The compensation carrier paid \$12,250 in death benefits to the estate of the widow. Since in Wisconsin the wrongful death action expired with the death of the widow, the supreme court held that the third-party rights of the employer also expired. As to the statutory right of action, the holding is more remarkable than it would be in most assignment or subrogation states, since the Wisconsin statute on its face appears to create a new cause of action. It states:

The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall like-

¹⁶290 F.2d at 260.

¹⁷6 Wis. 2d 411, 94 N.W.2d 635 (1959).

wise have the right to make claim or maintain an action in tort against any other party for such injury or death.¹⁸

But the court concluded that this sentence must be read in its context, which repeatedly treats the action as one in which the compensation recipient has an interest and is involved.

The court then turned to the insurer's argument that it had a cause of action for indemnity at common law, having been compelled to pay a sum of money as the result of the wrongful act of the third party. The court recognized that this theory had been accepted by a federal district court interpreting the Wisconsin Act,¹⁹ but it firmly declined to accept the federal court's view. It simply asserted that by provision of a remedy in the act, complete with details about sharing the proceeds, the legislature indicated its intention that there should be no other type of action for indemnification. The court appeared to concede that the result was unfair, but despaired of doing anything about it through construction of existing statutory language.

Louisiana must also be ranged with the jurisdictions that have in effect held that the employer's statutory remedy is exclusive. In *Todd-Johnson Dry Docks, Inc. v. City of New Orleans*,²⁰ the court stated that, under a third-party statute giving the employer the right to be reimbursed, for compensation paid, out of the employee's third-party recovery, the employer is limited to the amount recoverable from the third party by the employee. If this does not cover his outlay, he has no further cause of action.²¹

The Ohio story is unique. It begins with the first cases in which the possibility of a third-party suit by the employer based on an in-

¹⁸WIS. STAT. § 102.29(1) (1967).

¹⁹*Travelers Ins. Co. v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (W.D. Wis. 1950). This case is discussed in detail at text accompanying note 34 *infra*.

²⁰55 So. 2d 650 (La. Ct. App. 1951).

²¹This was reaffirmed in *Board of Comm'rs v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953). See also *de Roode v. Jahncke Serv., Inc.*, 52 So. 2d 736, 744 (La. Ct. App. 1951), holding that the employer's payment of medical benefits above those required by statute does not entitle him to subrogation for the excess. The court adds, however, that the employer might be able to obtain the right to demand these extra amounts by obtaining conventional subrogation from the employee, but says that no such conventional subrogation was shown here. *Id.*

In *Blunt v. Lunsford*, 126 So.2d 379 (La. Ct. App. 1960) an oil-drilling company contracted with an oil-tool company for the use of certain tools and a trained engineer. Payments were made on a per diem basis. An oil-drilling company employee was injured while working under the direction of the oil-tool company's engineer. The oil-tool company was held not liable to the oil-drilling company for indemnification of compensation benefits paid for the drilling company employee's injuries.

dependent duty was recognized. In *Midvale Coal Co. v. Cardox Corp.*²² the facts were strikingly similar to those in the *Hercules Powder* case in New Jersey.²³ The defendant third party was a supplier of explosive cartridges for use in the plaintiff's mine. Plaintiff's employee was injured because of the defectiveness of a cartridge. The failure to furnish and maintain safe cartridges was a breach of defendant's contract of supply with plaintiff. The employee obtained a maximum award of compensation, as a result of which plaintiff's insurance premium, under the experience rating system in effect, increased \$18,000. The court first held, in a hearing on a demurrer to the petition, that plaintiff could recover from defendant this \$18,000, regardless of whether or not the employee exercised his separate right to sue defendant in tort for his injuries. Later, after a trial on the merits, the court held on a second appeal that the damages should be limited to the amount actually paid to the injured worker.

To understand this decision, it is necessary first to remind oneself that there was no subrogation statute in Ohio. For this reason, there could be no argument that such a statute—in force in all but two states²⁴—provided the exclusive method by which the employer could reimburse himself for compensation expenditures. The court was therefore able to proceed squarely on the ground that this was a simple breach of contract, from which there naturally flowed as damages the increased premiums produced by the normal operation of the experience rating system, up to the amount of the actual payments to the injured employees—a result which must have been within the contemplation of the parties, and hence was not too remote. The fact that the third party might be subject to a double liability, once to the employer and again to the employee, did not disturb the court, since the third party was guilty of a breach of two duties.

Thus, if everyone pressed his rights to the utmost in Ohio, the result, at that point in the story, was this: the employer paid com-

²²152 Ohio St. 437, 89 N.E.2d 673 (1949) (ruling on demurrer), 157 Ohio St. 526, 106 N.E.2d 556 (1952) (ruling on merits).

The earlier case of *Dayton Power & Light Co. v. Westinghouse Elec. & Mfg. Co.*, 287 F. 439 (6th Cir. 1923), anticipated this decision by holding that, under the Ohio Act, the amount of payment of compensation could be recovered by an employer from a third party who installed a defective and dangerous machine which exploded.

²³Text accompanying notes 12 & 13 *supra*.

²⁴The other is West Virginia. Illinois faced a similar issue when a portion of its third-party subrogation statute was held unconstitutional. The Illinois supreme court held that the gap could be filled by a claim based on common-law subrogation. *Geneva Constr. Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 122 N.E.2d 540 (1954).

compensation and recovered from the third party his added premiums, thus coming out approximately even; the employee recovered once from the employer in compensation and again from the third party in tort; and the third party paid twice, once to the employer for breach of contract and once to the employee for tort.

If all this seemed slightly weird, the fault was not in this particular decision, but the lack of a third-party and subrogation statute, which could have prevented this odd tangle, and, more fundamentally, in the erroneous Ohio conception of compensation as something analogous to accident insurance, which blocked the accomplishment of subrogation by judicial decision.²⁵

This somewhat unstable situation has been once more²⁶ jostled by the Supreme Court of Ohio, leaving a new situation which can hardly be considered much of an improvement. In *Fischer Construction Co. v. Stroud*,²⁷ the court was confronted with a claim by an employer against a third party based, not on breach of warranty, but on simple negligence. The employer asked damages equal to the increase in his insurance premiums over the next five years. The court recognized that *Midvale* was authority for allowing an action against the third party based on breach of warranty, but added that *Truscon* was authority for barring an action based on negligence. The court asserted that this distinction was without basis in reason, that the *Truscon* rule was the better rule, and that *Midvale* was therefore overruled. The court supplies no discussion, no arguments, no authorities, no analogies, no reference to the fact that the result is inconsistent with that in every jurisdiction but one. The only supporting factor added is that the damages were speculative. There is room for some argument here, but, although the opinion is ambiguous on the point,²⁸ a careful analysis leads to the conclusion that a third-party

²⁵See 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.30 (1970).

²⁶At one time, Ohio had held that the employee's third-party recovery should be reduced by the amount of compensation received. *Ohio Pub. Serv. Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687 (1927). This at least would have provided a foundation for an equitable adjustment of rights, if it had been followed by a decision that the employer could then recover his compensation expenditure from the third party. Instead of this, the Ohio supreme court overruled *Sharkey* and held that the employer had no rights whatever against the third party. *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929).

²⁷175 Ohio St. 31, 191 N.E.2d 164 (1963).

²⁸The opinion repeatedly cites only the first *Midvale* appeal when reference to overruling is made, that is, the one in which increased premiums figured as the measure of damages. Nowhere does the opinion acknowledge that the measure of maximum damages in *Midvale* was finally the compensation payment itself.

action is barred whether the damages sought are increased insurance premiums or actual compensation expenditure—and the latter at least is surely not too speculative or uncertain to support an action for reimbursement.

Given the uninhibited disposition of the Ohio supreme court to overrule its earlier decisions when it serves its purposes, it would have done much better to overrule *Truscon* and restore *Sharkey*, which *Truscon* had overruled. Then at least a rough sort of equity would have resulted, with double recovery by the employee avoided, with the employer reimbursed, and with the true tortfeasor paying normal damages. As matters now stand in Ohio, the employee gets a double recovery and the employer gets no reimbursement even when he has been the victim of a breach of warranty by the third person.

The Ohio precedents are of little relevance to the central issue whether the employer's statutory third-party rights are exclusive, since there are no statutory third-party rights in Ohio. At most, they tend to reinforce in a general way the result in New Jersey, Florida, Louisiana, and the second circuit merely by illustrating an aversion to recognizing third-party liability to the employer except where expressly established.

When, under the heading of precedent, we look for support for the *Burnside* view that the employer's statutory remedy is not exclusive, we do not come away entirely empty-handed. The best authority on this side is afforded by two Kentucky cases, the *Ruby* and *Whittenberg* cases.²⁹ In the *Whittenberg* case, the subcontractor had paid compensation to his own employee, who had been injured as the result of the defectiveness of a hoist furnished by the general contractor. The employee first attempted to sue the general contractor as a third party, with the subcontractor joining in the action as

But in *Truscon* the measure of damages was the compensation outlay, and it was the barring of this action that the court generalized for all cases. In its final summary of what it held, the court refers only to recovery of increased premiums being barred. The confusion is further deepened by the fact that the precise character of the damages allowed in the second *Midvale* appeal was not the compensation expenditure, but rather the increased premiums with a ceiling fixed by the amount of compensation expenditure.

²⁹*Whittenberg Eng'r & Constr. Co. v. Liberty Mut. Ins. Co.*, 390 S.W.2d 877 (Ky. 1965), following *Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945), and *Johnson v. Ruby Lumber Co.*, 278 S.W.2d 71 (Ky. 1955). The first *Ruby* case arose on demurrer and decided the main point here at issue. The second *Ruby* case reached the court of appeals ten years later after a trial on the merits, and added chiefly the holding that the fact that the insurer rather than the employer was the real party in interest, having paid the compensation, was no defense, but that the insurer should have been added as a party.

subrogee. This action was dismissed on the ground that the general contractor, as statutory employer, was not a third party under the statute amenable to suit. The subcontractor then brought the present action based on an implied contract of indemnity that arises in favor of a person who without fault is compelled to pay damage on account of the tortious act of another. The court held that the action would lie, since the action on implied contract was independent of the statutory third-party action in tort. Indeed, so independent was it that neither *res judicata* nor collateral estoppel drawn from the earlier dismissal would apply to this cause of action.

The exclusiveness issue was not given much attention in the *Whittenberg* opinion, but it did figure prominently in the original *Ruby* case on which *Whittenberg* was squarely based. The reasons relied on in *Ruby* were essentially the same as those in *Burnside*: the act contains nothing that could be construed as a repeal of the employer's prior rights of action, and "repeals by implication are not favored and never declared unless clearly made to appear. What is true of statutes is true as to the common law."³⁰

The court adds: "To uphold the contention of appellees would result in taking from the subcontractor substantial monetary rights for an admitted negligent act of the principal, not doing substantial justice."³¹

It is interesting that Kentucky was able to reach this result in spite of the extra impediment, not present in the other cases discussed, that the third party was also a statutory employer within the compensation system. In this sense the case belongs also with the *Ryan* group, in that the separateness of the action simultaneously surmounts not only any implied exclusiveness of the employer's statutory third-party remedy but also the express exclusiveness of the employer's compensation liability.

As further company for the *Burnside* view, there is the dissenting opinion of Judge Lumbard in the *Liberty Mutual* case.³² There could be mentioned the *Midvale* case, which is not really in point because there was no statutory remedy to be called exclusive, and which in any event was overruled.³³ And there is the federal district court interpretation of the Wisconsin statute in the *Travelers* case,³⁴ which has been

³⁰187 S.W.2d at 453.

³¹*Id.*

³²*Liberty Mut. Ins. Co. v. United States*, 290 F.2d 257, 259 (2d Cir. 1961).

³³Discussion at text accompanying notes 24-28 *supra*.

³⁴*Travelers Ins. Co. v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (W.D. Wis. 1950).

disavowed by the Wisconsin supreme court.³⁵ It was held in *Travelers* that the insurance carrier, having paid death benefits, could bring a third-party action based on a theory of indemnity even though the employee's survivors might at the same time be bringing a third-party action themselves. The court invoked the rule that "an implied contract of indemnity arises in favor of a person who, without any fault on his part, is compelled to pay damages on account of the negligence of a third person . . ."³⁶ The court concluded by observing that, if the plaintiff carrier should recover, the amount of its recovery should be allowed as a set-off in the widow's action against the defendant third party. It is not clear from the facts given in the opinion why the carrier in this instance was not content with his statutory right to reimbursement out of the widow's recovery. One possible reason might have been that, under the Wisconsin statute, the widow would have been absolutely entitled to one-third of the damages recovered, whether or not this cut into the amount needed to reimburse the carrier.³⁷

In spite of the unimpressiveness of this body, of precedent anticipating the *Burnside* holding, it is submitted that the *Burnside* view is the better holding as a matter of law, of fairness, and of policy.

One is struck by the fact that none of the opinions holding the employer's statutory remedy exclusive really probes the legal issue in any depth. Most of them in a sentence or two jump to the conclusion that whenever a statute addresses itself to a remedy it must be assumed to have intended to abolish all other remedies. None of these opinions even makes a passing bow to one of the most potent of all rules of statutory construction, and the one found decisive by the Supreme Court in *Burnside*, that valuable rights of action are not to be deemed destroyed except by clear language or unmistakable expression of legislative intent. None takes note of the telling argument cited by the Supreme Court that, if the legislature had wished to make the third-party remedy exclusive, presumably it would have done so in the same way that it made the employee's compensation remedy exclusive against the employer.

Let us assume that, prior to the compensation act, there were two possible sets of remedies against a third party standing side by side: the employee's remedies in tort for personal injury, and the employer's remedies in tort, contract, or quasi-contract for reimbursement or in-

³⁵Murray v. Dewar, 6 Wis. 2d 411, 94 N.W.2d 635 (1959).

³⁶94 F. Supp. at 622.

³⁷WIS. STAT. § 102.29(1) (1967).

demnity. Now the compensation act is passed. Its third-party section addresses itself solely to the first, the employee's remedies. It adds to the employer's rights in certain ways, giving him a right of reimbursement, of intervention, and of subrogation or assignment. But at all times it is the employee's cause of action the statute acts upon. It does not touch those of the employer or carrier. It might be different if the statute indeed took note of the existence of pre-existing rights of action in the employer and went on to create a completely new cause of action for the employer instead of merely giving him certain rights in the employee's action.

Moreover, before a statutory remedy is construed to be an implied abolition of all antecedent remedies, it should be shown that the new remedy covers the ground previously dealt with by the old, without substantial lacunae where nothing is put in the place of the remedy abolished. As the sampling of cases in this discussion thus far indicates, the denial of nonstatutory remedies does indeed leave the employer without remedy in a variety of situations, while at the same time giving the third party a windfall in that he ends by paying less than he normally would under general law. A checklist of these situations may serve to show that they constitute more than a negligible fringe:

1. The third party's tort liability may have been arbitrarily limited under a wrongful death statute, as in *Burnside*. The same problem could arise whenever for any reason the tort recovery turned out to be smaller than the compensation liability. Ordinarily in the absence of some special limitation this would not happen, since the employee's wage loss and medical expense would be normal elements of damage, but it is by no means impossible.³⁸ The employee might, for example, have little or no actual wage loss to adduce in his damage action, and still receive a large award for a schedule loss, in which case it is at least theoretically possible that the jury award of damages might be smaller than the compensation payment.

2. The third party may escape liability by the peculiar interaction of the third-party statute and the general statute of limitations, as in *Liberty Mutual*.³⁹

3. The employee may die without dependents, as in *Oakes*,⁴⁰ so that there is no regular compensation liability on which to ground a

³⁸See, e.g., *Todd-Johnson Dry Docks, Inc. v. City of New Orleans*, 55 So. 2d 650 (La. Ct. App. 1951).

³⁹*Liberty Mut. Ins. Co. v. United States*, 290 F.2d 257 (2d Cir. 1961).

⁴⁰*Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 3 (1934).

subrogated suit, but there may be increased insurance premiums or a statutory death-without-dependents payment into a special fund.

4. The statutory third-party action may fail because the only persons entitled to bring a wrongful-death action die before any such action is brought, as in *Murray*.⁴¹

5. The third party may have a defense of contributory or comparative negligence against the employee that would not affect the employer's separate cause of action.

6. The third party may have the defense of personal relationship available to block the employee's tort action but not available against the employer's action.

7. The third party may have a defense of exclusive liability as the employee's employer, also not available against the plaintiff employer.⁴²

8. The third-party remedy may be only against tortfeasors, while the employer's cause of action may be for contractual indemnity.

9. The employer may have been obliged by contract to pay the employee more than the benefits provided by the compensation act, while the statutory third-party recovery only extends as far as payments required by statute.

In every one of these nine situations, a rigid adherence to the rule that the employer's statutory third-party rights are exclusive would deprive the employer of a valuable prior remedy and present the third party with a gratuitous immunity. Before a court, then, indulges in a one-sentence leap to the conclusion that the statutory remedy must have been intended to be exclusive, it should be aware that this is attributing to the legislature an intent to abolish pre-existing rights, not just in the fact situation immediately before it, but in at least the nine situations listed.

Some of these combinations have already been discussed, but some require further analysis.

The first, involving arbitrary limits imposed by wrongful-death statutes, exemplified by *Burnside*, has been examined earlier in this article.

The second problem, that of statute of limitations, has also been touched on in the form it took in *Liberty Mutual*.⁴³ One can imagine other ways in which the statute of limitations might figure in this

⁴¹*Murray v. Dewar*, 6 Wis. 2d 411, 94 N.W.2d 635 (1959).

⁴²This is not as impossible as it sounds, and will be discussed later. Text accompanying notes 50 *et seq. infra*.

⁴³Treatment in text at note 15 *supra*.

issue; for example, there might be a set of facts in which, for some reason, the statute of limitations has run against the employee's cause of action but not against the employer's.

The third example, death without dependents, may raise the present difficulty in at least two forms. The employer, as in *Oakes*, may suffer a financial impact from the death by the operation of experience rating on his insurance premium.⁴⁴ Or, under the provisions of many statutes, he may be required to pay a fixed sum into a special fund. In either event, there is no primary cause of action in dependents to which he can be subrogated. Wisconsin has dealt with this problem by expressly conferring on the employer a right of action against the third party to recover the amount paid into the State Treasury under its dealt-without-dependents provision,⁴⁵ but a federal court has ruled that, as to a death occurring in Minnesota (which has no such special reimbursement provision), a carrier that has made such a payment cannot recover it from a third party in a damage suit governed by Minnesota law.⁴⁶

Somewhat related to this category is that exemplified by *Murray*,⁴⁷ in which the unavailability of the primary right of action results from the fact, not that there were never any dependents, but that the only dependents who could have brought a wrongful death action died before initiating such an action, but not before surviving long enough to entitle their estates to a substantial death benefit award. This problem would only arise in a state under whose law a cause of action of this kind is destroyed by the death of the survivor, but, although many states do not agree with Wisconsin on this point, there are enough that do to make the *Murray* type of problem significant.⁴⁸

The fifth category, in which the employee's action is met by the defense of contributory or comparative negligence, does not at this writing appear to have an actual decided case to exemplify it,⁴⁹ but an

⁴⁴Text accompanying note 95 *infra et seq.*

⁴⁵Wis. STAT. § 102.29(2) (1967). This recovery is barred by the employee's contributory negligence if as great as that of the third party, or, if less, is reduced in proportion to the employee's relative negligence.

⁴⁶*Shelby Mut. Co. v. Girard Steel Supply Co.*, 224 F. Supp. 690 (D. Minn. 1963). The opinion contains an extended discussion of the exact nature of the insurer's liability under section 102.29(2), and of the conflict-of-laws problem presented.

⁴⁷*Murray v. Dewar*, 6 Wis. 2d 411, 94 N.W.2d 635 (1959).

⁴⁸See Annot., 43 A.L.R.2d 1291 (1955) (survival of wrongful death action).

⁴⁹*Cf. Cusumano v. Wilhelmsen*, 267 F. Supp. 164 (S.D.N.Y. 1967), in which the employee's verdict against the third party was reduced from \$119,000 to \$47,600 by a finding of his 60% comparative negligence. The employer, who had been joined by the third party with a claim for indemnity, had counterclaimed against the third party, but at the close of the trial withdrew his counterclaim.

appropriate concatenation of facts is not hard to imagine. Begin with a *Midvale-Hercules* type of episode. The third party has furnished the employer with fuses which, in breach of warranty, are defective. As a result, the employee is injured and the employer pays \$20,000 workmen's compensation. The employee sues the third party in tort. The damages are placed at \$25,000, but the employee's own comparative negligence is found to have been 40 percent, so that his recovery is reduced to \$15,000. The employer, even if he gets the full \$15,000 in reimbursement, is still \$5,000 out of pocket. He may well argue that the employee's comparative negligence is no defense to his separate cause of action for indemnity on the breach of warranty. In other circumstances, instead of a warranty of goods, the employer might have an express indemnity agreement, an implied indemnity agreement based on an implied promise of workmanlike performance, a separate right based on a special relationship like that of bailment or lease, and so on.

The sixth category, involving the defense of personal relationship, is in principle similar to the fifth. Suppose the employee is injured in the course of employment due to the negligent driving of his own wife. In a jurisdiction recognizing the personal relationship defense, the entire third party procedure might be blocked from the start, under the general concept that the cause of action involved is the employee's cause of action. Here the employer might resort to the elementary principle of equitable subrogation that one who without fault has been obligated to pay damages for the wrongful act of a third party is entitled to be indemnified for that loss by the third party.

The seventh category, involving the defense of exclusiveness of the compensation remedy, which on its face looks almost like a typographical error, actually has one or two decided cases to represent it. The *Whittenberg* and *Ruby* cases, which fall in this category, have already been commented on.⁵⁰

In this connection also may be mentioned the Wisconsin case of *Larsen v. J.I. Case Co.*,⁵¹ which contains several variants on this combination. Here the parties were reversed. The general contractor was the plaintiff, and the subcontractor, who was the actual employer of the injured employee, was the defendant. The employee sued the general contractor for damages, which is possible in Wisconsin, since Wisconsin does not accord to the general contractor the immunity of

⁵⁰Discussion in text at notes 29-31 *supra*.

⁵¹37 Wis. 2d 516, 155 N.W.2d 666 (1968).

a statutory employer.⁵² The general contractor impleaded the subcontractor-employer and sought indemnification on the strength of an express agreement under which the subcontractor agreed to indemnify the general contractor for claims against the general contractor arising out of the subcontractor's negligence. The subcontractor asked for summary judgment in its favor on the impleader, on the ground that its compensation liability was exclusive. The trial court acceded to this request, but the supreme court reversed, on the ground that the exclusiveness rule does not apply in the case of an express agreement for indemnification.

The eighth category, in which the statutory remedy is confined to tort while the employer seeks to assert a contract remedy, is also represented by a Wisconsin case, the *Acorn Products* case,⁵³ which is somewhat related to those discussed under the fourth and seventh categories. Here the general contractor as statutory employer had become liable in workmen's compensation to the employee of a sub-subcontractor, since neither the subcontractor nor the sub-subcontractor was insured. Woerfel, the general contractor, held an express contract of indemnity in which the subcontractor, Acorn, agreed to indemnify Woerfel for all claims that might arise out of Acorn's performance. Acorn subcontracted the work to G & W Glass, and it was an employee of G & W Glass that was injured. Acorn did not even qualify as an employer under the Wisconsin Act, since he did not at any time himself have more than two employees. This was significant, because the Wisconsin statute had attempted to deal with the problem of reimbursement of the general employer held liable as statutory employer by expressly providing that the statutory employer could get reimbursement from a subcontractor, but it added the words "if such contractor, subcontractor or other employer was an employer as defined in section 102.04."⁵⁴ The statute thus had a blind spot. It overlooked the intermediate contractor who was not himself an employer at all. When the general contractor turned to the third-party section, he found himself frustrated again. He was not blocked by any theory that Acorn was protected by the exclusiveness-of-compensation-liability rule, since, even if Acorn was treated as a statutory employer, he still remained, as we have seen, a third party in Wisconsin. But this time the obstacle lay in the fact that the Wisconsin third-party section ap-

⁵²*Culbertson v. Kieckhefer Container Co.*, 197 Wis. 349, 222 N.W. 249 (1928).

⁵³*New Amsterdam Cas. Co. v. Acorn Prod. Co.*, 42 Wis. 2d 127, 166 N.W.2d 198 (1969).

⁵⁴WIS. STAT. § 102.06 (1967).

plies only when the third party is a tortfeasor, which he was not here. The court drew a sharp distinction between cases based on tort, such as *Murray*,⁵⁵ and a case such as the present one based on an indemnity contract, and concluded that the insurance carrier could assert as subrogee all the remedies to which Woerfel was entitled under his agreement with Acorn.

Although both *Acorn* and *Larsen* involved express contracts of indemnity, once the principle of exclusiveness has been cracked by an express-contract case, it is not a very great matter to enlarge the crack by assimilating implied agreements to express. Thus, whenever there is an underlying contractual relation, such as for performance of a service, the *Ryan* implied-obligation formula is always a possibility. The *Acorn* facts do not fit very well into this formula, but the *Larsen* facts might; that is, even in the absence of an express indemnity agreement, it might be argued that the subcontractor impliedly promises the contractor to perform the work in a workmanlike way, and to indemnify the contractor for damages incurred by the contractor flowing from a breach of this promise. The Court in *Larsen* is careful to phrase the exception to the exclusiveness rule "the case of an express agreement for indemnification." But it is always hard to draw a line between an express contract and an implied contract, if both are indeed valid contracts recognized by law.

The ninth category listed above involves a fairly common practice under which employers contract to pay their employees medical or other benefits in addition to those required by the compensation statute. In a Tennessee case, *United States Fidelity & Guaranty Co. v. Elam*,⁵⁶ the insurance carrier, under an endorsement to the compensation policy, had paid such excess medical benefits. Although the insurer could not, of course, base a claim for reimbursement of the excess on the third-party provision of the compensation statute, the court held that the carrier had a valid claim in "conventional subrogation" against the third-party tortfeasor. The court said: "To hold otherwise in the case at bar would permit the tortfeasor to escape, to the extent of excess medical and hospital services, the consequences of his wrongdoing."⁵⁷

This case, then, to some extent, gives further support to the broad

⁵⁵*Murray v. Dewar*, 6 Wis. 2d 411, 94 N.W.2d 635 (1959).

⁵⁶198 Tenn. 194, 278 S.W.2d 693 (1955). The court distinguished the contrary result in the Louisiana case of *de Roode v. Jahncke Serv., Inc.*, 52 So. 2d 736 (La. Ct. App. 1951), on differences in the statute, and on the fact there was, in that case, no written agreement for excess compensation as required by the Louisiana statute.

⁵⁷278 S.W.2d at 704.

proposition that the employer's or insurer's statutory third-party remedy should not be deemed exclusive.

There is one special type of situation in which, although the employer does not get full reimbursement, the recognition of a separate cause of action in the employer would seem to run counter to the intention of the statute. This is the case that occurs under the kind of third-party statute that gives the employee, as in Wisconsin, a minimum of one-third of the recovery when the action is brought by the employee.⁵⁸ It also occurs under the Florida practice of "equitable" distribution, which may fall substantially short of full reimbursement of the employer.⁵⁹ In these instances the third party has paid full damages, and it would be inequitable to make him pay more because the legislature has adopted a distribution scheme that for incentive or other reasons leaves the employer less than fully reimbursed. In the *Murray* case, for example, suppose the carrier had succeeded in recovering first against the third party in its independent action. If the theory of allowing the action was followed to its logical conclusion, the carrier would have to be allowed to keep the entire recovery, without giving the employee his statutory one-third. It must be assumed, for purposes of the legal argument, that the employee's own recovery against the third party, reduced as the court indicated it should be by the amount of the carrier's third-party recovery, might sometimes be less than the employee would have got under his minimum one-third share in his own full statutory recovery guaranteed by the statute.

The problem may be even more acute under the Florida "equitable distribution" procedure. In the *Johnson* case, the carrier's complaint against the third party asked for the amount of compensation paid less the amount it had received in equitable distribution of the employee's third-party recovery. Suppose that the insurer had paid the employee \$10,000 in compensation, the third party had paid the employee \$15,000 in damages, and out of this the insurer had been awarded \$7,000 as equitable distribution. Under the insurer's theory in *Johnson*, it would be entitled to recover \$3,000 from the third party to round out its reimbursement. But this would mean that the third party would have paid \$18,000 when the full damages had been found to be \$15,000. The third party, in short, would have been asked to subsidize whatever policy purpose the legislature had in mind when

⁵⁸See *Murray v. Dewar*, 6 Wis. 2d 411, 94 N.W.2d 635 (1959).

⁵⁹See *United States Cas. Co. v. F.A. Johnson, Inc.*, 117 So. 2d 438 (Fla. Dist. Ct. App. 1960).

it decided not to reimburse the carrier in full out of the employee's third-party recovery.

Source and nature of the third party's separate duty to the employer

As observed at the outset of the discussion of *Burnside*, the defense of exclusiveness of the compensation third-party procedure, which has been the concern of the analysis up to this point, is only one of the two hurdles the employer must surmount in bringing a third-party action based on a separate duty owed to the employer himself. The other task is to show that there is such a separate duty, and, if there is, to define it and prove that the third party violated it.

As to the initial question whether there is any duty at all running from the shipowner to the stevedoring company, the Court quoted *Kermarec v. Compagnie Generale Transatlantique*:⁶⁰

The owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

The Court added that this duty would, of course, extend to the stevedoring company, pointing out that no one would doubt that the shipowner would be liable in tort to the stevedoring company if it negligently damaged the stevedore's equipment. Since the stevedore's liability for compensation payments was clearly a foreseeable consequence of the shipowner's negligence causing death of the stevedore's employee, the cause of action here would be equally clear.

The Court then examined in more detail the nature of the duty owed by the shipowner to the stevedore. The duty is not the same as that owed by the shipowner to the stevedore's employee. Specifically, the shipowner does not owe to the stevedore the absolute duty of seaworthiness owed to the employee under *Sieracki*.⁶¹ But the stevedore here did not rely on the unseaworthiness doctrine. It alleged specific acts of negligence.

The Court recalled that, in a different context, it had recognized the existence of a duty of some kind running from the shipowner to the stevedore. In *Weyerhaeuser*,⁶² the question was whether the breach of such a duty necessarily precluded recovery by the ship owner from the stevedore under *Ryan*. The Court had there concluded that at least one kind of breach of duty, failure by the shipowner to discover

⁶⁰358 U.S. 625, 632 (1959).

⁶¹*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

⁶²*Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

a defect created by the stevedore, would not preclude a recovery by the shipowner against the stevedore.

Since *Burnside* arose on the pleadings, and since the courts below did not feel it appropriate to go into the question whether the stevedore's counterclaim adequately alleged a breach of duties owed by the shipowner to the stevedore, the Supreme Court expressed no opinion on whether the conduct of the shipowner's employees in fact amounted to a breach of any such duties. The Court confined its precise holding to a decision that the federal maritime law does impose on the shipowner a duty of due care in the circumstances which the stevedore can assert in a tort action to recover his compensation outlay.

In a potentially significant footnote, however, the Court quoted the passage from the district court opinion in *Hugev*⁶³ defining the shipowner's duties toward the stevedore.⁶⁴ The Supreme Court pointed out that, while the *Hugev* opinion spoke of the listed obligations of care as being implied in fact from the stevedoring contract, the district court also indicated that they constituted "the duty of ordinary care imposed by law toward 'persons rightfully transacting business on ships.'"⁶⁵

The Supreme Court also quoted another district court opinion, that in the *Mickle* case,⁶⁶ which, while rejecting the contractual basis

⁶³*Hugev v. Dampskisaktieselskabet Int'l*, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960).

⁶⁴The district court stated:

The surrounding circumstances of fact, and that of law just recited, prompt the holding that, absent express provision to the contrary, the shipowner owes to the stevedoring contractor under the stevedoring contract the implied-in-fact obligations: (1) To exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workman-like manner and with reasonable safety to persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.

170 F. Supp. at 610-11.

⁶⁵394 U.S. at 417 n.18.

⁶⁶*Mickle v. The Henriette Wilhelmine Schulte*, 188 F. Supp. 77 (N.D. Cal. 1960).

for such obligations, found that the occupier of a ship owed certain duties to a business invitee, such as a stevedore, including the duty not to cause injury by negligent activity, the duty to warn of the latent perils actually known to the occupier, and the duty to inspect the premises to discover dangerous conditions.

Up to this point, the decision on the issue of duty is relatively noncontroversial, since the Court, in order to reverse, had to do no more than show that there was *some* duty.

The really interesting implications of the case lie in what the Court did *not* decide—but will inevitably have to decide sooner or later. Above all, it will be fascinating to see whether some kind of rough symmetry is achieved between the shipowner's rights under *Ryan* and the stevedore's rights under *Burnside*.

The remainder of the Court's opinion carefully avoided answering questions bearing on this ultimate mutual adjustment of rights, but did identify these questions and went out of its way to stress that they are at least open.

If there is to be anything approaching symmetry, the most important single question is the extent to which the stevedore's rights against the shipowner might be affected by the presence of some fault in the stevedore. Under *Weyerhaeuser*, as we have just seen, the shipowner may recover over against the stevedore in spite of some negligence on the shipowner's part, although what that "some" includes is still largely undefined. But can the stevedore similarly recover against the shipowner in spite of some stevedore negligence? The Court carefully declined to answer that question, pointing out that it had to assume at this stage of the case that the stevedore was free of fault in relation to the shipowner. True, the shipowner's pleadings alleged the stevedore's breach of warranty of workmanlike service, but this was not before the Court, since the stevedore's allegation of shipowner negligence was brought, not as a defense to the shipowner's complaint, but as a counterclaim for damages. The Court stressed that it was *not* deciding anything with respect to the interaction between the stevedore's claim for damages and the shipowner's claim for breach of warranty. But it is this very interaction that gives rise to the most interesting and important implications of *Burnside*, and that requires further analysis here.

At this juncture, it should be recalled that in one crucial respect the position of the parties is not symmetrical. The shipowner, in order to have a cause of action against the stevedore at all, has to steer a

course around the exclusive remedy defense possessed by the stevedore as employer. The stevedore has no such problem as to the shipowner, since the shipowner has no such defense based on his own status. The shipowner, accordingly, was required to find a source of liability in the stevedore that could not be said to be "on account of" the employee's injury. This at once ruled out any delictual action, such as contribution, and forced the shipowner to assert that his claim was "on account of" an independent contractual duty running from the stevedore to the shipowner. But the stevedore here was under no inhibition against bringing his action in tort, and this was indeed his primary reliance. Since the rule of comparative negligence rather than the defense of contributory negligence applies in admiralty, presumably the presence of some negligence in the stevedore would serve, not as an absolute defense, but as a basis for reduction in damages, in an action sounding in tort.⁶⁷

The stevedore's counterclaim, however, went on to assert two additional theories, one in contract and one in quasi-contract. Here again, since the Supreme Court already had adequate basis for reversal in its holding that a cause of action in tort was stated, it declined to express an opinion on the other two theories.

The contract theory advanced by the stevedore was that, corresponding to the implied warranty of the stevedore of workmanlike service, there are reciprocal warranties running from the shipowner to the stevedore. The Supreme Court's treatment of this theory, while studiously nondecisive, leaves the distinct impression that, when the question is formally before it for decision, it will recognize the existence of the reciprocal warranty by the shipowner. The Court cited several lower court decisions stating or intimating that the shipowner makes certain affirmative warranties that would support an action for damages,⁶⁸ and none stating or intimating the contrary. Significantly, the only countering argument mentioned by the Court as having been made by the shipowner was there was no privity of contract between

⁶⁷The Supreme Court's statement that it must be assumed at this stage of the case that the stevedore was faultless in relation to the shipowner appears to be merely an identification of the precise character of the issue as a result of its having arisen on the pleadings, rather than an implication that there would be a cause of action *only* if the stevedore were found faultless—which in view of the well-established rule of comparative negligence in admiralty is not a reasonable implication.

⁶⁸*Pettus v. Grace Line, Inc.*, 305 F.2d 151, 155 (2d Cir. 1962) (dissenting opinion of Judge Clark); *The No. 34*, 25 F.2d 602 (2d Cir. 1928); *Cusumano v. Wilhelmson*, 267 F. Supp. 164 (S.D.N.Y. 1967); *Ring v. Motor Vessel Cape Clear*, 226 F. Supp. 709 (N.D. Cal. 1964).

the stevedore and the shipowner because the actual stevedoring contract had been made not with the shipowner but with a time charterer. The Court again side-stepped the issue, since the contracts were not before it, but pointed out that the absence of contractual privity had been found no bar in the reverse situation, when the shipowner had asserted the stevedore's implied warranty of workmanlike service in spite of the interposition of a charterer between them.⁶⁹ In addition, the Court cited one lower court case suggesting that the stevedoring contractor may be the beneficiary of certain of the shipowner's obligations under the charter agreement,⁷⁰ and mentioned no case suggesting the contrary.

As to the question whether the stevedore's contract-based cause of action could survive a showing of some negligence in the stevedore, it seems inconceivable that the Supreme Court would impose a more restrictive rule on the stevedore than on the shipowner. The Court's holding in *Weyerhaeuser*⁷¹ that some negligence in the shipowner would not necessarily foreclose his suit against the stevedore is based on considerations that would all apply with equal force in the reverse direction.

The third theory advanced by the stevedore was that the shipowner has a quasi-contractual duty to indemnify the stevedore for liabilities the stevedore has incurred because of the shipowner's wrong. This was apparently the theory recognized by the district court, which then, however, held that any such duty could not be asserted because of the exclusiveness of the statutory third-party remedy. Here again, while the Supreme Court scrupulously refrained from expressing an opinion on the validity or applicability of the theory, the only morsels it set forth in its discussion were all on the side of validity. After pointing out that the claimed quasi-contractual obligation did not stem from the preexisting contractual relation of the parties but was conferred by law to place the liability where it justly belonged, the Court added that it had itself recognized the objective of the Compensation Act of "placing the burden ultimately on the company whose default caused the injury."⁷² The Court then cited a number of circuit court

⁶⁹*Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

⁷⁰*Drago v. A/S Inger*, 305 F.2d 139, 143 (2d Cir. 1962).

⁷¹*Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 335 U.S. 563 (1958).

⁷²*Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964).

cases⁷³ and one New York court of appeals case⁷⁴ recognizing such a quasi-contractual right of indemnity under federal maritime law, and quoted this summary of the doctrine by a district court:

[A]dmiralty courts have recognized a right to indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by the wrong of another. This right has been recognized in two general classes of cases: those in which the person seeking indemnification was without fault; and those in which such person was passively negligent, but the primary cause of the loss was the active negligence of another.⁷⁵

The assertion of this type of liability by the shipowner against the stevedore should probably be considered barred by the rule of exclusiveness of the employer's compensation liability.⁷⁶ The reason is that the quasi-contractual liability is liability "on account of" the injury, even if the remedy is quasi-contractual in form. But no such problem arises as to the assertion of such a quasi-contractual duty in the shipowner, as the Supreme Court noted at the end of its *Burnside* opinion.

As to each of the three theories advanced by the stevedore, then, it may be concluded that the existence of some negligence in the stevedore would not necessarily bar his action against the shipowner.

In analyzing the interplay between the *Burnside* and the *Ryan* types of action, we must next examine the effect of the relative degree or character of fault in the stevedore and shipowner. The purpose of this inquiry is to see whether the interaction of these reciprocal causes of action is capable of producing an equitable sharing of the ultimate burden of liability.

This task is simplified if we avoid the notoriously troublesome terminology of active-passive or primary-secondary negligence. This is particularly necessary when contractual indemnity is involved, as the

⁷³*Parenzan v. Iino Kaiun Kabushiki Kaisya*, 251 F.2d 928 (2d Cir.), *cert. denied*, *International Terminal Operating Co. v. Iino Kaiun Kaisya, Ltd.*, 356 U.S. 939 (1958); *American President Lines, Ltd. v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397 (2d Cir. 1954); *States S.S. Co. v. Rothschild Int'l Stevedoring Co.*, 205 F.2d 253 (9th Cir. 1953); *United States v. Rothschild Int'l Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950); *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F.2d 182 (2d Cir. 1929).

⁷⁴*McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952).

⁷⁵*Davis v. American President Lines, Ltd.*, 106 F. Supp. 729, 730 (N.D. Cal. 1952).

⁷⁶*See* discussion at 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 76.10(c), 76.44 (1970).

Court reasserted in *Burnside*, citing its caveat in *Weyerhaeuser*.⁷⁷ We achieve a greater degree of precision and factual meaningfulness, and cover the great bulk of the fact situations, if we employ the dichotomy of "creating a danger" and "failing to discover a danger."

It can be shown that, when the shipowner is the plaintiff, he can recover if his fault is failure to discover a danger created by the stevedore, but should not recover if his fault is creating a danger which the stevedore fails to discover.⁷⁸

If the interaction takes the form of affirmative claims by both stevedore and shipowner of contractual breaches of warranty by the other, it seems logically unavoidable that this pattern should work the same in both directions. So, if the stevedore's only fault, in his own claim against the shipowner, was his failure to discover a danger created by the shipowner, he should recover. Under the minority view,⁷⁹ he might also conceivably recover if he justifiably continued to work in the presence of the known danger.

A similar result would presumably follow if the stevedore's claim were in quasi-contract and the shipowner's were in contract. Note that the passage describing the basis of quasi-contractual liability quoted by the Supreme Court in the *Burnside* opinion expressly recognizes the right of the passively negligent party to demand indemnity. The Court quickly pointed out that its caution against the active-passive negligence terminology was directed only to the area of contractual indemnity. Since in practice "passive" or "secondary" usually translates into "failure to discover the danger," the suggested pattern should apply to quasi-contractual as well as contractual claims.

If the stevedore's action against the shipowner is based on tort, while the shipowner's action against the stevedore is based on contract (which in the present analysis is the only basis available to the shipowner), the shipowner's action would either succeed completely or fail completely under the tests just discussed, but the stevedore's action might lead to a division of the liability on comparative negligence principles.

If we apply all this to the question whether these various reciprocal actions can lead to an equitable sharing of the total liability, we

⁷⁷The Court expressly admonished federal courts in the future to avoid in this connection any reference to "theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence." *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569 (1958).

⁷⁸2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.43(a), text accompanying nn.4-12 (1970).

⁷⁹*Id.* at nn.13-18 and accompanying text.

come to the conclusion that as long as these actions are in contract or quasi-contract no such sharing is possible. It is inherent in the nature of the contractual approach that it will usually produce an all-or-nothing result. The reason is that the same conduct that would subject a party to an affirmative claim based on warranty would ordinarily simultaneously bar that party from himself asserting an affirmative claim based on warranty. Suppose the shipowner has created a danger which the stevedore has negligently failed to discover. The stevedore, in the view here presented, would have an action based on breach of the shipowner's duty to the stevedore. But if the shipowner should assert that the stevedore breached its contractual duty of workmanlike service, the stevedore should be entitled to defend on the ground that the shipowner's default in failing to furnish a vessel that could be reasonably worked in safety would be a material breach of their contract that discharged the stevedore from its own obligations.

It follows that any sharing in the sense of dividing the liability on some equitable basis keyed to relative fault would be possible only in a tort action, through application of comparative negligence standards. Note that the potential applicability of this sharing device is severely limited by the fact that it can only occur when the stevedore is the plaintiff.⁸⁰ The shipowner cannot bring a tort-based action because of the operation of the exclusive-liability defense.

Moreover, it must be realized that the great bulk of the cases will continue to be those in which the shipowner takes the offensive. It cannot be assumed that as a result of *Burnside* affirmative claims by the stevedore against the shipowner will become routine, and thus can supply the vehicle for a mutual adjustment of liabilities. The limiting factor here in most cases will be, not the lack of a breach of duty on the part of the shipowner, but the lack of resultant legal damages to the stevedore. The reason is that normally the stevedore's measure of his damages would be the amount of his compensation outlay, and this usually will have been repaid to him out of the longshoreman's recovery against the shipowner. It is only when that recovery is in-

⁸⁰*Cf.* *Chevis v. Luckenbach Overseas Corp.*, 228 F. Supp. 642 (E.D. Tex. 1964), in which the court, with a minimum of concern about the complex doctrinal difficulties involved, divided the indemnity damages equally on a tort-contribution basis. *Hebert v. D/S Ove Skou*, 232 F. Supp. 277 (E.D. Tex. 1964) also allocated the damages on a comparative basis. The comparative allocation was reversed in *D/S Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), but the possibility of some such sharing procedure was not entirely ruled out.

The idea that a tort-contribution approach in the shipowner's suit can be pressed into service to achieve an adjustment of the loss in this type of case must be dismissed as sharply out of line with the entire body of federal law since *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

adequate to cover the compensation outlay for special reasons such as the statutory limitation on wrongful death recoveries in *Burnside*, and the other eight situations identified earlier,⁸¹ that the stevedore can show any damage.

One of the opinions sometimes cited as suggesting the use of the stevedore's counterclaim as the vehicle for apportioning liability between stevedore and shipowner is Judge Clark's dissenting opinion in *Pettus v. Grace Line, Inc.*⁸² He first states that a breach by the shipowner of its duty to the stevedore to provide winches in good order would give the stevedore a right of action in damages even if it would not be a material breach of contract barring the shipowner's claim against the stevedore. He then says:

The measure of damages in such a situation would be the foreseeable pecuniary loss caused by the breach, which in this case would be that portion of the damages paid to Pettus [the longshoreman] attributable to the shipowner's wrongful provision of inadequate equipment.⁸³

The central theory of this suggestion is an ingenious one, in that if valid it would surmount the all-or-nothing problem inherent in the nature of a breach of warranty action. It raises two problems. The first question is whether the stevedore can affirmatively assert as damages a portion of the damages paid to the longshoreman by the shipowner. The argument is that this liability has in turn been passed on to the stevedore and that a portion of the stevedore's liability is thus a loss flowing from the shipowner's fault. But this is certain to be countered with the argument that the stevedore vis-à-vis the shipowner cannot be heard to assert as damages to himself the payment of damages that he himself has already been held to be fully liable for. At this writing, the device suggested by Judge Clark has apparently not been actually tested in a reported case, although such a possibility has been hinted at in one or two opinions.⁸⁴

The second question is whether there can ever be a degree of fault on the part of the shipowner grave enough to support an affirmative claim for damages but not grave enough to preclude the shipowner's claim for indemnity. It seems highly unlikely that this combination

⁸¹Discussion accompanying note 38 *supra et seq.*

⁸²305 F.2d 151, 155 (2d Cir. 1962).

⁸³*Id.* at 156.

⁸⁴*See, e.g.,* D/S Ove Skou v. Hebert, 365 F.2d 341, 351n. 18 (5th Cir. 1966); Cusumano v. Wilhelmsen, 267 F. Supp. 164 (S.D.N.Y. 1967) (the stevedore had filed a counterclaim against the shipowner but had withdrawn it at the end of the trial).

could occur. The main reason the idea has any currency is to be found in some loose language by the Supreme Court in *Italia*,⁸⁵ which badly needs correcting, and in some careless readings of its language in *Weyerhaeuser*.⁸⁶

In *Italia*, the Court in its zeal to stress the difference between liability for breach of warranty and liability for negligence went much further than the case before it required or the authorities justified when it said:

[R]ecovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary.⁸⁷

For this statement the Court cited *Weyerhaeuser*. If the quoted passage had stopped after the word "negligence," it would have been correct. But the addition of the words "whether active or passive, primary or secondary" was both gratuitous and misleading. The actual holding in *Weyerhaeuser* went no further than to say that the shipowner's unspecified negligence found by the jury might have consisted of its passive and secondary negligence in failing to discover a danger created by the stevedore. It carefully stopped short of saying that the other somewhat more active kinds of possible negligent conduct would not have precluded the shipowner's action. True, at another point, the Court warned generally against using the active-passive or primary-secondary negligence vocabulary in connection with contractual indemnity, but this is a far cry from saying that the shipowner may be guilty of primary negligence and still bring a successful indemnity suit against the stevedore. In the only cases on record in which the shipowner's fault was primary and the stevedore's merely secondary, in that the shipowner created the danger and the stevedore failed to discover it, the shipowner's fault has indeed been held to bar his indemnity action.⁸⁸

There are a few cases that do not stop with the simple dichotomy of creating a danger and failure to discover it. If the stevedore discovers the danger and continues to work in the presence of it, most

⁸⁵*Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

⁸⁶*Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

⁸⁷376 U.S. at 321.

⁸⁸See 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.43(a), nn.9-12 and accompanying text (1970).

cases hold that he may then become liable in indemnity.⁸⁹ The same has been held when the stevedore negligently activates a latent dangerous condition created by the shipowner.⁹⁰ But in both these cases it could be said that, as between the two degrees of fault, that of the stevedore had become primary. The very term "primary" indicates that the conduct of the two must be judged relatively, not absolutely. If the affirmative negligent conduct of the stevedore, because he had the last and best chance to prevent the accident, becomes the primary fault, it must follow that relatively the shipowner's fault is relegated to the status of "secondary"—so that even in these cases it cannot accurately be said that a primarily negligent shipowner brought a successful indemnity action.

The confusion here stems from the fact that considerations or degrees of negligence are not relevant to the liability of the person charged with a contractual duty, but are relevant to the standing of the person asserting a breach of that duty. The duty of workmanlike performance imposed on the stevedore is not a duty that can be necessarily satisfied by a showing of use of due care. Thus, in *Italia*, the stevedore created a dangerous condition by bringing on board a defective rope. The Court said:

The issue of breach of the undertaking does not turn on whether the contractor knew or should have known that his equipment was safe, but on whether the equipment was in fact safe for its intended use.⁹¹

But when it comes to judging whether the indemnitee's conduct is sufficient to preclude his assertion of the indemnity, the language of negligence is usually encountered. Thus, in *Weyerhaeuser*, the Court listed three possible acts of negligence of the shipowner, and asserted that the third, failure to detect the unsafe condition, was not a bar to the shipowner's action. As to the other two, failure to remove the rickety shelter earlier, or failure to correct or warn of a known dangerous condition, the Court expressed no opinion, leaving the inference that there is some point in the ascending scale of the indemnitee's own negligence at which his action is barred.

When the positions are reversed, consistency and symmetry would require that the contractual duty of the shipowner to the stevedore be cast in terms free from any negligence content, while the stevedore's standing to assert that duty might be judged in negligence terms.

The description of the shipowner's duty to the stevedore set out in

⁸⁹*Id.* at n.13. *But cf.* cases *contra* at nn.14 & 15 (1970).

⁹⁰*Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

⁹¹376 U.S. at 321-22.

Hugev and quoted by the Supreme Court in *Burnside*,⁹² may be criticized on the ground that it mixes a negligence concept into a contractual duty. Instead of saying that the shipowner owes the stevedore the duty to place the ship in a condition in which it can be worked in safety, it says that the shipowner owes a duty "to exercise ordinary care under the circumstances" to place the ship in such a condition. The Court was stating a minimum standard of duty and, as the Court itself recognized, if the duty went no further than this it would add nothing to the duty imposed by law on the shipowner to anyone rightfully transacting business on the ship. It would certainly be more in line with the trend of indemnity law represented by *Italia* to hold that the shipowner has a duty, implied from the stevedoring contract, not merely to use care, but in fact to provide a vessel that can reasonably be worked upon by the stevedore in safety and in compliance with latter's duty of workmanlike service.⁹³ At the same time, the shipowner should be entitled to assert that the stevedore is precluded from demanding indemnity based on this duty by the same degree of negligence that would preclude a stevedore's suit against a shipowner under *Weyerhaeuser*.

The main purpose of this discussion is to show the danger of sweeping statements that negligence is irrelevant in cases based on a warranty either way growing out of contract. Negligence is irrelevant in the sense of not being indispensable when the question is whether the stevedore has breached his warranty, and probably should also be when the question is whether the shipowner has breached his. But negligence cannot be ignored when the issue is whether the person asserting the indemnity is precluded by his own conduct from relying on the other's warranty.

To summarize the analysis of the possibility of an equitable sharing of the liability between the employer and third party: there appear to be only two ways in which something other than an all-or-nothing result could be produced—one well established but limited in applicability, the other of doubtful acceptability. The former is the bringing of a tort action by the employer accompanied by an appropriate reduction in his recovery for his own comparative negli-

⁹²For the complete quotation from *Hugev* see note 64 *supra*.

⁹³This view was accepted in *Highfill v. Sea-Land Serv., Inc.*, Civil No. SOC 4961 (Los Angeles City Super. Ct., Nov. 17, 1965), *rev'd sub nom.* *Sea-Land Serv., Inc. v. Matson Terminal Co.*, 253 Cal. App. 2d 885, 61 Cal. Rptr. 756 (Ct. App. 1967). The second district court of appeal limited the shipowner's duty to one of ordinary care to have a ship reasonably capable of being unloaded with safety.

gence—a procedure which ordinarily would only be available in those special cases in which the employee's third-party recovery is inadequate to reimburse the employer for his compensation outlay. The latter possibility would be acceptance of Judge Clark's suggestion, in his *Pettus* dissent, that the employer when sued in indemnity by the third party might counterclaim and assert as damages that portion of the total damages paid to the employee attributable to the third party's default.⁹⁴ Desirable as this result might be, the chances of its accomplishment by judicial decision seem small, for the reasons discussed earlier. Ideally, this problem should be disposed of as one important detail in the much-needed overall statutory treatment of the entire congeries of problems associated with the *Ryan* and *Burnside* cases.

The discussion so far has been largely centered on the implications of *Burnside*, but it goes without saying that much of the analysis will apply, *mutatis mutandis*, to the question under state law of the source and nature of the third party's duty to the employer and its interaction with the employer's duty to the third party. Just as *Ryan* has loomed large in the story of subsequent state decisions on the employer's separate liability to the third party, so it will not be surprising if *Burnside* has a marked impact on state cases involving an alleged independent duty of the third party to the employer.

Increased premiums as basis of damage suit

There remains one further controversy in this area, beyond the problem of exclusiveness and the problem of the source and nature of the third party's duty to the employer. This concerns the situation, already touched upon briefly,⁹⁵ in which the employer is subjected to increased insurance premiums as the result of the third party's wrong, but for some special reason gets no subrogation rights under the third-party statute.

This problem arose in a Minnesota case,⁹⁶ due to the somewhat unusual⁹⁷ Minnesota experience-rating system under which premium rates were apparently fixed according to accident experience rather than the amount of money actually paid out in claims. So, when an employee died as the result of a compensable injury, but left no dependents, the employer had his premium raised by \$8,356, while at

⁹⁴Text at note 81 *supra*.

⁹⁵Text at note 40 *supra*.

⁹⁶*Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934).

⁹⁷*Cf.*, e.g., NATIONAL COUNCIL ON COMPENSATION INSURANCE, EXPERIENCE RATING PLAN 10-11 (1940), under which, even if the employer becomes liable for and pays compensation, the payment does not affect his experience rating if the insurer obtains third party reimbursement.

the same time acquiring no right as subrogee to recoup this sum from the tortfeasor, who was a subcontractor, since no compensation had been paid or accepted.

The court held that the incurring of the obligation to pay these premiums was too remote to stand as damages flowing from the third party's negligence. The summary of the plaintiff's brief preceding the opinion indicates that the plaintiff relied on the defendant's breach of duty of due care toward the employee, which proximately resulted in loss to the plaintiff.

In Ohio, a similar problem arose because Ohio has no subrogation statute at all. It was at first held that a suit by the employer against the third party would lie for the amount of increased premiums.⁹⁸ In the same case, after a trial on the merits, a ceiling was placed on these damages equal to the amount of compensation paid.⁹⁹ Still later, the case was overruled.¹⁰⁰ The significance of the overruling for the precise issue here under examination is unclear,¹⁰¹ but the court did say that the damages were speculative.

Two issues must be separately identified here. One is whether damages in the form of increased premiums are speculative in the sense of being too remote. The other is whether they are speculative in the sense of being too vague in amount.

As to the first, it is difficult to see why the causal connection should be thought remote. There is an immediate causal nexus between the accident experience and the raising of the employer's insurance premium. Presumably this factor in the employer's rate can be isolated and proved in court by the introduction of appropriate evidence.

The argument relied on by the Minnesota court is that the loss to the employer was the result of his own employment contract with his employee, one incident of which was the obligation to carry compensation insurance. The court then invokes cases in which private insurance companies have been denied recovery against wrongdoers for claims paid by the insurer as the result of deaths or property damage caused by the defendants. The analogy is misconceived. For one thing, the employer's obligation to carry compensation insurance is not a matter of voluntary choice; it is imposed by law. For another, an insurance company is in the business of absorbing losses and collects

⁹⁸Midvale Coal Co. v. Cardox Corp., 152 Ohio St. 437, 89 N.E.2d 673 (1949).

⁹⁹Midvale Coal Co. v. Cardox Corp., 157 Ohio St. 526, 106 N.E.2d 556 (1952).

¹⁰⁰Fischer Constr. Co. v. Stroud, 175 Ohio St. 31, 191 N.E.2d 164 (1963).

¹⁰¹Discussion at note 28 *supra* and accompanying text.

premiums to cover that very purpose. An employer, however, does not collect premiums—he pays them. The Minnesota decision must be viewed as just one more unfortunate by-product of the early failure of courts to grasp the true nature of workmen's compensation—in this instance falling into the error of equating workmen's compensation with personal accident, life or property insurance.

As to the second problem, uncertainty as to the amount of the damages, there is more difficulty, but it should not be fatal to the claim. The obvious question is: how far into the future should the increased premiums be projected? In *Oakes*, the employer evidently asked for the total amount of increase that had accumulated in the four years preceding the bringing of the suit. In *Stroud*, the employer arbitrarily set the requested amount at the increase in premiums over the next five years. In *Midvale*, the limitation imposed was the amount of compensation actually paid—a device obviously not available in the *Oakes* type of case, where no compensation was paid.

Because the special situations in which this problem can arise are markedly varied, it would be difficult to suggest an all-purpose answer to this problem. One thing is clear, however: in line with a well-established maxim of the law of damages, if the right to damages is itself established, that right is not itself destroyed merely because there is difficulty in assessing the exact amount of damages.

If an *Oakes*-type case were to arise today, the employer would have the benefit, not only of the prevalence of a more modern concept of workmen's compensation bearing on the central issue, but also of the entire new line of cases in which employers as well as third parties recover directly from each other losses flowing from a breach of an independent duty imposed by contract or law. Since the defendant in *Oakes* was a subcontractor, the employer could assert that the defendant owed the employer a duty to do his work carefully, and that the negligent injury of plaintiff's employee was thus a direct breach of a duty to the plaintiff-employer himself. This approach was apparently overlooked, since the opinion goes off on entirely different arguments. Moreover, there is no reference to an argument that statutory subrogation is exclusive. This is more understandable, since it seems reasonably clear that the exclusive remedy argument would not be applicable here. There being no compensation to be paid, the statutory subrogation provision would be inoperative. The facts in *Oakes*, then, properly presented today, might well support a recovery by the employer.