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Steven M. Weinberg

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### Recommended Citation

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Available at: <https://scholarship.law.stjohns.edu/lawreview/vol53/iss2/3>

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## ADMIRALTY LAW

### RECOVERY DENIED TO "NON-VESSEL" IN THIRD-PARTY ACTION OVER AGAINST MUTUALLY CULPABLE STEVEDORE UNDER 1972 AMENDMENTS TO LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

*Zapico v. Bucyrus-Erie Co.*

Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),<sup>1</sup> an injured longshoreman<sup>2</sup> could bring an action for damages against a vessel based on the latter's breach of its warranty of seaworthiness.<sup>3</sup> The vessel was

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<sup>1</sup> Pub. L. No. 92-576 §§ 1-22, 86 Stat. 1251 (amending 33 U.S.C. §§ 901-950 (1970)) (codified at 33 U.S.C. §§ 901-950 (1976)). For a comprehensive analysis of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), see A. MILLUS & J. MANES, *THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND ITS EXTENSIONS* (1978).

<sup>2</sup> Employees performing maritime tasks may be generally divided into two categories: the crew of a vessel, known as seamen, and harbor workers, comprised of ship repairmen, ship builders, longshoremen and others. 1A E. BENEDICT, *ADMIRALTY* § 1 (7th ed. E. Jhirad 1977). Longshoremen are employed and supervised by stevedoring companies (stevedores) who contract with shipowners to perform the duties of loading and unloading the vessel. See *North-east Marine Terminal Co. v. Caputo*, 432 U.S. 249, 254 n.4 (1977); Proudfoot, *The "Tar Baby": Maritime Personal-Injury Indemnity Actions*, 20 STAN. L. REV. 423, 424 n.3 (1968).

Whereas seamen injured on or about the vessel have traditionally been afforded remedy under the general maritime law theories of maintenance and cure and unseaworthiness, see BENEDICT, *supra*, § 1; G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* ch. VI (2d ed. 1975), and the Jones Act, 46 U.S.C. § 688 (1976), longshoremen's remedies have been in a constant state of flux and confusion. See Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MAR. L. & COM. 1, 5-10 (1974). If injured aboard a vessel, a longshoreman could recover from the vessel owner for negligence under general maritime law, G. GILMORE & C. BLACK, *supra*, § 6-4, at 278, and prior to the original LHWCA, Act of March 4, 1927, ch. 509, 44 Stat. 1424, as amended by 33 U.S.C. §§ 901-955 (1976), from his stevedore-employer. *Atlantic Transp. Co. v. Imbrovek*, 234 U.S. 52 (1914). Land-based injuries to longshoremen, on the other hand, were governed by state workmen's compensation laws. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Responding to the demands of longshoremen and their employers for workmen's compensation coverage for injuries sustained on navigable waters, Congress enacted the first LHWCA. G. GILMORE & C. BLACK, *supra*, § 6-48, at 417.

<sup>3</sup> *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89-100 (1946). The warranty of seaworthiness is an obligation under the general maritime law on the part of the vessel owner to a seaman to maintain a reasonably safe ship. *Id.* at 90. Absolute and non-delegable, *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102 (1944), this warranty covers not only the vessel itself, but also its "appurtenant appliances and equipment," *id.*, work areas, cargo and methods of operation. Proudfoot, *supra* note 2, at 424. See generally *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971); G. GILMORE & C. BLACK, *supra* note 2, §§ 6-38 to -44. If breached, the warranty imposes absolute liability on the vessel for a seaman's resulting injuries. Although originally said to spring from the employment contract between the vessel and seaman, *The Osceola*, 189 U.S. 158, 171 (1903), the warranty was later deemed to be based on the hazardous nature of the seaman's occupation. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946). As a result, the *Sieracki* Court extended its protection to longshoremen because they were exposed to the same hazards. *Id.* at 99.

then permitted to seek indemnity from a stevedore<sup>4</sup> whose breach of its warranty of workmanlike performance resulted in the vessel's liability.<sup>5</sup> Under the amendments,<sup>6</sup> the remedy of unseaworthiness was abolished,<sup>7</sup> leaving negligence as the sole basis for a longshoreman's recovery against a vessel.<sup>8</sup> Furthermore, the vessel's right to recover indemnity from a stevedore was eliminated.<sup>9</sup> Congress, however, did not expressly address the right of a "non-vessel" to be indemnified by a concurrently negligent stevedore in a third-party

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<sup>4</sup> From the outset, the employer's obligation to pay compensation under the LHWCA was absolute and not based upon fault. 33 U.S.C. §§ 903, 904 (1976).

<sup>5</sup> *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Prior to the *Ryan* decision, the shipowner would be forced to assume complete liability for a longshoreman's injuries, even if its degree of culpability was considerably less than that of the stevedore or longshoreman. Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587, 590-91 (1974); see notes 31-35 and accompanying text *infra*.

<sup>6</sup> Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (codified at 33 U.S.C. § 905(b) (1976)). Section 905(b) provides in pertinent part:

In the event of injury to a person covered under this chapter caused by the negligence of a *vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such *vessel* as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the *vessel* for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the *vessel* to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the *vessel* under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the *vessel* except remedies available under this chapter.

33 U.S.C. § 905(b) (1976) (emphasis added).

Congress recognized that the "substantially" increased number of third party actions after the *Sieracki* and *Ryan* decisions had resulted in a situation in which "much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H.R. REP. No. 1441, 92d Cong., 2d Sess. 5, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4702 [hereinafter cited as H.R. REP., CONG. & AD. NEWS]. For a complete discussion of the congressional history behind the amendments, see *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974). See generally Cohen & Dougherty, *supra* note 5; Coleman & Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 35 MD. L. REV. 351 (1976); Shorter, *In the Wake of the 1972 Amendments to the L. & H.W.C.A.: The Vessel's Rights Against the Stevedore*, 7 J. MAR. L. & COM. 671 (1976); *The Second Circuit Note, 1974 Term*, 50 ST. JOHN'S L. REV. 280 (1975); see also *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974); *Munoz v. Flota Merchante Grancolombiana S.A.*, 553 F.2d 837, 840-41 (2d Cir. 1977); *Galimi v. Jetco, Inc.*, 514 F.2d 954 (2d Cir. 1975).

<sup>7</sup> 33 U.S.C. § 905(b) (1976).

<sup>8</sup> H.R. REP., *supra* note 6, at 6, reprinted in CONG. & AD. NEWS 4703.

<sup>9</sup> *Id.*

action.<sup>10</sup> Recently, in *Zapico v. Bucyrus-Erie Co.*,<sup>11</sup> the Second Circuit held that section 905(b) does not "by its own force" cut off the right of a negligent non-vessel to indemnification from a stevedore who also was at fault in causing a longshoreman's injury.<sup>12</sup> The court further held, however, that indemnity may only be recovered against the stevedore if there is a direct contractual relationship between these parties or if the non-vessel is an intended third-party beneficiary of the vessel-stevedore contract.<sup>13</sup>

In *Zapico*, a hydrocrane being driven down a ship's ramp during loading operations failed to brake and struck two longshoremen.<sup>14</sup> Suit was brought against the vessel by the estate of the deceased longshoreman and an injured co-employee. Bucyrus-Erie, the manufacturer of the crane, and Atlantic Container Line, Ltd. (ACL), the stevedore, were found equally responsible for the accident.<sup>15</sup> Statutory compensation benefits were paid by ACL<sup>16</sup> and the plaintiffs recovered tort damages from Bucyrus, who sought contribution or indemnity in a third-party action against ACL.<sup>17</sup> Finding that the

<sup>10</sup> *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 716 (2d Cir. 1978), *rev'g* 434 F. Supp. 567 (S.D.N.Y. 1977). Neither the legislative history of the 1972 amendments nor the language of § 905 contain any reference to non-vessels. See 33 U.S.C. § 905 (1976); H.R. REP., *supra* note 6, at 4-8, *reprinted in* CONG. & AD. NEWS 4701-05.

<sup>11</sup> 579 F.2d 714 (2d Cir. 1978).

<sup>12</sup> *Id.* at 721-22.

<sup>13</sup> *Id.* at 722.

<sup>14</sup> *Id.* at 716. At the time of the accident, the crane was being driven by an Atlantic Container Line, Ltd. (ACL) employee. *Id.*

<sup>15</sup> *Id.* at 716-17. The jury found by special verdict that both ACL's failure to provide a competent driver and Bucyrus' negligent manufacture of the crane were proximate causes of the accident, 434 F. Supp. at 569, but that Bucyrus was not liable under breach of implied warranty or strict products liability theories. Brief Amicus Curiae of the Nat'l Ass'n of Stevedores at 4, *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978). The driver of the crane was found to be incompetent but not negligent. 579 F.2d at 717.

<sup>16</sup> A longshoreman's acceptance of compensation benefits operates as an assignment to his employer of the former's tort claim, unless the longshoreman commences an action within six months from the time of the injury. 33 U.S.C. § 933(b) (1976). Double recovery by the employee is prevented by the imposition of an implied employer's lien on any damages awarded in the longshoreman's tort action. *The Etna*, 138 F.2d 37 (3d Cir. 1943); see *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd per curiam sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953); 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 100, at 181-83 (3d ed. 1975).

<sup>17</sup> 579 F.2d at 717. Under the doctrine of contribution, where two or more persons' tortious conduct concurrently cause injury to a third party, each bears liability equal to his share of fault. W. PROSSER, *THE LAW OF TORTS* § 51, at 310 (4th ed. 1971). Where one tortfeasor has paid the entire judgment, he may recoup from the other tortfeasors their proportionate shares of the judgment. *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 731 (D.C. Cir. 1972). Under the common law, contribution among joint tortfeasors was generally barred. See generally W. PROSSER, *supra*, § 50, at 305-06; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131-35 (1932). The rationale for the rule against contribution was that public policy demands that the courts not "make relative value judgments of

immunity afforded stevedores under section 905(b) only precludes suit by a vessel,<sup>18</sup> the district court concluded that, because Bucyrus was a non-vessel, section 905(a) was the only possible source of protection for the stevedore.<sup>19</sup> Since section 905(a) only insulates stevedore-employers from damages "on account of" the longshoreman's death or injury, the court held that Bucyrus could recover "partial indemnity"<sup>20</sup> either as a third-party beneficiary of ACL's implied warranty of workmanlike performance or under a theory of quasi-contract.<sup>21</sup> ACL was thereupon ordered to reimburse Bucyrus for half of the jury award.<sup>22</sup>

A unanimous Second Circuit<sup>23</sup> reversed the district court's decision.<sup>24</sup> Judge Friendly reasoned that in light of the express language

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degrees of culpability among wrongdoers." *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972) (citation omitted). See generally Leflar, *supra*, at 133-35. At least 23 states have statutes permitting contribution between joint tortfeasors. W. PROSSER, *supra*, § 50, at 307-08; Leflar, *supra*, at 144-46.

Under the doctrine of indemnity, on the other hand, the entire loss is shifted "from one tortfeasor who has been compelled to pay [the entire judgment] to the shoulders of another who should bear it instead." W. PROSSER, *supra*, § 51, at 310. Non-contractual, or tort indemnity, is based "merely upon a difference between the kinds of negligence of the two tortfeasors; as for instance, if that of the indemnitee is only 'passive,' while that of the indemnitor is 'active.'" *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951). As between contracting parties, contractual indemnity is available either through an express indemnity agreement, *Porello v. United States*, 153 F.2d 605, 607-08 (2d Cir. 1946), *aff'd in part, rev'd in part sub nom. American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947), or through a general contractual relationship from which an obligation to indemnify can be implied. See 2A A. LARSON, *WORKMEN'S COMPENSATION LAW* §§ 76.42-.43 (1976) [hereinafter cited as 2A LARSON]; Note, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490, 492-93 (1969). Under third party beneficiary law, an intended beneficiary, see RESTATEMENT (SECOND) OF CONTRACTS § 133 (1965), may seek indemnity from the promisor where the latter has an express indemnity agreement with the promisee, see, e.g., *Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79 (4th Cir. 1967), or where the promise to indemnify is implied, see, e.g., *Williams v. Pennsylvania R.R.*, 313 F.2d 203, 210-13 (2d Cir. 1963).

<sup>18</sup> 579 F.2d at 717; see 434 F. Supp. at 569.

<sup>19</sup> 434 F. Supp. at 569.

<sup>20</sup> Claims based on a theory of "partial indemnification" have been uniformly discredited because they contravene the basic distinction between contribution and indemnity. See, e.g., *LoBue v. United States*, 188 F.2d 800, 803-04 (2d Cir. 1951); *Rock v. Reed-Prentice Div. of Packaging Mach. Co.*, 39 N.Y.2d 34, 39, 346 N.E.2d 520, 522, 382 N.Y.S.2d 720, 722 (1976). For example, in *LoBue*, a vessel sought "partial indemnity" under the LHWCA from a mutually negligent stevedore for the tort damages paid to an injured longshoreman in the stevedore's employ. After rejecting the vessel's claim for contribution, the court stated that "to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule [against contribution] . . . by a mere change in nomenclature from 'contribution' to 'indemnity.'" 188 F.2d at 803-04.

<sup>21</sup> 434 F. Supp. at 569-70.

<sup>22</sup> 579 F.2d at 717.

<sup>23</sup> The panel consisted of Judges Friendly, Gurfein and Meskill.

<sup>24</sup> 579 F.2d at 726.

of section 905(b) and the absence of references to non-vessels in the amendments' legislative history, non-vessel actions were not contemplated by Congress when it enacted that provision prohibiting indemnity suits by "vessels."<sup>25</sup> Judge Friendly noted, however, that section 905(a) of the LHWCA continues to bar actions against the stevedore brought "on account of" the employee's injury.<sup>26</sup> Thus, while a suit for contribution as well as one in quasi-contract<sup>27</sup> would

<sup>25</sup> *Id.* at 721-22. A "vessel" is statutorily defined as "any vessel upon which . . . any person entitled to benefits under this chapter suffers injury or death . . . and said vessel's owner, owner pro hac vice, agent, operator, charter, or bareboat charterer, master, officer, or crew member," 33 U.S.C. § 902(21) (1976), and "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (1976).

<sup>26</sup> 579 F.2d at 719. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Supreme Court held that claims for contribution may not be made in non-collision maritime cases. *Id.* at 284-85. The Court reasoned that the common-law rule against contribution controlled and that "it would be unwise to attempt to fashion new judicial rules of contribution and . . . the solution of this problem should await congressional action." *Id.* at 285.

Several Second Circuit decisions have reached a similar conclusion on the basis of the LHWCA's exclusive liability clause. See *Lopez v. Oldendorf*, 545 F.2d 836 (2d Cir. 1976), *cert. denied*, 431 U.S. 938 (1977); *Slattery v. Marra Bros.*, 186 F.2d 134 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951); *American Mut. Liab. Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950); *Porello v. United States*, 153 F.2d 605 (2d Cir. 1946), *aff'd in part, rev'd in part sub nom. American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). The exclusivity clause, § 905(a), provides in part:

The liability of the employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employee fails to secure payment of compensation as required by this chapter, . . . an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death . . . .

33 U.S.C. § 905(a) (1976) (emphasis added). The rationale for the Second Circuit's conclusion that this section precludes contribution is as follows:

For a right of contribution to accrue between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. . . . Since the [employee] has no cause of action against his employer, the [third party] can claim no contribution on the theory of a common liability which it has been compelled to pay.

*Porello v. United States*, 153 F.2d 605, 607 (2d Cir. 1946), *aff'd in part, rev'd in part sub nom. American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947); see *Galimi v. Jetco, Inc.*, 514 F.2d 949, 956 (2d Cir. 1975); 2A LARSON, *supra* note 17, § 76.21.

<sup>27</sup> District court Judge Owen approved quasi-contractual recovery arising from a breach of an independent duty owed by ACL to Bucyrus. 434 F. Supp. at 569. This duty was stated to spring from the stevedore's warranty of workmanlike performance running from the vessel, which, like a manufacturer's warranty of its product, would entitle a foreseeable third party injured by a breach of that warranty to recover indemnity from the warrantor. *Id.* at 570 (citing *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960)). The district court noted that this right to quasi-contractual recovery as between an employer and his employee has been upheld in New York notwithstanding the state workmen's compensation

be barred under this section, the court reaffirmed the rule that a contract-based indemnity action is not "on account of" the injury and therefore may be maintained against a concurrently negligent stevedore.<sup>28</sup> Since Bucyrus was not in the position of a third party traditionally entitled to benefit from the stevedore's implied warranty<sup>29</sup> and there was no express indemnity agreement between ACL and Bucyrus, the *Zapico* panel held that no action could be maintained against ACL.<sup>30</sup>

The vessel's indemnity action, first enunciated by the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,<sup>31</sup> was a judicial response to the hardships encountered by shipowners burdened with absolute liability for longshoremen's injuries under the unseaworthiness doctrine<sup>32</sup> and the inability to seek contribution

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statute upon which the LHWCA was fashioned. 434 F. Supp. at 570 (citing *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938)). Judge Owen further supported his finding by relying on a New York case upholding apportionment of damages between a manufacturer and a compensation-paying employer, both of whom had been found liable for injuries to the latter's employee. 434 F. Supp. at 570 (citing *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972)). The Second Circuit rejected the district court's reliance on the quasi-contract theory, holding that recovery based on that ground would essentially be non-contractual tort indemnity, which is recovery "on account of" the employee's injury and therefore barred by § 905(a). 579 F.2d at 720. Closer examination of the district court's opinion, however, reveals that Judge Owen based his indemnity holding on third party beneficiary and apportionment theories, see 434 F. Supp. at 569-70, the former of which was subsequently approved by the Second Circuit. See 579 F.2d at 722. The unfortunate use of "quasi-contract" language in connection with warranty and equitable apportionment terminology, see 434 F. Supp. at 569-70, obfuscated Judge Owen's rationale.

<sup>28</sup> 579 F.2d at 720 (quoting G. GILMORE & C. BLACK, *supra* note 1, at 443). The court recognized that an argument could be made that contractual indemnity is "on account of" the longshoreman's injury because without it there could be no indemnity, but reasoned that the weight of precedent dispelled any effect that argument might be given. *Id.* at 720-21.

<sup>29</sup> *Id.* at 722-23. Bucyrus argued that although it was not expressly identified as an intended beneficiary, the stevedore's implied warranty of workmanlike performance running to the vessel should extend to a manufacturer who must "of necessity" use the stevedore's services to load the product onto the vessel. Brief for Third Party Plaintiff-Appellee at 18, *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978). In response, the *Zapico* panel stated that, although lack of privity does not foreclose a remedy based on a contractual indemnity theory, a remote manufacturer is not within the "zone of responsibility" arising out of the primary contract. 579 F.2d at 722 (quoting *DeGioia v. United States Lines Co.*, 304 F.2d 421, 425 (2d Cir. 1962)); see note 55 and accompanying text *infra*.

<sup>30</sup> 579 F.2d at 723. The Second Circuit also considered Bucyrus' request that its liability be reduced on an equitable credit theory. *Id.* at 724. Although precluded from deciding the issue, the court surmised that such a credit would be barred by the Supreme Court decisions of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). See 579 F.2d at 724-25; notes 58-60 and accompanying text *infra*.

<sup>31</sup> 350 U.S. 124 (1956).

<sup>32</sup> See S.S. *Seatrains La. v. California Stevedore & Ballast Co.*, 424 F. Supp. 180, 182 (N.D. Cal. 1976); Villareal, *Halcyon to Ryan to Weyerhaeuser to Cooper—Where Do We Go*

from a concurrently negligent stevedore.<sup>33</sup> Noting that the absolute liability placed on the vessel often led to unjust results, the *Ryan* Court held that a vessel charged with liability for a longshoreman's injuries due to unseaworthiness was entitled to seek indemnity from the stevedore whenever the latter's conduct had brought about the vessel's unseaworthy condition.<sup>34</sup> The stevedore's liability could be predicated upon an express contract to indemnify or upon a breach of its implied warranty of workmanlike performance.<sup>35</sup> Subsequent decisions, however, did not restrict this remedy to vessels in privity with the stevedore and charged with unseaworthiness; a breach of the stevedore's warranty also provided grounds for parties not in privity to seek indemnity.<sup>36</sup> As a result, the stevedore was often forced to bear the entire loss,<sup>37</sup> a result contrary to Congress' intent in enacting the original LHWCA.<sup>38</sup>

Congress sought to end this circuitous litigation and the attending injustices by enacting the 1972 amendments.<sup>39</sup> Longshoremen

*From Here*, 6 J. MAR. L. & COM. 593, 593-94 (1975); note 3 *supra*.

<sup>33</sup> *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

<sup>34</sup> 350 U.S. at 125; see *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

<sup>35</sup> 350 U.S. at 128-32. The *Ryan* Court initially sought to determine whether an express agreement by the stevedore to indemnify the shipowner was consistent with § 905 (now § 905(a)) of the original LHWCA, which states that compensation benefits "shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages . . . on account of such injury or death." *Id.* at 128-29 (citing 44 Stat. 1426, 33 U.S.C. § 905 (1970) (amended 1972)). In deciding the issue, the Court stated that the purpose of the exclusivity clause was to limit the employer's obligation to compensation benefits. In return, the employee and those claiming under or through him "on account of such injury" received a *quid pro quo* in the form of guaranteed compensation, regardless of fault. 350 U.S. at 129 (quoting 44 Stat. 1246, 33 U.S.C. § 905 (1970) (amended 1972)). The Court further stated that "the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages," and reasoned that the LHWCA does not eliminate a vessel's right to protect itself from liability by contract. 350 U.S. at 129 (footnote omitted). Notwithstanding the absence of an express agreement of indemnity, the Court held that a stevedore is obligated to reimburse a shipowner for damages occasioned by the stevedore's failure to perform its work "properly and safely." *Id.* at 132-34. Thus, an implied warranty of workmanlike performance was an "inescapable" term of the stevedoring contract. *Id.* at 133-34. Referring to the *Halcyon* non-contribution rule, the Court stated that the indemnity liability is not "on account of" the longshoreman's injury but instead based upon an independent obligation in contract. *Id.* at 130.

<sup>36</sup> Compare *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 423 (1960), with *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975) (pre-1972 injury), and *Williams v. Pennsylvania R.R.*, 313 F.2d 203 (2d Cir. 1963).

<sup>37</sup> See *Munoz v. Flota Merchanta Grancolombiana S.A.*, 553 F.2d 837, 839-40 (2d Cir. 1977); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 411 (E.D. La. 1974); G. GILMORE & C. BLACK, *supra* note 2, § 6-55.

<sup>38</sup> H.R. REP., *supra* note 6, at 5, reprinted in CONG. & AD. NEWS 4702.

<sup>39</sup> See *id.* at 4-8, reprinted in CONG. & AD. NEWS 4701-05. "The amended Act," it has

received increased benefits in exchange for relinquishing the remedy of unseaworthiness against the vessel, while the vessel relinquished its right to indemnity and the stevedore agreed to pay higher compensation benefits.<sup>40</sup> The question not expressly addressed by Congress, however, was whether stevedores were to be insulated from indemnity actions by non-vessels.<sup>41</sup> A strict construction of the statutory language and a myopic view of the legislative history justifies the *Zapico* court's decision to allow non-vessel indemnity suits. In addition to limiting itself to injuries "caused by the negligence of a vessel" and stating that "the employer shall not indemnify the vessel,"<sup>42</sup> section 905(b) provides that "the liability of the vessel shall not be based upon the warranty of seaworthiness."<sup>43</sup> Since the warranty of seaworthiness is peculiar to vessels utilized for the transport of cargo and passengers by water,<sup>44</sup> it would seem that in section 905(b) "vessel" can only refer to shipowners.<sup>45</sup> Additionally, although the LHWCA was amended in part to protect the stevedore from the high cost of insurance attributable to vessel indemnification actions,<sup>46</sup> there is no evidence in the legislative history that the

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been noted, "is a paradigm of political compromise." *Munoz v. Flota Merchante Gran Colombiana S.A.*, 553 F.2d 837, 840 (2d Cir. 1977).

<sup>40</sup> See 33 U.S.C. § 905(b) (1976); H.R. REP., *supra* note 6, at 6-7, reprinted in CONG. & AD. NEWS 4703-04.

<sup>41</sup> The district courts which have been presented with the question of non-vessel indemnity rights have reached conflicting conclusions. Compare *Spadola v. Viking Yacht Co.*, 441 F. Supp. 798 (S.D.N.Y. 1977), *S.S. Seatrain La. v. California Stevedore & Ballast Co.*, 424 F. Supp. 180 (N.D. Cal. 1976) (no recovery because purpose of amendments to completely insulate stevedore), *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (E.D. La. 1974) (express indemnity agreements between non-vessel and stevedore may be permissible but there must be reciprocal absolute duties for implied warranty of indemnity), *with Nieves v. Douglas S.S., Ltd.*, 451 F. Supp. 407 (S.D.N.Y. 1978), *Gould v. General Mills, Inc.*, 411 F. Supp. 1181 (W.D.N.Y. 1976), *Cargill v. United States*, 1977 A.M.C. 50 (E.D. Va. 1976) (§ 905(a) does not bar contribution or indemnity claim by non-vessel), *Brkaric v. Star Iron & Steel Co.*, 409 F. Supp. 516 (E.D.N.Y. 1976) (approving recovery under various theories), and *Crutchfield v. Atlas Offshore Boating Serv., Inc.*, 403 F. Supp. 920 (E.D. La. 1975) (§ 905(b) not applicable to non-vessels).

It was initially unclear whether a vessel held liable for negligence was likewise precluded from seeking indemnity under § 905(b). This question has been answered in the affirmative by the courts which have reasoned that Congress intended to prohibit all recovery actions over by shipowners. See, e.g., *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 888 (5th Cir. 1978); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974).

<sup>42</sup> 33 U.S.C. § 905(b) (1976).

<sup>43</sup> *Id.*

<sup>44</sup> See 2 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* 59 & n.16 (3d ed. 1975).

<sup>45</sup> Had Congress intended to eliminate all third party actions, the exclusivity clauses of the amended LHWCA could have been written to reflect that intent. Moreover, § 905(a), under which *Ryan* indemnity was permitted, remains unchanged.

<sup>46</sup> See H. R. REP., *supra* note 6, at 5, reprinted in CONG. & AD. NEWS 4702.

high rates were thought to be the result of indemnification actions by non-vessels.<sup>47</sup> Rather, testimony before the House Committee refers only to indemnification claims by shipowners.<sup>48</sup> It appears that non-vessel indemnity lacked the magnitude and the impact to attract Congressional attention.

Nevertheless, there is ample support for the view that section 905(b) was designed to completely insulate the stevedore-employer from liability beyond compensation payments.<sup>49</sup> The majority of federal courts of appeals interpreting the 1972 amendments have adopted this position, concluding that the stevedore's absolute immunity was an integral element of the final compromise.<sup>50</sup> As several district courts have noted, the Congressional policy disallowing vessel indemnification applies with equal force to non-vessel indemnity actions; money expended for litigation is more profitably directed toward increasing employee benefits.<sup>51</sup> Hence, it can be argued that any third party action which would re-channel these

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<sup>47</sup> See note 10 *supra*.

<sup>48</sup> See *Senate Hearings, Subcomm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 270-74 (1972), reprinted in *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 765-72 (E.D. Pa. 1974).

<sup>49</sup> See notes 50-52 and accompanying text *infra*. A number of district courts have reasoned that § 905(b) eliminated the linchpin of *Ryan* indemnity—the implied warranty of workmanlike performance. See *Spadola v. Viking Yacht Co.*, 441 F. Supp. 798, 802 (S.D.N.Y. 1977); *S.S. Seatrain La. v. California Stevedore & Ballast Co.*, 424 F. Supp. 180, 183 (N.D. Cal. 1976); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 411 (E.D. La. 1974). These courts reason that because the warranty was created by the *Ryan* Court as the reciprocal to the shipowner's warranty of seaworthiness, the elimination of the longshoreman's remedy of unseaworthiness by the 1972 amendments caused the stevedore's warranty likewise to fail. *Spadola v. Viking Yacht Co.*, 441 F. Supp. at 802; *S.S. Seatrain La. v. California Stevedore & Ballast Co.*, 424 F. Supp. at 183. It seems clear, however, that the warranty of workmanlike performance has survived the amendments. Unlike the warranty of seaworthiness, which has as its basis the seaman-shipowner relationship, the stevedore's warranty is an obligation arising from the stevedore-shipowner contract and as such is independent of the seaworthiness remedy. See *Henry v. A/S Ocean*, 512 F.2d 401, 406 (2d Cir. 1975); *DeGioia v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962); *accord*, *Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79 (4th Cir. 1967). Hence, although the shipowner's indemnity action is precluded by the amendments, the warranty itself remains intact. Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MAR. L. & COM. 1, 18 (1974); *cf.* *United States v. San Francisco Elevator Co.*, 512 F.2d 23 (9th Cir. 1975) (warranty of workmanlike performance by non-stevedore LHWCA employer not affected by amendments).

<sup>50</sup> See, e.g., *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978); *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

<sup>51</sup> See, e.g., *Santino v. Liberian Distance Transps., Inc.*, 405 F. Supp. 34 (W.D. Wash. 1975); *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974).

funds into litigation would directly conflict with the Congressional intent.<sup>52</sup>

Either approach, however, results in inequities. Under what may be termed the majority view, the non-vessel is forced to assume full responsibility for the employee's injuries irrespective of its degree of fault.<sup>53</sup> In contrast, under the *Zapico* holding, where the stevedore is concurrently negligent with the non-vessel, the stevedore will bear the burden of liability only when there is an express indemnity agreement or where the stevedore's warranty is extended to the non-vessel.<sup>54</sup> Even under the *Zapico* court's approach, however, in the absence of an express agreement, a non-vessel's right to recover indemnity from a stevedore is extremely limited. While acknowledging various theories under which third party actions have been permitted, the court was careful to point out that these theories generally have been invoked for the benefit of the vessel and, in a few cases, in favor of parties found to have been in a close working relationship with the stevedore.<sup>55</sup> It is apparent that an

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<sup>52</sup> Congress reasoned that by increasing the benefits to be paid by the stevedore and reimposing liability on a third party by foreclosing the *Ryan* indemnity route, the amendments would motivate the parties to increase safety measures. H.R. REP., *supra* note 6, at 2, 7-8, reprinted in CONG. & AD. NEWS 4699, 4704-05.

<sup>53</sup> See notes 49-52 and accompanying text *supra*.

<sup>54</sup> See notes 25-30 and accompanying text *supra*.

<sup>55</sup> 579 F.2d at 722-23. The court noted that indemnity actions have been permitted on an intended beneficiary theory, but that in each case the beneficiary was the vessel upon which the stevedore performed its contractual obligations to another party. See *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 423-24 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 428-29 (1959). Citing a Third Circuit case in which the plaintiffs were denied recovery as intended beneficiaries because they were too removed from the prime contract, *Isbrandtsen Co. v. Local 1291, I.L.A.*, 204 F.2d 495 (3d Cir. 1953); see *Hartnett v. Reiss S.S. Co.*, 421 F.2d 1011 (2d Cir.), *cert. denied*, 400 U.S. 852 (1970), the *Zapico* panel stated that Bucyrus' position was even more tenuous and therefore denied recovery under this theory. 579 F.2d at 722-23.

The court also recognized that a third party may recover if it falls within the "zone of responsibility" of the stevedore's warranty. *Id.* at 722. The "zone of responsibility" is a judicially created concept which has been applied to extend *Ryan* indemnity to those parties not in privity with the stevedore, but whose liability to an injured employee was in fact caused by the stevedore's breach of his warranty of workmanlike performance. See *DeGioia v. United States Lines Co.*, 304 F.2d 421, 425-26 (2d Cir. 1962). Thus, where a vessel was found liable for a longshoreman's injuries on the grounds of a breach of its seaworthiness warranty, the Second Circuit permitted the vessel's action over for indemnity against the stevedore despite the latter's contention that the vessel was neither in privity with it, nor an express third party beneficiary of the prime contract. *Id.* Holding that the stevedore had breached its warranty of workmanlike performance by failing to discover and cure the unseaworthy condition which had caused the employee's injury, Judge Clark stated:

The basis of the stevedore's obligation is its implied warranty of workmanlike service. The obligations which arise from warranty are not limited to the confines of an action on the contract; the zone of responsibility may extend beyond those in direct contractual relationship.

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analysis of the non-vessel's right which relies solely on these theories will have the effect of barring most non-vessel indemnity actions.<sup>56</sup>

The resulting inequity to the non-vessel is analogous to that faced by a vessel precluded from seeking indemnity or contribution from a concurrently negligent stevedore. As a means by which such inequities to vessels may be circumvented, several courts have suggested that the award to the injured longshoreman be reduced by an amount proportionate to the stevedore's negligence.<sup>57</sup> It is appar-

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Thus while the cases speak in the language of contract, it is misleading to cling to the literal implications of that language. The scope of the stevedore's warranty . . . is to be measured by the relationship which brings it into being . . . [and because the vessel has been found liable] . . . for injuries . . . [which] were the foreseeable result of the stevedore's [breach], it may recover indemnification, whether it was strictly a "third-party beneficiary" or not.

*Id.*; *LaCapria v. Compagnie Maritime Belge*, 427 F.2d 244 (2d Cir. 1970). The zone has also been extended to those third parties who were in a "close working relationship" with the stevedore and whose liability arose as a result of the stevedore's breach. See *Williams v. Pennsylvania R.R.*, 313 F.2d 203 (2d Cir. 1963). In *Williams*, a stevedore's employee was injured while unloading a barge that was under contract with the stevedore. The stevedore's employee was assisted by a crane located on a separate vessel and operated by an employee of the crane owner. Both workers were being directed by the stevedore's foreman. *Id.* at 206. The crane owner was held liable for the longshoreman's injuries and sought indemnity from the stevedore as a third-party beneficiary of the stevedore-barge contract. The Second Circuit permitted the action over for indemnity on the ground that the stevedore, at the time of contracting with the barge owner, knew that the crane owner "would be involved in a close working relationship with [the stevedore] . . . essential to [the] performance of its basic contractual duty," *id.* at 212, and was therefore liable for injuries which were the "foreseeable result" of its breach of warranty arising from the negligence of the foreman. *Id.* Parties within the zone can be said to be entitled to indemnity because, "but for" the stevedore's conduct, their liability would not have arisen. A few courts have reasoned that liability falls on the stevedore because he is in the best position to prevent the accident from occurring. *Munoz v. Flota Merchante Gran Colombiana S.A.*, 553 F.2d 837, 841 (2d Cir. 1977); *Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79, 81-82 (4th Cir. 1967). Since *Bucyrus'* situation differed from that of parties previously found to come within the zone, it was precluded from recovering under the zone theory.

<sup>56</sup> The *Zapico* court's use of pre-amendment cases is unique among those courts which have extended the indemnity remedy to non-vessels. Other district courts have allowed recovery by simply holding that § 905(b) is inapplicable to non-vessels, *Nieves v. Douglas S.S., Ltd.*, 451 F. Supp. 407 (S.D.N.Y. 1978); *Gould v. General Mills, Inc.*, 411 F. Supp. 1181 (W.D.N.Y. 1976); *Crutchfield v. Atlas Offshore Boating Serv., Inc.*, 403 F. Supp. 920 (E.D. La. 1975), or on grounds unrelated to interpretation of that section, see *Cargill v. United States*, 1977 A.M.C. 50 (E.D. Va. 1976); *Brkaric v. Star Iron & Steel Co.*, 409 F. Supp. 516 (E.D.N.Y. 1976).

<sup>57</sup> *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975); *Frasca v. Prudential Grace Lines, Inc.*, 1975 A.M.C. 1130 (D. Md.), *judgment rendered moot*, 394 F. Supp. 1092 (D. Md. 1975); *Shellman v. United States Lines Operators, Inc.*, 1975 A.M.C. 362 (N.D. Cal. 1974), *rev'd*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *cf. Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 146 (3d Cir. 1977); *Brkaric v. Star Iron & Steel Co.*, 409 F. Supp. 516, 524-25 (E.D.N.Y. 1976) (application of an equitable credit might be appropriate).

The D.C. Circuit has adopted a variation of the credit scheme under which the vessel

ent, however, that the application of this "equitable credit"<sup>58</sup> results in contribution and impairment of the stevedore's lien for compensation benefits,<sup>59</sup> both of which have been proscribed by the Supreme Court.<sup>60</sup> The Fourth Circuit, however, in *Edmonds v. Compagnie Generale Transatlantique*,<sup>61</sup> recently adopted a scheme which attempts to circumvent these restrictions. Under the *Edmonds* approach, the vessel's liability is limited to its proportionate degree of fault plus an amount equal to the compensation benefits paid by the stevedore, thus leaving the latter's right of recoupment unimpaired.<sup>62</sup> The *Zapico* court criticized this scheme because

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and the mutually negligent stevedore each bear 50% of the total liability. *E.g.*, *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727 (D.C. Cir. 1972). This "Murray credit," see *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968), has been harshly criticized as being inequitable because the 50% reduction does not reflect the true proportionate fault of the parties. See, *e.g.*, *Marant v. Farrell Lines, Inc.*, 550 F.2d at 146; *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Cohen & Dougherty*, *supra* note 6, at 605.

<sup>58</sup> The term "equitable credit" has its origin in *Frasca v. Prudential Grace Lines, Inc.*, 1975 A.M.C. 1143 (D. Md. 1975), *judgment rendered moot*, 394 F. Supp. 1092 (D. Md. 1975), in which a scheme suggested by jurists Cohen and Dougherty was adopted. See *Cohen & Dougherty*, *supra* note 6.

The theory underlying the credit is that it is inequitable for a vessel to bear full liability where both the stevedore and the vessel are mutually responsible for a longshoreman's injury. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 724 (2d Cir. 1978). For a discussion of various equitable credit theories, see *Cohen & Dougherty*, *supra* note 6; *Coleman*, *The 1972 Amendments to the L.H.W.C.A.: Life Expectancy of an Equitable Credit*, 12 THE FORUM 683 (1977); *Coleman & Daly*, *supra* note 7; *Gorman*, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. MAR. L. & COM. 1 (1974); *Robertson*, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447 (1976); *Steinberg*, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen Against Shipowners—A Proposed Solution*, 37 OHIO ST. L.J. 767 (1976).

<sup>59</sup> 33 U.S.C. § 933 (1976).

<sup>60</sup> *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) (contribution); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (lien impairment). See also *Landon v. Lief Hoegh and Co.*, 521 F.2d 756, 760-61 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). In *Pope & Talbot*, the Court rejected a vessel's contention that its liability be reduced by the amount of compensation benefits paid by a mutually negligent stevedore to an injured longshoreman, holding that the stevedore's implied right to an equitable lien under § 933 could not be impaired. 346 U.S. at 412. The Court noted that "reduction of [the vessel's] liability at the expense of [the stevedore] would be the substantial equivalent of contribution" barred by *Halcyon*. *Id.*

<sup>61</sup> 558 F.2d 186 (4th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3317 (U.S. Nov. 7, 1978).

<sup>62</sup> 558 F.2d at 194. The *Edmonds* court recognized that the scheme would not work in the rare case in which the total amount awarded is less than the amount of the lien. *Id.* at 192. In this situation, however, the stevedore could recoup the balance from the vessel in an independent action. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 407 (1952); see *Landon v. Lief Hoegh & Co.*, 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). See generally *The Second Circuit Note, 1974 Term*, 50 ST. JOHN'S L. REV. 280 (1975).

reduction of the vessel's liability would consequently lower the employee's recoverable tort damages.<sup>63</sup> It may be argued, however, that the employee relinquished his right to recover damages attributable to the employer's negligence when he agreed to accept the compensation benefits irrespective of fault.<sup>64</sup> Yet even under this theory of liability inequities to the vessel are still possible. Compensation benefits under the amended LHWCA are substantial;<sup>65</sup> as a result, the vessel may still pay more than its degree of fault warrants.<sup>66</sup>

A number of the problems confronted in non-collision maritime cases were apparently unforeseen by Congress when it enacted the 1972 amendments to the LHWCA. The courts are sharply divided on the issue of a non-vessel's ability to sue a concurrently negligent stevedore, and there remains an imbalance of equities in the ultimate assumption of liability between the negligent parties. That these conflicts are not easily resolved is clearly demonstrated by the Second Circuit's reasoning in *Zapico*. Although the adoption of an equitable credit scheme would appear to be the most appropriate solution at present, it appears that legislative intervention is once again necessary.<sup>67</sup>

Steven M. Weinberg

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<sup>63</sup> 579 F.2d at 725. The *Zapico* court suggested an alternative method by which the longshoreman could recover in full from the third party who would then recover from the negligent stevedore an amount equal to the stevedore's percentage of fault up to but not exceeding the level of compensation benefits. *Id.* at 726 n.8. The court recognized, however, that this solution is tantamount to contribution and thereby barred by *Halcyon*. *Id.*

<sup>64</sup> Coleman & Daly, *supra* note 6, at 379, 381 n.123.

<sup>65</sup> Under the amended LHWCA, the maximum compensation recoverable is increased from \$70.00 per week to an amount not greater than 200% of the national average weekly wage. See 33 U.S.C. § 906(b) (1976). This maximum was established with the expectation that approximately 90% of the employees covered by the LHWCA would now receive 2/3 of their weekly wage. H.R. REP., *supra* note 6, at 3, reprinted in CONG. & AD. NEWS 4700. See also note 6 *supra*.

<sup>66</sup> The recent trend in admiralty law has been to apportion liability on the basis of comparative fault. See *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). This form of apportionment has also been adopted by the New York Court of Appeals for land-based injuries, notwithstanding a workmen's compensation act containing an exclusive liability section. See *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), discussed in *The Survey*, 47 ST. JOHN'S L. REV. 185 (1972). See also *Brkaric v. Star Iron & Steel Co.*, 409 F. Supp. 516 (E.D.N.Y. 1976). The *Zapico* court stated that the *Dole* rule is clearly the most equitable form of apportioning liability between joint tortfeasors. 579 F.2d at 725.

<sup>67</sup> The majority of courts which have considered adoption of an equitable credit have practiced judicial restraint and called for legislative action. See *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 888-89 (5th Cir. 1978); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 673 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976); *Santino v. Liberian Distance Transps., Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974); cf. *Halcyon Lines v.*

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Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952) (new rules of contribution must await congressional action). Now that certiorari has been granted in *Edmonds*, 47 U.S.L.W. 3317 (U.S. Nov. 7, 1978), it is hoped that the Supreme Court takes advantage of this opportunity to extend comparative negligence to non-collision law.