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Admiralty -- Obligations of Shipowners to Stevedore Contractors for Injuries to Longshoremen

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City of Winston,[27] the North Carolina Supreme Court held that the election by the board of aldermen of one of its own members as "Street Boss," an office with pay, at a meeting in which he was present and participating, was against public policy.[28] In *Kendall v. Stafford*,[29] the court refused to allow members of the county commissioners to raise their own salaries for reason of interest. The court said that the fixing of salaries should be left to popular vote.

The power of Congress to set up price control, parity and marketing programs in the area of wheat production is clear. Similarly, it is for Congress and the Department of Agriculture to establish the most efficient and workable administrative hierarchy and procedural rules to determine the individual rights of program members. Within this broad scope of Congressional power there exist certain limits, one created by the due process clause of the fifth amendment. Certainly a farmer is entitled to a fair hearing before an impartial tribunal acting in a quasi-judicial capacity determining adjudicative facts that will establish the farmer's share of the community or county allotment. In the context of the *Garvey* decision, it is at least arguable that the degree of *interest* held by the committee members should be grounds for disqualification under general administrative law concepts. The entire situation appears to be one in which, by the mere process of elimination in determining the normal yield of each individual farmer in the community, each member of the committee will in fact determine "his own cause."

DONALD W. STEPHENS

Admiralty—Obligations of Shipowners to Stevedore Contractors for Injuries to Longshoremen

> *If any boatman or young man of the beach shall undertake to load or unload any ship or vessel by the job or for a lump sum, they are bound to load and unload her well and diligently, and as quickly as they can. . . . And if . . . the boatman or young man abovesaid have to incur any expense or sustain any loss, the said merchants or the managing owner of the ship or vessel for the merchants is bound to*

[27] 126 N.C. 374, 35 S.E. 610 (1900).

[28] For a similar case, *see* State v. Thompson, 193 Tenn. 395, 246 S.W.2d 59 (1952).

[29] 178 N.C. 461, 101 S.E. 15 (1919).

reimburse and to pay all that expense or loss or damage, which they shall have sustained through their fault.

—*Medieval Spanish Sea Code*[1]

The above quoted portion from *Les Costumes do la Mar* is remarkably current in its approach to the theoretical legal relationship between shipowners and those persons charged with the loading and unloading of their ships. In those more simplistic times, however, there were no stevedore contractors as we know them today. The modern longshoreman is employed by the stevedore, who, in turn, negotiates directly with the shipowner, and is placed in control of the ship until the work of loading or unloading the cargo is completed. Injuries to longshoremen, when they do occur, may be caused by some defect on board the ship for which the shipowner may be liable, or injuries may be caused by conduct on the part of the stevedore-employer. Since the longshoreman works on the shipowner's vessel while it is under the control of the employing stevedore, both the stevedore and the shipowner are potentially liable, and litigation growing from such injury results in a confusing "multi-party Donnybrook Fair."[2] The law concerning the relative duties and liabilities of the shipowner and stevedore is so complex because of this unique three-sided litigation, that the simplistic formula of the medieval Spanish mariners may have become a lost vision.

While on board the shipowner's vessel, and thence on navigable waters, the longshoreman's relationship with his stevedore-employer is governed by the Longshoremen's and Harbor Workers' Compensation Act.[3] The act is essentially a workmen's compensation statute designed to provide relief for the longshoreman injured in the course of his employment, or to provide payments to designated survivors in case of death. Compensation is paid irrespective of fault,[4] and is exclusive, according to the statute, as to the employing stevedore.[5] The Longshoremen's Act does not, however, limit the rights of the longshoreman or his representative against

[1] LES COSTUMES DO LA MAR (THE CUSTOMS OF THE SEA) ch. cliv, as found in THE BLACK BOOK OF ADMIRALTY, Append. III. This English translation is from 55 RERUM BRITANNICARUM MEDII ÆVI SCRIPTORES (CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND DURING THE MIDDLE AGES) 281 (1965).

[2] Proudfoot, *"The Tar Baby": Martime Personal-Injury Indemnity Actions*, 20 STAN. L. REV. 423 (1968).

[3] 33 U.S.C. §§ 901-50 (1964).

[4] *Id.* § 904.

[5] *Id.* § 905. But the Court has refused to apply the exclusiveness provision when the employer is the owner of the ship on which the long-shoreman is injured. Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967).

third persons, although acceptance of compensation by the longshoreman subrogates the stevedore to his rights as against such third persons unless the longshoreman or his representative brings an action within six months after payment.[6] If the stevedore exercises his subrogated rights against third persons and is successful, all recovery in excess of the amount that the stevedore has paid to the longshoreman is divided between the two, with the longshoreman getting four-fifths.[7]

In addition to his statutory rights against the stevedore-employer, the injured longshoreman has substantial opportunity for recovery from the shipowner on whose ship he is performing his stevedoring duties. Not only may suit be brought for injuries under maritime tort law, but since *Seas Shipping Co. v. Sieracki*,[8] the shipowner may be held liable for injuries to the longshoreman under the maritime doctrine of "unseaworthiness," a type of strict liability formerly applied only to seamen.[9]

When a longshoreman suffers an injury, therefore, both the stevedore and the shipowner may find themselves liable without being at fault—the stevedore for compensation under the Longshoremen's Act, and the shipowner for damages under the strict liability doctrine of "unseaworthiness." Problems arise after one of them has incurred such liability and attempts to recoup from the other his payments to the longshoreman. As was noted, payment of compensation under the Longshoremen's Act subrogates the employing stevedore to the claims of the injured longshoreman if the latter does not sue within six months of payment,[10] thus allowing the stevedore to proceed against the shipowner in those cases where the latter might be liable to the longshoreman. But the *Sieracki* decision,

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[6] Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award. 33 U.S.C. § 933(b) (1964).

[7] "The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer." *Id.* § 933(e)(2).

[8] 328 U.S. 85 (1946).

[9] The concept of unseaworthiness as applied to seamen and longshoremen has little to do with the vessel's ability to encounter the hazards of the sea. Rather, it is viewed in terms of safety hazards to individuals working on board the ship. See H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 13-20 (1963); Comment, *Unseaworthiness, Operational Negligence, and the Death of the Longshoremen's and Harbor Workers' Compensation Act*, 43 NOTRE DAME LAW. 550 (1968). For an example of how "strict" the liability under "unseaworthiness" is, see Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

[10] 33 U.S.C. § 933(b) (1964).

while holding the shipowner liable to a longshoreman for injuries caused by "unseaworthiness," provided no method by which the shipowner could be compensated by the stevedore when the unseaworthy condition was caused by the latter. Thus the stevedore was able to recoup his compensation payments to the longshoreman through the subrogation provisions of the Longshoremen's Act[11] even if the longshoreman's injuries resulted from an unseaworthy condition that the employing stevedore had created; and the shipowner had no way of preventing such an action, or of being compensated by the stevedore who was at fault. "The absolute liability of the shipowner for unseaworthiness and the fact that its vessel could easily be rendered unseaworthy without its knowledge by the acts of a land based contractor created a situation which cried out for relief."[12]

In addressing itself to this problem, the Supreme Court, after rejecting any tort theory of contribution, accepted the contention that when the stevedore made the contract with the shipowner he impliedly warranted that his services were to be carried out in a "workmanlike manner." Thus, in the landmark decision of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[13] the Court found that a breach of this warranty would entitle the shipowner to indemnity for his payments to an injured longshoreman. The controlling standard of "workmanlike" was conveniently vague so as to allow fluid application as each situation required, thereby leaving to the judgment of the court the task of balancing the liabilities in a given case.[14] It is important to note that negligence on the part of the shipowner will not bar his action for indemnity from the stevedore unless the negligence is of such nature as to prevent the stevedore from carrying out his implied warranty.[15]

As a result of the *Ryan* decision, the shipowner now possesses an independent right of action against the stevedore apart from the longshoreman's right to compensation from the stevedore, while the stevedore possesses certain subrogated rights of the longshoreman against the shipowner. Damages for breach of the stevedore's warranty are measured by

[11] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

[12] H. BAER, *supra* note 9, at 183.

[13] 350 U.S. 124 (1956). For a thorough discussion of pre-*Ryan* decisions, see Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PA. L. REV. 321 (1954).

[14] *See, e.g.*, Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

[15] *See, e.g.*, Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423 (1959); Weyerhaeuser S.S. Co. v. Nacirema Oper. Co., 355 U.S. 563 (1958).

the amount of damages paid to the longshoreman by the shipowner.[16] However, there is no correlation between the compensation paid to the longshoreman by the stevedore under the Longshoremen's Act and the amount he seeks to recover under the subrogated claim against the shipowner.[17] Since the longshoreman's recovery from the stevedore is measured by a wage-scaled compensation allotment,[18] it would seem that, normally, the amount of recovery against the shipowner under the longshoreman's rights, if the shipowner was found liable, would exceed any compensation liability incurred by the stevedore to the longshoreman.

It was inevitable, however, that a situation would arise in which the liability of the stevedore to the longshoreman would be greater than the amount the stevedore could recover through his subrogated claim under the Longshoremen's Act. In *Burnshide Shipping Co. v. Federal Marine Terminals, Inc.*[19] a longshoreman, Gordon T. McNeill, was killed on board a ship owned by Burnside. The potential statutory liability of Federal, the employing stevedore, under the Longshoremen's Act amounted to an approximated sum of $70,000.[20] However, under the Illinois wrongful death statute, which would govern the stevedore's subrogated claim under the Longshoreman's Act,[21] the maximum recovery for wrongful death is $30,000.[22] The administratrix of McNeill's estate brought a wrongful death action against the shipowner who, in turn, sought indemnification from the stevedore under the *Ryan* doctrine of breach of implied warranty for workmanlike service. The stevedore company filed a counterclaim for their potential liability of $70,000. In trying to avoid the statutory wrongful death limit of $30,000 for its subrogated claim against the shipowner, the stevedore argued that there was a separate cause of action in its favor against the shipowner apart from those subrogated rights under the Longshoremen's Act of the employee's wrongful death claim. Holding that the method provided under the Longshoremen's Act was the stevedore's exclusive remedy against the shipowner, the trial court dismissed

[16] *See* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 125 (1956).

[17] 33 U.S.C. § 933(b) (1964).

[18] *Id.* § 908-09.

[19] 392 F.2d 918 (7th Cir. 1968), *aff'g* 284 F. Supp. 740 (N.D. Ill. 1967), *cert. granted*, 393 U.S. 820 (1968).

[20] 392 F.2d at 919.

[21] Absent statutory provisions, there is no maritime wrongful death action. Since Congress has not provided for recovery for wrongful death that occurs within the territorial limits of a state, the Supreme Court has supplemented the maritime law with that state's wrongful death statute. H. BAER, *supra* note 9, at 99.

[22] ILL. REV. STAT. ch. 70, § 2 (1967).

the counterclaim.[23] The circuit court affirmed the district court's holding,[24] and Federal, the employing stevedore, is seeking review before the Supreme Court, where decision is presently pending.

The cases that may be correlated to those issues presented in *Burnside* have, with few exceptions, agreed with the district court's holding.[25] There is no direct authority for finding the shipowner separately liable to the stevedore,[26] but some cases have hinted that there may be occasions when a separate contractual liability may flow directly from the shipowner to the stevedore.[27]

Actions in contract and tort offer the two possible approaches to the independent liability concept. The tort theory presents the weaker base for a cause of action separate from the statutory right of subrogation, although it has had some recent support in admiralty circles.[28] One problem in the tort area is defining just what standard of duty is owed by the shipowner to the stevedore, as contrasted with his duty to the longshoreman. Despite allowing the longshoreman to avail himself of the doctrine of unseaworthiness against the shipowner, strong case law has expressed judicial unwillingness to extend the coverage of the doctrine past the individual longshoreman.[29] In addition, actions under a negligence theory should fail because the duty owed by the shipowner to the stevedore, as contrasted to the duty owed to the longshoreman, is too remote for legal cognizance.[30] It is understandable, therefore, that in *Burnside* the employ-

[23] 284 F. Supp. at 744-45.

[24] 392 F.2d 918 (7th Cir. 1968).

[25] *See, e.g.*, Doleman v. Levine, 295 U.S. 221 (1935) (no cause of action for part payment of compensation); United States v. Klein, 153 F.2d 55 (8th Cir. 1946) (statutory provisions for employer recovery of compensation paid under Federal Employees' Compensation Act exclusive for employer as to third persons); The Federal No. 2, 21 F.2d 313 (2d Cir. 1927); United States v. The S.S. Washington, 172 F. Supp. 905 (E.D. Va. 1959); California Cas. Indem. Exch. v. United States, 74 F. Supp. 401 (S.D. Cal. 1947); McCormick v Zander Reum Co., 25 Ill. 2d 241, 184 N.E.2d 882 (1962). *Cf.* United States v. Standard Oil Co., 332 U.S. 301 (1947).

[26] Burnside Shipping Co. v. Federal Marine Terminals, Inc., 392 F.2d 918, 919 (7th Cir. 1968).

[27] Hugev v. Dampskisaktieselskabet Int'l, 170 F. Supp. 601 (S.D. Cal. 1959).

[28] Proudfoot, *supra* note 2.

[29] *See, e.g.*, Albina Engine & Mach. Works, Inc. v. Hershey Choc. Corp., 295 F.2d 619 (9th Cir. 1961); Hugev v. Dampskisaktieselskabet Int'l, 170 F. Supp. 601 (S.D. Cal. 1959).

[30] *Cf.* Crab Orchard Improv. Co. v. Chesapeake & O. Ry., 115 F.2d 277, 282 (4th Cir. 1940).

ing stevedore limited its argument to the Supreme Court to an implied contractual theory as grounds for a separate cause of action.[31]

The implied contractual warranty is not an unfamiliar concept in admiralty. As was noted earlier by the excerpt from *Les Costumes do la Mar*, even the medieval longshoreman was "bound to load and unload [the ship] . . . well and diligently. . . ."[32] The *Ryan* decision found such a duty owing as an implied warranty of "workmanlike" service;[33] but the duty is owned by the stevedore-employer, not by the individual longshoreman. If the court can find an implied warranty running in favor of the shipowner against the stevedore, would it necessarily follow that it should find such a warranty running in favor of the stevedore against the shipowner?

The possibility of finding such an implied warranty in favor of the stevedore has not been entirely discarded. One of the most in depth considerations of the duties of the shipowner with respect to the stevedore was given in *Hugev v. Dampskisaktieselskabet International.*[34] The decision suggested that there was some minimal standard that the shipowner warranted to the stevedore, although in that case no breach was found.

> The surrounding circumstances of fact, and that of law . . . , 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 . . . in such condition that an expert and experienced stevedoring contractor . . . will be able . . . to load or discharge the cargo . . . in a workmanlike 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 . . . .[35]

It will be remembered that negligence of the shipowner has not been held a bar to his seeking indemnification from a stevedore for the latter's breach of his implied warranty of workmanlike service.[36] If the ship-

[31] Brief for Petitioner, Federal Marine Terminals, Inc. v. Burnside Shipping Co., — U.S. — (1969).

[32] See note 1, *supra*, and accompanying text.

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

[34] 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).

[35] 170 F. Supp. at 610-11.

[36] See note 15, *supra*.

owner is going to be allowed to collect indemnification despite his own negligent conduct, it would not seem logical that such negligence could conversely support an action by the stevedore.[37] What the *Hugev* opinion seems to imply is a doctrine akin to the tort "assumption of risk" theory. A stevedore should expect that after a long voyage certain hazardous conditions will exist on board the vessel.

> Being a mass of plates, pipes, wires, beams and various mechanisms, each to some degree vulnerable to the elements, it would be too much to expect a cargo vessel to arrive in port with all equipment, appliances and facilities in a fully seaworthy condition.[38]

While the shipowner impliedly covenants to exercise reasonable care to furnish a safe ship, the stevedore accepts the risks that he obviously expects to find on board.

> Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects . . . is in a seaworthy condition, or even in a reasonably safe condition.[39]

The "assumption of risk" concept conveniently compliments the decisions holding that negligence on the part of the shipowner (short of that which prevents the stevedore from fulfilling his implied warranty of workmanlike service) will be no bar to the shipowner's indemnification from the stevedore for the shipowner's liability to the injured longshoreman. Such a solution also has the advantage of being "situational"; it can be manipulated by the courts in much the same manner as the concept of "workmanlike service" is applied in shipowner indemnity cases.[40]

A cause of action apart from the stevedore's subrogated rights under the Longshoremen's Act could be found in such an implied obligation of the shipowner to furnish a safe ship with the concomitant implied assumption by the stevedore of risks produced by the predictable hazards to be found on board. In practical application, the courts could weigh the various factors that enter such a relationship, such as the length of the

[37] *Cf.* Proudfoot, *supra* note 2, at 444.
[38] 170 F. Supp. at 610.
[39] *Id.*
[40] See note 13 *supra*, and accompanying text.

voyage, the type of cargo that is carried, the age of the vessel, the season, and the climate of the port. Liability would be predicated not on what is foreseeable by the shipowner, but on what is foreseeable in a given situation by the stevedore.[41]

It might be questioned, however, whether such a finding of an implied contractual obligation on the part of the shipowner to the stevedore would disturb the equilibrium imposed on their relationship by the *Ryan* decision. In the great majority of cases, an equitable result can be reached by using the existing actions of the longshoreman under the subrogation provisions of the Longshoremen's Act. Only in the few cases where the problem as presented in *Burnside* arises would the theory of the stevedore's independent action be useful. It may be that the equitable result possible in the instant case would not justify problems, such as the following, that an implied contractual obligation on the shipowner would present.

1. Does the stevedore's action under such an implied warranty bar the longshoreman from bringing a subsequent action against the shipowner? If the independent action by the stevedore is found to be no bar to the longshoreman's tort action, then the stevedore may recover for his potential liability from the shipowner who will still be held liable to the longshoreman, thus producing dangers of double recovery. If the solution to that problem is to give the stevedore an action only for that amount in excess of what the longshoreman may recover, it is tantamount to admission that the action is not independent, but defined solely by the rights of the longshoreman.

If, instead, such an independent action by the stevedore is held to bar any future action by the longshoreman, then it must be conceded that the rights on which the suit is brought are not those of the stevedore, but actually those of the longshoreman. A method has already been provided for such recovery under the subrogation provisions of the Longshoremen's Act. Moreover, such a method of destroying the longshoreman's cause of action against the shipowner may produce harsh results when the stevedore fails in his independent action, especially since the longshoreman's consent need not be obtained for the stevedore's suit to be brought initially if the action is truly independent.

2. Would a breach of the stevedore's warranty of workmanlike service relieve the shipowner of his warranty to provide a reasonably safe

[41] *Cf.* Proudfoot, *supra* note 2, at 443-44.

ship? Or, conversely, would a breach of the implied obligation on the part of the shipowner justify a breach by the stevedore of his warranty? Such questions might be answered by ascertaining who breached his respective warranty first (a question of fact), or whether the initial breach is material or not (a question of law).[42]

3. If there will be more than one action (and with independent causes of action, such a result is inevitable) what effect will the doctrines of res judicata and collateral estoppel have on the second proceeding?

The answers to these problems are not easily found without in some way disturbing settled rules of law; to find a separate cause of action in favor of the stevedore could open a new "Pandora's box," causing more problems than it cured. The Supreme Court, after witnessing the distressing result of its *Sieracki* decision, may tred with more caution in *Burnside*. The fact that a method of recovery already exists within the framework of the Longshoremen's Act should carry great weight. Its provisions would be entirely adequate under normal circumstances.

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Civil Procedure—Broadening the Use of Collateral Estoppel—The Requirement of Mutuality of Parties

While driving Northland's car, Mackris collided with Murray and was killed. Northland sued Murray for his negligence and recovered for the damage to the car. Then Mrs. Mackris sued Murray for the wrongful death of her husband, claiming that the judgment in Northland's favor in the first action was conclusive of the issues of liability in the second. The federal district court agreed and gave her summary judgment. In *Mackris v. Murray*,[1] the sixth circuit took a different view and reversed. Although applying Michigan law, the court expressed a strong commitment against such a broad application of res judicata.[2]

[42] For a brief consideration of this problem, see *id.* at 444.

[1] 397 F.2d 74 (6th Cir. 1968).

[2] The federal court considered itself at liberty to construct a possible state court decision. The leading case, Clark v. Naufel, 238 Mich. 249, 43 N.W.2d 839 (1950), refused to allow the use of collateral estoppel defensively due to lack of mutuality of parties. Other cases, such as De Polo v. Grieg, 338 Mich. 703, 62 N.W.2d 441 (1954), admit that the modern rule is Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), which permits the use of collateral estoppel by a non-party in the first action, but decides the issue on differ-