

1-1-1972

## The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits

Peter E. Halle

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Peter E. Halle, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. Miami L. Rev. 94 (1972)  
Available at: <https://repository.law.miami.edu/umlr/vol27/iss1/5>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# COMMENTS

## THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972: AN END TO CIRCULAR LIABILITY AND SEAWORTHINESS IN RETURN FOR MODERN BENEFITS

PETER E. HALLE\*

I. INTRODUCTION .....	94
II. HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT ..	96
III. THE EXTENSION OF THE MARITIME DOCTRINE OF SEA-WORTHINESS TO LONGSHORE- MEN AND THE BIRTH OF THE THIRD PARTY CIRCULAR LIABILITY LAW SUIT UNDER THE ACT .....	98
A. <i>The Longshoreman is Protected by the Courts</i> .....	98
B. <i>What the Court Giveth, the Congress Taketh Away I</i> .....	100
C. <i>The "Circular Liability" Circle is Completed</i> .....	100
D. <i>What the Court Giveth, the Congress Taketh Away II</i> .....	102
IV. THE VALUE OF RECOVERY IN A THIRD PARTY ACTION VERSUS THE VALUE OF THE COMPENSATION REMEDY .....	103
A. <i>Elements of the Actions</i> .....	103
B. <i>The Value of Recovery Under the Act</i> .....	104
C. <i>The Value of Recovery in a Third Party Suit</i> .....	105
D. <i>Comparative Negligence</i> .....	105
V. THE PROBLEM AROUND THE CORNER—FEDERAL LAW OR STATE LAW IN THIRD PARTY ACTIONS BY PERSONS ON THE DOCK? .....	106
VI. CONCLUSION .....	107

### I. INTRODUCTION

The Longshoremen's and Harbor Workers' Compensation Act<sup>1</sup> covers 800,000<sup>2</sup> employees, only 270,000<sup>3</sup> of whom are longshoremen and harbor workers. The rest are District of Columbia workers,<sup>4</sup> civilian employees at military bases outside of the United States,<sup>5</sup> employees of federal contractors outside of the United States,<sup>6</sup> employees under the

---

\* Associate Editor, University of Miami Law Review; Student Instructor in Freshman Research and Writing.

1. 33 U.S.C. ch. 18 (1970) [hereinafter referred to as the Act]. This act has been amended by Pub. L. No. 92-576 (Oct. 27, 1972) [hereinafter referred to as the Amendments].

2. HOUSE COMM. ON LABOR AND PUBLIC WELFARE, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, S. REP. NO. 92-1125, 92d Cong., 2d Sess. 2 (1972).

3. *Hearings on S. 2318, S. 525, and S. 1547 Before the Senate Subcomm. on Labor*, 92d Cong., 2d Sess. 1 (1972).

4. District of Columbia Workmen's Compensation Act, ch. 612, 45 Stat. 600 (1928).

5. Defense Base Act, 42 U.S.C. §§ 1651-54 (1970) (enacted as Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622).

6. War Hazards Compensation Act, 42 U.S.C. §§ 1701-06, 1711-17 (1970) (enacted as Act of Dec. 2, 1942, ch. 668, 56 Stat. 1028).

Outer Continental Shelf Lands Act,<sup>7</sup> and certain employees of nonappropriated fund instrumentalities of the Armed Forces.<sup>8</sup> This comment will be primarily concerned with longshoremen and harbor workers and their status under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Traditionally, longshoring has been one of the more hazardous occupations in the United States. This is probably due to the everchanging and unfamiliar work area in which the longshoreman does his daily labor—the ship. The longshoreman's employer, the stevedoring company, usually does not own or maintain the work area, hence the stevedore has difficulty providing its employees with a safe place to work. While there are safety standards for ships constructed and sailed under the United States flag,<sup>9</sup> more than 80 percent of the ships loaded and unloaded by longshoremen fly foreign flags.<sup>10</sup> These foreign hulls have been characterized by labor spokesmen as "difficult to work on" and as "unsafe from top to bottom."<sup>11</sup> It is no wonder, then, that in 1971 longshoremen and harbor workers reported 68,464 injuries under the Act.<sup>12</sup> However, despite poor working conditions, the accident frequency in longshoring operations has *decreased* steadily,<sup>13</sup> while accident insurance costs have, just as steadily, risen.<sup>14</sup> This paradox has been caused, according to shipping industry representatives, by a legal dilemma called "the third party circular liability law suit."

In the typical "third party circular liability law suit," a longshoreman employed by a stevedore is injured aboard ship due to a deficient condition on board the vessel either created by the stevedore or allowed to exist by the stevedore's negligence. This deficient condition makes the vessel unseaworthy.<sup>15</sup> The injured party collects compensation as his exclusive remedy against his employer;<sup>16</sup> but he also sues the shipowner as a third party tortfeasor.<sup>17</sup> At this point, the shipowner can either implead<sup>18</sup> the injured party's stevedore-employer or await a judgment and go against him for indemnification.<sup>19</sup> The stevedore becomes responsible

7. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970) (enacted as Act of Aug. 7, 1953, ch. 345, 67 Stat. 462).

8. Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73 (1970) (enacted as Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139).

9. See 46 C.F.R. ch. 1 (1972).

10. *Hearings on S. 2318, S. 525, and S. 1547 Before the Senate Subcomm. on Labor*, 92d Cong., 2d Sess. 670 (1972).

11. *Id.*

12. *Id.* at 127.

13. *Id.* at 287.

14. *Id.* at 288.

15. Unseaworthiness is defined as a breach of the shipowner's absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

16. 33 U.S.C. § 905 (1970), as amended, Pub. L. No. 92-576, § 18(a) (Oct. 27, 1972).

17. 33 U.S.C. § 933 (1970), as amended, Pub. L. No. 92-576, § 15 (Oct. 27, 1972). This section preserves the injured longshoreman's right to bring a lawsuit against a third party.

18. Fed. R. Civ. P. 14.

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

to the shipowner for breach of an implied or express warranty to perform stevedoring services in a safe manner.<sup>20</sup> In this way the circle is closed and the injured party recovers indirectly that which he could not recover directly from his employer. Double recovery, however, is not allowed, as the longshoreman must reimburse the stevedore for the compensation paid him.<sup>21</sup> Yet the stevedore ends up paying the injured longshoreman, through the "agency" of the ship, a much greater amount than he would have been liable for under the Compensation Act, for the measure of damages is much higher in a third party suit than under the Act.

It is not difficult to see why "circular liability law suits" have become the hottest issue in the maritime law of personal injury. The industry has had to shoulder a heavy financial burden in terms of legal fees and insurance costs; but who can say that an industry able to spread the misery cost of its injured workers to the public at large is not in a better position to bear the financial loss than the injured worker himself? The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972<sup>22</sup> were designed to curtail circular liability while increasing compensation under the act to the injured party. Hopefully, this trade-off will ease the burdens of both employer and employee and re-establish the Longshoremen's and Harbor Workers' Compensation Act as a viable piece of legislation.

## II. HISTORY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The necessity for a federal compensation scheme for injured longshoremen<sup>23</sup> and harbor workers<sup>24</sup> first arose in 1917. Prior to that date they had been covered by state compensation acts. But the Supreme Court of the United States changed the status quo by drawing a fine distinction between workers injured on the docks, and workers injured on or over the navigable waters of the United States. In 1917, the Court decided *Southern Pacific Co. v. Jensen*,<sup>25</sup> which held the workmen's compensation law of New York inapplicable to a situation in which a New York longshoreman was killed on a gangway, suspended 10 feet over navigable waters, connecting the pier and the ship he was helping to

---

20. *Id.*

21. 33 U.S.C. § 933 (1970), as amended, Pub. L. No. 92-576, § 15 (Oct. 27, 1972); *Seaboard Marine Serv. Corp. v. Quigley*, 159 F. Supp. 27 (S.D.N.Y. 1958), *aff'd*, 266 F.2d 822 (2d Cir.), *cert. denied*, 361 U.S. 830 (1959).

22. Pub. L. No. 92-576 (Oct. 27, 1972).

23. A longshoreman is a workman who participates in the loading and unloading of ships. His duties may call for his presence on board the ship, on land, or in between. The longshoreman is employed by the stevedore company, which contracts his services.

24. A harbor worker is a workman who works repairing, painting, and doing other like jobs on board ship, on the dock, or in between.

25. 244 U.S. 205 (1917).

unload. The Court's main reason for denying compensation coverage under the New York law was to further uniformity in United States maritime law. Mr. Justice McReynolds, speaking for the majority, stated:

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be *destruction of the very uniformity* in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.<sup>26</sup>

In addition, the *Jensen* majority also held that the imposition of a state workmen's compensation remedy fell without the "saving to suitors" clause of the Judiciary Act of 1789<sup>27</sup> because workman's compensation acts were not remedies known at common law. The "saving to suitors" clause excepts from the exclusive maritime jurisdiction of the federal district courts all suits for which the common law gave a remedy irrespective of admiralty law.<sup>28</sup> As workmen's compensation was not a common law remedy, it could not be applied in a case governed by admiralty law. It would appear, however, from the pervasive federalist tone of *Jensen*, that that decision was prompted more by Congress' power to regulate commerce<sup>29</sup> than by the exclusive admiralty jurisdiction of the federal courts.<sup>30</sup> Often, it seems, decisions rendered in the name of admiralty jurisdiction would better be viewed as based upon the commerce clause.<sup>31</sup>

In response to *Jensen*, Congress expanded the "savings clause" to exempt rights and remedies under the state workmen's compensation laws,<sup>32</sup> but the Court quickly found this attempt to be an unconstitutional delegation of legislative power to the states.<sup>33</sup> Five years later, Congress again tried to amend the Judiciary Act,<sup>34</sup> but once more was rebuffed by the Court.

Without doubt Congress has the power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may

26. *Id.* at 217 (emphasis added).

27. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 78 (corresponds to 28 U.S.C. § 1333(1) (1970)).

28. *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867).

29. U.S. CONST. art. I, § 8, cl. 3.

30. U.S. CONST. art. III, § 2, cl. 1.

31. *See, e.g., The Montello*, 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

32. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

33. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

34. Act of June 10, 1922, ch. 216, 42 Stat. 634.

not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.<sup>35</sup>

Shortly thereafter, in 1927, the original Longshoremen's and Harbor Workers' Compensation Act<sup>36</sup> was enacted. Under this Act, compensation was 66 2/3 percent of an injured or disabled worker's average weekly pay, but *not to exceed \$25.00 per week*.<sup>37</sup> In 1948 the maximum recovery was raised to \$35.00 per week;<sup>38</sup> in 1954 to \$54.00 per week;<sup>39</sup> and in 1961 to \$70.00 per week.<sup>40</sup> Since 1961 there have been no further increases. The 1972 Amendments at long last remove the static maximum compensation ceiling in favor of a new maximum to be figured annually as a function of the national average weekly longshoreman's wage.<sup>41</sup> No longer will maximum disability payments be frozen at unrealistically low levels due to congressional inactivity. When one views the dismal record of maximum allowable compensation under the Act, it is no wonder that third party law suits became a popular vehicle for making an injured worker "whole," a goal unobtainable under the Longshoremen's and Harbor Workers' Compensation Act.

### III. THE EXTENSION OF THE MARITIME DOCTRINE OF SEAWORTHINESS TO LONGSHOREMEN AND THE BIRTH OF THE THIRD PARTY CIRCULAR LIABILITY LAW SUIT UNDER THE ACT

#### A. *The Longshoreman is Protected by the Courts*

In 1946, *Seas Shipping Co. v. Sieracki*<sup>42</sup> extended the maritime doctrine of seaworthiness to longshoremen aboard ships afloat in navigable waters who were injured while performing work traditionally done by members of the ship's crew, seamen. The doctrine of seaworthiness is an admiralty doctrine of absolute liability. Under it, a shipowner is burdened by an absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use."<sup>43</sup> Prior to *Sieracki*, this duty had only been owed to seamen, the wards of admiralty.<sup>44</sup>

At the time of his accident, Joseph Sieracki was employed by an independent stevedoring contractor to do longshoring work on the S.S. *Robin Sherwood*. On December 23, 1942, while Sieracki was aboard the

35. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227-28 (1924).

36. Act of March 4, 1927, ch. 509, 44 Stat. 1424.

37. Act of March 4, 1927, ch. 509, § 6, 44 Stat. 1426.

38. Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602.

39. Act of July 26, 1956, ch. 735, § 1, 70 Stat. 654.

40. Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203, *amending* 33 U.S.C. § 906 (1958).

41. Pub. L. No. 92-576, § 5 (Oct. 27, 1972), *amending* 33 U.S.C. § 906 (1970).

42. 328 U.S. 85 (1946).

43. See note 15 *supra*.

44. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *The Osceola*, 189 U.S. 158 (1903).

*Sherwood*, the sky, in the form of a ten ton cargo boom, fell in upon him. Sieracki was covered by the Longshoremen's and Harbor Workers' Compensation Act, but chose to bring a third party action against the owners of the *Sherwood*, alleging unseaworthiness of the vessel. His damages were stipulated to be \$9,500, a strong contrast with the maximum recovery of \$25 per week plus medical expenses under the then existing Act.<sup>45</sup> The trial court found the accident to have been caused by an unseaworthy condition as alleged; a shackle holding the cargo boom had been defective, making the boom unfit for its intended purpose. Nevertheless, the court stated that the finding of unseaworthiness would not result in recovery because Sieracki was not a "seaman, nor a member of the crew of the vessel,"<sup>46</sup> and therefore no duty was owed him. Never before had longshoremen been afforded protection under the doctrine of seaworthiness, and the district court was satisfied to continue its restriction to seamen.

The Court of Appeals, Third Circuit, however, reversed. Instead of searching for a way to call a longshoreman a seaman, as the district court had suggested would have to be done, the Third Circuit analyzed the problem in terms of risk. Concluding that a longshoreman is exposed to the same risks as a seaman, the court found the doctrine of seaworthiness applicable.<sup>47</sup> It reasoned that to allow an injured longshoreman and an injured seaman, who stood on the same deck and faced the same hazards, different recoveries based merely on their job titles would be preposterous.<sup>48</sup>

The Supreme Court affirmed, saying that seaworthiness "is a form of absolute duty owing to all within the range of its humanitarian policy."<sup>49</sup> The humanitarian policy referred to by the Court is that the owner of a ship is in a better position to distribute loss from injury throughout the shipping community than the individual injured:

Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but *of performing the ship's services* with the owner's consent. . . .<sup>50</sup>

[F]or injuries incurred while working on board the ship in navigable waters the [longshoreman] is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For

---

45. Act of March 4, 1927, ch. 509, §§ 6, 7(a), *as amended*, 33 U.S.C. §§ 906, 907(a) (1970), *as amended*, Pub. L. No. 92-576, §§ 4, 5(a), 6 (Oct. 27, 1972).

46. *Sieracki v. Seas Shipping Co.*, 57 F. Supp. 724, 726 (E.D. Pa. 1944).

47. *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 102 (3d Cir. 1945).

48. *Id.* at 101. Such a result has been reintroduced, however, by the 1972 Amendments. Pub. L. No. 92-576, § 18(a) (Oct. 27, 1972), *amending* 33 U.S.C. § 905 (1970).

49. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946).

50. *Id.* at 97 (emphasis added).

these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.<sup>51</sup>

The Supreme Court, then, limited the Court of Appeals' risk interpretation to cover only those longshoremen exposed to the "seaman's risk," *i.e.*, those longshoremen performing the tasks traditionally performed by seamen. Mr. Justice Frankfurter dissented from this view, arguing that the seaman occupies a special place as a ward of admiralty. Such a status, he reasoned, *is not* shared by land-based workers. In addition, Frankfurter could see no social justification in the extension of seaworthiness to longshoremen:

The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them. *Congress has made a determination that the employer is best able to bear the loss* which, in this instance, could not be avoided by the exercise of due care. This is an implied determination which should preclude us from saying that the ship owner is in a more favorable position to absorb the loss or pass it on to society at large than the employer.<sup>52</sup>

#### B. *What the Court Giveth, the Congress Taketh Away I*

The argument over seaworthiness which *Sieracki* started has now, perhaps, been silenced by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.<sup>53</sup> It seems that Justice Frankfurter's position has been vindicated, since the Amendments abolish seaworthiness as a remedy for longshoremen injured aboard ship.<sup>54</sup> Why the stevedoring companies have actively lobbied for this change, when it would appear that the doctrine of seaworthiness shifted the plaintiff's attack to the shipowner, is answered by an analysis of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*<sup>55</sup>

#### C. *The "Circular Liability" Circle is Completed*

The result of *Sieracki* was increased liability for unseaworthy conditions for which the shipowners were held accountable. Their pocket-books were sorely taxed and they, in turn, cast about for another party to relieve them of the financial burden. In *Ryan*, the Supreme Court shifted the burden of liability, making the stevedore an indemnitor for liability arising out of unseaworthy conditions which it had created aboard ship while loading or unloading under contract with the ship-

---

51. *Id.* at 99 (footnote omitted).

52. *Id.* at 108 (emphasis added).

53. Pub. L. No. 92-576 (Oct. 27, 1972).

54. *Id.* § 18(a).

55. 350 U.S. 124 (1956).

owner. Ryan Stevedoring Company had loaded the *Canton Victory*, a Pan-Atlantic Steamship Corporation ship, at Georgetown, South Carolina. The loaded vessel thereafter proceeded to Brooklyn, New York, where Ryan also unloaded it. At the pier in Brooklyn, Frank Palazzolo, a Ryan employee, was injured while unloading the *Canton Victory* when improperly secured cargo fell on his leg. Palazzolo was covered as a longshoreman by the Longshoremen's and Harbor Workers' Compensation Act. Under it he received \$2,490 in compensation payments, and \$9,857.36 in medical services. Ryan's insurance carrier was the disbursing agent.

Palazzolo, however, was not satisfied with the payment, and instituted a third party action against Pan-Atlantic, resorting to section 33 of the Act<sup>56</sup> and claiming unseaworthiness of the vessel.<sup>57</sup> The allegation was that the improperly stowed cargo made the ship unseaworthy. Palazzolo recovered a \$75,000 verdict, from which he reimbursed Ryan's insurance carrier for the medical expenses and compensation he had been paid. In the same action, Pan-Atlantic, owner of the *Canton Victory*, filed a third party complaint for indemnity against Ryan, alleging that the stevedoring company had negligently loaded the vessel in Georgetown. The trial court dismissed Pan-Atlantic's third party complaint, finding, *inter alia*, that Pan-Atlantic was a joint tortfeasor with Ryan and therefore precluded from recovery under *Halycon Lines v. Haenn Ship Corp.*,<sup>58</sup> which had held against contribution amongst joint tortfeasors in admiralty. The trial court also found that no express warranty of indemnity existed between the parties. The Court of Appeals, Second Circuit, reversed on this latter point, holding that "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity."<sup>59</sup> The Supreme Court affirmed.<sup>60</sup>

Ryan Stevedoring had argued that its liability was exclusively under section 5 of the Act:

The liability of an employer . . . [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death* . . . .<sup>61</sup>

56. 33 U.S.C. § 933 (1952) (enacted as Act of March 4, 1927, ch. 509, § 33, 44 Stat. 1440). The material is currently codified at 33 U.S.C. § 933 (1970), *as amended*, Pub. L. No. 92-576, § 15 (Oct. 27, 1972).

57. Palazzolo v. Pan-Atlantic S.S. Corp., 111 F. Supp. 505 (E.D.N.Y. 1953). This was the approach used in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). See section III, A *supra*.

58. 342 U.S. 282 (1952).

59. Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277, 279 (2d Cir. 1954).

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

61. 33 U.S.C. § 905 (1952) (enacted as Act of March 4, 1927, ch. 509, § 5, 44 Stat.

Ryan's argument was predicated on the view that the action was one sounding in tort. It reasoned that Pan-Atlantic's loss flowed solely from Palazzolo's injury, and that section 5 of the Act limited the employer's liability to its employee alone, thereby precluding the third party recovery sought by Pan-Atlantic. The Supreme Court, however, based its holding on contract. The Court reasoned that Pan-Atlantic's claim for indemnity arose out of Ryan's breach of an implied warranty to perform its stevedoring services in a safe manner. Looking to the Longshoremen's and Harbor Workers' Compensation Act itself, the Court stated:

Section 5 of the Act expressly excludes the liability of the employer "to the employee," or others, entitled to recover "on account of such [employee's] injury or death." Therefore, in the instant case, it excludes the liability of the stevedoring contractor to its longshoreman, and to his kin, for damages on account of the longshoreman's injuries. At the same time, however, § 5 expressly preserves to each employee a right to recover damages against third persons. It thus preserves the right, which Palazzolo has exercised, to recover damages from the shipowner in the present case. *The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless.* Petitioner's [Ryan's] agreement in the instant case amounts to the latter for . . . it is a contractual undertaking to stow the cargo "with reasonable safety" and thus to save the shipowner harmless from petitioner's failure to do so.<sup>62</sup>

#### D. *What the Court Giveth, the Congress Taketh Away II*

The 1972 Amendments to the Act overrule the italicized language from *Ryan* quoted above. Section 18(a) of the Amendments changes section 5 of the Act, providing:

[A longshoreman injured on a vessel] may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer [stevedore company] shall not be liable to the vessel for such damages directly or indirectly and *any agreements or warranties to the contrary shall be void.* . . . 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 Act.<sup>63</sup>

1426). The material is currently codified at 33 U.S.C. § 905 (1970), as amended, Pub. L. No. 92-576, § 18(a) (Oct. 27, 1972).

62. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129-30 (1956) (footnote omitted) (emphasis added).

63. Pub. L. No. 92-576, § 18(b) (Oct. 27, 1972) (emphasis added).

*Sieracki* and *Ryan* have been extended to include various classes of people and to cover many situations. Their progeny will not be discussed here, however, as the 1972 Amendments vitiate that line of decisions. The two major cases were analyzed here to highlight the changes in the Act. They also reveal the political and economic forces which clashed head-on in the forging of the 1972 Amendments.

#### IV. THE VALUE OF RECOVERY IN A THIRD PARTY ACTION VERSUS THE VALUE OF THE COMPENSATION REMEDY

##### A. *Elements of the Actions*

Both the doctrine of seaworthiness and the Longshoremen's and Harbor Workers' Compensation Act provide a species of liability without fault. To recover for unseaworthiness an injured party need only prove: (1) that he is a party to whom the shipowner owes the duty of making the vessel and its appurtenances reasonably safe; (2) that the duty was breached; and (3) that the individual seeking recovery suffered injury on account of that breach.<sup>64</sup> The duty to maintain a seaworthy vessel is absolute.<sup>65</sup> Thus, fault is not a requisite for recovery, as unseaworthiness need not be the result of negligence. The concept of fault is also absent from the Longshoremen's Act; section 4(b) states: "Compensation shall be payable irrespective of fault as a cause for the injury."<sup>66</sup> The injury under the Act must be job related.<sup>67</sup>

The desirability of unseaworthiness, as opposed to ordinary negligence, as the basis of the longshoreman's suit against a third party defendant shipowner is obvious. The burden of proof in negligence is much greater. The injured plaintiff must prove knowledge of the injury-producing defect on the part of the responsible party in order to establish liability. Such a burden is difficult enough in ordinary cases where the defendant is stationary. The same burden becomes almost intolerable in the maritime setting because both the place of injury (the ship), and the parties at fault (the crew) may depart for long voyages shortly after an accident. Furthermore, as much of American shipping is done on foreign hulls, the guilty vessel may *never* return. The expense and difficulty of preparing a case based on negligence could very well be overwhelming. Yet the 1972 Amendments abolish seaworthiness as a theory available to longshoremen, leaving only negligence: "The liability of the vessel under

---

64. See *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Sieracki v. Seas Shipping Co.*, 57 F. Supp. 724 (E.D. Pa. 1944).

65. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

66. 33 U.S.C. § 904(b) (1970) (enacted as Act of March 4, 1927, ch. 509, § 4(b), 44 Stat. 1426).

67. 33 U.S.C. § 902(2) (1970), *as amended*, Pub. L. No. 92-576, §§ 2, 3, 5, 15, 18, 20 (Oct. 27, 1972) (enacted as Act of March 4, 1927, ch. 509, § 2(2), 44 Stat. 1425).

this subsection *shall not* be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."<sup>68</sup>

### B. *The Value of Recovery Under the Act*

The difference in the value of recovery between compensation and third party practice, found in contrasting the measure of recovery for each, is the "gut issue" which had forestalled improvements in the Act for many years.<sup>69</sup> The main elements of recovery under the Act are medical expenses plus compensation payments for a *portion* of wages lost during the existence of a condition which prevented the injured party from working. Since the inception of the Act, the compensation portion of recovery has been 66 2/3 percent of the injured's average weekly wage, *subject to* a maximum payment, the most recent being \$70.00 per week.<sup>70</sup> In an industry in which wages have steadily increased over the last eleven years, the \$70.00 figure had become tragically inadequate. For example, Secretary of Labor Hodgson testified that the 1972 average weekly wage for longshoremen was \$184.00 in Boston and New York.<sup>71</sup> However, it should be emphasized that the quoted \$184.00 figure was only the *average* in those two ports; many workers make much more in weekly wages, depending upon their skills and jobs. Longshoremen who handle explosives or general cargo earned weekly wages of \$328.80 in the Port of New York during 1970;<sup>72</sup> to them \$70.00 is a drop in the bucket of financial need.

The 1972 Amendments provide for a liberalized recovery ceiling which varies with yearly changes in industry wage levels.<sup>73</sup> The standard is still 66 2/3 percent of the worker's average weekly wage, but the maximum payment has been greatly upgraded from \$70.00 per week:

[C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or \$167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

68. Pub. L. No. 92-576, § 18(a) (Oct. 27, 1972), *amending* 33 U.S.C. § 905 (1970) (emphasis added).

69. See S. REP. NO. 92-1125, 92d Cong., 2d Sess. 5 (1972).

70. 33 U.S.C. §§ 906-08 (1970), *as amended*, Pub. L. No. 92-576 (Oct. 27, 1972) (enacted as Act of March 4, 1927, ch. 509, §§ 6-8, 44 Stat. 1426-29).

71. *Hearings on S. 2318, S. 525, and S. 1547 Before the Senate Subcomm. on Labor, 92d Cong., 2d Sess. 38 (1972).*

72. *Id.* at 99.

73. Pub. L. No. 92-576, § 5(a)(3) (Oct. 27, 1972), *amending* 33 U.S.C. § 906 (1970).

(D) 200 per centum beginning October 1, 1975.<sup>74</sup>

The legislative purpose behind greater compensation is to raise "benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."<sup>75</sup>

### C. *The Value of Recovery in a Third Party Suit*

Inadequate benefits under the old Act forced injured longshoremen into a legal battle of economic survival. In port cities such as New York where living expenses are high, \$70.00 per week did not go very far. Third party suits bridged the gap with a more liberal damage measure. The elements of recovery in such suits are: (1) Actual wages lost; (2) Physical pain and suffering; (3) Impairment of future earning capacity; (4) Medical expenses; (5) *Future* physical pain and suffering; and (6) Mental pain and suffering.<sup>76</sup> Many of these elements are the same as those required under the Act;<sup>77</sup> but, the difference in recovery had been great in actual experience because the consciences of the court and the jury are the only limiting factors. A good example of this difference was seen in *Ryan*, where Frank Palazzolo collected \$12,797.36 under the Compensation Act, and \$75,000 in his third party action. It is assumed that a third party negligence action will result in similar recoveries under the 1972 Amendments' version of the third party action, now limited to negligence.

### D. *Comparative Negligence*

The 1972 Amendments limit third party actions to negligence for injuries sustained aboard ship. The Senate committee's report indicates that the legislative intent was to place the longshoreman injured aboard a vessel

in the same position he would be in if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "seaworthiness", "nondelegable duty", or the like.<sup>78</sup>

Despite its desire to place the longshoreman in the same position in

74. Pub. L. No. 92-576, § 5(a) (Oct. 27, 1972), *amending* 33 U.S.C. § 906 (1970).

75. S. REP. No. 92-1125, 92d Cong., 2d Sess. 5 (1972).

76. See NORRIS, MARITIME PERSONAL INJURIES § 53 (2d ed. 1966).

77. Medical expenses and wage compensation were discussed in section IV, B *supra*. Additional compensation is paid under the Act for permanent partial disability; a differential is paid for temporary partial disability, not exceeding 5 years, which results in decreased earning capacity. 33 U.S.C. § 908 (1970), *as amended*, Pub. L. No. 92-576, §§ 5(c), 7, 9, 20(a) (Oct. 27, 1972) (enacted as Act of March 4, 1927, ch. 509, § 8, 44 Stat. 1427).

78. S. REP. No. 92-1125, 92d Cong., 2d Sess. 10 (1972).

which he would be if injured ashore, the committee saved the *admiralty* version of contributory negligence—the less harsh doctrine of comparative negligence:

[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee *intends* that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee *intends* that the admiralty concept of comparative negligence . . . shall apply . . . . Also, the Committee *intends* that the admiralty rule which precludes the defense of "assumption of risk" . . . shall also be applicable.<sup>79</sup>

#### V. THE PROBLEM AROUND THE CORNER—FEDERAL LAW OR STATE LAW IN THIRD PARTY ACTIONS BY PERSONS ON THE DOCK?

Prior to the 1972 Amendments, the Act covered only those workers who were employed upon the navigable waters of the United States or in dry docks.<sup>80</sup> At times, however, longshoremen working on the dock would receive a ship-related injury there, such as cargo falling from a crane aboard the ship. Borderline cases such as these created a "twilight zone" in which the question was whether the Act applied.<sup>81</sup> A workman injured on the dock independent of anything to do with the vessel was covered by state law. The Amendments, however, change this by bringing longshoremen on the dock under their protective umbrella:

Sec. 3(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining pier, wharf, dry dock, terminal, building, way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel*).<sup>82</sup>

The intent, however, is not to cover all employees in the above enumer-

79. *Id.* at 12 (emphasis added).

80. 33 U.S.C. § 903(a) (1970), *as amended*, Pub. L. No. 92-576, § 2(c) (Oct. 27, 1972).

81. *Davis v. Department of Labor and Indus.*, 317 U.S. 249 (1942).

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements.

*Id.* at 256.

The extension of the act also should end the "maritime but local" controversy spawned by *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

82. Pub. L. No. 92-576, § 2(c) (Oct. 27, 1972), *amending* 33 U.S.C. § 903(a) (1970) (enacted as Act of March 4, 1927, ch. 509, § 3(a) 44 Stat. 1426).

ated areas, but only those "engaged in loading, unloading, repairing, or building a vessel."<sup>83</sup>

The new problem which arises from this expanded coverage is the choice of law in third party actions brought by workers injured on the docks against those causing the injuries. In the author's opinion, federal and not state law must be applicable. The expressed intent of the Senate committee in expanding coverage was to "promote uniformity;"<sup>84</sup> the committee did not want compensation left up to the states. Similarly, it could be said that resort to state law on third party shoreside claims would prevent uniformity. The interpretation of the Longshoremen's and Harbor Workers' Compensation Act from *Jensen*<sup>85</sup> onward has emphasized uniformity. Application of state law would run counter to the reason for which the Act was created: "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish."<sup>86</sup>

The Senate committee called for uniformity vis-à-vis accidents *aboard* ship, stating that it intended federal law to apply to third party negligence claims arising therefrom.<sup>87</sup> It would therefore seem only proper that the same law be applied to accidents on the docks. The ramifications of this prediction remain to be seen, but the application, for example, of comparative negligence, rather than contributory negligence, to a shoreside third party action would allow for recovery where recovery would not previously have been available in a state adhering to the contributory negligence doctrine.

## VI. CONCLUSION

The objects of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are:

1. To increase benefits under the Act.<sup>88</sup>
2. To make the stevedore-employer's sole liability the obligation to provide compensation and benefits under the Act.<sup>89</sup>
3. To make the vessel liable only for its own negligence.<sup>90</sup>
4. To eliminate hold-harmless or indemnity agreements between stevedore and vessel.<sup>91</sup>

83. S. REP. No. 92-1125, 92d Cong., 2d Sess. 13 (1972).

84. *Id.*

85. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

86. *Id.* at 217.

87. S. REP. No. 92-1125, 92d Cong., 2d Sess. 12 (1972).

88. S. REP. No. 92-1125, 92d Cong., 2d Sess. 5-6 (1972); see Pub. L. No. 92-576, §§ 5 & 7 (Oct. 27, 1972).

89. S. REP. No. 92-1125, 92d Cong., 2d Sess. 11 (1972); see Pub. L. No. 92-576, § 18(a) (Oct. 27, 1972), amending 33 U.S.C. § 905 (1970).

90. S. REP. No. 92-1125, 92d Cong., 2d Sess. 12 (1972).

91. S. REP. No. 92-1125, 92d Cong., 2d Sess. 12 (1972).

5. To extend the Act to shoreside areas.<sup>92</sup>

The success of the legislation in meeting these goals remains to be seen in its treatment by the courts. It is clear, however, that the increased benefits will dampen judicial eagerness to evade the Act, which may once again be a viable piece of social legislation.

---

92. S. REP. No. 92-1125, 92d Cong., 2d Sess. 12 (1972); see Pub. L. No. 92-576, § 2(a) (Oct. 27, 1972), *amending* 33 U.S.C. § 902 (1970).