Contribution in Non-Collision Maritime Cases

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ence of the debt, and the debtor can assert against the subrogee any
defenses he had against the original creditor. If the subrogation is
partial, the debtor can require the joinder of both the partial subrogor
and the partial subrogee, avoiding the possibility of multiple suits.
Thus, even in cases of partial subrogation, the debtor is not preju-
diced and the court correctly viewed his lack of consent as immater-
ial.

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Sessions, a longshoreman, was employed by Mid-Gulf Stevedo-
dores, Inc. to load a vessel in the Port of Houston. While walking atop
cargo previously loaded in Mobile by Cooper Stevedoring Co., he
stepped into a concealed gap, sustaining injury. Thereafter, Sessions
recovered damages from the vessel and the vessel sought contribution
from Cooper Stevedoring. In affirming the Fifth Circuit Court of
Appeals, the United States Supreme Court held that contribution is
permissible between joint tortfeasors in non-collision maritime cases
if the party against whom contribution is sought is not immune from
liability by statute. Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417

Cir. 1959); Motor Ins. Corp. v. Employers' Liability Assurance Corp., 52 So. 2d 311
(La. App. 1st Cir. 1951); International Paper Co. v. Arkansas & Louisiana M. Ry. Co.,
35 So. 2d 769 (La. App. 2d Cir. 1948). Since the subrogee is subject to all defenses
available to the debtor against the original creditor, and the subrogee can recover only
the amount expended, a third party will seldom pay the debt of another and request a
conventional subrogation from the original creditor, unless it is in his own interest to
do so. While the general contractor in the instant case could have let the supplier file
his lien, requested that the subcontractor bond the lien, and paid the supplier only in
case the subcontractor refused, it was more advantageous to the general contractor to
keep the supplier from filing the lien. See The Work of the Louisiana Appellate Courts
the instant case.

33. LA. CODE CV. P. art. 697 provides: "An incorporeal real right to which a person
has been subrogated, either conventionally or by effect of law, shall be enforced judi-
cially by: (1) the subrogor and the subrogee, when the subrogation is partial; or (2)
the subrogee, when the entire right is subrogated." The official comment to the article
indicates that both the partial subrogee and the partial subrogor are necessary parties
to a suit enforcing the subrogated claim, and the defendant waives his exception unless
he timely objects to the nonjoinder of a necessary party. Since in most cases the debtor
will be able to join both partial subrogee and partial subrogor, the instant case poses
no significant impediment to judicial economy.

In maritime law, the rule of contribution or division of damages between joint tortfeasors in collision cases is one of ancient origin. However, in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Co.*, the United States Supreme Court refused to allow contribution between joint tortfeasors in a non-collision case. The *Halcyon* rule has affected two lines of factually distinguishable cases. One line of cases involves basically the same fact situation as arose in *Halcyon*: the party against whom the shipowner sought contribution was the plaintiff's employer who was exempt from tort liability under the Longshoremen's and Harbor Workers' Compensation Act. Even in such situations, before the 1972 amendments to the Act, the strict rule of no-contribution was circumvented by the doctrine of *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.* which allowed a shipowner an action in indemnity against the longshoreman's employer based on a breach of an implied contractual obligation to perform in a safe manner.


6. 33 U.S.C. § 905(a) (Supp. 1972) provides in part: "The liability of an employer prescribed in section 904 of this title 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. . . ."

7. The 1972 amendment to the Act foreclosed the possibility of an action for indemnity against the employer by providing that an "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." 33 U.S.C. § 905(b) (Supp. 1972). See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974).


The second line of cases affected by *Halcyon* involves an important distinction: the party against whom contribution was sought was not immune by statute from suit by the plaintiff. Under these circumstances the courts were confronted with whether the broad prohibition against contribution in non-collision cases announced in *Halcyon* should be invoked to prevent contribution or whether the *Halcyon* holding should be limited to its particular facts. Some federal courts strictly applied the language of *Halcyon* to exclude contribution, although in some instances expressly questioning the equity of such a decision. In prohibiting contribution, courts echoed the Supreme Court's reservations in *Halcyon* about taking judicial initiative in light of anticipated complexities in administering contribution and determined that any solution should await Congressional action. Some of these courts were also influenced or confused by common law concepts barring contribution between joint tortfeasors. The inequitable result of the failure to distinguish *Halcyon* from cases involving no statutory employer immunity was that, as between mutual wrongdoers, the party against whom the plaintiff chose to bring suit was forced to bear the entire burden.

On the other hand, the Second Circuit, in *In re Seaboard Ship-


12. "It is ironic that admiralty, normally so hospitable to equitable principles, should deny contribution except in a strictly limited category of 'collision' cases. But this is the doctrine of *Halcyon*." Mendez v. States Marine Lines, Inc., 421 F.2d 851, 854 (3d Cir. 1970) (Freedman, J., concurring).


15. "We reiterate the view . . . that *Halcyon* merely reflects the long standing maritime rule which, like the common law, bars contribution between joint tortfeasors."

ping Corp., and the Fifth Circuit, in Horton & Horton v. T/S J.E. Dyer and Watz v. Zapata Off-Shore Co., distinguished Halcyon and allowed contribution where the joint tortfeasor from whom it was sought was not exempt by statute. According to the Second Circuit, Halcyon concerned an area of law covered by the Longshoremen's and Harbor Workers' Compensation Act and thus was "inapplicable in cases where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute." The Fifth Circuit used similar logic in distinguishing Halcyon.

The instant case, which was an appeal from the Fifth Circuit's application of the Horton and Watz exceptions to Halcyon, limited Halcyon to its particular facts. The decision in Kopke to allow contribution even in non-collision cases when neither of the joint tortfeasors is insulated from liability by statute will eliminate the disparity of approach which has characterized the lower court decisions. However, the question of how contribution is to be effected remains unanswered. In collision cases, although the equal division of damages is a well established rule, it has been criticized because it

17. 428 F.2d 1131 (5th Cir. 1970).
18. 431 F.2d 100 (5th Cir. 1970).
22. Suit was commenced prior to the 1972 amendments to the L.H.W.C.A., 33 U.S.C.A. § 905(b) (Supp. 1972) which prohibits actions against the shipowner based on absolute liability for unseaworthiness; thus, the amendments were inapplicable. Cooper Stevedoring v. Fritz Kopke, Inc., 417 U.S. 106, 107 n.1 (1974). However, the result would have been affected only to the extent that the vessel's liability was based on no-fault liability for "unseaworthiness," leaving the rule announced still viable.
23. See notes 11, 19 supra.
24. See Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 108 n.3 (1974): "[W]e have no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties."
forces parties disproportionally at fault to share the damages equally. At the same time, apportionment of fault has been allowed in order to mitigate damages in non-collision cases involving injuries to contributorily negligent maritime plaintiffs. In spite of the obvious equitable advantages, considerations of judicial efficiency make it uncertain whether apportionment of damages based on a proportional degree of fault will be utilized in effecting contribution pursuant to the Kopke decision. Even those courts allowing contribution before Kopke consistently divided the damages equally. However, because of the Supreme Court's refusal to decide this issue, the question remains open and may produce differing results in the lower courts.

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The United States Supreme Court in Union Oil Co. v. The San Jacinto, 409 U.S. 140, 141 (1972), granted certiorari “to consider petitioner's request that we abandon the divided damages rule,” but found no liability on the part of one vessel and did not reach the issue of damages.


27. The inflexibility of dividing damages equally when one party's degree of fault greatly outweights the other has been tempered somewhat by the “major-minor fault doctrine” designed “to relieve a party whose fault was only technical from the harshness of the divided damages rule” by releasing the party whose fault was only “minor.” Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 690 (5th Cir. 1970). See also The City of New York, 147 U.S. 72 (1893). See generally Gilmore & Black §§ 7-4, at 402-03.


29. One commentator in considering judicial efficiency as an argument against apportionment of damages has determined: “[T]he proportional negligence rule . . . seems in principle and in operation more just than the cruder . . . rule of divided damages. The only objection that really has any plausibility is the one based on the difficulty of assigning degrees of fault in exact percentages. The answer is, of course, that judges would simply approximate, as best they could, as is done every day in other cases in matters of amount of damages, degree of disability, etc. An attempt at a division on the basis of degree of fault would at least not be foredoomed to go badly wrong in a large number of cases, as is the present rule.” Gilmore & Black § 7-20 at 439.