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THE BURNSIDE DOCTRINE: DEVELOPMENT AND UNRESOLVED ISSUES

The Longshoremen's and Harbor Workers' Compensation Act¹ (LHWCA) provides a system of worker's compensation for persons qualifying as maritime employees under the Act.² Benefits to injured workers or their survivors are paid by the employer or his insurer.³ When a third party is at fault in causing an injury to a covered employee, the LHWCA provides that the compensation liability of the insurer is reduced by the amount recovered by the injured employee or his survivors⁴ in a tort action against the third-party tortfeasor.⁵ If the injured employee or his survivors do not file this tort suit against the third-party tortfeasor within six months after receiving compensation "under an award,"⁶ the acceptance of compensation acts as an assignment of the employee's or survivors' right to recover damages against the third person in favor of the employer.⁷ Additionally, the jurisprudence has established that the employer is entitled to be reimbursed out of the employee's tort recovery for compensation benefits paid, regardless of whether the compensation was paid under an award.⁸ This result remains even if the employer is concurrently negligent,⁹ and the employer may recover all of the compensation paid by him to the employee despite the fact that the employee

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1. 33 U.S.C. §§ 901-952 (1976).

2. For an injury to be compensable, the LHWCA requires that the worker have the "status" of a covered employee, as defined in 33 U.S.C. § 902(3) (1976). In addition, the injury must have occurred on a covered "situs" as defined in 33 U.S.C. § 903(a) (1976).

3. An employer who secures the payment of compensation to his employees is not liable in tort to an injured employee or to that employee's representative. 33 U.S.C. §§ 904-905 (1976). The terms "employer" and "insurer" are used interchangeably in this note since the remedies discussed herein relate to 33 U.S.C. § 933 (1976), which provides in subsection (h): "Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

4. In case of the covered employee's death following the injury, whether or not the death is the result of the injury, certain members of the employee's family are entitled to collect LHWCA benefits. 33 U.S.C. §§ 908(d), 909 (1976).

5. 33 U.S.C. § 933(f) (1976).

6. The definition of the words "under an award" has generated a great deal of litigation and is generally beyond the scope of this note. Basically the issue is whether a certain event constitutes an "award" so as to trigger the six-month period for an assignment. See generally *Pallas Shipping Agency v. Duris*, 103 S. Ct. 1991 (1983).

7. 33 U.S.C. § 933(b) (1976). The assignment can also work to the benefit of the insurer through 33 U.S.C. § 933(h) (1976).

8. See *The Etna*, 138 F.2d 37 (3d Cir. 1943).

9. In *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976), the court stated that "the stevedore-employer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award." *Id.* at 674.

bears the full burden of paying the expenses for the action against the third-party tortfeasor.¹⁰

These sections of the LHWCA and the jurisprudentially created remedies protect the insurer for that portion of compensation benefits paid or payable to the injured employee which does not exceed the liability of the tortfeasor. However, situations arise where the benefits paid to the injured employee or his survivors exceed the amount which the employee or his survivors could recover in a tort action against the tortfeasor. For example, state law may limit the amount of damages available in the employee's or survivors' tort action,¹¹ or the injured employee may be of such an age that his claim for lost wages is small, while the insurer would be liable for lifetime benefits to the employee or his survivors.¹² In such situations, the subrogation and assignment remedies listed above by which the insurer can reduce his compensation liability or recoup some of the benefits paid out will not be sufficient for the insurer to be made whole.

Development of the Burnside Doctrine

Assignment and subrogation are not the only means by which the insurer may recover. In *Federal Marine Terminals v. Burnside Shipping Co.*,¹³ the United States Supreme Court held that the statutory assignment remedy in section 933 of the LHWCA¹⁴ is not the exclusive remedy of the employer. A stevedore's employee, who was covered under the LHWCA, was killed while working on board a ship. Both the decedent's widow and the decedent's employer sued the shipowner, the widow seeking wrongful death recovery and the employer seeking reimbursement for past and future compensation payments.¹⁵ The state wrongful death statute limited recovery to \$30,000, as against a compensation liability which might total \$70,000. The Court considered two issues: (1) whether section 933

10. See *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74 (1980). It is questionable whether this same result is reached when the employer's tort recovery is not large enough to cover both the attorney fees and the compensation lien of the employer. The *Bloomer* court did not face this issue, and there is a conflict among the circuits. Compare *Ochoa v. Employer's Nat'l Ins. Co.*, No. 82-3618 (5th Cir. Feb. 13, 1984) (reasonable attorney fees must be deducted from the employee's recovery before the insurer's lien can be satisfied) and *Incorvaia v. Hellenic Lines*, 668 F.2d 650 (2d Cir.), cert. denied, 103 S. Ct. 293 (1982) (reasonable attorney fee has priority) with *Johnson v. Sioux City & New Orleans Barge Lines*, 629 F.2d 1244 (7th Cir.), cert. denied, 449 U.S. 987 (1980) (compensation lien has priority).

11. See, e.g., *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969) (state law limited the wrongful death recovery to \$30,000, while the compensation liability might total \$70,000).

12. See, e.g., *Hinson v. SS Paros*, 461 F. Supp. 219 (S.D. Tex. 1978) (66-year-old victim).

13. 394 U.S. 404 (1969).

14. 33 U.S.C. § 933 (1976).

15. The employer's claim was asserted in its counterclaim to an indemnification claim by the shipowner.

was the exclusive remedy available to an employer attempting to recover compensation benefits paid or payable to his employee injured by a third party, and (2) if section 933 is not the exclusive remedy, whether the third party (there, a shipowner) owed the employer (there, a stevedore) any duty giving rise to a cause of action in favor of the employer. The Court held that section 933 of the Act did not preclude a direct action by the employer against a third-party tortfeasor, noting that "the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect."¹⁶ Furthermore, the Court concluded that federal maritime law does impose upon a shipowner a duty of due care to a stevedoring contractor, and does recognize a direct action in tort in favor of the stevedore against the shipowner to recover the amount of compensation benefits payable as a result of the shipowner's negligence.¹⁷ Thus, the Court not only removed any bar to an independent cause of action on behalf of the employer, but also provided the employer with that independent cause of action.

The cause of action recognized in *Burnside* is a federal cause of action since, in that case, federal law provided the rule of decision in the victim's tort suit against the tortfeasor. The compensation liability of the employer is a federal liability under the LHWCA, but the tort action between the victim or the employer and the third-party tortfeasor may be either a state or federal cause of action. Therefore, if a court determines that state law applies, the employer must allege an appropriate state law cause of action.

In *Louviere v. Shell Oil Co.*,¹⁸ the plaintiff was injured in the explosion of a water heater on an offshore oil rig attached to the Outer Continental Shelf ninety miles off the Louisiana coast.¹⁹ The plaintiff was employed by Movable Offshore (Movable), a drilling contractor who owned the drilling rig.²⁰ Movable's insurer, Argonaut Insurance Co. (Argonaut), paid LHWCA benefits to the plaintiff.²¹ Argonaut filed suit against the platform owner, Shell Oil Co. (Shell), asserting an independent cause of action against Shell for compensation benefits paid or payable to the vic-

16. 394 U.S. at 412.

17. *Id.* at 416-17.

18. 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976).

19. *Olsen v. Shell Oil Co.*, 708 F.2d 976, 978 (5th Cir. 1983) (a case arising from the same accident).

20. *Id.*

21. The plaintiff was covered under the LHWCA through the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. V 1981). 43 U.S.C. § 1333(b) (Supp. V 1981) states:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the [LHWCA].

tim. Argonaut's suit was filed one day before the prescriptive period elapsed. The victim filed suit against Shell some two years later, while Argonaut's suit was still pending. The defendant Shell pleaded prescription to the victim's suit, arguing that Argonaut's suit did not interrupt prescription since Argonaut's suit was barred by section 933 of the LHWCA.

The first issue was whether state or federal law should apply to the case.²² Since the accident occurred on the Outer Continental Shelf, the Fifth Circuit looked to the Outer Continental Shelf Lands Act (OCSLA) which provides:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary . . . , the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and *artificial islands and fixed structures erected thereon*, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf²³

Thus, state law was applicable in *Louviere* because the cause of action arose on a fixed oil rig on the Outer Continental Shelf. Under the OCSLA, state law is applicable in fact situations such as that present in *Louviere*, not of its own force as state law, but rather as statutorily adopted federal law. The courts have implied that "federal law" in this context means federal statutory law, as opposed to federal common law.²⁴

Since state law applied to Argonaut's action, it was necessary to find a state cause of action. Although the court cited *Burnside* in concluding that section 933 did not bar an independent suit by the employer, that part of *Burnside* which provided a federal cause of action did not apply to Argonaut's claim which was governed by state law. The court held that Argonaut's claim stated a cause of action for unjust enrichment under Louisiana law, reasoning that Argonaut had specifically alleged that the fault of the defendants injured the employee whom Argonaut then became obligated to and did in fact compensate. Thus, the court reasoned that the tortfeasors were unjustly enriched at Argonaut's expense.²⁵ *Louviere*, therefore, followed *Burnside* in holding that section 933 was not a bar

22. 509 F.2d at 281 n.4.

23. 43 U.S.C. § 1333(a)(2)(A) (Supp. V 1981) (emphasis added).

24. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court stated that "Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law." *Id.* at 104-05 (footnote omitted).

25. 509 F.2d at 285.

to an independent cause of action by the employer, and it established one such independent cause of action under Louisiana law.

If the *Louviere* court's rationale is accepted, any Louisiana employer or insurer faced with a LHWCA compensation liability which exceeds the amount which the employee or his representative could have recovered in a direct action against the tortfeasor would seemingly have access to a *Burnside*-type action. However, the "enrichment" found by the court in *Louviere* arguably will not exist in most situations. The court found a benefit to the tortfeasor from the tortfeasor's transfer of the compensation burden to the employer. However, were it not for the unjust enrichment cause of action found by the court, the compensation burden would not be on the tortfeasor in the first place. The court has used the result of its reasoning as the foundation for that same reasoning. Thus, the vitality of the *Louviere* cause of action is questionable.²⁶

Having found that section 933 does not limit the insurer to the assignment and subrogation remedies and having found an appropriate state tort law cause of action, the only remaining issue after *Louviere* was whether the liability of the third-party tortfeasor under the state law cause of action is limited to the amount which might be recovered in a direct action by the victim. This question was answered in the recent case of *Olsen v. Shell Oil Co.*,²⁷ which arose from the same water heater explosion as that in *Louviere*. One man injured in the explosion and the widows of two other men killed in the explosion each filed suit against the platform owner, Shell. Argonaut, who had paid LHWCA benefits to the injured men and the survivors of those killed in the accident, intervened in the suits seeking subrogation for the amount of compensation paid to the victims. Argonaut also filed its own suit against Shell for recovery of past compensation payments and future compensation liability. All of the suits were consolidated for trial. The trial court held the platform owner liable to the injured man and the widows and ordered Shell to respond in damages. Differing amounts of the awards were to be paid to Argonaut as reimbursement for compensation benefits paid to the injured man and the widows. The amount of compensation paid by Argonaut to widow Olsen exceeded her tort recovery, so her entire award was paid over to Argonaut.

26. In other words, the *Louviere* court held that the tortfeasor is unjustly enriched by the transfer of the burden of compensating the injured employee from the tortfeasor to the employer, and to remedy this unjust enrichment, the court placed the burden of compensation on the tortfeasor. Prior to *Louviere*, the burden of compensating the injured employee has always rested on the employer's shoulders. Therefore, the *Louviere* court found an unjust enrichment of the tortfeasor in the tortfeasor's transfer of an obligation which, but for the finding of the unjust enrichment, the tortfeasor would not have had in the first place. The logic is clearly circuitous, relying on its conclusion as a foundation for its reasoning.

27. 708 F.2d 976 (5th Cir. 1983).

Argonaut's recovery of payments made to Olsen thus presented the situation previously mentioned since the section 933 assignment or subrogation remedies would not provide the insurer with full recovery because the amount of compensation paid or payable exceeded the liability of the third-party tortfeasor. The court noted that the district court had awarded Olsen's widow only \$16,000 because she had been divorced from the decedent at the time the accident occurred and had been receiving little support or comfort from him.²⁸ Argonaut's liability for compensation to the Olsen family, however, was much greater than this amount. Thus, were Argonaut limited to recovering what widow Olsen could recover from the tortfeasor, it would be limited to a \$16,000 recovery against a much larger compensation liability. The district court did not so limit the insurer, however, and ordered Shell to reimburse Argonaut for all compensation benefits paid and those payable in the future.²⁹

On appeal, Shell argued that its liability should be limited to the amount which could be awarded in "direct" tort damages; that is, the amount which could be awarded to the victims of the tort. The basis of the defendant's argument was that "the LHWCA contemplates one damage award against a culpable third person and limits that award to the amount the employee or his representative would be entitled to recover under applicable tort law."³⁰ Shell further argued that the inclusion in the LHWCA of a statutory assignment remedy, the only remedy for the insurer available in the statute, implies a limitation on the amount of any recovery by an insurer against a third-party tortfeasor. Therefore, even though a separate cause of action is available to the insurer, the liability of the tortfeasor is limited to the amount which the victims or their survivors could recover in a tort suit.

The Fifth Circuit chose to rely on the unjust enrichment cause of action created in *Louviere*, despite the problems with that theory of recovery.³¹ Citing *Burnside*, the court held that the LHWCA, particularly section 933, does not limit the amount of recovery from a tortfeasor of benefits paid or payable by an employer or insurer to that amount which the victims or their representatives are able to recover. The holding and the reliance on *Burnside* seem correct. Since the court treated the cause of action as a state law cause of action, *Burnside* would seem only important insofar as it held that section 933 is not the exclusive remedy for the employer and does not limit the amount of damages available

28. *Id.* at 981 n.4.

29. The court also held that the plaintiff's employer, Teledyne Movable Offshore, was to indemnify Shell.

30. *Olsen*, 708 F.2d at 980.

31. Since the same accident was involved in *Olsen* and *Louviere*, the *Olsen* panel was perhaps hesitant to differ from the arguably incorrect interpretation of state law reached by the *Louviere* panel.

to those recoverable by the employer via section 933 or the judicially created subrogation remedy. Interestingly, the court in *Olsen* cites *Burnside* only for the question of whether the tortfeasor's liability in an independent tort action by the insurer is limited to that amount recoverable in a direct action by the victim or his representative. In *Burnside*, the court never specifically stated that section 933 did not limit the amount of damages available, but since the court recognized that section 933 did not bar an independent action by the employer, the concomitant freedom of the damages amount from the limitations of section 933 may be implied.³²

The LHWCA was substantially amended in 1972³³ after the Supreme Court's decision in *Burnside*. One of the amended sections³⁴ provides that if the employee's injury was caused by "vessel negligence," the employee can recover directly against that "vessel."³⁵ This section was intended to abolish the *Sieracki*³⁶ doctrine, which had allowed a longshoreman "doing a seaman's work"³⁷ to recover from the vessel upon which he was working for injuries caused by an unseaworthy condition. The amendment limits the longshoreman to an action for negligence.³⁸ This amended section also provides that this new remedy for the employee is exclusive of all other remedies against the vessel except other remedies available under the Act.³⁹ One district court has held that this amendment had the effect of abrogating *Burnside*, and consequently, the court limited the insurer's recovery of past and future compensation benefits to that amount which would have been recoverable by the victim's representatives.⁴⁰ The tort-

32. The *Olsen* panel cites the following language from *Burnside*: "[W]e can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner." *Burnside*, 394 U.S. at 413, quoted in *Olsen*, 708 F.2d at 981. Arguably, once the *Burnside* court determined that a separate cause of action was available, it was taken for granted that the amount of damages available in such an action would not be tied to the amount of damages available in a direct action by the victim's survivors. The cited language seems to have dealt more with the question of whether section 933 was a bar to the separate cause of action than with the question of whether damages are limited to those available in the direct action.

33. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

34. 33 U.S.C. § 905(b) (1976).

35. 33 U.S.C. § 902(21) (1976) provides the definition of "vessel" for the purposes of the LHWCA.

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

37. *Id.* at 99.

38. H.R. REP. No. 1441, 92d Cong., 2d Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4701-05.

39. 33 U.S.C. § 905(b) (1976).

40. *Hinson v. SS Paros*, 461 F. Supp. 219 (S.D. Tex. 1978). The court concluded: "[T]he Amended Act as a whole, and § 905(b) in particular, has modified *Burnside* to the extent that employers or their compensation insurance carriers are limited to the recovery of compensation benefits paid, as provided in § 933, and that

feasor in that case was a vessel. In *Olsen*, the court correctly decided that since a vessel was not involved, this amendment, "[w]hatever its meaning,"⁴¹ could have no application.⁴²

Since *Burnside* was decided in 1969, it has been something of a "sleeping giant," applied only infrequently by the federal courts. One of the more widely cited applications of *Burnside* is *Landon v. Lief Hoegh & Co.*⁴³ In *Landon*, the court held that in a tort action by the victim against the third-party tortfeasor, the employer was neither a necessary nor indispensable party. The tortfeasor argued that because the employer had a cause of action under *Burnside*, he could be joined as a proper party plaintiff. The court also noted that "[the employer's] *Burnside* claim for relief would only become a practical remedy if it still exists, after it is determined that the compensation payments exceed the plaintiff's recovery."⁴⁴ Thus, the court reasoned that the employer might never have a cause of action against the tortfeasor, and complete relief could be had between the employee and the tortfeasor without the employer's presence.

In *Burnside*, the Supreme Court recognized that the duties owed to the stevedore-employer differ from those owed to the longshoreman-employee, so the judicial economy to be gained by determining the two causes of action in the same proceeding would seem marginal.⁴⁵ The *Landon* court's belief that the independent action could only be brought after

in no instance can they recover more than the injured worker or his beneficiaries. *Id.* at 223. The court also felt that the recovery of future compensation benefits would be too speculative.

41. *Olsen*, 708 F.2d at 982.

42. The Ninth Circuit has considered this issue. In *Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp.*, 696 F.2d 703 (9th Cir. 1983), the court, in concluding that the 1972 amendments have no effect on *Burnside* even in those cases involving a vessel tortfeasor, noted that "[t]he legislative history of the 1972 amendments shows that Congress intended the elimination of the *Ryan* [Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956)] and *Sieracki* type of causes of action. However, *no mention* was made of the *Burnside* type of a cause of action." *Id.* at 706.

To be completely accurate, one must recall that *Burnside* yielded two conclusions: (1) section 933 is not the employer's exclusive remedy against the tortfeasor, and (2) federal law imposes a duty upon the shipowner in favor of the stevedore employer. To speak of "the *Burnside* type of cause of action" directs attention at the latter conclusion of *Burnside*, while it is in fact the continuing validity of the former conclusion which is at issue. Had the *Olsen* or *Crescent Wharf* court concluded, as did the district court in *Hinson v. S.S. Paros*, 461 F. Supp. 219 (S.D. Tex. 1978), discussed *supra* note 40 and accompanying text, that the LHWCA amendments modified *Burnside*'s holding and made section 933 the employer's exclusive remedy, it would have been unnecessary to consider whether federal law (or state law, for that matter) provides the employer with a cause of action. The existence of a duty owed to the employer, for example, is irrelevant if the employer has no access to a remedy due to the exclusivity of section 933.

43. 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

44. *Id.* at 761.

45. In *Burnside*, the Court noted: "We do not, of course, hold that the shipowner's duty to the employer is the same as to the employee." 394 U.S. at 415.

tort damages to the employee were fixed, while not expressly supported by *Burnside*, makes sense. The cause of action necessarily only exists when the employer is damaged, and the employer is only damaged when the compensation liability exceeds the tort recovery of the victim.

Unresolved Issues of the Burnside Doctrine

Application of the *Burnside* doctrine presents several problems as yet not considered by the courts. As previously noted, the existence of an independent action by the LHWCA insurer or the employer of an employee injured by the fault of some third party should be required only infrequently. Specifically, such an action is only necessary when the compensation liability exceeds the amount which the employee or his representative could have recovered in a direct tort action against the tortfeasor.

One problem which exists when state law is to apply to the independent action by the insurer is the existence of an appropriate cause of action under Louisiana law. Given the apparent weakness of the *Louviere* cause of action for unjust enrichment, another theory of recovery will probably be required. The cause of action established in *Burnside* stems from a federally recognized duty, but perhaps such a duty (from a third party to the party responsible for the payment of workmen's compensation benefits) exists as a matter of state law. Alternatively, one commentator has suggested that the cause of action used in *Burnside* may be most closely related to a cause of action for negligent interference with contract.⁴⁶ It appears that such a cause of action is not recognized under Louisiana law.⁴⁷ In order to apply *Burnside* to those situations in which state law will provide the rule of decision, courts will be required either to continue to follow *Louviere* or to fashion a new cause of action based on *Burnside* or upon some other theory.

It appears that in the future the state courts may have more opportunities to address this issue for themselves. Recently, in *Lowe v. Ingalls Shipbuilding*,⁴⁸ the Fifth Circuit discussed the jurisdictional requirements for bringing a *Burnside*-type action in federal court. The plaintiffs, injured employees of the defendant, had reached a settlement with a third-party tortfeasor which was conditioned by agreement upon the third party's freedom from liability to the employer. The employees sought a declaratory judgment that

46. Maraist, *Current Developments of Interest—LHWCA: Employer's Recovery Against Tortfeasor*, 1 FIFTH CIR. REP. 19, 19 (Oct. 12, 1983).

47. See *PPG Industries v. Bean Dredging*, No. 82-C-2201, slip op. at 6 (La. Feb. 27, 1984) ("It is highly unlikely that the moral, social and economic considerations underlying the imposition of a duty not to negligently injure property encompass the risk that a third party who has contracted with the owner of the injured property will thereby suffer an economic loss.').

48. No. 82-4361, slip op. (5th Cir. Jan. 30, 1984).

the LHWCA, especially its 1972 amendments, restricts [the employer] to the Act's subrogation rights, that [the employer] accordingly has no independent or *Burnside* type indemnity action, and that, if the LHWCA does not so restrict [the employer's] rights, any independent rights [the employer] might have would arise under state law, and that under the law of the relevant state, Mississippi, [the employer] has no such rights.⁴⁹

The court found that it lacked subject matter jurisdiction under either diversity of citizenship grounds⁵⁰ or under admiralty jurisdiction.⁵¹ Considering federal question jurisdiction,⁵² the court found that the issue of the 1972 amendments' effect on *Burnside* was a "defensive issue which cannot form the basis of section 1331 jurisdiction."⁵³ The court noted that the *Burnside* cause of action is independent, by definition, from the LHWCA; thus, it could not arise under the LHWCA. Finally, the court rejected the argument that federal question jurisdiction was supported by the fact that the employer's obligation to pay compensation was one arising under federal law.⁵⁴ The court thus held that it would not have subject matter jurisdiction if this claim were brought by the employer, and that therefore it had no jurisdiction over the declaratory action brought by the employees.⁵⁵

Another potential problem is the effect of an employee's contributory negligence. Unless the injury to the covered employee was caused solely by his intoxication or by his willful intent to injure or kill either himself or another,⁵⁶ he is entitled to compensation regardless of his fault. However, the employee's tort recovery in his direct action against a negligent third party would be reduced or eliminated, depending upon the jurisdiction, by his contributory negligence. Suppose, for example, an employee was ninety percent contributorily negligent in causing his own

49. *Id.* at 1798-99.

50. 28 U.S.C. § 1332(a)(1) (1976).

51. *Id.* § 1333(1).

52. *Id.* § 1331.

53. No. 82-4361, slip op. at 1806 (footnote omitted).

54. "In these circumstances, this relationship between the LHWCA and [the employer's] questioned *Burnside* cause of action is too indirect, collateral and remote for the *Burnside* cause of action to be considered as one 'arising under' the LHWCA for purposes of federal question jurisdiction." *Id.* at 1809 n.10.

55. Given the federally recognized goal of conservation of the employer's resources for compensation, see *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74 (1980), one might argue that federal factfinding might better be used in this LHWCA-related *Burnside* situation. One author has suggested that a broader inquiry as to the applicability of federal question jurisdiction might be made, at least when there is a "debatable issue" as to federal question jurisdiction. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 17, at 96 (4th ed. 1983). Such an inquiry should include the desirability of having the federal courts decide the *Burnside*-related issues; a question not addressed by the court in *Low*.

56. 33 U.S.C. § 903(b) (1976).

injury. The potential tort liability of the third-party tortfeasor would be reduced by ninety percent or eliminated, depending upon the jurisdiction. However, the full amount of compensation would still be payable to the employee or his survivor. As between the tortfeasor and the employer, who should bear the burden of compensating the employee for his injuries caused in part by the employee's own negligence? Arguably, one of the risks which has been statutorily placed upon the employer is the risk that the employee might negligently cause, in whole or in part, his own injury. This can be seen in the section 903(b)⁵⁷ exclusion for a specific type of employee behavior, perhaps implying that the employer is responsible for compensation burdens caused by other types of employee fault. On the other hand, as between the employer and the tortfeasor, the tortfeasor is the only one directly at fault; the employer is blameless.

Resolution of this problem may well depend upon whether the courts are willing to impute the negligence of the employee to the employer. One commentator has suggested that the employee's negligence should not be imputed since the concept of imputed contributory negligence is fading⁵⁸ and since the cases have held that when the employer and the tortfeasor are concurrently negligent, the tortfeasor is to bear the entire burden of damages as to the employee.⁵⁹ Such holdings imply an unwillingness to hold the employer liable for anything except LHWCA compensation. However, the *Burnside* cause of action is outside of the LHWCA statute by definition. Arguably, the better treatment is to deal with the *Burnside* plaintiff/employer as any other tort plaintiff⁶⁰ and disregard the fact that the plaintiff is also an LHWCA employer. Bolstering this position is the fact that as to the compensation of the longshoreman or covered employee, it matters not whether the employer's recovery under *Burnside* is reduced due to the employee's imputed contributory negligence.

A related problem not yet considered by the courts is whether the employer's own concurrent negligence, which joins with the negligence of the third-party tortfeasor to produce the injury to the employee, should reduce the employer's recovery under a *Burnside*-type cause of action. The most common example of this situation occurs due to the employer's *respondeat superior* liability for the negligent acts of the victim's co-workers. Employer fault may not be used to reduce the tort recovery of the employee from the third-party tortfeasor,⁶¹ and the tortfeasor may not obtain contribution from the concurrently negligent employer.⁶² In

57. *Id.*

58. Maraist, *supra* note 46, at 20.

59. *See, e.g.*, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

60. This, of course, would not be dispositive of the issue, given the questionable status of the doctrine of imputed contributory negligence.

61. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

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

these situations, the courts have not been willing to allow the employer's fault to have a potential effect upon the recovery of the employee.⁶³ However, when the employer is suing the third-party tortfeasor to recover that amount of compensation which exceeds the tort liability of the third party to the employee, the employee faces no danger of financial loss and stands to get both his compensation and tort recovery. The employer's *Burnside*-type cause of action is wholly independent from the employee's cause of action in tort. The *Burnside*-type action is not founded on the tortfeasor's wrong to the covered employee, but on its "independent wrong" to the employer.⁶⁴ The reason for denying reduction of the employee's award, or the award to the employer to whom the employee's action has been statutorily assigned, is at least in part to protect the employee's right to compensation regardless of fault and tort recovery to the extent some third party is at fault. When the party who stands to lose is the employer (who could have avoided this risk by obtaining insurance) or the insurer (whose business is to spread these risks), the employer or insurer should arguably be left with that share of the loss for which the employer was responsible.⁶⁵

Conversely, one might argue that the protection of the employer's assets for the payment of compensation claims is a desirable result.⁶⁶ Thus, it is desirable to protect the employer from having to bear the loss of his own negligence or the negligence of his employee in situations where some third party is partially at fault in causing the employee's injury. This goal would be served as well in the employer's independent action against the tortfeasor as it is in the subrogation and assignment remedies, where this rule already applies. In other words, the argument would be that there is an important maritime interest in allowing the employer to recover all of the compensation payments he makes to his employees whenever some third party is at fault.⁶⁷

63. Reducing the employee's tort recovery as a result of the employer's fault obviously has a direct adverse effect upon the employee, while allowing the third party to obtain contribution from the negligent employer would subject the employer to some liability other than his compensation liability, thus potentially reducing the employer's ability to pay compensation claims.

64. *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 760 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

65. Although *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), seems to stand for the proposition that the employer's fault is not to be considered when determining the rights of the employer as to the third-party tortfeasor, that case would arguably not apply to the employer's independent cause of action. Furthermore, the application of *Edmonds* to a state law cause of action, such as the one in *Olsen*, is uncertain. The *Edmonds* Court noted: "Of course, our decision does not necessarily have any effect on situations where the Act provides the workers' compensation scheme but the third-party action is not governed by principles of maritime law." *Id.* at 272 n.31.

66. See, e.g., *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74 (1980).

67. One implication of such a conclusion is that federal law, rather than state law,

Against this conclusion, one might argue that by freeing the employer from any loss in such a situation the employer loses any incentive to exercise caution to prevent injury to his employees. However, this argument ignores the fact that the employer's LHWCA insurance rates will generally respond to claims filed against him, presumably deterring the employer from careless behavior by the prospect of paying more for his compensation insurance. Furthermore, the employer can not rely on a third party being at fault in causing injury to his employees. More often the injured employee's co-workers are responsible for the employee's injury, thus placing the entire compensation burden on the employer or his insurer.

In *Burnside*, the Court stated that its holding assumed that the stevedore-employer was faultless as to the shipowner-tortfeasor. Prior to the 1972 amendments to the LHWCA, the stevedore-employer was liable to indemnify the shipowner when the stevedore was found to have breached its warranty of workmanlike performance.⁶⁸ In *Desiano v. Norddeutscher Lloyd*,⁶⁹ the district court refused to apply *Burnside* to a situation where the employer was concurrently negligent, noting that the stevedore's obligation to indemnify the shipowner "stems not from any liability imposed upon it through no fault of its own, but rather from its own breach of warranty of workmanlike service."⁷⁰ The 1972 amendments to the LHWCA did away with the indemnity obligation of the stevedore to the shipowner and, thus, arguably renders *Desiano* of no effect. However, *Desiano* may present a situation where the warranty of workmanlike service still exists even though the right to indemnity has been taken away. The argument would be that when the employer exercises his independent cause of action against the tortfeasor, the 1972 amendments should not prevent the tortfeasor, to whom the warranty is owed, from raising it in defense, at least for that portion of the employer's recovery over what the employee could have recovered in a direct action.

Conclusion

Given the infrequency of the fact situations which give rise to a need for the use of the *Burnside* doctrine, it is not surprising that the principle has been used so little and that unresolved problems remain for the courts to consider. Of particular interest to the Louisiana bar, given the weakness of the logic used in *Louviere*, is the fact that the existence of a state law cause of action using *Burnside* is not yet certain in Louisiana. If the

should govern the employer's independent *Burnside* cause of action in all cases, since to decide otherwise would make the protection of this important maritime interest uncertain.

68. See *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *supra* note 42.

69. 301 F. Supp. 241 (S.D.N.Y. 1969).

70. *Id.* at 246.

Louviere court's rationale can be successfully attacked, and if a substitute theory of recovery cannot be found, those Louisiana employer actions in which state law provides the rule of decision would be without a bar in section 933 of the LHWCA and without a cause of action as well. Also, the problems of allocation of the compensation burden when the employer or employee is contributorily negligent remain to be addressed. Before these problems can be resolved in an orderly fashion, the courts will have to reexamine the policy goals of the LHWCA and make a determination as to who should bear the ultimate burden for compensation of an injured employee, the employer or the third party causing the injury.

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