Recent Developments Regarding Maritime Contribution and Indemnity

Gus A. Schill Jr.
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I. INTRODUCTION

Examining problems of maritime indemnity and contribution in the context of personal injury and wrongful death litigation leads to the general conclusion that any definition of these rights usually centers upon the classification of the injured worker in conjunction with the fortuitous location of the tort. The lack of a coherent approach to maritime personal injury litigation, arising from differences in the law applicable to the tort, adversely affects a reasoned determination of the defendant’s rights in seeking contribution or indemnity from another party. In evaluating a defendant’s options against other parties having roles in the casualty, a controlling factor is usually whether the plaintiff’s rights arise pursuant to the general maritime law of the United States, the Jones Act,1 the Longshore & Harbor Worker’s Compensation Act2 (henceforth referred to as the Longshore Act), the statutes and decisions of an adjoining state, and the worker’s compensation act of the state in whose waters the accident occurs. There is no logical method for solving the problem of indemnity and contribution because the applicable statutes often lack uniformity. Also, court decisions from various areas of the country sometimes conflict. One consequence of this lack of uniformity is the absence of predictable results for both maritime workers and employers in the area of general maritime litigation. Another result is the lack of clear guidelines for trial courts to use in deciding legal questions and for attorneys to use in drafting maritime contracts.

The area for consideration is broader than personal injury litigation since claims also result from damage to cargo or other property. The vessel owner, when faced with the prospect of being cast in liability, often seeks to recover indemnity or contribution from another party.3

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Contemporary maritime concepts of indemnity and contribution have two principal points for initial reference: *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, and *United States v. Reliable Transfer Co.* *Ryan* represents an all or nothing recovery for the party seeking indemnity, while *Reliable Transfer* determines recovery on the basis of proportionate fault. The conflicting philosophies underlying these two concepts did not become a major problem until the courts began to factor into the equation the 1972 Amendments of the Longshore Act.

The tripartite litigation between longshoremen, vessel owners, and stevedores/employers significantly affected the dockets of the federal courts. This element, along with the low proportionate recovery on the part of the plaintiff as compared with the total costs of litigation, led Congress to consider an improved method for increasing the injured party's share of the total dollar recovery. The amendments to the Longshore Act were designed to accomplish this result. The compensation benefits were increased, and the instances in which an injured longshoreman could seek recovery from a vessel owner were significantly reduced by removing the vessel's warranty of seaworthiness as a predicate for liability and replacing this liability feature with a newly designed concept of maritime negligence. At the same time, the vessel's owner was denied any express or implied contractual indemnity rights against

6. The defense available to the stevedore or other independent contractors is that the vessel owner's conduct was sufficient to preclude indemnity. *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S. Ct. 438, 441 (1958), speaks of this defense as precluding any recovery as opposed to an adjustment based on proportionate fault. Further, under the *Ryan* theory, attorney's fees and other costs of defense incurred by the indemnitee can be recovered from the indemnitor. *Todd Shipyards v. Turbine Serv., Inc.*, 674 F.2d 401, 415 (5th Cir.), cert. denied, 459 U.S. 1036, 103 S. Ct. 447 (1982), and *Royal Netherlands S.S. Co. v. Strachan Shipping Co.*, 362 F.2d 691 (5th Cir. 1966), cert. denied, 385 U.S. 1004, 87 S. Ct. 708 (1967). This conclusion is contrary to the general maritime law principle which denies cost of defense as a recoverable item. *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980).
9. Id. at 4702.
the stevedore/employer. The result of the statutory prohibition was that the vessel owner could make no recovery from the injured longshoreman's employer based upon either the Ryan implied contractual duty, an express contractual undertaking, or contribution predicated upon tort concepts.

One question presented by the legislation concerns the continued vitality of the Ryan doctrine in situations which do not involve an injured longshoreman as a plaintiff. Prior to the 1972 amendments, the Ryan theory of recovery, which was based upon a maritime contractor's breach of a duty owed the vessel owner to perform the work in a reasonably safe and workmanlike manner, had been extended to situations involving cargo damage, a dredge repair contract, and a drill pipe testing operation. A second inquiry is whether a non-vessel owner under the present wording of the Longshore Act can seek indemnity predicated upon a contractual theory from the stevedore/employer, since the statutory indemnity prohibition clause is limited to direct or indirect actions of the vessel. This article reviews the present avenues which are available, in a maritime context, to a defendant seeking recovery for contribution or indemnity from another party.

III. AVAILABLE REMEDIES AND DEFENSES IN MARITIME ACTIONS FOR INDEMNITY OR CONTRIBUTION

A. Litigation Dealing With the Longshore Act

It would appear from the language of the amendments to the Longshore Act that the stevedore/employer is insulated from contractual indemnity or contribution claims based on tort by the defendant in situations in which the injured longshoreman has instituted litigation.

10. 33 U.S.C. § 905(b) (1982). This has been described as the quid pro quo giving up by the vessel of its indemnity rights against the stevedore in exchange for the elimination of a longshoreman's cause of action predicated upon the vessel's unseaworthiness. Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 888 (5th Cir. 1978), cert. denied, 443 U.S. 915, 99 S. Ct. 3106 (1979); Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 721 (2d Cir. 1978).


against a third party; however, this conclusion is subject to an exception. The statutory language from section 905 is:

(a) 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 . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

(b) And the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. 16

Subsection (a) has been held to preclude actions by any party against the employer for tort-based indemnity or contribution, but does not affect an action for indemnity based upon a contractual relationship. 17 The issue is the scope of subsection (b) as a factor negating the employer's liability for contractual indemnity, either directly or indirectly, to a party that can be categorized as a "non-vessel." This question is discussed and consideration given to a method sanctioned by the courts to avoid indirectly the contractual prohibition of 905(b).

1. The Contractual Requirement of Being Named an Additional Insured to the Maritime Contractor's Insurance Policy

The Fifth Circuit Court of Appeals, in Voisin v. O.D.E.C.O. Drilling Co., 18 concluded that a contractual obligation on the part of the employer to name the vessel owner as an additional insured in the insurance policy can be enforced. Enforcement is allowed since this contractual duty is not incompatible with the statutory language of 905(b) precluding any agreement which would indirectly hold the employer liable for damages paid by the vessel owner to the injured employee. 19 It should follow that a contract could also require the employer to provide for a waiver of subrogation by its insurer in favor of the vessel owner. 20 Therefore,


19. In accord with Voisin is Stockstill v. Petty Ray Geophysical, 888 F.2d 1493, 1496 (5th Cir. 1989).

20. Price v. Zim Israel Navigation Co., 616 F.2d 422 (9th Cir. 1980) is in accord with Voisin and also discusses waiver of subrogation.
the vessel owner can indirectly reach the same objective of essentially holding the stevedore financially responsible through its insurer even though the vessel owner is prevented by statute from doing the same under either the Ryan doctrine or an express indemnity clause within the stevedoring contract.

Allowing the vessel to recover from the stevedore's insurer arguably circumvents the unequivocal language of the amendments; however, the long range objective of reducing the cost of longshore litigation is achieved by eliminating the insurance expense for at least one party. The concept of one insurer covering the risks of several parties appears to be cost effective and should be considered for other types of maritime transactions. In the final analysis, the vessel owner unquestionably pays for the stevedore's insurance program by way of charges associated with the loading or the discharging of vessels; therefore, it is not unreasonable for the vessel's interest to benefit from the stevedore's insurance program.

2. The Maritime Employer's Exposure for Indemnity Sought by Parties Not Associated With Vessels

The next inquiry is whether the statute precludes a non-vessel owner from seeking indemnity from a maritime employer pursuant to the Ryan theory of an implied contractual duty or an express contractual agreement. The decisions which have treated this question in the context of post-1972 personal injuries allow indemnity actions by non-vessel owners predicated upon an express or implied contractual duty, but have denied contribution or indemnity pursuant to a tort theory. 

Pippen v. Shell Oil Co. states that section 905(b) expressly terminates an implied or express indemnity duty only to a "vessel," but makes no specific reference to the right of a third party non-vessel to seek indemnity from the injured party's employer on a contractual theory. The rationale is that the prohibition expressed in section 905(b) was a quid pro quo trade off in favor of the stevedore since the compensation rates were substantially increased. In return, the longshoreman's action against the vessel would be limited to a strict definition of negligence which would not give the vessel a right for indemnity against the stevedore. These concerns regarding the congressional compromise are not present when a non-vessel owner seeks indemnity. Subsequent decisions are in harmony with this aspect of the Pippen decision.

21. 661 F.2d 378, 386-87 (5th Cir. 1981).
23. Avondale Shipyards v. Insured Lloyd's, 786 F.2d 1265, 1274 (5th Cir. 1986);
B. Indemnity and Contribution Move Offshore

The application of maritime indemnity and contribution in the context of offshore oil and gas activities is complex due to several inconsistent factors. In this geographical area, competing statutes and inconsistent policies prevent a reasoned review of the issues. The most reliable measure for evaluating a client's rights relative to a claim for indemnity or contribution depends upon the status of the injured party, and/or whether the accident occurred on a fixed platform, a platform which is capable of being floated from one drilling location to another, or a conventional vessel.

In this regard, attention will be focused upon situations involving injuries to seamen who come within the protective scope of the Jones Act or general maritime law, offshore workers whose remedies are provided by the Longshore Act, or injured parties who must bring their actions pursuant to the compensation act of the adjoining state. A subsidiary point for consideration is whether maritime law or the law of the adjoining state controls the definition, scope, or enforceability of an express agreement for indemnity.

The preceding problems are created in part by random assignment of workers to offshore structures and the fortuitous circumstance of the employee's location at the time of the accident. In most instances, these factors can be determinative of the plaintiff's choice of recovery, i.e., whether the applicable choice is the Jones Act and/or the general maritime law's remedy for unseaworthiness, the Longshore Act, or the Outer Continental Shelf Lands Act (OCSLA). Under the OCSLA, the substantive laws of the adjoining state determine the rights of the parties when the injury occurs in United States waters on a fixed platform on the outer continental shelf. The remedy usually available to the plaintiff is adopted from the state whose borders, if extended, would encompass the fixed platform. The exception is the issue of compensation benefits to the injured worker from the employer, with the compensation act of

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24. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946), extended the vessel's warranty of seaworthiness to workers who perform work traditionally carried out by crewmembers.

the adjoining state being applicable if the accident occurs in that state’s territorial waters and the Longshore Act governing injuries beyond state waters. The Longshore Act provides for compensation benefits to non-seaman workers injured on vessels which are situated on any of the navigable waters of the outer continental shelf irrespective of location within or without the territorial coverage of the adjoining state. This statute is also available to employees who are injured on fixed structures which are not within the territorial waters of an adjoining state. It should be remembered that a party’s rights or defenses in an indemnity/contribution controversy are usually controlled by the remedies which are available to the plaintiff.

Bridges v. Penrod Drilling Co. and Cooper v. Loper demonstrate a conflict on the question of whether the Ryan theory or proportionate fault prevails relative to an action in a situation in which the plaintiff is a seaman and claims the benefits of the Jones Act. It appears that the Ryan indemnity theory would be applied if the seaman’s action against a vessel owner is predicated upon an unseaworthy condition which was created by the actions of an independent contractor aboard the vessel, whether it is a traditional watercraft, movable drilling platform, or special purpose vessel. This was the pre-1972 rule, and there can be no reason for a different result since the Longshore Act is not involved. A recent decision from the United States District Court of Maryland concluded that the vessel owner could obtain indemnification on the Ryan theory for payment to the injured seaman for maintenance and cure to its crewmembers due to the stevedore’s failure to perform its work in a reasonably safe and workmanlike manner.

With the exception of the maritime contractor who is protected by the Longshore Act and the tug/tow situations illustrated in Bisso v. Inland Waterways Corp., maritime principles permit the parties to enter into an agreement whereby the indemnitor holds the indemnitee harmless

27. 740 F.2d 361 (5th Cir. 1984).
31. Bisso v. Inland Waterways Corp., 349 U.S. 85, 90, 75 S. Ct. 629, 632 (1955), held that exculpatory clauses in towage agreements involving the tug’s negligence are contrary to public policy; however, Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679, 685 (5th Cir.), cert. denied, 419 U.S. 836, 95 S. Ct. 63 (1974), supports the proposition that essentially the same result can be achieved by the tug requiring the barge owner to have its insurer name the tug’s interest as an additional insured and to waive subrogation.
for the latter's negligence. Maritime decisions are then utilized to determine whether this obligation has been expressed with clarity.\textsuperscript{32} A decision from the Fifth Circuit Court of Appeals\textsuperscript{33} reviewed apparently inconsistent conclusions set forth in \textit{Theriot v. Bay Drilling Corp.}\textsuperscript{34} and \textit{Thurmond v. Delta Well Surveyors},\textsuperscript{35} and concluded that the governing law is not that of the situs of either the tort or the contract's performance, but rather depends upon whether the contract is maritime in nature. The court found the master service contract to be maritime in the circumstances of the worker's injury because the work in progress specifically involved activities which were of a maritime nature. The result was that a hold harmless agreement in the master service contract was enforceable; however, a contrary result would have been reached if the activities had not been maritime, and Louisiana law would have then controlled the parties' rights.\textsuperscript{36} \textit{Lewis v. Glendel Drilling Co.}\textsuperscript{37} recognized that "[f]rom these inconsistent lines of authority springs the potential for significant uncertainty in the law applicable to offshore mineral exploration," but a resolution of the inconsistencies was left to "the court \textit{en banc}.'"\textsuperscript{38}

It is suggested that, in the drafting of a hold harmless agreement, the vessel or vessels which are covered should be named, and specific reference should be made to the eventuality of indemnity being permitted even if the indemnitee's negligence, in whole or in part, is the cause of a future casualty. Furthermore, the eventuality of gross negligence,

\textsuperscript{32.} \textit{Theriot v. Bay Drilling Corp.}, 783 F.2d 527, 538 (5th Cir. 1986), held that the indemnitee could prevail if the accident resulted from its negligence under the following contractual language: "Operator agrees to ... indemnify ... Contractor ... from all claims ... without limit and without regard to the cause or causes thereof or the negligence of any party." Id. at 540. Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1081 (5th Cir. 1984), aff'd in part, vacated in part, and remanded, 777 F.2d 1042 (5th Cir. 1985), reviewed a hold harmless agreement which did not have sufficient language to enforce the indemnitee's view that its negligence was included within the terms of the hold harmless agreement. See also \textit{Goings v. Falcon Carriers, Inc.}, 729 F. Supp. 1140 (E.D. Tex. 1989).

\textsuperscript{33.} Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990). See also Domingue v. Ocean Drilling and Exploration Co., 923 F.2d 393 (5th Cir. 1991), which sets forth the maritime/non-maritime guidelines; and Thibodeaux v. Atlantic Pacific Marine Corp., No. 88-0234 (W.D. La. August 17, 1989), where an appeal was filed and argued before the Court of Appeals for the Fifth Circuit; however, the litigation was settled prior to a decision by the court.

\textsuperscript{34.} 783 F.2d 527, 538 (5th Cir. 1986).

\textsuperscript{35.} 836 F.2d 952 (5th Cir. 1988).

\textsuperscript{36.} See Jones v. Berwick Bay Oil Co., Inc., 697 F. Supp. 260 (E.D. La. 1988) and Stiltner v. Exxon Corp., 593 F. Supp. 18 (E.D. La. 1983), which state that a hold harmless clause in a non-maritime contract relative to offshore exploration work cannot be enforced if Louisiana law is applicable.

\textsuperscript{37.} 898 F.2d 1083, 1087 (5th Cir. 1990).

\textsuperscript{38.} Id. at 1088.
punitive damages, attorney's fees, and costs should be mentioned if they are within the contemplation of the parties. It pays to be as specific as possible in drafting such an agreement since this should prevent both parties from litigating the meaning of the indemnity clause at a later date.

There are additional complexities which pertain to personal injuries for both maritime and non-maritime workers in the offshore area. Consideration will be given to an injury which occurs aboard a "vessel" (jack-up rig or conventional vessel), a fixed platform in state territorial waters, and a fixed structure outside of state waters. A "seaman" has the right to claim general damages pursuant to the Jones Act against his employer and to make a claim of unseaworthiness against the vessel owner. The non-seaman worker on a vessel located within or outside state waters on the outer continental shelf is limited to an action against the employer under the Longshore Act and could proceed against the vessel owner on a theory of negligence. Actions for indemnity and contribution should be governed by the concepts developed pursuant to the Longshore Act. An accident which occurs on a fixed structure brings about a situation in which the injured party's compensation remedy against his employer is dependent upon whether the situs of the structure is in state or federal territorial waters; however, the laws of the adjoining state control the injured party's rights against a non-employer as well as a party's remedy for indemnity or contribution irrespective of the location of the fixed platform. The employer may not claim protection from an action for contractual indemnity pursuant to section 905(b) of the Longshore Act in the event the employee is injured in federal waters since a "vessel" is not the indemnitee but rather the platform owner, and any defense would be by reference to the law of the adjoining state. Maritime law would not apply since the action involves a fixed structure.


41. Wooton v. Pumpkin Air, Inc., 869 F.2d 848 (5th Cir. 1989), holds that the law of the adjoining state, and not that state's choice of law test, prevails. Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223 (5th Cir. 1985). The interesting point is that, since a statute of the United States is involved in the litigation (the OCSLA), a federal court has jurisdiction over a state question. See Gulf Offshore Co. v. Mobil Oil
Both Texas and Louisiana have anti-indemnity oil field statutes which prohibit oil lease holders from obtaining certain hold harmless obligations on the part of the drilling contractor covering the indemnitee's negligence. Louisiana refuses to permit a hold harmless clause pertaining to the indemnitee's negligence in a drilling contract. Also, Louisiana fails to recognize the indirect method of requiring the drilling contractor to name the oil company as an additional insured in the policy, and a choice of law provision within the contract cannot circumvent the application of the statute. The Texas statute permits a hold harmless agreement to a maximum figure of $500,000 provided there is underlying insurance coverage. Mutual indemnity obligations are permitted in Texas to the extent that the parties' underlying insurance coverage is in equal amounts, but there are no Texas decisions which indicate that the anti-indemnity statute cannot be circumvented by a contractual requirement that the drilling contractor's insurance policy name the oil company as an additional insured and/or waive subrogation. One conclusion which

42. State law cannot be a point of reference in the interpretation of a maritime indemnity agreement. Angelina Casualty Co. v. Exxon Corp. U.S.A., 876 F.2d 40 (5th Cir. 1989). The location of the accident in state territorial waters does not alter the maritime definition to be given a hold harmless provision in a maritime contract; in other words, the law of the adjoining state does not govern. Lewis v. Glendel Drilling Co., 898 F.2d 1083 (5th Cir. 1990).


44. Babineaux v. McBroom Rig Bldg. Serv., 806 F.2d 1282 (5th Cir.), held in abeyance, 811 F.2d 852 (5th Cir.), issuance of mandate ordered, 817 F.2d 1126 (1987). An agreement requiring that the contractor's insurance policy name the indemnitee as an additional insured at the indemnitee's expense is valid. Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987).

45. Matte v. Zapata Offshore Co., 784 F.2d 628, 631 (5th Cir.), cert. denied, 479 U.S. 872, 107 S. Ct. 247 (1986); Lirette v. Union Tex. Petroleum Corp., 467 So. 2d 29, 32 (La. App. 1st Cir. 1985). The contrary is true with respect to a maritime contract since a choice of law provision in the contract can oust the application of maritime principles provided the state of choice has a substantial relationship to the parties or the transaction. Stoot v. Fluor Drilling Serv., 851 F.2d 1514, 1517 (5th Cir. 1988).


can be applied to all contracts interpreted in relation to an injury on a fixed structure is that law selection clauses are unenforceable since application of the substantive law of the adjoining state is mandated by the OCSLA.49

C. Do Ryan or Reliable Transfer Principles Control in Matters Not Covered by the Longshore Act?

It is reasonably clear that the Fifth and Eleventh Circuits consider the Ryan all-or-nothing doctrine to have been replaced by the Reliable Transfer proportionate fault rule. Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.50 reasoned in the context of property damage litigation that the 1972 amendments to the Longshore Act call for a rejection of indemnity predicated on the Ryan warranty since this concept is now “a doctrine so withered.”51 In conformity with Reliable Transfer, the proportionate fault rule was accepted in a situation in which improperly stowed cargo resulted in the capsizing of a vessel. Two subsequent decisions, Bosnor S.A. de C.V. v. Tug L.A. Barrios52 and Agrico Chemical Co. v. M/V Ben W. Martin,53 have followed this rationale. A contrary view was recently set forth by the Fifth Circuit with the statement that “Ryan still has valid application in some cases not involving workers covered by the LHWCA”;54 however, this general conclusion was given no further elaboration. The Court of Appeals for the Eleventh Circuit55 refused to follow the Ryan theory when a vessel’s crew member was injured because a defective hatch board was placed into position by the stevedore, reasoning that adherence to the propor-

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49. Union Tex. Petroleum Corp. v. PLT Eng'g, 895 F.2d 1043 (5th Cir.), cert. denied, 111 S. Ct. 136 (1990); however, maritime law may be ousted by a choice of law agreement between the parties. Stoot v. Fluor Drilling Serv., Inc., 851 F.2d 1514 (5th Cir. 1988).
50. 651 F.2d 1096 (5th Cir. 1981).
51. Id. at 1100.
52. 796 F.2d 776, 784-86 (5th Cir. 1986).
53. 664 F.2d 85, 92-94 (5th Cir. 1981).
tionate fault concept would encourage the vessel owner to follow safety procedures.\textsuperscript{56}

The decisions described in the preceding paragraph are not consistent with the views expressed by other courts. \textit{Campbell Industries, Inc. v. Offshore Logistics International, Inc.}\textsuperscript{57} involved a vessel owner seeking indemnity from a marine contractor due to an injury to a seaman assigned to the vessel. The trial court concluded that the accident resulted from the conduct of the contractor, and the vessel owner was granted a judgment for indemnity covering the maintenance and cure payments attributed to the crew member's injury.\textsuperscript{58} The Court of Appeals for the Ninth Circuit held that the \textit{Ryan} doctrine remains viable in situations which are not within the purview of the Longshore Act. In reaching this conclusion the court rejected the \textit{S/S Concordia Tadj} rationale.\textsuperscript{59} The result is that a vessel owner is entitled not only to recover for the payments made to the injured party, but also for the legal fees and expenses associated with the defense of the litigation.\textsuperscript{60} Additionally, the First,\textsuperscript{61} Second,\textsuperscript{62} Third,\textsuperscript{63} and Fourth\textsuperscript{64} Circuits have concluded that maritime contractors owe the vessel owner, under \textit{Ryan}, the implied contractual duty of performing the work in a reasonably safe and workmanlike manner with full indemnification.

The consequence of the divergent holdings by various courts increases the tension between the \textit{Reliable Transfer} and \textit{Ryan} concepts. As noted at the outset, \textit{Reliable Transfer} approaches the problem on a proportionate-fault theory, while \textit{Ryan} is an all-or-nothing proposition allowing

\textsuperscript{56} A contrary conclusion regarding the continued vitality of \textit{Ryan} was reached in a cargo matter by this court in \textit{Insurance Co. of North America v. M/V Ocean Lynx}, 901 F.2d 934, 941 (11th Cir. 1990).
\textsuperscript{57} 816 F.2d 1401 (9th Cir. 1987).
\textsuperscript{58} The Federal No. 2, 21 F.2d 313 (2d Cir. 1927), reflected an early view that no independent recovery could be obtained from a tortfeasor by the vessel owner for maintenance and cure payments to an injured seaman. This holding was rejected by the following recent decisions: \textit{Black v. Red Star Towing & Transp. Co.}, 860 F.2d 30 (2d Cir. 1988); \textit{Savoie v. Lafourche Boat Rentals, Inc.}, 627 F.2d 722 (5th Cir. 1980) (indemnity); and \textit{Adams v. Texaco, Inc.}, 640 F.2d 618 (5th Cir. 1981) (contribution). Texas law is presently contrary to the trend. See \textit{Houston Belt & Term. R.R. v. Burmester}, 309 S.W.2d 271 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.). The latest opinion from Louisiana accepts the contemporary trend. See \textit{Leveque v. Holloway's Propellers}, Inc., 540 So. 2d 396 (La. App. 5th Cir. 1989).
\textsuperscript{59} See \textit{Insurance Co. of North America}, 901 F.2d at 941; and \textit{Campbell Industries}, 816 F.2d at 1404-05.
\textsuperscript{60} Id. at 1406.
\textsuperscript{61} Parks \textit{v. United States}, 784 F.2d 20, 25-28 (1st Cir. 1986); \textit{Araujo v. Woods Hole, Martha's Vineyard}, 693 F.2d 1, 2 (1st Cir. 1982).
\textsuperscript{62} Saks \textit{Int'l, Inc. v. M/V Export Champion}, 817 F.2d 1011 (2d Cir. 1987).
\textsuperscript{63} \textit{Cooper v. Loper}, 923 F.2d 1045 (3d Cir. 1991).
\textsuperscript{64} \textit{Salter Marine, Inc. v. Conti Carriers & Terminals}, 677 F.2d 388 (4th Cir. 1982).
the vessel owner to recover attorney's fees and costs associated with the defense of the litigation in the event the maritime contractor did not perform in a reasonably safe and workmanlike manner. The difference among the several Courts of Appeals can and should be resolved by the Supreme Court. At no time since the 1972 amendments has the Supreme Court indicated that Ryan is a "withered doctrine" when the subject of litigation is not a maritime personal injury claim involving a Longshore Act employer and a vessel owner.

D. The Recovery of a Personal Injury Litigant From a Non-Settling Tortfeasor

Maritime law recognizes the concept of joint and several liability among parties who are defending against a plaintiff's action. In other words, the plaintiff is in a position to make a full recovery from one tortfeasor even though this defendant's proportionate fault percentage is of a lesser amount. There is a problem associated with the proper recovery for the plaintiff in the event of a settlement entered into with one or more of the co-defendants. Must the remaining defendant pay to the plaintiff an amount based on the percentage share of the non-settling defendant's negligence, or must the payment equal the full amount of the judgment minus the dollar amount of the settlement figure? There is a lack of consistency on this issue.

Maritime law accepts the proposition that a defendant who enters into a good faith settlement with the plaintiff has no further liability for contribution to the remaining defendants in the litigation. Whether the monetary judgment against non-settling defendants should be reduced by the percentage of the settling defendant's negligent conduct or by the amount which the settling defendant actually paid to the plaintiff is not clear.

Leger v. Drilling Well Control, Inc. reviewed the question and concluded that the plaintiff's recovery would be reduced by the settling defendant's percentage of negligence as opposed to the amount of the

65. Supra note 59, at 1406.
68. 592 F.2d 1246 (5th Cir. 1979).
settlement figure. An opposite conclusion was reached in *Self v. Great Lakes Dredge & Dock Co.* which held that the amount paid by the settling defendant would be subtracted from the plaintiff's judgment instead of factoring the settling party's percentage of negligence into the calculation. The court concluded that *Leger* was not controlling due to the intervening holding of *Edmonds v. Compagnie Generale Transatlantique,* which refused to reduce an injured longshoreman's judgment against the vessel owner by the percentage of the stevedore's negligence due to the statutory protection from indemnity or contribution afforded the stevedore for an action instituted by its employee against the vessel's interest. The most recent decision from the Court of Appeals for the Fifth Circuit rejected the *Leger* formula in favor of the line of reasoning set forth in *Self.* The court relied on *Hernandez v. M/V Rajaan,* in which there was no finding by the trial court of the settling defendant's percentage of negligence. There has been no indication that this court will resolve the apparent conflict with an *en banc* hearing.

It is submitted that the Fifth Circuit has not adequately explained the reason it chose to employ the *Self* formula rather than the proportionate percentage conclusion of *Leger.* The reason the non-settling tortfeasor cannot recover from the one that entered into a settlement agreement is due not to a statutory prohibition but to preference for the independent action on the part of the plaintiff. The contrary conclusions reached by the courts in *Leger* and *Self* increased the personal injury litigant's ultimate recovery in the context of an alternate option; however, a result most favorable to the plaintiff should not be the judicial guide. The Fifth Circuit should consider the question *en banc*

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70. This result was reached even though another panel in the same year concluded: "In this circuit, *Leger* applies to all theories of maritime liability apportionment including indemnity and contribution." Jovovich v. Desco Marine, Inc., 809 F.2d 1529, 1532 (11th Cir. 1987).


72. Myers v. Griffin-Alexander Drilling Co., 910 F.2d 1252, 1256 (5th Cir. 1990). It is submitted that it was not necessary for the court to make a choice between *Self* and *Leger* in order to decide the issue which was presented.


74. 841 F.2d 582 (5th Cir. 1988).
or, in the alternative, the United States Supreme Court should decide the issue.

E. Indemnity Pursuant to Terms of Charter Parties

The New York Produce Exchange charter party usually has a load, stow and trim provision set forth in Clause 8 which provides for cargo operations to be at the expense of the charterer. Fortunately, the Protection and Indemnity Clubs in Europe have entered an agreement concerning responsibility for cargo damage or shortage as the loss relates to claims for indemnity or contribution between the owner and the charterer pursuant to Clause 8.

The problem regarding claims for indemnity or contribution between the owner and charterer usually concerns a longshore injury aboard the vessel during the course of cargo operations. The Fifth Circuit concluded in *Woods v. Sammisa Co.* that the charter party's load, stow and trim provision did not create a right for indemnity on the part of the owner against the charterer where improperly stowed cargo permitted a longshoreman to make a recovery from the vessel owner based upon negligence. The Second and Ninth Circuits reached a contrary conclusion, and this disagreement among several Court of Appeals prompted three Justices of the Supreme Court to conclude that the vessel owner's petition for a writ of certiorari in *Woods* should be granted.

Most charter parties contain an arbitration clause, and the district court must grant arbitration in the event one of the parties makes a proper motion. The enforcement of the arbitration clause is a suggested

75. The unamended language of Clause 8 provides "The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the Captain, * * *," as quoted in *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 845 (5th Cir. 1989). On many occasions the parties will add language to the effect that cargo operations are to be under the supervision of the master, or that it is the obligation of the charterer to discharge the cargo in addition to the "to load, stow and trim responsibility."


procedure for an owner or charterer in a district court which accepts
a position on the load, stow and trim provision contrary to the party's
interest.

As previously noted, the Protection and Indemnity Clubs in Europe
have demonstrated a reasonable approach to cargo litigation by the
Inter-Club Agreement. Perhaps a similar understanding could be reached
on the subject of personal injury litigation since the Supreme Court
apparently will not formulate a uniform rule to be followed in this
country.

Another area of possible dispute between the owner and the charterer
is the charter party provision which allows the charterer to designate a
safe berth. 82 The Fifth Circuit, in Orduna S.A. v. Zen-Noh Grain Corp.,83
recently rejected the theory that this provision constituted a warranty
from the charterer to the owner and, in so doing, defined the charterer's
duty to the vessel owner as one of exercising due diligence in selecting
the port or berth. This conclusion was recognized as being contrary to
holdings by the Second Circuit which classified the safe berth provision
as a warranty.84 The Fifth Circuit once again rejected a Ryan type
warranty for a duty defined within the reasonable care concept which
in turn would conform with the Reliable Transfer concept of weighing
the conduct of the owner and charterer on a proportionate fault basis.

F. The Stevedore's Right of Recovery From the Vessel Owner

The stevedore has a lien against any recovery made by its employee
in a section 905(b) action against the vessel's interest, with the lien
comprising compensation payments and medical expenses made by the
stevedore for injuries experienced by the longshoreman. 85 The stevedore
faces future exposure for compensation benefits in the event the net

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83. 913 F.2d 1149, 1155-57 (5th Cir. 1990). An earlier opinion from this court in
support of this view is Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790, 801-02 (5th
Cir. 1977). Other decisions which expressed disapproval of the warranty standard are:
Matter of Complaint of Jubilant Voyager Corp. S.A. of Panama (The Cockrow), 1984
A.M.C. 1725, 1726 (E.D. Va. 1983); People of State of Cal. By and Through Dept. of
313 (1974); Park S.S. Co. v. Cities Serv. Oil Co., 188 F.2d 804, 805-06 (2d Cir. 1951);
Cities Serv. Transp. Co. v. Gulf Refining Co., 79 F.2d 521 (2d Cir. 1935). See also M.
Wilford, T. Coghlin, and J. Kimball, Time Charterers, 136-164 (3d ed. 1989); T. Schoen-
baum, Admiralty and Maritime Law, 389-90 (1987); G. Gilmore and C. Black, The Law
of Admiralty, 204-5 (2d ed. 1975).
U.S. 74, 100 S. Ct. 925 (1980) as stated in Session v. I.T.O. Corp. of Ameriport, 618
F. Supp. 325 (D.N.J. 1985), aff'd, 800 F.2d 1138 (3d Cir. 1986), cert. denied, 479 U.S.
1086, 107 S. Ct. 1290 (1987)).
amount received by the plaintiff is inadequate to meet the full compensation benefits afforded by the Longshore Act. When the injured longshoreman does not commence an action against the vessel's interest, the stevedore has the right under certain circumstances to proceed against the vessel owner by stepping into the shoes of the injured longshoreman. Cumbersome restrictions placed on this type of action, for the most part, prevent the employer from recovering its lien for compensation benefits paid the injured worker. Nevertheless, there is an under-utilized avenue available to the stevedore and its compensation carrier from the pre-1972 era of longshore litigation known as the Burnside theory.

The Supreme Court in Federal Marine Terminals, Inc. v. Burnside Shipping Co., held that the stevedore has a remedy in tort against the vessel owner for reimbursement of compensation benefits, and it is suggested that the vessel owner owes a duty of due care under the circumstances. The Fifth Circuit, in Hartford Accident & Indemnity Co. v. Costa Lines Cargo Services, Inc., recently confirmed this obligation on the part of the vessel's interest to the stevedore/employer and concluded that the duty was independent of any claim on the part of the injured worker. This remedy afforded the stevedore is essentially the reverse of Ryan, and it is a formidable right of action in view of the typically significant compensation and medical expense payments which are components of the lien.

A criticism of the continued vitality of the Burnside theory is that the Longshore Act specifically terminated the Ryan theory of recovery on the part of the vessel owner, which makes it difficult to accept the proposition that the reverse is not true. Why should the stevedore be permitted to recover its compensation payments from the vessel owner when this same party is precluded from seeking indemnity or contribution from the employer in an Edmonds situation? In fact, the vessel owner under Edmonds paid the plaintiff not only for its percentage of negligence, but also for the percentage of negligence attributed to the stevedore/employer.

86. 33 U.S.C. § 933(f) and (g) (1982).
87. 33 U.S.C. 933(b) (1982) transfers the maritime worker's action against the vessel to the stevedore provided a formal order is issued by the deputy commissioner, an administrative law judge or board. The transfer occurs six months from the date of the award assuming that the injured employee has not previously instituted litigation; additionally, the assignment is valid for a ninety day period, with the cause of action automatically reverting to the injured worker upon the lapse of the period.
89. Id. at 416-17. Hinson v. SS Paros, 461 F. Supp. 219, 223 (S.D. Tex. 1978) held that "employers or their compensation insurance carriers are limited to the recovery of compensation benefits paid . . . and that in no instance can they recover more than the injured worker or his beneficiaries."
90. 903 F.2d 352 (5th Cir. 1990).
G. Should a Negligent Stevedore Be in a Position to Recover Its Lien in the Event a Recovery Is Awarded A Longshoreman in the Action Against the Vessel?

The ability of a negligent stevedore to effect a full recovery of its lien from the longshoreman's judgment is an area which has not been fully explored by attorneys for either the injured longshoreman or the vessel owner. Edmonds v. Compagnie Generale Transatlantique involved an injury to a longshoreman who was crushed between a container and the ship's bulkhead. The allocation of negligence was set at vessel owner—20%, stevedore—70%, and the injured longshoreman—10%. Under the Reliable Transfer formula, the plaintiff's recovery against the vessel owner should be limited to 20%; however, the Longshore Act precludes either the injured worker or the vessel owner recovering from the stevedore/employer. The Supreme Court permitted the plaintiff to recover 90% of his monetary loss from the vessel owner on the theory that this party, as opposed to the longshoreman, should bear the risk of a loss allocation. There is no language in this opinion which would prevent the stevedore from recovering the full amount of its lien for compensation benefits from the funds awarded the plaintiff. In other words, the vessel owner is making an indirect payment to the stevedore in a situation in which the negligence of the employer played a significant role in the casualty.

The legislative history of the 1972 Amendments stresses the need for encouraging safety procedures on the part of both the vessel owner and the stevedore. The objective of safety was given as a reason for establishing a negligence standard on the part of the vessel's interest and for increasing the compensation benefits to the injured worker. Additionally, the legislative history of the statute categorically states that the vessel shall not be responsible for the conduct, acts, omissions, or equipment of the stevedore or the method in which the stevedoring operations are conducted. An equitable result is not reached in a factual situation similar to that encountered in Edmonds, and consideration should be given to a system which does not reward the negligent employer by permitting a full recovery of its lien. The failure to enforce a compensation lien against the longshoreman's judgment against the vessel owner would permit a double recovery. One remedial avenue would be for the vessel owner to be given a credit for that portion of the lien

94. Supra note 8.
95. Supra note 8, at 4703-04.
which is equal to the percentage of the stevedore's negligence, with the result that the stevedore will not profit from its negligent conduct.

IV. CONCLUSION

The confusion and lack of clear guidelines associated with maritime contribution and indemnity bring to mind the problems of basic maritime personal injury litigation claims which arise from the variety of rules governing recovery. There can be no precision in projecting a maritime client's future financial exposure and no certain strategy for pursuing a recovery for maritime indemnity or contribution until there has been radical reform of the remedial legislation for maritime workers. A worker on a fixed structure faces essentially the same hazards as one who is injured on a platform which can be floated to various locations, yet the available financial recoveries are vastly different. The same is true for remedies which are available to the parties at fault who seek a division, by way of indemnity or contribution, for their financial losses.

It is difficult to accept an appellate court's judicial determination of the Supreme Court's *Ryan* doctrine as "withered," since the Supreme Court has given no indication that *Ryan* has lost vitality in situations which do not involve an injury within the scope of the Longshore Act. The problem is compounded by a general indication from this same appellate court that *Ryan* remains viable in certain instances. One solution would be to use *Reliable Transfer* as the guide when both parties are negligent, but to follow *Ryan* when the indemnitee's liability to the plaintiff results solely from the indemnitor's breach of a contractual duty. The prevailing party could then recover attorney's fees and costs associated with the defense of the litigation, in addition to the funds paid the plaintiff. The tensions resulting from the existence of the various statutes and decisions relating to offshore matters, however, can only be solved by congressional action.

An additional measure of uniform maritime principles could be achieved if the United States Supreme Court would decide those issues which are currently the subject of disparate opinions among the appellate courts. It is apparent from this article that conflicts exist among various courts with respect to the applicability of the *Ryan* measure of damages, the continued acceptability of the *Leger* formula, the definition to be given a charter party's load, stow and trim provision, and whether the safe berth obligation on the part of the charterer constitutes a warranty to the vessel owner. Added to this list of judicial inconsistencies in the maritime field is the recent failure of courts to agree upon (1) the definition to be given the *Scindia* negligence standard in the context of a longshoreman's action against the vessel;96 (2) the party which has

96. Compare Woods v. Sammissa Co., 873 F.2d 842, 848, cert. denied sub nom.,
the burden of proof in the event of cargo loss due to fire; and (3) the definition of the unit which constitutes a "package" pursuant to the $500 monetary limit of the Carriage of Goods by Sea Act.

The law student is led to believe on the first day of class that maritime law requires uniformity. The opposite result has been reached due principally to the failure of the United States Supreme Court to resolve conflicting results reached by various courts of appeals and the apparent inability of the United States Congress to enact consistent legislation. The result is forum shopping, uncertainty, and a lack of clear guidelines for parties who wish to avoid future litigation by preparing an enforceable contract prior to entering a maritime enterprise.

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