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MARITIME PERSONAL INJURY: THE RAMIFICATIONS OF BURNSIDE

In carrying over into admiralty the principle of workman's compensation that industry shall bear the loss for personal injury due to industrial accident,¹ the courts have been faced with the additional problem of distributing that loss where more than one element of industry may be chargeable with part or all of the legal responsibility for a given injury.² The typical, and very frequent, situation in which this question arises in maritime law is the third party action in which the shipowner, after having incurred liability to an injured longshoreman, seeks to cast that liability upon the stevedoring contractor, the longshoreman's immediate employer.³ Where this has been allowed, courts have based recovery on contractual and warranty theories.⁴ Until recently, however, such indemnity recovery based on tort was not generally accepted.⁵ Moreover, while the courts have been progressively more liberal in allowing recovery by injured longshoremen against the shipowner,⁶ there has been a corresponding emphasis on the problem of loss distribution among the elements of industry involved.⁷ Emerging from the decisions in these third-party actions is the principle, which well may find application outside the admiralty situation, that, as between the elements of industry, the one to ultimately bear the loss will be the one that had the best opportunity to eliminate

1. 68 CONG. REC. 5412-13 (1927) (debate on Longshoremen's and Harbor Worker's Act).

2. *DeGioia v. United States Lines Co.*, 304 F.2d 421, 426 (2d Cir. 1962).

The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.

3. *E.g.*, *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959). See generally H. BAER, *ADMIRALTY LAW OF THE SUPREME COURT* 193 (2d ed. 1969).

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

5. *E.g.*, *Mikkelsen v. The Granville*, 101 F. Supp. 566 (E.D. N.Y. 1951). But see *Federal Marine Terminal v. Burnside*, 89 S. Ct. 1144 (1969).

6. See generally H. BAER, *supra* note 3.

7. James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 538 (1952).

The philosophy of workmen's compensation, on the other hand, is that losses should be allocated to the enterprise that creates the hazards that cause the losses, and ultimately distributed among those who consume its products.

or avoid the hazard from which the injury arose.⁸ It should be noted at the outset that emphasis in applying this principle is usually placed on actions occurring after a hazard has been created, and its application often results in finding liability on the part of one other than the creator of the hazardous condition.⁹

AN ANALYSIS OF *Burnside*

In *Federal Marine Terminals, Inc., v. Burnside Shipping Co.*,¹⁰ what appears to be the beginning of a culminating statement of the various theories which have been used to implement the general policy of the "eliminate or avoid" doctrine may be observed. But if *Burnside* appears to state the present law in this regard,¹¹ it also opens up a broad new area of speculation by putting to rest the beliefs (1) that section 933 of the Longshoremen's and Harbor Worker's Act is an exclusive remedy;¹² (2) that there can be a right over accruing to the shipowner only where there is a contractual basis for such right;¹³ and (3) that the stevedore's rights as against the shipowner are limited to subrogation under the Act.¹⁴ *Burnside*, moreover, does not limit the theories of recovery which may be available to either side.¹⁵ The third party indemnity cases must now be examined in the light of principles which may be applicable to both sides of the dispute, the court in *Burnside* having plainly indicated that rights and duties between these parties are reciprocal.¹⁶

8. *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966).

9. *E.g.*, *DeGioia v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962) citing *Waterman S.S. Corp. v. Dugan S. McNamara, Inc.*, 364 U.S. 421 (1960); *Paliaga v. Luckenbach S.S. Co.*, 301 F.2d 403 (2d Cir. 1962).

10. 89 S. Ct. 1144 (1969), *rev'g* 392 F.2d 918 (7th Cir. 1968).

11. *Burnside* holds that:

§ 33 of the Longshoremen's and Harbor Worker's Compensation Act is not the exclusive source of the stevedoring contractor's remedies against the shipowner, and the latter may have a cause of action in tort for the compensation payments caused by the shipowner's negligence

89 S. Ct. at 1154.

12. *Id.* at 1149.

13. *Id.* at 1150.

14. *Id.* at 1149-50.

15. *Id.* at 1152. "In holding that the stevedoring contractor has a direct action in tort, we do not preclude the possibility of a direct action under some other theory."

16. *Id.* at 1150-54.

Burnside is consistent with the pattern of decisions which hold that the Jones Act,¹⁷ the Longshoremen's and Harbor Worker's Act,¹⁸ and workmen's compensation acts generally are exclusive only to the extent that they affect the employer and employee.¹⁹ In the absence of language to the contrary, these acts are held to provide additional rights to injured parties within their respective ambits, and do not impair any rights not covered, including those which may exist against third parties, nor do they affect the rights of either the employer or the third party with respect to each other.²⁰ These facts, when introduced into the admiralty framework, apparently contravene the stated purpose of the Longshoreman's and Harbor Worker's Act.²¹ Thus, as a rule, the acts referred to have been strictly construed, allowing the injured party the widest of opportunities to gain adequate compensation, while the problem of loss distribution between elements of industry has been dealt with under principles of general common law.²²

THEORIES OF THE ACTION—WHAT DID *Ryan* REALLY SAY?

Preoccupation with finding a basis for liability characterizes many

17. 46 U.S.C. § 688 (1964).

18. 33 U.S.C. § 901 (1964).

19. E.g., N.Y. WORKMEN'S COMP. LAW § 29 (McKinney 1965). See *Wright v. Lichtman*, 36 Misc.2d 1096, 234 N.Y.S.2d 39 (1962).

20. See generally H. BAER, *supra* note 3, at §§ 1-9-15, 6-12.

21. *Id.*, Federal Marine Terminals, Inc. v. Burnside Shipping Co., 89 S. Ct. 1144 (1969); S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAW 311 (1944).

The compensation statute is a complete replacement or substitute for the common law on the subject which it covers . . . so far as it goes . . .

But it does not affect rights or wrongs not within its purview, or which by implication or express negation are excluded.

Horovitz, *supra*, at 311.

22. Under the act, the longshoremen's recovery is governed by a schedule of payments: 33 U.S.C. § 901 *et seq.* (1964). He avoids this schedule simply by suing the shipowner directly where he can allege negligence and unseaworthiness and be rather certain to reach the "deep pocket" of the vessel or its owner for a substantial sum. Where the shipowner has a basis for liability over (usually the negligence of the claimant or a fellow-servant which is imputed to the stevedoring contractor) he can pass on the full liability to the stevedoring contractor. Compare Federal Marine Terminals, Inc. v. Burnside Shipping Co., 89 S. Ct. 1144 (1969), with *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Cf. *Cusumano v. Wihelmsen*, 267 F. Supp. 164 (S.D. N.Y. 1967).

of the cases.²³ Privity or lack of it,²⁴ and causation²⁵ are significant areas of court concern in cases developing the theory of promissory liability based on contracts express²⁶ or implied in fact²⁷ or in law,²⁸ and those which find liability based on the shipowner's rights as a third party beneficiary.²⁹ As the law has developed, further complications have arisen when courts, attempting to follow what now seems to have been a pivotal decision of the Supreme Court, *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,³⁰ interpreted that case to mean that the existence of a contract as a basis for indemnity was a prerequisite.³¹ In *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*³² the Court, referring to its *Ryan* decision, carefully mentioned that "in the areas of contractual indemnity an application of the theories of 'active'

23. The warranty theory cases have followed the general trend of products liability cases. Cases sounding in tort have been a blend of the modern warranty theory and common principles of tort, agency, and restitution. Since these cases are tried under the Federal Rules of Civil Procedure, it is interesting that this should be the case. *Ryan, Burnside*, and many other cases, reflect the general confusion over "theory of the action." The cases generally reveal a complete blend of theory. See *Mikkelsen v. The Granville*, 101 F. Supp. 566 (E.D. N.Y. 1951). Compare *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), with *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959), and *United States v. Rothschild International Stevedore Co.*, 183 F.2d 181 (9th Cir. 1950). Cf. *American President Lines v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir. 1956).

24. *Mikkelsen v. The Granville*, 101 F. Supp. 566 (E.D. N.Y. 1951).

25. *Drago v. A/S Inger*, 305 F.2d 139 (2d Cir. 1962).

26. *Porello v. United States*, 153 F.2d 605 (2d Cir. 1946).

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

28. "The right of indemnity is based upon an independent duty or obligation owed by the employer to the third party, either as the result of express contract or as a result of implication raised by law." 2 A. LARSEN, *LAW OF WORKMEN'S COMPENSATION* § 76:10 (1952).

29. Thus while the cases speak in the language of contract, it is misleading to cling to the literal implications of that language. The scope of the stevedor's warranty of workmanlike performance is to be measured by the relationship which brings it into being. Since the shipowner here was held liable for injuries the jury found were the foreseeable result of the stevedores' failure to perform in a workmanlike fashion, it may recover indemnification, whether it was strictly a "third-party beneficiary" or not.

DeGioia v. United States Lines Co., 304 F.2d 421, 426 (2d Cir. 1962).

30. 350 U.S. 124 (1956).

31. *E.g.*, *Ocean Drilling & Exploration Co. v. Berry Brothers Oilfield Service*, 377 F.2d 511, 512 (5th Cir. 1967):

That case [*Ryan*], as well as subsequent decisions, made it clear that such right to indemnification is strictly contractual in nature, existing entirely independently of tort theories based on concepts of 'active-passive' and 'primary-secondary' negligence.

32. 355 U.S. 563 (1958).

or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."³³ *Burnside* now presents a definitive and positive statement that duties which can be a basis for an action over may exist independently of any contract in favor of the stevedore and, by implication, the shipowner.³⁴

Since the concepts of "primary" and "secondary" or "active" and "passive" negligence are inappropriate in actions sounding in contract, the courts will continue to decide cases based on contract theories. They will continue to weigh the stevedore's "warranty of workmanlike performance" [hereinafter WWLP] against the shipowner's conduct to determine whether, in the face of a breach of WWLP on the part of the stevedore, the shipowner's conduct is such as to preclude recovery over.³⁵ Moreover, although a valid disclaimer may be made, absent an express contract provision to disclaim or indemnify, the court will read indemnification into the agreement.³⁶ The WWLP appears to exist simply because of the relationship created by the character of the work to be performed, and because it will be performed aboard the ship. Therefore, the stevedore is held to his warranty, whether or not the contract to load or unload the ship is between the stevedore and the shipowner or between the stevedore and a third party, such as the consignee or owner of the cargo.³⁷ The shipowner warrants, on the other hand that the stevedore will have a safe place to work³⁸ although, as will be shown hereafter, different standards of legal sufficiency are applied to these reciprocal warranties.

Measures of Conduct

The performance of all warranties, express or implied, given by the stevedore to the shipowner is apparently to be measured by the standard of "expert."³⁹ Such a standard owes its force to the

33. *Id.* at 569. In *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. at 607, the court followed what it thought *Ryan*, *Weyerhaeuser*, and others were saying when it stated that "although the pleading as drawn sounds in tort, it appears settled that the shipowner cannot recover over against the stevedoring contractor on any tort theory."

34. 89 S. Ct. at 1150.

35. *E.g.*, *Drago v. A/S Inger*, 305 F.2d 139 (2d Cir. 1962).

36. *Pettus v. Grace Line*, 305 F.2d 151, 155 (2d Cir. 1962).

37. *Drago v. A/S Inger*, 305 F.2d 139 (2d Cir. 1962).

38. *Id.*

39. *Compare* *Federal Marine Terminals, Inc., v. Burnside Shipping Co.*, 89 S. Ct. 1144 (1969), *with* *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959).

concept that the stevedore is required to properly train and supervise his longshoremen, and recognizes the practical necessity of protecting the shipowner in a situation where the stevedore, as "acting" party, is in control⁴⁰ of the people, equipment, and events, and has the greater ability to see and forestall harm. Any other standard, it is submitted, would work to the detriment not only of the shipowner, but of the very class of people the law has been most solicitous to protect, the longshoremen themselves. *Burnside* appears to reject the "reasonably safe manner" test of *Weyerhaeuser*, relying on the standard of care stated in *Hugev v. Dampskisaktieselskabet International*⁴¹ which, although emphasizing the duty of the shipowner, shows that the standard required of each is different.⁴² From *Hugev* it can be seen that the stevedore is not free from responsibility to notice defects and unseaworthy conditions although courts have stated that the stevedore has no positive duty to inspect prior to sending its longshoremen aboard.⁴³

The shipowner, as has been noted, warrants only that he will provide a safe place to work.⁴⁴ The ship need not be free of hazards.⁴⁵ A different standard may be applied where the ship has been to sea and

40. *Porello v. United States*, 153 F.2d 605, 608 (2d Cir. 1946):

The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect may not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss

41. 89 S. Ct. at 1151 n.18.

42. It would appear immaterial as to the matter of standard of care whether the pleading is cast in contract or in tort. *Ryan*, in dealing with this aspect of the problem, says that the action is not changed from breach of contract to tort "simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." 350 U.S. at 134. See A. CORBIN, CORBIN ON CONTRACTS (1951) §§ 571, 947, 1264; cf. RESTATEMENT OF CONTRACTS §§ 295, 315 (1932).

43. Compare *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133 (2d Cir. 1968) (which holds there is no duty to inspect), with *Pettus v. Grace Line, Inc.*, 305 F.2d 151 (2d Cir. 1962) (holding that the stevedore had constructive notice of the hazard where its longshoremen operated machinery from which a safety pin was missing for a period of four hours and fifteen minutes).

44. 2 HARPER & JAMES, THE LAW OF TORTS § 27:12 (1956); RESTATEMENT (SECOND) OF TORTS § 341 (1965).

45. The absolute liability for unseaworthiness which exists in favor of the individual longshoreman does not yet extend to his stevedore employer. Cf. *Federal Marine Terminals, Inc. v. Burnside*, 89 S. Ct. at 1150.

has recently entered port after a storm.⁴⁶ In such a case it is clear that a higher degree of alertness will be required of the stevedore as its longshoremen board the ship. The standard of care required of the shipowner is that of "ordinary care under the circumstances,"⁴⁷ and he must give

the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.⁴⁸

The stevedore is not responsible for latent defects "not discoverable by a reasonable, if only a cursory, inspection."⁴⁹ Although it has been held that it owes no duty to the shipowner to discover defects, it does owe such a duty to its employees,⁵⁰ and analysis of *Burnside* indicates the possibility of such a positive duty to the shipowner as well.⁵¹

Control

Emphasis upon on-the-spot control by the stevedore, measurement of its performance in not causing liability to the shipowner against the "expert" standard, and a lesser degree of care required of the shipowner, indicate the extent to which the underlying principle of "eliminate and avoid" is at work in these decisions.⁵² Whether or not the

46. *Victory Carriers, Inc. v. Stockton Stevedoring Corp.*, 388 F.2d 955 (9th Cir. 1968).

47. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 89 S. Ct. 1144, 1151 n.18 (1969), citing 170 F. Supp. at 610.

48. *Id.*

49. *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133, 1138 (2d Cir. 1968).

50. Such a duty arises out of the duty to avoid injury to an employee. *But see Mikkelsen v. The Granville*, 101 F. Supp. 566 (E.D. N.Y. 1951). Cf. *American Mutual Liability Ins. Co. v. Matthews*, 182 F.2d 322, 323-24 (2d Cir. 1950), and in a non-admiralty situation, *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938).

51. By implication, the stevedore's standard of care and his duty to avoid liability place him in the position that, as a practical matter, he must inspect; his supervisors cannot ignore conditions or practices which could lead to injury and the liability of the shipowner.

52. See note 29 *supra*.

stevedore has failed to meet the standards required may be a matter which can be measured in terms of the customs, usages, and regulations of the industry itself.⁵³ "[I]ndustry's own approach [may] reflect an exacting standard of performance," as the court found it did in *D/S Ove Skou v. Herbert*, where the "fact of regulation [alone] indicated industry's awareness of the likelihood of damaged or defective hatch boards. . . ." ⁵⁴ Basing its holding on the "eliminate or avoid" principle the court said that "[t]he stevedore having the last operational contact with [the defective hatch boards] is in a position to avoid altogether, or minimize greatly, the hazard." ⁵⁵ Duties imposed by regulation do not include, however, those merely suggested in a statutory code.⁵⁶

THE WWLP AND KNOWLEDGE, ACTUAL OR CONSTRUCTIVE

Duties Which Arise Out of "Knowledge"

What constitutes a breach of the Warranty of Workmanlike Performance? The cases are instructive. In *Reed v. Bank Lines Ltd.*, the court held that the stevedore's implied WWLP was breached where the injury was caused by either the injured longshoreman or a fellow servant.⁵⁷ The right of indemnity in favor of the shipowner may exist even though the latent condition amounts to unseaworthiness.⁵⁸ *Drago v. A/S Inger* stands for the proposition that although the shipowner's duty is to provide a vessel in an efficient state of repair, where there was a defective winch which caused injury, the shipowner could have recovery over because the stevedore breached its WWLP by failing to repair the winch.⁵⁹ *Drago* gives a further insight into the standard to which the stevedore is held when

53. E.g., Federal Safety and Health Regulations for Longshoring, 29 C.F.R. § 504.31 (1969). *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966).

54. 365 F.2d at 347-48.

55. *Id.* at 348.

56. *Id.*

57. 285 F. Supp. 808 (E.D. La. 1966).

58. Where the unseaworthiness is caused by the stevedore it may be called a "technical" breach as in *Trygstad v. States Marine Corporation*, 150 F. Supp. 556 (D. Ore. 1957). See also *Robillard v. A.L. Burbank & Co., Ltd.*, 186 F. Supp. 193 (S.D.N.Y. 1966). But if the stevedore breaches his WWLP or is primarily or actively negligent with respect to the unseaworthiness the shipowner ought to be able to successfully prosecute his action over. *Garbellotto v. Montelindo Compagnie Navegacion, S.A. v. Pittston Stevedoring Corp.*, 294 F. Supp. 487 (S.D. N.Y. 1969).

59. 305 F.2d 139 (2d Cir. 1962). See also *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133 (2d Cir. 1962).

the court states that "the Contractor will provide all necessary labor and services to discharge, unload and handle paper from ships or barges in a prompt and efficient manner."⁶⁰ The stevedore has, in addition, a positive duty to call all unseaworthy conditions it encounters to the attention of the ship's officers.⁶¹ When the stevedore has knowledge of a condition which it recognizes as unsafe it has a duty to stop work rather than continue to work in the face of such knowledge.⁶² If the stevedore proceeds in the face of a known hazard, it will incur liability because it has "brought into play" the preexisting condition.⁶³ Generally, the stevedore will be deemed to know of the hazard if it is within the knowledge of its employees.⁶⁴ Such knowledge may be actual⁶⁵ or constructive.⁶⁶

Conduct to Preclude

Conduct on the part of the shipowner which will be held to preclude recovery over against the stevedore must be at least such as will "prevent or seriously handicap the stevedore in his ability to do a workmanlike job" or amount to a hindrance of the contractor in the performance of its contractual duties.⁶⁷ For example, the mere fact that the shipowner's personnel generally supervise unloading of the ship will not charge the shipowner with negligence where injury results from a defective winch under the direct, detailed control of the stevedore, even though the ship is responsible for the defective winch.⁶⁸ Neither does the fact of the shipowner's negligence with respect to the injury preclude recovery over,⁶⁹ nor, as has been shown, does the mere fact of unseaworthiness.⁷⁰ Moreover, where the

60. 305 F.2d at 142.

61. *Smith v. Jugoslavenska Linjska Providea*, 278 F.2d 176 (4th Cir. 1960).

62. The cases stress the fact that the stevedore has an alternative to continuing work. See e.g., *Misurella v. Lothmian Lines, Inc.*, 328 F.2d 40 (2d Cir. 1964); *Nordeutsher Loydd, Brennan v. Brady Hamilton Stevedore Co.*, 195 F. Supp. 680 (D. Ore. 1961).

63. E.g., *Gilchrist v. Mitsui Sempaku K.K. v. Jarka Corp.*, 405 F.2d 763 (3d Cir. 1968).

64. E.g., *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133 (2d Cir. 1968).

65. *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968); See also *Pettus v. Grace Line, Inc.*, 305 F.2d 151 (2d Cir. 1962).

66. *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (1968).

67. *Albanese v. N.V. Nederl. Amerik Stoomr. Maats.*, 346 F.2d 481, 484 (2d Cir. 1965).

68. *Id.*

69. *McNamara v. Weichsel Dampschiffahrts AG Kiel, Germany*, 293 F.2d 900 (2d Cir. 1961).

70. *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966).

longshoreman has created the hazard, or the unseaworthiness, the shipowner has been held not to be precluded from recovery over even where the shipowner has negligently failed to discover the danger.⁷¹

Conclusion

From the contract cases, one may justifiably reach the conclusion that the stevedore is under a heavy burden to avoid causing liability to the shipowner. This duty is, in essence, a practical expression of the underlying principle of loss distribution: the loss should fall on the one who might have best avoided or minimized it. It can readily be seen that the resolution of these cases is based on a weighing of the facts to determine whether, given an existing condition, the conduct of the stevedore or the conduct of the shipowner was such, in relation to that condition, that one or the other was in a superior position to avoid the event which operatively caused the injury.

KNOWLEDGE REVISITED

In this determination, the element of knowledge plays a critical part. In *Vaccaro v. Alcoa Steamship Co.*,⁷² a seaman was injured by defective ship equipment operated by longshoremen. Holding that the stevedore was liable over, the court stated that the duty of the stevedore to remedy the defect arises where the dangerous condition is present for a period of time which is of sufficient duration for the stevedore to have constructive notice of its existence. Mere passage of time, under this view, is sufficient to allow a holding that the stevedore's conduct was responsible for the hazard. Yet in the same case the court insists that the stevedore has no duty to inspect the ship before sending its men aboard. It is submitted that, although such a duty may not exist, as a practical matter the stevedore's supervisory personnel must at least inspect the areas in which its men will work, and, in particular, the equipment to be used. Such an inspection need only be reasonable, and apparently need not extend to latent defects not discernible by visual inspection.⁷³ Moreover, even if the condition is discernible, its danger must also be recognizable.⁷⁴ Dicta in the case indicates that another element must be present before knowledge of an employee may be imparted

71. *DeGioia v. United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962).

72. 405 F.2d 1133 (2d Cir. 1968).

73. *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968).

74. 405 F.2d at 1138.

to the stevedore. Not only must the condition be discernible and the danger apparent, but, before the unreported knowledge of a longshoreman can be imparted to the stevedore, it must also be shown that the longshoreman should reasonably have believed that someone might be injured in the use of the equipment or by the condition.⁷⁵ The Ninth Circuit has taken the view that the stevedore is "required to conduct such a preliminary inspection as would disclose any patent conditions of danger to which its workmen might be exposed and to take reasonable steps to prevent such exposure."⁷⁶ The better view, and one consistent with the holding in *Burnside*, is that the stevedore has some positive duty to inspect. Actual or constructive knowledge of the hazard may be a precondition of liability. If constructive, time will play an important role, not only in the determination of the existence of such knowledge, but in determining whether such knowledge was acquired in time to allow action to prevent the injury. Knowledge of the longshoreman is imputed to the stevedore. It does not matter that the knowledge is that of non-supervisory personnel. The degree of control, the activities of the crew, and the period of time the longshoremen are on board bear on this question.

A Practical Test

The attorney faced with case analysis in this situation must evaluate the facts of his case carefully in the light of the "eliminate or avoid" principle. A practical test might be: which of the parties under the facts of the case had knowledge which, when considered in relation to the time available to react, would have effectively enabled it to eliminate or avoid or greatly minimize the hazard and to prevent the injury?

DIRECT ACTION IN TORT

Although contractual theories have to date provided the larger body of case law, *Burnside* stands for the proposition that there are direct rights in tort arising out of the same duties to avoid injury and liability which are emphasized in the contract cases. Because of the tortious quality of actions based on breach of the WWLP, and the heavy reliance of the cases on tort theories of causa-

75. *Id.*

76. *Victory Carriers, Inc. v. Stockton Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968).

tion, imposition of a duty by law based upon certain relationships is all that has been lacking to support an action for indemnity grounded on a pure tort theory. While *Burnside* plainly states that there may be a number of theories which will allow recovery, the uniqueness of the case lies in the holding that there is a clear duty on each party not to cause the other liability, and that this duty sounds in tort.⁷⁷ Indicating that rights and duties between stevedore and shipowner are reciprocal, the court's holding is "limited to a rejection of *Burnside's* argument that a shipowner's tortious conduct may be used as a shield, but not as a sword."⁷⁸

The Supreme Court rejects the line of cases which implies that there is no non-contractual right to indemnity,⁷⁹ and approves the concepts set forth in *Midvale Coal Co. v. Cardox Corp.*, where it was held that the negligent injury of an employee by a third party gave rise to a non-contractual right on the part of the employer to recover the amount of increase of insurance premium charged to the employer as a result of the injury.⁸⁰ Basing its holding on the fact that there was an independent ground for recovery, that court held the double recovery doctrine inapplicable where a single act caused a breach of two duties, one contractual, the other tortious.⁸¹ Moreover, *General Aniline & Film Corp. v. A. Schrader & Son, Inc.*⁸² stands for the proposition that the payment of compensation amounts to direct and proximate damages, a theory which *Burnside* embraces.⁸³ Thus, the elements necessary for recovery are, apparently, a relationship brought about by employment of the contactor's personnel on another's premises, and compensation paid to an employee by the employer (or possibly on his behalf by his insurer) as a result of injuries caused by the negligence of a third

77. 89 S. Ct. at 1150.

78. *Id.* at 1152.

79. *E.g.*, *Burnside Shipping Co. v. Federal Marine Terminals, Inc.*, 392 F.2d 918 (7th Cir. 1968).

80. 152 Ohio St. 437, 89 N.E.2d 673 (1949).

81. *Id.* In *Midvale* the company was allowed recovery on the basis that there was an independent ground to support it, although Ohio law prohibited the employer from receiving reimbursement for awards paid "from any source."

82. 12 N.Y.2d 366, 367, 190 N.E.2d 232, 233 (1963) citing *Dayton Power & Light Co. v. Westinghouse Elec. & Mfg. Co.*, 287 F. 439, 441 (6th Cir. 1923):

A payment of compensation absolutely required by law . . . can scarcely be other than a proximate and direct loss. Indeed, it is difficult to conceive how a liability could be more proximate, more direct and more immediate than the one so created.

83. 89 S. Ct. at 1150.

party. *Burnside* does not rule on the question of whether such an action could be based on unseaworthiness alone, but indicates it may not.

Under the foregoing principles the shipowner would become a participant in the workman's compensation scheme extended to longshoremen under the Longshoremen and Harbor Worker's Act. Where the longshoremen and the stevedore are free from fault, the stevedore ought to have recovery for costs and compensation paid, regardless of whether or not his employee failed to sue the shipowner, and regardless of whether the shipowner's liability to the stevedore is premised on negligence or unseaworthiness, as long as the stevedore has been compelled to make an award under the Act.

As it had in *Ryan*, the Court in *Burnside* recognizes that

[t]he exclusivity of the statutory compensation remedy against the employer was designed to counterbalance the imposition of absolute liability; there . . . [being] no comparable *quid pro quo* in the relationship between the employer and third persons . . .⁸⁴

The *Burnside* Court cites its own holding in *Kermarec v. Compagnie General Transatlantique* expounding the duties of the shipowner:

. . . the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.⁸⁵

Burnside continues, extending

[t]hat duty of reasonable care imposed by law . . . to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the shipowner's negligence caused damages to the stevedoring contractor's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.⁸⁶

84. *Id.* at 1149.

85. 358 U.S. 625, 632 (1959).

86. 89 S. Ct. at 1150.

Because it means that for all legal purposes relating to personal injury rights and remedies, the stevedore company is physically on board a ship whenever its employees are, the analogy of employee to equipment must be accorded great importance. It may be said with accuracy that whenever an employee of the stevedore is aboard ship on the stevedore's business, the company is aboard, and by its constructive presence has certain duties owed to it. The violation of those duties will crystallize into rights of action when the stevedore is actually damaged, in other words, when he has to pay compensation or incurs expense in the form of legal fees, costs, or increased insurance premiums because of injury to his employee. There appears to be no reason why his insurer should not be subrogated to his rights in such a situation.

Burnside Transitional

The recognition of a direct right of action sounding in tort, and the principle of reciprocity as set forth in *Burnside* simply clarify *Ryan*. Theories of "primary" and "secondary," "active" and "passive" negligence have had a development which is parallel in many respects to the actions based on contract wherein the breach of WWLP is weighed against "conduct such as to preclude recovery over." These cases uniformly appear to depend upon the same principle: that the loss distribution will be determined on the basis of who might have best eliminated, avoided, or minimized the hazard. While here, as in the contract cases, the discussion will be concerned primarily with actions in which the shipowner has sought to recover indemnity from the stevedore, it should be remembered that under *Burnside* the rights and duties of both parties arise out of their relationship, and are to some degree correlative and reciprocal. Like the contract-warranty theories, the primary-secondary (active-passive) theories also presuppose a preexisting condition upon which the tortfeasor will act.⁸⁷ Here, instead of a breach of warranty, or a failure to maintain an agreed-upon standard of performance, there is an intervening act of negligence.⁸⁸ As in *Hugev v. Dampskisak-tieselskabet International*, where the basis of the action was contractual, the duty of the shipowner was "ordinary care," and the test of the stevedore's performance was that of "expert," so, too, the duty of the shipowner in tort is one of "ordinary care,"⁸⁹ and the standard required of the stevedore appears to be that of an "expert." Requirements and tests

87. *United States v. Rothschild Int'l Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950).

88. RESTATEMENT (SECOND) OF TORTS §§ 441-43 (1965).

89. 89 S. Ct. at 1150.

of knowledge are parallel in both contract- and tort-based actions. Illustrative of the confusion caused by their parallel nature is the case of *Parenzan v. Iino Kaiun Kabushiki Kaisya*, which was brought on an implied warranty theory, but which discussed the issue of liability in terms of "proximate and primary cause" and fixed liability over on the stevedore on the premise that the shipowner had merely created "a condition which set the stage for" the operation of the stevedore's negligence.⁹⁰ In this regard the language of *Goldsberg v. Kollsman Instrument Corp.*⁹¹ is instructive. Speaking generally on the subject of products liability the court said that

[a] breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.⁹²

Therefore, whether the case is said to sound in contract or in tort, liability will be determined according to the relationship of, or the existence or nonexistence of, an act or omission which either promotes or avoids injury by operating or failing to operate on a preexisting hazardous condition.

CONCLUSION

Analysis indicates that the Supreme Court has taken the view that the theory of the action is of secondary (if any) importance, and that almost any theory will be adequate to bring the parties before the court. What is of prime importance is the relationship between the shipowner and the stevedore as determined with respect to elements of control and knowledge. Thus, the principal ramifications of *Burnside* are that regardless of the theory of the action, as a practical matter the result should be the same. Whether the action is said to sound in tort or contract, such casting should not be allowed to control where a result is clearly compelled by the facts when viewed in the perspective of the "eliminate or avoid" doctrine. Assuming a preexisting hazard caused by "operational" negligence or a condition of unseaworthiness resulting from natural deterioration of the vessel, the operable facts fixing liability should be care-

90. 251 F.2d 928, 930 (2d Cir. 1958).

91. 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

92. *Id.* at 436, 191 N.E.2d at 82 (1963).

fully assessed to determine who was in control of the situation. To the extent that the act or omission can be considered a failure to eliminate, avoid, or greatly minimize the effect of the hazard, liability will be established. It is clear that this test places the primary duty of avoidance on the stevedore. The stevedore has responsibility to maintain standards of supervision and training which will place its men aboard ship with such knowledge and experience that they will be able to recognize and deal with most hazards encountered. Furthermore, the fact that the shipowner may be able to recover indemnity from the stevedore ought to strengthen the protection afforded to shipowner and employees by industry codes and regulations which spell out the requirements of proper conduct. That the "eliminate or avoid" principle has unquestionable validity can be recognized from the fact that under modern industry practices the stevedore, through its supervisory personnel, has almost complete control of the working environment during operations. Out of control arises the exacting standard which the courts have so often enforced.

A Matter of Equity or Policy?

The shipowner's absolute duty of seaworthiness, on the other hand, and his duty of ordinary care to all who come on board with "interests not inimical" to his, seem to place a similar exacting burden on him. As between the stevedore and the shipowner there must inevitably be a weighing of the equities to determine who will ultimately pay. A question which *Burnside* does not answer satisfactorily is whether or not that weighing process should take place in all circumstances. *Burnside*, for example, recognizes a direct action in tort between the stevedore and shipowner. The basis of the action is negligence. If the real claim is for reimbursement, and the real damage to the stevedore is the compensation paid out under the Act, then it appears that, unless the theory of the action is to control, the stevedore should have recovery in a direct action against the shipowner even where the cause of the injury for which compensation has been paid was the unseaworthiness of the vessel. No sound reason exists for denying a complete reciprocity of restitution in the matter of loss distribution between elements of industry.

Shipowner and Contractor: Contributing Partners in a Common Fund?

Since an excellent case can be made for reciprocity, the existing

workmen's compensation system protecting the rights of seamen and longshoremen should be reevaluated. Because the shipowner may now judicially be made an unwilling partner to the stevedore in the administration of the Act, and since the protection of the stevedore can effectively be circumvented because of the longshoreman's right against third parties, and the shipowner's right of action for indemnity against the stevedore, the Longshoremen's and Harbor Worker's Act, as well as the Jones Act and perhaps other workmen's compensation acts, are inadequate. In the case of the Longshoremen's and Harbor Worker's Act it appears from the relationships involved that the shipowner should be brought into the workmen's compensation system, with the rights of the longshoremen guaranteed as they are now. Under this scheme the benefits could be paid on a pro rata basis or by either the stevedore or the shipowner upon a determination of primary liability based on the principle of "elimination and avoidance" as developed by the cases.

Ultimate Triumph of "Eliminate or Avoid" Principle

Whatever future legislative developments may occur, for the present it may be assumed that third-party indemnity actions involving stevedore contractors and shipowners will increase in number. *Burnside* having opened a new avenue of recovery to the stevedore, and perhaps, by implication, to the shipowner, the Court, through that case, has approved all theories of action which reasonably tend to promote loss distribution based on primary responsibility to eliminate or avoid hazard. Moreover, the fact that the stevedore company is constructively aboard a vessel for most legal purposes incident to loss distribution indicates that the primary burden will usually be on the stevedore to avoid a given injury.

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