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Shipowner or Stevedore: Liability to Injured Longshoremen

COMMENTS

SHIPOWNER OR STEVEDORE: LIABILITY TO INJURED LONGSHOREMEN

If a longshoreman is injured because of a defective piece of equipment, normally he can recover from the shipowner on the theory that he has breached the warranty of seaworthiness. Under what circumstances can the shipowner in turn recover from the stevedoring company on the theory it has breached the warranty of workmanlike service. A conflict has developed as to how far a stevedoring firm's implied warranty of workmanlike service[1] should be extended. In *Booth Steamship Co. v. Meier & Oelhaf Co.*,[2] the Second Circuit ruled that this implied warranty places a duty on the stevedore to supply proper seaworthy equipment. It prohibits the use of equipment which is latently defective even though the firm is not aware of the defect and has not been negligent in its use. This imposes absolute liability on the stevedore. When the Ninth Circuit was presented with this issue in 1962 the *Booth* case was cited as persuasive authority for finding liability.[3] After a review of prior cases this court refused to extend the implied warranty to include liability without fault. Its conclusion was that the major cases in this area have limited recovery to situations involving negligent conduct on the part of the stevedore.

In order to evaluate the reasoning of the two courts, it is necessary to review the decisions regarding the theory of workmanlike service and the earlier doctrine of unseaworthiness from which it arose. In 1903 the Supreme Court in *The Osceola*[4] ruled that the vessel and her owner are to be held liable absolutely for injuries received by seamen in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. This duty to provide a seaworthy ship is not dependent on the exercise of reasonable care but is absolute and nondelegable. The shipowner, having complete and absolute control over the seamen aboard his vessel, can control every movement the seamen make and should therefore be held liable for any injuries to them which might be caused by defects in the vessel herself or her equipment. Furthermore,

1. Exactly what this implied warranty of workmanlike service encompasses will be hereinafter discussed.
2. 262 F.2d 310 (2d Cir. 1958).
3. Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co., 310 F.2d 481 (9th Cir. 1962).
4. 189 U.S. 158 (1903).

the shipowner can afford to insure the safety of his crewmen and can treat any damages paid for an injury as an expense of the business, thus spreading the loss.[5] In this way seamen are assured of compensation merely by demonstrating that an unseaworthy condition existed, and are not left to the uncertain determinations of courts in actions to recover for negligence.[6]

Exactly what does the condition of seaworthiness entail? The duty of the shipowner is to furnish a vessel and appurtenances reasonably fit for their intended use and no more. The test is not one of perfection but rather one of reasonable fitness.[7] What is more, seaworthiness does not apply to any and every defect which causes injury. The doctrine is not that broad. In order for a defective condition to constitute unseaworthiness on the part of a ship, the defect must be found in the hull, gear, stowage, appurtenant appliances or equipment of the ship.[8]

At first the theories of liability for unseaworthiness and liability because of negligence were separate.[9] If the injury was caused by negligence a charge of unseaworthiness could not be raised. Then the Supreme Court in *Mahnich v. Southern S.S. Co.*,[10] ruled that if a shipowner is liable for furnishing an unseaworthy appliance even when there is no negligence, a fortiori, the shipowner is liable when the unseaworthy condition has resulted from the negligence of the officers of the vessel. This reasoning seems sound when we remember that one of the purposes of the unseaworthiness doctrine is to make it easier for the injured seaman to recover compensation for his injury by not forcing him to prove negligence.

The Court's next step in expanding this doctrine of unseaworthiness was to extend the relief to longshoremen injured while working aboard the ship.[11] The Court reasoned that longshoremen on board ship are rendering services like those performed by the crew. The risks involved in the stevedoring duties are incident to the longshoreman's service to the ship. A longshoreman in these circumstances is nothing less than a seaman as to the duties he performs and should be treated as such for the purposes of the liability of the shipowner to him. It should not matter that an intermediate employer stands between the longshoreman and the shipowner.[12]

5. Shamrock Towing Co. v. Fichter Steel Corp., 155 F.2d 69 (2d Cir. 1946).

6. The H. A. Scandrett, 87 F.2d 708 (2d Cir. 1937).

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

8. See, *e.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Recently the doctrine has been extended to cover the cargo containers themselves as well as the stowage of the cargo. Gutierrez v. Waterman S. S. Corp., 83 Sup. Ct. 1185 (1963).

9. Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928).

10. 321 U.S. 96 (1944). In this case a patently defective rope was selected and supplied by the ship's mate; good rope was available.

11. Seas Shipping Co. v. Sieracki, *supra* note 8.

12. In discussing the liability of the intermediary employer who takes over portions of the ship's work, the Court stated that he "ordinarily has neither rights nor opportunity

Once it was held that longshoremen were entitled to a seaworthy vessel and equipment, the operations of the longshoremen's employer became important. When a stevedoring firm enters into a contract to load or unload a vessel, control of the area is usually relinquished by the shipowner. The stevedore brings on board his own longshoremen, often his own equipment, and is placed in complete charge of the unloading operation (subject to cursory inspections by the ship's mate).

If the unseaworthiness of a ship is caused by the stevedore's defective equipment, brought on board the vessel for a temporary purpose, should the shipowner be held responsible? At first it was thought that if the shipowner turned over a seaworthy ship to the stevedore his duty in this respect terminated at the time control was relinquished.[13] But the Supreme Court in a per curiam decision, *Alaska S.S. Co. v. Petterson*, answered the question of liability in the affirmative.[14] This decision has been interpreted as standing for the proposition that the shipowner's absolute liability to provide a seaworthy vessel, together with its appurtenant equipment, is not affected by the relinquishment of control to the stevedore, and the shipowner is liable even for defects in equipment brought on board by the stevedore and used under the stevedore's sole control.[15] Nor is it a defense that the temporary condition of unseaworthiness arose subsequent to the commencement of the voyage.[16] To protect the longshoreman courts had placed an enormous burden upon the shipowner. Whether he could have prevented the injury was not a consideration. If the vessel was in fact unseaworthy for any reason, he, as the owner of that vessel, was liable for any injury caused thereby.

Courts realized that this treatment of the shipowner was harsh in situations where the stevedore created the unseaworthy condition. What could

to discover or remove the cause of the peril, and it is doubtful that he owes to his employees, with respect to these hazards, an employer's ordinary duty to furnish a safe place to work, unless the perils are obvious or his own action creates them." *Id.* at 95. As will be seen, the stevedore-employer has been found to owe this duty to his employees at least as far as the shipowner is concerned.

13. Lopez v. American-Hawaiian S.S. Co., 201 F.2d 418 (3d Cir. 1953). The court distinguished Hawn v. Pope & Talbot, 198 F.2d 800 (3d Cir. 1952) on the ground that in that case there was no evidence that the shipowner had surrendered control of the ship.

14. 347 U.S. 396 (1954), *affirming* 205 F.2d 478 (9th Cir. 1953). The dissent argued that although the doctrine of absolute liability for unseaworthiness is reasonable when applied to a shipowner in relation to the ship itself and her equipment, there is no justification for applying it to equipment owned by others and brought on board by them. To so extend liability would make the shipowner responsible for results caused by latent dangers he cannot guard against. The burden should be upon the one best able to eliminate the hazard, the stevedoring company. (This is the argument raised by the court in the *Booth* case to support the conclusion that the implied warranty of workmanlike service extends to latent defects in equipment supplied by the stevedore.)

15. Berti v. Campagnie De Navigation Cyprien Fabre, 213 F.2d 397 (2d Cir. 1954).

16. *Supra* note 7.

be done? Could they hold that if the stevedore was really the party at fault he was the one who must ultimately pay? In considering this possibility, the courts were faced with the Longshoremen's and Harbor Workers' Compensation Act, enacted in 1927.[17] Congress had intended this act to have the same characteristics as the state and federal workmen's compensation acts. The longshoreman injured in the course of his employment was to be able to collect automatically a set compensation from his employer. The employer gave up all defenses which he might raise against his employee's recovery. Compensation was made payable irrespective of fault.[18] In return, the employer's liability was to be limited to the amounts set by the act. This limitation of liability was supposedly assured by section 905 of the act:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .[19]

This section seems to strictly limit any recovery from the employer to that specified by the act itself.

The act also provides that the longshoreman has the right to elect to sue a third party who is the sole or joint cause of his injury.[20] He is given the choice of accepting the compensation from his employer which the act allows or trying to collect a greater sum from a third party.[21] Under section 933 the longshoreman is not precluded from suing the shipowner for negligence and unseaworthiness.

This leads back to our original question: What recourse does the shipowner have in this situation? He first tried to join the stevedore as an additional defendant, alleging that since the stevedore-employer's negligence had contributed to the injuries he should also contribute to the damages. The Supreme Court put an end to this argument, ruling that there is no contribution among joint tort-feasors in this area, no matter what the degree of fault involved.[22]

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17. 44 Stat. 1426 (1927), 33 U.S.C. § 901 (1958).

18. Longshoremen's and Harbor Workers' Compensation Act § 34(b), 44 Stat. 1426 (1927), 33 U.S.C. § 904 (1958).

19. Longshoremen's and Harbor Workers' Compensation Act § 5, 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

20. Longshoremen's and Harbor Workers' Compensation Act § 33, 44 Stat. 1426 (1927), 33 U.S.C. § 933 (1958). See American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

21. The longshoreman can put more than one iron in the fire, however. He may receive compensation from his employer under the act and at the same time sue a third party for damages. If he receives a verdict against the third party, he must then reimburse his employer for any payments made.

22. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952).

The next argument raised by the shipowner was that he should be indemnified by the stevedore if his (the shipowner's) negligence was only passive or secondary and the stevedore's negligence actively brought into play the unseaworthiness[23] or prior negligence.[24] The claim here is not for contribution but for full indemnity. The shipowner is alleging not that the stevedore is jointly liable but rather that he is solely at fault—that the shipowner is being held liable for the stevedore's acts. The stevedore should reimburse him, argues the shipowner.[25] The circuits have generally held that this argument is invalid since it brings tort liability upon the stevedore; the Longshoreman's Act specifically says he should not be answerable in tort except under the terms of the act itself. To rule otherwise would violate the "spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability."[26]

Tort liability could not be imposed upon the stevedore. But this did not mean that the right to indemnity could not arise by virtue of an express contract between the shipowner and the stevedore. The act does not expressly prohibit the shipowner from insuring himself by including a promise to hold him harmless in the contract with the stevedore. Such a contract would be independent of and would not derive from the injury to the longshoreman, except in a remote sense not contemplated by the provisions of section 905 of the act.[27]

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.[28] held that merely placing into a contract the clause that the stevedore will perform all of the shipowner's stevedoring services implied that these services would be performed in a safe and workmanlike manner. This obligation is implied in fact and not in law, arising out of and being the essence of the contractual obligation to perform the stevedoring services. Although the *Ryan* case dealt only with improper stowage by the stevedore, the decision demonstrated that the Court was willing to recognize an implied-in-fact warranty upon which to base a suit for indemnity. The next step was to extend this warranty to cover the use of equipment incidental to the handling of the cargo (whether such equip-

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In the district court, evidence was brought in bearing on the relative degree of fault, and it was found that the shipowner was 25% and the stevedore 75% at fault.

23. Rich v. United States, 177 F.2d 688 (2d Cir. 1949).

24. United States v. Rothschild Int'l Stevedoring Co., 183 F.2d 181 (9th Cir. 1950); McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E.2d 463 (1952).

25. States S.S. Co. v. Rothschild Int'l Stevedoring Co., 205 F.2d 253 (9th Cir. 1953).

26. Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3d Cir. 1954).

27. Crawford v. Pope & Talbot Inc., 206 F.2d 784, 792 (3d Cir. 1953).

28. 350 U.S. 124 (1956).

ment was supplied by shipowner or stevedore). This was accomplished in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.*[29] Again there was no express indemnity clause present in the contract between the parties, but the Court found an implied warranty to "use the equipment with reasonable safety and to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance." If the stevedore renders a substandard performance which leads to foreseeable liability for the shipowner, the stevedore has breached his implied warranty, and the shipowner is entitled to indemnity "absent conduct on its part sufficient to preclude recovery."[30]

The area of indemnification though broadening was still limited to situations in which there was a contract between the two parties which this implied warranty of workmanlike service could accompany. This limitation did not remain in existence very long. One year after the *Weyerhaeuser* decision, the Court handed down its decision in *Crumady v. The Joachim Hendrik Fisser.*[31] In this case the vessel had been chartered by its owners to another company, which in turn had entered into a service agreement with the stevedoring company. The Court found the case to be governed by its *Ryan* decision. The reasoning was elementary: "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not."[32] Under these circumstances the vessel is a third-party beneficiary of the servicing contract. The action was a proceeding *in rem*, and the vessel was mentioned in the contract. These characteristics justify application of the third-party beneficiary theory. Its application was not limited to such cases, however. In a later case the Court ruled that the owner, no less than the ship, is the beneficiary of the stevedore's warranty.[33]

Courts have given the warranty remedy broad scope, but the shipowner must meet certain conditions to be entitled to the remedy. Originally, the only culpable conduct on the shipowner's part that would not bar recovery was merely failing to discover the stevedore's negligence.[34] But it is now generally agreed that even a finding of negligence in supplying defective equipment will not necessarily bar the shipowner's right to indemnity. Since the shipowner's action is in contract, recovery must depend upon whether

29. 355 U.S. 563 (1958).
30. *Id.* at 567.
31. 358 U.S. 423 (1959).
32. *Id.* at 428.
33. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); De Gioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962) (literal or figurative third-party beneficiary language unnecessary).
34. Trygstad v. States Marine Corp., 150 F. Supp. 556 (D. Ore. 1957).

his conduct has been such as to bar enforcement of the contract, and not on whether he has been found negligent in regard to the longshoreman.[35] Where the terms of a contract do not expressly impose upon one an obligation sought to be imposed, the obligation "must . . . be implied in fact from inferences necessarily arising out of circumstances surrounding the contract and its performance."[36] A ship coming into port after days at sea cannot be expected to be in a fully seaworthy condition. The stevedoring company should realize this and act accordingly. The only contractual duties the shipowner owes to the stevedoring company (absent express provision) are: (1) "to exercise ordinary care under the circumstances to place the ship . . . , [its] equipment and appliances . . . in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter . . ." will be able to do his work "in a workmanlike manner and with reasonable safety" to his longshoremen;[37] and (2) to give the stevedore

> 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 any 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 . . . .[38]

What conduct on the part of the stevedore will be considered a substandard performance of its duties, entitling the shipowner to indemnity? What will constitute a breach of the implied warranty of workmanlike service? The basic premise is that if the stevedore fails to use reasonable care in handing either equipment or cargo—gives a substandard performance of his duties resulting in foreseeable loss to the shipowner by rendering him vulnerable to a lawsuit—the stevedore has breached his obligation to the shipowner under the contract.[39] Although the Supreme Court has not laid down a comprehensive rule for determining what constitutes substandard performance, there are two broad areas into which the performance might fall: (1) conduct which creates the unseaworthy condition of the vessel; and (2) conduct which activates the ship's pre-existing unseaworthy condition.

It seems reasonable that if the stevedore negligently uses the ship-

35. Calmar S.S. Corp. v. Nacirema Operating Co., 266 F.2d 79 (4th Cir. 1959).
36. Hugev v. Dampskisaktieselskabet Int'l, 170 F. Supp. 601, 609 (S.D. Cal. 1959), *aff'd*, 274 F.2d 875 (9th Cir. 1960).
37. 170 F. Supp. at 610-11.
38. *Ibid.*
39. Paliaga v. Luckenbach S.S. Co., 301 F.2d 403 (2d Cir. 1962).

owner's seaworthy equipment and creates an unseaworthy condition,[40] or negligently supplies its own defective equipment, its performance should be considered a substandard one.[41] But what should be considered activating a ship's pre-existing unseaworthy condition, the second area mentioned? It should be remembered that, on the one hand, the stevedore does not act as an insurer against any loss.[42] A court would not imply a promise on the part of the stevedore to protect the shipowner from injury that was his fault only.[43] On the other hand, that the shipowner failed to fulfill his duty to supply adequate equipment is not enough by itself to prevent indemnity.[44]

But if the stevedore knows of the unseaworthy condition and fails to correct it or fails to stop his longshoremen from continuing to work under hazardous conditions, he is negligent and has breached the warranty.[45] The continuance of work, with knowledge of the danger washes away prior negligence on the part of the shipowner and leaves the stevedore's conduct as the cause of the injury.[46] The shipowner owes no duty to restrain the stevedore from acting or using the ship's defective gear with disregard for known defects.[47] In fact, the stevedore's actual knowledge of the unsafe condition may not be necessary. If an employee of the stevedore is put on notice that a part of the ship may not be safe he *must* not use his judgment in assuming that a safe condition exists.[48] It would seem that the stevedore will ultimately bear the loss unless the injury is caused solely by the ship-

40. There is still some debate over whether there should be a distinction between injuries caused by unseaworthy gear and injuries caused by improper use of proper gear. See the dissent's arguments in Grillea v. United States, 232 F.2d 919, 924 (2d Cir. 1956).

41. We speak only of *negligently* supplying defective equipment. Whether a similar rule should apply to the non-negligent supplying of defective equipment will be discussed hereinafter.

42. Ferrigno v. Ocean Transp. Ltd., 201 F. Supp. 173 (S.D.N.Y. 1961).

43. Shannon v. United States, 235 F.2d 457, 458 (2d Cir. 1956). "[T]o imply a duty on the part of the stevedore toward the shipowner to inspect the equipment before using it for the very purpose for which it was supplied or to detect patent defects would be to imply a promise on the part of the stevedore to protect the shipowner from its own negligence." The court then goes on to find an express agreement to inspect.

44. Pettus v. Grace Lines Inc., 305 F.2d 151 (2d Cir. 1962).

45. American President Lines, Ltd. v. Marine Terminal Corp., 234 F.2d 753 (9th Cir. 1956). But see Hagans v. Farrell Lines Inc., 237 F.2d 477 (3d Cir. 1956), where the court argued that knowledge of and acquiescence in the existence of defective appliances do not place a burden on the stevedore to correct them as long as the defective equipment is supplied by the shipowner.

46. A/SJ Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir. 1958).

47. Weigel v. M.S. Belgrano, 188 F. Supp. 605 (D. Ore. 1960), *reversed in* 299 F.2d 897 (9th Cir. 1962) on the ground that the injured party was not doing the type of work traditionally performed by seamen.

48. Smith v. Jugoslavenska Linijska Plovidea, 278 F.2d 176 (4th Cir. 1960). The court ruled that the safety man's judgment was not vindicated by the fact that three men used the ladder without incident before the accident.

owner's negligence or by an unseaworthy condition of the vessel to which the stevedore cannot be connected in any way.[49]

At this point, it appears that the law may be a little harsh in its treatment of stevedores. However, there may be a trend at least in the lower courts and possibly even in the Supreme Court to mollify the situation. Possibly courts are beginning to realize they may have extended their breach-of-warranty findings a bit too far. After all, if the shipowner has also been negligent why should the entire liability be placed upon the stevedore?

Formerly it was held that an express warranty in a contract would not bar the finding of an implied obligation to indemnify the shipowner.[50] In a recent Second Circuit decision[51] the court held that an action on the implied warranty cannot be brought where there is an express warranty in existence. Although the court held the stevedore liable under the express warranty in this case, a different result is possible. Suppose the express warranty states that the stevedore will protect the shipowner from any liability which might arise solely from the stevedore's negligence. Suppose further that a court finds both the stevedore and shipowner negligent. The court might then conclude that the express warranty bars the raising of the implied warranty of workmanlike service; the shipowner cannot recover from the stevedore since the sole negligence of the stevedore was not the cause of the resulting damages. Such a result is a possibility.

In 1959 it was held that the fact that unloading is done in the customary manner does not necessarily mean that the stevedore has satisfied the standard of reasonable care.[52] The court reasoned that the fact that the shipowner does not insist that the stevedore perform his services in a safer way than is usual does not mean that the shipowner accepts the responsibility for a practice which is unsafe. The Fifth Circuit recently held that although compliance with the customs of an industry is not in itself due care, it is evidence of due care. The shipowner must affirmatively show the unreasonableness of customary practice.[53] The burden of proving or disproving the reasonableness of performance has shifted from the stevedore to the shipowner.

A 1962 Supreme Court ruling may reflect this trend. The Court in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*[54] reversed a lower court's decree of indemnity on the ground that although there was a breach of the

49. 61 MICH. L. REV. 539 (1963).
50. Oleszcuk v. Calmar S.S. Corp., 169 F. Supp. 628 (D. Md. 1958), *rev'd*, 266 F.2d 79 (4th Cir. 1959).
51. D'Agosta v. Royal Netherlands S.S. Co., 301 F.2d 105 (2d Cir. 1962).
52. Curtis v. A Garcia Y Cia, 272 F.2d 235 (3d Cir. 1959).
53. Cia Maritima Del Nervion v. Flanagan Shipping Corp., 308 F.2d 120 (5th Cir. 1962).
54. 369 U.S. 355 (1962).

implied warranty of workmanlike service present, that breach did not cause the injury to the longshoreman. There can be no indemnity without a clear causal connection.

A new view has been taken as to what will constitute a breach of warranty in the situation where the stevedore carries on the work with the shipowner's latently defective equipment. This view takes the position that the stevedore need do no more than make a cursory inspection of any equipment supplied by the shipowner (or of the area in which his longshoremen are to work.) A ship in port must get underway as quickly as possible and without the expense, delay, and interference with the ship's equipment which a complete inspection would entail.[55] Since the shipowner would not expect the inspection, it would not be the mutual contractual understanding of the parties, and no implied-in-fact warranty to that effect can arise.

If the stevedore does receive notice of a defect in the equipment supplied, passes this knowledge on to the shipowner, and gives him an opportunity to remedy the situation, the stevedore will not be deemed to have breached his implied warranty by not stopping the work and rejecting the equipment—at least when the shipowner asks him to continue the work.[56] Although both are negligent (the stevedore by continuing to work with defective equipment and the shipowner in failing to repair the equipment), the stevedore's action should not be considered a breach. His job is to get the work done efficiently and quickly. To stop the work might open him up to a charge of breaching the express terms of his contract.[57]

With this background in the law surrounding the stevedore's implied warranty, one is prepared to analyze the two decisions which inspired this Comment. Should the indemnity doctrine be extended to cover injuries resulting from latently defective equipment *supplied by the stevedore* without knowledge of the defect? The court in the *Booth* case felt that the implied warranty should cover the situation. True, the *Ryan* and *Weyerhaeuser* cases were concerned with situations in which the non-discovery of the cause of the injury constituted a negligent omission. But that fact would not exclude the existence of liability without fault. As a matter of fact, the *Ryan* case, in comparing the implied warranty to a manufacturer's warranty of the soundness of its manufactured product,[58] impliedly sanctioned this extension. Williston, dealing with this topic,[59] states that the effect of that warranty is to make the manufacturer absolutely responsible for the existence of the warranted qualities. It makes no difference whether the manufacturer-seller

55. See Curtis v. A. Garcia Y Cia, *supra* note 52.
56. Cruz v. Hudson S.S. Co., 206 F. Supp. 216 (D.P.R. 1962).
57. United States v. Harrison, 245 F.2d 911 (9th Cir. 1957).
58. *Supra* note 28, at 133-34.
59. 1 WILLISTON, SALES 237 (1948).

is guilty of any fault in the matter; if he fails to supply a product of the quality warranted, he has breached his contract, whether the defect is latent or visible and however honest his intention may have been. The court in the *Booth* case felt that this reasoning was especially valid where the supplier of the equipment is also the user of it in performing his services. The shipowner recognizes the expertise of the stevedore in both selection and use of the equipment. The shipowner relies on the ability and experience of the other and at most will make only a routine inspection of the equipment employed. The ultimate burden should be on the one in the best position to find the defect and correct it—the stevedore. The court might have mentioned that stevedoring firms are large and able to spread the burden of compensating injured longshoremen throughout the shipping industry as well as the shipowner can. Since no one is really very blameworthy in this situation and, at the same time, the longshoreman should be able to collect for his injury, should not such funds flow from his employer? But what becomes of the exclusiveness of the employer's liability under section 905? The protection of that statute vanishes.

The Ninth Circuit decision viewed this area of the law in an entirely different light. The court tried to look to the reasons behind prior decisions in interpreting their wording. Consider the type of warranty implied. It is a warranty of *workmanlike* service. The word "workmanlike" describes an ordinary standard of performance. The closest synonym to "workmanlike" is "skillful"; a job well done is connoted by such terms. These terms set a standard. Failure to meet the standard would constitute negligence. Liability without fault simply does not fit into the framework of this language. The language in the cases speaks in terms of reasonable care and lack of negligence. Consider the background behind prior decisions: unwillingness to back down from the decision in the *Halcyon* case, where the Court ruled that there can be no contribution between joint tort-feasors; the express provisions of the *Longshoremen's Compensation Act*—in the face of these obstacles the feeling that the owner should not be compelled to pay for the stevedore's faults. It seems reasonable that courts intended only to impose a liability in contract similar to that which would be imposed in tort were it not for the prior *Halcyon* decision. Although the remedy is in contract rather than tort, the standard of performance should be the same with negligent conduct constituting a breach. What of the *Ryan* case's comparison of this implied warranty to the manufacturer's warranty? The Ninth Circuit decision considered this analogy invalid and distinguished the warranties: the stevedore's warranty involves the performance of services, not a physical product. There is no valid reason to extend this warranty to cover liability without fault, stated the court.

Which of these two decisions is sounder and which one will be sustained if the Supreme Court has the opportunity to decide is a difficult question. Each decision has its good points and both can be found lacking to a certain extent. The best view should place the burden of protecting or indemnifying the longshoreman on the person best able to provide for the longshoreman's safety. The party held liable should be the one who created the unseaworthy condition in the first instance unless there is a showing that the other party should have prevented this condition from taking effect. Under this theory the party who supplies the defective equipment, if nothing more is involved, should be the one to pay.

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