Comparative Negligence and the Harbor Workers' Act: History, Examination, Diagnosis and Treatment

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COMPARATIVE NEGLIGENCE AND
THE HARBOR WORKERS' ACT — HISTORY, EXAMINATION,
DIAGNOSIS AND TREATMENT

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**Ross F. Plaetzer

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I. INTRODUCTION

This article examines several doctrines of American maritime law relating to the personal injury of longshoremen and harbor workers. At present this area is governed by overlapping provisions of maritime negligence law, similar in many respects to the common law of negligence, and by the statutes comprising the Longshoremen’s and Harbor Workers’ Compensation Act, as amended. The integration of these two mechanisms of loss allocation has presented a considerable dilemma for the courts. It has been stated that courts “cannot write on a fresh slate” in fashioning new doctrines in the maritime area. Thus, the history of the various contributing principles is critical to an attempt to understand the present status of the law as it relates to injured longshoremen and harbor workers, and to evaluate suggested principles for the future.

II. HISTORY

A. In General

It is very likely that ever since man first took to the sea in ships he has had a code, at first oral, later written: a network of rules and customs known, observed and enforced by all who plied the sea. As on land, damage, injury and death occur on the sea. The necessities of the sea and seafaring demanded rules and customs. It would be a mistake, however, to view the web of rules and codes which grew out of seafaring life and activities as a system of arcane and enigmatic customs, usages and practices intelligible only to a select few. “The maritime law is not a corpus juris — it is a very limited body of customs and ordinances of the sea.” It is much like the common law — a system based on pragmatism, albeit with some historical quirks. There “is nothing really forbiddingly esoteric

3. Some authorities have pointed to the maritime code promulgated by the Island of Rhodes in 900 B.C. as the earliest of which any mention is made in the ancient literature. See Gilmore & Black, supra note 2, at 3-4.
about . . . [the maritime] law. It is just law, in a special factual setting."

Since it is concerned with persons and property of an itinerant nature, the maritime law developed in an international setting. Early in American admiralty legal history, Justice Story observed these origins:

[The] maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all of Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states. . . . Of this great system of maritime law it may be truly said, . . . ["Nor will there be one law at Rome, another at Athens, one now, another in the future; instead, one law eternal and immutable will govern all nations for all times."]

As the writers of a well known treatise have stated, "Certainly the early opinions (especially those of Story) prove that the courts looked on the maritime system they were administering as international in scope, for they are replete with citations to the continental European authorities, not for persuasive analogy but 'as evidence of the general marine law.'"

The maritime law, however, affects not only sailors, merchants, traders, shipowners and stevedores, but also those who live and move under the jurisdiction of the "shoreside" or common law. Consequently, it is not surprising that the common law has had an influence, to a varying extent, on the growth and development of the maritime law in England and the United States. However, the maritime law was bound neither by the developed principles of the common law nor by the deep land-based historical roots of that system. It could sift and winnow the rules of the common law, adopting what seemed useful and good and rejecting what seemed harsh or inexpedient. For instance, maritime law enforces contracts, in-

5. Gilmore & Black, supra note 2, at 46.
cluding "charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettissons; and, . . . policies of insurance," but "it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law." The maritime law never accepted the common-law terms of the statute of frauds.  

B. Seamen

To understand the development of the maritime law in relation to injured longshoremen and harbor workers, one must trace the history of that law as it involved injured seamen. For the captain and crew on the high seas, the vessel constitutes a closed system. No one can leave at his will in the manner that a disgruntled clerk can leave a shop; all are subject to restriction of movement. This fact has led to the creation of three principal remedies for seamen injured onboard the vessel.

The first remedy is that of maintenance and cure. The Supreme Court in 1903 in The Osceola formulated the rule of maintenance and cure: "[T]he vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." As the remedy has been carried forward in the federal courts, it is said to be "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service,  

13. 189 U.S. 158 (1903).
14. Id. at 175.
and extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery.\textsuperscript{15} The vessel owner's duty is liberally interpreted in favor of the seaman,\textsuperscript{16} and the duty is imposed without regard to negligence or fault on the part of the seaman.\textsuperscript{17} The right to maintenance and cure is forfeited only by clearly wrongful conduct, such as insubordination, disobedience of orders and gross misconduct.\textsuperscript{18} The vessel owner's obligation is an affirmative duty which arises out of the employment contract between the vessel and the seaman,\textsuperscript{19} or as it is sometimes put, out of the relationship or status between the vessel and the seaman.\textsuperscript{20} Maintenance and cure is not intended to compensate the injured seaman for disabilities suffered and therefore does not provide him with damages either for pain and suffering, or for loss of future earning capacity.

A compensatory damage remedy for seamen slowly emerged from the vessel owner's duty to furnish a seaworthy vessel. The duty, first recognized in relation to seamen by the federal courts in 1789,\textsuperscript{21} was enforced under a contract theory.\textsuperscript{22} Initially, this remedy did not enable an injured seaman to recover damages for a breach, but allowed him merely to make reasonable complaints about the condition of the vessel. It also allowed him the privilege to leave the service of the vessel without incurring charges of mutiny or desertion and


\textsuperscript{16} See, e.g., id. at 532; Dragich v. Strika, 309 F.2d 161, 163 (9th Cir. 1963).

\textsuperscript{17} See, e.g., Oswalt v. Williamson Towing Co., 488 F.2d 51, 53 (5th Cir. 1974); Prendis v. Central Gulf S.S. Co., 330 F.2d 893, 896 (4th Cir. 1963).


\textsuperscript{19} See, e.g., Boggs v. Dravo Corp., 532 F.2d 897, 901 (3d Cir. 1976); Turner v. Wilson Line of Mass., 242 F.2d 414, 417 (1st Cir. 1957); Doucette v. Vincent, 194 F.2d 834, 838 (1st Cir. 1952).


\textsuperscript{21} Dixon v. The Cyrus, 7 F. Cas. 755 (D. Pa. 1789).

\textsuperscript{22} Id.; The Moslem, 17 F. Cas. 894 (S.D.N.Y. 1846); Rice v. The Polly and Kitty, 20 F. Cas. 666 (D. Pa. 1789). See also United States v. Ashton, 24 F. Cas. 873 (Cir. D. Mass. 1834) (defense of unseaworthiness pleaded against charge of revolt).
without forfeiting his wages.\footnote{Id.} The contractual basis of the duty eroded during the latter part of the nineteenth century as seamen were awarded tort recoveries against the vessel for injuries caused by hazardous and defective conditions existing in breach of the seaworthiness obligation.\footnote{See The Anaces, 93 F. 240 (4th Cir. 1899); see also cases cited in note 22 supra.}

As the tort aspect of the duty evolved, the federal courts developed rules to provide that any contributory negligence or assumption of risk by the seaman served only to diminish the damage award, and not to provide an absolute bar to recovery.\footnote{Hansen v. The Julia Fowler, 49 F. 277 (S.D.N.Y. 1892). See also The Max Morris, 137 U.S. 1 (1890); The Explorer, 20 F. 135 (C.C.E.D. La. 1884); The Wanderer, 20 F. 140, 143 (C.C.E.D. La. 1884).} As the Supreme Court stated in \textit{The Osceola}: "[T]he vessel and her owner are . . . liable to an indemnity 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."\footnote{189 U.S. 158, 175 (1903).}

Liability for unseaworthiness to an injured seaman arose only where the vessel owner's failure to exercise reasonable care under the circumstances caused the injury.\footnote{The France, 59 F. 479 (2d Cir. 1894); The Henry B. Fiske, 141 F. 188 (D. Mass. 1905); The Robert C. McQuillen, 91 F. 685 (D. Conn. 1899); The Concord, 58 F. 913 (S.D.N.Y. 1893); The Lizzie Frank, 51 F. 477 (S.D. Ala. 1887); The Edith Godden, 23 F. 43 (S.D.N.Y. 1885); The City of Alexandria, 17 F. 390 (S.D.N.Y. 1883).} No liability existed for unseaworthiness which resulted from latent defects or those inherent structural defects not remediable through the exercise of reasonable care. As to "appliances appurtenant to the ship," liability was limited to those instances where the owner had neglected to use reasonable care to "supply and keep in order" proper appliances. Liability was restricted to actual defects in the vessel and its equipment. Any negligence on the part of the captain or crew in the \textit{operation} of the vessel's equipment which resulted in injury to a seaman did not constitute unseaworthiness so as to provide a means of recovery for damages.\footnote{Storgard v. France & Canada S.S. Co., 263 F. 545, 547 (2d Cir. 1920); The Colusa, 248 F. 21, 24 (9th Cir. 1918).} "Operating negligence" was not included in the unseaworthiness concept until 1944.\footnote{Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). This concept was somewhat
In 1922, the Supreme Court in *Carlisle Packing Co. v. Sandanger,* a case which Justice Stewart forty-nine years later called "obscure," made a statement in dictum which was to be subsequently interpreted to mean that liability for unseaworthiness did not depend on the exercise of reasonable care but was strict and absolute in nature. The Court remarked, "[W]e think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline." This constituted a traditional case of the breach of the duty of seaworthiness to supply and keep in order proper appliances. The dictum lay dormant for several years but was later applied as a rule of law in cases such as *Sabine Towing Co. v. Brennan,* and *The H.A. Scandrett,* where the Second Circuit, in an opinion by Judge Augustus Hand, cited *Sandanger* for the proposition that "liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute."

In 1944, in *Mahnic v. Southern Steamship Co.,* the

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32. 259 U.S. at 259.

33. Id.

34. 72 F.2d 490, 494 (5th Cir. 1934).

35. 87 F.2d 708 (2d Cir. 1937).

36. Id. at 710. Judge Hand offered a rationale for the rule: Nor does this seem an unduly harsh imposition. A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put. It seems to us that everything is to be said for holding her absolutely liable to her crew for injuries arising from defects in her hull and equipment. The liability can be covered by insurance and is better treated as an expense of business than one left to an uncertain determination of courts in actions to recover for negligence.

Id. at 711.

37. Not all the federal courts had read *Sandanger* as imposing an absolute duty of seaworthiness on the owner of the vessel irrespective of any consideration of reasonable care. Compare *The Tawmie,* 80 F.2d 792, 793 (5th Cir. 1936); *The Cricket,* 71 F.2d 61, 63 (9th Cir. 1934); Southern Ry. Co. v. Hermans, 44 F.2d 366, 369 (4th Cir. 1930); *The Valdarno,* 11 F.2d 35, 37 (5th Cir. 1926); Kahyis v. Arundel Corp., 3 F. Supp. 492, 495 (D. Md. 1933); *The Ipswich,* 46 F.2d 136, 137 (D. Md. 1930) (reasonable care) with *Roberts v. United Fisheries Vessels Co.,* 141 F.2d 288, 293 (1st Cir.)
Supreme Court, in holding that unseaworthiness encompassed operating negligence, stated in broad terms that the vessel owner’s duty to furnish a seaworthy ship was absolute, and not premised on negligence or fulfilled by the exercise of reasonable care. The seaworthiness doctrine requires that the vessel owner furnish reasonably fit personnel as well as reasonably fit supplies and equipment. That the owner had no prior knowledge of the unseaworthy conditions constitutes no defense. But the duty, while absolute, is not unattainable. “The standard is not perfection, but reasonable fitness; . . . a vessel reasonably suited for her intended service.”

Maintenance and cure, and damages for unseaworthiness do not provide the seaman with his only means of recovery for injury. A cause of action for negligence is available as well. This is separate and apart from negligence which may lead to an unseaworthy condition on the vessel. As spelled out in *The Osceola*, the general maritime law denied a seaman an action to recover for personal injury based on a negligence theory against the vessel or her owner. After a faulty attempt to change the state of the law in 1915, Congress five years later enacted the Jones Act giving the seaman an action for negli-
gence against his shipowner-employer. The Jones Act incorporated FELA and abolished assumption of risk and contributory negligence as defenses, but provided that any damages recoverable would be diminished in proportion to the amount of negligence attributed to the seaman.\textsuperscript{46} It proved a popular means of recovery, but its importance lessened when the Supreme Court declared in \textit{Mahnich} that the seaworthiness duty was an absolute one and included operating negligence.

\textbf{C. Longshoremen and Harbor Workers}

This article would hardly be necessary if the remedies afforded seamen had been deemed concurrently applicable throughout their development to harbor workers (including longshoremen), or, alternatively, if harbor workers had been considered "landbased" seamen and for that reason had available the traditional remedies of seamen. However, such was not the case. Maintenance and cure has never been afforded harbor workers.\textsuperscript{47} In actions for breach of the duty to furnish a seaworthy vessel or for negligence, the development of the law has been different and complex.

In suits by harbor workers against their employers for injuries caused by negligence, the first question to be answered was whether the admiralty courts had cognizance of the action.\textsuperscript{48} There was an issue as to whether the duties and tasks

\begin{footnote}
\textsuperscript{46} There was an issue as to whether the duties and tasks of a towboat company against a railroad which had left a sight pile against which one of the appellee's towboats crashed. The case did not decide the question whether a harbor worker could sue in admiralty for injuries sustained by reason of the vessel owner's negligence. In a later case, Judge Benedict relied on the Court's language in holding a vessel liable in an admiralty proceeding for injury sustained by a harbor worker while

\end{footnote}
performed by harbor workers were sufficiently maritime in nature to confer jurisdiction on the admiralty courts.\(^4\) Before the question was resolved,\(^5\) harbor workers brought their actions against employers in state courts and on the law side of the federal courts, both of which imposed a duty of reasonable care on the employer to furnish a safe work place and allowed the defense of assumption of risk.\(^6\) The admiralty courts were influenced by the common-law courts and adopted the same duty and defenses established there.\(^7\) Following New York's\(^8\) lead, states began to extend coverage of their workers' compensation plans to harbor workers injured aboard a docked vessel; but in 1917,\(^9\) the Supreme Court held the New York

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49. The nature of a harbor worker's tasks was argued only in cases when a harbor worker sought a lien against the vessel for services provided. See, e.g., The Amstel, 1 F. Cas. 798 (S.D.N.Y. 1831) (harbor worker's work not maritime in nature since he works on land or on a vessel at the wharf; and his concern is with the cargo rather than the ship); The Circassian, 5 F. Cas. 702 (E.D.N.Y. 1868); M'Dermott v. The S. G. Owens, 16 F. Cas. 15 (C.C.E.D. Pa. 1849); The Joseph Cunard, 13 F. Cas. 1132 (S.D.N.Y. 1845). Contra, The Gilbert Knapp, 37 F. 209 (E.D. Wis. 1889); The George T. Kemp, 10 F. Cas. 227, 229 (D. Mass. 1876). The emphasis in these maritime liens cases was on the nature of the work done, rather than on the location where it was performed. Early attempts by harbor workers to bring tort cases in admiralty were impeded by the "nature of the work" analysis undertaken by the courts in cases dealing with attempts to create and enforce liens by harbor workers. Judge Benedict was correct in looking to the "locality" where the tort was committed rather than to the "nature of the work" done by the harbor worker in deciding whether admiralty jurisdiction attached. See note 48 supra.

One may wonder if the federal courts will now be forced full circle. Directed by the terms of the 1972 amendments to the LHWCA, 33 U.S.C. § 902(3), to find included within its coverage a "longshoreman" and "other person[s] engaged in long-shoring operations," the Court found that "the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. [Our decision] . . . focuses upon the nature, not the location, of employment." P.C. Pfeiffer Co. v. Ford, 100 S. Ct. 328, 337 (1979) (emphasis added).


52. See, e.g., Cornec v. Baltimore & O.R.R., 48 F.2d 497 (4th Cir. 1931) (no assumption of risk found); The Elton, 142 F. 367 (3d Cir. 1906) (fellow servant rule).


Compensation Act to be unconstitutional as applied to harbor workers since actions to recover for shipboard injuries fell within the federal admiralty jurisdiction. The Court maintained that to apply the state act would be contrary to a policy of national uniformity of maritime law and that the power to modify maritime law was vested exclusively in the Congress.  

Later in 1917, Congress amended the “saving to suitors” clause to include claimants’ rights and remedies under state workers’ compensation laws; but three years later, that amendment was held unconstitutional as an invalid delegation of power to the state.  

In 1924 a second amendment was rebuffed by the Court.  

The Court itself then tried to remedy the problem. In 1926 in *International Stevedoring Co. v. Haverty*, it held that harbor workers were seamen under the Jones Act which gave them a cause of action against their stevedore-employers for negligence unimpeded by the assumption of risk doctrine. At the time of the *Haverty* decision Congress was well along in the process of drafting legislation to provide a federal maritime workers’ compensation plan and, despite the remedy afforded by the Court’s interpretation of the Jones Act, decided to enact the bill, thereby nullifying the effect of *Haverty* six months after it was handed down. The enacted plan was called the Longshoremen’s and Harbor Workers’ Compensation Act.  

In many instances a harbor worker’s injuries will result from the negligence of the vessel’s crew or from a defect in the

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55. *Id.* at 214-16. *But see* Sun Ship, Inc. v. Pennsylvania, 100 S. Ct. 2432 (1980).
57. Ch. 97, §§ 1 & 2, 40 Stat. 395 (1917).
62. LHWCA, supra note 1.
vessel itself. In such cases the harbor worker may desire to seek a third-party recovery against the vessel. The jurisdiction of admiralty courts over such suits was affirmed in 1882.\(^{63}\) A line of decisions followed in which harbor workers recovered from the owners of vessels for injuries caused by physical defects in the vessel and its equipment.\(^{64}\) Such actions were premised on the vessel owner's alleged failure to provide a safe place to work. Difficulties were encountered in this area, however, because the harbor worker's stevedore-independent contractor-employer was under a like duty to provide the harbor worker-employee with a safe place to work aboard the vessel.\(^{65}\)

Delineation of the respective roles of the vessel owner's duty to the "business invitee"-harbor worker and the stevedore-independent contractor's duty to furnish its employee with a safe work environment proved troublesome for the courts. Some courts considered which party was in the better position to avoid or rectify the condition or operation causing the injury, or which had control of the relevant portion of the vessel.\(^{66}\)

These conflicts became academic in 1946\(^{67}\) when the Supreme Court held that the shipowner's absolute duty to furnish a seaworthy vessel to *seamen* was equally applicable to harbor workers aboard the vessel. The harbor worker thus became entitled to recover from the shipowner based on the

\(^{63}\) Leathers v. Blessing, 105 U.S. 626 (1882).

\(^{64}\) See, e.g., The Anaces, 93 F. 240 (4th Cir. 1899); The Elton, 83 F. 519 (4th Cir. 1897); Steel v. McNeil, 60 F. 105 (5th Cir. 1894); The Protos, 48 F. 919 (C.C.E.D. Pa. 1891); The Rheola, 19 F. 926 (C.C.S.D.N.Y. 1884); Keliher v. The Nebo, 40 F. 31 (S.D.N.Y. 1889); The Carolina, 30 F. 199 (E.D.N.Y. 1886); The Max Morris, 24 F. 860 (S.D.N.Y. 1885), *aff'd*, 28 F. 881 (2d Cir. 1886), *aff'd*, 137 U.S. 1 (1890); The Calista Hawes, 14 F. 493 (E.D.N.Y. 1882); The Helios, 12 F. 732 (S.D.N.Y. 1882); Gerrity v. The Bark Kate Cann, 2 F. 241 (E.D.N.Y. 1880).


\(^{67}\) Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
shipowner's absolute duty to provide a seaworthy vessel. In addition, a harbor worker retained his cause of action for negligence against the vessel and his right to receive workers' compensation from his employer under the 1927 LHWCA. Clothed with these three rights, the harbor worker was at last on a par with his seaman counterpart who had the maintenance and cure, Jones Act negligence and unseaworthiness remedies. In affirming that the shipowner's duty to provide a seaworthy vessel was absolute and nondelegable, a "species of liability without fault,"68 "neither limited by conceptions of negligence nor contractual in character,"69 the Court stated that the owner could not escape this duty by parceling out his operations to independent contractors or their harbor workers, who in so undertaking the task are "doing a seaman's work and incurring a seaman's hazards."70 In effect, the shipowner became almost an insurer of the harbor worker while he was engaged in stevedoring or other harbor work.71 Due diligence as to the health and safety of harbor workers was no longer the touchstone for determining the vessel's liability.

Seaworthiness claims fell into two categories: one, where the owner, having actual or constructive knowledge that a certain activity would occur, had the absolute duty of furnishing equipment and a place aboard ship for its use so that the activity could be undertaken in reasonable safety; and the other, where the equipment actually supplied for doing the work proved incapable of performing its function in the manner for which it was designed.72 It became firmly established that the vessel's unseaworthiness might arise from any number of individual circumstances, including:73 defective gear, appurtenances in disrepair, unfit crew,74 improper manner of loading

68. Id. at 94.
69. Id.
70. Id. at 99.
71. This was so despite occasional passing comments by the courts to the contrary. See Scott v. Isbrandtsen Co., 327 F.2d 113, 124 (4th Cir. 1964); Clevenger v. Star Fish & Oyster Co., 325 F.2d 397, 400 (5th Cir. 1963); Freitas v. Pacific-Atlantic S.S. Co., 218 F.2d 562, 564 (9th Cir. 1955).
cargo⁷⁵ and improper stowage of cargo.⁷⁶ Nevertheless, mere negligent use of seaworthy equipment did not, in and of itself, make a vessel unseaworthy. Control of the work area was irrelevant to liability for unseaworthiness.⁷⁷ A vessel was seaworthy even if the defective equipment had been brought aboard by a stevedore-employer for its own use.⁷⁸ Whether or not equipment was so defective as to render a vessel unseaworthy was a question of fact for the jury. The scope of the meaning of the term was carried to extreme lengths. For example, in one case, the Supreme Court held that it was a jury question as to whether a wrench which had enough play in its jaw to permit it to slip on a nut was such a defective appliance as to render a vessel unseaworthy.⁷⁹ The mere fact that an accident occurred did not, in and of itself, establish unseaworthiness.⁸⁰

Negligent use of an otherwise seaworthy appliance, which was thereby made unseaworthy at the very instant of injury, raised no unseaworthiness issue, and the owner of the vessel was not liable for such “transitory unseaworthiness.”⁸¹ In 1971, the Supreme Court lessened somewhat the shipowner’s burden for damages by holding that a stevedore-employer’s negligence would not be imputed to the vessel owner so as to bring about a liability for unseaworthiness.⁸²

Between 1946 and 1956, shipowners contended that they should have a right of indemnification or contribution against stevedore-employers whose negligence brought about, in whole or in part, a breach of the owner’s duty of seaworthiness. In 1952, in a case in which a jury had found an owner to

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77. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954), aff’d, 205 F.2d 478 (9th Cir. 1953).
81. See Grillea v. United States, 232 F.2d 919 (2d Cir. 1956).
be twenty-five percent negligent and a stevedore-employer to be seventy-five percent causally negligent for a harbor worker’s injury, the Court denied the owner indemnification because of the prohibition against contribution between joint tortfeasors. The Court noted that any change in this concept borrowed from the common law was properly a matter for legislative modification.

The final judicial innovation introduced in this area before Congress acted in 1972 was the Court’s decision that an implied “warranty of workmanlike service” existed between the shipowner and the stevedore-independent contractor-employer under the jobbing contract between these parties. Failure to perform the contract reasonably and safely breached the warranty. Consequently, the shipowner was entitled to full indemnification from the stevedore-employer as reimbursement for any damages recovered by a harbor worker from the shipowner or his ship for unseaworthiness of the vessel. The Court held that a stevedore-employer had an obligation, which was the essence of his contract with the vessel, to perform stevedoring operations in a proper, competent and workmanlike manner with reasonable safety and to indemnify the shipowner for damages resulting from the stevedore’s improper performance. By this contractual fiction, the Court succeeded in circumventing the existing bar of the maritime rule against contribution between joint tortfeasors and effectively shifted the burden from an innocent owner of a vessel to a negligent stevedore-employer whose liability had previously been thought limited by the exclusive liability provisions of the LHWCA.

The federal courts expanded the stevedore-employer’s warranty of workmanlike service in a virtually limitless manner. The stevedore-employer’s contractual obligation to per-

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86. Id. at 133.
87. Id. at 132-35.
88. Prior to the 1972 amendments § 905 provided that the employer's liability for workers' compensation “shall be exclusive and in place of all other liability of such employer to the employee . . . .” 33 U.S.C. § 905 (1970).
form in a competent and workmanlike manner applied not only to the handling and stowing of cargo, but also to the use of equipment incidental to such operations.\textsuperscript{89} It became well settled, however, that the stevedore-employer was not liable to indemnify the shipowner for a harbor worker's injuries when those injuries were caused by a hidden or latent defect of which the stevedore had neither actual nor constructive knowledge.\textsuperscript{90} However, defects which were in fact observed could not be left unremedied by the stevedore-employer.\textsuperscript{91} The injuries had to be caused by the particular defect of which the stevedore had knowledge, but no knowledge was imputed if the injury occurred before the stevedore-employer had an adequate opportunity to remedy the condition.\textsuperscript{92} The stevedore-employer had no duty to make a detailed inspection of the work area prior to commencing work on a vessel. A cursory examination was sufficient.\textsuperscript{93} As a general rule, negligent acts on the part of the owner-indemnitee were not held to preclude recovery from the stevedore-indemnitor. The right to full indemnification came to include not only the amount of the insured harbor worker's recovery from the shipowner but also the shipowner's costs and actual reasonable attorney's fees incurred in defending against the injured harbor worker's claim.\textsuperscript{94}

\begin{itemize}
\item \textsuperscript{89} See, e.g., Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958).
\item \textsuperscript{90} See, e.g., Allison v. Cosmos S.S. Corp., 433 F.2d 840 (9th Cir. 1970); Shaw v. Lauritzen, 428 F.2d 247 (3d Cir. 1970); Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (2d Cir. 1957).
\item \textsuperscript{92} See, e.g., Orlando v. Prudential S.S. Corp., 313 F.2d 822 (2d Cir. 1963).
\item \textsuperscript{93} See, e.g., Delaneuville v. Simonsen, 437 F.2d 597 (5th Cir. 1971); Cia Maritima Del Nervion v. Flanagan Ship Corp., 308 F.2d 120 (5th Cir. 1962); Atlantic & Gulf Stevedores, Inc. v. Skibs A/S Dammotor, 342 F. Supp. 837 (S.D. Tex. 1971).
\item \textsuperscript{94} See, e.g., Rederi A/B Dalen v. Maher, 303 F.2d 565 (4th Cir. 1962); DeGioia v. United States Lines Co., 304 F.2d 421 (2d Cir. 1962); A/S J. Ludwig Mowincckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227 (2d Cir. 1958); Holley v. Steamship
The foregoing historical sketch is somewhat detailed, but it is presented to illustrate the tangled and intricate web of law which Congress faced in 1972 when it sought, at last, to alter some of the judicial superstructure developed in the maritime law over the prior ninety years and to impress that law with simpler, more expedient, and fairer concepts for the determination of liability for injuries sustained by a longshoreman or harbor worker in the course of his employment.

III. Examination

In the practice of statutory interpretation, resort is often made to the legislative history of an enactment to divine the legislative intent of those who passed the statute into law. When a statute is ambiguous or vague, courts often turn for guidance to the hearings, committee reports and debates of the legislature. In the case of the 1972 amendments to the LHWCA, the federal courts have treated these materials, especially the committee reports, as a "Rosetta stone" in deciphering the supposed intent and purpose of the Congress enacting them. Unfortunately, legislative intent is often a fiction employed by courts to provide support for a particular statutory interpretation which they desire to achieve. Rarely, if ever, can anything approaching an authentic and real legislative intent of the collective body enacting a law be identified. The views and opinions of key sponsors of a piece of legislation can be pointed to, but what they utter in committee or on the floor in debate is not always what they really think or intend. Many times, what they say is only what they perceive as necessary to be said in order to gain a sufficient majority for passage. Nevertheless, while resort to a fictional legislative intent is rarely, if ever, a reliable indicium of collective legislative purpose, such resort is made by many courts, including the Supreme Court. The legislative history of the 1972 amendments to the LHWCA has had an especially potent effect on the shape of several aspects of law as interpreted by the courts. For instance, a sentence in both the House and Senate committee reports on the amendments to the effect that the question of whether negligence existed in a particular situation could "only be resolved through the application of

accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties,” has led countless lower courts to the conclusion that Congress, by using the phrase “land-based,” meant to impose a standard of care similar to the traditional common-law standard of care with regard to landowners and business invitees. Courts turned to the Restatement of Torts and established principles based on rules which had their origins several centuries ago in England. Such a literal resort to the committee reports and the legislative intent of Congress, as well as the adoption of land-based principles of tort law, distracted the attention of the courts from the standard of care established in the maritime law by the Supreme Court. This effort by the lower courts to effect what they thought was the legislative intent of Congress persisted until recently when several circuit courts cited a 1959 Supreme Court decision as being the better-reasoned standard of care under traditional admiralty and maritime law concepts.

It is risky for courts to seek support for a particular construction or interpretation in the legislative history of the 1972 amendments to the LHWCA. Bills to amend the LHWCA were introduced into both houses of Congress during 1971. Hearings were held by the applicable committees in


both houses.^{101} A Senate subcommittee held five days of hearings on several bills, and a House subcommittee held three days of hearings on similar bills. Out of a total of eighteen members assigned to the House select subcommittee, seven members attended the first day, four members attended the second day and five members attended the third day of hearings on the bills.^{102} In the Senate subcommittee, which had a total membership of twelve, two senators, the chairman and a minority member of the subcommittee, attended the first day of hearings, and of these only the chairman was present on the four remaining days.^{103} The risk involved in a court's relying upon the legislative history of a statute such as the 1972 amendments can be shown by a recent Supreme Court case where the Court stated, "The Senate Subcommittee on Labor heard testimony that 30-35% of ship repair work is done on land."^{104} The "Senate Subcommittee on Labor," to which the Supreme Court referred, consisted that day of only one member, the chairman.^{105} Moreover, the chairman himself, the only member present on that day, was not a sponsor of any of the bills being considered and was not present on the Senate floor when the amendments were voted on and adopted.^{106} It is difficult to find compelling authority in reports issued by congressional committees, most of whose members never heard testimony or, perhaps, gave little, if any, prior consideration to the bills.

It is difficult also, in the case of the 1972 amendments to the LHWCA, to find persuasive authority from the legislative history worked out on the floor of either house during consideration of the bills. The Senate was the first body to consider


the 1972 amendments. On September 14, 1972, it passed the amendments without modification, without debate and by a voice vote. On Saturday, October 14, 1972, the House passed its own version of the 1972 amendments under a legislative procedure whereby debate was restricted to one hour and no amendments were allowed to the bill.\textsuperscript{108} The debate on the bill is not informative and consists of little more than a restatement of the committee reports and statutory language. It is difficult to tell how many members of the House were present for debate on the amendment, but it is significant that after the debate had concluded and the speaker called for a division vote on passage of the bill, only seventy-nine members responded, forty-eight in favor of passage and thirty-one against.\textsuperscript{109} Subsequently, a member of the House asked for a roll call vote and 269 members responded, with 162 not voting.\textsuperscript{110} Even if a "legislative purpose or intent" could be gathered from the limited debate in the House, it is difficult to say that such was the intent or purpose of a majority of the House. Ordinarily, legislation as far-reaching as the 1972 amendments to the LHWCA would have been given considerable attention in both houses, and the resulting versions from each probably would have been referred to a conference committee where a compromise between the two versions would have been worked out. But in the case of the 1972 amendments, action on the bills was taken so late in the session and so close to the time when many members of Congress were up for reelection, that an expedited procedure was necessary.

After the House had passed a different version than the one approved by the Senate, the amendments were sent back to the Senate which then agreed to the House version with only limited debate and again on a voice vote.\textsuperscript{111} Again, it is difficult to tell how many members of the Senate were present for the debate, but almost forty senators were reported absent.

\textsuperscript{107} See 118 Cong. Rec. 30670-74 (1972).
\textsuperscript{109} See 118 Cong. Rec. 36388 (1972). A division vote is called by the speaker after the completion of debate and requires all members present in the chamber in the affirmative of the question to first rise from their seats and be counted and then those in the negative. House Rule I, 5, § 630 (1972).
\textsuperscript{110} 118 Cong. Rec. 36388-89 (1972).
\textsuperscript{111} Id. at 36265-74.
for the entire day when the bill was considered.\footnote{112} Debate in
the Senate the second time was limited to comments by the
sponsor of the 1972 amendments,\footnote{113} and his remarks consisted
of a restatement of the Senate committee report.\footnote{114} In fact,
some doubt exists as to whether he actually read his com-
ments to those senators present since his remarks parallel al-
most word for word the text of the committee report, and it
was the practice at that time to give no indication in the Con-
gressional Record whether or not a statement was actually
made on the floor of the Senate or whether it was merely in-
serted later when the Congressional Record was printed.\footnote{115}
If, in fact, he did not read his statements to those members of
the Senate present during consideration of the bill, but in-
stead inserted them into the record \textit{ex post facto}, then they
are entitled to little, if any, weight in fathoming a congress-
sional intent.\footnote{116} This is the environment in which the “legisla-
tive intent” of Congress was forged as to the 1972 amend-
ments to the LHWCA. One member of the House sub-
committee which was considering the 1972 amendments
stated at a committee meeting, after hearing testimony that a
great deal of compromise would be necessary in enacting the
amendments, “I think it is also important to write it on the
floor. The legislative history will have to be written on the
floor.”\footnote{117} That same member was not even present during the
debate or vote in the full House on the 1972 amendments.\footnote{118}
Congressional consideration of the 1972 amendments was

\footnote{112} Id. at 36186-87, 36187-88, 36240, 36261.

\footnote{113} Sen. Williams.

\footnote{114} Compare remarks of Sen. Williams, 118 Cong. Rec. 36270-73 (1972) with

\footnote{115} At the time of the debate on the 1972 amendments to the LHWCA, it was
not the practice of the Congressional Record to indicate by the use of “bullet” state-
ments or insertions which were not spoken by a legislator on the floor, as is currently
the practice. See \textit{also} Hutchinson v. Proxmire, 99 S. Ct. 2675, 2678 n.3 (1979).

\footnote{116} \textit{See} 2A C. Sands, \textit{Sutherland Statutes and Statutory Construction} §§

\footnote{117} Remarks of Rep. Esch, 1972 House Hearings, supra note 101, at 120.

\footnote{118} A short statement by Rep. Esch in support of the passage of the 1972 amend-
ments to the LHWCA appears at 118 Cong. Rec. 36388 (1972), for October 14, 1972,
the date the amendments were passed. It appears, however, that the statement was
never actually delivered on the floor of the House, and that Rep. Esch was not pre-
sent for debate and voting since he is officially recorded as “not voting” and had
formed a pair with Rep. Fulton, who also did not vote on the bill. Id.
haphazard. While the subject matter encompassed by the amendments had been discussed in various House and Senate committees for the previous twenty years,\textsuperscript{119} House and Senate consideration in 1972 was not comprehensive, and its meaningfulness is questionable.

The Supreme Court has ascribed to Congress three main goals in enacting the 1972 amendments. "The primary purposes of the 1972 Amendments were to raise the amount of compensation available under the Act, to abolish longshoremen's seaworthiness remedy against the owners of a vessel, and to outlaw shipowners' claims for indemnification from stevedores."\textsuperscript{120} As mentioned above, \textit{Seas Shipping Co. v. Sieracki}\textsuperscript{121} and \textit{Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.}\textsuperscript{122} had created a situation wherein the shipowner was absolutely liable for a breach of the judicially-enacted warranty of seaworthiness, but could shift his burden of liability completely to the stevedore-employer upon a showing that the stevedore had breached the judicially-created warranty of workmanlike performance which required that the stevedore perform his work in a safe and workmanlike manner. Consequently, what was referred to as a "circular liability" arrangement had been created whereby an injured longshoreman col-

\begin{itemize}
  \item\textsuperscript{120} P. C. Pfeiffer Co. v. Ford, 100 S. Ct. 328, 332 n. 3 (1979).
  \item\textsuperscript{121} 328 U.S. 85 (1946).
  \item\textsuperscript{122} 350 U.S. 124 (1956).
\end{itemize}
lected unemployment benefits from his stevedore-employer and also brought suit against a negligent third-party shipowner who, in turn, brought suit against the stevedore-employer for a breach of the warranty of workmanlike service. This circular arrangement led to the result that a stevedore-employer was liable not only for compensation benefits, but also in many cases was liable to indemnify the owner of the vessel for any damages awarded in a court action. At the same time that courts were working out the principles of the seaworthiness-indemnity cycle, longshoremen and their unions were becoming appreciably discontented with the level of compensation benefits paid to injured workers under the LHWCA. The benefit level had not been increased since 1961 and had remained at seventy dollars per week even though the average wage of a longshoreman had risen to two hundred dollars per week by 1972. Several bills were introduced into Congress in 1971 seeking to raise the level of benefits to a higher maximum and to effect other changes in the provisions of the LHWCA.

When hearings were held on the bills in both the House and Senate, numerous representatives of both shipowners and stevedore-employers testified. The gist of their complaints was that if the level of compensation benefits were to be raised, they would demand in return that the circular liability arrangement established by the Supreme Court in Sieracki and Ryan be abolished. They claimed that the particular arrangement had the effect of raising compensation insurance premiums to almost unbearable levels. One stevedore-employer representative went so far as to assert that if the benefit levels were raised without a concomitant abolishing of the circular liability arrangement, many parts of the stevedoring and shipping industries would be "push[ed] toward bank-

123. Of this arrangement Judge John Brown of the Fifth Circuit remarked in one case: "This is another of the growing number of multi-party Donnybrook Fairs in which like Kilkenny cats... all lash out against each other in the hope that somehow all or part of the Sieracki-Ryan-Yaka-Italia fallout can be visited on another." D/S Ove Skou v. Hebert, 365 F.2d 341, 344 (5th Cir. 1966).
125. See bills listed in note 100 supra.
ruptcy . . . " There was testimony at the hearings that while the level of compensation benefits had remained constant since 1961, the accident frequency rate in the stevedoring industry had undergone a steady decline and that the rate of severe injuries had declined substantially. However, during that same time the compensation insurance premium rate had increased exponentially. It was asserted that this was due primarily to the increase in third-party suits brought by injured longshoremen against vessel owners under the warranty of seaworthiness doctrine. The ease of recovery under such a doctrine, it was claimed, gave incentive to commence such third-party actions. Evidence was presented by one representative of stevedoring concerns that in 1963 in the district courts of New York just over twenty-seven percent of all federal longshoremen claims that exceeded one thousand dollars had resulted in third-party suits. By 1970, that rate had increased to seventy-seven percent. Two primary reasons were asserted for this increase in commencement of third-party actions. First, since 1961, the disparity between the weekly compensation level paid under the LHWCA and the actual weekly wage of the average longshoreman had increased. Second, under the warranty of seaworthiness doctrine, the absolute liability which rested on the shipowner made recovery by an injured longshoreman an easily surmountable obstacle.

A raise in the level of weekly compensation benefits was proposed. Evidence was presented to the committees, however, that if the level of compensation benefits were raised

133. Most of the bills discussed at the hearings proposed a benefit level increase of some kind. See bills listed in note 100 supra.
without a concurrent change in the circular liability arrangement, compensation insurance premiums would rise, depending upon the proposal adopted, anywhere from fifty-three to one hundred twenty-eight percent. The stevedore-employers and shipowners first proposed to include a vessel under the definition of an "employer" under the provisions of the LHWCA. This would have immunized the vessel against suit by an injured longshoreman, since the LHWCA provides that an injured harbor worker may not bring a third-party action against his "employer." Even though the stevedore would, in fact, be the real employer of the injured harbor worker, a change in the definition of that term under the LHWCA encompassing the vessel would thereby make the vessel a fictional "employer" of the longshoreman. This would have had the effect of barring all suits against the vessel, whether for negligence or for the breach of the warranty of seaworthiness. During the hearings on this proposal, which was introduced in both houses of Congress, a consensus quickly developed that a negligence action should be retained, while the warranty of seaworthiness should be abolished. Stevedore-employers then argued that if the vessel owner's absolute warranty of seaworthiness was to be abolished, their duty to indemnify a vessel owner for a breach of the warranty of workmanlike performance should also be abolished. This was agreed to with little opposition. The remaining portions of the hearing records in both houses contain little more than repetitions of why the warranty of seaworthiness and the warranty of workmanlike performance should be done away with, and statements from union spokesmen that the level of compensation benefits should be increased.

Perhaps the most significant part of any of the testimony given before either committee occurred during a portion of a Senate committee hearing when one of the committee's counsel was questioning an attorney representing the National

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The colloquy was as follows:

Mr. Mittelman. Do you know whether it is a common practice in the Port of Philadelphia and other ports for stevedores . . . to include in their contract with shipowners, a hold-harmless clause under which the stevedore agrees to hold the shipowner harmless even from the result of the shipowner's own negligence if it causes an injury to one of the stevedore's employees?

Mr. Scanlan. Mr. Mittelman, I think there are some cases where that has happened, and it all depends on the contract and the contractual relationship between the parties, the shipowner, and the stevedore.

That's the typical hold-harmless agreement.

. . . .

Mr. Mittelman. If we wrote into this a prohibition, a hold-harmless clause to the extent that they hold a shipowner harmless for injuries due to the shipowner's own negligence, plus a provision which authorized third-party action only where there was negligence on the part of the shipowner as a third party, wouldn't that protect the stevedore from the circular liability that he now develops [sic]?

Mr. Scanlan. Yes; that would give him a great deal of protection. It wouldn't be complete protection, because of the fact that you have stated, that you would retain the right of a longshoreman to bring a suit against the shipowner for negligence.

. . . .

Mr. Mittelman. There is a precedent for this. I think it is section . . . [234] of the New York State real property law, 138 which prohibits an owner of a building from getting a

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138. Section 234 N.Y. Real Property Law (Consol.) was added to the statutes by 1937 N.Y. Laws, ch. 907, and renumbered as § 5-321 N.Y. Gen. Oblig. Laws (McKinney) by 1963 N.Y. Laws, ch. 576. It reads as follows:

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.
hold harmless because from, say, the maintenance contractor under which the maintenance contractor agrees to indemnify the owner of the building from the result of his own negligence. There is a precedent for this sort of thing.

What I am getting at is a system that permits the third-party action and then prohibits the shipowner from coming back against the stevedore.139

What the committee counsel was proposing was allowing an injured longshoreman to sue a third party for negligence while eliminating the absolute doctrine of seaworthiness and foreclosing the possibility that a shipowner would require a stevedore to execute an indemnity agreement. By prohibiting any indemnity agreements, the effect of the Ryan doctrine of the warranty of workmanlike service (as well as any attempt to resurrect such a doctrine in the form of an express indemnity agreement) would be nullified.

The attention of these subcommittees and their respective counsel was directed primarily, if not exclusively, to three parties: the injured longshoreman, the shipowner and the stevedore-employer. No testimony focused on and no attention was given to any situations involving more than those parties. The focus was on achieving a workable compromise whereby benefit levels could be substantially increased under the LHWCA in return for relieving shipowners and stevedore-employers from the burden imposed by the Sieracki-Ryan circular liability arrangement. If the committee hearings are any indication of the thoroughness with which Congress examined and balanced the competing interests of the various groups represented before it, then it might be fairly stated that little if any balancing was undertaken. As the above-quoted comments by the counsel to the committee suggest, everyone was in agreement that the compensation benefit level should be raised. The only question was how to provide that negligence actions be allowed to be commenced by an injured longshoreman or harbor worker while abolishing the dual warranties of seaworthiness and workmanlike performance. Congress' attention did not go beyond the evidence presented by the witnesses testifying before the committees. The longshoremen wanted increased compensation benefits. The shipowners and steve-

139. 1972 Senate Hearings, supra note 101, at 272-73 (footnote added).
dore-employers wanted to be relieved of circular liability suits. A compromise was worked out, and the legislation was passed.\textsuperscript{140}

The 1972 amendments to the LHWCA removed most, if not all, of the \textit{Sieracki-Ryan} legacy from the maritime law of personal injury to longshoremen and harbor workers.\textsuperscript{141} The question remains as to what effect the removal of so pervasive and encompassing a body of doctrine and rules, stretching from 1946 to 1972, would have on the law in this area. The committee reports assert that removal of the \textit{Sieracki-Ryan} doctrine clears the way for application of the "admiralty concept of comparative negligence."\textsuperscript{142} Whether this is, in fact, the case depends upon whether a "concept" of comparative negligence existed in the maritime law of personal injury to longshoremen and harbor workers prior to the twenty-six year predominance of the \textit{Sieracki-Ryan} liability scheme.

Initially, it is sufficient to define the concept of comparative negligence as a system of loss allocation providing for the apportionment of damage in some manner according to the fault of the parties involved. This is in contrast to the traditional common-law rule barring recovery to a party seeking damages if his own negligence was found to have contributed to his harm. A concept of a sharing or dividing of the damages first took hold in the maritime law of collision.

The first mention of dividing the loss in the Anglo-American maritime law occurred in 1614.\textsuperscript{143} The defendant in that case was found solely at fault and was made to pay one-half of the loss of the ship's cargo and the entire amount for damages

\textsuperscript{140} The amendments replaced the fixed weekly benefit rate with a percent formula correlated to the "national average wage" as determined by the Secretary of Labor. This scheme eliminated the need for Congress to continually adjust the benefit schedule by legislation to keep up with inflation. Additionally, death benefits paid to survivors were increased for widows and children; benefits to surviving children were made payable until age 23 if the child was attending school; funeral expenses up to a fixed amount were payable; and compensation benefits were made available in cases of serious disfigurement. A revamped administrative procedure was also included.

\textsuperscript{141} See text accompanying notes 202-42 infra.


\textsuperscript{143} See Turk, \textit{Comparative Negligence on the March}, 28 \textsc{Chi.-Kent L. Rev.} 189, 226 (1950) [hereinafter cited as Turk].
to the ship itself.\textsuperscript{144} This case was not, strictly speaking, a case of comparative negligence since the plaintiff was not at fault, but it introduced into the maritime law the concept of dividing damages as opposed to allowing a plaintiff either complete or no recovery. There are other instances where the defendant vessel was solely at fault and the English courts awarded one-half damages to the plaintiff.\textsuperscript{145} Decisions from the same period, however, indicate that sometimes a court would allow recovery in an amount other than one-half of the damages where only the defendant was at fault.\textsuperscript{146} In other instances the court apportioned the loss according to the relative fault of the parties.\textsuperscript{147} By the end of the seventeenth century, however, the general rule was to apply one-half damages in the event of collision when two vessels were at fault.\textsuperscript{148}

In 1695, the rule of one-half damages was first applied to a case of fault on the part of both the plaintiff and the defendant.\textsuperscript{149} A 1706 case revised the equal division rule on the difficulty of accurately attributing the fault among the parties involved.\textsuperscript{150} Throughout the eighteenth century, the English admiralty courts followed the equal division rule, even in cases of mutual fault, and avoided any attempts to allocate loss according to relative degree of fault.\textsuperscript{151} In the early 1820's, one admiralty trial court, in a case where both vessels were found at fault, apportioned the loss in unequal shares.\textsuperscript{152} On appeal, however, the House of Lords criticized that method of allocation and directed the division of loss in equal shares.\textsuperscript{153} This remained the rule in England until modified by a statute in 1911 providing for apportionment of loss according to the relative degree of fault.\textsuperscript{154}

American admiralty courts were quick to adopt the En-

\begin{footnotes}
\footnote{144. Id.}
\footnote{145. Id.}
\footnote{146. Id.}
\footnote{147. Id.}
\footnote{148. Id. at 227.}
\footnote{149. Id.}
\footnote{150. Id.}
\footnote{151. Id.}
\footnote{152. Id. at 228.}
\footnote{154. Turk, supra note 143, at 228.}
\end{footnotes}
glish rule of equal shares in collision cases of mutual fault.\textsuperscript{155} In 1855, the Supreme Court held that this was the proper rule for the federal courts to apply.\textsuperscript{156} The Court failed to consider whether this rule would apply if one vessel were grossly more at fault than the other or whether it would ever be proper to allocate loss according to degree of fault. This was so despite the fact that the Court earlier in the century had enunciated principles of maritime law which seemed to indicate a more careful consideration of the amount of blame attributable to a party. In \textit{The Marianna Flora},\textsuperscript{157} the Court stated, "Even in cases of marine torts . . . courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity . . . ."\textsuperscript{158} And a flexible standard was indicated in \textit{The Palmyra}\textsuperscript{159} where it was noted, "In the admiralty, the award of damages always rests in the sound discretion of the court, under all circumstances."\textsuperscript{160} By 1874, the Court was able to assert, "By the rule of the admiralty court, when there has been such contributory negligence, or in other words, when both have been at fault, the entire damages resulting from the collision must be equally divided between the parties."\textsuperscript{161}

By the end of the nineteenth century, some lower federal courts had issued decisions apportioning loss unequally according to relative fault,\textsuperscript{162} but such innovation was short-lived. The courts continued to utilize the equal division rule until the Supreme Court once again entered the area and abolished the rule in 1975 in favor of a proportionate fault rule.\textsuperscript{163}

The previous discussion of the one hundred twenty-year old divided damages rule in collision cases has not mentioned

\textsuperscript{155} Id. at 231.
\textsuperscript{156} The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 434 (1855).
\textsuperscript{157} 24 U.S. (11 Wheat.) 497 (1826).
\textsuperscript{158} Id. at 509.
\textsuperscript{159} 25 U.S. (12 Wheat.) 1 (1827).
\textsuperscript{160} Id. at 10.
\textsuperscript{162} See, e.g., The Chattahoochee, 74 F. 899 (1st Cir. 1896); The Victory, 68 F. 395 (4th Cir. 1895); The Mary Ida, 20 F. 741 (S.D. Ala. 1884). See also N. M. Patterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576 (N.D. Ill. 1962) (apportioning liability \(\frac{1}{2}-\frac{1}{2}\)), rev'd, 324 F.2d 254 (7th Cir. 1963).
\textsuperscript{163} United States v. Reliable Transfer Co., 421 U.S. 397 (1975).
any role Congress took in seeking to modify or abolish it. As mentioned above, the same rule in England was nullified by an act of Parliament in 1911. From its general recognition by the Supreme Court in 1855, the divided damages rule was considered only by the courts until 1911. In that year, encouraged by the text adopted by the International Maritime Convention approved in Brussels in 1910, the President and Secretary of State attempted to draft legislation similar to the English act of 1911, but abandoned their efforts when strong protests against such a change were raised. In 1937, the President again submitted the Convention calling for a proportionate division of damages in collision cases to the Senate Committee on Foreign Relations, which reported favorably on it. The intervention of World War II, however, foreclosed further action, and the President subsequently withdrew the Convention from further congressional consideration in 1947. No other legislative attempts were made to modify the doctrine before the Supreme Court acted in 1975.

The maritime concept of comparative negligence more quickly overcame the equal division rule in situations where the negligence of the plaintiff concurred with that of the defendant to cause a personal injury or death. Not foreclosed from awarding damages other than in equal shares as they were in the field of collision cases, the lower courts felt free to exercise the traditional hallmarks of admiralty jurisprudence—discretion and equity. By 1884, Judge Pardee of the Fifth Circuit, in two important decisions, felt "disposed to hold that in cases of maritime tort, it is the rule of courts of admiralty to exercise 'a conscientious discretion and give or withhold damages upon enlarged principles of justice and equity.'" In deciding the case, the court stated that it did not find that outside of collision and prize cases, the admiralty courts have claimed or exercised a different rule as to cases of contributory, concurrent, or comparative negligence from that applied generally in courts of law and equity, in

164. Turk, supra note 143, at 234-35.
165. Id. at 235.
166. Id. at 235-36.
cases of damage and torts committed or suffered on land. . . . [The court has] not been able to find a case where a seaman, freighter, or passenger, injured through his own negligence, has been allowed to recover damages outside of care and attendance from the ship or her owners.¹⁶⁹

Nonetheless, Judge Pardee, in one case where a harbor worker was injured when he caught his arm in the wheels of a revolving steam winch as a result of both his own negligence and the negligence of the vessel he was working on, did not divide damages equally, but allowed the injured worker some of his special but not his general damages.¹⁷⁰ In another case, Judge Pardee awarded a seaman, who was concurrently negligent with a vessel, damages to the extent of the cost of direct care, attention, medical services and expenses.¹⁷¹ The court deemed recovery "not as a compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury."¹⁷²

Following this example, federal courts thereafter began to allow damages proportionate to the circumstances and not according to a set rule of equal division.¹⁷³ Nonetheless, a trial court occasionally would do so, citing the "admiralty rule,"¹⁷⁴ but the pervading rule for personal injury cases was stated by an Oregon district court as follows:¹⁷⁵ "When the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all of the circumstances of the case."¹⁷⁶

Any doubts on the matter were resolved by the Supreme Court in 1890. The trial court in The Max Morris¹⁷⁷ had

¹⁶⁹. Id.
¹⁷⁰. Id. at 140.
¹⁷². Id.
¹⁷³. See, e.g., Anderson v. The Ashebrooke, 44 F. 124, 127-28 (C.C.E.D. Tex. 1890); The Mystic, 44 F. 398, 399 (S.D.N.Y. 1890); The Truro, 31 F. 155, 160 (E.D.N.Y. 1887); The Max Morris, 24 F. 860, 862-64 (S.D.N.Y. 1885); The Mabel Comeaux, 24 F. 490, 491-92 (C.C.E.D. La. 1885).
¹⁷⁴. See, e.g., The Eddystone, 33 F. 925, 927 (E.D. Va. 1887).
¹⁷⁶. Id. at 479.
¹⁷⁷. 24 F. 860 (S.D.N.Y. 1885).
awarded an injured harbor worker his loss of wages, but re-quired him to bear all pain and suffering and consequential damages as a result of the finding of concurrent negligence.\textsuperscript{178} The trial court found Judge Pardee's decisions persuasive and stated that the "practice in admiralty to apportion damages in cases of mutual fault is not strictly confined" to nonpersonal injury cases.\textsuperscript{179} In allowing the injured longshoreman to re-cover his lost wages, the court stated, "Such a rule will cer-tainly not diminish the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels toward providing all needful means for the safety of life and limb."\textsuperscript{180}

The circuit court affirmed\textsuperscript{181} and on appeal to the Supreme Court the district court's holding was sustained in broad lan-guage. The Court found the rule allowing some recovery to a concurrently negligent injured longshoreman or harbor worker to be "an amelioration of the common-law rule, and an exten-sion of the admiralty rule, in a direction which we think is manifestly just and proper."\textsuperscript{182} Commenting on the decision of the district court, the Supreme Court agreed with its holding.

We think this rule is applicable to all like cases of marine tort, founded upon negligence, and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of a negligence of the libel-ant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.\textsuperscript{183}

The court found it unnecessary to give an opinion about whether "in a case like this the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or lesser proportion of such dam-ages. . . ."\textsuperscript{184} But since the district court and circuit court had allowed damages based on a rule other than the one-half division rule and the Supreme Court did not disturb that

\textsuperscript{178} Id. at 864.
\textsuperscript{179} Id. at 863.
\textsuperscript{180} Id. at 864.
\textsuperscript{181} 28 F. 881 (C.C.S.D.N.Y. 1886).
\textsuperscript{182} 137 U.S. 1, 14 (1890).
\textsuperscript{183} Id. at 15.
\textsuperscript{184} Id.
award, the implication was that federal courts need not apply a strict divided damage rule in personal injury cases. Thereafter, the federal courts consistently applied a rule of comparative negligence when both the plaintiff and defendant were at fault for causing the injury, repeating the rule that contributory negligence did not bar recovery, but served only to reduce the damages allowed.185

After the 1927 enactment of a workers’ compensation act covering longshoremen and harbor workers,186 the number of actions brought by such injured employees to recover under the comparative negligence doctrine diminished. The act as originally passed provided that the acceptance by a worker of compensation benefits operated as an automatic assignment to his employer of his third-party cause of action against a negligent vessel or other party.187 Thus, an injured longshoreman or harbor worker seeking a third-party damage recovery had to completely forego acceptance of benefits in the interim, a hardship most chose not to undergo.188

Nonetheless, the courts continued to develop the doctrine of comparative negligence in actions brought by injured seamen189 and in certain other instances.190 As discussed above,191 however, the Supreme Court had in 1903 in The Osceola192 held that a seaman could not recover against the vessel for injuries caused by the vessel’s negligence. Congress

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185. See, e.g., Panama R.R. Co. v. Johnson, 289 F. 964, 976 (2d Cir. 1923); Storgard v. France & Canada S.S. Corp., 263 F. 545 (2d Cir. 1920), cert. denied, 252 U.S. 585 (1921); Cricket S.S. Co. v. Parry, 263 F. 523, 526 (2d Cir. 1920); John A. Roebling's Sons Co. v. Erickson, 261 F. 986, 987 (2d Cir. 1919); Carter v. Brown, 212 F. 395 (5th Cir. 1914); The Scandinavia, 156 F. 403, 406-07 (D. Me. 1907); The Lackawanna, 151 F. 499, 501 (S.D.N.Y. 1907); The Julia Fowler, 49 F. 277, 279 (S.D.N.Y. 1892); The Frank & Willie, 45 F. 494 (S.D.N.Y. 1891).

186. See note 61 supra.


188. And the Act was so construed. See American Stevedores, Inc. v. Porello, 330 U.S. 446, 454-56 (1947); Toomey v. Waterman S.S. Corp., 123 F.2d 718 (2d Cir. 1941); The Nako Maru, 101 F.2d 716 (3d Cir. 1939). Contra, Johnsen v. American-Hawaiian S.S. Co., 98 F.2d 847 (5th Cir. 1939).

189. See, e.g., Cricket S.S. Co. v. Parry, 263 F. 523 (2d Cir. 1920).


191. See text accompanying note 43 supra.

192. 189 U.S. 158 (1903).
changed that rule in 1920 with passage of the Jones Act, which allowed a seaman to recover against a shipowner and a vessel even when there was concurrent negligence. Thus, development of the principle of comparative negligence by the federal court regarding seamen was guided by the terms of the statute and not by the "admiralty concept of comparative negligence." Even recovery under the Jones Act comparative negligence rule fell into disuse after the Supreme Court's decision in 1944 holding a vessel absolutely liable under the warranty of seaworthiness to an injured seaman. The Court's similar holding two years later gave injured longshoremen and harbor workers little incentive to pursue a recovery under principles of comparative negligence in actions against third parties under the LHWCA. However, even in unseaworthiness actions, contributory negligence served to proportionately reduce recoveries. In and of itself, this was an application of true comparative negligence.

Instances of the application of comparative negligence under the general maritime law did continue to occur in the federal courts from 1927 to 1972. In 1953, the Supreme Court decided a case in which the shipowner contended that the maritime law had "not developed any definite rule as to the effect of contributory negligence, and therefore the common law rule under which contributory negligence bars recovery should govern in admiralty . . . ." In rejecting this contention, the Court reasserted that the rule of comparative negligence prevails in admiralty actions.

The harsh rule of the common law under which contrib-

193. See note 45 supra.
196. See cases in note 226 infra.
199. Id. at 408.
utory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.200

It can be fairly stated that there did, in fact, exist an “admiralty concept of comparative negligence” prior to the enactment of the 1972 amendments to the LHWCA. However, it had fallen somewhat into disuse since the rise of the warranty of seaworthiness (except for its contributory negligence application to reduce recoverable damages) which made recovery simpler for injured longshoremen and harbor workers. Nevertheless, the evidence was so insubstantial that American admiralty law had moved in the direction of a comprehensive and specific system for distribution of loss on a comparative basis that the Supreme Court, even in 1953, was able to say only that the policy in admiralty was to allow “such consideration of contributory negligence in mitigation of damages as justice requires.”201 No uniform means had been developed for precisely defining the manner in which the concurrent negligence of an injured longshoreman or harbor worker would operate to diminish his recovery against a negligent party.

IV. Diagnosis
A. Warranties

The 1972 amendments to the LHWCA undeniably eliminated a vessel’s absolute, nondelegable duty of seaworthiness as it relates to longshoremen and harbor workers. Section 905(b) states that the “liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness

200. Id. at 408-09.
201. Id. at 409 (emphasis added).
or a breach thereof at the time the injury occurred." As the Supreme Court has recognized, this language explicitly nullifies the rule established in Sieracki and forecloses an injured employee from maintaining an action for unseaworthiness against a vessel. The apparent rationale for this change was stated in the committee reports.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occurred to longshoremen or other workers covered under the Act who are injured while working on those vessels. . . . The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

In place of recovery on the basis of breach of warranty of seaworthiness, an injured longshoreman may bring a third-party action predicated on a shipowner’s negligence. This provides an injured employee with the opportunity to seek a third-party recovery from a tortfeasor but not under the guise of any special maritime theory of liability.

The explicit effect of the 1972 amendments on the doctrine of warranty of workmanlike performance from a stevedore or repairman and the correlative right of indemnification of a shipowner is uncertain. Section 905(b) states that 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.” The accompanying committee reports to the amendments attempt to be explanatory.

The Committee also believes that the doctrine of the Ryan case, which permits the vessel to recover the damages for

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which it is liable to an injured worker where it can show that
the stevedore breaches an express or implied warranty of
workmanlike performance is no longer appropriate if the
vessel's liability is no longer to be absolute, as it essentially
is under the seaworthiness doctrine. Since the vessel's liabil-
ity is to be based on its own negligence, and the vessel will
no longer be liable under the seaworthiness doctrine for in-
juries which are really the fault of the stevedore, there is no
longer any necessity for permitting the vessel to recover the
damages for which it is liable to the injured worker from the
stevedore or other employer of the worker. 206

The testimony presented by stevedoring representatives at
the committee hearings dealt with the effect the full indem-
nity doctrine had on stevedore-employers subject to the Ryan
warranty of workmanlike performance implied in a service
contract with a vessel. The Ryan doctrine was objectionable
because it placed full liability on a stevedore-employer when-
ever he caused or brought into play an unseaworthy condition
on the vessel. Even though there might have been a joint
sharing of fault, a breach of the Ryan warranty of workman-
like performance made the stevedore-employer fully liable to
indemnify the vessel for any resulting damages to a longshore-
man or harbor worker.

Initially, one must remember the distinct difference be-
tween the imposition of a warranty of workmanlike perform-
ance and a duty to indemnify a third party. As some courts207
have recognized, the warranty of workmanlike performance is
a contract-based doctrine by which there is implied in a ser-
vice agreement a promise that a party will undertake its du-
ties properly and safely. In the context of the Ryan case, the
Court implied a promise by the stevedore-employer "to stow
the cargo in a reasonably safe manner."208 However, the Ryan
Court's creation of a doctrine of workmanlike performance
under such circumstances was a departure from what is com-
monly thought of as a warranty. Generally, warranties such as

207. See, e.g., Navieros Oceanikos, S.A. v. S.T. Mobil Trader, 554 F.2d 43, 46-47
(2d Cir. 1977); Fairmount Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252,
1259 (2d Cir. 1975).
the those of merchantibility, fitness for a particular purpose, and habitability, imply a promise by a manufacturer or seller that a product or item will function as intended or advertised to the public, or that it will be fit for its intended or reasonably expected purpose. None of these warranties contains an implied promise that the manufacturer or seller has constructed or assembled a particular product in a reasonably safe and proper manner. The promise implied in a warranty stresses the end result, or operation, of the object sold and warranted. There is no emphasis on the manner in which the seller or manufacturer constructed or prepared the item. The focus is on whether the thing sold or warranted will be in the condition which a reasonable person might expect, or that it will operate as one might reasonably expect.

The warranty of workmanlike performance or service, as it has evolved from Ryan, has come to mean not that, like a carpenter or plumber, one warrants that the finished product will meet workmanlike standards, but that the actual manner of operation and conduct of a party will be carried out in a proper and safe way, that is, that the party will not be negligent or careless in the carrying out of its duties and services. Thus, as construed by many courts, the warranty of workmanlike service is held to be a promise by a party that it will not be negligent under the circumstances. Of course, if this is all that is meant by a warranty of workmanlike performance, it is superfluous, for the tort law imposes such a standard of conduct on all persons under all circumstances. There is no reason to construct a contractual fiction to accomplish the same objective. Unfortunately, many courts have done just that. They have implied into many service agreements a promise that the contracted party will not cause injury or damage by improper, unsafe or incompetent perform-

210. Id. at § 2-315.
213. Id.
ance. Warranties have been found in such situations as a contract of towage,214 a contract between a shipyard and a ship,215 a contract between a painting contractor and a ship,216 a contract for ship repair,217 a contract for ship cleaning,218 a contract for launch service,219 a pilot's contract with a ship,220 and a contract to do work on a ship's engines.221 The focus, however, in all of those situations was not on the accomplishment of a workmanlike result, (for instance, a proper paint job or repair of a ship's engine) but, rather, on the manner of operation by the contracted party in undertaking its assigned duties. A focus which goes to the proper and safe manner of operation of a particular undertaking is best served by the law of negligence, which imposes a duty of reasonable care under the circumstances, or, if a higher standard is necessary, by a tort law of strict liability. The imposition in such situations of a contractually implied promise or warranty covering the manner of operations is awkward and impractical. For one thing, liability for breach of a warranty is usually limited to those damages which might fairly be supposed to have been in the contemplation of the parties at the time the contract was made or which might naturally be expected to follow the breach of a warranty.222 Under a recovery based on negligence or strict liability, however, the damages would not be limited merely to those which were foreseeable, but to those which are, in fact, caused in any way by the negligent or strictly liable act.223 Additionally, when two or more parties are jointly

217. H & H Ship Serv. Co. v. Weyerhaeuser Line, 382 F.2d 711 (9th Cir. 1967).
liable for causing damage or injury, apportionment of fault under a breach of warranty theory is extremely difficult. Either a warranty is breached or it is not, and attributing a percentage of fault to each of several parties, all subject to separate and distinct warranties, would be an unwieldy, if not impossible, task. Such apportionment of fault is better served by applying the principles of tort law and comparative negligence.

The primary reason for rejecting the imposition of a warranty of workmanlike performance on stevedore-employers in light of the enactment of the 1972 amendments is a more fundamental one. It is difficult to deny that the absolute, non-delegable warranty of seaworthiness imposed on vessels was the *raison d'être* for the creation of a warranty of workmanlike performance in the first place. While reasoning on the basis of *post hoc ergo propter hoc* is seldom profitable, in this situation it appears pertinent. As the warranty of seaworthiness evolved from the court's decision in *Sieracki*, a shipowner was held absolutely liable, even for the acts or omissions of stevedores or employees of stevedores. He was also subject to liability for the manner or method in which stevedores or employees of stevedores performed their assigned work, and for defects in the gear or equipment of stevedores whether used aboard the ship or ashore.

In effect, a shipowner became almost an insurer of the safety of all persons involved in any maritime activities which had a relation to the ship. The inherent unfairness of subjecting a shipowner or ship to absolute liability, when he had no knowledge of or means to correct a defective condition or when an operation carried out by persons not under his employ or control was done in a negligent manner causing damage or injury, was evident to the Court and in the *Ryan* decision it sought to remedy that unfair situation. Rather than abolishing the absolute duty imposed by the warranty of seaworthiness, the Court sought instead to shift the entire burden of liability to the more blameworthy of the two parties in what the Court felt

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225. See note 71 supra.
was the majority of the situations, i.e., to the stevedore-employer. After Ryan, while a shipowner still had an absolute duty to provide a seaworthy vessel, and was liable for a breach of that warranty, if the shipowner could show that another party was partially or wholly responsible for the creation or maintenance of the unseaworthy condition, he could shift the entire burden of liability to that party. There was no apportionment of liability; either the shipowner was absolutely and fully liable or someone else was.226 The Court constructed this arrangement by creating a rule that a service agreement between a shipowner and another party included within it an agreement to indemnify the shipowner (and his ship) if any act of the other party should cause or bring into play a condition of unseaworthiness of the vessel.227 To effect this promise of indemnification, the Court constructed a contract-based warranty of workmanlike performance.228 Thus, whenever a stevedore-employer breached its warranty of proper and safe performance by, for instance, negligently undertaking a task thereby causing or bringing into play an unseaworthy condition on the vessel, it was required by reason of the imposed duty of indemnification to reimburse the vessel fully for any and all damages caused. Even though both the shipowner and the stevedore-employer might have been at fault in causing a particular injury to a longshoreman or harbor worker, the Court felt that as long as one party was to be entirely liable for any injuries caused, it ought to be the "stevedore company which brings its gear on board [and] knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations."229 Whether absolute liability for a particular injury would fall fully on the shipowner or the stevedore-employer in a particular situation was a decision to impose liability on the "party best situated to adopt preventive measures and thereby to reduce the likelihood of in-

226. A plaintiff's contributory negligence did, however, serve to reduce his recovery. See, e.g., Adams v. United States, 393 F.2d 903 (9th Cir. 1968); Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir. 1967).
228. Id.
The warranty of workmanlike performance, as a vehicle for carrying out an implied promise to indemnify, is suitable only when there is no apportionment of fault and only one of several parties will be held liable for the entire damage amount. When apportionment of fault is the rule, a system of comparative negligence is best suited to distribute liability.

Tort law is a more appropriate system of fault allocation and determination in situations involving conduct and actions which cause injury than is a contract-based concept. As the Supreme Court has recognized, Congress intended to nullify the doctrines of both the Sieracki and the Ryan cases by adopting the 1972 amendments to the LHWCA. There is no express indication that in extirpating the root Congress intended to take the branch as well. But in nullifying the effect of Ryan in its original context as a vehicle for providing a means of allowing full indemnification, the federal courts should not now uphold it in peripheral contexts. The doctrine of workmanlike performance was created for a specific purpose, and the vehicle giving rise to its existence having passed, the entire superstructure should be razed by the courts.

Of course, there will be situations such as existed in Italia Societa per Azionia di Navigazione v. Oregon Stevedoring Co., where a stevedore-employer might not be liable under a standard of negligence but would be liable under the formerly prevailing warranty of workmanlike performance. In Italia Societa, a longshoreman was injured when a tent rope sup-

230. Id. at 324.

231. In McGuire v. Lykes Bros. S.S. Co., 486 F. Supp. 1374 (E.D. Wis. 1980), the court rejected the vessel's claim of a warranty of workmanlike performance entitling it to full indemnity, stating that under section 905(b) of the LHWCA "liability among the vessel, the injured longshoreman and other parties on the vessel, is apportioned according to fault on a true comparative basis." Id. at 1381. See also Santos v. Scindia Steam Nav. Co., 598 F.2d 480, 485, 489 (9th Cir. 1979), cert. granted sub nom. Scindia Steam Navigation Co. v. De Los Santos, 100 S. Ct. 2150 (1980); Lopez v. A/S D/S Svendorg, 581 F.2d 319, 322 (2d Cir. 1978); Wiles v. Delta S.S. Lines, Inc., 574 F.2d 1338, 1339 (5th Cir. 1978) (per curiam); Gay v. Ocean Transport & Trading, Ltd., 564 F.2d 1233, 1238 (6th Cir. 1977); Pastorello v. Konin Klijke Nederl Stoomb Maats, 456 F. Supp. 882, 886 (E.D.N.Y. 1978) (all asserting comparative negligence exists under the LHWCA amendments of 1972).


plied by the stevedore-employer snapped while he was using it. The district court specifically found that the stevedore was not negligent in any respect, since the defective condition of the rope was a latent defect. But, as stated above, under the Sieracki-Ryan doctrine either the vessel or the stevedore was to be held fully liable; there could be no apportionment of liability. Under the circumstances, the Court felt that it would be fairer to impose liability on the stevedore-employer even though it was not negligent because, in comparison to the vessel, it was in a better condition to take “preventive measures and thereby to reduce the likelihood of injury.” The injured longshoreman, then, was allowed to recover. Under a system of comparative negligence, where a standard of reasonable care would be the only criterion for judging liability, the injured longshoreman in Italia Societa would not have been allowed recovery under the facts established. Wherever negligence is the sole criterion for recovery, negligence must be proven or recovery will be denied. It is not a valid objection to the abolition of the warranty of workmanlike performance to simply state that in cases where negligence cannot be proven no one will be liable in tort for a longshoreman’s or harbor worker’s injuries. The abolition of any warranty of workmanlike performance between any or all of the parties in this situation simply puts the maritime law in a position similar to that prevailing in all industrial situations. There is nothing inherently unfair in such equality.

Retention of the warranty of workmanlike performance as a vehicle for imposing full indemnity on a stevedore-employer has been promoted in two contexts. First, is the context where a third party against whom recovery is sought by an injured longshoreman is not a vessel but is some other entity. In those situations, the third party has argued that while the right of a vessel to seek indemnification from a stevedore-emp-

234. Id. at 317-18.
235. Id. at 324.
236. Id. at 321-22.
ployer who has breached a warranty of workmanlike conduct has been abolished, such has not been the effect between parties who are not vessels and who are not the employer. The basis of this argument is that in being freed of the absolute warranty of seaworthiness, vessels as a *quid pro quo* relinquished their right to full indemnification from a stevedore-employer; however, no such *quid pro quo* was given by *nonvessel* third parties since they were never subject in the first place to the warranty of seaworthiness. A similar argument is propounded in a second context. It is argued by vessel owners that the only situation in which the warranty of workmanlike performance requiring full indemnification has been abolished is that existing between a vessel and a stevedore-employer or repairman-employer. The vessel owners argue that there was no abolition of the warranty of workmanlike performance in the context where a vessel is sued but the injury was caused in whole or in part by the fault of a stevedore or repairman who is not the employer of the injured party. Such was the case in *McGuire v. Lykes Bros. Steamship Co.*, where the shipowner contracted with a stevedore to perform services and the stevedore, in turn, subcontracted with another company to provide additional assistance. An employee of the subcontractor was injured and sued the shipowner and the nonemploying stevedore-general contractor. The shipowner sought full indemnification from both the general contractor-stevedore and an independent contractor-repairman aboard the vessel at the time of the accident on the basis that each had breached the warranty of workmanlike performance to the shipowner. The shipowner argued that the warranty of workmanlike performance and the right to full indemnity still existed since Congress had meant to abolish them only when the stevedore was the *actual employer* of the injured longshoreman. The trial court rejected this argument and applied the doctrine of comparative negligence. The shipowner’s argument loses its force when considered in the context of a comparative negligence system. Under such a system,


240. 486 F. Supp. 1374 (E.D. Wis. 1980).
which allocates fault among all parties who are to blame and allows contribution between and among joint tortfeasors, a rule of implied full indemnification has no place whatsoever. The argument for the retention of the warranty of workmanlike performance as the vehicle for allowing full indemnification ignores two facts. First, the imposition of a warranty of workmanlike performance would be seldom, if ever, justified unless predicated on the corollary doctrine of absolute liability under a warranty of seaworthiness. Without absolute liability under a doctrine such as the warranty of seaworthiness, a concurrent doctrine imposing total liability on a stevedore-employer has no justification. The doctrines of unseaworthiness and of indemnification were harmonized to impose liability on the party then thought to be best suited to minimize the particular risk involved. Second, the admiralty concept of comparative negligence is designed to promote the "more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public." Liability apportionment according to fault is a workable system which distributes loss and liability to those responsible according to their degree of fault.

B. Comparative Negligence

With the rules of Sieracki and Ryan removed from the field of third party litigation under section 905(b) of the LHWCA, the question remains concerning the precise form of comparative negligence which should be applied under that section. Federal court cases prior to 1972 applying the general maritime law did not specifically identify the type of comparative negligence system which they were utilizing. Characteristically, the courts said that an injured longshoreman’s or harbor worker’s concurrent negligence did not bar recovery but served only to reduce damages, or that in light of such negligence, the court would award damages as justice and equity required. The question whether a plaintiff’s negligence could ever be so great as to go beyond the pale of justice and equity

242. The Max Morris, 137 U.S. 1, 14 (1890).
243. See, e.g., Carter v. Brown, 212 F. 393, 395 (5th Cir. 1914); The Scandinavia, 156 F. 403, 406-07 (D. Me. 1907).
and still not bar recovery was never directly addressed. No answer is found in the text of section 905(b).

Although there are various forms of comparative negligence, only two are important to the present discussion. The first of these is the so-called "pure" form of comparative negligence. Under this doctrine, a plaintiff is allowed to recover reduced damages up to the point where it can be said that his own conduct was the sole cause of his damage. In other words, so long as the other party's negligent conduct was to any extent causal of the claimant's injury, the claimant may recover his damages reduced only in proportion to the amount by which they were deemed due to his own contributory fault.

Only where the plaintiff is found to be entirely to blame for his own injuries is he then barred from recovery.

The second basic form of comparative negligence allows a plaintiff recovery up to the point at which his negligence is equal to or greater than that of the defendant. Under this variant, when a plaintiff's negligence is found to be greater than that of the defendant, recovery is barred. When his own negligence is only equal to or less than that of the defendant, he may recover damages, which will be diminished according to the amount of negligence attributed to him.

One commentator has stated: "Since 1890 it has been perfectly clear that pure comparative negligence . . . applies in personal injury cases arising under maritime law. From that time, admiralty courts have followed the practice of diminishing damages recovered to the extent of . . . [plaintiff's] contributory negligence." A close look at the case law, though, does not present conclusive support for this generalization. Prior to 1972 federal courts rarely specified to what degree they had found the plaintiff and defendant to be relatively responsible for an injury. Therefore, it is difficult to determine if instances existed in which recovery was allowed despite the

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245. Laufenberg, Comparative Negligence Primer 9 (Def. Research Instit., Inc. 1975) (footnote omitted).
247. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 3.3(B), at 57 (1974) (footnote omitted).
fact that a plaintiff might have been more negligent than a defendant. In *The Lackawanna*, a passenger brought a negligence action against a ferry boat for personal injuries. In deciding the case, the court found that the passenger's conduct "constituted negligence on his part to a greater degree than that of the ferry boat." The court allowed the plaintiff one-third of his damages. In *Guerrini v. United States*, Judge Learned Hand, writing for the court, remanded the case to the district court for clarification of the facts, stating that "if the judge supplies the finding we mentioned the faults will be in the proportion of one to [three] and a decree will be entered for one-fourth of the award which he made," thereby apparently allowing a partial recovery even in the face of a finding that the plaintiff was more negligent than the defendant. It is difficult to find other similar examples.

A more fundamental reason exists for finding that the form of comparative negligence to be applied under section 905(b) is pure comparative negligence. The "equal to or greater than" rule simply lowers, but does not eliminate, the bar of contributory negligence. As discussed above, at least since 1884 in negligence actions under the general maritime law, the federal courts have eschewed the common-law rule that contributory negligence bars recovery. The concept of contributory negligence at any point totally barring recovery by a plaintiff is foreign to the admiralty court. Therefore, a modified system, such as the "equal to or greater than" form of comparative negligence, which at a certain point bars recovery because of the contributory negligence of the plaintiff, does not appear to be the one that should be embraced by the federal courts in actions under section 905(b). The "equal to or greater than" system simply shifts the rule of contributory negligence to a lower level, leaving it in full effect in certain instances. Pure comparative negligence should thus be utilized by the courts in actions under the LHWCA.

Numerous federal court negligence decisions under section 905(b) have calculated numerical percentages for the plain-

248. 151 F. 499 (S.D.N.Y. 1907).
249. Id. at 501.
250. 167 F.2d 352 (2d Cir. 1948).
251. Id. at 356.
252. See text accompanying notes 167-85 supra.
tiff's and defendant's negligence in order to determine the amount by which the plaintiff's damage award should be reduced. As one circuit court stated, "Under the admiralty rule, the plaintiff's recovery is reduced in proportion to his own fault . . . ." Such an objective method of calculating a party's degree of negligence by a percentage or proportion has support in cases decided prior to the adoption of the 1972 amendments. The Second Circuit in 1920 approved a district court's jury charge which read as follows: "If the jury finds that plaintiff was guilty of contributory negligence, this need not be a bar to a verdict in its favor . . . . [T]hey may take that fact into account in reduction of damages, thereby reducing the recovery to an extent proportionate with the extent of plaintiff's fault." In Stokes v. United States, a court in the same circuit stated that it was inclined "to the belief that, in such a case, division on a 30-70% basis is not erroneous." Three years later, the court remanded a case stating that if the plaintiff were found negligent, the district court should "apportion the damages." In Ahlgren v. Red Star Towing & Transp. Co., a district court jury had found the plaintiff fifteen percent contributorily negligent and reduced the damage award accordingly. On appeal, the defendant contended that the court should reduce the award by fifty percent. The court rejected the contention that a fifty percent reduction rule should apply noting that "apportionment of damages . . . on a comparative fault basis and without reliance on a statute . . ." was the proper method under the general maritime law. The court added that the Supreme Court in The Max Morris" said it left open the question of

253. See, e.g., Edmonds v. Compagnie Generale Transatlantique, 99 S. Ct. 2753 (1979); Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979); Lawson v. United States, 605 F.2d 448 (9th Cir. 1979); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979); Smith v. Eastern Seaboard Pile Driving, Inc., 604 F.2d 789 (2d Cir. 1979); Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir. 1978).


255. Cricket S.S. Co. v. Parry, 263 F. 523, 526 (2d Cir. 1920) (emphasis added).

256. 144 F.2d 82 (2d Cir. 1944).

257. Id. at 84.


259. 214 F.2d 618 (2d Cir. 1954).

260. Id. at 621.

261. 137 U.S. 1 (1890).
apportionment of damages. Filling in this gap . . . we and several other courts, in such personal injury maritime tort cases, have applied the rule of comparative negligence. The lower court's decision was affirmed because the court found "apportionment in a personal-injury suit for a maritime tort resting on negligence only" to be proper.

The Supreme Court has never directly addressed the question of percentage apportionment of damages in personal injury actions. However, in Beadle v. Spencer, the Court stated that contributory negligence under the maritime law was the "ground only for apportionment of the damage . . . ." And the Supreme Court in Edmonds v. Compagnie Generale Transatlantique considered a case in which the district court had found the plaintiff ten percent negligent, and two other parties seventy percent and twenty percent responsible for the plaintiff's injuries. The Court did not comment on the district court's apportionment on the basis of percentage amounts.

Percentage apportionment can sometimes result in ridiculously finite calculations. For example, in one case a shipowner was found liable for 22.2222 percent and a salvor for 77.7778 percent of the damage resulting from an explosion during salvage operations on a vessel which had previously been involved in a marine fire. Nonetheless, it appears to be the most efficient means for apportioning liability among the parties in actions under section 905(b).

Likewise, in Edmonds, the Supreme Court stated that Congress in using the term "comparative negligence . . . al- luded only, and not erroneously . . . to the comparative negligence of the plaintiff longshoreman and the defendant shipowner — a concept that . . . was well established in admiralty." It would not be a fair reading, however, to interpret this statement as meaning that only the negligence of the plaintiff and a single defendant may be apportioned in an

262. 214 F.2d 618, 621 (2d Cir. 1954).
263. Id. at 622.
265. Id. at 131.
267. In re M/T Alva Cape, 616 F.2d 605, 611 (2d Cir. 1980).
268. 99 S. Ct. at 2760-61 n.23 (emphasis added).
action under section 905(b). Rather, it would be proper to apportion negligence among all the parties alleged to be causally negligent for an injury. This was the law applied by Chief Judge Reynolds in McGuire v. Lykes Bros. Steamship Co., in which the negligence of the plaintiff and four other parties was apportioned.

When liability is apportioned according to the relative degree of fault of the various parties, attempts by one party to shift the entire burden of liability to another on the basis of an indemnification theory are wholly inappropriate. In Doca v. Marina Mercante Nicaraguense, S.A., one negligent defendant sought full indemnification from another negligent defendant on the basis of an alleged breach of a warranty of workmanlike performance. The district court found that full indemnity under the 1972 amendments to the LHWCA was "open to question," but avoided resolving the issue since it

269. 486 F. Supp. 1374 (E.D. Wis. 1980).
270. And this computation should include the alleged causal negligence of all "phantom," settling, immune, or nonjoined persons as well. This was the procedure employed by Chief Judge Reynolds in McGuire v. Lykes Bros. S.S. Co., 486 F. Supp. 1374 (E.D. Wis. 1980) and that specifically deemed "logically essential" by the California Supreme Court in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2 (1978). The California court approved the following jury instruction in that case:

REDUCTION OF DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

If you find that plaintiff's injury was proximately caused by a combination of negligence of [one or more of] the defendant[s] and contributory negligence of the plaintiff, you will determine the amount of damages to be awarded by you, as follows:

First: You will determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if plaintiff had not been contributorily negligent.

Second: You will determine what proportion or percentage is attributable to the plaintiff of the total combined negligence of the plaintiff and of the defendant[s] [and of all other persons] whose negligence proximately contributed to the injury.

Third: You will then reduce the total amount of plaintiff's damages by the proportion or percentage of negligence attributable to the plaintiff.


272. Id. at 756.
found that there had been no breach of any warranty of workmanlike performance even if one did, in fact, exist.273 A similar contention was put forward in the McGuire274 case by the shipowner defendant, but the court specifically rejected any theory of indemnity. It held, instead, that under the 1972 amendments "liability among the vessel, the injured longshoreman and other parties on the vessel, is apportioned according to fault on a true comparative basis"275 and, as such, a percentage apportionment of liability and not indemnity was the rule. This appears to be the better rule in cases under section 905(b) and should be the one uniformly adopted by the lower courts in such actions.

C. Liability Apportionment Among Joint Tortfeasors

Once liability has been apportioned between two or more defendants on the basis of a comparison of the amount of their responsibility for any injuries, the question of liability for payment of damages must be resolved. It is apparent that the concept of joint and several liability in the context of concurrent tortfeasors is the rule under the comparative negligence system in actions brought under the LHWCA against negligent third parties.276 The rule of joint and several liability provides that a tortfeasor is liable for any injury for which his negligence is a proximate cause.277 When the independent negligent actions of a number of tortfeasors are the concurrent proximate cause of a single injury, each tortfeasor is personally liable for the entire amount of damage sustained. The injured person may sue any one, several or all of the tortfeasors to obtain a recovery for his injuries. The mere fact that under a system of comparative negligence it is possible to assign some specific percentage figure to the relative responsibility of each defendant does not detract from the rule that each defendant's negligence is a proximate cause of the entire indivisible injury to a plaintiff. Under the joint and several liability concept, an injured employee suing negligent third

273. Id.
275. Id. at 1381.
parties is not deprived of his right of recovery because one or more of the joint tortfeasors is financially unable to satisfy his proportioned share of the damages.

Contribution is the process by which the joint tortfeasors apportion liability among themselves. Contribution arises when a joint tortfeasor has paid more than his fair share or burden of a common liability. It requires that a negligent wrongdoer, whose liability towards another is concurrent and common with at least one other tortfeasor, must have paid more than his proportionate share of the common liability. The Supreme Court in Cooper Stevedoring Co. v. Fritz Kopke, Inc., recognized the right of contribution between joint tortfeasors in noncollision cases under the maritime law. The Court stated that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one or two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." The Court, however, left open the question of whether contribution "should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties."

One year later, in a collision case which involved only two parties so that it did not touch on the question of contribution per se, the Court provided some guidance.

We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision ..., liability for such damage is to be allocated among the parties proportionately to the comparative degree of their

279. Id.
282. Id. at 108 n.3.
fault, and that liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.284

Thus, it seems clear that contribution should also be based on the relative degree of fault of each party causing a particular injury to a longshoreman or harbor worker.285 Allocation of liability based on the percentage of causal negligence attributable to each joint tortfeasor is far more equitable and just than allocation equally between them. If liability between a single plaintiff and a single defendant can be allocated on the basis of the percentage of fault attributable to each, the same can be done for contribution purposes among all of the joint tortfeasors. A Wisconsin state court, considering the question of allocation of liability for contribution purposes between joint tortfeasors, stated, "[T]here is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury."286 Moreover, the determination and enforcement of rights of contribution between joint tortfeasors can easily be accommodated in the same proceeding which resolves the underlying damage claim between the plaintiff and any named defendants.287

Complications occur, however, when one or more of the joint tortfeasors has made a settlement with the plaintiff and is thus not a party to the action. Such a settlement can occur through the use of one of several mechanisms. The first is a covenant not to sue. This covenant is a contract and is construed as being between the plaintiff and a third party.288 In consideration of a payment or other thing of value, the plaintiff agrees not to bring suit against the third party, who is then insulated from further liability. A covenant not to sue,

284. Id. at 411 (emphasis added).
286. Bielski v. Schulze, 16 Wis. 2d 1, 9, 114 N.W.2d 105, 109 (1962).
however, does not release or extinguish any of the plaintiff's cause of action against the joint tortfeasors.\(^{289}\) It is merely a contract between the plaintiff and a third party, not affecting the rights of those not parties to it. Consequently, if, at trial, the settling joint tortfeasor is found liable for a certain percentage of causal negligence, the nonsettling tortfeasor, against whom a damage award has been recovered, might have a right of contribution against the settling tortfeasor. For example, let us suppose that at trial there were a damage award of $100,000, the nonsettling tortfeasor was found sixty percent negligent, and the settling tortfeasor was found forty percent negligent. Pursuant to the rule of joint and several liability, the nonsettling tortfeasor would be entitled to credit as a reduction against the $100,000 damage award only the specific dollar amount paid by the settling tortfeasor to the plaintiff. Unless the settling tortfeasor had made a payment of at least $40,000 to the plaintiff, the nonsettling tortfeasor would have a right of contribution against the settling tortfeasor. If the settling tortfeasor had paid the plaintiff only $20,000 for the covenant not to sue, the nonsettling tortfeasor would be liable to the plaintiff for $80,000. However, this would be more than his fair share of the common liability, \(i.e.,\) $60,000. Hence, he would have a right of contribution for $20,000 against the settling tortfeasor. Even though the settling tortfeasor had "bought his peace" with the plaintiff, he has not thereby immunized himself from the contribution rights of a nonsettling joint tortfeasor.

A second and distinct settlement mechanism has been devised for use under a tort system of comparative negligence whereby a third party, wishing to settle prior to trial with a plaintiff, may do so and at the same time immunize himself from the contribution rights of nonsettling joint tortfeasors. This is accomplished by means of a release of (and indemnification for) that part of the cause of action for which the settling tortfeasor might be liable at trial.\(^{290}\) A release usually represents an abandonment or relinquishment of a claim or right to the person against whom the claim or right exists.\(^{291}\)

\(^{289}\) Id.

\(^{290}\) See Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

A release discharges the claim or obligation. A plaintiff executing a release cannot sue a settling tortfeasor, and also forfeits that part of the cause of action which he has settled. In the case of *Pierringer v. Hoger*, the Wisconsin Supreme Court approved a release which it found to be effective under a system of comparative negligence and contribution apportioned according to relative fault. In that case, each release provided that the plaintiff


does hereby credit and satisfy that portion of the total amount of damages of the undersigned . . . which has been caused by the negligence, if any, of such of the settling parties hereto as may hereafter be determined to be the case in the further trial or other disposition of this or any other action, it being the act and intention of the undersigned to release and discharge, and he does hereby release and discharge that fraction and portion and percentage of his total causes of action and claim for damages against all parties . . . which shall hereafter, by the further trial or other disposition of this or any other action, be determined to be the sum of the portions or fractions or percentages of causal negligence for which any or all of the settling parties hereto are found to be liable . . . .

The effect of such a percentage release under a system of comparative negligence is to discharge the plaintiff's claim to the extent of the percentage determined at trial to which the settling tortfeasor is liable for the plaintiff's injuries. Under the percentage release, if a plaintiff settles prior to trial with a tortfeasor who at trial is found to be twenty percent liable for the plaintiff's injuries, then the release will discharge twenty percent of the plaintiff's cause of action, regardless of the amount of consideration given by that settling tortfeasor to the plaintiff. The payment made in consideration for obtaining the release is the settling tortfeasor's fair proportion of the common liability which he shared with the other joint tortfeasors. This being so, a nonsettling tortfeasor may not claim any right of contribution against a tortfeasor who obtains a percentage release from the plaintiff. For example, let

292. *Id.*
293. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).
us assume that the damages are $100,000, and a joint tortfeasor settles before trial for $5,000. He is then found at trial to be twenty percent causally negligent while a nonsettling tortfeasor is found eighty percent causally negligent. As a result of the release, the nonsettling tortfeasor may claim no right of contribution against the settling tortfeasor even though the settling tortfeasor’s fair share, if he had not settled, would have been $20,000. This is so because the nonsettling tortfeasor is not thereby required to pay any more than his fair share of the common liability. Since he is eighty percent liable for the damages, he must pay only $80,000. He will not be liable for the $15,000 which the plaintiff might have gotten by not settling with the other joint tortfeasor. The plaintiff is not allowed to recover this $15,000 deficit because he has settled and released twenty percent of his claim in its entirety for $5,000. The nonsettling tortfeasor will not be heard to complain because he, in fact, has paid no more than his fair share of the common liability. It is none of his concern that a settling tortfeasor has made a better bargain than he by settling than by going to trial.

In the system of comparative negligence existing under section 905(b) of the LHWCA, such a settlement mechanism would encourage early settlement since a settling party could assure itself that it would not be joined in any further action and that it would not be liable for contribution to a nonsettling tortfeasor against whom a judgment is gained by an injured longshoreman. The percentage release, approved by the Wisconsin court, would have this effect. Its use should be encouraged by federal courts handling personal injury suits by longshoremen against negligent third parties. One commentator described this percentage type release, as follows:

Claimants will be able to make settlements with the settling parties in those instances where agreement can be reached between them and still retain their pro rata claims and causes of action against non-settling joint tort-feasors to the extent of the ultimately determined proportionate liability of the non-settling defendants. Non-settling defendants will be protected in that they will benefit from a pro tanto reduction in the recoverable damages allocable to the conduct of settling parties, and will only be responsible for the damages attributable to their own proportionate liability in the
action.\textsuperscript{295}

In light of the Supreme Court's recognition of a right to contribution between joint tortfeasors in noncollision cases, its strong inclination, as shown in \textit{United States v. Reliable Transfer Co.}\textsuperscript{296} to favor the allocation of damages based on relative fault, and the general policy of the law to encourage early settlement, the federal courts should encourage the use of such percentage releases in maritime, personal injury, third-party actions.

\textbf{D. Damage Apportionment Among Joint Tortfeasors}

Since the Supreme Court's 1946 decision in \textit{Sieracki}, the courts increasingly have had to struggle with the problems of damage allocation in longshore personal injury cases. This struggle has had a checkered history, moving first from extreme to extreme; a fair and equitable allocation of liability satisfactory to all still has not been established. In the aftermath of the 1972 amendments to the LHWCA and the concomitant general demise of the \textit{Sieracki-Ryan} seaworthiness — indemnity cycle of liability, employers and third-party tortfeasors have been vying in an effort to allocate the economic burden imposed by a damage award apportioned under the comparative negligence system established by Congress. Such a conflict between the various groups — owners, stevedores, liability underwriters and compensation carriers — has resulted in a highlighting of the conflict between three distinct but related "loss-allocating mechanisms."\textsuperscript{297} One is the tort-based concept of contribution between joint tortfeasors, as discussed above. Another, is the non-tort, absolute liability concept of workers' compensation.\textsuperscript{298} The third is the equitable concept of a lien credit.\textsuperscript{299} The interrelation of these three

\begin{itemize}
  \item \textsuperscript{295} Id. at 539.
  \item \textsuperscript{296} 421 U.S. 397 (1975).
  \item \textsuperscript{297} Edmonds v. Compagnie Generale Transatlantique, 99 S. Ct. 2753, 2757 (1979).
  \item \textsuperscript{298} See generally 2A A. Larson, \textit{The Law of Workmen's Compensation} §§ 65 to 65.10 (1976).
  \item \textsuperscript{299} See Coleman & Daly, \textit{Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act}, 35 Maryland L. Rev. 351 (1976); Cohen & Dougherty, \textit{The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripar-
principles has never been satisfactorily harmonized by the courts. The current status of the law simply replaces one unfairness with another; the ill-fated Sieracki-Ryan combination has merely been replaced by the courts with an equally arbitrary system of inequitable loss apportionment. The interplay of the compensation system with an employee's cause of action in tort against a negligent third party has left third-party tortfeasors jointly and severally liable for the whole of any damage award made to an injured employee, while allowing a negligent employer to escape any liability whatsoever, even the absolute liability imposed by the workers' compensation system.\(^3\)

The "obstinate cleaving"\(^3\) by the courts to such a system of loss allocation has created a status quo unsupported by equitable principles and congressional intent, real or imagined. The words of the Supreme Court in a related context are appropriate in maintaining that the status quo "has continued to prevail . . . by sheer inertia rather than by reason of any intrinsic merit."\(^3\) After discussing the origins of this inequitable situation, the authors will suggest a system of allocation under section 905(b) of the LHWCA wholly consistent with the spirit and purpose of the Act and unopposed to precedent established thereunder.\(^3\)

As discussed above,\(^3\) the Supreme Court has allowed contribution between joint tortfeasors in maritime personal injury cases since the *Cooper Stevedoring*\(^3\) case in 1974. Contribution was established in the maritime personal injury area by the Court in order to achieve a "more equal distribution of justice."\(^3\) Notably, however, in *Cooper Stevedoring*, none of the joint tortfeasor defendants was subject to the LHWCA in

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\(^{301}\) A phrase used by Judge Learned Hand in regard to the former rule of divided damages in collision cases. National Bulk Carriers v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (L. Hand, J., dissenting).

\(^{302}\) United States v. Reliable Transfer Co., 421 U.S. 397, 410 (1975) (abolishing the 1855 rule of equal division of damages in collision cases).


\(^{304}\) *See* text accompanying note 280 *supra*.


\(^{306}\) *Id.* at 111 (1974) (quoting *The Max Morris*, 137 U.S. 1, 14 (1890)).
regard to the injured longshoreman. Thus, there were no "countervailing considerations" posed by the LHWCA which would interfere with the allowance of contribution between the wrongdoers. However, when one of the wrongdoers happens to be the employer of the injured longshoreman and subject to the compensation scheme, a different result has evolved as to the allowance of contribution between the various wrongdoers.

Discussion in this area must begin with Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., where the Court first considered the existence of a right of contribution against a negligent employer subject to the LHWCA. In that case the stevedore-employer was found to be seventy-five percent negligent and the shipowner twenty-five percent negligent. The Court initially asserted that it had the power to work out rules of contribution between a negligent employer and a negligent third party and would do so if "wholly convinced that it would best serve the ends of justice." Under these circumstances, however, the Court felt that "it would be unwise to attempt to fashion new judicial rules of contribution" and deferred the question to congressional action. The Court stated that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." It would be better for Congress to legislate in the area, the Court concluded, since the "record before us is silent as to the wishes of employees, carriers and shippers . . . ." In a footnote to the decision, the Court specifically found it unnecessary to decide whether or not section 905 of the LHWCA foreclosed contribution between a negligent employer and a third-party tortfeasor.

One year later in Pope & Talbot, Inc. v. Hawn, the

307. The defendants were the owner and time charterer of the vessel on which the plaintiff was injured.
310. Id. at 285.
311. Id.
312. Id. at 287.
313. Id. at 286.
314. Id. at 286 n.12.
Court again encountered the question of loss allocation between an employer and a third party. The district court had found both the employer and the shipowner to be negligent and that the longshoreman himself had been seventeen and one-half percent causally negligent of his own injuries.\textsuperscript{316} The district court reduced the damage award by the seventeen and one-half percent amount and entered a contribution order in favor of the shipowner.\textsuperscript{317} The court of appeals reversed the judgment of contribution\textsuperscript{318} and the Supreme Court affirmed on the basis of its holding in \textit{Halcyon}. The Court stated that in \textit{Halcyon}, "We held that contribution could not be exacted under circumstances like those here involved."\textsuperscript{319}

This situation remained until the Court's decision in 1956 in \textit{Ryan},\textsuperscript{320} which, significantly, did not turn on the subject of contribution between mutual wrongdoers. Instead, as discussed above,\textsuperscript{321} it centered on the contractual principle of a warranty of workmanlike performance which was held to be implied in every service agreement between a stevedore and a shipowner. If a breach of that warranty contributed to the injury of a longshoreman, a shipowner was entitled to full indemnity from the breaching stevedore. Since shipowners had the right of full indemnification in almost every instance where a longshoreman was injured by the concurrent fault of both the shipowner and the stevedore-employer, the question of contribution between the employer and a negligent third party was of little importance, until Congress acted in 1972.\textsuperscript{322} Congress' nullification of the \textit{Ryan} decision in the context of mutual fault between a stevedore and a shipowner again shifted attention to the question of contribution between a negligent employer and a negligent third party.\textsuperscript{323}

When the Supreme Court in 1974 in \textit{Cooper Stevedoring}\textsuperscript{324} held that contribution was allowable between joint tortfeasors,

\begin{itemize}
\item \textsuperscript{317} Id. at 232.
\item \textsuperscript{318} Hawn v. Pope & Talbot, Inc., 198 F.2d 800 (3d Cir. 1952).
\item \textsuperscript{319} 346 U.S. 406, 408 (1953).
\item \textsuperscript{320} Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).
\item \textsuperscript{321} See text accompanying notes 207-30 supra.
\item \textsuperscript{322} See note 1 supra.
\item \textsuperscript{323} See cases listed in note 338 infra.
\item \textsuperscript{324} 417 U.S. 106 (1974).
\end{itemize}
it specifically stated that the "factors underlying our decision in Halcyon still have much force." Although the question of the negligence of the employer was not actually before the Court in that case, the implication of the reaffirmation of the underlying rationale in Halcyon was that contribution per se was not allowable between a negligent employer and a negligent third party. Presumably, this was because a stevedore-employer's exclusive liability was to the injured employee in the form of compensation benefits. In spite of this, the lower courts, in handling longshore personal injury cases, devised several formulas for allocating damage liability between a negligent employer and other third parties which were thought not to be in contravention of Cooper Stevedoring.

In developing any loss-allocation system, the lower courts had to keep in mind two factors. The first was the provision of section 905 making compensation benefit payments the exclusive liability of an employer in relation to its employee. This much had been stated by the Court in Ryan:

The obvious purpose of this provision [section 905] is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment.

And, in Cooper Stevedoring, the Court re-emphasized the exclusivity of section 905 by stating, "Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employees' exclusive remedy." A second factor was the congressional addition to section 905 of a provision stating that "the employer shall not be liable to the vessel for such damages directly or indirectly . . ." In evaluating the viability of the various loss-allocation

325. Id. at 112.
329. Id. at 112-13.
schemes worked out by the lower courts, one must keep in mind the underlying rationale of a workers' compensation system. Workers' compensation is not based upon principles of tort law. Under a compensation act, the theory of negligence as the basis of liability is abolished, and, in general, a right to compensation is given for all injuries incident to the employment relationship. The employee forfeits a tort-based right to seek an uncertain but possibly larger recovery from his employer and is given in its place a recovery which is absolute in its payment and definite in its sum. The theory of a compensation act is that it provides a remedy for the employee which is both expeditious and independent of proof of fault, and imposes on an employer a liability which is limited and determinate. The amount of the compensation liability is generally determined in accordance with a definite schedule based upon the loss of earning power, the usual provision being for the payment of a specified amount at regular intervals over a definite period. The payments, unless contested by the employer, begin almost immediately after a work-related injury occurs. Hence, there is no delay, as there would be in a court proceeding, before an employee begins to receive a recovery. Most workers' compensation schemes do not abolish all of an employee's causes of action in tort, preserving for him an action against a negligent third party, but not his employer.

The LHWCA embodies all of these basic principles of workers' compensation law. The LHWCA has prohibited direct actions by longshoremen against their employers since it was enacted in 1927, but it has retained a right for an injured employee to sue a negligent third party. As is true of most compensation statutes, the LHWCA does not require an employee to elect between absolute compensation benefits and a right of action against a negligent third party. He may

332. Id. § 2, at 5.
336. Ch. 509, § 33(a), 44 Stat. 1440 (1927) (codified at 33 U.S.C. § 933(a) (1976)).
337. Id.
seek both, and it is in just such situations that the courts have been forced to harmonize the differing liabilities of employers who are covered by the LHWCA and concurrently negligent third parties who are not.

The first loss-allocation scheme urged upon the lower courts in longshore personal injury cases under the LHWCA was developed in Murray v. United States, a circuit court case litigated under the Federal Employees' Compensation Act, which, like the LHWCA, precluded a suit against an employer by an injured employee. In denying the third-party tortfeasor a right to sue the employer for a contribution, the court stated:

Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule . . . that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had "bought his peace," is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. . . . The tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but that act gave him assurance of compensation even in the absence of fault.\(^1\)

Under the so-called Murray Credit, a third-party tortfeasor who was jointly at fault with the employer was not forced to pay the entire damage award; due to the injured employee's recovery under the compensation act, the damage award was reduced by one-half. The Murray Credit met with little success in courts litigating claims under the LHWCA.\(^2\)

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339. 405 F.2d 1361 (D.C. Cir. 1968).
341. 405 F.2d 1361, 1365-66 (D.C. Cir. 1968).
Shellman v. United States Lines Operators, Inc. highlighted the limited equitable application of that particular scheme and rejected the Murray Credit "because it works only when (1) the negligence of the employer is 50%, and, (2) the compensation act recovery is 50% of what a judge or jury finds to be the actual damage suffered by the employee, and (3) no lien is allowed to an offending employer." Other courts followed the Shellman court's lead and likewise rejected the Murray Credit doctrine.

The Shellman court, however, did adopt a different loss-allocation scheme. In considering plaintiff's motion to strike the allegations in the answer setting forth the Murray Credit doctrine and a similar motion filed by the stevedore's subrogated compensation insurer to strike the allegations of contributory negligence, the court stated that in "[c]onsidering the precedents, the statute and its legislative history, some order may be made out of the position of the competing interests in this litigation." The court went on to hold that in a negligence suit, the shipowner may claim the contributory negligence of both the injured longshoreman and the stevedore-employer in reduction of any damages resulting from some negligence on the part of the shipowner. Under this scheme, an injured longshoreman's potential recovery was to be reduced not only by the percentage of his attributed negligence, but also by the percentage of negligence attributed to his employer. A subsequent district court adopted the same rationale, labeling it an "equitable credit" doctrine which meant that a credit to the shipowner was allowed on the total damages assessed in the same percentage as the court or jury found the stevedore-employer to have contributed to the plaintiff's injury. The equitable credit doctrine was specifically overruled in the Shellman case on appeal and rejected

344. Id. at 368.
345. See cases in note 342 supra.
347. Id. at 369.
348. Id. at 369-70.
350. Id. at 1144.
The primary objection to the equitable credit doctrine was that it had the effect of imposing "unjustified burdens upon the injured longshoreman" by reducing his recovery by the amount of causal negligence attributed to his stevedore-employer. The courts found this unfair because "the injured plaintiff is entitled to recover the full amount of his damages." As one court noted:

To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of plaintiff, the one person who is blameless [in this case]. The innocent victim of concurrent negligence would find that, through some judicial attempt to achieve equity for other parties, he must accept a partial loaf of joint and several liability.

In Edmonds v. Compagnie Generale Transatlantique, the Fourth Circuit instituted the equitable credit doctrine in the form of a proportionate fault rule. A majority of an en banc panel of the court concluded that the shipowner could be required to pay no more than the proportion of causal negligence attributed to him.

From the longshoreman's point of view, this is not a harsh result. He is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury. Our holding is only that he may not recover from the ship damages attributable to the neglect or actions of his fellow longshoremen or others than the ship's crew.

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356. 577 F.2d 1153 (4th Cir. 1978).

357. Id. at 1156.
In that case, the district court had found the plaintiff ten percent at fault, the ship twenty percent at fault and the stevedore-employer seventy percent at fault. The ship was thus required to pay only twenty percent of the damage award. The Supreme Court reversed.

V. Treatment

A. Requirements

Several implicit elements are involved whenever a court attempts to fashion a loss-allocation scheme which straddles the area between a tort-based fault system and a system of absolute, no-fault liability. All of the above-mentioned apportionment systems have sought an apportionment of fault based on the comparative negligence system imposed by Congress in the 1972 amendments to the LHWCA. The shipowners have been attempting to spread the loss as far as possible according to fault. This, of course, brings about an equity of liability based on an objective, easily ascertainable standard. In addition, it further effectuates the congressional intent in favor of a system of comparative fault over absolute tort liability of an individual party. Some courts have structured loss-allocation mechanisms on the inherent fairness involved in a comparative fault system. On the other hand, too little attention has been paid to the impact of these loss-allocation schemes on the injured longshoreman. In seeking fairness in allocation, the courts have often let the burden of that allocation fall upon the injured employee. In this regard, the maintenance of the integrity of the workers’ compensation system has not been observed. A compensation system imposes an absolute liability of payment on an employer but at a fixed and determinate rate. Beyond this determined level, an employer should not be forced to pay. Any system of contribution between a negligent employer and a third-party tortfeasor, which requires an employer to contribute to any damage

358. Id. at 1154.
359. Id.
361. See the remark of Judge Friendly in Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 725 (2d Cir. 1978), “[O]ne is still left to wonder why the longshoreman injured by the negligence of a third party should recover less when his employer has also been negligent than when the employer has been without fault.”
award an amount in excess of compensation liability, does not adhere to the principle that a compensation system should limit an employer's liability to a determined amount.

Any acceptable system of loss-allocation in this area must strike a proper balance between the law-making power of Congress as evidenced in the LHWCA and the ability of the federal courts to interpret the law, weigh the equities within any given situation and reach a decision. The authors propose that a fair and equitable balance among all of the parties may be based upon the following five propositions:

1. An employee injured in the course of his employment should recover workers' compensation benefits from his employer, regardless of fault.

2. An injured employee's third-party tort recovery should be diminished by no one's causal negligence but his own.

3. An injured employee should not be allowed the double recovery of compensation benefits and a larger third-party recovery for the same injury.

4. Causal fault should be apportioned as far as possible on a true comparative basis among all wrongdoers, whether parties to the action or not, regardless of immunity.

5. A causally negligent employer should be liable to an injured employee only to the extent of its workers' compensation liability.

Proper application of these propositions to an injured (or deceased) longshoreman-shipowner-stevedore-third party situation will result in an equitable lien credit solution to balance the law and the equities between all of the parties.

The viability of any system based on the five propositions set forth above must first be evaluated against the Supreme Court's decision in Edmonds v. Compagnie Generale Transatlantique and the provisions of the LHWCA. In Edmonds, the circuit court had held that under the 1972 amendments to the LHWCA, the shipowner was liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. The Supreme Court premised its decision reversing the circuit court on two basic grounds. The first was that Congress, in enacting the 1972 amendments, had shown

363. 577 F.2d 1153 (4th Cir. 1978).
no intent to modify the "existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of the non-party stevedore . . . ."\textsuperscript{364} The Court stated that "[f]or a number of reasons, we are unpersuaded that Congress intended to upset a 'long-established and familiar principle' of maritime law by imposing a proportionate fault rule."\textsuperscript{365} The majority of the Court was unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who was injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.\textsuperscript{366}

In the Court's opinion, the "legislative history strongly counseled against the proportionate fault rule of the circuit court since the "reports and debates leading up to the 1972 amendments contained not a word of this concept."\textsuperscript{367} The Court also believed that the proportionate fault rule adopted by the circuit court produced "consequences that we doubt Congress intended. It may remove some inequities, but it creates others and appears to shift some burden to the longshoreman."\textsuperscript{368} The Court was especially concerned that in the sorting out of liabilities among the parties, an unfair portion of the burden would be shifted to the injured longshoreman.\textsuperscript{369}

Under the Court of Appeals' proportionate fault rule, however, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the vessel. . . . Under the Court of Appeals' proportionate fault system, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of

\begin{thebibliography}{99}
\bibitem{364} 99 S. Ct. 2753, 2758 (1979).
\bibitem{365} Id. at 2758 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).
\bibitem{366} Id. at 2759-60.
\bibitem{367} Id. at 2760.
\bibitem{368} Id.
\bibitem{369} Id. at 2761.
\bibitem{370} Id.
\end{thebibliography}
compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

....

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.371

The second ground relied upon by the Court for not changing the "rule so as to make the vessels liable only for the damages in proportion to its own negligence"372 was the "interface of statutory and judge-made law"373 which existed in this area.

In 1972, Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change .... By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we may knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances .... Once Congress has relied upon conditions that the courts have created, we are not as free as we could otherwise be to change them.374

The court refused to uphold the particular proportionate fault rule (equitable credit) established by the circuit court both because it could find no legislative intent compelling this result and because change in this area was more appropriately a congressional task.

In fashioning any loss-allocation scheme to balance the equities between a negligent employer and a negligent third party, one must keep in mind certain provisions of the LHWCA. Section 914 of the Act compels an employer to periodically and promptly pay compensation benefits directly to the injured employee "without an award."375 Under section

371. Id. at 2761-62.
372. Id. at 2762.
373. Id. at 2763.
374. Id.
907, the employer must furnish "medical, surgical, and other attendance or treatment, nurse and hospital service, medicine . . . and apparatus, for such period as the nature of the injury or the process of recovery may require."\textsuperscript{376} Section 904 mandates that compensation "shall be payable irrespective of fault as a cause for the injury."\textsuperscript{377} Under section 933, an injured employee is given the additional right to recover damages against a third party in tort.\textsuperscript{378} The employee need not elect between receiving compensation and recovering damages in an action in court. Paragraph (b) of section 933 does stipulate that if an employer contests liability for compensation payments under the LHWCA and an award is made compelling the employer to pay such benefits, there is "an assignment to the employer of the injured employee's cause of action against the third party unless the employee commences suit against the third party within six months after such award."\textsuperscript{379} Paragraph (e) sets out a schedule of distribution whenever an employer recovers against a third party on an assigned cause of action.\textsuperscript{380} Paragraph (h) subrogates the employer's compensation insurance carrier to all the rights of the employees under section 933.\textsuperscript{381} Whenever an assignment is made and an employer recovers against a third party, the employer is entitled to retain an amount equal to his expenses in bringing this suit, the cost of benefits paid under section 907, all amounts paid as compensation and one-fifth of whatever is left before returning the remaining amount to the employee.\textsuperscript{382} Thus, in many cases where an assignment is made, an employer, regardless of any causal negligence on his part, is reimbursed for any payments made as compensation or medical expenses under the LHWCA. This reimbursement comes from the third-party damage award. It seems inequitable for a stevedore-employer who is, for example, forty percent causally negligent for the injury sustained by its employee, to recoup all of its statutorily-imposed liability in relation to the em-

\textsuperscript{376} 33 U.S.C. § 907(a) (1976).
\textsuperscript{377} 33 U.S.C. § 904(b) (1976).
\textsuperscript{378} 33 U.S.C. § 933(a) (1976).
\textsuperscript{379} Id. at (b).
\textsuperscript{380} Id. at (e).
\textsuperscript{381} Id. at (h).
\textsuperscript{382} Id. at (e).
ployee and to contribute nothing to the third party who might be equally or less negligent. This loss-allocation arrangement is particularly inappropriate under the comparative negligence system which Congress instituted in the 1972 amendments to the LHWCA. However, Congress chose to leave paragraph (e) of section 933 intact, and the Supreme Court in Edmonds recognized that courts have no power to alter the assignment distribution schedule. This provision for receiving reimbursement of the amount of compensation benefits paid to an injured employee from a third-party tort recovery is a usual feature of most compensation systems. The negligent third party serves as a source from which an employer may recoup the cost of absolute liability compelled by the Act.

There are three other ways, in addition to the section 933(b) assignment, whereby an employer who becomes obligated to pay compensation to an employee may recover from a negligent third party. The employer may bring an action directly against the third party in tort to recover the amount of compensation benefits paid in excess of the amount to which it was subrogated under section 933; it may intervene in an action brought by an employee; or, it may allow the employee to prosecute the action himself and assert a lien against the amount of the employee's judgment. None of these methods, however, has given any indication whether the employer's right to reimbursement is defeated when the employee's injuries are caused by the concurring negligence of the employer, one of its agents, or a third party. Although the assignment provision of section 933 appears to be absolute and not dependent in any way on whether or not the em-

386. See, e.g., Bloomer v. Liberty Mut. Ins. Co., 100 S. Ct. 925 (1980); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438, 439, 446 (9th Cir. 1979); Fed. R. Civ. P. 24(a)(2). Although Bachtel states that the stevedore-employer "intervened pursuant to 33 U.S.C. § 933 (1976) and asserted a lien," Id. at 439, that section makes no provision for intervention in a case where an injured longshoreman brings the action. Instead, intervention is properly allowed under Fed. R. Civ. P. 24(a)(2).
ployer was causally negligent, the same cannot be said for any of the other means by which a compensation-paying employer may claim reimbursement for benefits paid.

The right of an employer to proceed directly against a negligent third party for any deficiency in the damage award and the right to apply a lien against any judgment recovered by the injured employee, are judicially created. In *Federal Marine Terminal, Inc. v. Burnside Shipping Co.*, the Supreme Court held that the right of assignment under section 933 of the LHWCA was not an exclusive grant of recovery to an employer of the amount of benefits it had been forced to pay on account of the negligence of a third party. The Court held that an employer had a cause of action in tort for the compensation payments caused by the negligence of a third party. In *The Etna*, the Third Circuit was faced with a situation wherein an employer had made compensation payments to an injured employee without an award, and the employee had subsequently commenced a third-party action against the shipowner and recovered a judgment. The employer then attempted to recover the amount of its compensation payment from the damage award. The employee refused to reimburse the employer on the grounds that, since the compensation was not paid "under an award," he was under no compulsion to repay the employer for the amount of compensation benefits made. The circuit court found that the assignment provision of section 933 "neither expresses nor implies a restriction upon the employer's right to subrogation, the circumstances being otherwise appropriate." Thus, the court found that there existed a "right to subrogation which, under equitable principles, attaches where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible." Under this theory, even though the LHWCA afforded the employer no statutory right of recovery, there was an equitable right under which he might do so.

Although the court in *The Etna* labeled the right of the

389. 138 F.2d 37 (3d Cir. 1943).
391. 138 F.2d 37, 41 (3d Cir. 1943).
392. Id. at 39.
employer for reimbursement a right of "subrogation," that was, strictly speaking, not the case. Subrogation is broadly defined as the substitution of one party in the place of another with reference to a lawful claim or right.\textsuperscript{393} It is the method by which the equities in favor of one person, such as the employer, are resolved via the legal rights of another, such as the employee. However, such is not the case in a workers' compensation-third-party suit. The employer does not seek to be "put in the shoes" of the employee so that he might seek a recovery through the legal rights of the employee against a negligent third party. Instead, the employer merely seeks to be reimbursed from any sufficient recovery of an employee from a negligent third party. Under proper circumstances, this creates the situation for imposition of an equitable lien. An equitable lien is the right to have a fund applied in whole or in part to the payment of a particular obligation.\textsuperscript{394} Like equitable subrogation, it does not arise in favor of a mere volunteer.\textsuperscript{395} "Where the equitable lien is on a fund . . . it is enforced by a direction to pay the claimant out of the fund." The Edmonds case correctly recognized that The Etna had created an equitable lien and not a right of subrogation.\textsuperscript{397}

Even before the 1972 amendments to the LHWCA, negligent third parties had attempted to have the amount of compensation benefits made by the employer, to which The Etna equitable lien attached, applied as an offsetting credit against any damage award recovered in a tort action by the injured employee.\textsuperscript{398} That question was not addressed by the court in The Etna because the controversy there was between the employee and the employer; the shipowner was not a party to the appeal. At the outset, then, it appears that the enforcement of an equitable lien for the full amount of workers' compensation benefits paid is a satisfactory result only when the employer is not at fault in any degree. "The rule produces palpably unfair

\textsuperscript{393} See 73 AM. JUR. 2d Subrogation § 1 (1974).
\textsuperscript{394} See RESTATEMENT OF RESTITUTION § 161, Comment b (1937).
\textsuperscript{395} See 51 AM. JUR. 2d Liens § 24 at 163 (1970).
\textsuperscript{396} RESTATEMENT OF RESTITUTION § 161, Comment b (1937).
results in every other case."

In *Halcyon*, the circuit court had decided that a right of "contribution" existed between an employer who was seventy-five percent negligent and a third party who was twenty-five percent negligent. But the court further held that the amount the employer could be compelled to pay could not exceed the amount determined by the employer's workers' compensation liability. On appeal to the Supreme Court, both parties agreed that the decision of the circuit court "limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable," and each urged a different rule. The Supreme Court noted that it had "never expressly applied" a rule of contribution to noncollision maritime cases, and stated that the establishment of such a rule was better left to Congress which could give a fair accommodation to the diverse interests of the various groups involved. The Court specifically found it unnecessary to decide whether the LHWCA precluded any right of contribution between an employer and a negligent third party.

In *Pope & Talbot, Inc. v. Hawn*, both the employer and a third party were adjudged negligent, and on appeal to the Supreme Court the third party contended that the damage award against it should be reduced by the amount of compensation payments made by the employer. The Court rejected the third party's claim on two grounds. First, it stated that section 933 of the LHWCA specifically allowed an employer "to recoup his compensation payment out of any recovery from a third person negligently causing such injuries." Neither party to the appeal had suggested that section 933 was, in fact, applicable to the facts of the case, since the employer had not paid the compensation benefits "under an
award." The Court's reliance on that section was thus misplaced. The remaining ground upon which it rejected the third party's claim for a credit offset was that it "would be the substantial equivalent of contribution which we declined to require in the Halcyon case." This second ground was also misplaced. Contribution, as discussed above, is a right of one who has discharged a common obligation to recover from another, also liable, that proportion which the latter rightly owes and ought to bear. It arises where one joint wrongdoer has paid more than his fair share of the common liability incurred by several parties. It differs from subrogation, which gives the party paying the common obligations all the rights and remedies of the compensated party, and from an equitable lien, which enforces payment from a recovered fund. Contribution compels one who is liable but who has not yet paid his fair share of the common obligation to do so. The contributory payment is made not to the plaintiff, but to the joint wrongdoer who has paid a disproportionate share of the common burden. The general rule is that an employer may not, strictly speaking, be a joint tortfeasor liable in contribution, since the employer's liability is imposed, as well as limited, by the provisions of a workers' compensation act, while that of the third-party tortfeasor rests on the principles of negligence.

An equitable lien credit rule does not seek to compel contribution, a payment of the employer's fair share of the common liability to the third party, but, instead, seeks to adjust the equities of the situation to insure that the wrongdoing employer is not allowed to recoup benefits which he was absolutely compelled to pay regardless of fault. It seeks not to impose, directly or indirectly, a liability of the employer to the third party, but to insure that the employer does not escape his statutory duty under the compensation act to the injured employee. It seeks not to effect a subterfuge, but to insure

410. See text accompanying notes 278-79 supra.
that the equities of the situation are not abused or perverted. An equitable lien credit rule seeks to insure that some of the burden of monetary compensation to the victim is placed ultimately on an employer "whose default caused [in part] the injury."\textsuperscript{12}

In \textit{Halcyon} and \textit{Hawn}, the Court held that a third-party defendant was not entitled to have the judgment reduced by the amount of compensation that the plaintiff had received from his employer. In so holding, the Court allowed the employer to assert its \textit{Etna} lien; assignment under section 933 was unavailable since the compensation was not paid under an award. In each case, this defense was equated with an attempt to secure contribution between joint tortfeasors. Especially in \textit{Halcyon}, the Court's refusal to allow the third party to have the judgment against him reduced was based not on any apparent conflict with the provisions of the LHWCA, but on the Court's hesitancy to "fashion new judicial rules of contribution."\textsuperscript{13} The Court's decision in \textit{Cooper Stevedoring}\textsuperscript{14} unequivocally established a rule of general maritime law which allows contribution between joint tortfeasors, even in noncollision cases. Thus, in the absence of the LHWCA, a negligent third party would be allowed contribution against a concurrently negligent employer when the third party has paid more than its proportionate share of the common liability. To the extent that the prohibition against contribution in \textit{Halcyon} and \textit{Hawn} relied on the absence of a maritime rule allowing contribution in noncollision cases, the Court's reasoning has been rendered obsolete.

In \textit{Cooper Stevedoring}, the Court stated that the "factors underlying our decision in \textit{Halcyon} still have much force"\textsuperscript{15} and that the "decision in \textit{Halcyon} was, and still is, a good law on its facts."\textsuperscript{16} The Court made these assertions in response to an argument by a joint tortfeasor that \textit{Halcyon} stood for the rule of an absolute bar against contribution in noncollision

\textsuperscript{15} \textit{Id.} at 112.
\textsuperscript{16} \textit{Id.} at 115.
cases. To support its assertions, the Court made reference to the congressional enactment of the amendments to the LHWCA. "Indeed, the 1972 amendments . . . re-emphasized Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy." While this statement is true, it is wholly irrelevant to the issue presented in that case. There was no argument in that case as to the amount of liability between the employer and its injured employee. Instead, the disagreement was over the allocation of liability between two joint tortfeasors. Therefore, Cooper Stevedoring serves to breathe no new vitality into the obsolete reasoning of Halcyon and Hawn.

If contribution is to be denied between a negligent employer and a negligent third party, that denial must rest on grounds other than Halcyon, Hawn and Cooper Stevedoring. Support for the rejection of any rule against contribution can, in fact, be found in the amendment to section 905 enacted by Congress in 1972. Section 905(b) states that "the employer shall not be liable to the vessel for such damages directly or indirectly." Both the House and Senate reports accompanying the amendments state that since the warranty of seaworthiness was abrogated, "there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." The reports further state that "indemnity or contribution agreements are prohibited by the act." But the stipulations in section 905(b) limit only contribution or indemnity from a negligent employer for damages, i.e., those awards made in a third-party tort action between an injured employee and a joint tortfeasor. The section in no way affects the absolute liability of an employer to make compensation payments to an injured employee. Further, it in no way goes to the issue of whether or not an equitable lien should be allowed a negligent employer under the doctrine of

417. Id. at 111.
418. Id. at 112-13.
421. Id.
The Etna. A colloquy at a Senate hearing on the 1972 amendments between the key draftsman of section 905 and a testifying witness indicates that the prohibition against contribution or indemnity was meant to eradicate a very specific practice in the maritime industry. What the committee draftsman sought to prohibit was hold-harmless agreements given by the stevedore-employer to the shipowner, which insulated the shipowner against liability for its own negligence. This being the express purpose of that particular clause in section 905(b), it should not be construed to interfere with the modification of equitable lien rights between the parties.

B. Application

The comparative negligence system of fault allocation instituted by Congress under the 1972 amendments should not be avoided because of the reasoning of cases decided prior to adoption of the amendments. The question now is how the courts should interpret the Etna lien rule to reflect the advent of comparative responsibility among negligent parties, employers and nonemployers. The comparative fault system principle that the employer and a third party should, to the extent consistent with the employer's statutory immunity from tort liability, share the burden of the employee's recovery as joint tortfeasors, leads to the logical and equitable conclusion that the concurrently negligent employer should receive an equitable lien or reimbursement only for the amount by which its compensation liability exceeds its proportional share of the injured employee's recovery.

The rule of lien rights formulated in The Etna is not a rule of contribution. Neither is the rule of equitable lien credit rights a rule of contribution, compelling the negligent employer to "contribute" any of the lien right amount to the third party tortfeasor. Rather an equitable lien credit rule is an equitable rule of accommodation between negligent parties; it asks the court to equitably disallow a lien right until such time as it would be equitable to reinstate it. It adheres

422. See note 137 supra.
423. See text accompanying note 139 supra.
424. Id.
strictly to the *Etna* lien consideration, and not any other. An equitable lien credit does not ask the court to fashion new judicial rules of contribution, a task which the Supreme Court declined in both *Halcyon*\(^{425}\) and *Edmonds*,\(^{426}\) but undertook in *Cooper Stevedoring*.\(^{427}\) Instead, such a rule asks the courts to modify the rule judicially created in *The Etna*. What negligent third parties have, in effect, been advocating is that, since double recoveries to injured employees have been avoided all along, either by allowing an assignment under section 933 or allowing an equitable lien under the *Etna* rule, it would be more equitable in cases where the employer is negligent not to use the damages allocable to the employer's fault to repay its lien, but rather to reduce the liability of third parties by the amount of the compensation benefits paid or to be paid, at least to the extent that those benefits fall short of the percentage share of responsibility attributed to the employer.

Challenge to such hybridization cannot fairly be based on any supposed insurmountable distinction between a fault-based and a nonfault-based system. The argument often is that the workers' compensation and tort recovery systems are mutually exclusive. They are, however, intimately related in several respects. The Supreme Court has itself noted that the two systems present "an interface of statutory and judge-made law"\(^{428}\) characterized by "the overlap of loss-allocating mechanisms that are guided by somewhat inconsistent principles." \(^{429}\) Section 904 of the LHWCA states that "[c]ompensation shall be payable irrespective of fault as a cause for the injury,"\(^ {430}\) but an employer need not pay benefits if an employee's injuries were caused by the "willful intention"\(^ {431}\) of the employee, a tort-based distinction of fault. While an employee may collect a statutorily regulated benefit under the Act, he retains a right to bring a tort action of his

\(^{429}\) Id. at 2757.
\(^{430}\) 33 U.S.C. § 904(b) (1976).
\(^{431}\) Id.
own to recover from a third party for the same injuries.\footnote{432} Further, though an employer must furnish an injured worker with medical and surgical treatment, nurse and hospital services, and medicine,\footnote{433} he retains a tort action against a negligent third party to recover any such amounts incurred because of the third party's negligence.\footnote{434} If an injured employee fails to commence a third-party suit in tort within six months of the later of the last voluntary payment or a formal compensation award, his tort cause of action is assigned by statute to his employer or its carrier.\footnote{435} If the injured employee brings the action himself, the employer has a lien upon any recovery for benefits paid under the compensation scheme.\footnote{436} An employer's compensation insurance carrier is entitled to be subrogated to any of the tort rights of the employer.\footnote{437} An employer also has an independent tort action against a third party to recover any deficiency existing between the third-party recovery or settlement and the amount of compensation benefits paid by the employer under the LHWCA.\footnote{438}

The Supreme Court in \textit{Edmonds} impliedly advised against any attempts to evaluate the \textit{Etna} lien rule to reflect the advent of comparative responsibility among negligent parties. The Court stated that when Congress has relied upon conditions that the courts have created, "we are not as free as we would otherwise be to change them."\footnote{439} The \textit{Etna} lien rule is, of course, judicially created, and re-evaluation of the doctrine in the \textit{Etna} case does not require the courts to alter the construction of any provision of the LHWCA in any manner. Under the circumstances of the 1972 amendments, the Court's pronouncement that congressional reliance on prior court rulings has restricted the ability of the Court to shape the law is utter fiction. There is not a scintilla of evidence in the legislative history indicating that Congress in any way relied on the

\begin{itemize}
\item \footnote{432} \textit{Id.} at (a).
\item \footnote{433} \textit{Id.}
\item \footnote{434} \textit{Id.} at (b).
\item \footnote{435} \textit{Id.} at (b).
\item \footnote{436} \textit{See} The \textit{Etna}, 138 F.2d 37 (3d Cir. 1943).
\item \footnote{437} 33 U.S.C. § 933(h) (1976).
\item \footnote{439} 99 S. Ct. 2753, 2763 (1979).
\end{itemize}
judicially created *Etna* rule in fashioning the 1972 amend-
ments. The hearings and committee reports indicate that the *Etna* rule was never a topic of substantive discussion.\footnote{440} Even
if it were, there was no legislative ratification of that rule
under the 1972 amendments. To impute to Congress an intent
to ratify, or even to premise its legislative enactments on, a
judicially created rule, such a rule clearly must have been
brought to the attention of Congress during consideration of
the legislation;\footnote{441} discussion of it must have been more than a
mere mention in the thousands of pages of legislative his-
tory;\footnote{442} and the key supporters of the legislation must have
been "familiar with existing rulings, or . . . they [must have
meant] to incorporate them, whatever they may [have been.]"\footnote{443} None of these requirements was evidenced in the
enactment of the 1972 amendments.

The deferential attitude by the Supreme Court to a sup-
posed reliance by Congress on a judicially created condition is
especially foreign to the maritime law. "Admiralty law is
judge-made law to a great extent"\footnote{444} and "the Judiciary has
traditionally taken the lead in formulating flexible and fair
remedies in the law maritime."\footnote{445} It is the constant interplay
between judge-made and statutory law through which the
maritime law evolves and remains a growing, adapting body of
policies, rules and relationships. The courts must undertake
their role in that continuous evolutionary process. A posture
of judicial deference to an imagined legislative reliance on the
status quo is not compatible with such growth. The oblique
implication put forth in *Edmonds* cannot fairly be extended
to foreclose judicial efforts to reshape judicial rules.

One of the major results of Congress’ enactment of the
1972 amendments was the establishment of a system under

\footnote{440. See note 494 infra.}
\footnote{441. See, e.g., TVA v. Hill, 437 U.S. 153, 192 (1978); United States v. Calamaro,
354 U.S. 351, 358-59 (1957); Commissioner v. Glennshaw Glass Co., 348 U.S. 426, 431
(1955); Helvering v. New York Trust Co., 292 U.S. 455, 468 (1934).}
\footnote{442. SEC v. Sloan, 436 U.S. 103, 121 (1978).}
\footnote{443. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 790 (2d Cir.) (L.
Hand, J.), aff'd, 328 U.S. 275 (1946). See also Cleveland v. United States, 329 U.S. 14,
21 (1946) (Rutledge, J., concurring).}
\footnote{444. Edmonds v. Compagnie Generale Transatlantique, 99 S. Ct. 2753, 2756
(1979).}
\footnote{445. United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975).}
which liability for damage is to be imposed in proportion to respective fault. It is somewhat anomalous, however, that a negligent third party causing injury to a person may seek proportionate contribution from all solvent joint tortfeasors whose causal negligence combines to produce the injury, but may not seek to hold the injured party's negligent employer liable even for an amount no greater than the employer's statutorily imposed compensation benefit liability. It is true that in the first instance the wrongdoers are joint tortfeasors and no workers' compensation scheme is involved. Nevertheless, the factor of a compensation program should not allow a negligent employer to avoid liability, even its statutory responsibility to make compensation payments.

An injured employee's desire to secure a third-party tort recovery in addition to the guaranteed benefits under a statutory workers' compensation scheme, an election allowed under almost every state plan, has the effect, if the employee recovers a substantial sum from the third-party tortfeasor, of converting a system whereby an employer pays regardless of fault into a system whereby an employer is relieved of paying regardless of fault. Such a procedure is illogical and unfair. As between an employee and his employer, the statutory workers' compensation scheme should serve as an absolute limit of an employer's liability. The combination of a third-party action in tort by an employee with the operation of a compensation scheme should not relieve a wrongdoing employer of this absolute liability. Combining a system which imposes liability without fault with a system imposing liability only on the basis of fault should not result in relieving a party of liability without regard to fault. Workers' compensation systems were not enacted to serve as temporary benefit schemes to sustain an injured employee until he could recover from a wrongdoing third party in tort, and then, subsequently, reimburse in full a wrongdoing employer out of that tort recovery. If this were so, how could it honestly be maintained that workers' compensation plans are loss-allocation systems which insure that the "cost of the product should bear the blood of the workman"? The "interface of statutory and judge-made law"

446. See note 334 supra.
should not stand an *absolute* liability system on its head and shake from it all logic and equity.

If the relative fault of the employee and the fault of the third party can be compared, what reason exists for not proportioning the comparative responsibility of the employer as well? If included in the proportion and if found causally negligent, the employer's negligence should have a direct bearing on its compensation lien recovery. This can be accomplished only by examining its lien and assignment rights for benefits already paid to the employee. In this way, the employee is denied a double recovery, as he should be; but, as between the employer and a third party, the burden of liability is apportioned according to actual fault.

This system whereby the employee gets his full damages, the employer pays his percentage of liability but not above the level of the compensation payments which he has been and will be obliged to pay regardless of fault, and the third party is relieved of the obligation of paying the full judgment, is not novel. It was the one proposed by the circuit court in *Halcyon*, 448 99 S. Ct. 2753, 2763 (1979). the one later suggested but not applied by Judge Friendly in the Second Circuit, 449 Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951). and the one applied by the California Supreme Court in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*. 450 Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 726 n.8 (2d Cir. 1978). In that case, the California court decided that in light of the judicially developed doctrine of comparative fault prevailing in that state, the best way to harmonize the interests of a negligent employer and a negligent third party would be to apportion liability as far as possible. The mechanics of such a procedure were set out by the court as follows:

When the issue of an employer's concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense. . . . Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of . . . [comparative negligence]. The court should then deduct the

employer’s percentage share of the employee’s total recovery from the third party’s liability—up to the amount of the workers’ compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement—or any lien . . . —to the extent that his contribution would then fall short of his percentage share of responsibility for the employee’s total recovery. 452

Once responsibility has been apportioned, the recoverable damage award is determined by first subtracting from the total award the proportionate amount attributable to the injured employee’s negligence, and then subtracting the proportionate amount attributable to the employer’s negligence up to the amount of the workers’ compensation benefits paid. 453

Once an employer’s compensation contribution corresponds to his proportional share of fault, the employer should be granted full lien rights on any amounts paid over that level. 454

"Only when such level of contribution has been reached, however, will grant of the . . . credit adequately accommodate the principle that a negligent employer should not profit from his own wrong." 455

This equitable lien credit rule is structured in such a manner that the employee fully recovers his tort damages—but from the proper parties. As the California court stated:

Allowing the concurrently negligent employer a credit limited in this fashion is rational if non-negligent employers are to be permitted credit; each profits, if at all, only to the extent it committed no wrong . . . . The employer does not profit from its wrong, nor does the employee enjoy a double recovery. 456

As the California court pointed out, under such a rule, "[a]n employer will obtain a reduction of its workers’ compensation liability only if its degree of negligence is so small that its statutory liability exceeds its percentage share of the tort measure of damages." 457 There is nothing unfair in this to the

452. Id. at 842, 587 P.2d at 692, 150 Cal. Rptr. at 896.
454. 22 Cal. 3d at 843, 587 P.2d at 692, 150 Cal. Rptr. at 896.
455. Id.
456. 22 Cal. 3d at 846, 587 P.2d at 694, 150 Cal. Rptr. at 898.
457. 22 Cal. 3d at 846, 587 P.2d at 695, 150 Cal. Rptr. at 899.
employer. The employer pays its statutorily imposed obligation, irrespective of fault, but because of its comparative responsibility it is denied the recoupment of that statutory amount. Section 905(b) of the LHWCA is not contravened because such a rule does not make the employer "liable to the vessel for . . . damages directly or indirectly. . . ." First, under the equitable lien credit rule, an employer is not liable to the vessel or any other negligent third party. The employer is liable only to the employee by reason of its statutory compensation obligation. Second, under the rule, the employer is not liable for damages, but only for the compensation benefits which it is required to pay regardless of fault in any circumstance where an employee is injured.

Language in the Supreme Court's decision in Bloomer v. Liberty Mutual Insurance Co. should not be interpreted as precluding application by the lower courts of the proposed loss-allocation procedures. In light of the question presented for discussion and the grounds asserted for the holding by the Court, the case must be read narrowly.

In Bloomer, an injured longshoreman brought suit against a shipowner alleging that its negligence had caused his injuries. During settlement negotiations the plaintiff's counsel requested that the stevedore-employer and its compensation insurance carrier reduce their nonstatutory lien by a share of the costs of recovery. The compensation insurance carrier refused this request and successfully moved to intervene in the action. Thereafter, the plaintiff settled with the shipowner for $60,000. The question presented for decision by the Court was whether the stevedore's judicially created lien should be reduced by a proportionate share of the longshoreman's expenses in obtaining recovery from the shipowner, or whether the stevedore was entitled to be reimbursed for the full amount of the compensation payments made to the plaintiff under the LHWCA. Finding no explicit answer in the Act itself, the Court turned to the structure and history of the LHWCA.

The Court found that the provisions of section 933 provid-
ing that a stevedore-employer or its compensation carrier be reimbursed for all legal expenses utilized in obtaining a third-party recovery under a statutory assignment of an injured longshoreman's cause of action applied "with considerable force against requiring . . . [the stevedore-employer or its compensation carrier] to bear a part of the longshoreman's costs when the longshoreman recovers on his own. There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought the action."461 This statement, however, has little to support it. Section 933 makes no provision for an equitable lien of any kind on the part of a stevedore-employer who has paid compensation to an injured employee. Even applying a basic rule of statutory construction, expressio unius est exclusio alterius, the mere fact that a specific distribution and reimbursement scheme is provided when a stevedore-employer recovers on an assigned cause of action but no such distribution is provided when the injured employee himself recovers, undercuts the very contention that the Court makes. It is only the lien judicially created in The Etna462 which gives a stevedore-employer and its compensation carrier a claim for reimbursement.

The legislative history and amendments to section 933 speak with considerable force against the contention put forward by the Court. When the distribution scheme set forth in section 933 was devised in 1927,463 an injured employee could not recover both compensation benefits and a third-party damage award.464 Rather, an express, initial election was required between benefits on the one hand and a third-party tort action on the other. Thus, at the time it was first developed, the distribution plan in section 933 could not have been intended by Congress to apply to instances where the injured longshoreman recovered a damage award from a negligent third party. The distribution system was meant to apply only when there could be compensation benefits and a third-party recovery, i.e., after an employee had accepted benefits and his

461. Id. at 928.
462. 138 F.2d 37 (3d Cir. 1943).
463. Ch. 509, § 33(e), 44 Stat. 1440 (1927).
464. Id.; see cases in note 188 supra.
stevedore-employer had recovered under the assigned cause of action. Section 933 cannot be invoked as support for the judicially created lien rights of employers; they must stand or fall in their own right.

In 1938, Congress undertook to change the provision in section 933 which made the mere acceptance of compensation benefits operate as an assignment of "all right of the person entitled to compensation to recover damages against . . . [a] third person." The very fact that Congress changed this scheme to provide for an automatic assignment only if the injured employee elected to accept benefits "under an award," leaving untouched the situation where he could accept benefits voluntarily paid by the employer under section 904 and bring a third-party damage action on his own without thereby assigning his cause of action to his stevedore-employer, serves as strong proof that Congress left it to the courts to fashion equitable rules. If Congress had meant to apply the system set forth in section 933(e), or any variation thereof, to damage awards recovered solely by an employee who has also received compensation benefits but not "under an award," it easily might have done so at the very time it saw fit to eliminate the mandatory assignment procedure enacted in 1927. That it did not codify any rule to cover such damage recovery situation, which surely must have been within its contemplation at the time it made a change in the section, speaks strongly of no congressional rule in this area.

Should Congress have wished to act in 1938 with regard to a stevedore-employer's recoupment of compensation benefits from a damage award gained by an injured longshoreman, it would have been especially prudent to do so at that time. Under the 1938 amendments as enacted, an employee still had to make an election whether to accept benefits or seek a third-party recovery. But the mere fact that the employee accepted benefits in the interim period, while deciding whether or not to commence an action, did not serve as an automatic assignment of his cause of action, as it had under the 1927 statute.

466. 33 U.S.C. § 933(b) (1940).
Thus, it would often have happened that an injured longshoreman would draw benefits for, say, a six-month period and then elect to commence a suit. While the employer need not continue to pay benefits after that election, the employer still would desire to recoup the benefits paid out during that six-month interim period. Congress chose to provide no statutory means for an employer to do so. That it should not have acted to do so indicates a legislative choice to let the courts fashion suitable rules under the general maritime law.

Similarly, under the 1959 amendment to section 933, Congress chose not only to abolish the necessity for election by an injured longshoreman between receiving benefits and seeking a third-party damage award, but also to eliminate the mandatory assignment of the employee's cause of action to the stevedore-employer whenever benefits were accepted "under an award" if the employee commenced a third-party suit within six months thereafter. These changes created two situations where an employee could receive benefits and a third-party damage recovery. Yet, Congress abstained from enacting a statutory rule to cover such circumstances, leaving only the federal courts to fashion such rules.

The Supreme Court in *Bloomer* sought support in the legislative history pursuant to the 1959 amendment to section 933 for its assertion that "Congress did not intend to alter" the judicially created *Etna* lien right of a stevedore-employer. It sought this support on three different grounds. First, it quoted a Senate report accompanying the 1959 amendment as saying that "'an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of a recovery.'" This selective quotation is quite misleading since the entire quotation from the Senate report referred to by the Court reads as follows:

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party

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470. Id.
471. 100 S. Ct. 925, 929 (1980).
suit, he would not be entitled to double compensation. The bill, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. 474

What the Senate report stated is that the bill itself 475 provides that an employer must be reimbursed for any compensation paid to an injured employee under the Act. But this statement contained in the committee report is wholly incorrect. The bill referred to, 476 the very one enacted into law in 1959 by Congress, made no provision whatsoever that an employer must be reimbursed for any compensation paid to an injured employee. Just as previous versions enacted by Congress had provided, 477 and just as the current version of section 933 provides, 478 an employer would be reimbursed only when it gained a third-party recovery on a cause of action assigned to it. The bill referred to in the committee report made no provision for codifying the Etna lien right rule.

Further, the Supreme Court asserted that "[d]uring the hearings on the 1959 amendments, the rule that an employer would not be required to bear a proportionate share of the longshoreman's cost of recovery was specifically drawn to Congress' attention, and one witness suggested that it should be abandoned." 479 The Court was again mistaken in its very assertion. To support its contention that "[d]uring the hearings on the 1959 amendments" 480 Congress considered the question whether a stevedore-employer should bear a proportionate share of a longshoreman's expenses in seeking a third-party recovery the Court referred to hearings before a 1956 House special subcommittee. 481 Surely it cannot be contended that testimony before a committee of a different body of the

476. Id.
477. Ch. 509, § 33, 44 Stat. 1440 (1927); ch. 685, §§ 12 & 13, 52 Stat. 1168.
479. 100 S. Ct. 925, 929 (1980) (emphasis added).
480. Id. (emphasis added).
481. Id. at 929 n.5, (citing Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability): Hearings Before a Special Subcomm. of the House Comm. on Educ. and Labor, 84th Cong., 2d Sess. (1956)).
legislature three years earlier can in any way provide support as to the intention of the other body of Congress three years later. Also, the House special subcommittee, after holding three days of hearings in 1956, took no action toward enacting legislation in any way affecting the LHWCA, but instead raised a jurisdictional question as to whether the matter of amending that statute might not more properly be taken up by the House Merchant Marine Committee.482

The subcommittee appreciates the concern of the various parties participating in these hearings over the inequity of permitting employees entitled to benefits under this act to recover substantial sums from third parties when such parties are without fault. The subcommittee, in recognition of this concern, is recommending to the appropriate committees of Congress that legislation be considered which will remedy this situation.483

Neither in that Congress nor any subsequent Congress until 1972484 was action taken which addressed the primary concern of the 1956 House special subcommittee.

Lastly, the Court asserted that "Congress elected not to disturb the existing rule"485 allowing a stevedore-employer to assert a judicially created equitable lien against a third-party recovery made by an injured longshoreman. Yet, the mere fact that Congress "elected not to disturb" an existing judicial rule does not in and of itself codify or uphold that judicial rule. The Court made reference to a brief exchange which occurred between two senators486 prior to approval of the 1959 amendment to section 933 on a voice vote.487 One senator488 asked whether the pending amendment to section 933 in any way affected the Court's grant of an equitable lien to a stevedore-employer on an employee's third-party recovery.489 Another

483. Id.
484. See note 1 supra.
485. 100 S. Ct. 925, 929 (1980).
486. Senators Butler and Bartlett.
senator, quoting a statement from the committee which reported the bill, stated that the committee found it unnecessary to include a provision in section 933 granting an employer a lien on an employee's third-party recovery for compensation benefits since the courts had already construed "the present section . . . [933] as providing such lien." However, the fact that, at the time Congress amended section 933 in 1959, federal courts had provided a stevedore-employer with a judicially created lien under The Etna, does not preclude subsequent courts from modifying the judicially created rule of the case.

The statement by the Court that witnesses at the 1972 hearings on amendments to the LHWCA "brought to the attention of Congress the longstanding rule that an employer could recover the full amount of its compensation award from the longshoreman's recovery against the shipowner" is not supported by the portions of the hearing records cited by the Court. Therefore, no congressional intent on the question of

492. 138 F.2d 37 (3d Cir. 1943).
494. Justice Marshall in his opinion for the Court stated, "Witnesses also brought to the attention of Congress the longstanding rule that an employer could recover the full amount of its compensation award from the longshoreman's recovery against the shipowner." 100 S. Ct. at 931 (footnotes omitted). In a footnote, the Court cited the House and Senate hearing reports for support. Id. at n.10. A reading of the portions of those records cited, however, does not lend persuasive authority to the Court's assertion that the Etna lien rule was "brought to the attention of Congress."

The first reference the Court makes to the Senate hearing is to the prepared remarks of Thomas W. Gleason, president of the International Longshoremen's Ass'n, AFL-CIO, which were inserted into the hearing record. Mr. Gleason did not appear before the Senate subcommittee and did not testify. Further, his prepared remarks noted that the "Compensation Act specifically requires longshoremen to repay the stevedoring company employers out of any third party recovery . . . ." 1972 Senate Hearings, supra note 101, at 160 (emphasis added). Mr. Gleason did not refer to the Etna rule.

Similarly, in prepared remarks inserted into the record, David B. Kaplan, chairman of the Admiralty Section, American Trial Lawyers Ass'n, in distinguishing between a recovery based on unseaworthiness and one founded on negligence, stated that in either situation the "compensation carrier (the stevedore-employer or its insurance company) had a lien on his recovery of compensation damages for reimbursement of the compensation paid and the medical [benefits] furnished." 1972 Senate Hearings, supra note 101, at 371. In his oral testimony, not cited by the Court, before the subcommittee which consisted that day of only Sen. Eagleton, he remarked, "And another think [sic] I want to make sure you understand completely: Out of your re-
The ability of the lower courts to reevaluate the *Etna* lien rule in light of the loss-allocation system of comparative negligence existing under the 1972 amendments to the LHWCA remains unimpaired, either by the legislative history of any Congress considering amendments to the Act, or by the Su-

covery, you must pay back all the sum of money that you may have received in compen-
sation. So there is no double recovery." *1972 Senate Hearings, supra* note 101, at 354. Mr. Kaplan made his remarks in the context of suggesting the abolishment of workers' compensation as the exclusive liability of the employer.

Next, the Court refers to a letter from Braxton B. Carr, president of the American Waterways Operators, Inc., to Sen. Williams, the Chairman of the Senate Labor and Public Welfare Committee, stating, "Also, any compensation paid to the employer under the Act is deducted from the court-awarded damages as an offset payment." *1972 Senate Hearings, supra* note 101, at 720.

The first reference to the House hearings is to a colloquy between Rep. Daniels, the Chairman of the House subcommittee, and Francis A. Scanlan, of the National Maritime Compensation Committee. Four members of the House subcommittee were present on that day when Rep. Daniels asked Mr. Scanlan what situation prevailed under the LHWCA in regard to the right of a compensation carrier to recover the amounts paid to an injured longshoreman. Mr. Scanlan replied:

The same situation prevails. There is a subrogation lien. If the longshoreman recovers $30,000 or $100,000 and if his compensation lien amounts to $3,000 or $4,000, that has to be deducted from either the settlement, the direct settle-
ment, or from a verdict in court. So the same situation prevails, Mr. Chairman.

Mr. Daniels. I just wanted to clarify that in my mind.

*1972 House Hearings, supra* note 101, at 119.

The Court next refers to the testimony given by John R. Martzall, president of the Louisiana Trial Lawyers Ass'n, wherein he stated, "Under the Longshoremen's and Harbor Workers [sic] Act the stevedore is permitted to intervene in the third-party action to get back from the actual tort-feasor, the shipowner, all of the compensation which it had already paid or is going to pay." *1972 House Hearings, supra* note 101, at 157. It is unclear whether Mr. Martzall meant to assert that the LHWCA itself provided that in every circumstance the compensation carrier be allowed recovery of benefits paid, or whether he meant to include both statutory and *Etna* lien recovery situations.

The final reference made by the Court is to the companion prepared statement of Mr. Gleason, *supra*, given before the House subcommittee. Again, Mr. Gleason did not testify in person and in his prepared remarks, which were inserted into the hearing record, he makes reference only to the Act itself and not to any recovery rights under case law. *1972 House Hearings, supra* note 101, at 295.

Such evidence—letters, prepared remarks not delivered but merely inserted into the hearing record, and oral testimony referring solely to the LHWCA itself and not to any judicially created lien right rules—does not make for convincing authority that, in fact, "[w]itnesses also brought to the attention of Congress the longstanding rule" of the *Etna* case. Legislative ratification cannot be based on such evidence. Iso-
lated statements, themselves often ambiguous and not on point, are simply not suffi-
preme Court's holding in *Bloomer*. *Bloomer* should properly receive a narrow construction of its holding that a stevedore-employer or its compensation carrier may not be held liable for a proportionate share of a longshoreman's expenses in obtaining recovery from a negligent third party.

The eminent fairness and reasonableness of such an equitable lien credit rule within the context of a comparative negligence system is forcefully illustrated by applying the rule to the facts and figures of the *Edmonds* case. The jury in that case apportioned ten percent negligence to the injured employee, twenty percent to the shipowner, and seventy percent to the stevedore-employer. The jury awarded damages totaling $100,000, which were first reduced by the ten percent causal negligence attributed to the employee. Under the Supreme Court's decision in *Edmonds*, the twenty percent negligent shipowner was severally liable for the entire $90,000 judgment. From this fund, the stevedore-employer's subrogated insurance company was allowed to enforce an *Etna* equitable lien in the amount of $49,152, the amount of statutory benefits paid. The end result was that the stevedore-employer had no liability either in compensation benefits or damage amounts, the shipowner was liable for $90,000, and the injured employee received $49,152 in compensation benefits and $40,848 in damage amounts.

Applying the equitable lien credit rule to modify the *Etna* lien rule, the result would be different and more fair. Assuming the same proportion of negligence among the parties, and the same total damage award, the injured employee would receive the same amount of compensation benefits and the same reduced damage award. The shift would occur between the financial liability of the employer and the shipowner. Since seventy percent or $70,000 of the total damage award was attributable to the negligence of the employer, the employer would be denied an *Etna* lien because his payments to the employee would be short of his percentage share of responsibility for the employee's total recovery. That is, the employer is responsible for $70,000 in damages, but has paid only $49,152. He cannot be compelled to pay the full $70,000 due

496. Id. at 2764 n.1 (Blackmun, J., dissenting).
to the LHWCA benefit level limit. But because of his causal negligence, the employer would not be allowed to recoup its compensation benefits from the $90,000 damage amount awarded to the employee. The negligent shipowner, on the other hand, would not be liable, initially, for the entire $90,000 damage amount. Instead, the shipowner would be liable for $20,000, the amount corresponding to its percentage of comparative responsibility for the employee's injury. Additionally, due to its status as joint and several tortfeasor, it would be required to pay the difference between the amount of benefits paid by the employer and the employer's total percentage share of responsibility for the damage recovery. The difference in outcome between application of a full *Etna* lien and application of such a lien as modified by the equitable lien credit rule can be illustrated by the table below.

<table>
<thead>
<tr>
<th>%Fault</th>
<th>Recovery or Liability (Total $100,000)</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Edmonds</td>
</tr>
<tr>
<td>Shipowner</td>
<td>20</td>
</tr>
<tr>
<td>Stevedore-Employer</td>
<td>70</td>
</tr>
<tr>
<td>Longshoreman</td>
<td>10</td>
</tr>
</tbody>
</table>

* [49,152 Workers' Compensation + 40,848 Third-Party Action]

Whether a stevedore-employer’s compensation liability to an injured employee following a third-party recovery should take the form of future benefits paid according to the LHWCA schedule, or a present value, lump-sum settlement, is a matter for negotiation between the parties subject to the approval of the Secretary of Labor on a case by case basis.497

Modification of the *Etna* lien rule fully comports with the five propositions asserted above498 as appropriate for any loss-allocation scheme encompassing both a fault and a non-fault mechanism. An injured employee receives his compensation


498. See text at page 416 *supra.*
benefits regardless of fault. His tort recovery is diminished by only his own causal negligence, and not by that of anyone else (as it was in the circuit court’s decision in *Edmonds*). The employee is still not allowed a double recovery of compensation benefits and a damage award for the same injury. Most importantly, causal fault is apportioned as far as possible in relation to the comparative responsibility of all wrongdoers. Finally, a negligent employer is not required to pay any more than the amount imposed by the benefits schedule of the LHWCA.

VI. Conclusion

The general maritime law is one of the oldest bodies of law known to man. For that reason it is often thought to be subject to a certain degree of inertia. It is true that there are less drastic changes in that body of law than in many fields of law in effect today. Nevertheless, the general maritime law has always been contemporary, progressive and often in a position of leadership with regard to other areas of law.

The history of the general maritime law of tort indicates that comparative negligence, in the form of divided damages as to ship collisions and in the form of true comparative negligence as to personal injuries, has been in full force and effect for many years. Recently, the divided damages rule as to collision law was altered to that of true comparative negligence. The adoption of a rule of true comparative negligence in determining the legal and damage liabilities of the parties to an accident involving a longshoreman is a logical, reasonable and equitable extension of the applicability of true comparative negligence in the general maritime law. There are no real barriers to such an extension, only the imagined impediment of the “exclusive liability” provision of the LHWCA. As has been pointed out above, there is no rhyme or reason for requiring one party to bear the full brunt of liability and damages when a number of parties are at fault in causally connected negligence.

The time has come to stop the pendulum. For years it has been swung between total liability on the part of a shipowner or some other non-employing third party and total liability on the part of a stevedore-employer for the injury or death of a longshoreman or harbor worker caused by the concurrent negligence and fault of a number of parties including the steve-
dore-employer. The authors are of the opinion that the fault
system of negligence under the general maritime law and the
non-fault system of liability under the LHWCA logically and
equitably can be combined by use of the equitable lien credit
rule, so as to reach a result which does not cast an undue bur-
den on any particular party and which permits the injured
longshoreman or harbor worker or the survivors of one who is
deceased to recover the full amount of damages due and ow-
ing by reason of the accident. The approval and adoption of
an equitable lien credit rule is in keeping with the modern
realistic philosophy of spreading the risk of liability and pay-
ment of damages over those causing or contributing to the
cause of a disaster within the logical, reasonable and equitable
boundaries of a hybridization of the two systems applicable
thereto.499

499. A similar principle was used and the same result was reached under a modifi-
cation of the theory of contribution in Minnesota and Pennsylvania. See Lambertson