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great advantages,[73] but it is equally clear that care should be taken by those electing or intending to elect so that involuntary termination does not occur. Thus, the attorney, accountant or other financial advisor must explicitly explain all ramifications of an election, especially what events may lead to termination. Further periodic checks are necessary to insure that no subsequent events have come about which would cause disqualification.

All the cases considered which were decided within the Fourth Circuit seem to be justified under the statutes and regulations as they now stand. This is not to say, of course, that there is no need for improvement in the law itself, and suggestions for improvement have been made. Inflexibility would seem to be the main problem and could be cured through regulations or rulings. In cases such as *A & N*, the court itself performed the task.[74] The major statutory revision needed seems to concern section 1371(a)(4) which should clearly state that two groups of stock are not of different classes for purposes of Subchapter S if the sole distinction between them is a difference in voting rights.

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## CONTRIBUTORY NEGLIGENCE AS A PER SE BREACH OF THE STEVEDORE'S IMPLIED WARRANTY

The Longshoremen's and Harbor Workers' Compensation Act[1] allows a longshoreman injured in the course of his employment to waive his compensation payments[2] and sue a shipowner for damages on the basis of unseaworthiness or negligence.[3] If the shipowner has supplied defective equipment, for example, or has created an unsafe condition,[4] he will be strictly liable to the longshoreman for the "unseaworthy" vessel.[5]

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[73]In 1968, over 200,000 corporations elected Subchapter Status. 2 U.S. TREASURY DEPARTMENT, TAX REFORM STUDIES AND PROPOSALS 271 (Comm. Print 1969).

[74]Text accompanying notes 33 and 62 *supra*.

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[1]33 U.S.C. §§ 901-50 (1970).

[2]*Id.* at § 933(a).

[3]The Act's exclusive liability provision abrogates any independent tort liability of the employer. Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511, 514-15 (5th Cir. 1967).

[4]Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[5]Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

If the injured longshoreman himself is contributorily negligent, his damages are reduced in proportion to his negligence, as is customary in admiralty law.[6] The shipowner may seek to relieve his burden of strict liability, however, by impleading the longshoreman's employer for indemnity, and the shipowner will prevail if he can prove that the employer breached his warranty of reasonable safety implied by the law.[7] Recovery for breach of warranty, however, is not necessarily reduced or barred by the shipowner's own negligence.[8] In fact, the warranty is now construed strongly in favor of the shipowner, as a recent Fourth Circuit case illustrates.

In *United States Lines, Inc. v. Jarka Corp.*,[9] a longshoreman returning from lunch ashore stumbled over a coil of heaving line left by a crewman of the ship in a narrow passageway near a hatch.[10] The longshoreman, Kwarta, fell and injured his elbow on the hatch coaming.[11] He subsequently brought an action for damages against United States Lines for unseaworthiness, and United States Lines impleaded the stevedoring company for any damages which might be awarded to Kwarta. The district court found the ship unseaworthy as a result of the misplaced line, but reduced damages one-third for Kwarta's contributory negligence in failing to see the hazard in time to skirt it.[12] United States Lines appealed the district court's refusal to allow indemnity on the basis of Kwarta's contributory negligence.

The question presented to the Fourth Circuit was whether Kwarta's negligent failure to see the coiled rope was a breach of Jarka's implied warranty of workmanlike performance. This warranty, which originated in the 1956 Supreme Court case of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,[13] has been called the essence of every stevedoring contract; it has been held to imply a duty on the part of every worker to perform properly and safely.[14] Without undertaking an analysis of the factors surrounding the accident, the appellate court in *Jarka* concluded that the contributory negligence found as a fact by the district court was

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[6]*See* 2 M. NORRIS, THE LAW OF SEAMEN § 630 at 203 (3d ed. 1970).

[7]Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

[8]Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

[9]444 F.2d 26 (4th Cir. 1971), *rev'g* Kwarta v. United States Lines, Inc., 314 F. Supp. 112 (D. Md. 1970).

[10]314 F. Supp. at 114.

[11]*Id.*

[12]*Id.* at 116.

[13]350 U.S. 124 (1956).

[14]*Id.* at 133-34. *See also* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 318 (1964) (discussing the *Ryan* holding).

in itself a breach of the duty of reasonable safety.[15]

In equating contributory negligence with breach of warranty, the court relied upon the recent Second Circuit case of *McLaughlin v. Trelleborgs Angfartygs A/B*.[16] There, a longshoreman unsuccessfully attempted to raise engine bearings from a lower deck with a defective hoist supplied by the ship.[17] The longshoreman had put himself in a dangerous position near the hoist high above the deck when he slipped and fell. In the indemnity action the court found him to be one-sixth contributorily negligent.[18] The appellate court articulated a broad rule that a stevedoring company implicitly warrants that its men will not negligently expose themselves to injury and that reasonable safety extends to human, as well as material, resources.[19] According to *McLaughlin*, then, any negligence of the longshoreman, however slight, is not "reasonably safe performance" and amounts to a per se breach of his warranty.

It seems, however, that the *McLaughlin* rule followed in *Jarka* only aggravates a built-in inequity of the maritime triangle. Unlike the initial action against the shipowner for unseaworthiness, where there is a weighing of fault to apportion damages, recovery in the indemnity action is "all-or-nothing":[20] either the warranty is breached or it is not; if it is, the employer bears the full burden, even if the shipowner is 99% at fault.[21] Under these circumstances, it would appear that a court should evaluate the stevedore's conduct flexibly and cautiously, examining the totality of the situation, including the nature of the hazard created by the shipowner,[22] to achieve an equitable result.

In *Jarka*, however, there was virtually no analysis of the facts sur-

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[15]444 F.2d at 28.

[16]408 F.2d 1334 (2d Cir. 1968), *cert. denied*, 395 U.S. 946 (1969).

[17]408 F.2d at 1336.

[18]*Id.*

[19]*Id.* at 1337. The contributory negligence of the longshoreman is imputed to his employer. Arista Cia DeVapores, S.A. v. Howard Terminal, 372 F.2d 152 (9th Cir. 1967).

[20]*See* Larson, *Workmen's Compensation Employer's Independent Action Against Third Party*, 27 WASH. & LEE L. REV. 223, 249 (1970). *See also* Proudfoot, *"The Tar Baby": Maritime Personal-Injury Indemnity Actions*, 20 STAN. L. REV. 423 (1968). The possibility of tort-contribution was long ago dismissed as a means of adjustment in this type of suit in Halcyon Lines v. Haenn Ship Ceiling & Refining Corp., 342 U.S. 282 (1952).

[21]In Hartnett v. Reiss S.S. Co., 421 F.2d 1011 (2d Cir.), *cert. denied*, 400 U.S. 852 (1970), a jury found one percent contributory negligence on the part of the stevedore, and the court's mechanical application of *McLaughlin* compelled it to award full indemnity to the shipowner despite the fact that shipowner was 99% at fault. The court said:

> [I]t does seem strange that conduct by a . . . [stevedore] which deviated only minimally (1%) from the norm should subject his employer to potentially full liability.

*Id.* at 1018.

[22]*See* text accompanying notes 45-52 *infra*.

rounding the accident; the appellate court's conclusion was automatic. This is not to imply that the result reached in *Jarka* was or was not unjust; rather the problem rests in blind application of the *McLaughlin* rule which effectively forecloses any introspective examination into the fairness of the result. Although the immediate judicial concern in *Jarka* was and should have been breach of warranty, the fundamental justification for indemnity nevertheless is fairness; to place the loss where it rightly belongs.[23] In a case where the longshoreman's negligence is minimal, adherence to a per se rule plainly may lead to inequitable allocation of damages.[24]

The district court in *Jarka* relied upon the Fifth Circuit case of *D/S A/S Sverre v. Texports Stevedore Co. (Maples' case)*,[25] in which a longshoreman fell while descending an unsafe ladder into a hold, and was seriously injured.[26] In striking disagreement with both Second and Fourth Circuit precedents, the court in *Maples* found that the longshoreman's 40% contributory negligence was not a breach of the warranty of workmanlike service.[27] Although this appears to be the only Fifth Circuit case exactly on point, other cases of that circuit have said that contributory negligence is only a factor in evaluating the longshoreman's conduct

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[23]*See* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964).

[24]*See, e.g.*, note 21 *supra*. It has been suggested that common-law indemnity, which may loosely be called a quasi-contractual remedy, is barred by the statutory exclusivity of the employee's recovery. *See* note 3 *supra*; note 54 *infra*. *See also* Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3d Cir. 1954). Thus it has been held inappropriate to rely upon concepts of primary (or active) and secondary (passive) negligence as a basis for indemnity. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1958). *See also* Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 420-22 (1969). However, in Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PA. L. REV. 321 (1954), the author stated:

> Granted that the effect of the act makes the existence of a contractual or other relational duty running from the employer to the shipowner an indispensable condition to indemnity, the questions remain: Under what circumstances will it be held that such duty has been breached and, if it has, that the breach may be held to impose a liability for indemnity? Once the duty and breach are established, the equities are apt to return as a factor in the deliberations of courts where the provisions of the contract leave room for resort to such considerations. In short, the ultimate result may be an amalgamation of the two theories of liability, in which the quasi-contract principles are imported into the areas left open by agreements between the parties.

*Id.* at 343.

[25]1966 A.M.C. 2032 (S.D. Tex. 1966), *aff'd* 387 F.2d 648 (5th Cir.), *cert. denied*, 391 U.S. 914 (1968).

[26]*Id.* at 2033-34.

[27]*Id.* at 2035.

under his warranty.[28] Thus it appears that some attempt is made in the Fifth Circuit to focus the inquiry not on the longshoreman's conduct in isolation, but on the totality of the situation in which it might be said that the stevedore acted with reasonable safety in a hazardous circumstance, despite the fact that he did not behave perfectly.

The Supreme Court case of *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*,[29] also relied upon by the district court,[30] tends to support the position that negligence is only a factor in the breach of warranty issue. *Italia* emphasized that contract and not negligence standards should apply, recalling the *Ryan* decision:

> [The Court in *Ryan*] pointedly declined to characterize the stevedore's conduct as negligent . . . . Although in *Ryan* the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and non-negligent conduct alike.[31]

The Court in *Italia* added that the implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment,[32] and that the liability imposed under the warranty "should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."[33]

*Italia* had approached the breach of warranty issue by defining the scope of the duty owed by the longshoreman under his warranty and then determining whether a standard of reasonable safety had been reached consonant with such duty. The district court in *Jarka* therefore apparently thought that even though Kwarta negligently stumbled, the stevedore did not have supervision over the rope and hence the scope of the duty of safety with respect to it was limited.[34] This argument was rejected by the court of appeals with the statement that *Italia* has "rarely been adapted to preclude a judgment-over by the ship against the stevedore even when the ship has breached its duty of care."[35] The weight of recent authority seems to be in accord with this for two reasons.

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[28]*See, e.g.*, Lusich v. Bloomfield S.S. Co., 355 F.2d 770, 778 (5th Cir. 1966). The Third Circuit has taken the same position, but only in dicta. *See* Humble Oil & Ref. Co. v. Philadelphia Ship Maint. Co., 444 F.2d 727, 731 (3d Cir. 1971).

[29]376 U.S. 315 (1964).

[30]314 F. Supp. at 115.

[31]376 U.S. at 319.

[32]*Id.* at 321-22.

[33]*Id.* at 324.

[34]314 F. Supp. at 115.

[35]444 F.2d at 28. The Supreme Court has not since addressed itself to the narrow question of what conduct may constitute breach of warranty of workmanlike performance.

First, under the *McLaughlin*[36] rationale the supervision and control standard which defines the scope of a longshoreman's duty under his employer's warranty became a subjective, internalized standard: the longshoreman's duty extends not only to the equipment with which he works, but also to himself, and he will therefore always have the power to minimize the risk of injury caused by his own negligence.[37] Second, it is just as easy to say that the stevedore company is the party best situated to encourage its employees to take the proper precautions for their own safety.[38] Against these considerations, therefore, the argument is less persuasive that shipowner's supervision and control of the rope limited the stevedore's duty of safety with respect to it.

Whatever force *Italia* has had in broadening the vision of courts beyond the isolated negligence of an injured longshoreman, its vitality has been consistently undermined by the earlier Supreme Court case of *Crumady v. The Joachim Hendrick Fisser*,[39] which espoused a narrower view. The appellate court in *Jarka* relied upon *Crumady* as being "particularly apt" for the circumstance.[40] In *Crumady* a longshoreman was injured when a boom fell because a fellow worker put too much strain on a winch.[41] The ship's crew had improperly set the safety "cut-off" switch on the winch, thereby allowing the heavy strain and giving rise to the claim of unseaworthiness. Justice Douglas wrote that since the negligence of the stevedores "brought the unseaworthiness of the vessel into play," they had breached their warranty of workmanlike performance.[42]

The "brought into play" language has been widely cited, and Judge

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[36]Note 16 *supra*.

[37]408 F.2d at 1337-38. *But see* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 76.43(a) (1970). Formerly, the stevedore's duty was not as simplistically described. Larson perceives the distinction, in older cases, between creating a dangerous condition and failing to discover it, and finds that generally in every case where the shipowner creates the dangerous condition, indemnity has been allowed where the stevedore discovers the condition but continues his work. Similarly, indemnity has typically been denied where the stevedore has not discovered the hazard created by the shipowner. This is contrary to *Jarka*, of course. Another category confuses the distinction: this is where the defect created by the shipowner is latent, but the stevedore activates it by his own misconduct. Indemnity has been allowed in this situation and it is arguable that *Jarka* fits into it. In the final category established by the author, indemnity is always allowed where the stevedore creates the hazard and the shipowner fails to discover it. These distinctions based on notice of course go far beyond the statement that the stevedore *always* has the power to minimize the risk of his own injury.

[38]This argument was used in Arista Cia DeVapores, S.A. v. Howard Terminal, 372 F.2d 152, 154 (9th Cir. 1967).

[39]358 U.S. 423 (1959).

[40]444 F.2d at 28.

[41]358 U.S. at 425-26.

[42]*Id.* at 429.

Bryan in *Jarka* also drew upon it to say: "The striking parallel [to *Crumady*] is that in the instant case also the ship created the danger, but the longshoreman brought it into play."[43] It is indeed hard to imagine a situation, though, in which a stevedore who is negligently involved in an accident has not brought the unseaworthiness into play, since accidents do not occur by themselves. Thus *Crumady* probably stands for the same proposition that *McLaughlin* represents: *any* negligence of the longshoreman which is a proximate cause of the accident and injury will be a breach of the warranty of workmanlike performance.[44]

Two years after it enunciated the doctrine of the stevedore's warranty in *Ryan*, the Supreme Court in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*[45] indicated that some types of conduct on the part of the shipowner could preclude indemnity even though a warranty might have been breached.[46] Despite the subsequent broadening of the stevedore's liability under the warranty, however, *Weyerhaeuser* has been narrowly construed. The appellate court in *Jarka* rejected the district court's contention that the placement of the rope in the access-way of the ship was conduct by the shipowner sufficient to defeat indemnification.[47] This comports with previous Second and Fourth Circuit holdings that such conduct does not include the "mere creation of the unsafe condition."[48] In fact, it is only when the shipowner actively hinders or prevents the longshoreman from performing safely that indemnity will be denied.[49]

It is suggested, though, that this rule be re-examined in light of the more recent broadening of the stevedore's liability under his warranty. If the law makes the longshoreman's conduct under his warranty harder to excuse, perhaps it also ought to reconize that many types of misconduct by the shipowner will now make the warranty easier to breach.[50] With its

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[43]444 F.2d at 29.

[44]It is possible of course that a jury will find otherwise. *See, e.g.*, Waterman S.S. Corp. v. David, 353 F.2d 660 (5th Cir. 1965). In such a case it may be reversible error to upset the verdict, even if it appears as a matter of law that the warranty has been breached. *See* International Terminal Operating Co. v. N.V. Nederl. Amerik Stoomv. Maats., 393 U.S. 74, *rev'g* Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 392 F.2d 763 (2d Cir. 1968). For a treatment of proximate cause in indemnity actions see Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir. 1958).

[45]355 U.S. 563 (1958).

[46]*See generally* Larson, *Workmen's Compensation Employer's Independent Action Against Third Party*, 27 WASH. & LEE L. REV. 223 (1970).

[47]444 F.2d at 29.

[48]*E.g.*, Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965); Evans v. Overseas Maritime Co., 330 F. Supp. 654, 663 (D.S.C. 1970), *aff'd*, 451 F.2d 188 (4th Cir. 1971).

[49]Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd., 388 F.2d 267, 271-72 (5th Cir. 1968).

[50]The *Weyerhaeuser* limitation on stevedore's liability is not now utilized as a factor to be balanced with possible liability under the warranty. It is raised only as an affirmative

balancing of conduct approach to the warranty problem, it is not surprising that the Fifth Circuit in the *Maples* case[51] has taken this view, but it is to be emphasized that that case is unique and runs strongly against the bulk of authority. However, it would seem that an expanded interpretation of *Weyerhaeuser* might at least enable courts to be flexible in those situatons where a shipowner who is greatly at fault stands to receive full indemnification.[52]

*Jarka* thus exemplifies the current tendency of federal courts to construe every matter pertaining to maritime indemnity strongly against the stevedore. In retrospect, though, it is questionable whether the Supreme Court, when it enunciated the stevedore's implied warranty in *Ryan*,[53] ever contemplated that the stevedore should bear the consistent burden of liability that federal courts have since imposed. On the contrary, it seems apparent that the *Ryan* court implied the warranty of workmanlike performance principally to alleviate the shipowner's onerous burden of strict liability;[54] contribution had been disfavored prior to *Ryan*, in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[55] and the implied warranty was the only feasible alternative to allocate loss.

In *Halcyon*, a shipowner had sought unsuccessfully to obtain contribution from the stevedoring company as a joint tortfeasor.[56] Although it was implicitly recognized in *Halcyon* that contribution might be a desirable remedy for both parties,[57] the Supreme Court noted that at common law, contribution was not generally allowed absent express legislative assent,[58] and that Congress had thoroughly preempted the field with the

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defense after the breach of warranty issue has been resolved in favor of the shipowner; at such time the burden is upon the stevedore to prove that his conduct should be executed under this rule. Humble Oil & Ref. Co. v. Philadelphia Ship Maint. Co., 444 F.2d 727, 732 (3d Cir. 1971). It is suggested, however, that viewing each party's conduct in isolation may be inequitable.

[51]1966 A.M.C. 2032 (S.D. Tex. 1966), *aff'd*, 387 F.2d 648 (5th Cir.), *cert. denied*, 391 U.S. 914 (1968); *see* text accompanying notes 27-30 *supra*.

[52]Note 21 *supra*.

[53]350 U.S. 124 (1956).

[54]Justice Black in his dissenting opinion indicated that shipowner's counsel had stipulated that his action was not based on a contract but on common-law indemnity. He then noted that common-law indemnity was not permitted by the Act and said,

> I suppose it is for this reason that the Court purports to find an actual contract to indemnify and thus decides the case on an issue neither presented in the complaint nor considered by the trial court.

*Id.* at 141-42.

[55]342 U.S. 282 (1952). In *Halcyon*, the stevedoring contractor was hired to make repairs on Halcyon's ship, and during those repairs a longshoreman was injured. A jury found the longshoreman 75% contributorily negligent. *Id.* at 283.

[56]*Id.*

[57]*Id.* at 284-85.

[58]*Id.* at 285.

Longshoremen's and Harbor Workers' Compensation Act.[59] The Court in *Halcyon* therefore rejected apportionment of damages, not because there was another, better method of allocation, but because altering the structure of maritime recovery, so firmly imbedded in statute, was not its function.[60]

The *Ryan* court, however, faced the Compensation Act head-on and concluded that a warranty remedy would contravene neither the letter nor the spirit of the Act.[61] The device of the warranty, then, finally enabled the shipowner to shift his loss if he could show professional misconduct on the part of the stevedore.

It is thus apparent that the pervading policy against which both the *Halcyon* and *Ryan* cases were considered was the alleviation, in some way, of the essentially unfair burden of constant and strict liability under which the shipowner suffered.[62] Courts since *Ryan*, though, appear to have placed the stevedore in a situation similar to that occupied by the shipowner before *Ryan*: liability almost always falls upon him regardless of the fault of the other party. Under this circumstance, it would appear that the necessity for judicial alleviation of the stevedore's plight is no less imperative than it was fifteen years ago for the shipowner. This seems particularly true since the stevedore's problem arises from within the judicial process by the unnecessarily harsh construction and application of the inherently flexible legal tools of the warranty and the *Weyerhaeuser* limitation. But inasmuch as the federal courts probably will continue to mechanically apply a per se rule of stevedore liability, as

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[59]*Id.* at 285-86.

[60]The *Halcyon* Court said:

> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.

*Id.* at 285.

[61]350 U.S. at 131-32.

[62]In Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PA. L. REV. 321 (1954), cited in the *Ryan* opinion, 350 U.S. at 132 n.6, the author states:

> During the past decade . . . the subject [of contribution and indemnity] has attained special significance in connection with injuries to harbor workers; the expansion of responsibility of shipowners has produced a considerable body of decisions dealing with their attempts to shift the burden of damages to the worker's employer.

*Id.* at 321. *See also* Ambler, *Seamen Are "Wards of the Admiralty" but Longshoremen Are Now More Privileged*, 29 WASH. L. REV. 243 (1954).