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Workman Compensation Suits: a Rejection of the Common Fund Doctrine: Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980)

Linda A. Brandt

WORKMAN COMPENSATION SUITS: A REJECTION OF THE COMMON FUND DOCTRINE

Bloomer v. Liberty Mutual Insurance Co. 445 U.S. 74 (1980)

The United States Supreme Court has ruled in *Bloomer v. Liberty Mutual Insurance Co.*[1] that a stevedore's lien for the amount of compensation payments to an injured longshoreman under the Longshoremen and Harbor Worker's Compensation Act[2] against the longshoreman's recovery in a negligence action against the shipowner may not be reduced by an amount representing the stevedore's proportionate share of the longshoreman's legal expenses in obtaining recovery from the shipowner. As a result, the "equitable common fund" doctrine[3] has no application to cases arising under the Longshoremen and Harbor Worker's Compensation Act.

In an 8–1 decision,[4] the Court in *Bloomer* concluded another episode in the judicial struggle over the distribution of amounts recovered in suits brought by the longshoremen against a shipowner. The Court's decision clearly indicates an intent to guarantee the stevedore full reimbursement for all compensation benefits paid to the employee.

The episode began when Petitioner, William E. Bloomer, Jr., was injured during the course of his employment on the vessel S.S. Pacific Breeze. Having received $17,152.83 in compensation from Respondent, Liberty Mutual Insurance Company,[5] Bloomer brought a diversity suit against the owner of the vessel alleging negligence on the part of the shipowner.[6] Respondent was designated carrier of workers' compensation for Bloomer's employer, Connec-

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1. Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74 (1980).

2. 33 U.S.C. 901, et seq. (1976).

3. The Equitable Common Fund Doctrine states that when a third person benefits from litigation instituted by another, courts should exercise their equitable powers to require that person to bear a portion of the expense of the suit. *See* Boeing Co. v. Van Gemert, ___ U.S., ___, 100 S. Ct. 225 (1980); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257–259 (1975); *id.* at 275–280 (Marshall, J. dissenting); Mills v. Electric Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Bank, 307 U.S. 161 (1939).

4. Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74 (1980). Mr. Justice Blackmun dissented and filed an opinion. *Id.* at 88.

5. The designated carrier of workers' compensation for Bloomer's employer, Connecticut Terminal Company, Liberty Mutual Insurance Co. is to be referred to as the stevedore in the Court's opinion. *Id.* at 75 n.1.

6. Bloomer alleged that the shipowner had negligently created hazardous conditions on board the vessel, that the ship's deck was slippery and dangerous, and that as a result he had fallen and incurred severe injuries. *Id.* at 75.

ticut Terminal Company, and was therefore subrogated to all its rights under the Act.

Bloomer notified Respondent of the pending action and requested that Respondent reduce its lien by a share of the litigation costs.[7] Respondent refused, asserting its right to full reimbursement.

Petitioner settled with the shipowner for $60,000 and moved for summary judgment against the insurance company, arguing that Respondent's lien against the recovery from the shipowner be reduced by an amount representing its proportionate share of the expenses of the suit against the shipowner. Petitioner contended that since recovery from the shipowner would benefit Respondent, equity required that Respondent bear a portion of the expenses of obtaining that recovery.[8]

The United States District Court for the Southern District of New York denied Petitioner's motion.[9] On Petitioner's appeal, the Second Circuit affirmed the decision of the district court.[10] The court of appeals concluded that a stevedore should not be required to pay a share of the longshoreman's legal expenses in a suit brought against the shipowner.[11] Certiorari was then granted by the United States Supreme Court.[12]

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7. After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third party (i.e. the shipowner). 33 U.S.C. § 933(b). The stevedore is entitled to be reimbursed for any compensation paid to the longshoreman out of the net proceeds of the recovery paid to the longshoreman by the third party. S. REP. No. 428, 86th Cong., 1st Sess. 2, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 2135.

8. Bloomer sought to have the fund distributed in the following manner:

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	59,797.20
less attorney's fee of one third	(19,932.40)
balance	39,864.80
lien of stevedore	17,152.83
less proportionate share of fees and expenses (.3355866 x 17,152.83) (5,756.26)	(11,396.57)
net to Bloomer	28,468.23

Under this distribution, Bloomer would receive a total of $45,621.06, $5,756.26 over and above the amount representing his $60,000 damages recovery minus expenses, 445 U.S. at 76.

9. 488 F. Supp. 652 (S.D.N.Y. 1978).

10. 586 F.2d 908 (2d Cir. 1978).

11. *Id.* at 911.

12. Certiorari was granted to determine whether a stevedore should be required to pay a share of the longshoreman's legal expenses in a suit brought against the shipowner. The courts of appeals had been divided.

The Ninth and Fourth Circuits had held that the stevedore should be charged with a share of the longshoremen's legal expenses, Bachtel v. Mammoth Bulk Carriers,

In affirming the decision of the court of appeals, Justice Marshall, writing for the Court, emphasized three points.[13] Each point was based upon the Court's understanding of Congress's intentions in enacting the workmen's compensation statutes. According to the Court, these intentions were made clear by the Act's language, structure and history.

As a first point, the Court indicated that Congress did not intend for the stevedore to pay a portion of the legal expenses incurred in a suit by a longshoreman because the Act did not expressly so provide.[14] This failure, the Court pointed out, is in clear contrast to the explicit provision for distribution of any amount obtained by the stevedore in a suit brought pursuant to its assignment[15] from the longshoreman. The latter provision clearly provides that the stevedore is not responsible for paying any of the expenses incurred by it in its litigation against the shipowner.[16] Since Congress did not intend the stevedore to pay legal expenses when it brought suit against the shipowner pursuant to § 933(e), there is no reason to assume Congress should intend the stevedore to pay these expenses when the longshoreman brings the action.[17]

Ltd., 605 F.2d 438 (9th Cir. 1979); Swift v. Bolton, 517 F.2d 368 (4th Cir. 1975). The First Circuit, like the Second, has disallowed apportionment, Cella v. Partenreederei MS Ravenna, 529 F.2d 15 (1st Cir. 1975), *cert. denied*, 425 U.S. 975 (1976). The Fifth Circuit has adopted a third approach calling for an individualized inquiry into whether apportionment is fair in the particular case, Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978).

13. 445 U.S. at 77-88.
14. 445 U.S. at 78.
15. 33 U.S.C. § 933(c).
16. 33 U.S.C. § 933(e) provides:

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under Section 907 of this title;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, ... and the present value of the cost of all benefits thereafter to be furnished under Section 907 of this title . . .; and
>
> (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

17. 445 U.S. at 78-79.

As a second point, the Court noted that an evaluation of the history of the Act indicates that double compensation on the part of the longshoreman was clearly not contemplated by Congress.[18]

However, the legislature did contemplate provision of full reimbursement to the stevedore for its compensation payment.[19] The Court traced the legislative history[20] of the original act and its subsequent amendments to illustrate its point, that forcing the stevedore to pay any of the longshoreman's legal expenses would be the same as providing the longshoreman with a double recovery,[21] as he would be receiving a greater sum than would be

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18. *Id.*

19. *Id.*

20. As originally enacted in 1927, the Longshoremen's and Harbor Workers' Compensation Act required a longshoreman to choose between the receipt of a compensation award from his employer and a damages suit against the third party. If the longshoreman elected to receive compensation, his right of action was automatically assigned to his employer. Act of March 4, 1927, ch. 509, § 33, 44 Stat. 1440 (current version at 33 U.S.C. § 901, et seq. (1976)).

In 1938, Congress provided that in cases in which compensation was not made pursuant to an award by a deputy commissioner (appointed by the Secretary of Labor, *see* 33 U.S.C. § 940), the longshoreman would not be required to choose between the compensation award and an action for damages. No election was required unless compensation was paid pursuant to such an award. *See* Act of June 25, 1938, ch. 685, § 12, 13, 52 Stat. 1168. This version of the Act did not provide for distribution of amounts recovered from the third party in a suit brought by the longshoreman. The lower courts interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. *See e.g.,* The Etna, 138 F.2d 37 (3rd Cir. 1943); Miranda v. City of Galveston, 123 F. Supp. 889 (S.D. Tex. 1954); Fontana v. Pennsylvania R. Co., 106 F. Supp. 461 (S.D.N.Y. 1952) (Weinfeld, J.) *aff'd mem. on opinion below sub nom,* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953).

Under the same version of the Act, the lower courts also decided that the stevedore should not be required to bear a proportionate share of the longshoreman's legal expenses. *See* Davis v. United States Lines Co., 253 F.2d 262 (3rd Cir. 1958); Oleszczuk v. Calmar SS Corp., 163 F. Supp. 370 (D.C. Md. 1958); Fontana v. Pennsylvania R. Co., *supra,* 106 F. Supp. at 463–464.

In 1959, Congress amended the Act to delete the election of remedies requirement altogether. Act of August 18, 1959, Pub. L. 86–171, 73 Stat. 391, codified at 33 U.S.C. § 901 (1976). The longshoreman would have six months within which to bring an action against a third party before the right of action was assigned to the stevedore. The employer had to be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. S. REP. No. 428, *supra* note 7, at 2135.

In 1972, Congress amended the Act to abolish the unseaworthiness remedy for longshoremen, limited the longshoreman's action against the shipowner to one based on negligence and eliminated the third party action by the shipowner against the stevedore. H.R. REP. No. 92–1441, 92d Cong., 2d Sess. 5 *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4702.

21. 445 U.S. at 79.

possible in an ordinary suit for damages. The stevedore, on the other hand, would not be fully reimbursed. Such inequality in the respective positions of the two parties violates the legislative purposes made clear by the express provisions of the Act.[22]

The Court carefully examined the hearings on the amendments and noted that Congress purposely elected not to change the existing rule.[23] The Court did recognize a substantial effort on the part of Congress to assist the longshoreman by amending the Act in 1972,[24] but it once again noted that Congress had had the opportunity to, but did not, modify the Act to require the stevedore to pay its share of the legal expenses.[25] This failure to act on the part of Congress was indicative of a congressional intent to disallow a proration of the legal expenses. Therefore, the Court did not feel justified in taking steps to modify the Act on its own.[26]

As a third point, the Court noted that its interpretation of the Act is necessary to insure proper results.[27] This interpretation allows the longshoreman to receive an amount no less than that which he would receive in an ordinary negligence action, disallows a windfall at the expense of the stevedore, and guarantees that the stevedore receive reimbursement for the full amount of its compensation payment to the longshoreman.

The Court pointed out that the structure of the Act was changed to insure that stevedores would have sufficient funds to pay improved compensation benefits to longshoremen.[28] This could only be guaranteed if the stevedore was protected from huge litigation costs formerly incurred in third party actions.[29] The Court suggested that forcing the stevedore to pay litigation expenses would only benefit the lawyers, not the injured longshoreman.[30]

The dissent, written by Mr. Justice Blackmun,[31] characterized the Court's approach as one which "relegates the injured longshoreman's welfare to secondary status, well behind the interest of his stevedore employer in

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22. 33 U.S.C. § 933(e).
23. 445 U.S. at 81 n.6.
24. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 1, et seq., 86 Stat. 1263 *amending* 33 U.S.C. § 901, et seq. (1970) (codified at 33 U.S.C. § 901 et seq. (Supp. II, 1972).
25. 445 U.S. at 81 n.6.
26. *Id.* at 85-86.
27. *Id.* at 86.
28. *Id.* at 83-84.
29. *Id.*
30. 445 U.S. at 83, 85 n.11.
31. *Id.* at 88.

conserving resources."[32] He noted that under the Court's rule, the stevedore has everything to gain and nothing to lose.[33]

This result, he indicated, cannot be reconciled either with the Court's espoused view that the Act is to be construed with the interests of the longshoreman foremost in mind,[34] or the modern concept that the industrial enterprise, rather than the injured workman, should bear the costs of industrial accidents.[35]

In analyzing the Court's argument of the failure of the Act to expressly provide that the stevedore should pay a portion of the longshoreman's legal expenses as indicative of an intent that the stevedore not pay such a portion, Justice Blackmun claimed that the Court had "oversimplified the variegated history of the judicial 'rule', ha[d] overdrawn the clarity of the congressional approval of it, and ha[d] failed to adequately consider the impact of the 1972 amendments on the 'rule'."[36]

A review of the existing case law demonstrated that the rule of nonpayment by a stevedore of a longshoreman's litigation expenses has not achieved the broad acceptance implied by the Majority's opinion.[37] As pointed out to the contrary by Justice Blackmun, there is authority that indicates no settled judicial construction[38] of the rule.

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. 445 U.S. at 89.
37. Fontana v. Pennsylvania R. Co., 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd mem. sub nom* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), *cert. denied,* 346 U.S. 886 (1953) and Davis v. United States Lines Co., 253 F.2d 262 (3rd Cir. 1958), held that attorney fees for a third party action must be borne in their entirety by the longshoreman.

However, in the Fourth, Fifth and possibly Second Circuits, alternative approaches have been used.

In Ballwanz v. Jarka Corp., 382 F.2d 433 (4th Cir. 1967), it was the difference in interests and the lack of true benefit to the stevedore, and not the arguments advanced in *Fontana* and *Davis*, that led the Fourth Circuit to refuse a proration of fees.

In Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026, 1035–36, *cert. denied,* 412 U.S. 949 (1973), the Fontana-Davis "rule" was displaced in the Fifth Circuit by an approach that, in certain circumstances, required the longshoreman and stevedore to "pay attorney fees and litigation expenses in proportion to their recoveries."

In the Second Circuit, the Fontana-Davis approach has not been uniformly followed. Landon v. Lief Hoegh Co., 521 F.2d 756, 761 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976), treated the compensation lien as an "express trust for the benefit of the employer" with the longshoreman as statutory trustee.

38. 445 U.S. at 92.

Justice Blackmun viewed the congressional inaction as an indication that Congress regarded the allocation of a recovery as a matter best left to a balancing of equities by the Court.[39] It is clear that in Justice Blackmun's view, the equities would be balanced only if the stevedore paid an allocation of the costs of bringing the suit directly proportional to the recovery he received from the suit.[40]

Second, Justice Blackmun proposed that congressional concern, as evidenced in the 1972 amendments,[41] was primarily for the workman and not for the stevedore employer, as indicated by the Court.[42] Therefore, the purpose of protecting the stevedore from litigation expenses was only to provide a real increase in actual benefits to the worker.[43] It would be absurd then, according to Justice Blackmun, to prevent proration of the attorney fees merely because such would result in a real increase in payment to the longshoreman.

Third, Justice Blackmun pointed out that the supposed windfall the longshoreman would receive if the stevedore had to contribute a proportionate share of the litigation expenses, is, in effect, a fiction.[44] He noted that each cost the longshoreman pays out constitutes a reduction in his recovery for his adjudicated injury.[45] Any payment by the stevedore, then, would only assist in alleviating this reduction from the longshoreman's recovery. The payment would not, however, provide the longshoreman with a windfall.[46] So long as the longshoreman's total compensation remains less than his actual damages there is no true "double recovery."[47]

To illustrate the absurdity of the Court's placement of the stevedore's interests above those of the longshoreman's, Justice Blackmun asked whether the Court would rule the same way if presented with a case where the third party recovery was so small that virtually nothing would be left for the longshoreman after payment of attorney fees and reimbursement of the stevedore's lien.[48]

Given the reasoning developed by Justice Blackmun in his dissent, it is difficult to comprehend the result reached by the Court in *Bloomer*. The Majority did point out that nothing in their decision suggests that the

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39. *Id.*
40. 445 U.S. at 93-94.
41. *See supra* note 24.
42. 445 U.S. at 94.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. 445 U.S. at 95.
48. *Id.*

stevedore's lien has priority over the longshoreman's expenses.[49] However, there appears to be nothing in the Court's opinion, besides that statement in a footnote,[50] to suggest otherwise. The *Bloomer* opinion appears to indicate that unless Congress specifically provides otherwise, the primary concern of the courts is to protect the stevedore's interest. This position cannot be reconciled with the purpose or role of employment compensation.

The effect of this decision may be to dissuade longshoremen from bringing suit against the shipowners, unless they can be absolutely certain of receiving a substantially greater recovery in their negligence action against the shipowner than that of the statutory compensation benefit[51] received from the stevedore. This result is due to the requirement that the longshoreman first pay his attorney and litigation expenses from his recovery and, second, reimburse the stevedore for the full amount of compensation benefits already advanced. Depending on the amount of money which remains after all these deductions, the longshoreman may regret his expense of time and emotion in a suit against the shipowner. This result appears to be in direct conflict with the expressed purpose of the amendments to the Act[52]; the purpose was to enable the employee to bring a third party liability suit.[53]

Under the law prior to the amendments the employee had to choose between receiving the compensation benefits or pursuing a lawsuit against a third party.[54] He could not elect to do both. Usually, the employee chose to receive the compensation benefits to meet immediate and necessary expenses. The purpose of the amendments was to permit the employee to take both actions, without forfeiting either right.[55]

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49. 445 U.S. at 86 n.13.

"Respondent does not challenge the approach adopted in Fontana v. Pennsylvania R. Co., 106 F. Supp. 461, 463–464 (S.D.N.Y. 1952), *aff'd mem. on opinion below sub nom.* Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.) *cert. denied,* 346 U.S. 886 (1953), under which the expenses of suit, including attorney fees, represent the first charge on the recovery against the third party. *See* S. REP. No. 428, note 7. Under this view, if the recovery against the shipowner is less than the sum of the lien and the expenses of suit, the longshoreman will receive the full amount of his expenses even if the remainder is insufficient to reimburse the stevedore for its lien. *See* Valentino v. Rickners Rhederei G.M.B.H. etc., 552 F.2d 466 (2d Cir. 1977). We do not today address the *Valentino* situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses." *Id.*

50. *Id.*

51. *See supra* note 2.

52. *See supra* note 7.

53. *See* S. REP. No. 428, *supra* note 7 at 2135.

54. *Id.* at 2134.

55. *Id.* at 2135.

The current interpretation by the Majority appears to harken to a time before the amendments. The employee does technically have the right to elect both choices. However, one must question the efficacy of these rights, when it appears that one right is not financially worthy of pursuit.

The Court, does, in a footnote,[56] make it clear that this decision is not intended to give the stevedore's lien priority over the longshoreman's expenses. Thus, if after deduction of attorney fees and litigation expenses, the longshoreman finds that he has a recovery less than the amount originally obtained in the compensation payment from the stevedore, he will not have to fully reimburse that party. Nevertheless, the longshoreman is certainly not guaranteed any benefit from having undertaken the expense and stress of litigation.[57] He may decide it is not worthwhile to initiate a suit. Essentially, one of his options has been eliminated. Assuming this result to be a legitimate possibility, why has Congress established a six-month period[58] within which the longshoreman is given priority to initiate the suit? This is a question the Majority has apparently failed to address in its opinion, and is an issue this author feels needs to be addressed. Contrary to the longshoreman, the stevedore is arguably rewarded for initiation of a suit. When he initiates a suit against a shipowner, he becomes entitled to deduct from the recovery proceeds all compensation benefits originally advanced to the longshoreman, all court costs and all attorney fees.[59] Only after these deductions are made, does the longshoreman become entitled to any of the proceeds.[60] Even then, the longshoreman is only entitled to receive four-fifths of the net proceeds. The stevedore is entitled to keep the remaining one-fifth of the net proceeds as compensation for its efforts in bringing the suit.[61]

The Majority appears to emphasize the specific congressional inclusion of the stevedore provision as proof that Congress intended to protect his interest. A closer examination of legislative history[62] reveals, however, that Congress intended this provision as a means of protecting the longshoremen's interests. The purpose of the "reward" to the stevedore was not to encourage the stevedore to initiate the suit, but rather to act as an incentive to the stevedore to obtain the largest possible settlement or recovery in an action, rather than settling for the amount of the compensation benefit paid to the longshoreman.[63] This purpose benefits the longshoreman.

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56. 445 U.S. at 88 n.15.
57. *Id.*
58. *See supra* note 7.
59. 33 U.S.C. § 933(e).
60. *Id.*
61. *Id.*
62. *See supra* note 20.
63. *Id.*

Since the purpose of specifically providing for the allocation of recovery proceeds was not to benefit the stevedore, but rather to benefit the longshoreman, the argument advanced by the Majority of a lack of specific congressional intent to benefit the longshoreman vis à vis recovery proceeds, must fail. A more plausible interpretation of Congress's failure to specifically provide for the proration of expenses is that Congress felt such a provision was not necessary in light of the articulated purpose of the Act to benefit longshoremen.

The legislative history of the Act clearly provides that the purpose of the Act is the protection of the longshoreman. In this author's opinion, the *Bloomer* Majority has failed to interpret the Act in a way compatible with its purpose.

Linda A. Brandt