Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act

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EQUITABLE CREDIT: APPORTIONMENT OF DAMAGES ACCORDING TO FAULT IN TRIPARTITE LITIGATION UNDER THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

RANDALL C. COLEMAN* and WARREN B. DALY, JR.**

I. INTRODUCTION

In most industrial accident cases involving personal injury to employees, workmen's compensation statutes require the employer to provide the injured employee with certain designated benefits. When the injury is caused in part by the negligence of a third party to the employment relationship, the employer generally attempts to shift all or part of its liability to the third party. The resultant problem of how to apportion liability between employers and third parties has been characterized as "[p]erhaps the most evenly balanced controversy in all of compensation law."¹

Longshoring² has been one industry in which workers, despite workmen's compensation coverage, have frequently filed third-party actions.³ In most cases, the target has been the owner of the ship on which the longshoreman was injured. Prior to November 26, 1972,

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² Longshoring involves the loading and unloading of cargo ships. Workers on the job are called longshoremen. Their employers, who in turn enter into contracts with shipowners to provide these loading services, are called stevedoring companies, or simply stevedores.
the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), shipowners warranted the "seaworthiness" of their vessels to longshoremen performing work on board. When a longshoreman was injured due to unsafe conditions aboard its vessel, the shipowner was held absolutely liable for all proven damages. This liability existed even though the unsafe condition was unknown to the vessel's crew and was brought about by a stevedoring company hired to load or unload the vessel. As a corollary to this rule of strict liability, however, shipowners were entitled to indemnification from the stevedore employing the injured longshoreman if the stevedore had breached its so-called "warranty of workmanlike performance." Courts have granted indemnity in a wide variety of circumstances. Thus, third-party litigation prior to the 1972 amendments centered not on a determination of whether the injured longshoreman could recover, but rather on who would have to pay.

This is no longer true. Section 5(b) of the LHWCA, added by the 1972 amendments, states:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer

6. Damages were reduced by an amount equal to the percentage in which the injured longshoreman was found to be contributorily negligent. Id. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), especially the concurring opinion of Frankfurter, J., 346 U.S. at 415.
shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.9

In post-1972 amendment cases, stevedores have been correctly asserting that while a shipowner may be required to pay the full damages of a longshoreman injured on board its vessel as a result of the joint negligence of stevedore and shipowner, the shipowner is precluded by the LHWCA from obtaining indemnification. Furthermore, stevedores assert that they are still entitled to recover their compensation liens.10 Thus, under the result urged by stevedores in joint-fault situations, the entire liability for a longshoreman's injuries, including workmen's compensation, would be shifted from stevedores to shipowners.

Neither the pre-amendment result nor the one now advanced by stevedoring interests is satisfactory. Congress clearly outlawed indemnification, but as a consequence "the third party, who has received no benefits from the workmen's compensation act, is forced to pay all of the damages when normally he would ... be liable for ... none at all...."11

Dean Prosser, in discussing the analogous topic of contribution, criticized this all-or-nothing approach:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, ... while the [other] goes scot free.12

The pre-amendment system of indemnification was unattractive because, depending upon the resolution of the facts, the shipowner's

10. For a discussion of the mechanics of lien recovery see notes 228-29 and accompanying text infra.
recovery against the stevedore either was for its entire liability or was rejected in toto. Thus, a system of "sharing in the sense of dividing the liability on some equitable basis keyed to relative fault" quite clearly could not have evolved while principles of indemnity remained firmly entrenched. The abrogation of the warranty of workmanlike performance in longshoring personal injury cases has thus promoted renewed interest in equitable sharing of liability between jointly negligent shipowners and stevedores. There was nothing astounding, however, in such a progression. The extension of the warranty of seaworthiness to longshoremen and other harbor workers was undoubtedly in response to the inequities caused by the exclusivity of workmen's compensation benefits, which were woefully inadequate, as an employee's sole remedy against his employer. Moreover, as a subsequent quid pro quo for the shipowner's essentially strict liability, the stevedore's "obligation to indemnify '[was] based altogether upon the law's notion — influenced by an equitable background — of what [was] fair and proper between the parties.'"

Relying on equitable principles, several recent decisions in federal district courts have allowed plaintiff longshoremen to recover from the shipowner only that percentage of total proven damages which equalled the shipowner's relative fault. Other contrary decisions, how-


Stevedores hold themselves out as experts in the art of ship stowage. They are being paid to do the work efficiently, safely and in a manner so as not to visit liability upon the shipowner. When, by the stevedore's failure to do the work in the safe manner which he impliedly agrees, the shipowner is made to respond in damages to the injured worker, it is but proper that the contractor make the shipowner whole. In this respect, the result achieved by Ryan is eminently fair.


ever, have held such a credit improper as disruptive of the compensation scheme created by Congress in the 1972 amendments to the LHWCA.\textsuperscript{17}

This article will analyze the application of credits in third-party actions brought against shipowners by longshoremen and examine their viability as permanent rules of maritime law.

II. THE EQUITABLE CREDIT

\textit{Frasca v. Prudential-Grace Lines, Inc.},\textsuperscript{18} a post-amendment third-party action by a longshoreman against the owner of the ship on which he was injured, gave judicial birth to the term "Equitable Credit."\textsuperscript{19} In adopting the credit, the \textit{Frasca} court found a previously articulated model, which sought to combine all the competing equities, to be particularly persuasive.\textsuperscript{20} That solution, which the court believed would "produce an equitable result in all instances,"\textsuperscript{21} contained the following main provisions:

[1] An employee injured in the course of his employment recovers workmen's compensation benefits from his employer, regardless of fault. If the injury was not contributed to by the negligence of any third party, he recovers nothing more than these compensation benefits.

[2] If the injury was caused by the fault of a third party, the employee may sue such third party for common law damages. His recovery is to be reduced to the extent of his own contributory negligence. And, if the employer was not also at fault, the full


\textsuperscript{19} Based upon a jury verdict finding Prudential-Grace Lines forty percent at fault, the trial judge in \textit{Frasca} held the shipowner liable to the longshoreman for forty percent of his total damages. \textit{See} Revision and Extension of Remarks by the trial judge reported at 1975 A.M.C. 1143 (D. Md. 1975). Prudential-Grace subsequently moved for entry of judgment notwithstanding the verdict under FED. R. CIV. P. 50(b). In an opinion granting that motion because "as a matter of law . . . the shipowner breached no duty that it owed to the plaintiff," 394 F. Supp. at 1102, 1975 A.M.C. at 1142, the trial judge reiterated without further comment his previous decision that the shipowner could only be held liable for that percentage of proven damages which equalled his degree of fault. \textit{Id.} at 1095, 1975 A.M.C. at 1131.

\textsuperscript{20} The model is set forth in Cohen & Dougherty, \textit{supra} note 8, at 606-07.

amount of all compensation benefits is to be deducted from the employee's recovery and paid to the employer in reimbursement.\textsuperscript{22}

These two points cover those cases in which the third-party shipowner is either solely at fault or completely free from fault. Little disagreement has arisen over the disposition of matters falling within either of those categories. Consider the following facts:

<table>
<thead>
<tr>
<th>Vessel's fault</th>
<th>0%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevedore's fault</td>
<td>90%</td>
</tr>
<tr>
<td>Longshoreman's fault</td>
<td>10%</td>
</tr>
<tr>
<td>Damages</td>
<td>$10,000</td>
</tr>
<tr>
<td>Compensation lien</td>
<td>$4,000</td>
</tr>
</tbody>
</table>

A limitation of the injured longshoreman's recovery to the $4,000 received in workmen's compensation benefits is universally conceded to be the proper result under the LHWCA. True, the worker has been unable to recover sixty percent of his provable damages, but such is the nature of the compromise inherent in workmen's compensation acts.\textsuperscript{23} The injured worker is assured his payments even in cases where his own negligence is one hundred percent. Consider the following situation where fault is reversed:

<table>
<thead>
<tr>
<th>Vessel's fault</th>
<th>90%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevedore's fault</td>
<td>0%</td>
</tr>
<tr>
<td>Longshoreman's fault</td>
<td>10%</td>
</tr>
<tr>
<td>Damages</td>
<td>$10,000</td>
</tr>
<tr>
<td>Compensation lien</td>
<td>$4,000</td>
</tr>
</tbody>
</table>

It is similarly conceded that the longshoreman will recover a judgment of $9,000 against the negligent shipowner, representing a ten percent reduction in proven damages due to the finding, under the admiralty concept of comparative negligence,\textsuperscript{24} that his fault contributed in causing his injuries to that degree. From the $9,000 judgment, the longshoreman will then repay the $4,000 previously advanced by his employer as workmen's compensation.

\textsuperscript{22} Cohen & Dougherty, \textit{supra} note 8, at 606.

\textsuperscript{23} See notes 112-24 and accompanying text \textit{infra}.

\textsuperscript{24} See notes 45-48 and accompanying text \textit{infra}.
The model then suggested a more novel and daring pair of rules:

[3] If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer’s dollar liability in compensation. Just as every employee will be guaranteed minimum benefits of workmen’s compensation, so will every employer be guaranteed a maximum liability of compensation benefits, whether directly or indirectly, for any employee’s industrial accident.

The proportional amount of any employer’s fault is to go in mitigation of the third party’s damages, in the same fashion as the employee’s contributory negligence, so that the third party actually responds to the employee only for that amount of the employee’s damages as is equal to the third party’s proportion of the fault.

[4] From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee’s recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer’s fault were less than the amount of the compensation benefits, the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee’s recovery. If the employer’s fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault.25

These third and fourth points concern the controversial area of mutual fault, in which the actions of both the shipowner and the stevedore combine in some proportion, with or without concurrence of fault on the part of the injured longshoreman, to bring about his injuries. Together, they are the heart of the Equitable Credit. The third “rule” states simply that a negligent third party can only be held liable for that portion of total proven damages which would equal his proportionate fault. The final section then provides a formula for determining what portion of its compensation lien, if any, the stevedore or its insurance carrier would be entitled to recover in a given situation.

When the compensation lien exceeds the damages attributable to the fault of the stevedore, none of the parties can claim to have been

25. Cohen & Dougherty, supra note 8, at 606-07.
unfairly treated. Consider a case in which the trier of fact finds as follows:

<table>
<thead>
<tr>
<th>Fault</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vessel's fault</td>
<td>60%</td>
</tr>
<tr>
<td>Stevedore's fault</td>
<td>30%</td>
</tr>
<tr>
<td>Longshoreman's fault</td>
<td>10%</td>
</tr>
<tr>
<td>Damages</td>
<td>$10,000</td>
</tr>
<tr>
<td>Compensation lien</td>
<td>$4,000</td>
</tr>
</tbody>
</table>

The longshoreman will be entitled to a recovery of $6,000 against the vessel. Because the fault of the stevedore reduced the longshoreman’s recovery by $3,000, the injured worker would only be required to repay $1,000 of the workmen’s compensation payments previously received. The longshoreman’s total recovery is therefore $9,000: $4,000 previously received in workmen’s compensation benefits plus $5,000 remaining from his judgment against the shipowner after the repayment of $1,000 to his employer. Because $9,000 was all that he would have been entitled to in any event, he can not be heard to complain of any injustice. The stevedore was statutorily protected from payment of an amount greater than its responsibility under the compensation act. However, due to a sharing of fault with the shipowner, the stevedore has escaped with less than its full compensation liability. Thus, the fortuitous finding of ship’s negligence has provided the concurrently negligent stevedore with a $1,000 windfall. Obviously, the vessel, which was sixty percent at fault, cannot complain about liability for sixty percent of the loss.

When the damages attributable to the fault of the stevedore exceed its compensation lien, a more difficult situation arises. Assume the following findings:

<table>
<thead>
<tr>
<th>Fault</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Vessel's fault</td>
<td>40%</td>
</tr>
<tr>
<td>Stevedore's fault</td>
<td>50%</td>
</tr>
<tr>
<td>Longshoreman’s fault</td>
<td>10%</td>
</tr>
<tr>
<td>Damages</td>
<td>$10,000</td>
</tr>
<tr>
<td>Compensation lien</td>
<td>$4,000</td>
</tr>
</tbody>
</table>

26. Sixty percent of $10,000.
27. Thirty percent of $10,000.
28. $4,000 (amount of lien) minus $3,000 (reduction in recovery due to stevedore's fault).
29. Naturally, some stevedores will not view this situation in the same light. Under legal principles whereby the concurrently negligent shipowner is liable for all
The longshoreman recovers a judgment of $4,000 against the shipowner. Because the fault of the stevedore reduced the plaintiff's recovery $5,000, an amount in excess of the stevedore's compensation lien, no repayment of the lien is required. As above, the vessel cannot complain, for its liability is in proportion to its fault. The stevedore's liability is limited to $4,000, the amount of payments made by it pursuant to the compensation act. Whenever damages attributable to its fault exceed the amount of its lien, the compensation act, as applied under the Equitable Credit, would actually reduce the stevedore's potential liability to a level beneath what it would have been were the stevedore a joint-tortfeasor not protected by the LHWCA.8 The injured longshoreman, however, now recovers only $8,000 — $4,000 each from the shipowner and stevedore. At first blush, it appears that injustice has been done, for the longshoreman's recovery is now $1,000 less than he would have recovered in the absence of a compensation statute.31 Upon reflection, though, this result is not so strange. Whenever a longshoreman is injured by the negligence of his employer and compensation payments to him fall short of what could have been recovered in an action at law, the same result will follow. While perhaps unjust in a given case, it again spotlights the tradeoff which is the essence of the workmen's compensation scheme.32 In exchange for automatic payment of compensation benefits for work-related injuries regardless of fault, the employee gives up the possibility of an increased, but speculative, recovery based on the employer's negligence. This compromise has not generally been criticized. With these considerations in mind, it would be incorrect to criticize as inequitable the result reached through application of the Equitable Credit in cases of this type. By receiving damages from the negligent third-party proportionate to its relative fault, the employee obtains a fuller recovery without risking his absolute right to collect workmen's compensation as a matter of law.

The Equitable Credit not only appears to be the fairest way of resolving the conflicting interests of longshoremen, stevedores, and ship-

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of the longshoreman's proven damages, reduced by his contributory negligence, the stevedore in the hypothetical now under consideration would recover its entire lien. Thus, argues the stevedore, application of the Equitable Credit results not in a $1,000 windfall but rather in a $3,000 loss.


31. If no statute applied, the $9,000 recovery would be calculated in the same fashion as the example at note 24 and accompanying text, supra.

32. See notes 112-24 and accompanying text infra.
owners, it also provides a reciprocal device to balance the stevedore's right to obtain recompense for its liability to an injured longshoreman.

33. Not all parties with a stake in the outcome of longshoring personal injury litigation agree that the Equitable Credit is the fairest way to resolve such conflicts. Sage and scholarly counsel have sought out variations of the Equitable Credit which might placate stevedoring interests and thus avoid the criticism that credits such as the Equitable Credit merely return courts to the three-cornered litigation of pre-amendment days.

One proposed approach to the Equitable Credit would alter the method of calculating the amount of lien repayment while still limiting a shipowner's liability to that portion of total damages which equals his proportionate fault. Instead of the Equitable Credit method of reducing the stevedore's lien recovery by the amount of third-party damages lost by the longshoreman due to stevedore negligence, the proposal would reduce the stevedore's lien in direct proportion to its negligence. Such an approach was thought to be even more equitable than the Equitable Credit, while far more appealing to stevedores and thus more likely to prevent tripartite litigation. However, it is doubtful whether it can achieve either goal.

For the sake of analysis assume the following longshoring accident:

- Longshoreman's damages: $10,000
- Ship's negligence: 40%
- Stevedore's lien: $4,000
- Stevedore's negligence: 60%

Under the Equitable Credit, since the longshoreman's recovery of $4,000 (forty percent of $10,000) was reduced $6,000 by the stevedore's negligence, an amount in excess of the stevedore's lien, the longshoreman is not required to pay any of the lien. However, under the alternate proposal, the stevedore would be precluded from recovering only sixty percent of its lien in accordance with its degree of fault. Thus, under the two systems, the burdens of the three parties are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Equitable Credit</th>
<th>Alternate Proposal</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>% Fault</td>
<td>Economic Loss</td>
</tr>
<tr>
<td>Shipowner</td>
<td>40</td>
<td>$4,000</td>
</tr>
<tr>
<td>Stevedore</td>
<td>60</td>
<td>$4,000</td>
</tr>
<tr>
<td>Longshoreman</td>
<td>0</td>
<td>$2,000</td>
</tr>
<tr>
<td></td>
<td>100</td>
<td>$10,000</td>
</tr>
</tbody>
</table>

The alternate proposal reduces the longshoreman's total recovery from $8,000 to $6,400. Certainly it is inequitable to allow a stevedore who is already shouldering less than his proportionate share based on fault to reduce his liability still further at the expense of an injured longshoreman, which is precisely what the alternate proposal does. (Note that even under the Equitable Credit, the longshoreman will not be able to recover $2,000 of his $10,000 damages. In turn, the stevedore pays only forty percent of those damages in workmen's compensation though it is sixty percent at fault. In any case in which the stevedore's negligence reduces the plaintiff's recovery by more than the amount of the lien, credit defenses will cause a reduction in the plaintiff's overall recovery. This is because, under the compromise of workmen's compensation, discussed at notes 112-24 and accompanying text infra, the longshoreman has given up his right to collect from his employer based on fault in exchange for the absolute right to the full coverage of workmen's compensation. We agree that such a result is not unfair.) Viewed in terms of shipowner and stevedore, the alternative credit permits the stevedore to pay proportionately less than the shipowner, although its fault is greater. This can be condoned when the stevedore has paid the maximum amount of compensation available under the LHWCA, but when a stevedore recovers part of its lien under such circumstances, it is hard to see how the admiralty principle of proportioning liability according to fault is advanced. Rather
directly from a negligent shipowner. Since a stevedore is entitled to file suit against a third-party shipowner to recover its lien when its liability is based, in whole or in part, on the shipowner's negligence, it is difficult to criticize a system which seeks to protect the shipowner from shouldering the entire liability when the loss was occasioned, in whole or in part, by the negligence of the stevedore. At the same

than improving on the equities present under the Equitable Credit, the proposed alternative in fact achieves just the opposite result.

The proposed change also fails to attain its objective of avoiding three-cornered controversies. Any suggestion that stevedores or their compensation carriers will not feel obliged to participate if the shipowner's credit will result in a diminution of their lien recovery only to the proportionate extent of stevedore fault is totally unrealistic. Once a third-party action is instituted and a credit defense asserted, stevedoring interests must map their game plan. The stevedore knows that there is some danger of its losing at least part of its lien, but it does not know how much and will not know how much until the case has been tried. If found ninety percent at fault, the stevedore would lose ninety percent of its lien, even under the alternative proposal. Recognizing this possibility, it is hard to imagine that the application of a percentage fault rule for reducing lien repayment would provide a stevedore much comfort. Any stevedore willing to fight for recovery of its lien is unlikely to acquiesce for a ten percent tidbit.

While avoidance of stevedore participation in all probability cannot be achieved by adopting the amendment to the Equitable Credit just discussed, courts should not look adversely on the Equitable Credit even if stevedores will thus be brought into the proceedings. Opponents of credit alternatives have argued that the application of such alternatives will cause rifts between stevedores and longshoremen. Admittedly, prior to the 1972 amendments, the interests of longshoremen and stevedores were usually at odds. While a stevedore might have benefited from a longshoreman's victory in the pre-amendment setting by recovering compensation extended prior to trial, such payments were typically low under the compensation rate structure then in existence. On the other hand, if the stevedore was found to have violated its warranty to the shipowner of a workmanlike performance of its job, it would become liable for the entire judgment. Thus, stevedores generally had little to gain and a great deal to lose. Consequently, they frequently sympathized with the shipowner's efforts to defeat the longshoreman's claim. Under the amendments, however, the stevedore's exposure is limited to its compensation payments. It can only benefit from a longshoreman's recovery. Conversely, if the stevedore's negligence is found to be substantial, application of the Equitable Credit might cause a reduction of the longshoreman's total recovery. When the stevedore's fault exceeds its compensation exposure, the longshoreman's total recovery will be reduced. See notes 112-24 and accompanying text infra. Thus, if the longshoreman is not actively interested in proving an absence of stevedore negligence, he is at worst ambivalent. No circumstances are foreseen in which the interests of stevedore and longshoreman would be incompatible.

34. When compensation payments are accepted pursuant to an award by the Deputy Commissioner of Workers' Compensation Programs or the Benefit Review Board and no third-party action is brought within six months thereafter, the right to bring such an action is automatically assigned to the employer by operation of law. 33 U.S.C. § 933(b) (1970). Conversely, when payments are made voluntarily without entry of a formal award, the employer has been held to have a common law right to recover the amount of such payments from a negligent third-party. See Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).
time, the congressional design to limit the liability of stevedores to
the extent of their compensation payments is accomplished.\footnote{35}

Thus, the Equitable Credit is deeply endowed with notions of
fundamental fairness, which should make it very appealing to courts
struggling with the problems of damage allocation in longshoring
personal injury cases. It has been urged, however, that the doctrine
is barred by various legal theories, some of which owe their inception
to the LHWCA, and some of which are creatures of the judiciary.
Before courts can, in good conscience, adopt the Equitable Credit, they
must be convinced that it is consistent with the full body of American
maritime law.

III. APPORTIONMENT OF FAULT IN ADMIRALTY

Comparative negligence concepts are not new to federal courts
sitting in admiralty. Before the turn of the century, it was recognized
that "courts of admiralty could exercise a conscientious discretion, and
give or withhold damages upon enlarged principles of justice and
equity."\footnote{36} From this rule, which has frequently been restated,\footnote{37}
has evolved a "doctrine of comparative negligence . . . adopted for uniform

\footnote{35. Professor Larson discussed this same problem in a non-maritime context. 2 A. LARSON, supra note 1, § 76.10. In American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950), rev'd 81 F. Supp. 25 (N.D. Iowa 1948), an employee of Armour & Co. was injured at work by an American District Telegraph employee and received compensation payments of $6,800. In a third-party suit against American District Telegraph alleging damages of nearly $60,000, judgment was entered for the plaintiff in the district court. American District Telegraph's action against Armour was dismissed, but the Eighth Circuit reversed, holding the concurrently negligent employer liable to American for the damages American owed to Armour's employee. Each side to this controversy has an argument in its favor which, considered alone, sounds irresistible. The employer here complains with considerable cogency that the net result is that $60,000 has been put in the employee's pocket and has left the employer's pocket, all because of a compensable injury, in spite of the plain statement in the act that the employer's liability for such an injury shall be limited to compensation payments. Yet if the third party were made to bear the entire $60,000 damages, he would argue with equal cogency that it is unfair to subject him, the lesser of two wrongdoers, to a staggering liability which he would not have had to bear but for the sheer chance that the other parties involved happened to be under a compensation act. Why should he, a stranger to the compensation system, subsidize the system by assuming liabilities that he could normally shift to or share with the employer? 2 A. LARSON, supra note 1, § 76.10, at 14-288. Note how the arguments of both sides succumb to an Equitable Credit analysis. 36. The Max Morris, 137 U.S. 1, 13 (1890). 37. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953).}
application in cases brought by longshoremen as well as seamen for ship-board injury actions (maritime torts).”

Sharing of liability among parties whose actions have concurred to bring about a loss has long been a rule of admiralty in collision cases. In 1974, the Supreme Court extended the rule permitting contribution among joint tortfeasors to non-collision cases in order to ameliorate “the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.” The following term, in United States v. Reliable Transfer Co., the Court replaced its rule of equally divided damages in collision cases with one which apports liability in proportion to fault. The new rule was created to avoid the gross inequities frequently resulting from a system in which relative fault of mutual wrongdoers is not considered.

42. Mr. Justice Stewart, writing for the unanimous Court, stated:

It is no longer apparent, if it ever was, that this solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel’s fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. For example, where one ship’s fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second. “This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence . . . .” [G.] GILMORE & [C.] BLACK, [THE LAW OF ADMIRALTY] 528 [(2d ed. 1975)].

421 U.S. at 405 (footnote omitted).

It is interesting to note a recent decision involving aviation, an area closely analogous to maritime law. Plaintiffs in Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975), brought an action on behalf of one of the victims of a mid-air crash involving a small private plane and an Allegheny commercial airliner in which the decedent had been a passenger. After deciding that federal law applied and citing with approval Dean Prosser’s criticism of rules prohibiting contribution, see note 12 and accompanying text supra, the court stated:

In our judgment the better rule is that of contribution and indemnity on a comparative negligence basis. Under such an approach the trier of fact will determine on a percentage basis the degree of negligent involvement of each party in the collision. The loss will then be distributed in proportion to the allocable concurring fault.

504 F.2d at 405.
From this whirlwind review of judicially created admiralty rules for apportionment of damages, it is clear that division based upon comparative fault is favored and should be adopted in all cases absent specific legislative direction to the contrary. Thus, courts faced with claims arising under the 1972 amendments to the LHWCA should feel free to apply any rule which equitably distributes liability and which is not barred by the explicit wording or the legislative history of the amendments. The report of the House Committee on Labor and Education clearly states the Committee's intention "that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury." Because no similar statement exists concerning those cases in which the stevedoring employer's negligence is found to have been a cause of the longshoreman's injury, the next inquiry must be whether sharing of liability between stevedore and third-party shipowner was prohibited, either expressly or impliedly, by the 1972 amendments.

It is important to understand that express congressional authority for some system of proportionate liability is not a prerequisite for application of the Equitable Credit. Unless prohibited by Congress, there is ample authority for judicial adoption of the credit, notwithstanding the now somewhat outmoded language of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, suggesting that such problems await congressional action. In *Reliable Transfer*, the Supreme Court recognized:

> [t]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the


47. "We have concluded that it would be unwise to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries." *Id.* at 285.
controlling rules of admiralty law." . . . No statutory or judicial precept precludes a change in the rule of divided damages, and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases.48

IV. THE 1972 AMENDMENTS TO THE LHWCA

The drafters of the 1972 amendments to the LHWCA had two primary goals. First, they sought to increase payments of workmen's compensation by an amount sufficient to provide adequate replacement for income lost due to work-related injuries. The second goal was a realignment of the rights and liabilities of longshoremen, stevedores, and shipowners in third-party litigation.49 This latter problem was characterized as "[o]ne of the most controversial and difficult issues which the Committee has been required to resolve."50

It will be recalled that under judicially created doctrines shipowners had been held absolutely liable to longshoremen injured because of unseaworthy conditions aboard their ships, but that such shipowners later became entitled to complete indemnity from the stevedoring company when the injury was, in whole or in part, due to a breach of the stevedore's "warranty of workmanlike performance."51 Testimony before congressional committees considering proposed amendments to the LHWCA disclosed that this third-party litigation was becoming very costly and suggested that funds spent on litigation "could better be utilized to pay improved compensation benefits."52 To deal with the third-party problem, Congress in 1972 added section 5(b) to the

51. See notes 5-8 and accompanying text supra.
   Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased significantly because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action.
   Id. at 5, U.S. Code Cong. & Ad. News, 92d Cong., at 4702-03.
LHWCA,53 thereby eliminating the shipowner’s warranty of seaworthiness to longshoremen. Furthermore, because the shipowner’s liability could now be based only on his negligence, Congress found it appropriate to prohibit indemnity, whether contractual or implied.54 As before, the employee’s workmen’s compensation benefits would remain his exclusive remedy against his employer.

While the abrogation of warranties of seaworthiness and indemnity are very clearly stated, section 5(b) failed to clarify the manner in which damages should be apportioned in cases in which concurring negligence of a shipowner and a stevedore combined to cause an injury to a longshoreman. While it may be argued that the exclusivity language of section 5(a) of the LHWCA55 forbids any apportionment, it appears unlikely that the Congress could have intended such a result.56 Section 5(a) states:

The liability of an employer prescribed [in the LHWCA] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . .

The argument advanced is that a shipowner seeking apportionment of damages falls into the category of “anyone otherwise entitled to recover damages” and that such apportionment is therefore statutorily barred.

53. Section 5(b) of the 1972 amendment is codified at 33 U.S.C. § 905(b) (Supp. IV, 1974), amending 33 U.S.C. § 905 (1970), and is set out in the text accompanying note 9 supra.

54. For a review of the impact one author believes the 1972 amendments will have on pre-amendment concepts of unseaworthiness and indemnity see Gorman, supra note 8, at 14-22.


56. The late Professor Hart and Professor Sacks noted the absurdity of assigning to Congress such an intent.

The national legislature, we are asked to suppose, made a deliberate decision that the third person — when there was one — should be left holding the bag for both employer and employee. In pursuance of a Congressional purpose to sweeten up the quid pro quo even for negligent employers, the third person was to be deprived of the right of contribution which the principles of the preexisting general law plainly gave him, with no quid in return for his quo whatever. And this was to be accomplished, inter alia, by presenting the legal world with the there-tofore unheard of spectacle of a negligent plaintiff recovering from his co-tortfeasor not merely half his damages but the whole of them — on the excuse that a surplus might be produced which would benefit the plaintiff’s employee. The third person unfortunate enough to injure a beneficiary of a compensation act, in other words, was to be the gratuitous statutory indemnitor of the beneficiary’s wrong-doing employer.


That analysis, however, is contrary to the language and reasoning of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*\(^{58}\)

In *Ryan*, an injured longshoreman had received compensation benefits from Ryan, his employer, and then brought a third-party action against Pan-Atlantic, owner of the vessel on which he was injured. The shipowner then sought indemnity from Ryan, the stevedoring employer. Judgment was entered for the longshoreman and, after appeal, Pan-Atlantic was granted indemnity from Ryan, whose defense centered around the exclusivity provision — identical to the present provision — which was then in effect.\(^{59}\) The Court found that:

The obvious purpose of this provision 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*. In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other hand, the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman’s damages.

Section 5 of the Act expressly excludes the liability of the employer “to the employee,” or others, entitled to recover “on account of such [employee’s] injury or death.” Therefore, in the instant case, it excludes the liability of the stevedoring contractor to its longshoreman, and to his kin, for damages on account of the longshoreman’s injuries. At the same time, however, [section] 5 expressly preserves to each employee a right to recover damages against third persons. It thus preserves the right which [the longshoreman] has exercised, to recover damages from the shipowner in the present case. The Act nowhere expressly excludes or limits a shipowner’s right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor’s own agreement to save the shipowner harmless.\(^{60}\)

Thus, applying the principle of *ejusdem generis*, the phrase “anyone otherwise entitled to recover damages from such employer” in section 5(a) means only those persons “claiming under or through such employee.”\(^{61}\) Those persons, however, unlike shipowners, were given a *quid pro quo* for insertion of an exclusivity provision in the LHWCA.

In allowing indemnity in *Ryan*, the Court emphasized that because the shipowner’s cause of action against the independent stevedoring com-

\(^{58}\) 350 U.S. 124 (1956).


\(^{60}\) 350 U.S. at 129–30 (footnotes omitted).

\(^{61}\) Id. at 129. *Contra*, 2 A. Larson, *supra* note 1, § 76.22, at 14–308 to –309.
pany was based on breach of their contractual relations, the remedy was clearly not barred by the exclusivity provision of the LHWCA which precluded only those claims directly on account of injury to a longshoreman arising out of his employment.\(^\text{62}\) However, nothing in Ryan suggests that a different result would have been reached in the absence of a contractual relationship.\(^\text{63}\) When a stevedore’s wrong causes injury to another, it is illogical to provide a remedy if the duty breached was contractual in nature, but not if it violated principles of tort.\(^\text{64}\)

Thus, because the language of section 5(a), unchanged since Ryan, does not preclude apportionment of fault between negligent shipowners and stevedores, any statutory exclusion must be found in section 5(b),\(^\text{65}\) added by the 1972 amendments. However, rather than directing shipowners to pay all proven damages, a close analysis of the first three sentences of section 5(b) uncovers strong evidence that shipowners are to be held liable only for those damages chargeable to their own negligence.

The first sentence creates a general right of recovery “[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel.”\(^\text{66}\) The second and third sentences, covering workers who were “employed by the vessel to provide stevedoring services [or] ... ship building or repair services,”\(^\text{67}\) qualify the availability of that remedy when no independent stevedoring contractor is employed, but rather longshoremen are hired directly by the shipowner. Such shipowners are considered to function in two entirely different capacities, retaining immunity from third-party actions in favor of compensation liability when supervising and conducting longshoring operations, but also remaining subject to suit whenever actions of the ship’s crew are identified as causing injury to a longshoreman. To

62. 350 U.S. at 130.

63. The Ryan Court noted in passing that it need not reach that issue. Id. at 132 n.6.

64. The difference between contract and tort remedies is largely historical. Moreover, if the contractual indemnity in Ryan was not, as the Court found, “on account of such injury,” then a similar indemnity based on tort would be similarly beyond the reach of the LHWCA’s exclusivity provision. Just as the stevedore’s failure to perform its job in a workmanlike manner, causing the shipowner to pay damages to its employee, is not technically an injury to the employee, so also a negligent act of the stevedore causing similar liability to fall upon the shipowner cannot be considered an injury only to the employee, but rather an injury directly to the shipowner as well.

65. Set out in full in text accompanying note 9 supra.


67. Id.
ensure retention of the immunity, a negative clause was inserted in section 5(b): "[N]o such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."\(^{68}\)

While at first glance no inconsistencies are apparent in the first three sentences of section 5(b), an absurd anomaly arises if the word "negligence" as used in the first and third sentences is construed as meaning any negligence whatsoever.\(^{69}\) An employee of an independent stevedoring contractor will recover his full damages from a negligent shipowner under the first sentence, even though the ship's fault was only a one percent factor in causing the accident and the negligence of his employer was ninety-nine percent responsible. However, if the longshoreman is hired directly by the shipowner, the third sentence would deny him any recovery whenever persons involved in doing the stevedoring work commit as little as one percent of the negligence, despite the fact that the negligence of the ship's crew might have been ninety-nine percent responsible for his injuries. Obviously, this result could not have been intended by the Congress.

Because a literal reading of section 5(b) creates irreconcilable conflict if the word "negligence" is understood to mean any negligence at all, some alternative meaning which harmonizes the section must be adopted. This is simply and effectively achieved if "negligence," as used in section 5(b), is recognized as contemplating the extent of fault in addition to its threshold existence. Thus, the first sentence creates a right of recovery for injuries received to the extent such injuries were caused by the vessel, and the third sentence limits the recovery of longshoremen hired directly by the vessel only by the extent that their fellow workers caused the injury. Thus viewed, section 5(b) is internally consistent and in accord with the general principles of maritime law.\(^{70}\)

Despite the fact that, under close analysis, section 5 now appears to compel application of an equitable-type credit, it is nonetheless true that express language in the LHWCA, as amended, neither prohibits nor approves such a credit. Consequently, the next step involves an examination of the legislative history to the 1972 amendments. Both the House of Representatives and the Senate held a series of hearings on several bills then pending to amend the LHWCA.\(^{71}\) Subsequently,

\(^{68}\) Id.

\(^{69}\) When the same word appears twice in any portion of a statute, it is presumed that an identical meaning was intended to attach to those words. See Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932); Meyer v. United States, 175 F.2d 45, 47 (2d Cir. 1949).

\(^{70}\) See text accompanying notes 36-48 supra.
Committee Reports were issued, and the bills reported out were adopted.

Two of the bills under consideration, H.R. 3505 and S. 525 sought to eliminate the third-party difficulties by defining "employer" to include the vessels on which longshoring work was being conducted. These bills would thus have immunized shipowners from suit by making the payment of workmen's compensation benefits the exclusive remedy of the injured longshoremen against both the stevedore and the shipowner. Naturally these bills were strenuously opposed by representatives of the longshoremen, who lobbied for a bill which would have allowed injured longshoremen to recover from shipowners based upon the unseaworthiness of their vessel, but would have denied the shipowner any right of indemnity against the employing stevedore. Needless to say, shipowners found this suggested solution to be totally unacceptable. Thus, a polarity of interests formed on the third-party question which threatened to prevent adoption of any bill despite the general feeling that some sort of change was long overdue.

While both sides emphasized the benefits that would be achieved should their views be accepted, it was obvious that they foresaw the likelihood of a compromise solution. Sprinkled throughout the hearings are isolated indications that some give and take between shipowners and stevedores had been contemplated. Ralph M. Hartman, testifying in favor of retention of an injured longshoreman's right to bring a third-party action against a shipowner, suggested that "[t]o abrogate

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72. See note 44 and accompanying text supra.

73. Senate Bill 2318 was reported by the Senate Subcommittee on Labor on Aug. 17, 1972, reported by the Senate Committee on Labor and Public Welfare on Sept. 13, 1972, 118 Cong. Rec. 30397 (1972), and considered and passed by the Senate on Sept. 14, 1972. 118 Cong. Rec. 30674 (1972). H.R. 12006 was discharged from the House Select Subcommittee on Labor and approved by the House Committee on Education and Labor on Sept. 25, 1972. 118 Cong. Rec. 32023 (1972). In lieu of H.R. 12006, the House considered and passed a slightly amended version of S. 2318 on Oct. 14, 1972, 118 Cong. Rec. 36388 (1972), with which the Senate concurred.


77. Assistant Manager, Safety and Workmen's Compensation Division, Bethlehem Steel Corp., representing the Shipbuilders Council of America. House Hearings, supra note 71, at 65.
this right, without the longshoremen or ship repair yard workers receiving a quid pro quo from the responsible third party, would . . . be morally wrong and [might] raise a question of possible violation of the due process clause of the Constitution." 78 This analysis, however, suggests a difficulty with any denial of apportioned liability between shipowner and stevedore. Borrowing Mr. Hartman's words, "to abrogate [the right of apportioned damages], without [the shipowner] receiving a quid pro quo from the responsible [stevedore], would be wrong."

Attorneys who had frequently represented injured longshoremen believed that apportioned damages were eminently fair. John R. Martzell 79 remarked that, in mutual fault cases, shipowners would only "be responsible for anything in excess of the Longshoremen's and Harborworkers Act benefits." 80 He viewed this solution as a good one because it limited employers to liability for compensation while providing some relief against negligent shipowners. 81 David B. Kaplan, 82 while advocating retention of the warranty of seaworthiness, nonetheless believed that the relative liability of shipowner and stevedore would most equitably be determined under notions of comparative negligence, 83 whereby each would "bear its rightful share of the total 'misery cost.'" 84 It appears that Senator Javits approved of a limited negligence remedy against shipowners. Discussing such a proposal with Secretary of Labor Hodgson, the Senator stated: "There would be no diminution of the negligence from one employer to the other, but you would still attain some penalty, as it were, for negligence which caused injuries . . . ." 85 The committee reports, while clearly indicating congressional intent in many areas not made expressly clear by the amendments themselves, do not shed a great deal of light on the proper procedure for apportioning damages in mutual fault cases. After eliminating the right of longshoremen to sue for unseaworthiness, the House Report continued:

Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act . . .

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78. House Hearings, supra note 71, at 71.
80. Id. at 157.
81. Id.
82. Chairman of the Admiralty Section of the American Trial Lawyers Association. House Hearings, supra note 71, at 133.
84. Senate Hearings, supra note 71, at 377.
85. Id. at 38.
for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work . . . for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore . . . or for other categories of unseaworthiness which have been judicially established.86

The Report posited an example and reaffirmed that the "vessel [would] not be chargeable with the negligence of the stevedore or employees of the stevedore."87 It is not clear whether Congress intended this language to apply to joint fault situations. Certainly, however, if Congress had intended that the vessel owner be found one hundred percent responsible when stevedore negligence contributed to the accident, the Committee could very well have said in its Report that the vessel would not be charged with the sole negligence of the stevedore.88 "Indemnity (or warranty) language is no longer permissible under § 905(b). But if the Congress really meant that the 1% negligent shipowner should pay full damages to the injured worker and recover nothing from the 99% negligent employer, it might have said so more clearly."89 Unfortunately, the brief floor debate provides no guidance.90

Additionally, compounding the difficulties of determining congressional intent is an unexplained gap in the legislative history. The compromise bill reported out of committee was significantly different from any of the bills under consideration during the subcommittee hearing with regard to third-party practice. This gap was bridged during a meeting, attended by representatives of all interested factions, which had been called in the hope that a last-minute compromise could be worked out, thereby enabling passage of the amendments before the 92d Congress was adjourned.91 Many narrow issues were discussed

87. Id. at 7, U.S. Code Cong. & Ad. News, 92d Cong., at 4704.
88. The failure of Congress to add a similar word was found by one court to be a persuasive reason for adopting a certain interpretation of the amendments in an analogous situation. The shipowner in Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G., 379 F. Supp. 759 (E.D. Pa. 1974), had argued that it could not be held liable unless the accident was caused by its sole negligence. The court very properly held that if Congress had intended such a result, it had only to insert the word "solely" in the first sentence of section 905(b). Id. at 769. Similarly, the Second Circuit rejected a shipowner's argument that it could only be held liable if found to be solely responsible for the accident by noting that Congress could easily have phrased section 905(b) to provide a remedy for injuries "caused by the 'sole' negligence of the vessel." Landon v. Lief Hoegh & Co., 521 F.2d 756, 763 (2d Cir. 1975).
89. G. Gilmore & C. Black, supra note 8, § 6–57, at 452.
91. Letters from Eugene Mittelman of December 12, 1975 and E.D. Vickery of October 29, 1975 to the authors, on file at the Maryland Law Review. Mr. Mittelman
at the meeting, including among them the question of apportionment of loss where the fault of both the third-party shipowner and the employer-stevedore combined to cause injury to a longshoreman. Several formulas were advanced, but resolution of the problem could not be achieved in the time available. Ultimately, solution of the question was left to the courts. 92

In construing legislation, the temptation is great to read into general language answers to a myriad of specific problems not expressly dealt with by the statute. The question with which this article deals is very precise:

[D]id the compensation acts, in conferring immunity on the employer from common-law suits, mean to do so only at the expense of the injured employee, or also at the expense of outsiders? One answer is that the injured employee got quid pro quo, in receiving assured compensation payments as a substitute for tort recoveries, while the third party has received absolutely nothing, and hence should not be impliedly held to have given up rights which he had before. It is unfair, so the argument runs, to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain. 93

Although it is true that shipowners did benefit from abrogation of the warranty of seaworthiness previously owed to longshoremen, such benefits only partially balanced the scale. Termination of the seaworthiness warranty was balanced by an end to indemnity. While the shipowner could no longer pass on damages due to unsafe conditions created by the stevedore, neither could it be liable for them initially. However, the shipowner is now asked to assume complete responsibility for damages caused by the stevedore whenever it contributes to those damages in any degree. For this added exposure, which would not exist in the absence of the compensation act, the shipowner has received no quid pro quo.

Congress does not necessarily intend to answer all foreseeable questions whenever it gives its approval to new legislation. In fact, it frequently legislates only to the extent required to solve a given problem or correct a particular injustice. This is in keeping with the general

served as Minority Counsel to the Senate Subcommittee on Labor which conducted hearings on the 1972 amendments and was himself an active participant in drafting the Committee Reports. Mr. Vickery is an attorney in Houston who represented the National Maritime Compensation Commission. They both attended the compromise meeting, which lasted well into the early morning, along with representatives of the congressional committees considering the bills, the Department of Labor, stevedores, shipowners, and labor unions representing longshoremen.

92. Id.

93. 2 A. Larson, supra note 1, § 76.52, at 14-407.
interstitial nature of legislative proceedings. Courts, rather than redundantly inquiring as to what Congress intended in a given situation, must consider two other alternatives: that Congress either did not consider that situation at all or intentionally chose not to offer a solution, leaving the matter for judicial resolution. That does not mean, however, that the courts should not be guided in part by those clear expressions of congressional intent which have relevance to the question under consideration.

One clear purpose of the amendments was "to insulate the longshoreman's and harbor worker's employer from any liability other than that provided by the Act." The whole package, however, was viewed by the Congress as an equitable solution to the problems of protecting longshoremen and harbor workers. When one statute attempts to achieve a variety of goals and its legislative history suggests varying guidelines for achieving those goals, conflicts are inevitable. In re-


[T]here are numerous solutions possible in determining how to spread liability among joint tortfeasors with each solution having the common denominator, so it is contended, of fairness. Regardless of what our feelings may be, however, we are bound in the cases before us by Congress' policy determination.

Id. at 766 (footnote omitted).
96. For this reason, judicial solutions which contravene stated congressional goals must be rejected. Id. at 769.
97. See id. at 767.
98. Speaking on the floor of the House, Representative Quie of Minnesota, a member of the Committee on Education and Labor which had considered the amendments, stated, "It seems to me, with this problem having faced us so long, this committee came out with an equitable solution that we should go with . . . ." 118 Cong. Rec. 36386 (1972). Representative Esch of Michigan, a member of both the Committee on Education and Labor and the Select Subcommittee on Labor, added his view that "it is fair to all who are most vitally and materially concerned. It corrects long-standing inadequacies and inequities. In fact, it is so good a bill that it might well serve in many respects as a model for other public agencies that deal with workmen's compensation." Id. at 36388.
99. The legislative history, for example, states that "where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." House Report, supra note 14, at 4, U.S. Code Cong. & Ad. News, 92d Cong., at 4702. The Report later states, however, that a uniform body of federal law is to be formulated, as "the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located." Id. at 8, U.S. Code Cong. & Ad. News, 92d Cong., at 4705. When considering how to apportion liability in joint fault situations, the wide variety of rules used in different jurisdictions (see notes
solving conflicts within the LHWCA, reliance must be placed upon the wisdom of courts to "draw some guidelines to reconcile the Congressional purpose with the equitable principles applicable to admiralty practice."\textsuperscript{100} The Equitable Credit contains just such guidelines.

V. SUPPORT FOR THE EQUITABLE CREDIT

A. Apportionment of Damages in Previous Compensation Cases

In an attempt to prevent courts from awarding to shipowners equitable credits against favorable plaintiffs' verdicts, longshoremen and other harbor workers may well assert their right at common law to collect all provable damages from a jointly and severally liable tortfeasor without regard to the right of such tortfeasor to contribution or indemnity. Because the right of harbor workers to bring an action against shipowners in admiralty for negligence has evolved from common law rights of action, this argument may appear persuasive to some courts.

There are two answers to this argument. The first, though perhaps somewhat superficial, is that a shipowner found negligent in a third-party action is not actually jointly and severally liable with the stevedore, whose liability is statutorily limited to payment of workmen's compensation.\textsuperscript{101} Secondly, this is not a normal tort action at common law. Although the liability of each party may be determined largely under common law principles, it cannot be forgotten that such a third-party suit is the final function of a legislative scheme for the protection of injured workers. All that transpires must be considered in that light. It is therefore important to understand fully the nature and purposes of workmen's compensation systems.

1. The Basic Nature of Workmen's Compensation

Workmen's compensation, it must be initially understood, is not based upon principles of tort law.\textsuperscript{102} To the contrary, "the right


\textsuperscript{101} Cohen & Dougherty, supra note 8, at 605.

\textsuperscript{102} It has been asserted, "Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced . . . to the importation of tort ideas . . . ." 1 A. Larson, supra note 1, § 1.20, at 2-3.
to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame." Since its inception in Europe in the latter part of the nineteenth century, the idea of workmen's compensation spread quite rapidly and now, after a somewhat shaky beginning, compensation statutes are in effect throughout the United States.

The basic theory of workmen's compensation is best characterized by an old campaign slogan, "the cost of the product should bear the blood of the workmen." In addition to passing on the cost of these injuries to the consumer, compensation statutes have also proved beneficial to injured workers by speeding their relief and helping to reduce friction with their employers. Financially, the goal of compensation statutes is income replacement. To accomplish this, the 1972 amendments to the LHWCA set the level of payments for total disability, whether temporary or permanent, at two-thirds of the worker's average weekly wage, but not to exceed 200 percent of the national average weekly wage for longshoremen and harbor workers. Because the compensation benefits are non-taxable, most workers will receive nearly

103. Id. at 2.


105. W. Prosser, supra note 12, § 80, at 530 (original source of slogan unknown). Dean Prosser went on to say:

The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. Id. at 530-31. Professor Larson has stated:

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.


106. See W. Prosser, supra note 12, § 80, at 531.

107. This was a specifically stated goal of the 1972 amendments to the LHWCA. See House Report, supra note 14, at 1, U.S. CODE CONG. & AD. NEWS, 92d Cong., at 4698-99.

108. Id. at 2-3, U.S. CODE CONG. & AD. NEWS, 92d Cong., at 4700. Under this formulation, it was expected that ninety percent of all covered harbor workers would be entitled to recover two-thirds of their normal pay in the event of a work-related injury which prevented them from working.
the same take-home pay while on compensation as they received on the
job.\textsuperscript{109}

Once lost income is replaced, however, the goals of workmen's
compensation are not at an end. Indeed,

every mature loss-adjusting mechanism must look in two direc-
tions: it must make the injured person whole, and it must also
seek out the true wrongdoer whenever possible. While compensa-
tion law, in its social legislation aspect, is almost entirely pre-
occupied with the former function, it is not so devoid of moral
content as to overlook the latter. It should never be forgotten that
the distortions of our old-fashion fault concepts that have been
thought advisable for reasons of social policy are exclusively
limited to providing an assured recovery for the injured person;
they have never gone on — once the injured person was made
whole — to change the rules on how the ultimate burden was
borne.\textsuperscript{110}

Concepts of fault should thus be considered once the automatic payment
of benefits of the injured worker has been assured.\textsuperscript{111}

2. \textit{The Compromise Inherent in Workmen's Compensation}

In protecting injured workers, the compensation statutes strike a
promise

by which the workman is to accept a limited compensation, usually
less than the estimate which a jury might place upon his damages,
in return for an extended liability of the employer, and an assurance
that he will be paid. Accordingly, even though his damages are
partly of a nature not compensated under the act, he has no cause
of action based on the negligence of his employer.\textsuperscript{112}

\textsuperscript{109} In the case of some highly paid workers, compensation benefits may even
exceed normal take-home pay. See Statement of the American Mutual Insurance
Alliance, \textit{Senate Hearings, supra} note 71, at 234, 236.

\textsuperscript{110} 2 A. Larson, \textit{supra} note 1, \S 71.10, at 14-1.

\textsuperscript{111} Id. at 14-2.

\textsuperscript{112} W. Prosser, \textit{supra} note 12, \S 80, at 531-32 (footnote omitted). See 2 A.
Larson, \textit{supra} note 1, at \S 65.10. Secretary of Labor Hodgson discussed this com-
promise during his testimony before the congressional subcommittees considering the
1972 amendments to the LHWCA. \textit{House Hearings, supra} note 71, at 47; \textit{Senate
Hearings, supra} note 71, at 29. See also Bernstein, \textit{The Need for Reconsidering the
Role of Workmen's Compensation}, 119 U. Pa. L. Rev. 992, 993 (1971); Boals, \textit{supra
note} 104, at 518-19; Comment, \textit{Workmen's Compensation: Third Party Action
Against A Virginia Employer in Tort}, 9 U. Rich. L. Rev. 159 (1974); Note, \textit{Con-
tribution and Indemnity: The Effect of Workmen's Compensation Acts}, 42 Va. L.
Rev. 959, 961 (1956). Examples of damages not compensated under the LHWCA
include pain and suffering, injury to sexual organs or capacity, and disfigurement short
of that affecting employability. See 2 A. Larson, \textit{supra} note 1, at \S 65.20. Such
losses are non-compensable because they do not affect a workers wage-earning capacity.
While compensation benefits are the exclusive remedy of an injured worker against his employer, they do not bar him from bringing an action against a third-party responsible, in some degree, for his injuries. The employer has assumed strict liability in exchange for limited exposure; the third-party, on the other hand, has sacrificed nothing.\textsuperscript{113}

It is important, however, to understand exactly what portion of his cause of action an injured worker has given up in exchange for workmen's compensation. Failure to differentiate elements of a worker's claim could easily result in a double recovery contrary to the intent of the compensation system.\textsuperscript{114} In the absence of a compensation statute, an injured worker would be entitled to sue any party whose negligence was a cause of his injuries. If the negligence of two or more parties combined to cause his injury, he could join them in one action or proceed independently against any one of them. In the latter situation, however, the defendant could obtain contribution from the other tortfeasors in proportion to their responsibility for the loss.\textsuperscript{115} In the longshoring situation, the two tortfeasors would normally be the shipowner and the stevedore who employed the injured man. If no compensation act were present to modify the rights and liabilities of those parties, a shipowner held liable to an injured longshoreman would thus be entitled to contribution, from a concurrently negligent stevedore, in an amount determined by their relative fault. The LHWCA, however, has prohibited direct actions by longshoremen against their employers since its creation in 1927. Because the Supreme Court had prohibited contribution in longshoring cases,\textsuperscript{116} an inequitable situation arose. Longshoremen could only sue shipowners, who were then unable to obtain any contribution, even when the stevedore's fault greatly exceeded that of the vessel. It was in answer to this problem that the Court in \textit{Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.}\textsuperscript{117} created the stevedore's implied warranty of workmanlike performance. After \textit{Ryan}, if conduct of the stevedore sufficient to breach the warranty were a cause of the longshoreman's injury, the entire burden of meeting damages would be shifted to the stevedore even if the fault of the shipowner was also substantial.\textsuperscript{118} Thus, one unfair solution was replaced by another.

\begin{itemize}
\item \textsuperscript{113} See \textit{2 A. Larson, supra} note 1, § 71.20, at 14-3.
\item \textsuperscript{114} See \textit{United States Lines Co. v. Jarka Corp.}, 265 F. Supp. 811, 815 (D. Mass.), \textit{modified}, 387 F.2d 436, 437 (1st Cir. 1967).
\item \textsuperscript{116} \textit{Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.}, 342 U.S. 282 (1951).
\item \textsuperscript{117} \textit{350 U.S. 124} (1956).
\item \textsuperscript{118} The stevedore could avoid indemnification only if the negligent conduct of the shipowner precluded the stevedore from performing its job in a workmanlike performance.
\end{itemize}
It is in the light of these developments that one must consider the meaning of the 1972 amendments to the LHWCA and the recent decision in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*\(^{119}\) which accorded a general right to obtain contribution from joint tortfeasors. If injured by the mutual fault of a shipowner and a stevedore, a person not in the employ of either could bring an action against either or both for all of his provable damages. If only one were sued, it could obtain contribution from the other. Thus, each would pay its share of the whole. When the injured man is an employee of the stevedore, however, the LHWCA enters the picture. Because “between an employer and its injured employee, the right to compensation under the Act should be the employee’s exclusive remedy,”\(^{120}\) the longshoreman cannot obtain that portion of his proven damages at law caused by his employer’s negligence directly from the stevedore. He must recover them from the shipowner or not at all. Note, however, that if the longshoreman is permitted to recover both his compensation and damages at law in excess of those allocable to the negligence of parties other than his employer, he will have obtained a double recovery. Double recoveries have been avoided all along by repaying the stevedore’s compensation lien out of the damages recovered at law. In that case, however, the stevedore, rather than paying compensation instead of damages, pays nothing at all. The obvious equitable way to avoid such a result is not to use the damages allocable to the stevedore’s fault to repay the lien of the negligent employer, but rather to reduce the liability of third parties to their fair share based on relative fault. In effect, the longshoreman would be giving up that portion of his potential recovery at law caused by the negligence of his employer in exchange for an absolute right to receive compensation benefits. This is simply another way of restating the operation of the Equitable Credit.

Consider the following examples:

\[
\begin{array}{ccc}
\text{Fault} & \text{A} & \text{B} \\
\text{Vessel} & 0\% & 0\% \\
\text{Stevedore} & 100\% & 0\% \\
\text{Longshoreman} & 0\% & 100\% \\
\end{array}
\]

In both cases, assume damages of $10,000 and a compensation lien of $4,000. In A and B, the result would be identical. When only the longshoreman and/or the stevedore are at fault, the longshoreman’s


\(^{120}\) *Id.* at 113.
recovery is limited to compensation payable under the statute. In both cases he receives $6,000 less than the damages which could have been proven in court, but in only one case is he considered a loser. In A he could have recovered the full $10,000 had he been entitled to sue his employer; in B he would have recovered nothing. This illustrates the compromise of workmen's compensation.

Now alter the facts as follows:

<table>
<thead>
<tr>
<th>Fault</th>
<th>A1</th>
<th>B1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vessel</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>Stevedore</td>
<td>50%</td>
<td>0%</td>
</tr>
<tr>
<td>Longshoreman</td>
<td>0%</td>
<td>50%</td>
</tr>
</tbody>
</table>

Again, assume damages of $10,000 and a $4,000 compensation lien. By making the third party fifty percent at fault in each of the situations considered above, an anomaly arises. In B1, the longshoreman recovers $5,000 from the vessel, but is required to repay $4,000 to the blameless stevedore. Thus, his real recovery increases only $1,000. In A1, however, under a non-credit approach, the recovery from the vessel would be $10,000, of which $4,000 would again be repaid to the stevedore. In both cases, the vessel is fifty percent at fault, but due to the fortuitous circumstance in A1 that the stevedore, rather than the injured longshoreman, was the other negligent party, the shipowner is required to pay double damages, in effect absolving the negligent stevedore at little gain to the longshoreman. Under the Equitable Credit analysis, the longshoreman in A1 would recover only $5,000 from the vessel, but would not be required to repay the stevedore's lien of $4,000, yielding a net recovery of $9,000. In A, the longshoreman suffered a loss of $6,000 due to the compensation statute. In A1, because he can bring an action against the vessel, he is able to recover $5,000 of that loss. It is illogical, however, to assert that the chance appearance on the scene of a third-party tortfeasor should enable an injured longshoreman to recover damages resulting from his employer's negligence which would otherwise be barred by the compensation statute.

Situations like the ones discussed above, in which either the longshoreman or the stevedore is negligent, but not both, pose a difficult problem for courts not applying an Equitable Credit.

Both the employer and the employee normally profit by a successful recovery against the third party. If one is innocent and the other guilty of negligence, the award of damages has the effect

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121. $10,000 reduced by fifty percent because of the worker's contributory fault.
122. See text accompanying note 25 supra.
of rewarding the guilty; but a denial of damages has the equally unfair effect of penalizing the innocent. Since the cause of action cannot be split, a choice must be made between the two injustices.\footnote{123}

The Equitable Credit avoids this injustice by the pure allocation of damages in accordance with fault, in a manner consistent with the spirit of the compensation act.

A final thought on the compromise of workmen's compensation:

If this is the justification for the exclusive remedy rule, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.\footnote{124}

Thus, in example $A_1$, $4,000$ of the $10,000$ judgment awarded the longshoreman is used to repay the stevedore's lien. As the compensation benefits have been replaced by money from the shipowner, the stevedore has paid nothing. Because, however, it has not incurred the absolute liability prescribed by the LHWCA, there is no reason why it should benefit from the statutory language isolating it from other liability, whether to the longshoreman or to the shipowner. This problem, also, is obviated by the Equitable Credit.

3. Prior Judicial Resolutions of Third-Party Dilemmas

Recognition of the dilemma associated with apportioning liability in third-party employer mutual fault situations is not a recent development.\footnote{125} The early trend in many jurisdictions, however, was to protect negligent employers from contributing to the third party's liability under the theory that the employer's compensation payments constituted his sole and exclusive liability.\footnote{126} As time passed, a few jurisdictions, utilizing a variety of weapons, began to crack the employers' armor.

\footnote{123} 2 A. Larson, supra note 1, § 75.20, at 14-261. It is interesting to note that in LHWCA third-party litigation, only guilty stevedores are rewarded; the recoveries of guilty longshoremen are reduced by the doctrine of comparative negligence.

\footnote{124} Id. § 65.10, at 12-4.

\footnote{125} Some commentators suggested solutions similar to those discussed herein many years ago. See, e.g., McCoid, The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers, 37 Texas L. Rev. 389, 444-54 (1959); Note, Recent Developments in the Iowa Workmen's Compensation Law Where Negligent Third Parties Are Involved, 37 Iowa L. Rev. 84, 95 (1951); 36 Minn. L. Rev. 549, 555 (1952).

a. Credits Based on State Law

Pennsylvania was an early exception to the "no contribution" rule, allowing third parties to recover contribution from concurrently negligent employers in an amount not exceeding compensation benefits owed under the local statute.127 Procedurally, after an employee had obtained a judgment against a third party for his damages, the third party would claim contribution from the employer in the amount of compensation benefits and pay the entire judgment to the employee. Once the employee had been paid, he was required to return to his employer the amount of compensation previously paid by the employer to the employee. Thus, by a very circuitous method, the employer was denied recovery of his lien, having in practice been required to pay it out twice, but only allowed to recover it once.

The same result has been reached in North Carolina in a straightforward manner. Although a negligent third party may not seek contribution or indemnity from a concurrently negligent employer, the third party may assert the employer's contributory negligence as a defense, thereby obtaining a pro tanto reduction of liability to the extent of workmen's compensation benefits.128 In later adopting the North Carolina approach, the Supreme Court of California stated the pro tanto rule:

[W]hether an action is brought by the employer or the employee, the third party tortfeasor should be able to invoke the concurrent negligence of the employer to defeat its right to reimbursement, since, in either event, the action is brought for the benefit of the employer to the extent that compensation benefits have been paid to the employee.129

The rule, which has been applied in third party actions by employees whether or not the employer has intervened or been made a party in


interest, has been adopted in several other jurisdictions and its acceptance appears to be growing.

The appeal of the pro tanto rule of limited contribution is based on a blend of practical and equitable considerations. Practically, it preserves rather than defeats the compensation system and harmonizes it with the law of contribution. Equitably, it gives the third party tortfeasor relief from the gross inequity of bearing the full burden for wrongs caused in part by others, and it prevents negligent employers from totally avoiding responsibility for compensating their employees. Thus, while continuing to make injured workers whole, the system also attempts to place the burden where the fault lies. The pro tanto solution is not without its disadvantages, however. When compensation payments are not complete at the time the third party action is tried, it is impossible in most cases to calculate the amount of the credit owed to the third party. Indeed, it has been suggested that chicanery by employers in pressuring employees not to accept compensation benefits as such until after the third party action is completed could completely undermine pro tanto credits.

One possible approach states may take in dealing with this problem is the one recently adopted by New York. In Dole v. Dow Chemical Co., the court of appeals allowed a negligent third party to obtain indemnification from a concurrently negligent employer based upon the employer's proportionate fault. Accepting this tort law tour de force as an accomplished fact, and reserving the question of the compensation law's exclusive-remedy provision, one may go on to observe that the end result may well be the most equitable yet achieved by any jurisdiction.

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131. See Santisteven v. Dow Chemical Co., 362 F. Supp. 646 (D. Nev. 1973) (interpreting state statutory scheme in diversity action); Liberty Mut. Ins. Co. v. Adams, 91 Idaho 151, 156, 417 P.2d 417, 422 (1966); Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 626, 161 N.E.2d 812, 816-17 (1959). District Judge Pettine, in an innovative opinion in Newport Air Park, Inc. v. United States, 293 F. Supp. 809 (D.R.I. 1968), felt that if the Rhode Island Supreme Court had been confronted with this problem, it would have adopted Pennsylvania's rule permitting contribution. Judge Pettine therefore permitted contribution to Newport Air Park. The decision was vacated by the First Circuit, however, on the ground that federal law, and not the law of Rhode Island, applied. The court held that no contribution was allowed under the applicable statute. 419 F.2d 342 (1st Cir. 1969).


134. 2 A. Larson, supra note 1, § 76.22, at 14-320.
b. Credits Based on Federal Law

As was the case with most states, the early federal rule was that no contribution could be obtained by a third party from a jointly negligent employer.\(^{135}\) In 1951, the Third Circuit in *Baccile v. Halcyon Lines*\(^{136}\) adopted a contrary rule in what has been characterized as a "sincere attempt to work out a sort of compromise to minimize the apparent unfairness of an all-or-nothing disposition of the recovery-over problem."\(^{137}\) Baccile, a harbor worker, was injured on board a ship owned by Halcyon Lines. After Halcyon had been sued as a negligent third party, it attempted to obtain contribution from Haenn Ship Ceiling & Refitting Corporation, whose negligence was a concurrent cause of the injuries to Baccile, its employee.\(^{138}\) The trial court, after finding both Haenn and Halcyon negligent, divided Baccile's damages equally between them under a rule of admiralty generally applied in collision cases.\(^{139}\) The Third Circuit, while finding a right of Halcyon to obtain contribution from Haen, limited it to the amount of workmen's compensation which Baccile could have collected from Haenn under the LHWCA.\(^{140}\) In so doing, the court struck a balance between what it saw as the competing interests in admiralty of dividing liability according to fault and limiting the liability of employers of longshoremen and harbor workers. On appeal, the Supreme Court reversed, holding in effect that there was no right to contribution in non-collision cases.\(^{141}\)

Nearly twenty years passed before another form of credit surfaced as a creature of federal law. The plaintiff in *Murray v. United States*\(^{142}\) was a government employee injured in a falling elevator in a building

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136. 187 F.2d 403 (3d Cir. 1951).

137. 2 A. Larson, *supra* note 1, § 76.22, at 14–299.


139. *Id.* See notes 41–42 and accompanying text *supra*.

140. 187 F.2d at 404.

141. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284–85 (1952). Interestingly, both Halcyon and Haenn claimed on appeal "that the decision below limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act [was] impractical and undesirable." *Id.* at 284.

142. 405 F.2d 1361 (D.C. Cir. 1968).
leased by the United States. The building owner, who was sued by Murray, sought indemnity and contribution from the government. Murray had received workmen's compensation from the government pursuant to the Federal Employees' Compensation Act, which, like the LHWCA, precludes a suit against his employer by an injured worker. As a consequence, the District of Columbia Circuit held that the third-party building owner had no right to sue the employer for contribution. The court, however, went further:

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. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A 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.

While the Murray Credit has not been adopted outside the District of Columbia, it was recently reaffirmed there in *Dawson v. Contractors Transport Corp.*, the significance of which is heightened by the fact that Dawson was covered by the LHWCA. The rule allowing contribution among joint tortfeasors in admiralty makes the maritime area a fertile one for creation of new credit defenses "for it is more likely to be in the climate of contribution that 'Murray credit' seeds can germinate." While credit defenses are undoubtedly still in their infancy, the "determination and ingenuity displayed in *Baccile,*"

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144. 405 F.2d at 1364.
145. *Id.* at 1365-66, citing *Martello v. Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962). It is worthy of note that Chief Justice Burger (then Circuit Judge) was a member of the panel which gave birth to the "Murray credit." For an excellent discussion of Murray see 2 A. Larson, *supra* note 1, § 76.22, at 14-314 through -319.
146. 467 F.2d 727 (D.C. Cir. 1972).
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Murray, Newport Air Park, and the Pennsylvania, North Carolina, California and New York cases, are strong evidence of a conviction that some device ought to be found to arrive at a compromise of the interests of employer and third party in [workmen's compensation] cases.\textsuperscript{150}

B. Credit Defenses in Post-Amendment Cases

As noted earlier,\textsuperscript{151} there has been some conflict in decisions handed down thus far in cases arising under the 1972 amendments. Some of the inconsistency may be traced to consideration of different credits, while the balance discloses basic disagreement among the courts as to the purpose of the amendments and how to resolve conflicts between the LHWCA, as amended, and general principles of maritime law.

The first case to consider credit defenses was \textit{Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.},\textsuperscript{152} in which the defendant shipowner asserted both a pro rata Murray Credit and a pro tanto credit. In granting the plaintiff's motion to strike the credit defenses, the court noted Congressional "concern that the stevedore employer would not be held liable for any damages caused by the vessel owner's negligence."\textsuperscript{153} In conclusion, the court stated:

Congress sought to eliminate all actions against the stevedore whether for indemnity or contribution, whether based on tort or on contract, and whether for fees and expenses. Allowance of any such actions, even a \textit{pro tanto} recovery to the extent of payments made by the employer under the Act, would create the circuitous type action Congress considered was too costly and disruptive of the compensation scheme to be permitted.\textsuperscript{154}

While perhaps correct in stating that Congress intended to curtail indemnity and contribution from stevedore to shipowner, the court's analysis in striking credit defenses is not persuasive. Apparently it was assumed that the credit defenses asserted were the equivalent of a prayer for contribution. Indeed, the court even characterized the Murray Credit as a "rule of contribution"\textsuperscript{155} even though the Murray court plainly stated that contribution could not be permitted in that case.\textsuperscript{156} The \textit{Lucas} court then stated, without discussion, that applica-

\begin{thebibliography}{156}
\item 150. 2 A. Larson, \textit{supra} note 1, § 76.22, at 14-321.
\item 151. \textit{See} notes 16-17 and accompanying text \textit{supra}.
\item 153. \textit{Id.} at 767. \textit{See} \textit{id.} at 768.
\item 154. \textit{Id.} at 769.
\item 155. \textit{Id.} at 764.
\item 156. 405 F.2d at 1364.
\end{thebibliography}
tion of a credit would bring about disruption and delay. Credit defenses aside, a shipowner is certain to introduce whatever evidence he can obtain which tends to show that stevedore negligence caused the accident. The stronger the evidence against a stevedore, the weaker it must become against the shipowner. Once all such evidence has been presented, asking a jury to determine the percentage of stevedore's negligence in addition to that of longshoreman and shipowner creates little or no extra burden. It is difficult to imagine how application of a credit, especially the Equitable Credit which is calculated and applied with so little difficulty, can be said to cause any more delay than is inevitably present whenever the injured worker chooses to bring a third-party action.

A case recently decided by the Second Circuit peripherally concerns credit defenses. The shipowner in *Landon v. Lief Hoegh & Co.*, 157 attempted to join the stevedore's compensation carrier as an indispensable party under Rule 19 of the *Federal Rules of Civil Procedure*, based on the theory that the insurer had a cause of action against the shipowner to recover its compensation payments. 158 Apparently, the shipowner intended to use this as a vehicle to raise the stevedore's negligence in its own defense. The lower court granted the insurer's motion to dismiss on the grounds that no such cause of action then existed. On appeal, the Second Circuit affirmed, 159 stating its belief that to reduce the stevedore's full recovery of its workmen's compensation payments would be contrary to the 1972 amendments. 160

The first West Coast case to review credit defenses was *Shellman v. United States Lines Operators, Inc.*, 161 in which United States Lines asserted a Murray Credit in its defense. The motion of the stevedore's subrogated insurer to dismiss the defense was granted, but the court's decision opened the door for application of a credit similar to the Equitable Credit. First, the court quickly disposed of the Murray Credit.

*Murray* cannot be applied here because in spite of the attempt of the court to reach an equitable result, the failure is obvious. *Murray* accomplishes its purpose only where (1) the negligence of the employer is 50%, and (2) the compensation act recovery is

159. 521 F.2d 756 (2d Cir. 1975).
160. *See* notes 267-70 and accompanying text *infra*. Credit defenses were also rejected in *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 1975 A.M.C. 1505 (D. Ore. 1975), with judgment for the longshoreman resulting.
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.\(^{162}\)

The court then went on to examine the relationship between the parties. If he recovered from United States Lines, Shellman would have been required to repay the insurer's compensation lien before obtaining any additional recovery for himself. Thus, as plaintiff, Shellman wore two hats; he was, in effect, suing both for his own use and for the use of his employer's subrogated insurer. Because United States Lines would receive a credit to the degree of Shellman's negligence, the *Shellman* court reasoned that it should similarly be given a credit to the extent of the stevedore's negligence.\(^{163}\) Thus the court, of its own volition, approved the application of an Equitable Credit.

A potential analytical problem with *Shellman* lies in its analysis of the 1972 amendments. The court stated that its decision was guided by the following language from the LHWCA: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to its vessel."\(^{164}\) It appears that this language was meant to apply to those special situations in which the shipowner also acts itself as the stevedore. Language nearly identical to that portion of the LHWCA quoted in *Shellman* appears in the House Committee Report and supports this view.\(^{165}\) Whether the language relied on by *Shellman* was also intended to reach normal

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162. *Id.* at 368.
163. *Id.* at 369-70. At the same time, a pro tanto defense was rejected.
164. *Id.* at 370, *citing* 33 U.S.C. § 905(b) (Supp. IV, 1974).
165. The *House Report* states:

   The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S.S. Yaka, 373 U.S. 410 (1963) and Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing long-shoring services. Similar provisions are applicable to ship building or repair employees directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

third party situations is doubtful. To the contrary, the introductory phrase—"If such person was employed by the vessel to provide stevedoring services"—would appear to limit the operation of the remainder of the sentence to that group. Therefore, it appears unlikely that an appellate court would view with favor an argument that longshoremen employed indirectly by vessels through an independent stevedoring contractor are included within the scope of the statutory language quoted in Shellman.

To be fair to the Shellman court, it is possible that the language concerning persons "employed by the vessel to provide stevedoring services" was included in the opinion only to point out the inconsistency of the language "caused by the negligence of" as that phrase is used in the first three sentences of section 5(b).\(^ {166} \) However, regardless of the intended meaning of that portion of Shellman, that language does nothing to undermine the viability of the Shellman credit.\(^ {167} \) The presence or absence of language compelling the credit is not critical so long as the statute is devoid of language prohibiting it. From our earlier discussion, it is evident that no such prohibition exists.\(^ {168} \)

When the trial court in Frasca v. Prudential-Grace Lines, Inc.\(^ {169} \) was confronted with a finding of mutual fault, it had before it the conflicting decisions of Lucas and Shellman. The court found itself "persuaded by the reasoning of the court in Shellman . . . and by the language of the Longshoremen's Act, as amended, . . . that an offset or credit on the damages assessed [was] indicated."\(^ {170} \) The Frasca court then rejected the Murray Credit as being inequitable in most circumstances and adopted the Equitable Credit as one which can and will produce an equitable result in all instances.\(^ {171} \)

Two decisions handed down this year in the District of Oregon have further muddied the waters. In Hubbard v. Great Pacific Shipping Co., Monrovia,\(^ {172} \) the Murray Credit and a credit based upon Shellman were both rejected because they "would have the result of negating Congress's intent of eliminating direct or indirect third-party actions

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166. See notes 66-70 and accompanying text supra.
167. Shellman was argued on appeal before the Ninth Circuit concurrently with Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 1975 A.M.C. 1505 (D. Ore. 1974), which rejected credit defenses asserted by the shipowner. Opinions were issued on November 21, 1975, after this article was virtually complete. For a discussion of those opinions see the addendum to this article infra.
168. See notes 49-100 and accompanying text supra.
170. Id. at 1144.
171. Id.
in longshoreman-injury cases as embodied in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. 173

Similarly, credit defenses were disallowed in *Croshaw v. Koninklijke Nedloyd, B. V. Rijswijk*, 174 but only in deference to the holding of *Hubbard*. 175 The *Croshaw* court would clearly have preferred a different result, based upon its belief "that the legislative scheme, construed in its entirety, does contemplate an offset in these circumstances." 176 After rejecting the Murray Credit, the court then stated its preference for the Equitable Credit as being consistent with the Supreme Court's recent condemnation of arbitrary and inequitable damage rules in *United States v. Reliable Transfer Co.* 177

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173. *Id.* at 1520.
175. *Hubbard* was heard by the Chief Judge for District of Oregon. Thus, the trial judge in *Croshaw* felt he "must conform to the *Hubbard* decision to maintain uniformity of law within the district."
176. 398 F. Supp. at 1231. The court was particularly critical of the manner in which *Hubbard* sidestepped the hard questions concerning apportionment between shipowners and stevedores.

It would apparently apply comparative negligence between the shipowner and the plaintiff as dictated by the Act and accept reduction of damages by the percentage of the plaintiff's comparative negligence. But the shipowner is held liable for the remainder, regardless of the stevedore's concurrent negligence. The inequities of this program are obvious. If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment. Some jurisdictions tolerate this, but I cannot.

*Id.* at 1232.

177. 421 U.S. 397 (1975). The *Croshaw* court found its task simple when compared to the obstacles the Supreme Court overcame in unanimously deciding *Reliable Transfer*.

*Reliable Transfer* overruled a century and a half of judicial precedent. I need not overcome such formidable obstacles. The 1972 amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

398 F. Supp. at 1233.

The only other case to consider credit defenses thus far is *Kroft v. Nedlloyd & Hoegh Line*, Civil No. 73-306-AAH (C.D. Calif., 1975). The longshoreman's damages were found by the jury to be $58,000. Furthermore, in answering Special Interrogatories submitted by the judge, the jury determined that the negligence of the plaintiff had contributed two percent to his injury and that the stevedore's concurrent negligence had been twenty-five percent responsible. In charging the jury, the judge instructed them:

If you should find that the stevedoring contractor was negligent, and such negligence was a proximate cause of plaintiff's injuries, then you should determine the damages, if any, to which the plaintiff would have been entitled. You will then reduce the amount of damages by that proportion by which the stevedoring contractor was negligent.

Defendant's Proposed Jury Instruction No. 8, as modified and given by the judge in *Kroft*. Applying this instruction to the findings of negligence, the judgment was reduced a total of twenty-seven percent, and the plaintiff was therefore awarded $42,340. It appears that comparable results might have been obtained in other post-amendment cases in which similar special interrogatories were given to juries, but
The Equitable Credit has been favorably received. It is not surprising that judges are generally receptive to a formula which does not conflict with the basic legislative design of the LHWCA and, moreover, has as its main thrust the notion of fundamental fairness to all parties. While the reaction of attorneys representing longshoremen has thus far been mixed,\textsuperscript{178} stevedoring interests have been understandably cool to the Equitable Credit. Without it, they stand to recover compensation payments even when their fault is ninety-nine percent responsible for an employee's injury. It may therefore be anticipated that several arguments will be raised to attack the Equitable Credit in trial and appellate courts.

which were mooted by verdicts for the defendant shipowners. See Milton v. American President Lines, Ltd., Civil No. C 74-0950 SC (N.D. Calif., Mar. 11, 1975); White v. Hellenic Lines, Ltd., 1975 A.M.C. 191 (D. Md. 1974). It should be noted that the interrogatories submitted in these cases did not instruct the jury to make any calculations or reduce any damages. Those functions were retained by the judge. While it does not appear that there is any reason for asking juries to determine the relative percentages of vessel and stevedore responsibility unless application of a credit is contemplated, it is nonetheless possible that the judges in Milton and White could have held the shipowners liable for all proven damages.

178. While the plaintiffs' bar has not generally endorsed the Equitable Credit to date, it would appear that a uniform application of the credit would benefit longshoremen by encouraging settlement of third-party claims. The 1972 amendments to the LHWCA have thus far made settlement virtually impossible in many, if not most cases. Because of the vast improvements in compensation benefits, compensation liens frequently approach the amount of damages which may reasonably be expected at trial. Whenever the shipowner's prospects for avoiding liability are substantial, settlement becomes impossible. In a non-credit setting, the plaintiff longshoreman obviously cannot afford to settle for less than he expects to receive in compensation. Thus, a stalemate is formed; the plaintiff's minimum demand is higher than the maximum settlement value placed on the case by the shipowner. The result is trial in the majority of cases. While this problem could be greatly alleviated if stevedores or their insurers would agree to waive all or part of their claim for reimbursement, such waivers generally have not been offered. And indeed, there is no reason to expect them. If credit defenses are disallowed and a judgment entered for the longshoreman, the stevedore will generally obtain recovery of its entire lien. If the vessel is exonerated, nothing is lost. Therefore, stevedores have very little incentive to enter into settlement negotiations. See Landon v. Lief Hoegh & Co., 521 F.2d 756, 763 (2d Cir. 1975) (suggesting that employers not subject to a defense of concurrent negligence have little incentive to settle, but leaving resolution of the problem for Congress).

When a credit is applied, all of this changes. Stevedores will realize that if they are found at fault, they will lose part, if not all, of their lien. Thus, they are encouraged to give up part of their lien rather than risk it all. If the shipowner is then willing to provide enough "new money" above and beyond that necessary to satisfy part of the stevedore's lien, settlement can be effected. The Supreme Court has indicated its belief that application of comparative negligence standards, which would be used in an Equitable Credit, tends to encourage out-of-court settlements. In Reliable Transfer, the Court stated, "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975) (footnote omitted).
VI. CHALLENGES TO THE EQUITABLE CREDIT

A. The Viability of the "No Contribution" Agreement

At common law there was no contribution between joint tortfeasors on the theory that wrongdoers should not be allowed to avoid the consequences of their actions. Feeling the result to be unnecessarily harsh, approximately one-half of the states passed statutes permitting contribution while others have judicially adopted a similar rule.179

Admiralty was an early leader in developing systems for apportioning fault.180 While the rule was initially limited to collision cases by Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,181 it has recently been extended into the area of personal injuries.182 That extension, however, suggested that the Halcyon rule remained good law on its facts; negligent third parties could still not obtain contribution from concurrently negligent employers whose liability was limited exclusively by statute to payment of workmen's compensation.183

Naturally, stevedoring interests can be expected to argue that the Halcyon rule, when joined by the exclusivity provisions of the LHWCA, as amended, denies the judiciary any freedom to apply credit defenses. In analyzing that argument, several inquiries are necessary: (1) What did Halcyon stand for when decided? (2) What role did Congress intend for Halcyon in adopting the 1972 amendments to the LHWCA? (3) What does Halcyon stand for now? and (4) What is the nature of the relief sought in credit defenses, particularly the Equitable Credit?

1. The Remnants of Halcyon

Prior to the decision in Halcyon, there had been a split of authority on the question of whether a shipowner could obtain contribution from a stevedore for liability resulting from injuries suffered by an employee of the stevedore. A number of early district court opinions had allowed contribution,184 but the precedential value of some of them had later

180. See note 39 and accompanying text supra. See Staring, supra note 39, at 305-10.
183. Id. at 112-13.
been undermined by contrary decisions in the courts of appeals. In *Halcyon*, the Court granted certiorari to resolve this conflict.

The precise holding of *Halcyon* is somewhat puzzling. Ostensibly the Court held "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." In practice, however, a court can never merely decline to decide a question, for the abdication results in perpetuation of the status quo, normally to the detriment of the party seeking relief. Thus, while *Halcyon* postponed resolution of the dilemma, its effect was to deny shipowners a right of contribution from concurrently negligent employers. That deference to Congress should cause such results at all is regrettable; that courts should permit it to happen in admiralty, over which congressional power is found only by implication in the jurisdictional grant to the judiciary, is particularly unfortunate.

By declining to decide, the *Halcyon* Court dismissed the contention that under maritime law damages should be apportioned by simply stating that "this Court has never expressly applied [that rule] to non-collision cases." One thing is clear in the opinion: it was not based on any interpretation of the LHWCA. In a footnote, the Court stated: "We find it unnecessary to decide this question" of "whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act . . . ."

While the relevant inquiry concerns what vitality remains after the passage of two decades of growth in maritime law, there are serious doubts whether *Halcyon* was good law even when decided. Because the denial of contribution was not based on the LHWCA as it then existed, the Court must have believed that *Halcyon* was not entitled to contribu-


186. 342 U.S. at 283-84.

187. *Id.* at 285.


189. 342 U.S. at 284 (footnote omitted).

190. *Id.* at 286-87 n.12.

191. *Id.* at 286.
tion even in the absence of any statute. Such a notion could only have been based upon the underlying body of maritime decisional law.

Personal injury cases in admiralty have not generally been judged under principles different from those normally applied in other maritime matters. In apportioning fault in an early personal injury case, the Court found the rule "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." No reason is apparent why, as suggested by Halcyon without amplification, principles applicable in adjudicating marine collisions should differ from those applied where personal injuries arise from other causes. Indeed, Pope & Talbot, Inc. v. Hawn, decided shortly after Halcyon, confirmed that judicial discretion to create equitable rules existed in cases of personal injury. In denying a contention that contributory negligence should bar the plaintiff's action, Mr. Justice Black, who also authored Halcyon, stated:

The harsh rule of the common law under which contributory 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.

Doubt further exists, beyond the wisdom of the judicial methodology utilized in Halcyon, as to whether the Court was even accurate in saying that principles of contribution had previously been limited to collision cases. While it is true that few, if any, such cases actually reached the Supreme Court, a rash of lower court cases allowed contribution in a wide variety of situations. Interestingly, the pre-Halcyon denials of contribution by lower courts seem to have invariably been based on the language of the compensation act, ostensibly assuming that contribution would be available were the statute not a bar.

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192. The Max Morris, 137 U.S. 1, 15 (1890).
194. Id. at 408-09, citing The Max Morris.
195. See generally Staring, supra note 39, at 321-34.
196. See, e.g., cases gathered in note 185 supra.
197. The preceding analysis is based in part on the highly critical discussion of Halcyon in H. Hart & A. Sacks, The Legal Process 519-41 (1958). The authors concluded:

at one stroke the Court (1) reached an unsound conclusion in the case before it, (2) destroyed the harmony of the underlying maritime law in this general area; and (3) established a precedent which puts in question the continued vitality in the federal courts of the whole Anglo-American tradition of growth of decisional law.

Id. at 535.
Subsequent cases did little to amplify the true meaning of *Halcyon*. The same issue in *Pope & Talbot, Inc. v. Hawn*\(^{198}\) was decided on authority of *Halcyon* without discussion.\(^{199}\) The Court did rule, however, that a credit to the shipowner in the amount of compensation paid by the stevedore "would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case."\(^{200}\) A few years later, the decision of the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*\(^{201}\) emasculated *Halcyon* by implying a promise by the stevedore to perform its work in a workmanlike manner, breach of which would lead to indemnity. The question naturally follows whether *Halcyon* has been reincarnated, since the 1972 amendments eliminated indemnification based upon warranties of workmanlike performance in third-party compensation cases.

The abdicating holding of *Halcyon* cannot stand today. Since the Court invited it to consider the question almost a quarter of a century ago, Congress, despite passing significant amendments to the LHWCA in 1972, has thus far failed to discuss the apportionment of liability to an injured longshoreman between a concurrently negligent stevedore and shipowner. In light of past experience, a continued judicial policy to await congressional direction is unrealistic. Because Congress has decided not to accept the invitation to legislate on this point, the courts must confront the issue squarely. *Halcyon* did not reach the issue of whether the LHWCA, as it then existed, prohibited such contribution,\(^{202}\) so its continuing validity cannot rest upon the 1972 amendments to the LHWCA. Therefore, if *Halcyon* is to retain any vitality, it must be based on the existence of a non-statutory rule prohibiting contribution from a stevedore to a shipowner.\(^{203}\) Since the

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199. Id. at 408.
200. Id. at 412.
202. See text accompanying notes 190–91 *supra*.
203. It is worth noting that even the presence of the LHWCA might be unavailing in the face of contrary principles of maritime law. *See* Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597 (1963); *The Chattahoochee*, 173 U.S. 540 (1899). In *The Chattahoochee*, the rules of the Harter Act, 46 U.S.C. §§ 190–96 (1970), exempting shipowners from liability for losses occurring due to navigational errors of the crew were required to give way to the admiralty rule of divided damages in collision cases. An analogous rule was applied in *Weyerhaeuser* where the Court held that the exclusivity provision of the Federal Employee’s Compensation Act, 5 U.S.C. § 757(b) (1970), must similarly yield in collision cases. Some efforts have been made to distinguish *Weyerhaeuser* from the typical third-party longshoring case because "[t]he moiety obligation, unlike contribution between tortfeasors generally, is indeed a separate duty based, not on the two wrongdoers’ mutual relation to the plaintiff, but on their relation to each other." 2 A. Larson, *supra* note 1, § 76.22, at 14–302. Whether this distinction is helpful is uncertain. It seems to suggest that when a longshoreman
decision in Cooper Stevedoring Co. v. Fritz Kopke, Inc., however, contribution in such circumstances is clearly the rule of admiralty.

The Halcyon opinion was unavoidably a subject of discussion in Cooper Stevedoring, as it was relied upon by those parties seeking to avoid liability for contribution. In reviewing its earlier decision in Halcyon, the Court said:

Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrain from allowing contribution in the circumstances of that case.

These factors underlying our decision in Halcyon still have much force. 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 employee's exclusive remedy.\textsuperscript{205}

Such an argument, however, is a far cry from an assertion that the stevedore must always recover his lien regardless of his fault or that to prohibit the stevedore from recovering that which he is already required by the LHWCA to pay is void because it is contribution prohibited by Halcyon.

Since Cooper Stevedoring went on to distinguish Halcyon on its facts, the language quoted above is not related to the Court's holding that "[o]n the facts of this case . . . no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors."\textsuperscript{206}

What weight then, if any, should be given to the language in Cooper Stevedoring discussing Halcyon? It is evident that Halcyon was not fortified by any newly formed rules of law.\textsuperscript{207} Rather, its

sues a shipowner, no contribution may be obtained from the stevedore, but when the stevedore sues to recover its lien as in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 409 (1969), alleging breach of a duty owed the stevedore by the shipowner, that contribution would be in order. The Supreme Court decision in Weyerhaeuser is discussed in detail in 2 A. Larson, supra note 1, § 76.22, at 14–300 to –306; Weyerhaeuser and subsequent case, Drake v. Treadwell Const. Co., 229 F.2d 789 (3d Cir. 1962), cert. granted, vacated and remanded, 372 U.S. 772 (1963) (which relied on the Ninth Circuit's decision in Weyerhaeuser) are also discussed in Comment, Workmen's Compensation: Third-Party Action Against A Virginia Employer in Tort, 9 U. Rich. L. Rev. 159, 166–67 n.26 (1974).

205. Id. at 112.
206. Id. at 113.
207. Because the Court stated that compensation was an employee's exclusive remedy against his employer, Cooper Stevedoring arguably stands for the proposition
continued viability rests on the present validity of the original opinion, which has already been criticized above. The remains of *Halcyon* may thus be summarized: payment of compensation is an employer's sole obligation under the LHWCA, and third parties may not increase the stevedore's exposure by seeking contribution for their tort liability to injured longshoremen. The Equitable Credit is a different concept altogether. The stevedore is not asked to pay more to its employee because it was at fault. The credit simply acts to prevent it from recovering its lien in those circumstances. Thus, rather than negating the viability of an Equitable Credit, *Halcyon* lends support to its application.

B. *The Equitable Credit as Contribution*

No discussion of the present status of the *Halcyon* no-contribution rule would be complete without a determination of the effect on the rule, if any, of the 1972 amendments to the LHWCA. Section 5(b), in its discussion of a shipowner's liability to a longshoreman, states in part that "the employer shall not be liable to the vessel for such damages."208 Professors Gilmore and Black noted that "[i]t would have been perfectly simple to adopt the *Halcyon* rule of no contribution in § 905(b): The employer, *even if his negligence has contributed to the injury*, shall not be liable. . . ."209 The fact of the matter is that no such language is present. While not necessarily persuasive that Congress intentionally ignored *Halcyon*,210 the absence of language to that effect does constitute strong evidence that the Congress did not consider *Halcyon* and thus made no attempt to codify the rule for which that case is remembered.

No mention is made of contribution in the amendments themselves. The legislative history, despite its length, contains only the briefest mention. The Committee Reports,211 for example, speak only of prohibiting "hold-harmless, indemnity or contribution agreements . . . as that an injured worker is barred from seeking recovery from a third person for damages incurred due to the employer's negligence. It would be wise to recall, however, that the language relied upon for such an argument is dictum.

208. 33 U.S.C. § 905(b) (Supp. IV, 1974). The entire section is set out in the text accompanying note 9 supra.

209. G. GILMORE & C. BLACK, supra note 8, at 451 (emphasis added).

210. Similarly inconclusive is a recent statement by the Second Circuit, "We see nothing in the statute to exclude it." Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 n.4 (2d Cir. 1975). The mere failure to exclude the *Halcyon* rule, without some evidence that it was being considered by Congress, cannot support an argument that it was codified by section 905(b).

211. See notes 14 and 44 supra.
a matter of public policy . . .”212 That prohibition is a far cry from an edict forbidding limited equitable contribution by court order in the form of non-recoverable compensation payments where the concurring fault of a shipowner and stevedore caused an injury to a longshoreman. Assuming arguendo, however, that as a result of Halcyon and the 1972 amendments a “no contribution” rule exists, it does not automatically follow that the Equitable Credit must thereby fall.

Much has been written in a continuing attempt to define contribution. It is generally agreed that before contribution may be obtained, there must exist a “joint tort.”213 The meaning of “joint tort” and identification of the term “joint tortfeasors,” however, is a more difficult proposition. Dean Prosser has said: “The contribution defendant must be a tortfeasor, and originally liable to the plaintiff. If there was never any such liability, as where he has the defense of . . . substitution of workmen’s compensation for common law liability, then he is not liable for contribution.”214 This formulation has proved to be a major hurdle for third parties attempting to obtain contribution from negligent employers in a compensation setting,215 and has long been used by stevedores in resisting contribution bids by shipowners.216 The stevedore is absolutely liable under the LHWCA for compensation benefits. The shipowner is liable for damages if proved negligent. Because their respective liabilities are different in nature, scope, and operation, there is no common liability and hence no contribution.217 So goes the argument.

Because contribution is basically an equitable doctrine,218 however, a variety of attempts have been made to achieve equitable results in workmen’s compensation situations where common liability of an employer and third party could not be shown.219 The rule in Pennsylvania

215. See 2A. Larson, supra note 1, § 76.22, at 14–305 to –306.
217. See 2A. Larson, supra note 1, § 76.21, at 14–295 to –298; McCoid, supra note 125, at 437; Note, Contribution and Indemnity: The Effect of Workmen’s Compensation Acts, 42 Va. L. Rev. 959, 960 (1956). For a survey of cases in which contribution was denied because of an absence of common liability see Annot., 53 A.L.R.2d 977, 980–82 (1957).
218. See Murray v. United States, 405 F.2d 1361, 1365 (D.C. Cir. 1968); Staring, supra note 39, at 335.
bases allowance of contribution on a finding of joint negligence rather than requiring joint liability.\textsuperscript{220} The necessity for such semantical gymnastics makes the question of contribution in compensation cases one ripe for criticism. While the requirement of common liability is well entrenched in the law, there is no clear reason why it should defeat contribution in those cases where one party will otherwise be unjustly enriched at the expense of another.\textsuperscript{221} This is especially true in admiralty, which has traditionally apportioned damages despite the lack of any common liability.\textsuperscript{222}

In response to just this problem, the Third Circuit once attempted to permit contribution in a third-party longshoreman’s case by changing the test to “mutual wrongdoers.”\textsuperscript{223} By using a “mutual wrongdoer” analysis, liability could be apportioned in a more equitable fashion. When this concept comes into conflict with a legislative directive, it must naturally bow to the extent necessary to accommodate the intent of Congress. Thus, while a shipowner would be entitled to pass on a portion of the ultimate liability for injuries suffered by a longshoreman to the worker’s negligent employer, the stevedore’s liability could not exceed its compensation exposure.\textsuperscript{224} In essence, this is how the Equitable Credit functions.

If one considers contribution in a narrow sense — a sharing of liability by two parties liable in common to a third — the Equitable Credit cannot be considered as contribution and thus cannot run afoul of the rule of Halcyon, should that prove to have endured. Moreover, the Credit does not conflict with the LHWCA because it requires an employer to do no more than he would have been required to do by statute had no third party become involved. On the other hand, if one views contribution very generally — as any sharing of ultimate liability for injuries to a workman — then, while the Equitable Credit is certainly contribution, it is also approved by the LHWCA. Congress could not have meant to prohibit contribution in this general sense, for it is sure to be present whenever compensation benefits exceed proven

\textsuperscript{220} See 2 A. Larson, supra note 1, § 76.22, at 14-306; Note, Contribution and Indemnity: The Effect of Workmen’s Compensation Acts, 42 Va. L. Rev. 959, 966-68 (1956); Comment, supra note 112, at 163. The Pennsylvania contribution rule is discussed in greater detail at note 127 and accompanying text supra.

\textsuperscript{221} See H. Hart & A. Sacks, supra note 197, at 524-25.

\textsuperscript{222} See id. at 525-26 and cases cited therein.

\textsuperscript{223} Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951), discussed at notes 136-26 and accompanying text supra. Unfortunately, the concept was brushed aside without much comment by the Supreme Court in Halcyon.

\textsuperscript{224} See Note, Workmens’ Compensation: Should a Contributory Negligent Employer be Subrogated?, 42 Ind. L.J. 430, 440 (1967).
damages at law. In such a case, although the entire third-party judgment will be used to repay the stevedore's lien, some will remain unrecovered. Thus, the shipowner and the stevedore have each paid a portion of the longshoreman's total monetary recovery for his injuries. When there is no negligent third party, the stevedore and the longshoreman "share" the loss. Thus, in the general sense, a stevedore "contributes" in every compensation case. The fortuitous happenstance that a third party later becomes liable to the longshoreman for additional damages cannot change the basic nature of compensation payments. Rather, a stevedore should only be permitted to obtain reimbursement to the degree necessary to avoid unjustly enriching either the longshoreman or the shipowner.

VII. THE ROLE OF STEVEDORES AND THEIR SUBROGATED INSURERS

While one of the stated purposes of the 1972 amendments to the LHWCA was to avoid costly and time-consuming tripartite litigation, the Act as amended nonetheless recognizes that longshoremen, stevedores, and shipowners all have rights and duties which may, and indeed usually will, bring them together in most typical third-party actions filed by longshoremen against shipowners. A longshoreman need not elect whether to receive compensation or sue a third party, and in the vast majority of cases, he will have received some compensation benefits before filing his third-party claim. Naturally, if liability of the third party can be established, the employer will seek to recover the payments it has made to its employee pursuant to the compensation act. The LHWCA explicitly recognizes this fact by assigning to the employer the employee's cause of action against any negligent third party if the employee fails to bring suit himself within six months after

225. In some cases this is not true. A stevedore may recover the excess in a common law suit against the shipowner. However, the negligence of the stevedore may be raised by the shipowner in its defense. Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).

226. Senator Javits stated, "Our real concern in this regard is not doing away with the negligence concept. It is structuring it in such a fashion that the courts cannot repeat all over again what they repeated on the circular liability suits in contrast to the clear intent of Congress from 1946 forward." Senate Hearings, supra note 71, at 38.

227. Section 33(a) of the LHWCA states:

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

formal award of compensation benefits. While no express assignment appears in the LHWCA for benefits paid between the time of injury and the completion of compensation proceedings, it is clear that the stevedore nonetheless has some interest, accruing at the moment of its initial payment, in being reimbursed by any third party ultimately found at fault.

When an accident occurs due to mutual fault of shipowner and stevedore, complications arise. Obviously the blameless employee may have his compensation and also proceed against the shipowner, but he may not recover twice. His recovery is limited by damages proven in court or by maximum workmen's compensation benefits, whichever is greater. When the sum of compensation paid prior to judgment and damages awarded in the third-party action exceed the maximum recovery, the longshoreman must return the excess to someone. It is here that the interests of shipowner and stevedore clash. Normally, the stevedore does not actively enter the third-party litigation. He merely stands outside the courthouse door, palm outstretched, to receive reimbursement of compensation benefits from the longshoreman's third-party recovery. The shipowner, however, understandably wants to keep the excess for himself where his fault was small when compared to that of the stevedore. Therefore, in order to make the longshoreman whole while limiting his own liability, the shipowner must find a method of bringing the stevedore into the courtroom so that the rights of all parties are properly represented. Stevedores, in the meantime, can be expected to oppose such attempts on the ground that before judgment they have no interest in the proceedings and that to bring them into the courtroom would defeat the legislative intent to end tripartite litiga-

229. See International Terminal Operating Co. v. Waterman Steamship Co., 272 F.2d 15, 17 (2d Cir. 1959), cert. denied, 362 U.S. 919 (1960); The Etna, 138 F.2d 37, 40 (3d Cir. 1943). Typically, when a longshoreman is injured he is completely unable to work for a period of time. During this incapacity, he receives compensation for his temporary total disability without benefit of an award and is also provided with free medical treatment. Once his condition stabilizes, it becomes possible for physicians to determine what permanent partial or permanent total disability, if any, he has suffered. Until such determination is made, it is unusual for any award to occur.

If a longshoreman is severely injured and has a promising third-party claim, he will usually bring it before final adjudication of his compensation benefits. This enables the longshoreman to pursue a more substantial monetary award while still retaining the right to final determination of compensation for permanent partial disability if he loses. If he wins, of course, his recovery will likely exceed the value of a potential compensation award, and he will never press his compensation claim. He does retain, however, the right to seek additional compensation after a successful third-party action. 33 U.S.C. § 933(f) (1970).
230. See The Etna, 138 F.2d 37, 41 (3d Cir. 1943); 2 A. Larson, supra note 1, § 71.20.
tution.231 Courts thus far have divided in their approach to this problem, leaving the issue very much up in the air.

A. Bringing in the Stevedore

Maritime law has long permitted an employer to protect its subrogated interests through intervention in an action brought against a shipowner by one of its employees.282 Moreover, since the stevedore's compensation carrier stands in the shoes of the employer, he "may at all times intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages."233 Whether an employer or his subrogated insurer can be compelled to join in the litigation before any statutory assignment of rights to them occurs is less clear.234 According to one commentator, however, the "cases that deny joinder of the insurance carrier have been termed a minority, and it has been stated that after Aetna [Life Insurance Co. v. Moses]235 the weight of authority classifies the subrogated insurance carrier as a necessary party."236 Some courts have reached the intermediate result that while it is not necessary to join the missing party, it is permissible.237

Such a result is eminently reasonable. Permitting joinder in such cases is the "obvious way to see that everyone's interests are watched over."238 This is particularly true where both the longshoreman and stevedore seek their recoveries through the same cause of action.239 As the Aetna Court said, "both 'are interested in the recovery,' which is obviously true."240

231. See Gorman, supra note 8, at 21.
232. See The Etna, 138 F.2d 37, 41 (3d Cir. 1943).
233. Id. at 42, quoting from The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854).
234. See 2 A. Larson, supra note 1, § 74.41, at 14-253 and cases cited therein.
235. 287 U.S. 530 (1933).
236. 3A J. Moore, Federal Practice ¶ 17.09 [2-3], at 339 (2d ed. 1967). See the cases collected id. n.4.
237. See United States Fid. & Guar. Co. v. United States, 152 F.2d 46 (2d Cir. 1945); Moore v. Hechinger, 127 F.2d 746 (D.C. Cir. 1942).
238. 2 A. Larson, supra note 1, § 74.16, at 14-193. Similarly, "[i]t is generally held that where two parties are entitled to a portion of the proceeds of a third party recovery, both may and sometimes must be joined as co-plaintiffs." E. Blair, Reference Guide to Workmen's Compensation § 24:03, at 24-11 n.9 (1974).
239. E. Blair, supra note 238, § 24:03 at 24-12.
240. Moore v. Hechinger, 127 F.2d 746, 750 (D.C. Cir. 1942), quoting from Aetna Life Ins. Co. v. Moses, 287 U.S. 530, 543 (1933). It is important to recognize that the joinder advocated herein is completely different from an impleading under Fed. R. Civ. P. 14 seeking indemnity. While the latter seeks to hold the stevedore liable for damages owed by the shipowner, the former merely seeks to adjust repayment of compensation to the stevedore in an equitable fashion.
The trend in admiralty mirrors that in other areas. In *Joyner v. F & B Enterprises, Inc.*, the District of Columbia Circuit denied a third party's motion for joinder of the plaintiff's employer under Rule 17 of the *Federal Rules of Civil Procedure* "on the ground that an employer who pays compensation without an award lacks a substantive right to sue a third party for reimbursement of benefits paid." The Fifth Circuit, however, recently found *Joyner* inconsistent with the Supreme Court's decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.* *Burnside* had held that an employer, in addition to any right he might have to reimbursement under the LHWCA, had a common law right to recover its compensation payments as damages from a shipowner resulting from breach of the vessel's duty to provide the stevedore a safe place to work. Nothing in the 1972 amendments to the LHWCA removed that right.

Under authority of *Burnside*, the Second Circuit recently denied joinder of a stevedore's insurer in *Landon v. Lief Hoegh & Co.* The shipowner had moved to join the insurer "as a necessary party plaintiff pursuant to Rule 19(a)." In deciding that joinder was improper, the court assumed that a *Burnside* claim could only arise after a determination "that the compensation payments exceed the plaintiff's recovery." That assumption is counter to the Fifth Circuit's recent analysis of *Burnside* in *Louviere v. Shell Oil Co.* Without deciding the real import of *Burnside*, the Second Circuit in *Landon* could have determined the propriety of joinder by examining the interests of the parties to the litigation. The court categorized the

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241. 448 F.2d 1185 (D.C. Cir. 1971).
243. Id. at 282.
245. Id. at 410–12. For a detailed discussion of *Burnside*, see generally 2 A. Larson, *supra* note 1, § 77.
246. See Louviere v. Shell Oil Co., 509 F.2d 278, 284 (5th Cir. 1975). But see *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 761 (2d Cir. 1975) (suggesting that *Burnside* may not have survived the 1972 amendments).
247. 521 F.2d 756 (2d Cir. 1975). The duty to provide its stevedore with a safe place to work is different from the pre-amendment non-delegable duty to provide longshoremen a safe place to work, and in all probability it has survived the amendments. Thus, if cargo is damaged because of unsafe conditions on board its vessel, or if a stevedore's equipment is thereby damaged, liability will rest with the vessel. On the other hand, however, it is believed that with regard to cargo claims, stevedores still warrant to shipowners that they will do their job in a workmanlike manner. Thus, if the stevedore's carelessness causes damage to cargo, it will presumably be liable for breach of its warranty.
248. Id. at 758.
249. Id. at 761.
250. 509 F.2d 278 (5th Cir. 1975).
insurer's interest as "not in the litigation between the plaintiff and
ship, but only in the plaintiff's recovery."

This totally ignores the equitable right of the insurer to a portion of the plaintiff's recovery. In effect, the longshoreman brings not one action, but two: one for his own benefit and one for the use of his employer's subrogated insurer.

This fact of life has been recognized by other courts. *Poleski v. Moore-McCormack Lines, Inc.* held that since the longshoreman had a duty to reimburse his employer's insurer out of his recovery, the "carrier is therefore a party for whose benefit such an action is brought. By paying compensation or medical expenses without an award a carrier foregoes only its right to control the employee's right of action against the third person . . . . It may be joined as a plaintiff or as a use plaintiff." Thus, in effect, the court found that "both insured and insurer 'own' portions of the substantive right."

The *Poleski* decision retains vitality today. Based on its authority, joinder of the insurer was allowed in *White v. Hellenic Lines, Ltd.* The application of the Equitable Credit under this theory was recently illustrated in *Frasca v. Prudential-Grace Lines.* Frasca brought suit against Prudential-Grace "to his own use, and to the use of Liberty Mutual Insurance Company," the insurer of Frasca's employer. After the jury findings, the trial judge stated: "The judgment, accordingly, will be that Frank Frasca, to his own use, recover the sum of $8,400.00 with costs; and that Frank Frasca, for the use of Liberty Mutual, recover nothing." This procedure recognizes the actual interests of the parties and permits justice to be done within the framework of the 1972 amendments to the LHWCA. Because impleading the stevedore under Rule 14 of the *Federal Rules of Civil Procedure* is no longer permitted after the 1972 amendments, the "use-plaintiff" concept may be expected to have increased appeal.

### B. The Nature of the Right the Stevedore Seeks to Protect

A stevedore obtains a statutory lien only when it pays compensation "under an award." Otherwise, repayment is obtained "through ap-

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251. 521 F.2d at 761.
253. *Id.* at 581.
254. *Id.* at 582.
257. 1975 A.M.C. at 1144.
258. 1975 A.M.C. at 1145.
plication of the equitable doctrine of subrogation.” In determining when reimbursement is allowed and when it should be denied, courts have uniformly applied equitable principles, for such is the nature of subrogation. Thus, courts sitting in admiralty have been able to


This takes us to the very fundamentals of subrogation. It is now a mechanism so universally applied in new and unknown circumstances that it is easy to overlook that it originates in equity. Every facet, whether substantive or procedural, is controlled by the equitable origin and aim of subrogation. These principles, so well established that to cite cases would be an affectation, find expression in accepted texts, as the following excerpts reflect. “Legal subrogation is a creature of equity not depending upon contract, but upon the equities of the parties.” § 4 at 679. Through it equity seeks “* * * to prevent the unearned enrichment of one party at the expense of another * * *.” § 4 at 681. It has “for its purpose the working out of an equitable adjustment and the doing of complete and perfect justice between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it, and preventing the sweeping away of the fund from which in good conscience the creditor ought to be paid.” § 6 at 683-84. It has been “characterized as an eminently just doctrine, a pure, unmixed equity, one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of equity and justice, and to prevent injustice.” § at 685. Applied as it now is, “it is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.” § 7 at 686. It is “a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends upon the equities and attending facts and circumstances of each case.” § 10 at 688. Because its object is “to do complete and perfect justice between the parties without regard to form or technicality, the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy. Consequently, relief by way of subrogation will not be granted where it would work injustice or where innocent persons would suffer, or where the result would be inimical to a sound public policy.” § 11 at 690. As “subrogation is administered upon equitable principles, it is only where an applicant has an equity to invoke that the courts will interfere. Moreover, the equity of the party seeking subrogation must be strong and his rights clear, and his equity must be superior to that of other claimants.” § 12 at 690-91. And it “will not be enforced to the prejudice of other rights of equal or higher rank, or to displace an intervening right or title, or to overthrow the equity of another person.” § 13 at 691-92. Subrogation “is not an absolute right which a party paying the debt of another may enforce at will, but rather, a matter of grace to be granted or withheld as the equities of the case may demand.” § 16 at 693. The whole aim of subrogation “is the doing of equity and justice, and the relief will not be decreed where it will work an injustice, and so it cannot be invoked to the injury of innocent third persons.” § 17 at 693.

Id. at 697.
avoid any fundamental unfairness in making the parties to longshoring cases whole. Stevedoring interests are not prejudiced, for they have ample opportunity to present their equities before the court.

In some cases, legal principles are applied in determining the right to recoup compensation payments. For example, the subrogee's negligence has been asserted as a defense to his claim. More often, however, courts think in terms of such equitable notions as unclean hands: if an insurer or his insured is unworthy, he should not obtain a recovery. To allow a negligent employer to hide his fault behind a mask of subrogation would subvert the equitable principles which prompted its creation. Thus, courts have denied full subrogation in a variety of circumstances. The North Carolina rule succinctly states the employer's situation: "[H]is hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of law."

The failure of some to recognize the distinction between legal and equitable rights is apparent from their assertions that any reduction in the stevedore's recovery of its lien constitutes "indirect liability," which is forbidden by the amendments. Such reasoning, which was central to the rejection of credit defenses in Hubbard v. Great Pacific Shipping


264. See id. at 434-35; 33 NOTRE DAME LAW. 506, 507 (1958).

265. Nacirema Operating Co. v. Oosting, 456 F.2d 956 (4th Cir.), cert. denied, 409 U.S. 980 (1972), was an action by a stevedore and its subrogated insurer to recover its lien from a longshoreman's third-party judgment before a payment of fees to the plaintiff's attorney. Since the interests of the longshoreman and the stevedore had been conflicting and the stevedore had consequently attempted to defeat the longshoreman's recovery, it was held that the insurer could obtain reimbursement only for the plaintiff's net recovery, the amount remaining after payment of costs and attorneys' fees. Obviously, the court thought it unfair to allow the stevedore to recoup statutory expenditures from a fund which it made every effort to diminish.


The indirect liability proscribed by Section 905(b) concerned legal rights and remedies. Congress drafted that proscription in order to eliminate indemnity actions and warranty provisions which had been exposing stevedores to liability for personal injury awards based on the shipowner's negligence or the "unseaworthiness" of his vessel. Legislative history does not reveal whether Congress intended to protect the stevedore's equitable lien from his own negligent conduct as well. Such protection does not appear justified and would clearly violate fundamental principles of equity.

Because the Equitable Credit brings the stevedore or his insurer into the litigation only to determine what portion of its compensation lien, if any, should be refunded from the third-party recovery, it is fully consistent with the goal of the 1972 amendments to reduce tripartite litigation. Furthermore, it is manifestly proper under the equitable principles associated with subrogation. As will shortly be seen, application of the Equitable Credit will serve to advance, not retard, the most basic purpose of the LHWCA.

VIII. FURTHERING THE LEGISLATURE'S SOCIAL AND ECONOMIC POLICIES

Legislation may be characterized as a response by a group of individuals representing the public to a situation which they feel is intolerable. When basic public policy and values are offended, new duties will be structured to bring the deviant practice back within accepted norms. Such a process occurred during passage of the 1972 amendments to the LHWCA. Congress determined that longshoremen and other harbor workers were subject to frequent and severe injury, and that the compensation and risk distribution systems were not satisfactory to protect these workers. Thus, two primary goals were evidenced: elimination of as many of these accidental injuries as possible and, when they inevitably occur, compensation of the injured worker in an amount ample to insure his continued economic well-being.

270. Id. at 1233-34.
Congress intended to fulfill these goals through the creation or retention of two basic duties. First, the stevedore, employer of the injured longshoreman, would be required to pay compensation in the event of a work-related injury, regardless of fault. By raising compensation benefits substantially and providing an annual adjustment as a hedge on inflation, Congress achieved its goal of economic protection. At the same time, the safety objective was promoted, for a stevedore could decrease its insurance premiums for workmen's compensation only by taking preventive action to reduce the number of claims. Secondly, shipowners were to be held liable when their negligence was a cause of the accident. Such third-party recoveries could only improve the worker's financial situation and would serve as an incentive to shipowners to adopt their own safety programs. Any analysis of the LHWCA and the procedures available for relief thereunder must keep in mind these primary duties and the policy considerations responsible for their initiation.

As a corollary to these duties, a right is granted to longshoremen and harbor workers to receive compensation from their employers and to expect certain standards of conduct from shipowners. When these rights are infringed, remedial devices are available. If compensation is not paid, a claim may be filed against the employer. If the breach of duty of a third party is a cause of his injury, the employee may also bring an action against such third party. Note, however, what happens when a worker's third party recovery is used to repay his concurrently negligent employer. Effectively, he is not denied his monetary remedy, for otherwise he would obtain a double recovery. He is, however, stripped of his right to recover compensation. Because that right was afforded to further the congressional purpose of providing incentives to employers to follow strict rules for on-the-job safety, the worker has lost something of value. His rights against his employer are arbitrarily scuttled in favor of his rights against a third party. In the shuffle, safety objectives are lost. While no financial loss results, most workers would undoubtedly agree that being injured and

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274. It is doubtful whether safety programs initiated by stevedores owe their creation solely to altruistic motivation. Workmen's compensation insurance is a cost of doing business, and to the extent that safety programs produce positive results from an actuarial standpoint, a real saving has been effected. However, if negligent stevedores obtain reimbursement of compensation paid whenever a third party is jointly negligent, their incentive to maintain stringent safety programs will be seriously undermined.
then being made whole is never as satisfactory as never being injured in the first place.

Arguably, what is advocated herein is recovery for moral fault, and indeed that is true. Certainly one is not always provided a remedy for injuries attributable to the moral wrongs of another. Quite clearly Congress could have decided that social policy would best be advanced by allowing employers to recover the entire amount of compensation benefits advanced by them to a worker without regard to the employer's fault, either absolutely or comparatively. Congress, however, stopped short of such a drastic step. Instead, the policy reasons for preventing stevedores from absolving themselves completely were carefully spelled out:

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.275

Some courts have specifically recognized the existence of these policy considerations in attempting to distribute liability equitably under the LHWCA.276 As the stevedore and the shipowner are in equally good positions to distribute the risk among users of the service,277 there is no reason to exclude stevedores from shouldering a portion of the liability when to do so would contravene the safety objectives of the Act. Few longshoring accidents occur outside of the scope of the work that stevedores are hired specifically to do.278 In assigning fault in these accidents, it has long been a policy of admiralty to promote

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276. For example, Judge Pettine discussed the effect of "open-ended contribution" on "the social and economic policies underlying the compensation scheme" in Newport Air Park, Inc. v. United States, 293 F. Supp. 809, 815 (D. R.I. 1968), rev'd, 419 F.2d 342 (1st Cir. 1969).

277. See McCoid, supra note 125, at 444. If anything, stevedores can distribute the risk more effectively than shipowners. When the risk is distributed by a stevedore, all shipowners using that stevedore will share the burden through the stevedore's fee, later passing it on themselves in freight charges. When shipowners must distribute the loss directly, one level of distribution is eliminated.

278. Dennis Lindsay, an attorney representing the West Coast Stevedoring Association and the National Maritime Compensation Committee, so testified before the Senate Subcommittee conducting hearings on the 1972 amendments to the LHWCA: "You are well aware that vessel's gear failures and the like only are 1 percent of all accidents. Most accidents are a result of housekeeping of the stevedore by its men during the whole work operation . . . ." Senate Hearings, supra note 71, at 654.
safety by “placing the burden ultimately on the company whose default caused the injury.’”

One final and persuasive argument also rests on the very foundations of social policy. When a longshoreman is injured, whether with or without any fault on the part of his employer, the stevedore must nonetheless provide benefits under the LHWCA. When, however, a third party’s negligence also contributes, the employer, in the absence of a credit, will recover all or most of his compensation payments. This creates an anomaly. The employer is better off when both he and a third party are negligent than when no one is negligent. Such a result has been strongly criticized on humanitarian grounds:

Recognizing the necessity of those socio-economic contingencies which stimulate business, it is clear that regardless of negligence no one should be allowed to benefit from the injury or death of another human being. This is a truism: a philosophical and religious concept as well as a basic maxim of law.

IX. CONCLUSION

Workmen’s compensation is a system designed to support injured workers during their period of disability. Third-party actions in the context of a workmen’s compensation setting are not punitive in nature. By holding negligent third parties liable, courts are able to encourage them to maintain more stringent safety standards, while providing a bonus for the injured worker. These ideals are advanced sufficiently, however, by holding third parties liable only for those damages caused by the third-party’s proportionate fault.

In tort litigation, most courts have felt compelled to grant total victory to one side or the other. Fortunately, courts sitting in admiralty have felt free to adopt more enlightened rules, based on notions of equity and fundamental fairness. Recently in the area of personal injury to longshoremen and harbor workers, Congress, by the 1972 amendments to the LHWCA, ended the era of Sieracki, Ryan, and their progeny which had shifted total victory back and forth without entertaining the possibility of compromise.

279. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964). This concept was compared before the Senate Subcommittee with the notion in criminal law that “[p]unishment is a deterrent to crime. If there is any merit in this proposition, then there is certainly merit in the proposition that making the wrongdoer and his defective appliances bear the cost of the ‘human misery’ produced thereby is a deterrent to the carelessness and to his supplying defective equipment.” Statement of David B. Kaplan, Chairman of the Admiralty Section of the American Trial Lawyers Association. Senate Hearings, supra note 71, at 377.

An opportunity now exists for admiralty to foster a new set of rules for apportioning fault in third-party cases which could provide the guidelines for reform throughout the field of workmen's compensation. The employer-employee relationship does not consider fault; employee negligence is not a bar to the recovery of compensation payments. However, once a third party is brought into the picture, fault concepts emerge. A third party cannot be held liable unless he is at fault. A third party cannot be held liable for those damages caused by the fault of the injured worker himself. Because negligent employers are permitted to escape sole liability under the compensation act when a negligent third party is involved, justice is furthered by allowing those third parties similarly to escape sole liability when their fault was only a partial cause of the worker's injury.

This article has analyzed a series of rules for apportioning liability, now known as the Equitable Credit, which are believed to constitute the fairest method available for determining the proper liability of shipowners and stevedores in the longshoring personal injury setting. Their adoption by the courts at this time would advance the present trend of the Supreme Court in apportioning damages in admiralty and will provide the incentive for a whole new era of growth throughout the field of workmen's compensation.
ADDENDUM

On November 21, 1975, after preparation of this article had been virtually completed, the Ninth Circuit issued opinions in the appeals of Shellman v. United States Lines, Inc., and Dodge v. Mitsu Shintaku Ginko K.K., Tokyo, concerning the availability of credit defenses to shipowners. In both cases, credit defenses were disallowed and the defendant shipowners were ordered to pay the entire damage award of each longshoreman. From the proceeds of such judgments, the longshoremen were required in turn to repay the liens of their employers' workmen's compensation insurers. Thus, the stevedoring companies ultimately avoided any financial loss whatsoever, notwithstanding the findings of the Shellman and Dodge trial courts of seventy percent and fifty percent stevedore negligence respectively.

Unfortunately, the opinions are uninformative, neither providing a particularly coherent or succinct analysis of the non-credit viewpoint nor attempting to analyze the reasons advanced for adoption of a credit. Rather, the Shellman opinion, without bothering to deal analytically with the decision below, is based on the theories, largely unsupported and unexplained, that a longshoreman is always "entitled to recover the full amount of his damages," and that credit defenses constitute an "unjustified burden upon the injured longshoreman" and "would shift the inequity from shipowner to injured longshoreman." Apparently overlooked is the fact that, in the absence of vessel negligence, longshoremen are limited to compensation payments even when their employers undeniably have been negligent. While not criticizing this result, the court, by some logical tour de force not evidenced in the opinion, found it grossly unfair to prevent an injured longshoreman from recovering his entire judgment from a concurrently negligent shipowner, even though the shipowner's negligence might have been only one percent responsible for the longshoreman's injuries. If, as the Ninth Circuit suggests, fairness to the parties is the controlling consideration, the results reached in the Shellman and Dodge appeals are unsupportable.

Perhaps the Shellman panel sensed the inherent weakness in its argument, for it ultimately fell back on the comforting advice in Halcyon

281. Civil No. 75-3071 (9th Cir., Nov. 21, 1975).
282. Civil No. 75-1442 (9th Cir., Nov. 21, 1975).
285. Civil No. 75-3071, Slip op. at 6.
286. Id. at 7.
287. Id. at 8.
Lines v. Haenn Ship Ceiling & Refitting Corp.\textsuperscript{288} that "it is for Congress and not for the courts to create a solution to this problem."\textsuperscript{289} However valid that proposition was when voiced in Halcyon, the failure of the Ninth Circuit to discuss it in light of the recent congressional decision to leave resolution of the joint-fault dilemma to the courts is disturbing.\textsuperscript{290}

The Ninth Circuit's opinion in Dodge, rendered by the same panel which heard Shellman, also relied largely on Halcyon. The Dodge opinion, however, based its holding substantially on the premise that any credit would, in effect, constitute the sort of contribution prohibited in Halcyon.\textsuperscript{291} Furthermore, the court ruled that because any reduction in the stevedore's lien recovery would be another form of contribution, it made no difference whether the lien was legal or equitable.\textsuperscript{292}

It can only be hoped that future opinions in this area, regardless of their outcome, will address themselves fully to all arguments on both sides of the issues.

\textsuperscript{288} 342 U.S. 282 (1952).
\textsuperscript{289} Slip op. at 8-9. See the criticism of this philosophy, notes 187-88 and accompanying text supra.
\textsuperscript{290} See text accompanying notes 91-92, supra.
\textsuperscript{291} Civil No. 75-1442, Slip op. at 2-4. The distinction between contribution and the Equitable Credit, which the Ninth Circuit either did not understand or simply chose to ignore, is explained fully at notes 209-25 and accompanying text supra.
\textsuperscript{292} Id. at 7. The equitable nature of the lien is discussed at notes 259-70 and accompanying text supra.